Federal Court Cour fédérale

**Date: 20191112**

**Docket: IMM-4017-18**

**Citation: 2019 FC 1414**

**Toronto, Ontario, November 12, 2019**

**PRESENT: Mr. Justice Diner**

**BETWEEN:**

**JAMES ALAN COX**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] This application for judicial review challenges a decision of a Minister's Delegate who issued an exclusion order against Mr. Cox upon his attempted re-entry to Canada, based on inadmissibility for non-compliance with the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. For the reasons that follow, this application for judicial review is denied.

[2] In early 2018, Mr. Cox, a 56-year-old U.S. citizen, sponsored by his Canadian wife, submitted an inland spousal application for permanent residence in Canada. He also submitted a work permit application.

[3] In August 2018, Mr. Cox and his wife left her Ottawa home for a short trip to the U.S. to attend the funeral of a family friend. Upon his attempted re-entry to Canada at the Prescott, Ontario Port of Entry, Mr. Cox was sent to secondary inspection. Two Canada Border Services Agency [CBSA] officers then searched Mr. Cox's car. They identified a small quantity of what they alleged was marijuana, and briefly arrested Mr. Cox.

[4] Following the short detention, the first officer asked Mr. Cox to unlock his cell phone, where he found several emails and text messages which he took to be written evidence that Mr. Cox had been performing unauthorized work in Canada.

[5] As a result of his investigation, the first officer wrote two inadmissibility reports pursuant to section 44(1) of the Act – the first based on criminality (re: entering with marijuana), and the second based on non-compliance with the Act (re: non-compliance). As to the former, the officer's report alleged that Mr. Cox had attempted to smuggle undeclared marijuana into Canada and recommended that Mr. Cox be referred for an inadmissibility hearing before the Immigration Division [ID]. As to the latter, the first officer found that Mr. Cox "has been working" in Canada as a temporary resident and without work authorization, and recommended that if the Minister's Delegate [MD] chose to take action, that Mr. Cox be issued an exclusion

order in accordance with subparagraph 228(1)(c)(iii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] for a year.

[6] The second officer – serving as the MD for the purposes of the section 44(2) review – was present when the first officer drafted his section 44(1) reports. The MD declined to act on the first report regarding the marijuana, but concurred with the second. In his section 44(2) review [Decision], the MD issued a one-year exclusion order.

[7] Mr. Cox's application for permanent residence was subsequently denied on the basis of the exclusion order. Mr. Cox sought leave and judicial review of the permanent residence decision, which is being held in abeyance pending the outcome of the present matter.

[8] Both parties – Mr. Cox and the two officers – submitted affidavits for this judicial review. None of the affiants were cross-examined on these affidavits, nor were there any procedural challenges to the affidavits, other than general concern from Mr. Cox's counsel that the officers were bootstrapping their decision. However, these three affidavits, read collectively, do little to clarify the inconsistencies between each side's version of what took place during the examination of Mr. Cox at secondary inspection.

[9] Mr. Cox maintains that the officers did not question him about whether he intended to work after re-entering Canada. Rather, he provides numerous explanations for the texts and email messages found on his cell phone.

[10] The officers, on the other hand, recount another version of the events that took place at the port of entry. Most notably, the MD states in his affidavit that when confronted with conversations indicating that he still had work to complete in Canada, Mr. Cox "could not explain these conversations."

[11] A more complete recitation of the background may be found in the parties' Statement of Agreed Facts, reproduced at Annex A to these Reasons.

## II. Issues and Standard of Review

[12] Mr. Cox raises two issues. First, he claims the MD erred by issuing the exclusion order rather than referring the matter to the ID for determination. Second, he claims that the MD was biased, having been with the first officer through most of the evening, and assisting with certain parts of the process.

[13] Mr. Cox urges the Court to review the first issue (the MD's issuance of the exclusion order) on a correctness standard. As Mr. Cox acknowledges, reasonableness review presumptively applies where an administrative decision-maker is interpreting and applying his or her home statute or a statute closely connected to his or her function (*Edmonton (City) v Edmonton East (Capilano) Shopping Centres Ltd*, 2016 SCC 47 at para 22). However, Mr. Cox submits that this case falls into the exception identified in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], for questions involving the "jurisdictional lines between two or more competing specialized tribunals" (at para 61).

[14] I disagree. The issue in this case turns on the interpretation of specific provisions of the MD's home statutes, including subparagraph 228(1)(c)(iii) of the Regulations. That provision empowers the MD to issue an exclusion order for "failing to establish that [foreign nationals] hold the visa or other document as required under section 20" of the Act. For the full text of the statutory provisions mentioned in these Reasons, please see Annex B.

[15] Nor am I persuaded that the *Dunsmuir* exception for jurisdictional lines between competing tribunals applies, as it was intended for situations where court intervention is necessary to demarcate jurisdictional lines. Here, there is no overlap or blurring of authority between the MD and the ID. There is no question that the MD had the authority to determine whether the Act and Regulations were satisfied, such that an exclusion order could be issued.

[16] My conclusion on this point is consistent with the jurisprudence of this Court determining that the decision to issue an exclusion order under section 228 of the Regulations is reviewed on a reasonableness standard. The most recent analysis on the point was conducted by Justice Norris, who found that deference is owed due to the largely fact-based nature of the decision (*Marcusa v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1092 at para 15.

[17] Reviewing this Decision on a reasonableness standard also accords with the Supreme Court's repeated cautioning against characterizing an issue as "jurisdictional" when it is only doubtfully so (e.g., *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 33). It is important to note, however, as pointed out in *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 44, that even when a

deferential standard applies, the range of reasonable interpretations of a home statute may still be very narrow.

[18] Both parties agree that the second issue alleging bias raises a question of procedural fairness, and should be reviewed on a correctness standard (*Canadian Association of Refugee Lawyers v Canada (Citizenship and Immigration)*, 2019 FC 1126 at para 58).

## III. Analysis

### A. *Reasonability of the Exclusion Order*

[19] Mr. Cox argues that the MD erred in issuing the exclusion order along with his section 44(2) report, based on two grounds, namely that:

1. the MD issued the exclusion order outside of his jurisdiction, and that only the ID could issue such an Order, because the MD based the Decision at least in part on past work. Both the relevant statutory provisions and jurisprudence require such a determination to be made by the ID, not by a senior officer at the border; and
2. a work permit was not a document required under section 20 of the Act since Mr. Cox was only entering as a visitor, and thus the MD's jurisdiction under subparagraph 228(1)(c)(iii) could not have been triggered.

[20] While I agree with certain of Mr. Cox's observations contained within his arguments, I do not agree that the Decision in unreasonable. Stated another way, I do not find that in its

totality, the Decision falls outside the range of possible or acceptable outcomes given the underlying facts and governing law.

[21] On the first ground Mr. Cox raises that the MD issued the Exclusion Order outside of his jurisdiction due to having one of two section 44(1) reports beyond his purview, the policy manual ENF 5, entitled "Writing 44(1) Reports," states at Section 12.1:

> **Reports with allegations outside the Minister's jurisdiction**
>
> If a report contains one or more inadmissibility allegations, and if the Minister's delegate has jurisdiction for all inadmissibility allegations contained within that report, the Minister's delegate can determine the disposition of that report.
>
> If, however, there are several inadmissibility allegations in a report and the Minister's delegate has jurisdiction for only some of them, then the Minister's delegate is not authorized to determine a disposition for that report, and all allegations must be referred to the Immigration Division.

[22] Mr. Cox, on the second ground, maintains that the MD never determined that he was entering Canada to work. Rather, Mr. Cox alleges that the examination and Decision both addressed his past conduct, and not his future plans. He was only seeking to enter as a visitor, not a worker. Mr. Cox submits that the case law says that this breaches what an MD can properly adjudicate at a port of entry: the MD acted outside of his jurisdiction, and the matter should have been sent to the ID for a final determination.

[23] I cannot agree with Mr. Cox's position on either ground. As to the first jurisdictional argument – that the MD proceeded with two grounds of inadmissibility – while the first officer wrote two section 44(1) reports, each contained a single ground of inadmissibility. The first

section 44 report alleged criminal inadmissibility. The second section 44 report alleged attempted entry into Canada without proper documentation. Clearly, the MD proceeded to consider only the second report and did not consider the report relating to the contraband. Thus, the MD clearly avoided any jurisdictional issue outlined in ENF 5 regarding “one or more inadmissibility allegations”. In other words, the MD did not provide “several inadmissibility allegations” in the Decision.

[24] On the second point regarding the allegation of attempting to enter Canada to work without authorization, while the MD looked back to the past, he also clearly looked toward the future. In my view, as long as the MD did not purely consider past work, but also considered future work, then he acted within his jurisdiction. Several key passages of the Decision illustrate this analysis. These key passages, in the order they appear in the Decision, are cited verbatim below:

> The root of Mr. COX inadmissibility under report N302266300 stems from the fact that Mr. COX has been in residing in Canada without any status other than that of a temporary resident (visitor). Evidence was found during a secondary examination that included a electronic media (cell phone) exam that indicated Mr. COX has been working in Canada without being in possession of the required documentation, namely a document authorizing him to work. During the review process Mr. COX was given several opportunities to be truthful about his work in Canada and despite being presented with screen shots of his work interaction via text messages; he failed to take responsibility for his action and instead choosing to make excuses.
>
> Mr. COX is not in possession of any approved documentation that would allow him to enter Canada with the purpose of engaging in the Canadian Labour Market. In order to be a temporary resident admitted to work in Canada the officer must be satisfied that he has applied for and received the required documentation as set out in both the Immigration and Refugee Protection Act and Regulations. Based on the evidence presented in the A44(1) report both the examining officer and myself as the reviewing Minister's Delegate

> are not satisfied that he possesses the required work authorization documentation.

[25] It is true that the MD begins by referencing Mr. Cox's past conduct. But this look through the rear-view mirror is a prelude to the MD's comments about the future, namely that Mr. Cox lacks documentation "to enter Canada with the purpose of engaging in the Canadian Labour Market." In essence, the MD is saying that Mr. Cox requires a work permit, but does not have one. In fact, he later observes that while Mr. Cox did apply for a work permit, the computer notes reflect its refusal (as noted below). The MD proceeds to quote from the first officer's section 44(1) report (in capital letters) which provides a fuller explanation of the evidence to which the MD refers:

> BASED ON EVIDENCE FOUND DURING AN ELECTROIC EXAMINATION OF HIS CELL PHONE, THE SUBJECT HAS BEEN WORKING IN CANADA WITHOUT AUTHORIZATION AT A CONTRACTOR IN OTTAWA, EVEN SETTING UP A NUMBERED CANADIAN-INCORPORATED BUSINESS FOR WHICH HE HAS RECEIVED DIRECT DEPOSITS FOR WORK BEING COMPLETED.
>
> SEVERAL TEXTS MESSAGES ON HIS CELL PHONE SHOW COMPLETING JOBS FOR SEVERAL INDIVIDUALS AND ALSO WORKIGN WITH STAFF, THAT INCLUDE COORDINATIOING PICKUP TIMES FOR JOBS IN THE OTTAWA AREA.
>
> TEXTS MESSAGES AS EVIDENCE WERE CONFIRMED AS THE STRATED HE IS OFTEN REFERRED TO AS JIM, AS INDICATED IN THE EVIDENCE TAKEN FROM THE EXAMINATION OF THE SUBJECTS CELL PHONE AND BY VERIFYING THE EMAIL THAT IS CONFIRMED IN HIS CONTACT INFORMATION IN THE GLOBAL CASE MANAGEMENT SYSTEM (GCMS).
>
> HAD THE SUBJECT BEEN CAUGHT WORKING IN CANADA WITHOUT AUTHORIZATION EARLIER HE WOULD NOT BEEN DEEMED ELIGIBLE TO APPLY FOR

> PERMANENT RESIDENCE IN CANADA AND WOULD HAVE POSSIBLY FACED A REMOVAL ORDER.
>
> THE SUBJECT HAS BEEN COMPLETING WORK IN CANADA THAT REQUIRES A WORK PERMIT AND IS NOT IN POSSESSION OF A VALID WORK PERMIT OR ANY OTHER DOCUMENTATION THAT WOULD AUTHORIZE HIM TO WORK IN CANADA.
>
> THE SUBJECT HAS BEEN COMPLETING WORK IN CANADA THAT REQUIRES EITHER A LABOUR MARKET IMPACT ASSESSMENT OR LABOUT MARKET IMPACT ASSESSMENT EXEMPTION. THE SUBJECT IS NOT IN POSSESSION OF ANY OF THESE DOCUMENTS.

[26] I might agree with Mr. Cox's position that the Decision and the resulting exclusion order uniquely address the past if the above passage were the sum total of the Decision. But that is not the case. The passage only represents a part of the Decision, namely the first officer's assessment and recommendation. The MD goes on to note, in his own independent analysis, that he is aware of the possibility of referring to the ID, and explains why he decides not to do so:

> Under the Immigration and Refugee Protection Act and Regulations a referral of Mr. COX to an Admissibility Hearing for committing an offence on entry with the recommendation of the issuance of a deportation order would be in line with current policy set out in section 229 of the Immigration and Refugee Protection Regulations.
>
> However after an extensive interview by both myself as the Minister's Delegate and the Examining Officer; I do not feel that using government resources or holding Mr. COX under detention based on his continued untruthfulness while he awaits a referral to an Admissibility Hearing is an appropriate use of government resources or the most efficient way to maintain the integrity of the Immigration and Refugee Protection Act in this specific instance.
>
> Mr. COX will now have time to ensure he understands what is required to work in Canada and how to apply for that authorization prior to engaging in work in Canada.

