Federal Court  Cour fédérale

**Date: 20120907**

**Docket: IMM-8195-11**

**Citation: 2012 FC 1059**

**Ottawa, Ontario, September 7, 2012**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**SU FENG SHI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The primary issue in this case is whether procedural fairness requires that counsel previously on record for an individual who is the subject of a request for a danger opinion be served with disclosure documents in addition to the individual concerned. Where counsel is known such disclosure is required. In the particular circumstances of this case, I find that the respondent can not be faulted for failing to provide the documents where they were not informed that the individual had counsel.

[2] For the reasons that follow I find that the applicant was not denied procedural fairness and the application is dismissed

**BACKGROUND:**

[3] The applicant, a citizen of China born in 1980, came to Canada in 1999 and was granted refugee status on the ground of religious persecution in 2000. He became a permanent resident the same year. Within two years he was facing serious criminal charges including robbery. By reason of a conviction under the *Criminal Code* for assault causing bodily harm in 2004, he was found to be inadmissible under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (hereafter IRPA) in January 2005 and a removal order was issued. The applicant appealed that determination to the Immigration Appeal Division.

[4] In 2007 the applicant's then immigration counsel withdrew from the record by reason of an inability to contact the applicant and the appeal was declared abandoned. A warrant was issued for the applicant's arrest. Later the same year, the applicant was convicted of robbery, disguise with intent and unlawful possession of a controlled substance and the warrant was executed while he was serving his sentence.

[5] On November 5, 2007 the applicant was served with notice that a request for a determination had been made to the Minister of Public Safety and Emergency Preparedness with respect to whether the applicant constituted a danger to the public in Canada and should be removed subject to an assessment of the risk he might face in China, pursuant to 115(2)(a) of the IRPA. At

that time he was provided with a list and copies of the material that would be provided to the Minister for consideration, notably documents relating to his immigration history, court records and police reports. That material did not include records relating to the 2007 criminal convictions.

[6] The applicant retained counsel for the purposes of a detention review hearing late in 2007. He was released under terms and conditions including cash bonds on December 24, 2007. Counsel submitted written representations on December 31, 2007 with respect to the material included in the package served on the applicant, contending that they did not disclose a sufficient case to establish that the applicant represented a danger and that he continued to face a risk of persecution in China. The submissions were acknowledged by letter addressed to Mr. Shi care of the law firm in January, 2008. He had named the firm as his point of contact in a form entitled "Authority to Release Personal Information to a Designated Individual' dated October 11, 2007. The form states that such designated individual will not be a representative to conduct business with Citizenship and Immigration Canada or CBSA on the applicant's behalf. For that purpose, the form states, a different "Use of a Representative" form must be completed.

[7] In May 2009 Mr. Shi was arrested and charged with additional criminal offences involving the shooting of a person in a public place. He was convicted of assault causing bodily harm on December 16, 2009. As a result, an updated disclosure package was prepared including the occurrence reports, certificates of conviction, the reasons for sentence in relation to the 2007 and 2009 convictions and country condition reports pertaining to religious freedom in China.

[8] On August 9, 2010 while the applicant was on remand at the Toronto Jail awaiting trial on fresh criminal charges laid in April 2010 of assault and forcible confinement, he was visited by a CBSA officer, accompanied by another officer who is a native Mandarin speaker and qualified interpreter. On that occasion, the applicant was provided disclosure of the updated disclosure package and signed a disclosure receipt. The cover letter accompanying the additional materials indicated that Mr. Shi had fifteen days in which to make final representations and arguments or submit evidence before the documents would be presented to the Minister to form a danger opinion.

[9] The August 2010 meeting was interpreted into Mandarin and the interpreting officer deposed that she gave the applicant the opportunity to ask questions and to indicate whether he did not understand. The officer serving the package deposed that his practice is to always ask if the client has counsel and if so, he contacts counsel to ensure they are aware of the current process and any disclosure materials in accordance with Ministerial Policy. In the officer's tracking system for danger opinion proceedings, no counsel was listed for Mr. Shi nor was there a "Use of Representative Form" which would authorize CBSA to conduct business with counsel on the applicant's behalf.

[10] On August 20, 2010, the applicant was convicted of assault and forcible confinement and received two concurrent sentences of 18 months' imprisonment and 2 years of probation. On September 20, 2010, the Request for the Minister's Opinion document package was provided to the applicant in jail and he was informed that he could provide further submissions to the Minister's delegate before a decision would be made.

