Federal Court  Cour fédérale

Date: 20110714

Docket: IMM-3399-10

Citation: 2011 FC 885

BETWEEN:

ROMAN CHERNIKOV

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by a Minister's delegate dated May 19, 2010, wherein the applicant was found to constitute a danger to the public in Canada under paragraph 101(2)(b) of the Act and is ineligible for refugee consideration.

[2] The applicant requests that the decision of the Minister's delegate be set aside and the claim remitted for redetermination. In addition, the applicant seeks costs in the amount of $7,500.

Background

[3] Roman Chernikov (the applicant) was born in the Kyrgyz Soviet Socialist Republic, now Kyrgyzstan, on February 19, 1972.

[4] The applicant left for Poland in 1990 and claimed refugee protection in Germany in 1991 which was denied. The applicant then returned to Kyrgyzstan where he lived until 2000. From 2000 to 2006, the applicant resided in the United States.

[5] In February 2004, the applicant was convicted of impaired driving causing bodily injury in California. He was further convicted of a probation violation and failure to appear in connection with the impaired driving conviction.

[6] The applicant entered Canada in August 2006. He claimed refugee protection in October 2009.

Minister's Delegate's Decision

[7] The Minister's delegate summarized the applicant's criminality including charges for disorderly conduct, robbery and possession of a controlled substance of which the applicant was not

convicted. He noted that he gave little weight to the charges which did not result in convictions but noted that they provide evidence of police involvement on numerous occasions.

[8] The Minister's delegate then considered the circumstances of the applicant's convictions finding that the applicant pled no contest to impaired driving causing bodily harm under the *California Vehicle Code*, division 11, article 2, §23153(b). The applicant was released on his own recognizance, with conditions, but was convicted of failure to appear. The Minister's delegate noted that the applicant successfully completed his drinking driver program on April 5, 2005 but was subsequently convicted of violating his probation and sentenced to two years. The Minister's delegate determined that the length of the applicant's sentence indicated the severity of the crime according to the sentencing judge.

[9] The Minister's delegate then engaged in a danger assessment. He found that the offence contrary to section 23153(b) of the *California Vehicle Code* equates to paragraph 253(1)(b) of the *Criminal Code*, RS 1985, c C-46, which is punishable by a maximum term of imprisonment of ten years under subsection 255(2).

[10] The Minister's delegate reviewed the applicant's counsel's submissions that Canada Border Services Agency (CBSA) included statements about the applicant's hospitalization for alcohol withdrawal in an inadmissibility report pursuant to subsection 44(1) and section 55 of the Act (the section 44 report) provided to the Minister's delegate. The Minister's delegate found that the applicant was provided with an opportunity to release his medical records to the CBSA to establish why he was hospitalized.

[11] The Minister's delegate found that the offence of impaired driving causing bodily harm occurred because of the applicant's problem with alcohol or drugs and that the applicant was unable to comply with the terms of his probation or parole. The Minister's delegate found that the applicant has a continuing problem with drugs or alcohol abuse which remains inadequately treated and therefore he may reoffend by committing a similar offence in Canada. The Minister's delegate concluded that this presents an unacceptable risk to the public and therefore the applicant was found inadmissible for serious criminality.

Issues

[12] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the Minister's delegate base his decision on an erroneous finding of fact that the applicant was previously charged with robbery?
3. Was there a breach of procedural fairness?

Applicant's Written Submissions

[13] The applicant submits that the Minister's delegate erred in finding that the applicant was charged with robbery. The applicant submits that the US Federal Bureau of Investigation report notes all arrest entries and the delegate erroneously conflated the arrest entries with criminal charges. This error influenced the Minister's delegate's danger assessment of the applicant. The

applicant submits that even if he were charged with these offences, it was an error for the Minister's delegate to find the charges to be evidence that the applicant would reoffend.

[14] The applicant argues that the Minister's delegate improperly relied on information which was not disclosed. He submits that CBSA breached procedural fairness by not disclosing the criminal documentation or the medical and financial evidence referred to in the Minister's delegate's danger opinion. CBSA provided no verifiable evidence that the applicant was being treated for alcohol withdrawal. The Minister's delegate's request that the applicant produce his medical records to counter CBSA's allegations inappropriately reversed the onus of proof. The onus was on the Minister's delegate to establish that the applicant is a danger to the public.

[15] The applicant submits that there was insufficient evidence for the danger opinion. There was no evidence to support the finding that the applicant has a real problem with drugs and alcohol. The Minister's delegate had no details of the offence or the applicant's history. A danger opinion must be based on underlying evidence and as this one was not, the judicial review should be allowed.

Respondent's Written Submissions

[16] The respondent submits that the applicant has not shown that the charges listed by the Minister's delegate were only arrests. Moreover, the Minister's delegate was entitled to rely on the evidence surrounding any charges that did not lead to a conviction, as per *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326. The Minister's delegate gave little weight to any of the charges which did not result in convictions and the applicant has not proven

and found only that there was evidence of police involvement on numerous occasions. The applicant has not proven that the Minister's delegate based his decision on any erroneous findings of fact. Further, at no point does the applicant deny that he was charged with the crimes listed in the summary of criminality and his counsel's submissions are not evidence.

[17] The respondent submits that the medical information was disclosed to the applicant through the section 44 report. The applicant's counsel had the opportunity to respond to the information and the applicant had the opportunity to release his medical records to CBSA, which he chose not to do. As such, the applicant has waived the right to assert procedural unfairness. The respondent further submits that even if the applicant has not waived procedural fairness, the onus of proof is not on the respondent and nor does procedural fairness require the CBSA to disclose information it receives from tips from reliable sources.

[18] Finally, the respondent urges the Court to rely on the further affidavit of CBSA officer Kane, filed on December 9, 2010, which included fifteen pages of medical documents concerning the applicant. These documents indicate that the applicant was, in fact, being treated for alcohol related issues and does have a serious problem with alcohol. The respondent submits that these documents are admissible despite being new evidence and hearsay as they are necessary for the respondent to rebut statements made by the applicant in his memoranda and they are reliable because they were made about the applicant by Calgary Health authority personnel.

Analysis and Decision

[19] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[20] Questions of procedural fairness, including the right to know and be able to respond to the case against oneself, are evaluated on a standard of correctness (see *Noha v Canada (Minister of Citizenship and Immigration)*, 2009 FC 683 at paragraph 21).

[21] **Issue 2**

Did the Minister's delegate base his decision on an erroneous finding of fact that the applicant was previously charged with robbery?

The applicant submits that there are two problems with the Minister's delegate's findings regarding the criminal charges against him. First, that he was not charged but rather only arrested for the offence of robbery. Second, that even if he were charged, it was an error for the Minister's delegate to use a charge which did not result in conviction as evidence of the applicant's likelihood to reoffend in Canada.

[22] Regardless of whether the applicant was arrested or charged with robbery in the United States, the Minister's delegate did not rely on the charges or arrests in the danger assessment. The Minister's delegate reviewed the offence in California of impaired driving causing bodily harm, the equivalent offence in Canada. The Minister's delegate then determined that the applicant was likely

to reoffend based on the information in the section 44 report that the applicant has a continuing problem with alcohol which is untreated.

[23] The charge of robbery was not relevant to the Minister's delegate's conclusions.

[24] **Issue 3**

Was there a breach of procedural fairness?

The respondent submits that procedural fairness was not breached when CBSA included unsourced medical information in the section 44 report, and, even if there were a breach, the applicant waived his right to assert procedural unfairness rights by refusing to produce his medical records to contradict the allegations of the CBSA officer.

[25] According to the affidavit of CBSA officer Kane, the CBSA officer received a tip from Calgary Health Region that the applicant had been hospitalized for alcohol withdrawal issues and had checked out against the orders of the doctors.

[26] The CBSA officer included this information in his section 44 report to the Minister's delegate for use in the danger assessment. However, the officer did not include the source of the information or any documentary evidence such as medical records.

[27] The respondent submits that procedural fairness does not require CBSA to disclose information it receives from tips from reliable sources. However, this runs contrary to the guidelines for officers requesting a danger opinion. The *ENF 28 Ministerial Opinions on Danger to the Public and to the Security of Canada* developed by CIC, indicates in section 7.5 that "all documentation

must be releasable to the person concerned and to the person's counsel" and that a CIC or CBSA officer should not present information to the Minister's delegate which is "speculative in nature", "cannot be sourced", or "was not disclosed to the person by CIC."

[28] While the ENF 28 Manual is only a guideline and policy document, it outlines the appropriate conduct in drafting a danger opinion. The CBSA officer should not have included the information from the Calgary Health Region tip in the section 44 report and doing so amounted to a breach in procedural fairness.

[29] The applicant's counsel objected to the inclusion of the medical information in the section 44 report. Counsel's danger opinion submissions state that there was a "lack of any disclosed medical or other evidence to corroborate this finding. The office has submitted no hospital records, charts or statement from doctors to verify any of his statements or conclusions."

[30] I will not consider the further affidavit of the CBSA officer which includes medical documentation on the applicant's hospitalization and treatment. Affidavits containing extrinsic information may be admitted in judicial review proceedings where they are relevant to reviewing issues of procedural fairness or jurisdiction at the level of the decision maker and where they are necessary (see *Quiroa v Canada (Minister of Citizenship and Immigration)* 2007 FC 495 at paragraphs 26 and 27). The information in the further affidavit was not before the delegate at the time of drafting the danger opinion. The information, although related to the issues before this Court, does not address the breach of procedural fairness that occurred in including in the danger

opinion unsourced information that was not disclosed to the applicant. The further affidavit is therefore not properly before this Court.

[31] The respondent submits that after reviewing these submissions, the Minister's delegate provided the applicant with the opportunity to release his medical records to CBSA and by not doing so, the applicant waived the right to claim a lack of procedural fairness.

[32] Contrary to the respondent's position that the "onus of proof is not on the respondent", the applicant was not under a duty to produce his medical records, as the Minister's delegate does, in fact, bear the burden to show that the applicant is a danger to the public. As Madam Justice Judith Snider held in *Hasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1069 at paragraph 13:

> …the Minister bears the burden of showing that the Applicant is a danger to the public. To reverse that onus and require an applicant to satisfy the delegate that he or she is not a continuing danger to the public has been held to be an error. Such was the situation in *Kim v. Canada (Minister of Citizenship & Immigration)* (1997), 127 F.T.R. 181 (Fed. T.D.), where the delegate's final recommendation read: "the information provided does not satisfy me that this type of violent behaviour will not occur again."

[33] This onus of proof does not shift to the applicant simply because the CBSA officer improperly included information which could not be sourced in the section 44 report submitted for the danger opinion. The breach of procedural fairness and the attempt to reverse the onus to the applicant to defend against the allegations substantiating the danger opinion was an error of law requiring judicial intervention.

[34] As such, I would allow the application for judicial review.

[35] The applicant has sought $7,500 for costs primarily because the respondent did not disclose the additional medical evidence. I am not persuaded that the facts of this case amount to "special reasons" as required by Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22.

[36] The application for judicial review is therefore allowed.

[37] The parties shall have one week from the date of this decision to submit any proposed serious question of general importance for my consideration for certification and three days will be allowed for any response.

"John A. O'Keefe"
Judge

Ottawa, Ontario
July 14, 2011

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, RSC 2001, c 27

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Criminal Code, RS 1985, c C-46

253.(1) Every one commits an offence who operates a motor vehicle or vessel or operates or assists in the operation of an aircraft or of railway equipment or has the care or control of a motor vehicle, vessel, aircraft or railway equipment, whether it is in motion or not,	253.(1) Commet une infraction quiconque conduit un véhicule à moteur, un bateau, un aéronef ou du matériel ferroviaire, ou aide à conduire un aéronef ou du matériel ferroviaire, ou a la garde ou le contrôle d'un véhicule à moteur, d'un bateau, d'un aéronef ou de matériel ferroviaire, que ceux-ci soient en mouvement ou non, dans les cas suivants :
(a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or	a) lorsque sa capacité de conduire ce véhicule, ce bateau, cet aéronef ou ce matériel ferroviaire est affaiblie par l'effet de l'alcool ou d'une drogue;
(b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.	b) lorsqu'il a consommé une quantité d'alcool telle que son alcoolémie dépasse quatre-vingts milligrammes d'alcool par cent millilitres de sang.
255.(1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,	255.(1) Quiconque commet une infraction prévue à l'article 253 ou 254 est coupable d'une infraction punissable sur déclaration de culpabilité par procédure sommaire ou par mise en accusation et est passible :
(2) Everyone who commits an offence under paragraph 253(1)(a) and causes bodily harm to another person as a result is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years.	(2) Quiconque commet une infraction prévue à l'alinéa 253(1)a) et cause ainsi des lésions corporelles à une autre personne est coupable d'un acte criminel passible d'un emprisonnement maximal de dix ans.

ENF 28 Ministerial Opinions on Danger to the Public and to the Security of Canada

1. What this chapter is about

The purpose of this chapter is to define the policies and procedures with respect to ministerial danger opinion reports.
This chapter aims to provide functional guidance and direction to officers, managers and others at Citizenship and Immigration Canada (CIC) and the Canada Border Services Agency (CBSA) who
are involved in the decision-making process and the issuance of danger opinions.

7.5. Documentation

All documentation must be releasable to the person concerned and to the person's counsel.

When possible, certified copies should be made by the issuing authority of the original document.

Criminal documentation which must be provided with the danger opinion submission include:

• an A44 report highlights (IMM 5051B or IMM 5084B), which documents the person's criminal and personal history (employment, family, community involvement, associations, etc.) in Canada;

• police occurrence or observance reports linking the person to criminal activity and/or known associates, if releasable;

• pre-sentence reports or the judge's sentencing remarks, which should determine that the level of risk is consistent with the officer's recommendation;

• Probation and Parole Services and

1. Objet du chapitre

Le présent chapitre vise à définir les politiques et les procédures concernant les avis de danger émis par le ministre. Il vise également à fournir des directives fonctionnelles aux agents, gestionnaires et autres membres du personnel de Citoyenneté et Immigration Canada (CIC) et de l'Agence des services frontaliers du Canada (ASFC) qui participent à la prise de décisions et à l'émission des avis de danger.

7.5. Documentation

On doit pouvoir transmettre tous les documents à la personne en cause ou à son conseil.

Dans le mesure du possible, il faut obtenir des copies certifiées du document original de l'autorité émettrice.

Documents devant être présentés avec la demande d'avis de danger :

• les grandes lignes du rapport rédigé en vertu du L44 (IMM 5051B ou IMM 5084B) qui documentent les antécédents personnels et criminels d'une personne (emploi, famille, engagement communautaire, associations, etc.) au Canada;

• le constat ou le rapport d'observation des autorités policières qui établissent des liens entre l'intéressé et des partenaires connus, s'il est possible de divulguer ces documents;

• des rapports présentenciels ou les remarques du juge au moment du prononcé de la sentence qui devraient permettre de déterminer que la recommandation de l'agent est pertinente en fonction du niveau de risque;

• les documents des Services de probation et de

Correctional Services Canada documentation addressing rehabilitation issues;

libération conditionnelle et de Service correctionnel Canada, qui traitent des questions de réadaptation;

• Correctional Services Canada reports that include information about the crime;

• les rapports des Services correctionnels Canada qui incluent des renseignements sur le crime;

• the RCMP Summary of Police Information (C-480) must be obtained by forwarding the person's fingerprints to the RCMP. After an RCMP Summary of Police Information is obtained, conviction certificates for each conviction are not required;

• pour obtenir le Sommaire des renseignements judiciaires de la GRC (C-480), il faut envoyer les empreintes digitales de la personne à la GRC. Si on dispose du Sommaire des renseignements judiciaires de la GRC, on n'a pas besoin du certificat de déclaration de culpabilité pour chacune des condamnations;

• for an A115(2)(a) case, the person's Personal Information Form (PIF) and/or the RPD reasons, whenever available, should be included;

• pour tout cas visé au L115(2)a), il faut inclure le Formulaire de renseignements personnels (FRP) de la personne et (ou) les motifs de la SPR, s'ils sont accessibles;

• police occurrence reports, which are often voluminous and do not necessarily reflect what was established in court;

• les constats de police, qui sont souvent volumineux, mais ne reflètent pas toujours ce qui a été établi au tribunal;

• the elements of proof with regard to outstanding charges can only be used as secondary evidence to warrant a danger opinion; and

• les éléments de preuve liés à des accusations en instance peuvent être employés uniquement comme preuves secondaires pour justifier un avis de danger;

• charges that have been withdrawn or stayed and absolute or conditional discharges are not to be included and must be blocked out unless they indicate a pattern of negative behaviour, namely, conditional discharge for trafficking followed by a conviction for trafficking. Officers will make a note to file, and legibly sign and date the documents.

• les accusations suspendues ou retirées, et les libérations absolues ou conditionnelles peuvent être employées seulement si elles sont liées à une série d'accusations semblables, p. ex. libération conditionnelle suivi par une condamnation pour trafic des stupéfiants. Les agents doivent signer de façon lisible, donner la date et inscrire une remarque au dossier.

Supplemental documentation required:

Documents supplémentaires requis :

• all evidence, whether it be positive or negative;

• toutes les preuves, qu'elles soient positives ou négatives;

• evidence which demonstrates the person's

• des preuves qui permettent de mieux

lifestyle and values;

connaître les valeurs et le style de vie de la personne;

• evidence of rehabilitation, which must be considered before seeking a Minister's opinion; and

• des preuves de la réadaptation, aspect dont il faut tenir compte avant de demander l'avis du ministre;

• information concerning the person's behaviour during immigration proceedings.

• des renseignements concernant le comportement de la personne au cours des procédures d'immigration.

Documentation which should not be included:

Documents ne devant pas être joints à la demande :

• statements which are speculative in nature;

• les énoncés de nature hypothétique;

• information which cannot be sourced;

• les renseignements pour lesquels on ne dispose pas de la source;

• information which was not disclosed to the person by CIC;

• les renseignements qui n'ont pas été divulgués à la personne par CIC;

• media accounts concerning the person and the offences committed—since the accuracy of these accounts may be questionable; and

• les témoignages des médias concernant la personne et les infractions commises, puisqu'on peut remettre en question l'exactitude de ces témoignages;

• information relating to charges under the Youth Criminal Justice Act that have been withdrawn or stayed. Absolute or conditional discharges must be blocked out (refer to section 7.8 below).

• les renseignements concernant les accusations déposées en vertu de la Loi sur le système de justice pénale pour les adolescents qui ont été retirées ou suspendues, de même que les absolutions inconditionnelles ou sous condition (voir la section 7.8 ci-dessous).

7.6. Procedural fairness

7.6. Équité de la procedure

The decision-making process for a Minister's opinion must adhere to the principles of procedural fairness. The person concerned must be fully informed of the case and be given a reasonable opportunity to respond to any information the decision-maker will use to arrive at a decision.

Dans le cas où le ministre émet un avis, le processus de décision doit respecter les principes de l'équité de la procédure. La personne en cause doit connaître en détail l'accusation à laquelle il répond et doit avoir la possibilité de réagir à tout renseignement sur lequel le décideur s'appuiera pour prendre une décision.

California Vehicle Code

23153. (a) It is unlawful for any person, while under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

(b) It is unlawful for any person, while having 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle and concurrently do any act forbidden by law, or neglect any duty imposed by law in driving the vehicle, which act or neglect proximately causes bodily injury to any person other than the driver.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after driving.

FEDERAL COURT

SOLICITORS OF RECORD

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