[27] The MD then proceeds to consider what he concludes is evidence of past work, and what the consequences could have been for his permanent residence application:

> Mr. COX did not present any evidence to outweigh his inadmissibility. Mr. COX attempted to apply for a work permit earlier this year, however according to the Global Case Management System (GCMS) it appears it will be rejected has he does not qualify for a work permit under the category for which he made his application. The fact that Mr. COX knew he needed a work permit demonstrates to me that he knew better than to work in Canada without prior authorization.
>
> During the examination process it became apparent that Mr. COX has been engaging in unauthorized employment in Canada for the past few years. Had he been caught earlier, his application for Permanent Resident would not have been forwarded through the stages as he would have face [*sic*]a removal order for his non-compliance with the act.

[28] These observations were all open to the MD. He was simply setting the stage for his conclusions about what an entry would mean going forward, finding that Mr. Cox would continue to work:

> After reviewing this case I do not feel that simply allowing Mr. COX to withdraw his application to enter Canada is an appropriate outcome to this review. Mr. COX has been given several chances to be in Canada as a visitor and despite being presented with hard evidence would not take any ownership for his actions. <u>I believe that if Mr. COX was admitted to Canada he would continue to work without authorization.</u> Mr. COX has set up a numbered Canadian business believing that he should be allowed to work and hire others to work without prior authorization. He failed to recognize that he had contravened the Act and Regulations and instead choose to pass blame or make excuses.
>
> Mr. COX did disagree with some minor point [*sic*] of the allegations made against him in this A44(1) report, however he could present no evidence that explained or excused the hard evidence found during the examination process.

> Mr. COX requires [*sic*] to have approval to work in Canada and must at a minimum be in possession of the required documentation to make that application at the port of entry.
>
> [Emphasis added.]

[29] Again, while a certain portion of the Decision addresses past conduct, the MD draws a conclusion about the impropriety of that conduct. His conclusion, in my view, sanctions Mr. Cox for what he will do, rather than what he has done. The officer prevents his entry due to what he feels will ensue as an inferred both from past conduct (such as setting up a company), but also from text messages regarding what the officer interprets to indicate future work. Again, these inferences and conclusions were open to the MD based on the totality of the evidence.

[30] Finally, in the concluding “Reasons and Decision” section of his section 44(2) report, the MD writes:

> Mr. COX does have a wife in Canada and several friend [*sic*] who he claims are some of the people he has been working for without authorization.
>
> …
>
> While a foreign national may have dual intent as stated in act, it specifically states that the border services officer is satisfied that they will leave Canada by the end of the period authorized for their stay and will not work without authorization. However based on the information/evidence I am not satisfied that this is the case.
>
> I find that the A.44(1) report for non-compliance is well founded (N302266300) and I concur with the examining Officer’s recommendation that an Exclusion Order for a one year period be issued under the Act.
>
> [Emphasis added.]

[31] Similar to his observations above, the MD once again looks forward to future conduct. I therefore cannot accept Mr. Cox's arguments that the MD improperly ruled on his past conduct and found him inadmissible for prior non-compliance with the Act.

[32] I further find that the MD's conclusions were reasonable in light of the evidence on the record, namely copies of text messages with various individuals regarding:

1) assistance in getting work done. For instance, Mr. Cox wrote "I am looking for somebody to work with me in Ottawa on different jobs," "I am a …contractor and do anything that comes my way. I am currently working on repairing a large in ground pool and building a deck for a client in Barrhaven…," "I have a house to install flooring and repaint";

2) receiving and responding to requests for services, such as:

   - Woman to Mr. Cox: "I had dinner with a friend of your wife's… she mentioned that you renovate kitchens. I was wondering if you are interested/ available to provide us with a quote"; to which Mr. Cox responded "Sorry I didn't get back to you sooner but I was out of town with my wife. Would you like me to stop by one day this week, take a look and see what you have in mind?", and

   - Mr. Cox to woman: "I visited house this afternoon… There seems a lot of cleaning needed: I should have discussed things such as carpet shampoo, windows and screens, door tracks, basement perimeter"; to which Mr. Cox replied "I saw the mark on the floor and it appeared to be a rust stain. I have a product which should help remove or lighten the stain."

- Mr. Cox subsequently writes to woman: "I replaced the pump and increased the drainpipe size. I also sprayed a moldecide solution twice around the perimeter of the room. The windows were opened and a large fan was used to dry the floor. Once everything was relatively dry I closed the windows and ran the fan and dehumidifier. I am sure we should have no problems. I have to attend a funeral in NY on Wednesday and will work over the weekend to get your property ready for the tenents [sic]. I will put together a bill for the work and send it over to you."

3) evidence of deposits being made into Mr. Cox's bank account, including an e-transfer from the woman in # 2 above.

[33] The timing of the messages is consistent with Mr. Cox's departure to the U.S. for the funeral, and his return to Canada. I do not find Mr. Cox's argument that the Decision was unreasonable vis-à-vis lack of documentation for a work permit to be persuasive in light of this evidence. Nor do I find the case law upon which Mr. Cox relies to be compelling: he cites a series of cases that have quashed exclusion orders issued at ports of entry by MDs with section 44(2) reports. Indeed, this Court's jurisprudence is clear that allegations purely regarding past work in Canada in violation of status must be sent to the ID for determination regarding the issuance of an exclusion order. However, all the cases to which Mr. Cox points differ in their factual scenarios and application of the law.

[34] Specifically, Mr. Cox cites *Paranych v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 158 [*Paranych*], in which Justice Zinn adopted Justice Locke's earlier

reasoning in *Gupta v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1086 [*Gupta*], for the proposition that past unauthorized work is a breach of the law which an MD must refer to the ID, rather than issue a removal order. As an aside, *Paranych* also cites Justice Harrington's decision in *Yang v Canada (Public Safety and Emergency Preparedness)*, 2014 FC 383.

[35] However, in *Gupta*, *Paranych*, and *Yang*, the applicants went to the respective ports of entry expressly to apply for work permits for which they either had the colour of right based upon prior student status (*Yang*, *Paranych*), or work permit pre-approval (*Gupta*). None of the three applicants in those cases sought to enter Canada as visitors. And in none of those cases did the MD find evidence of prospective work and refuse entry due to a lack of documentation authorizing such work.

[36] Instead, Mr. Gupta, Mr. Paranych, and Ms. Yang all presented themselves at the port of entry to apply for a work permit so that they could work going forward. In each case, this Court found that the Minister's delegate had unreasonably ruled purely on past conduct, finding fault with allegedly undocumented or improper work in Canada. As a result, the MDs' analyses in each of those three situations were found by this Court to be improper due to their uniquely retrospective focus, from which they had no basis to issue exclusion orders. Rather, the Court held in each of those cases that the MD should instead have referred the inadmissibility determination to the ID for a final decision. And for that very reason, I find each case to have differed from Mr. Cox's situation.

[37] I also note that in another recent case that relied on *Paranych*, Justice Shore quashed an exclusion ordered by an MD arising from a section 44(2) report, based once again on a section 41 non-compliance allegation for failing to hold a document required to enter Canada (i.e. a work permit), even though the applicant had been pre-approved for a work permit by the Los Angeles visa office (*Fivaz v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 764 [*Fivaz*]). Similar to the other fact patterns, the MD had found the applicant inadmissible for having worked in Canada without work authorization (i.e., while only having visitor status).

[38] Here, unlike in *Fivaz*, *Paranych*, *Gupta*, and *Yang*, Mr. Cox did not approach the port of entry to apply for a work permit. Rather, he stated and maintained through the examination that he was coming in as a visitor. The MD found this contention to be inconsistent with the evidence, and remained unconvinced by Mr. Cox's responses. Although I agree with Mr. Cox that the officers' reports contain several references to past work, the Decision nonetheless references upcoming work.

B. *Apprehension of Bias*

[39] Mr. Cox claims that the process that took place between the two officers at the Prescott Port of Entry crossed the line into a reasonable apprehension of bias, in that the MD assisted the first officer with certain parts of the section 44(1) report that he ultimately reviewed and incorporated into his section 44(2) report.

[40] I note that both parties have provided affidavits in support of this application. Of course, an applicant's affidavit must be provided as part of a judicial review; it is a required document. Affidavits from decision-makers such as immigration officers, on the other hand, are unusual. They will normally not be admissible – or at minimum be given little weight – due to perceived "bootstrapping" by decision-makers, that is to say, introducing subsequent justification to support a decision or its reasons (see, for instance, *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 at para 41).

[41] One of the exceptions to the admissibility of affidavit evidence from decision-makers in a judicial review is when the applicant claims a breach of procedural fairness, which underlies a bias claim. That is what Mr. Cox asserts here. As a result, I have read the officers' affidavits solely for the purpose of understanding the process that took place at the port of entry. Having so considered the contents of the various affidavits, I do not find that there was a reasonable apprehension of bias: an informed (i.e. reasonable) person, viewing the situation realistically and practically and having thought the matter through, would not conclude that it is more likely than not that the MD would have been unable to decide the case fairly (*Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369).

[42] The threshold for bias, whether real or perceived, is high. The grounds for finding a reasonable apprehension of bias must be substantial, rather than coming from the viewpoint of a "very sensitive or scrupulous conscience" (*Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 76). The officers did not cross this high threshold at the Prescott Port of Entry when they

went to Mr. Cox’s vehicle together due to safety protocols, and arrested Mr. Cox due to suspected contraband.

[43] According to the officers’ evidence, the first officer then conducted his review. As a newer officer, he was unexperienced in the CBSA database, and experienced issues with it. He consulted and sought assistance from the MD, the other officer present that evening, with procedural elements of his review and with entering information into the computer system.

[44] Mr. Cox, however, submits that procedural fairness requires that officers refrain from assessing their own reports. He claims that this requirement of natural justice was denied in this case, as the first officer (the one who wrote the section 44(1) report) was insufficiently independent from the MD (who adjudicated the report and issued the section 44(2) Decision).

[45] Mr. Cox alleges that his interactions during the examination were primarily with the MD, and that the MD provided substantial instruction to the first officer on what to include in the section 44(1) report. In other words, Mr. Cox argues that the MD was too heavily involved in the drafting of the section 44(1) report, and the roles between the two officers were blurred as a result.

[46] I am not persuaded by Mr. Cox’s assertions. I find the officers’ affidavits to be credible with respect to the procedures they followed that evening, and have little reason to doubt the explanation of what transpired and why the first officer required assistance from the MD. I thus feel that I can place weight on this affidavit evidence in assessing the alleged breach of

procedural fairness. Furthermore, I note that on the face of the report and Decision, while the MD referenced the first officer's section 44(1) report, he independently analysed the facts and evidence, and exercised his own judgment in coming to his conclusions. I see no evidence of impartiality or unfairness other than the claims made by Mr. Cox, which do not stand up when held in relief against the explanation of the officers, or with the cell phone evidence.

[47] The process was not perfect. I agree that it would have been better had the officers not communicated that evening, but it was the best that the officers could manage given the situation and short staffing that existed that evening. Their conduct did not cross the line such that the MD exhibited any degree of pre-judgment or predisposition giving rise to a reasonable apprehension that he was unresponsive to the evidence and arguments advanced (*Canada (Minister of Citizenship and Immigration) v Jaballah,* 2006 FC 180 at para 13). The officers acted practically, and without any evidence of unfairness in the circumstances.

## IV. Conclusion

[48] Despite very able arguments and valiant efforts from Mr. Blakey on behalf of Mr. Cox, I am not persuaded that the Decision was unreasonable or unfair. Consequently, this application for judicial review will be dismissed.

## JUDGMENT in IMM-4017-18

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is dismissed.

2. No questions for certification were argued, and I agree none arise.

3. There is no award as to costs.

"Alan S. Diner"

Judge

**Annex A**

**Statement of Agreed Facts**

1. The Applicant is a US citizen. In 2014 he married Carolyn Doyle-Cox. She is a US citizen by birth and a naturalized Canadian citizen. Ms. Doyle-Cox lives in Canada. The Applicant resides in the United States.

2. After they were married in 2014, the Applicant spent significant amounts of time in the Ottawa area. In early-2018, the Applicant submitted an Application for permanent residence (PR) based on spousal sponsorship. He also submitted an Application for an open work permit.

3. On the evening of 4 August 2018, the Applicant and his spouse arrived at the Prescott port of entry (POE). They were returning to Ms. Doyle-Cox's home in the Ottawa area following a four-day trip to the US to attend the funeral of a family friend.

4. Upon their arrival at the POE, the Applicant and his spouse were interviewed at primary inspection. The Officer referred them to secondary inspection.

5. At secondary inspection the, Applicant primarily interacted with two officials of the Canada Border Services Agency (CBSA) – |||||||||||||||||||||||||| |||||||||||||||||||||||||| [Officer 1] and ||||||||||||||||||||||||| ||||||||||||||||||||||||| [Officer 2].

6. The CBSA inspected the Applicant's vehicle. Both Officers participated in the exam. An item was discovered in the Applicant's vehicle that the CBSA alleged to be marijuana. The Applicant was arrested by |||||||||||||||| |||||||||||||||| [Officer 1] on an allegation of smuggling marijuana. |||||||||||||||| |||||||||||||||| [Officer 2] was also present during the arrest.

