Federal Court Cour fédérale

Date: 20180418

Docket: IMM-3757-17

Citation: 2018 FC 416

Toronto, Ontario, April 18, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SORIE ALHAIL CONTEH

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application by the Minister of Citizenship and Immigration [Minister] for judicial review, under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA], of the August 4, 2017 decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, dismissing the Minister's appeal.

[2] The Respondent, Sorie Alhail Conteh, is a citizen of Sierra Leone, who came to Canada in 2001 as a Convention refugee. On September 29, 2014, a report was prepared under section 44(1) of IRPA alleging that Mr. Conteh was believed to be inadmissible to Canada under sections 36(1)(a) and 37(1)(a) of IRPA, which deal respectively with serious and organized criminality. Both allegations were then referred for an admissibility hearing under IRPA section 44(2).

[3] The Immigration Division [ID] held the admissibility hearing on March 18, 2016. Mr. Conteh was found to be inadmissible under section 36(1)(a) for (i) having been convicted of possession for the purposes of trafficking a controlled substance, and (ii) receiving a sentence of 42 months.

[4] However, the ID refused to deal with the section 37(1)(a) allegations against Mr. Conteh, stating that the Minister had provided no rational reason or tangible benefit for pursuing the allegations in addition to those under section 36(1)(a), and that the ID would not use its scarce resources to decide them.

[5] The Minister then appealed the ID decision to the IAD by notice of appeal filed April 18, 2016. On October 25, 2016, a pre-hearing conference was held at which only preliminary, non-substantive matters were discussed. Following the pre-hearing conference, the Minister did not receive any further communication from the IAD. On August 4, 2017, the IAD issued a written decision dismissing the appeal, without holding a hearing or providing either party a chance to make written submissions.

[6] In its decision, the IAD held that the ID was "well within its statutory rights" to decide to hear only the section 36(1)(a) allegations. The IAD relied on section 162(2) of IRPA, which provides that "Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit". The IAD concluded that the ID had "every right" to proceed efficiently, and that the Minister's "strategic" aims in pursuing the section 37(1)(a) allegations had no bearing on the ID's management of its own process. Finally, the IAD found that the Minister had not demonstrated that anything would be gained by the ID hearing the section 37(1)(a) allegations, or that not hearing the section 37(1)(a) allegations would occasion a breach of procedural fairness.

II. Analysis

[7] In this application, the Minister raises two issues.

[8] First, the Minister argues that the IAD breached principles of procedural fairness in dismissing the appeal without providing the parties an opportunity to be heard. The parties agree, as do I, that breaches of procedural fairness are reviewed on a correctness standard (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 34-56).

[9] I find that the Minister's right to procedural fairness was indeed breached. This case is factually similar to *Canada (Citizenship and Immigration) v Chen*, 2011 FC 514 at paras 8-9 [*Chen*], in which this Court held that it was it was "manifestly unfair for the IAD to render a decision, without providing the parties with notice that it was prepared to render a decision and without providing one of the parties with any opportunity to participate" (at para 9). Here, as in

Chen, the IAD did not grant the Minister its right to be heard, thereby breaching “one of the most fundamental rights of a party to a proceeding” (*Chen* at para 8).

[10] The second issue raised by the Minister is whether the IAD erred in finding that the ID had the statutory authority to decline to hear the section 37(1)(a) allegations. The Minister submits that this issue is reviewable on a correctness standard because it concerns the proper interpretation of IRPA, relying on *Azeem v Canada (Citizenship and Immigration)*, 2012 FC 402 at para 6). Conversely, Mr. Conteh submits that the IAD’s decision attracts a reasonableness review. However, notwithstanding his position on standard of review, Mr. Conteh also asks this Court to rule on the substantive issue raised in the IAD’s decision.

[11] In my view, it is now well-established that a tribunal is presumptively owed deference in the interpretation of its home statute (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 23 [*Singh*]). Here, no exceptions to that presumption apply, and the IAD’s decision is consequently reviewable on a reasonableness standard (*Singh* at paras 23-29). Therefore, my finding on procedural fairness is determinative of the Minister’s application because it invalidates the decision under review (*Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 (SCC) at 661).

[12] Further, I have concluded that, in addition to being unnecessary for the disposition of this application (see *David v Canada (Attorney General)*, 2014 FC 358 at para 62), it would also be inappropriate for me to rule on the reasonableness of the IAD’s decision (*Qin v Canada (Citizenship and Immigration)*, 2013 FC 147 at paras 6 and 42). When conducting

reasonableness review, it is not this Court's role to evaluate the IAD's reasoning on the basis of submissions that the IAD has not itself considered (albeit, through its own error). The IAD's analysis may well have been different had it had the benefit of the Minister's submissions (see *Grewal v Canada (Citizenship and Immigration)*, 2017 FC 955 at para 21), and particularly the case law referenced by the Minister in this application, including *Fox v Canada (Citizenship and Immigration)*, 2009 FCA 346, *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319, and *Ismaili v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 427. This jurisprudence, relied on with vigour by the Minister, should be properly considered by the IAD.

III. Conclusion

[13] In conclusion, I will order that its decision be set aside and referred back for reconsideration, solely on the basis of the IAD's significant breach of procedural fairness. Further, having regard to the undue delay between the Minister's notice of appeal and the rendering of the IAD's decision, reconsideration should proceed on an expedited basis.

IV. Proposed Question for Certification

[14] At the hearing, both the Minister and Mr. Conteh raised the prospect of a certified question relating to the ID's ability to decline to hear the section 37(1)(a) allegations. I agree that this issue transcends the interests of the parties. However, it is not dispositive of this application in light of the IAD's breach of procedural fairness, and therefore no question will be certified in this case (*Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9).

JUDGMENT in IMM-3757-17

THIS COURT'S JUDGMENT is that:

1. The application is granted.
2. The IAD's decision dated August 4, 2017 is set aside and the matter is referred back to the IAD for reconsideration by a different panel on an expedited basis.
3. No questions are certified.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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