Federal Court  Cour fédérale

Date: 20111004

Docket: IMM-1528-11

Citation: 2011 FC 1131

Toronto, Ontario, October 4, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

JOSE MAURICIO DELGADO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for a judicial review seeking to set aside a decision made by the Minister's Delegate dated January 6, 2011 wherein it was determined that the Applicant would not be at risk if he were to be returned to Angola. For the reasons that follow, the application is dismissed.

[2] The Applicant is an adult male citizen of Angola. Together with his wife, the Applicant sought refugee protection in Canada. The Immigration and Refugee Board allowed his wife's claim but found that the Applicant was excluded from consideration for refugee status by reason of Article 1F(a) of the Convention. The Applicant sought a Pre-Removal Risk Assessment (PRRA). By a decision dated May 3, 2005 a PRRA Officer determined that the Applicant would be at risk if he were to be removed to Angola.

[3] A Restriction Assessment was conducted by the Canada Border Services Agency pursuant to subsection 172(2)(b) of the *Immigration and Refugee Protection Regulations* SOR/2002-227. In a report dated January 13, 2003, the Agency concluded that the Applicant was complicit in crimes against humanity having regard to his membership in a group known as UNITA.

[4] The Minister's Delegate made an inquiry as to risk in accordance with subsections 112(3)(c), 113(d)(ii), 97(1)(a) and (b), and 114(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). In a decision dated the 6th day of January, 2011, the Minister's Delegate rejected the Applicant's application for a stay of removal. It was concluded that, on balance, there was insufficient evidence to demonstrate risk to life or that the Applicant would face more than a mere possibility of cruel and unusual treatment and punishment or torture in Angola.

[5] The Applicant's Counsel based his argument as to why the Minister's Delegate's decision should be set aside on three grounds:

a. Under the scheme of IRPA and the *Regulations* the decision should be made by a PRRA Officer, not the Minister's Delegate;

b. The Minister's Delegate failed to give proper consideration to country conditions in Angola; in particular, various reports submitted on behalf of the Applicant were seemingly ignored; and

c. The Minister's Delegate failed to give any consideration as to whether the Applicant, on arrival in Angola, would be forthwith detained and subject to unusual punishment or torture even if he were to be released eventually.

[6] As to the first argument, the issue was substantially considered by Justice Shore of this Court in *Placide v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1056. At paragraph 60 to 62 of that decision, Justice Shore set out the scheme of the relevant provision:

> ***60*** *In general, any foreigner who is subject to a removal order that is in force and who is not named in a security certificate or a danger opinion may apply to the Minister for protection (subsection 112(1) of the IRPA). If a foreigner, like Mr. Placide, is described in subsection 112(3) of the IRPA, refugee protection may not result (subsection 112(3)* in limine*). Consideration of such a person's application, in contrast to that of a regular application, which is considered on the basis of sections 96 to 98 of the IRPA, is -- in a situation such as Mr. Placide's -- on the basis of the grounds for protection set out in section 97 and the nature and severity of acts committed by the applicant or the danger that the applicant constitutes to the security of Canada (subparagraph 113(*d*)(i) of the IRPA).*

> ***61*** *Before making a decision, the Minister's delegate must take into consideration the written assessments of the grounds for protection described in section 97 and the factors set out in subparagraph 113(*d*)(i) of the IRPA (subsection 172(1) of the IRPR). The two assessments are disclosed to the applicant, who has 15 days to file written submissions with the Minister's delegate. If the delegate concludes that the applicant is not described in section 97, he or she is not required to take the factors set out in subparagraph 113(*d*)(i) into consideration and can reject the application for refugee protection (subsection 172(4) IRPR). This process is in fact a codification* of *Suresh v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1, at paras. 122-123).*
>
> ***62*** *Finally, if, however, the Minister's delegate concludes that the applicant would be subjected to a risk described in section 97, he or she must assess the factors set out in subparagraph 113(*d*)(i) and, if applicable, conduct a balancing exercise to determine whether the applicant's situation is exceptional enough to warrant his removal to a country where torture is used (paragraph 113(*d*) of the IRPA;* Suresh, *above, at paras. 76-79; Charkaoui (Re), [2006] 3 F.C.R. 325, 2005 FC 1670, at paras. 12-13)).*

[7] Applicant's Counsel argued by analogy to the Federal Court of Appeal decision in *Nagalingam v Canada (Minister of Citizenship and Immigration)*, [2009] 2 FCR 52 and with reference to the word "made" in subsection 172(4)(a) of the *Regulations*, that the PRRA Officer and not the Minister's Delegate is the proper person who must determine the risk to the Applicant. I disagree.

