Federal Court  Cour fédérale

Date: 20170911

Docket: IMM-1416-17

Citation: 2017 FC 820

Ottawa, Ontario, September 11, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

HARDEEP SINGH BRAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of an interlocutory decision of the Immigration Division of the Immigration and Refugee Board (the "ID"), dated March 10, 2017, in which the Member held that the Applicant's *Charter* concerns should not be considered at his admissibility hearing and that the ID would not entertain *Charter* arguments or evidence at that hearing.

II. Background

[2] The Applicant is a natural of India who became a permanent resident of Canada in 1998 at the age of 15. He is not a Canadian citizen.

[3] The Applicant plead guilty to criminal charges in the United States for conspiracy to distribute cocaine, and was sentenced to a 24-month term of imprisonment. This criminal conviction involved 15 kilograms of cocaine, destined for Canada. Upon completion of his sentence, US authorities deported the Applicant to India. Upon his return to Canada, he gave details of his criminality to the Canada Border Services Agency ("CBSA") at the Vancouver International airport.

[4] Further salient background facts relevant to this application are clearly set out in paragraphs 8 to 12 of the related judicial review of the referral decision to determine the Applicant's admissibility to Canada, the decision of Justice Anne Mactavish in *Brar v Canada (Minister of Safety and Emergency Preparedness)*, 2016 FC 1214 [*Brar*]:

> **8** Mr. Brar was subsequently given notice that reports may be prepared declaring him to be inadmissible to Canada for serious criminality, organized criminality and transnational crime. He was then interviewed by a CBSA Inland Enforcement Officer, and was given the opportunity to provide written submissions to the Officer prior to a decision being made as to whether to refer him for an admissibility hearing. In support of his request not to be referred to an admissibility hearing, Mr. Brar and his counsel provided the Officer with several sets of submissions and supporting materials over a three and a half year period.
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> **9** Among other things, Mr. Brar submitted that even though his offence was serious, it had not involved violence or firearms. Several years had passed since his one criminal offence, and he had not engaged in any further criminal activity. A psychologist's

> report provided by Mr. Brar had, moreover, indicated that he posed a low risk of re-offending. Mr. Brar also noted that he had come to Canada as a child, that he had lived in Canada for many years, and that he had minimal ties to India. All of Mr. Brar's immediate family, including his wife, were in Canada, and he was gainfully employed.
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> **10** An initial decision to refer Mr. Brar to an admissibility hearing was set aside on consent, after he sought judicial review of that decision. After receiving further submissions from Mr. Brar, the Inland Enforcement Officer once again recommended that he be referred for an admissibility hearing in relation to his serious criminality, as well as his involvement in organized criminality and transnational crime. A Minister's Delegate subsequently adopted that recommendation, and referred Mr. Brar's case to the Immigration Division of the Immigration and Refugee Board, and it is this decision that underlies this application for judicial review.
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> **11** Mr. Brar has never claimed that he would be at risk if he were returned to India. He further concedes that he is inadmissible to Canada as a result of his American drug conviction, and that he would inevitably be found to be inadmissible by the Immigration Division. He notes, however, that if his case goes to an admissibility hearing, the Immigration Division would have no equitable jurisdiction to consider humanitarian and compassionate factors before issuing a removal order against him.
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> **12** Moreover, because the punishment for Mr. Brar's offence could have exceeded 10 years, had the offence been committed in Canada, he is not entitled to appeal the Immigration Division's finding to the Immigration Appeal Division of the Immigration and Refugee Board. Mr. Brar is also permanently barred from seeking humanitarian and compassionate relief under section 25 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, because he is inadmissible to Canada under section 37 of the Act for organized criminality and transnational crime. Consequently, the only place where Mr. Brar's humanitarian and compassionate considerations can be considered is at the referral stage.

[5] On July 13, 2015, the Minister's Delegate referred the Applicant for an admissibility hearing on all three provisions - s. 36(1)(a), s. 36(l)(b) and s. 37(1)(b) of the *Immigration and*

Refugee Protection Act, SC 2001, c 27 [*IRPA*] - pursuant to his (the Minister's Delegate's) three s. 44(2) reports.

[6] The Applicant sought judicial review of the s. 44(2) referral to an admissibility hearing.

[7] In seeking judicial review of the s. 44(2) referral, the Applicant conceded that he is inadmissible, but argued that his rights under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11. [*Charter*] had been violated due to an (alleged) lack of a "proportionality assessment".

[8] The Honourable Madam Justice Mactavish, in *Brar* above, dismissed the Applicant's judicial review application on the basis that:

i. The Applicant conceded he was inadmissible due to his drug conviction, and considered it inevitable that the ID would find him inadmissible, unless he obtained discretionary relief at the s. 44 stage;
ii. In reliance upon the jurisprudence, including from the Supreme Court of Canada, the Court declined to find the Applicant's s. 7 *Charter* rights were engaged; alternatively, the Court found no breach of fundamental justice;
iii. The discretionary consideration and weighing of personal circumstances at the s. 44 stage in this case was found to equate with a "proportionality assessment", taking into account the Applicant's *Charter* and international law arguments;
iv. The decision to refer the Applicant to an admissibility hearing before the ID "was entirely reasonable". The Applicant was given an opportunity to make submissions as to his personal circumstances warranting sympathetic consideration, and made numerous, lengthy submissions; he did not point to anything else he would have wanted to be considered. The Court observed that simply re-weighing the evidence was beyond the scope of judicial review.

[9] No question was certified for appeal.

[10] In proceeding to an admissibility hearing before the ID, the Applicant again raised s. 7 *Charter* arguments. The Minister's counsel objected to the Applicant asking the tribunal to re-litigate the same *Charter* issue already determined by Madam Justice Mactavish of this Court, and further sough to hold the Applicant to his admissions of inadmissibility.

[11] The ID determined that neither s. 7 of the *Charter* nor s. 12 of the *Charter* is engaged at the admissibility stage of the process and declined to allow the Applicant to proceed further with his *Charter* arguments.

[12] It is this March 10, 2007 interlocutory decision of the ID that is the subject of the Applicant's current leave application.

III. Issues

Preliminary objections:

A. Is the Applicant entitled to seek judicial review of an interlocutory Order?

B. By seeking this judicial review, is the Applicant collaterally attacking the Judgment of Madam Justice Mactavish of November 2, 2016?

Issues if Preliminary Objections are overcome:

C. Did the Member err in law because he denied the Applicant the right to adduce evidence to establish that section 7 of the *Charter* was engaged in the admissibility proceedings against the Applicant?

D. Is it appropriate to consider the substantive engagement of section 12 of the *Charter* at the stage of determining admissibility to Canada?

IV. Standard of Review

[13] Subject to the preliminary objections being overcome, the standard of review for leave in respect of this matter is whether any of the Applicant's arguments relating to the applicability of sections 7 and 12 of the *Charter* at the admissibility hearing raises a reasonably arguable case.

[14] Questions of interpreting a home statute are dealt with on the standard of reasonableness and determining a constitutional question is looked at on a correctness standard.

V. Analysis

[15] The Applicant argues that if one carefully reviews the relevant jurisprudence, when the issue before the Court is an assertion that the Applicant will suffer torture or other forms of cruel, inhumane and degrading treatment, the proper place for an assessment of the section 7 *Charter* issues is either at the Pre-Removal Risk Assessment ("PRRA") stage, or in the case of a Convention Refugee, when the danger opinion is decided. I agree.

[16] However, the Applicant also argues that in a case such as this one, where the issues do not relate to torture upon removal, but rather relate to the question of the impact of deportation on a long term resident who does not have the right to make a humanitarian and compassionate application or a right to appeal to the Immigration Appeal Division, then the sole place where *Charter* issues can be adjudicated is before the Immigration Division. In this case, section 7 of the *Charter* is engaged by the deportation process and the Applicant should be able to adduce evidence before the ID on this issue.

[17] Similarly, the Applicant submits section 12 of the *Charter* should also be considered by the ID, as it would be grossly disproportionate to remove him to a country that he has not lived in since he was a young child, given that it would remove him from his family, his support network, and the country he has lived in for many years, resulting in cruel and unusual treatment or punishment.

[18] The Applicant acknowledges that if I determine the case of *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 [*Chiarelli*], should be followed, then the section 12 *Charter* argument must fail.

[19] The Respondent argues that the law is clear that a determination of substantive section 7 or section 12 *Charter* rights at the referral stage in an admissibility proceeding is premature, as a matter concerning an interlocutory decision; has already been decided by Justice Mactavish in this case and therefore is a collateral attack on her decision; in any event has already been determined to be premature by both the Federal Court of Appeal and Supreme Court of Canada; and would be futile, as Justice Mactavish has already determined, after conducting a full judicial review that a "proportionally assessment has been adequately and reasonably conducted".

A. *Preliminary Objections – Section 7*

[20] As I indicated to counsel for the Applicant during the course of the hearing, I agree with the Respondent that Justice Mactavish rejected the Applicant's section 7 *Charter* argument, if not expressly then implicitly, in finding that she had serious doubts that section 7 of the *Charter* is engaged at the admissibility referral stage, based upon well-established jurisprudence (*Brar*,

above, at paras 21-26; *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras 74, 75; *JP v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 262 at paras 120-125).

[21] I therefore find that raising the section 7 *Charter* argument now is a collateral attack on Justice Mactavish's decision (*Hardy Estate v Canada (Attorney General)*, 2015 FC 1151 at paras 74-75; *Farhadi v Canada*, 2014 FC 926 at paras 31-32).

[22] Moreover, even if the section 7 *Charter* argument being raised here does not amount to a collateral attack, it is in any event not engaged at the admissibility referral stage in this case – Justice Mactavish has already determined there is no breach of fundamental justice on this front.

[23] Given my section 7 *Charter* decision on this basis, I need not consider the issue of whether there can be judicial review of an interlocutory matter as it relates to the section 7 *Charter* issue.

B. *Section 12*

[24] Section 12 of the *Charter* was not raised before Justice Mactavish and therefore I find that there is no collateral attack on her decision by raising this argument before me now. However, it begs the question as to why this issue is now being raised when it could have been raised before Justice Mactavish in the first instance?

[25] The ID held that the section 12 *Charter* arguments were premature, for the same reason that the section 7 *Charter* argument is premature: in the deportation context, both section 7 and section 12 are directed to the consequences of removal, and to having a "proportionality assessment prior to removal".

[26] The Respondent argues that the ID is correct in this approach, and that in any event, the Applicant had a fully canvassed proportionality assessment prior to removal, which was found by Justice Mactavish to be adequate and reasonable (*Brar*, at paras 27, 31-33):

> **27** In this case, Mr. Brar had a face-to-face interview with the Inland Enforcement Officer. He was repeatedly afforded the opportunity to provide written submissions in support of his request not to be referred for an admissibility hearing, and he provided the Officer with copious submissions that had been prepared with the assistance of counsel. Mr. Brar was provided with draft recommendations prepared by the Inland Enforcement Officer for consideration by a Minister's Delegate, and he was given the right to comment on them. Any errors in the draft reports that were identified by Mr. Brar were corrected, and a thorough analysis of Mr. Brar's case was provided to the Minister's Delegate. This analysis is considered to be part of the Minister's Delegate's reasons: *Huang v. Canada (Public Safety and Emergency Preparedness)*, 2015 FC 28 at para. 88, 473 F.T.R. 91.
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> **31** Mr. Brar has not identified any further information that he was unable to provide to either the Inland Enforcement Officer or the Minister's Delegate that could possibly have assisted his case. Nor has he identified any principle of fundamental justice that was not complied with in relation to the Minister's Delegate's determination that Mr. Brar should be referred to the Immigration Division for an admissibility hearing.
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> **32** In essence, what Mr. Brar says is that the Minister's Delegate gave too much weight to the seriousness of his criminal conviction and not enough weight to his humanitarian and compassionate factors, and that this breached principles of fundamental justice. It is not, however, this Court's role to usurp the role of the Minister's Delegate and reweigh the evidence to reach a different conclusion.

> **33** Mr. Brar also argued in his memorandum of fact and law that the Minister's Delegate made certain findings of fact that were unsupported by the evidence. The respondent's memorandum of fact and law identified the evidence in the record that supported the findings in question, and no reviewable error has been demonstrated by Mr. Brar in this regard. Indeed, the fact that evidence from the psychologist's report was referred to in the Inland Enforcement Officer's analysis simply confirms the thoroughness that was applied to the review of Mr. Brar's submissions.

[27] The Applicant argues that even if I find that the section 7 *Charter* argument must fail, it is open to the Court to consider a different contextual approach as to whether section 12 of the *Charter* can be considered at the admissibility referral stage. However, this view is qualified by whether *Chiarelli* should still govern my decision as binding jurisprudence against such a finding.

[28] The Applicant draws a number of factors to the Court's attention in arguing against the continued applicability of *Chiarelli* since it was decided 25 years ago:

i. Section 12 of the *Charter* must be applied in light of relevant international law (*Saskatchewan Federation of Labour v Saskatche*wan, [2015] 1 SCR 245 at pars 62-64; *Health Services and Support -- Facilities Subsector Bargaining Assn v British Columbia*, [2007] 2 SCR 391 at paras 78-79; *Ontario (Attorney General) v Fraser*, 2011 SCC 20 at para 92) [*Fraser*]);
ii. Section 12 relates to a "treatment" as cruel and unusual treatment, and the act of deportation is a treatment from beginning to end, not to be segmented into its various stages and is to be looked at from the perspective of the person subjected to it (*Chiarelli*, at para 29; *Canepa v Canada (Minister of Employment and Immigration)*, [1992] 3 FCR 270 (FCA) at para 19);
iii. When considering the section 12 *Charter* right, the Court must look at whether the legal consideration for admissibility – criminality or serious criminality - versus the law's effect on the individual by deportation, is grossly disproportionate. The rule against gross proportionality has evolved since *Chiarelli*, but only applies in extreme cases where the seriousness of deportation (effects on the individual) are totally out of sync with the objective of the deportation (here, public safety) (*Canada (Attorney General) v Bedford*, [2013] 3 SCR 1101 at paras 105, 120-122; *Carter v Canada (Attorney General)*, [2015] 1

SCR 331 at paras 89-90; *R v Nur*, [2015] 1 SCR 773 at paras 65, 118; *Canada (MCI) v Harvey*, [2013] FCJ No 806 at paras 52-54);

iv. In considering whether the state objective of deportation, when criminality or serious criminality may affect public safety, may be grossly disproportionate to the Applicant's individual assessment of consequences, if deported, the Court needs to bear in mind that:

   a. In determining whether treatment or punishment is "cruel and unusual", the Court must consider whether that treatment is "so excessive as to outrage [our] standards of decency", and that there must be some active state process in operation, involving an exercise of state control over the individual (*R v Smith*, [1987] 1 SCR 1045 at para 83 [*Smith*]; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at para 182);
   b. The Court will look at a number of factors as part of a kind of "cost/benefit" analysis: does the treatment go beyond what is necessary to achieve a legitimate aim; are there adequate alternatives; is the treatment arbitrary; does the treatment have a value or social purpose; does it accord with public standards of decency or propriety; is it unusually severe and hence degrading to human dignity and worth (*Smith*, at para 44; *Canadian Doctors for Refugee Care v Canada (Attorney General)*, 2014 FC 651 at paras 583-585, and 612-614);
   c. In this case, the Applicant has accepted that he is inadmissible; his sole defence is that the admissibility hearing violates the principles of fundamental justice. Here, the Applicant has no right of appeal before the IAD, no right to seek a H&C consideration, and no right to a PRRA (he did not assert a risk upon return to India) and given the specific allegations against him under sections 36 and 37, there is no remedy available to him prior to removal other than to have the ID consider the issues raised at the admissibility hearing – those issues are that to remove him to a country where he has not lived since he was a young child, from his family and support network in Canada where he has lived for a long time, would be grossly disproportionate to the state goal of public safety, given that the Applicant received an unconditional release following service of his sentence in the United States, and the evidence shows he does not pose a risk to security or public safety.

[29] Once again the Respondent argues that the consideration of the section 12 *Charter* issue at the admissibility stage of this proceeding is premature – it is purely a timing issue. Until there is a removal order, the Court can only speculate what the outcome of the admissibility hearing will be and the consequences of removal when no removal, order has been made. It is also improper for the Applicant to seek judicial review of an interlocutory order.

[30] Moreover, the Applicant had his proportionality assessment conducted over a three year period, and his concerns have already been addressed and determined. Furthermore, international law was considered in the Applicant's proportionality assessment, which Justice Mactavish found to be reasonable and represented a proportionate balancing of the competing interests at stake.

[31] Even if I was to find that the Applicant may seek judicial review of an interlocutory order, which I need not do here, I agree with the Respondent that the section 12 *Charter* argument is premature when, as is this case, it remains uncertain, albeit very likely, that the Applicant will be found to be inadmissible and in fact may probably be removed.

[32] I agree that the Applicant cannot invoke section 12 of the *Charter* before the final stage of deportation (*Norouzi v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 368 at paras 33-36 [*Norouzi*], relying on *Barrera v Canada (Minister of Employment and Immigration)*, [1993] 2 FCR 3 (FCA) [*Barrera*]).

[33] I also agree that the proportionality assessment by Justice Mactavish, while not specifically dealing with the section 12 *Charter* argument, did deal with the merits of the Applicant's personal circumstances, which he tries to rely upon, as the underpinning for both his section 7 and section 12 *Charter* arguments, and were found to be largely due to the typical consequences of removal.

[34] Moreover, I disagree with the Applicant that given my decision, the Applicant would be barred from raising the section 12 *Charter* issue – in finding the argument premature, he is not precluded from doing so if the chooses to seek a judicial review of any removal order, or in seeking a stay of the removal in conjunction with that judicial review, again if he chooses to do so.

[35] Accordingly, I dismiss the application for judicial review.

[36] The Applicant at the hearing raised three questions for certification:

i. Is it appropriate to consider the substantive engagement of section 12 of the *Charter* at the stage of determining admissibility to Canada?
ii. Is the deportation of a long term permanent resident a treatment within the meaning of section 12 of the *Charter*?
iii. If so, are there circumstances where the deportation might be grossly disproportionate so as to be a breach of section 12?
iv. Is section 7 engaged in the case of the deportation of a permanent resident who has admitted he is inadmissible under sections 36 and 37?

[37] At the end of the hearing, the Applicant's counsel agreed that only one question should be considered for certification:

i. Is it appropriate to consider the substantive engagement of section 12 of the *Charter* at the stage of determining admissibility to Canada?

[38] The Respondent relies on the cases of *Norouzi* and *Barrera*, above, to argue that this existing jurisprudence has already established that section 12 *Charter* arguments are premature when the prospect of removal is uncertain, particularly when the applicant has not yet been found inadmissible, much less subject to a removal order.

[39] As such, no question should be certified.

JUDGMENT in IMM-1416-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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