Federal Court  Cour fédérale

Date: 20170511

Docket: IMM-4449-16

Citation: 2017 FC 489

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, May 11, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

KONGOLO, PATRICK NGOYI

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Background

> [21] The applicant submits that the nature of his convictions is insufficient to classify him as a danger to the public, pursuant to subsection 115(2) of the Act. He argues that these incidents are no more than "minor economic offences" in which violence was not a factor and as such, they should not be used to classify him as a danger to the public.
>
> [22] I disagree with the applicant's reasoning regarding section 115 and the parallel he draws between violent acts and the danger

> to the public classification. The wording of section 115 does not include limitations to only particular types of offences. It leaves the consideration of whether an individual constitutes a danger to the public to the discretion of the Minister's delegate. The Minister's delegate considered that violence was not used in the commission of the applicant's offences, but also acknowledged the number of crimes committed, their continuing nature, and the serious effect such crimes can and do have on the Canadian public. After weighing all the evidence before him, the Minister's delegate determined the applicant was a danger to the public based on the nature of his crimes.
>
> [23] What the applicant is really asking the Court to do is to re-weigh the evidence that was before the Minister's delegate. It is not the function of this Court to re-weigh the evidence of a discretionary decision. This evidence was sufficiently reliable to warrant the conclusion that the applicant is a danger to the public in Canada. Further, I find that applicant has failed to illustrate that the Minister's delegate improperly exercised his discretion, or made any other reviewable error.
>
> (*Arinze v. Canada (Solicitor General)*, 2005 FC 1547 (see also the applicant's submissions regarding the dangerousness of Patrick Ngoyi Kongolo, volume 3 of 5, Tribunal Record, paragraph 15 at page 267))

[1] The Court notes that the applicant's allegations of fear are limited to the ties his father had to the Mobutu regime and his involvement in activities with the Congolese community, in Canada, denouncing the current president of the Democratic Republic of the Congo [DRC] (Applicant's Record, at page 55). However, he does not specify how he could personally be a target of interest or persecution in the DRC. The Court also notes that the document to which the applicant refers, regarding the treatment of people who were closely involved with the Mobutu regime, is an update from 2002. It cannot be said that this evidence demonstrates the recent situation of collaborators of the former regime in the DRC. Lastly, the Court notes that the Minister's delegate considered the evidence relating to the human rights situation in the DRC, while qualifying the information contained in the report; she found that the applicant was from

Kinshasa, a more stable region than the east of the country, where the most serious violations occur.

[2] The Federal Court of Appeal, in *Nagalingam v. Canada (Citizenship and Immigration)*, 2008 FCA 153 [*Nagalingam*], sets out the principles governing the application of paragraph 115(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]:

> [44] By way of summary then, the principles applicable to a delegate's decision under paragraph 115(2)(*b*) of the Act and the steps leading to that decision are as follows:
>
> > (1) A protected person or a Convention refugee benefits from the principle of *non-refoulement* recognized by subsection 115(1) of the Act, unless the exception provided by paragraph 115(2)(*b*) applies;
> >
> > (2) For paragraph 115(2)(*b*) to apply, the individual must be inadmissible on grounds of security (section 34 of the Act), violating human or international rights (section 35 of the Act) or organized criminality (section 37 of the Act);
> >
> > (3) If the individual is inadmissible on such grounds, the delegate must determine whether the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada;
> >
> > (4) Once such a determination is made, the delegate must proceed to a section 7 of the Charter analysis. To this end, the Delegate must assess whether the individual, if removed to his country of origin, will personally face a risk to life, security or liberty, on a balance of probabilities. This assessment must be made contemporaneously; the Convention refugee or protected person cannot rely on his or her status to trigger the application of section 7 of the Charter (*Suresh, supra* at paragraph 127).
> >
> > (5) Continuing his analysis, the Delegate must balance the nature and severity of the acts

> committed or of the danger to the security of Canada against the degree of risk, as well as against any other humanitarian and compassionate considerations (*Suresh*, *supra* at paragraphs 76-79; *Ragupathy*, *supra* at paragraph 19).

II. Nature of the matter

[3] This is an application for judicial review under subsection 72(1) of the IRPA of an opinion issued by the Minister's delegate on October 6, 2016, stating that the applicant is a danger to the public in Canada pursuant to paragraph 115(2)(a) of the IRPA.

III. Facts

[4] The applicant, age 43, is a citizen of the DRC. He arrived in Canada as a student in December 1995, followed by one of his brothers the year after. He comes from a family that had close ties to members of the Mobutu regime. In 1997, in the wake of the regime's fall, the applicant allegedly stopped receiving financial support from his father and feared for his life if he were to have to return to the DRC.

[5] On June 18, 1997, the applicant claimed refugee status in Canada, which he obtained on September 26, 1997.

[6] Between 1997 and April 2015, the applicant committed over twenty fraud, identity theft and forgery offences, for which he pleaded guilty and was convicted.

[7] On November 19, 2015, the applicant received a notice of intent from the Canada Border Services Agency [CBSA] regarding the request for the Minister's opinion under paragraph 115(2)(a) of the IRPA. The applicant made submissions on December 4, 2015, and August 12, 2016, after the CBSA released additional information.

IV. Decision

[8] On October 6, 2016, the Minister's delegate found that the applicant constitutes a danger to the public in Canada pursuant to paragraph 115(2)(a) of the IRPA and that he could be removed to the DRC.

[9] Firstly, the delegate stated that she was satisfied that the applicant is inadmissible in Canada for serious criminality under paragraph 36(1)(a) of the IRPA, in light of his convictions between 1999 and 2014.

[10] Secondly, the delegate considered the applicant's numerous repeat criminal offences, as well as his lack of engagement in his rehabilitation. She found that the applicant constitutes a risk to the public in Canada.

[11] Thirdly, the delegate assessed the risk to which the applicant would be exposed should he be removed to the DRC. She noted that there was no documentary evidence that would allow her to find that the applicant was currently at risk as someone who had close ties to the former regime. Furthermore, although the human rights situation is unstable in certain areas of the DRC, that is not the case in the Kinshasa region, where the applicant lived before he left for Canada.

On a balance of probabilities, the delegate found that the applicant will not face a personal risk to his life, freedom and safety if he returns to the DRC.

[12] Lastly, the delegate examined the humanitarian and compassionate considerations raised by the applicant, namely the best interests of his four Canadian daughters and of his current spouse's two children. The delegate considered the following arguments made by the applicant: he has a good relationship with his biological daughters; one of his daughters has a pervasive developmental disorder; and his spouse's two children are attached to him. She noted, however, that no documentation had been submitted to support the nature of his relationship with his daughters and how often he sees them, or to establish the financial or emotional support that he provides to them. She also considered that, although the applicant's departure may sadden his spouse's children, they had already been separated from him during his incarceration and could remain in touch through technology.

V. Issues

[13] The applicant is not disputing the evaluation by the Minister's delegate with respect to the danger that he presents to the public in Canada.

[14] Consequently, the issues raised in this case are as follows:

1. Did the delegate err in her assessment of the risk that the applicant would face if he were removed to the DRC?
2. Did the delegate err in her assessment of the humanitarian and compassionate considerations related to the best interests of the children affected?

[15] The decision by the Minister's delegate to issue an opinion pursuant to paragraph 115(2)(a) of the IRPA, as well as the delegate's assessment of the risk faced by the applicant and humanitarian and compassionate considerations, is subject to the reasonableness standard of review (*Nagalingam*, above, at paragraph 32; *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at paragraph 47).

VI. Relevant provisions

[16] Paragraph 115(2)(a) of the IRPA sets out the exception to the principle of non-refoulement:

Principle of Non-refoulement	**Principe du non-refoulement**
Protection	**Principe**
115 (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	**115** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.
Exceptions	**Exclusion**
(2) Subsection (1) does not apply in the case of a person	(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a	a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

danger to the public in Canada; or	
(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.	b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

VII. Analysis

[17] For the reasons that follow, the application for judicial review is dismissed.

A. *Risk faced by the applicant in the DRC*

[18] The applicant submits that the delegate's decision is unreasonable because of the errors made in her assessment of the risks that he would face to his life, freedom and safety if he were to return to the DRC. First, the applicant criticizes the delegate for finding that he would be safe in the DRC even though she cites the U.S. Department of State's *2015 Country Report on Human Rights Practices* on the DRC, which outlines serious human rights deficiencies in that country. He argues that this apparent contradiction vitiates the delegate's decision because it lacks justification, transparency and intelligibility (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 at paragraph 16). Second, the applicant criticizes the delegate's selective treatment of the evidence. He alleges that the delegate ignored the passage of a document that corroborates his fears and describes the persecution of individuals having "held a very senior visible position in the party,

the government or the security forces, or from overt opposition to the current government" (*Democratic Republic of Congo (RDC): Update to RDC33027.F of 25 November 1999 on the treatment by the Congolese government of former diplomats who return to Kinshasa and other individuals who are perceived as Mobutu sympathizers (2001-2002)*). Thus, the delegate allegedly made a reviewable error (*Thomas v. Canada (Citizenship and Immigration)*, 2007 FC 838).

[19] On the contrary, the respondent argues that the delegate properly analyzed the risk that the applicant might face should he return to the DRC, since he did not demonstrate that there are serious grounds to believe that he would personally be exposed to the alleged risks. Thus, the respondent argues that, given the documentary evidence submitted and the lack of documentation establishing the existence of a current risk, the delegate's decision is reasonable and contains no errors that would justify the intervention of the Court. The delegate had the authority to assess the evidence submitted and determine the weight to be given to the applicant's allegations (*Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 39; *Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409).

[20] The Federal Court of Appeal, in *Nagalingam*, above, sets out the principles governing the application of paragraph 115(2)(a) of the IRPA:

> [44] By way of summary then, the principles applicable to a delegate's decision under paragraph 115(2)(*b*) of the Act and the steps leading to that decision are as follows:
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> (5) Continuing his analysis, the Delegate must balance the nature and severity of the acts committed or of the danger to the security of Canada against the degree of risk, as well as against any other humanitarian and compassionate considerations (*Suresh, supra* at paragraphs 76-79; *Ragupathy, supra* at paragraph 19).

[21] The Court notes that the applicant's allegations of fear are limited to the ties his father had to the Mobutu regime and his involvement in activities with the Congolese community, in Canada, denouncing the current president of the DRC (Applicant's Record, at page 55). However, he does not specify how he could personally be a target of interest or persecution in the DRC. The Court also notes that the document to which the applicant refers, regarding the treatment of people who were closely involved with the Mobutu regime, is an update from 2002. It cannot be said that this evidence demonstrates the recent situation of collaborators of the

former regime in the DRC. Lastly, the Court notes that the Minister's delegate considered the evidence relating to the human rights situation in the DRC, while qualifying the information contained in the report; she found that the applicant was from Kinshasa, a more stable region than the east of the country, where the most serious violations occur.

[22] Thus, the Court finds that it was open to the delegate to conclude that the applicant would not personally be exposed to a risk to his life, freedom or safety if he had to return to the DRC. Therefore, there are no grounds for the Court to intervene on this point.

B. *Humanitarian and compassionate considerations: the best interests of the children affected*

[23] The applicant criticizes the delegate's finding with respect to the humanitarian and compassionate considerations. She allegedly breached her duty to be alert, alive and sensitive to the best interests of the children affected by the decision (*Kanthasamy v. Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61 at paragraphs 36–39; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817). She allegedly failed to assess the impact of the applicant's departure on the children, downplaying the significance of the evidence of good relationships by comparing the separation resulting from removal to that of his incarceration and by suggesting that the children could stay in touch with their father through Skype. Furthermore, the applicant argues that the delegate erred by considering the seriousness of the inadmissibility in her assessment of the children's best interests:

> [TRANSLATION]
>
> I find that, overall, separation from the children is not a sufficient factor to prevent removal given the seriousness of the

> inadmissibility. For these reasons, I find that the best interests of the affected children have not been established.
>
> (Delegate's decision, at page 33; Applicant's Record, at page 38)

[24] The applicant argues that the delegate erred by considering the seriousness of the inadmissibility in her analysis of the best interests of the children, citing the decision in *Williams v. Canada (Citizenship and Immigration)*, 2012 FC 166, rendered by Justice James Russell of this Court:

> [63] When assessing a child's best interests an Officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application. [Emphasis in original]

[25] The respondent first argues that the delegate properly considered all of the applicant's submissions before ruling on the best interests of the children affected by the decision (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 [*Owusu*]). The respondent also argues that it was open to the delegate to find that, although the applicant's departure could cause hardship to his children in Canada, the extent of the danger that he poses outweighs this hardship (*Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 FCR 358, 2002 FCA 125 [*Legault*]; *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 [*Hawthorne*]).

[26] With respect to the assessment of the evidence regarding the best interests of the children, the Court finds that the delegate did not make a reviewable error. In her decision, the delegate considered all the evidence submitted by the applicant and was sensitive to the sadness that the

applicant's departure would cause the children. Nevertheless, as the respondent points out, the burden was on the applicant to submit sufficient evidence to establish that the best interests of the children would be jeopardized if he were removed to the DRC (*Owusu*, above). It is clear that this burden of proof was not discharged and that the applicant did not satisfy the delegate.

[27] The Court agrees with the respondent's arguments and finds that the delegate considered all the circumstances, including the best interests of the children, before finding that there were insufficient humanitarian and compassionate grounds to justify not removing the applicant (*Legault* and *Hawthorne*, above).

VIII. Conclusion

[28] The application for judicial review is dismissed.

JUDGMENT in IMM-4449-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There are no questions of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
This 10th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4449-16
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