[8] This matter also was considered by Justice Shore in *Placide, supra*. He wrote at paragraphs 63 to 65:

> ***63*** *In this context, it is obvious that the PRRA officer who conducted the assessment, dated November 16, 2007, merely gave advice or made a suggestion that is not binding upon the Minister's delegate. In accordance with section 6 of the IRPA, the Minister did not delegate to the PRRA officer but to National Headquarters only the power to dispose of an application for protection*

> *described in subsection 112(3) of the IRPA (Immigration Manual, ch. 1L3, CIC Instrument of Designation and Delegation, Item 48 (Delegated authority - Form an opinion whether, in relation to the eligibility of a claim under subsection 101(2) of the Act, a person who is inadmissible on grounds of serious criminality by reason of a conviction outside Canada is a danger to the public in Canada.) This is delegated to National Headquarters).*
>
> ***64*** *In fact, case law requires that the delegate make the decision himself and give reasons for it: "the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion" (Suresh, above, at para. 126). The process is similar to that of Thomson v. Canada (Deputy Minister of Agriculture), [1992] 1 S.C.R. 385, at pages 399 to 401, in which the Court ruled that the holder of a power who receives a recommendation is not required to follow it (case law has several similar examples: Jaballah (Re), [2005] 1 F.C.R. 560, 2004 FCA 257, at paras. 17-22 (PRRA;* obiter); *Robinson v. Canada (Canadian Human Rights Commission) (1995), 90 F.T.R. 43, 52 A.C.W.S. (3d) 1098, at para. 23; Jennings v. Canada (Minister of Health) (1995), 97 F.T.R. 23, 56 A.C.W.S. (3d) 144, at paras. 31-32, aff'd by (1997), 211 N.R. 136, 56 A.C.W.S. (3d) 144, leave to appeal to S.C.C. refused, see [1997] S.C.C.A. No. 319; Abdule v. Canada (Minister of Citizenship and Immigration) (1999), 176 F.T.R. 282, 92 A.C.W.S. (3d) 578 at para. 14).*
>
> ***65*** *Otherwise, the Minister's delegate would not really be exercising the power conferred on him. The Minister's delegate would merely be approving assessments administratively and giving them force of law. This would essentially give PRRA officers a decision-making power which the Minister decided to delegate to another officer in the public service.*

[9] The analogy to *Nagalingam* is misplaced. That case dealt with a different section *of* IRPA, section 115, and while some wording is similar to the provisions at issue here, they are not identical. Justice Shore in *Placide* considered the identical sections.

[10] Reference to the word “made” in subsection 172(4) does not assist the Applicant. It reads:

> ***172***. *(4) Despite subsections (1) to (3), if the Minister decides on the basis of the factors set out in section 97 of the Act that the applicant is not described in that section,*
>
> *(*a*) no written assessment on the basis of the factors set out in subparagraph 113(*d*)(i) or (ii) of the Act need be made; and*
>
> *(*b*) the application is rejected.*

[11] It must be kept in mind that a Regulation cannot override the *Act*. We can understand the term "made" in subsection 172(4) to pertain generally to whether or not the Minister or his Delegate needs to provide or "make" a written assessment regarding the application of subsections 113(d) (i) or (ii) to the Applicant's case. In the matter at bar, since the Minister's Delegate decided that the Applicant was not subject to s. 97 of IRPA "no written assessment on the basis of the factors set out in subsection 113(d)(i) or (ii) of the Act need be made" (in the words of the IRPA).

[12] As to the second ground, that is, whether the Minister's Delegate failed to give proper consideration to the country condition material submitted on behalf of the Applicant, it is true that the Delegate quoted extensively from only one source, however, it is to be noted that the Delegate's decision concludes by saying that the Delegate has reviewed and considered the entirety of the submissions from the Applicant, the Restriction Assessment, and all attendant documentation. The case law is abundant that not every piece of documentation needs to be referred to in a decision such as this. I am satisfied that the documentation referred to, at length, by the Delegate is probably the most pertinent. There is nothing to suggest that any pertinent material that may have led to a different conclusion was ignored.

[13] The third ground raised by Applicant's Counsel at the hearing was that the Minister's Delegate did not take into consideration the treatment that the Applicant might receive were he to be incarcerated immediately upon entry into Angola, even if he were later released. This argument was not raised with the Minister's Delegate. There is no evidence in the record to support an allegation that the Applicant is likely to be arrested upon entry into Angola. While there is a warrant for his arrest issued many years ago still outstanding, an amnesty has been declared in Angola respecting matters pertinent to the arrest warrant. The Applicant bears some burden to place on the record some evidence to support the allegations now raised that he would be arrested upon his return to Angola. He has not.

[14] I therefore find no basis for setting aside the decision of the Minister's Delegate.

[15] Counsel for the Applicant has submitted questions for certification. Counsel for the Minister argues that this is not a case for certification. I have carefully considered those questions. No question will be certified.

[16] There is no special reason to award costs.

ORDER

FOR THE REASONS PROVIDED:

THIS COURT ORDERS that:

1. The application is dismissed;

2. There is no certified question; and

3. There is no order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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