7. The Applicant was handcuffed, searched and placed in a room for questioning. The Applicant was advised of his *Charter* rights and his right to contact American consular authorities. The Applicant contacted embassy staff. Staff directed him to a legal-aid hotline. The Applicant contacted the hotline.

8. The CBSA questioned the Applicant about the alleged marijuana. The Applicant denied that the item belonged to him. CBSA confiscated the alleged marijuana.

9. Sometime later, the CBSA advised the Applicant that the arrest had been discontinued.

10. After the arrest was discontinued, the CBSA requested that the Applicant unlock his mobile phone for inspection. The Applicant complied. The inspection revealed emails and text message exchanges between the Applicant and others, which CBSA took to be evidence that the Applicant had been performing unauthorized work, and which appeared to indicate that there was work in process.

11. Under the s. 44 scheme of the Act, “an officer who is of the opinion that a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.” Section 44(2) requires the Minister to evaluate whether, in his opinion, the report is well-founded. Section 44(2) normally authorizes the Minister to refer a report he believes to be well founded to the Immigration Division for adjudication and, where appropriate, the issuance of a removal order. However, in some cases involving foreign nationals who are not Permanent Residents, Section 44(2) requires the Minster to directly adjudicate a s. 44(1) report when certain “circumstances prescribed by the Regulations” are met. In such circumstances, the Minister “may make a removal order”. Those circumstance are prescribed under s. 228 of the Regulations. The decision under section 44 (2) is made by a more senior immigration officer known as the Minister’s Delegate. In this case, the officer who signed the report was ||||||||||||| ||||||||||||| [Officer 1] and the Delegate who rendered the decision was |||||||||||| |||||||||||| [Officer 2].

12. The CBSA produced two s. 44(1) reports alleging that the Applicant is inadmissible to Canada. |||||||||||||||| |||||||||||||||| [Officer 1] signed both reports. |||||||||||||||||| |||||||||||||||||| [Officer 2] was present when the reports were being drafted. The first report concerned smuggling marijuana. The second concerned the Applicant’s work in Canada.

13. The Applicant was presented with the 44(1) reports. The Applicant expressed that he did not agree with the reports. The Applicant was asked to sign the reports. He initially refused

to sign the reports, stating that they were not accurate. However, the Applicant eventually signed each report, indicating that he had received the reports.

14. The Minister's Delegate declined to act on the s. 44(1) report concerning the alleged smuggling of marijuana. |||||||||||||||| |||||||||||||||| [Officer 2] did, however, act on the second report. As noted on the Removal Order, the Delegate determined that the report was well-founded and the Applicant was inadmissible for failing to comply with the Act. He also determined that the Minister's s. 228 authority to directly issue a removal order against the Applicant was engaged. The Delegate found that, per s. 228(1)(c), the Applicant was inadmissible to Canada for failing to establish that he held "the visa or other document required under section 20 of the Act."

15. The Delegate issued a 1-year exclusion order against the Applicant, dated 5 August 2018. The Applicant was subsequently directed to return to the United States. He complied. The Applicant's spouse was permitted to enter Canada.

16. Subsequent to the Applicant's removal from Canada, his PR application was denied. The Applicant applied for leave and judicial review of that decision in IMM-907-19. With the Respondent's consent, the Applicant submitted a motion that that matter be held in abeyance until IMM-4017-18 is disposed of. On 23 April 2019 Prothonotary Aalto granted the motion.

## Annex B

| *Immigration and Refugee Protection Act, SC 2001, c 27* | *Loi sur l’immigration et la protection des réfugiés, LC 2001, ch 27* |
| --- | --- |
| **Obligation on entry** | **Obligation à l’entrée au Canada** |
| 20 (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish, | 20 (1) L’étranger non visé à l’article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver : |
| (a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and | a) pour devenir un résident permanent, qu’il détient les visa ou autres documents réglementaires et vient s’y établir en permanence; |
| (b) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay. | b) pour devenir un résident temporaire, qu’il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée. |
| **Declaration** | **Déclaration** |
| (1.1) A foreign national who is the subject of a declaration made under subsection 22.1(1) must not seek to enter or remain in Canada as a temporary resident. | (1.1) L’étranger qui fait l’objet d’une déclaration visée au paragraphe 22.1(1) ne peut chercher à entrer au Canada ou à y séjourner à titre de résident temporaire. |
| **Provincial criteria** | **Critères provinciaux** |
| (2) A foreign national referred to in subsection 9(1) must also establish, to become a permanent resident, that they hold a document issued by the | (2) L’étranger visé au paragraphe 9(1) est tenu en outre, pour devenir résident permanent, de prouver qu’il détient le document délivré par la province en cause |

province indicating that the competent authority of the province is of the opinion that the foreign national complies with the province's selection criteria.

attestant que l'autorité compétente de celle-ci est d'avis qu'il répond à ses critères de sélection.

**Non-compliance with Act**

41 A person is inadmissible for failing to comply with this Act

(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and

(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

**Manquement à la loi**

41 S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

**Preparation of report**

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

**Rapport d'interdiction de territoire**

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

**Referral or removal order**

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the

**Suivi**

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut

residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

alors prendre une mesure de renvoi.

***Immigration and Refugee Protection Regulations, SOR/2002-227***

***Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227***

**Subsection 44(2) of the Act — foreign nationals**

228 (1) For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

(a) if the foreign national is inadmissible under paragraph 36(1)(a) or (2)(a) of the Act on grounds of serious criminality or criminality, a deportation order;

(b) if the foreign national is inadmissible under paragraph 40(1)(c) of the Act on grounds of misrepresentation, a deportation order;

(b.1) if the foreign national is inadmissible under subsection 40.1(1) of the Act on grounds of the cessation of refugee protection, a departure order;

**Application du paragraphe 44(2) de la Loi : étrangers**

228 (1) Pour l'application du paragraphe 44(2) de la Loi, mais sous réserve des paragraphes (3) et (4), dans le cas où elle ne comporte pas de motif d'interdiction de territoire autre que ceux prévus dans l'une des circonstances ci-après, l'affaire n'est pas déférée à la Section de l'immigration et la mesure de renvoi à prendre est celle indiquée en regard du motif en cause :

a) en cas d'interdiction de territoire de l'étranger pour grande criminalité ou criminalité au titre des alinéas 36(1)a) ou (2)a) de la Loi, l'expulsion;

b) en cas d'interdiction de territoire de l'étranger pour fausses déclarations au titre de l'alinéa 40(1)c) de la Loi, l'expulsion;

b.1) en cas d'interdiction de territoire de l'étranger au titre du paragraphe 40.1(1) de la Loi pour perte de l'asile, l'interdiction de séjour;

(c) if the foreign national is inadmissible under section 41 of the Act on grounds of

c) en cas d'interdiction de territoire de l'étranger au titre de l'article 41 de la Loi pour manquement à :

(i) failing to appear for further examination or an admissibility hearing under Part 1 of the Act, an exclusion order,

(i) l'obligation prévue à la partie 1 de la Loi de se présenter au contrôle complémentaire ou à l'enquête, l'exclusion,

(ii) failing to obtain the authorization of an officer required by subsection 52(1) of the Act, a deportation order,

(ii) l'obligation d'obtenir l'autorisation de l'agent aux termes du paragraphe 52(1) de la Loi, l'expulsion,

(iii) failing to establish that they hold the visa or other document as required under section 20 of the Act, an exclusion order,

(iii) l'obligation prévue à l'article 20 de la Loi de prouver qu'il détient les visa et autres documents réglementaires, l'exclusion,

(iv) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, an exclusion order,

(iv) l'obligation prévue au paragraphe 29(2) de la Loi de quitter le Canada à la fin de la période de séjour autorisée, l'exclusion,

(v) failing to comply with subsection 29(2) of the Act as a result of non-compliance with any condition set out in section 184 or subsection 220.1(1), an exclusion order, or

(v) l'une des obligations prévues au paragraphe 29(2) de la Loi pour non-respect de toute condition prévue à l'article 184 ou au paragraphe 220.1(1), l'exclusion,

(vi) failing to comply with the requirement under subsection 20(1.1) of the Act to not seek to enter or remain in Canada as a temporary resident while being the subject of a declaration made under subsection 22.1(1) of the Act, an exclusion order;

(vi) l'obligation prévue au paragraphe 20(1.1) de la Loi de ne pas chercher à entrer au Canada ou à y séjourner à titre de résident temporaire pendant qu'il faisait l'objet d'une déclaration visée au paragraphe 22.1(1) de la Loi, l'exclusion;

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4017-18 |
| **STYLE OF CAUSE:** | JAMES ALAN COX V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | KINGSTON, ONTARIO |
| **DATE OF HEARING:** | SEPTEMBER 24, 2019 |
| **JUDGMENT AND REASONS:** | DINER J. |
| **DATED:** | NOVEMBER 12, 2019 |

**APPEARANCES:**

| | |
|---|---|
| Steven Blakey | FOR THE APPLICANT |
| Nadine Silverman | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |