Federal Court  Cour fédérale

Date: 20190621

Docket: IMM-5004-18

Citation: 2019 FC 844

Ottawa, Ontario, June 21, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

VICTOR JESUS RAMOS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Victor Jesus Ramos, is a citizen of Argentina and a permanent resident of Canada. On March 3, 2017, the Applicant was convicted of manslaughter. Due to this serious criminal offence, the Applicant became inadmissible under subsection 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"). A CBSA enforcement officer ("Officer") reviewed the Applicant's file for six months and wrote a section 44(1) Case

Review and Recommendation report. This report recommended that the Minister's Delegate exercise discretion under section 44(2) of the IRPA not to refer the matter to an admissibility hearing.

[2] However, on April 26, 2018, (the same day as receiving the Officer's recommendation), the Minister's Delegate decided to refer the Applicant to an admissibility hearing under subsection 44(2) of the IRPA.

[3] On October 12, 2018 the Applicant applied to this Court for judicial review. For the reasons that follow, this application for judicial review is granted.

II. **Background**

[4] The Applicant, Victor Jesus Ramos, is a citizen of Argentina. He arrived in Canada when he was seven years old. In 2011, when he was seventeen, the Applicant became a permanent resident through a successful humanitarian and compassionate (H&C) application.

[5] On October 6, 2013, the Applicant attended a rave with a group of people, where he got into an altercation with another group. When those people left, the Applicant and his group followed and attacked them. One of the people with the Applicant had a knife and used it to fatally stab a 19-year-old male. Although the Applicant was a lead aggressor in this incident, he did not know his co-accused was carrying a knife.

[6] On March 3, 2017 the Applicant was convicted of manslaughter contrary to section 236 of the Criminal Code. He was sentenced to three years of imprisonment. As the Applicant had

spent some time in pretrial custody, this was effectively a sentence of two years and three months.

[7] The evidence is that the Applicant shows remorse, has a high potential for rehabilitation, and is not a public safety risk. For example, on April 12, 2018 the Parole Board of Canada issued a decision stating that the Applicant admits his responsibility in the death and does not present an undue risk to society. That decision explains that the Applicant left school when he was just nine years old so that he could work. During this time he began associating with gang members and using marijuana. He also says he became involved with rough associates as a way to protect himself from being bullied. However, the October 6, 2013 incident was not a gang action and the Applicant has no gang affiliations.

[8] On April 12, 2018 the Applicant was granted day parole, and two months later was released into a community residential facility.

A. *The Officer's Case Review and Recommendation 44(1) Report*

[9] Due to the Applicant's manslaughter conviction, the Officer prepared a section 44(1) report to determine if the Applicant is inadmissible to Canada under section 36(1)(a) of the IRPA. After six months of working on the file, on April 26, 2018 the Officer determined that despite the Applicant's criminal inadmissibility, the Minister's Delegate should exercise discretion and write a warning letter rather than refer the Applicant to an inadmissibility hearing.

[10] The Officer's Case Review and Recommendation report demonstrates that the Officer came to this conclusion after a lengthy investigation. The reasons consider the Applicant's

immigration history, and note that he had been in Canada for 17 years and never visited Argentina.

[11] The Officer also considered that the Applicant had an intermittent job working as a painter at a company owned by his brother. Additionally, the Applicant, who did not complete high school, was currently working on earning his General Educational Development ("GED") as a requirement of incarceration. The Officer's notes also explain that the Applicant has a brother, mother (who is ill and requires assistance) and nephew in Canada, as well as a common-law spouse with whom he has a Canadian daughter. The Officer considered the Applicant's submissions that it would be hard on his family if he is deported. The Applicant submitted that he would most likely move to Argentina with his common-law spouse and his child.

[12] The Officer noted that the Applicant did not undermine his participation in the incident, and identified himself as an aggressor. The Officer then considered the changes the Applicant had made to his life, for example severing ties with his friends and acquaintances, and focusing more on his family, and determined that his potential for rehabilitation was high. The Officer also noted that the Applicant's parole officer considered that the Applicant's public safety and escape risk was "LOW" (emphasis in original), had a "**high Reintegration Potential**" (emphasis in original), and was remorseful.

[13] On April 26, 2018, the Officer concluded the Case Review and Recommendation report by recommending that the Applicant be issued a warning letter.

B. *The Minister's Delegate's 44(2) Decision*

[14] On the same day as receiving the Officer's Case Review and Recommendation report, the Minister's Delegate decided to refer the Applicant to an admissibility hearing under section 44(2) of the IRPA. In reaching this decision, the Minister's Delegate reviewed the physical CBSA Inland Enforcement case file, the National Case Management System, the Global Case Management System, as well as the Applicant's submissions.

[15] The Minister's Delegate considered that the Applicant was convicted of Manslaughter and received a sentence of three years of imprisonment. The Minister's Delegate then considered the length of time the Applicant had resided in Canada, and that he had minimal ties to his home country. The reasons note briefly that the Applicant's common-law spouse was pregnant with his child at the time the Applicant made submissions, and that he was taking the GED tests.

[16] The Minister's Delegate then discussed the October 6, 2013 stabbing incident. The reasons note that it was a highly violent incident involving a weapon and the death of an individual. The reasons also note that the Applicant was involved in attacking the group of people and that he "and the group then fled leaving the victim in a pool of blood on the street and did not summon emergency services or any sort of assistance." Further, the reasons note that it took the Applicant months to turn himself in to the police, and he did so only after one of his associates was arrested. Overall, the Minister's Delegate found that the serious nature of his offence outweighed any H&C factors. The Minister's Delegate ended the analysis by concluding that "[a]lthough a referral to an Admissibility Hearing will likely lead to the issuance of a removal order and perhaps [the Applicant's] removal from Canada, he will still have the

opportunity to start a new life with his family, a choice the victim of this senseless act of violence will never have."

[17] As a result of the referral, the Applicant's admissibility hearing took place on September 28, 2018. He was ordered deported. Leave to seek judicial review of that decision was denied.

III. **Issue**

[18] The primary issue before me is whether the Minister's Delegate demonstrated a reasonable apprehension of bias.

IV. **Standard of Review**

[19] Issues concerning a reasonable apprehension of bias are reviewed for correctness (*Malit v Canada (Citizenship and Immigration)*, 2018 FC 16 at para 11).

V. **Analysis**

[20] The Applicant submits that the reasonable apprehension of bias test is satisfied in this case for two reasons. First, the Applicant takes issue with the Minister's Delegate issuing the decision on the same day the Officer's opinion was rendered. The Applicant submits the speed with which the section 44(2) report was rendered demonstrates a closed mind (*McGuire v Royal College of Dental Surgeons (Ontario)* (1991), 77 DLR (44th) 732 at para 105 (Ont Div Ct) [*McGuire*]).

[21] Second, the Applicant submits the Minister's Delegate injected her own personal feelings into the reasons, demonstrating bias (*Kankanagme v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1451 at paras 20-26 [*Kankanagme*]; *Sharif v Canada (Attorney General)*, 2018 FCA 205 at para 51). Namely, the Applicant submits the Minister's Delegate used a hostile tone, focused on the victim and the crime, did not reference the IRPA's statutory objectives, did not impartially assess public safety, and was concerned with moral condemnation at the following passages:

a. "leaving the victim in a pool of blood on the street";

b. "he will still have the opportunity to start a new life with his family, a choice the victim of this senseless act of violence will never have";

c. "he only turned himself into police months after the incident and only after one of his associates had been arrested"; and

d. "the victim's family was put through the emotional and psychological trauma of a trial."

[22] The Respondent submits that the reasons indicate that the Minister's Delegate reviewed the 44(1) report, the CBSA Inland Enforcement file, the National Case Management System File, the Global Case Management System File, and the Applicant's submissions. Thus, the Respondent submits the decision is based on all the evidence.

[23] The Respondent submits that the Minister's Delegate properly considered factors about the offence because she has less discretion in regards to more serious offences (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126). The Respondent submits the Minister's Delegate properly emphasized facts such as the Applicant's role as the lead aggressor, the highly violent assault, and the fact that the victim died as a result of the assault. The

Respondent also submits the emphasis on the three year sentence is in accordance with section 36(1)(a) of the IRPA.

[24] The test of a reasonable apprehension of bias is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would [they] think that it is more likely than not that the [decision-maker], whether consciously or unconsciously, would not decide fairly." (*Kankanagme,* above at para 16, citing *Committee for Justice and Liberty v Canada (National Energy Board),* [1978] 1 SCR 369 at 394).

[25] On the issue of the speed of the Minister's Delegate in reaching her decision, I disagree with the Applicant because this argument is based on an assumption rather than evidence. Specifically, there is no evidence about when the Minister's Delegate reviewed the entirety of the file. This is unlike *McGuire,* where the Ontario Court of Justice considered an appeal of a discipline committee decision. In that case, the evidence before the Ontario Court of Justice included the minutes of the meeting. These meeting minutes proved that the committee took just 17 minutes to consider the matter before making its decision. But in the instant case, the evidence is limited to the date the Minister's Delegate received the section 44(1) report. This evidence establishes when the Minister's Delegate received the section 44(1) report, but not more; it does not establish when the Minister's Delegate reviewed the whole file. As the Respondent points out, the file includes the CBSA Inland Enforcement file, the National Case Management System File, as well as the Global Case Management System File. Perhaps the Minister's Delegate considered these materials prior to receiving the section 44(1) report. On the other hand, perhaps the Applicant is correct and the Minister's Delegate took only one day to

read everything. The Court cannot assume when the material was considered, and the presence of this assumption distinguishes this matter from *McGuire*.

[26] I do, however, agree with the Applicant that the Minister's Delegate demonstrated a reasonable apprehension of bias. What is remarkable about the decision is that the Minister's Delegate commented on all of the negative factors, but almost no mitigating factors. For example, the Minister's Delegate never mentioned that the Applicant did not stab the victim, did not know that his friend carried the knife, and has been found to show deep remorse. There is likewise no mention of the Parole Board's April 12, 2018 report, which granted the Applicant day parole and states that he does not present undue risk to society.

[27] The perfunctory mitigating factors mentioned by the Minister's Delegate in her decision are that the Applicant had lived in Canada for almost 18 years, had family and friends in Canada, and his common-law spouse was pregnant with his child. At the hearing of this matter, the Court questioned the Respondent about the lack of mitigating factors in the decision. According to the Respondent, the Minister's Delegate is an expert and requires deference. However, before the section 44(2) report was issued, the Applicant's common-law spouse had already given birth to their daughter. This fact is explicitly mentioned in the section 44(1) report. I infer that the Minister's Delegate was unaware that the Applicant's daughter had been born despite the Minister's Delegate's duty to review the section 44(1) report. This Court does not give deference to factually incorrect findings, nor does it give deference to bias.

[28] I also agree with the Applicant that the Minister's Delegate engaged in a moral assessment of the Applicant's crime. This is apparent from the statement that "he will still have

the opportunity to start a new life with his family, a choice the victim of this senseless act of violence will never have". This finding illustrates that the Minister's Delegate based the decision on personal feelings, rather than the law, and therefore the process was not impartial.

[29] In sum, the Applicant has satisfied his high evidentiary burden to establish that a reasonable apprehension of bias occurred in his matter. The reasons indicate that the Minister's Delegate's mind was closed and the section 44(2) report was not decided fairly, and for this reason I am setting the decision aside.

VI. **Certified Question**

[30] The Applicant submitted three questions for certification, all of which the Respondent objected to:

1. What is the scope of the Minister's Delegate's discretion under section 44(2) of the IRPA when deciding whether to refer a permanent resident to an admissibility hearing?
2. In exercising their discretion under section 44(2) of the IRPA, is a Minister's Delegate required to consider the best interest of any child affected by the decision? If so, what is the nature of this consideration?
3. Is compliance with international human rights law, rehabilitation or avoidance of gross disproportionality a *Charter* value? If so, are any of these values engaged by a Minister's Delegate's decision to refer a permanent resident to an admissibility hearing?

[31] A certified question must be dispositive of the appeal (*Zazai v Canada (Citizenship and Immigration)*, 2004 FCA 89 at para 11) and a question of general importance (*Liyanagamage v Canada (Citizenship and Immigration)* (1994), 176 NR 4 at para 4 (FCA)). I will not certify the Applicant's questions given that this matter was decided on the reasonable apprehension of bias issue.

VII. **Conclusion**

[32] The application for judicial review is granted, and the matter is referred to a different delegate of the Minister for redetermination. Accordingly, the Immigration Division's deportation order rendered on September 28, 2018 following the Minister Delegate's referral is quashed.

JUDGMENT in IMM-5004-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, and the matter returned to a different delegate of the Minister for redetermination.
2. The Immigration Division's deportation order against the Applicant rendered on September 28, 2018 is quashed.
3. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5004-18
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