[11] The applicant was visited again by a CBSA officer at the Central North Correctional Centre in Penetanguishene, Ontario on October 7, 2010 where he was serving his sentence for the 2010 convictions. The officer served two additional documents relating to the 2010 convictions and the applicant again signed a letter acknowledging that he had received disclosure. The letter reiterated that he had fifteen days in which to make further submissions.

[12] None of the documents served on the applicant in 2010 were disclosed to the counsel who had represented Mr. Shi in 2007. Mr. Shi made no attempt to contact counsel when served with the updated disclosure packages. No supplementary representations or evidence were submitted by the applicant prior to the issuance of the Minister's opinion on December 13, 2010. Counsel first learned of the disclosure in 2011 when he was again retained to act on Mr. Shi's behalf for a detention review.

**DECISION UNDER REVIEW:**

[13] Where a person is inadmissible to Canada by reason of serious criminality, the Minister or his or her delegate must determine whether the person is a danger to the public in Canada and, if so found, balance that against the risk faced by the individual if returned to his country of origin and any humanitarian and compassionate considerations.

[14] In this instance, the delegate determined, on the balance of probabilities, that the violent and repetitive nature of the applicant's offences and poor prospects for rehabilitation meant that his continued presence constituted a present and future danger to the Canadian public.

[15] The Minister's delegate was satisfied that the applicant would not be personally exposed to a risk to life, risk of torture or risk of cruel and unusual treatment, and would not be exposed to more than a mere possibility of persecution if returned to China, either as a member of the Tian Dao faith, the basis of his refugee claim, or by reason of a subsequent conversion to Christianity as claimed in 2007. If the applicant would have been at risk, the delegate found, the balance was in favour of his removal. There were no humanitarian and compassionate considerations to outweigh the fact that he was a danger to the public.

**ISSUES:**

[16] The applicant contends:

i. that he was denied procedural fairness, and

ii. that the risk assessment was unreasonable.

**ANALYSIS:**

*Standard of Review;*

[17] Questions of procedural fairness attract no deference: *Canada (Attorney General) v Sketchley*, 2005 FCA 404, at para 53; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. The proper approach is to ask whether, in the particular circumstances, the requirements of the duty have been met: *Pusat v Canada (Minister of Citizenship and Immigration)* 2011 FC 428 at para 14.

[18] Apart from questions of fairness in this context, the jurisprudence has satisfactorily established that the standard of review for a Minister's danger opinion is reasonableness: *La v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 476 at paras 12-16; *Randhawa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 310 at para 3; and *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 41.

[19] As a preliminary matter, I noted at the outset of the hearing that the submission of an affidavit by a member of the same firm as counsel who appeared for the applicant was in apparent breach of Rule 82 of the *Federal Courts Rules*. Where necessary to submit such evidence, the proper course of action, in my view, would have been to refer the applicant to another law firm.

*Was there a breach of procedural fairness?*

[20] The onus of ensuring procedural fairness is heightened in the context of a danger opinion considering the impact of the decision on a refugee and his rights under s 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11: *Canada (Minister of Citizenship and Immigration) v Bhagwandass*, 2001 FCA 49 at paras 30-31.

[21] The applicant submits that he was denied procedural fairness by the manner in which he was served with documents and from the failure of the Minister to serve those documents on his counsel. As a result, the applicant contends, he was denied an opportunity to respond. As the issues under

consideration by the delegate were fact dependent, the outcome could have been different had proper submissions been made.

[22] It is well established from the jurisprudence and the Minister's own policy that the respondent had the duty to disclose all documentation to the applicant and his counsel, if known. This is set out in the respondent's operational manual: ENF 28, *Ministerial Opinions on Danger to the Public and to the Security of Canada* at section 7.5. See also *Chernikov v Canada (Minister of Citizenship and Immigration)*, 2011 FC 885 at para 27; and *Ashour v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7836 (FC) at para 8.

[23] The respondent must be taken to have been aware that the applicant had immigration counsel in 2007 even if the proper form had not been completed because submissions from counsel were received and acknowledged. It is also clear that the two document packages served on the applicant in 2010 were not provided to the 2007 immigration counsel. That counsel did not learn of them until after the issuance of the danger opinion. What is not clear from the record is whether Mr. Shi's immigration counsel continued to represent the applicant between the events in 2007 and 2011 when the counsel again became engaged in Mr. Shi's legal problems.

[24] This is not a case such as *Ashour*, above, which involved ongoing proceedings before a quasi-judicial body, the Immigration Appeal Board, where counsel was clearly listed as counsel of record and neither the applicant nor counsel were served with the relevant materials. Here, in my view, the duty of fairness was satisfied by disclosure of the materials directly to Mr. Shi. It was then

incumbent upon him to inform the officers that he was represented or to inform his counsel he had received disclosure of documents, neither of which he did.

[25] In my view, the respondent can not be faulted for the applicant's failure to take any action in his own interest when served with the document packages despite having been on notice since 2005 that he was subject to removal.

[26] The applicant claims that he did not understand the two meetings he had with the CBSA officers. It is clear from the applicant's past dealings with the criminal justice system that he has some knowledge of English. While his 2004 sentencing hearing was interpreted, during the 2007 proceedings he responded to questions from the presiding judge and completed court documents without interpretation. The fact that he was taking English as a Second Language courses was submitted in mitigation.

[27] Even if I were to accept the applicant's assertion that he has difficulty understanding English, the August 20, 2010 meeting with CBSA officers was interpreted by a native speaking Mandarin qualified interpreter. I do not accept the applicant's claim that he was unable to understand the interpreter, the purpose of the meeting as explained to him by the officers, or the disclosure letter that he signed. Even if I were to find that his affidavit evidence was credible, by his own statement the applicant claims he was told by the officers that he should give the package to his lawyer within fifteen days. He says he spoke with his wife shortly thereafter. There is no evidence that she made any efforts to contact counsel to inform them a package had been served upon Mr. Shi.

[28] According to the officers' affidavit evidence, which I accept in preference to that of the applicant, the applicant did not complain of an inability to understand at the meeting or thereafter prior to the issuance of the decision. The absence of a complaint about the quality of interpretation at the earliest possible opportunity has been held to constitute a waiver: *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at para 19; *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1161 at para 3; and *Mowloughi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 662 at paras 30, 32.

[29] While the October 2010 meeting was not interpreted, the additional documents disclosed to the applicant on that occasion were clearly already within the applicant's knowledge as he had been present during his conviction in August 2010 and signed the order that formed part of his sentence. The applicant's assertion that he was unable to do anything in respect of the material delivered to him at the Central North Detention Centre as the papers were taken away from him because he was involved in a fight is simply not tenable. Nothing prevented the applicant from asserting his rights to instruct counsel.

[30] Had I reached a different conclusion, this is not a case in which I would have applied the principle of inevitable outcome set out in *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, [1994] SCJ No 14 (QL) at para 53. Here the decision under review is fact based and did not turn on a question of law for which there is only one correct answer. The alleged breach precluded further submissions on important matters such as the applicant's recent convictions. While this is doubtful, the outcome might conceivably have been different.

*Was the delegate's risk assessment reasonable?*

[31] The applicant was granted protection in 2000 on the strength of his claim that he was a follower of Tian Dao beliefs and practices in China. He submits that the Minister's delegate's risk assessment was unreasonable because the delegate did not assess the risk that the applicant would continue to be perceived to be a Tian Dao follower in China and did not base conclusions on persecution of Christians in China on the evidence.

[32] The onus was on the applicant, once found to be a danger to the public in Canada, to persuade the delegate that there is a risk upon removal. The designated person cannot simply rely on his protected status as a Convention refugee: *Jama v Canada (Minister of Citizenship and Immigration)*, 2009 FC 781 at paras 85-86; *Hasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1069 at para 22; and *Camara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 168 at paras 58-60.

[33] Here, the evidence that the applicant was a Tian Dao adherent in China was scant. In any event, it is a religion he did not continue to follow in Canada. The Minister's delegate reasonably concluded that since the applicant was no longer a Tian Dao follower and that a significant amount of time had passed since he was granted status, the applicant did not demonstrate he would face persecution in China for that reason. Nor did he establish that he would face risk by reason of a *sur place* conversion to Christianity.

[34] It is clear from the record that the applicant is a long-time gang member with little or no regard for the safety of others or Canadian law. Overall, the decision falls well within the range of possible outcomes in light of the law and the facts: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 16-18.

[35] When given the opportunity at the hearing, counsel for the applicant did not propose a question for certification. Counsel for the respondent indicated that should I find that service on counsel was required in this instance, the Minister would wish to propose a question. As indicated above, I do not make such a finding.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is dismissed. No question is certified.

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-8195-11 |
| **STYLE OF CAUSE:** | SU FENG SHI<br><br>and<br><br>THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | July 19, 2012 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | MOSLEY J. |
| **DATED:** | September 7, 2012 |

**APPEARANCES:**

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|---|---|
| Asiya Hirji | FOR THE APPLICANT |
| Ildiko Erdei | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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|---|---|
| ASIYA HIRJI<br>Mamann, Sandaluk & Kingwell LLP<br>Toronto, Ontario | FOR THE APPLICANT |
| MYLES J. KIRVAN<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |