

Date: 20080604

Docket: IMM-4433-07

Citation: 2008 FC 548

Ottawa, Ontario, June 4, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CHRISTINO CHAND

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Chand was born in Fiji. He immigrated to Canada in 1987 with his family when he was 11 years old. He became a permanent resident on May 5, 1992, under the DC-8 refugee backlog class. On September 27, 2005, Mr. Chand received a five-year sentence for trafficking cocaine and methylenedioxyamphetamine (MDA).

[2] The detail of his crime is of some relevance to the matters under consideration.

[3] Mr. Chand was arrested as a result of an RCMP sting operation. Officers had arranged to purchase 4 kilograms of cocaine and to meet with the seller's supplier who turned out to be Mr. Chand. Following his arrest and the seizure of 4 kilograms of cocaine from Mr. Chand, his premises were searched and a further 1099 grams of cocaine, 393 pills of Ecstasy (MDMA), 728.2 grams of marijuana and \$10,000 to \$15,000 in cash were located and seized.

[4] In imposing the five-year prison sentence the trial judge noted that while this was a first conviction, he was of the view that Mr. Chand had a long-term involvement in drugs. It was noted that Mr. Chand was a supplier of cocaine at the kilo or multi-kilo level. Part of the reason for the sentence Mr. Chand received was the large quantity of hard drugs that were involved. The judge was also of the view that there was a significant degree of planning and premeditation involved in the offence and the circumstances lead him to the conclusion that Mr. Chand's drug dealing was an ongoing one and had likely been so for an extended period of time.

[5] In light of his conviction and sentence he was visited on March 30, 2007, at Ferndale Institution, by Canada Border Services Agency Enforcement Officer Stritzi who delivered a letter of the same date that stated:

A report under section 44(1) of the *Immigration and Refugee Protection Act* has been or may be prepared alleging that you may be inadmissible to Canada under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, because of your criminal convictions under sections 5(1) and 5(2) of the *Controlled Drugs and Substances Act* for Canada.

[6] Attached to the cover letter was a document signed by Officer Stritzi dated March 28, 2007, entitled “Report under Subsection 44(1) of the Immigration and Refugee Protection Act”. That document (the Stritzi Report) provides, in part, as follows:

In accordance with subsection 44(1) of the *Immigration and Refugee Protection Act*, I hereby report that Christino Chand born 12 Aug 1976 in Fiji is a person who, in my opinion, is inadmissible pursuant to paragraph 36(1)(a)...

[7] The cover letter to the Stritzi Report advised that a decision to allow him to remain in Canada or to seek to have a removal order issued against him would be made in the near future and he was invited to make written submissions. Mr. Chand did provide a detailed written submission dated April 27, 2007, which together with the tendered exhibits totalled more than 160 pages.

[8] The Applicant’s submissions and other relevant documents were considered by Immigration Officer Vanderstar who prepared a report dated June 5, 2007, entitled: “Subsection 44(1) and 55 Highlights – Inland Cases (Short)” which I shall refer to as the Highlights Report.

[9] The Highlights Report summarized Mr. Chand's offence, education, employment, and referenced his favourable pre-sentence report. As well, it provided a recommendation that Mr. Chand be referred to an admissibility hearing and that a deportation order be sought. The author of the Highlights Report states:

Although Mr. Chand does not have any previous criminal convictions, it is clear that Mr. Chand had been involved in drug trafficking for a significant period of time and that Mr. Chand was also benefitting (*sic*) financially and enjoying the lifestyle that came from his illegal ways. Mr. Chand was also not involved in small time

drug dealing or acting as a mere courier; Mr. Chand is a supplier for cocaine in multi-kilogram amounts. The amount of cash and other narcotics obtained from Mr. Chand's residence with Mr. Teng show his involvement in the drug trade as well. A significant factor in coming to my recommendation is that the Judge sentenced Mr. Chand to a term of imprisonment of five (5) years. The sentence imposed indicates the seriousness of the offence committed by Mr. Chand.

[10] Mr. Vanderstar also noted in his recommendations: "If a deportation order were to be issued against Mr. Chand he cannot be removed from Canada unless he is found to be a danger because he was granted refugee status". The Highlights Report was reviewed and signed off by Mr.

Vanderstar's superior and by Acting Director Murray Wilkinson. Mr. Wilkinson included a handwritten note to the Highlights Report dated June 12, 2007, which reads in part as follows:

After a careful review of the submissions made by Christino Chand and his counsel I conclude the referral of this case to the I.D. is in fact warranted. Mr. Chand was involved in trafficking of drugs at a very high level.... It should be noted that Mr. Chand is NOT a convention refugee and could be removed at the conclusion of the process. (emphasis in original)

[11] The Highlights Report, together with Mr. Wilkinson's comment (collectively referred to as the Section 44(1) Report) was then sent to the Minister's Delegate for a decision under section 44(2) as to whether the report ought to be referred to the Immigration Division for an admissibility hearing to determine if Mr. Chand was a person described in subsection 36(1)(a) of the Act, i.e. inadmissible on grounds of serious criminality.

[12] Prior to the Section 44(1) Report being reviewed by the Minister's Delegate a further report dated July 25, 2007 was prepared by Heather Cumming, Analyst, Case Review, Case Management Branch (the Case Review Report).

[13] In the Case Review Report Ms. Cumming includes a recommendation. She writes:

Based on all factors in this case, I recommend referral to an admissibility hearing not be signed at this time. In my opinion, Mr. Chand should be given an opportunity to prove he has turned his life around. I recommended he be issued a stern warning letter that clearly outlines the consequences of any further criminal involvement.

[14] In the background section of the Case Review Report, Ms. Cumming writes:

CBSA officials have indicated that if a deportation order were to be issued against Mr. Chand he cannot be removed from Canada unless he is found to be a danger to the public because he was granted refugee status. This is incorrect. Subject was granted permanent resident status in the DC8 category via the refugee backlog. He was not determined to be a Convention refugee. Information from the Asylum Division, Refugee Branch, confirms that people in the DC8 category are not considered to be protected persons.

[15] The Section 44(1) Report and the Case Review Report were both placed before the Minister's Delegate for her decision under section 44(2) as to whether to refer Mr. Chand to an admissibility hearing.

[16] The Minister's Delegate made an undated written notation referencing the statement by Ms. Cumming that it was incorrect that Mr. Chand could not be removed absent a danger opinion. She writes:

Are we sure about that? As I am under the impression that a danger opinion will be required if deportation issued. (see attached)

[17] The attached is an e-mail chain that ends with an email that asserts that DC-8s, such as Mr. Chand, are not Convention refugees and are not protected persons; however, they are entitled to a Pre-Removal Risk Assessment, if requested.

[18] At the foot of the Case Review Report the Minister's Delegate writes:

Have read entire submissions. Admissibility hearing signed this date because of the seriousness of offence. [Initials] 27th August 2007

[19] It is this decision under section 44(2), referring Mr. Chand to an admissibility hearing, that is the subject of Mr. Chand's judicial review proceeding.

[20] The Applicant alleges that the Minister's Delegate erred:

1. in that she relied on the Section 44(1) Report which was founded on an error of law that the Applicant was a protected person;
2. in that she relied on the Highlights Report which makes reference to a number of documents that were not disclosed to the Applicant, despite his counsel's request; and
3. in that she failed to provide adequate reasons for her decision to refer the matter to an admissibility hearing.

Did the Minister's Delegate err in relying on the Section 44(1) Report which was founded on an error of law that the Applicant was a protected person?

[21] The Applicant argues that when Officer Vanderstar made his recommendation to refer the admissibility report to the Minister's Delegate he did so under the mistaken impression that Mr. Chand could not be removed from Canada without a danger opinion issuing because he believed that Mr. Chand was a Convention refugee. It is submitted that his recommendation may have been different had he been aware of the correct state of affairs. Mr. Chand advances the position that the Minister's Delegate thus erred in relying on a report that was made based on an error of law. I find this submission to be without merit for a number of reasons.

[22] First, the Applicant is seeking a review only of the Minister's Delegate's decision, not the Section 44(1) Report and it is this second decision he claims is in error. Second, the Section 44(1) Report is comprised of more than Officer Vanderstar's recommendation. It is also comprised of the sign-off by Acting Director Wilkinson, who noted the error in Officer Vanderstar's Report and corrected it by noting that the Applicant is not a Convention refugee and could be removed at the end of the admissibility hearing. Accordingly, the error of Officer Vanderstar was corrected before it reached the Minister's Delegate. Third, there is no evidence that the Section 44(1) Report would have been any different had Officer Vanderstar not made the error. We do know that Acting Director Wilkinson was of the view that a referral was appropriate, and thus there is every reason to believe that he would not have signed off on the recommendation if it was otherwise.

Was there an error in law in failing to disclose to the Applicant the documents referenced in the Highlights Report?

[23] The Highlights Report does reference a number of documents that were attached to it when transmitted to the Minister's Delegate as a part of the Section 44(1) Report.

[24] The Applicant relies on the decisions of Justice Hughes in *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 725, as support for his submission that the failure to provide these to counsel constitutes an error of law. This case is substantially different than that considered by Mr. Justice Hughes. First, the documents referenced in the Highlights Reports are all to be documents that the Minister could reasonably expect the Applicant to have. They included the Crown disclosure at the criminal trial, the criminal charge, the judge's reasons for sentence, pre-sentence report, etc. In fact, counsel for the Respondent noted that the Applicant himself had provided many of the same documents with his submission prior to the preparation of the Section 44(1) Report.

[25] I have some sympathy for the submission made by Applicant's counsel that he should not have to undertake the sort of analysis done by Respondent's counsel to determine exactly what document was meant by the designators used (e.g. Red Tab 1, Yellow Tab 2, Blue Tab 6). It would have been preferable had the author simply stated the actual description of the document being referenced. However, the fact remains that these were documents in the Applicant's possession or were documents one could reasonably expect he had.

[26] Second, in *Hernandez*, Justice Hughes was faced with a situation where a document containing a recommendation that was submitted to the Minister's Delegate was not disclosed prior to the admissibility hearing. Here it is argued that these were not disclosed to counsel prior to the section 44(2) review. That is an administrative process. I can find no error of law either in the failure to disclose prior to the section 44(2) review or the Minister's Delegate having relied on those documents.

Did the Minister's Delegate err in failing to provide adequate reasons for her decision to refer the matter to an admissibility hearing?

[27] The Applicant submits that the cursory handwritten notation of the Minister's Delegate is little better than no reasons at all. He referenced 19.4 of the Respondent's internal publication "ENF 6 - Review of Reports under A44(1)" which list a number of factors that ought to be included when preparing reasons.

[28] The Respondent submits that written reasons are not required in the context of a section 44(2) decision given the low level of procedural fairness accorded such administrative decisions: *Lee v. Canada (Minister of Employment and Immigration)*, 2006 FC 158, noted with approval in *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 725.

[29] In my view, the Minister's Delegate had before her two very detailed reports: the Highlights Report and the Case Analysis Report. Both reviewed all of the relevant factors in considerable detail. The handwritten note of the Minister's Delegate indicates that she read all of the submissions which include these reports. She concluded that a referral is necessary due to the "seriousness of

offence”. I agree with the submissions of counsel for the Respondent – the serious nature of Mr. Chand’s criminal activity was, for the Minister’s Delegate, the deciding factor. Mr. Chand is able to read the Section 44(1) Report, the Case Analysis Report and the Minister’s Delegate’s note and conclude, as I have, that the reason for the referral, despite the factors that weighed in his favour, was the seriousness of his crimes. The reasons provided by the Minister’s Delegate which include the Section 44(1) Report and the Case Analysis Report are, in this case, sufficient.

Certified Question

[30] Counsel for the Applicant proposed three certified questions:

1. Does a Minister’s Delegate making a decision to refer a long-term permanent resident to an admissibility hearing pursuant to s. 44(2) of the *Immigration and Refugee Protection Act* have an obligation to set out the factors considered in coming to her decision (as set out in CIC Manuel ENF 6 Chapter 19.4) where she indicates that she is relying on her own written reasons?
2. Can a Minister’s Delegate making a s. 44(2) decision rely on a report submitted by one subordinate officer when there is a report by another officer which reaches the opposite conclusion, or is the Minister’s Delegate under an obligation to undergo a clear analysis of the two reports explaining her preference for one of the two recommendations?
3. Can a Federal Court Judge conducting a judicial review hearing of an officer’s decision infer that the officer was relying on a subordinate officer’s report when the officer herself indicates that she is relying on her own written reasons?

[31] Counsel for the Respondent submits that none of the prepared questions are questions of general importance. Counsel further submits that the first two proposed questions do not arise on the facts and they cannot be dispositive of an appeal. The test for certifying a question for appeal is

whether there is a serious question of general importance that would be dispositive of an appeal:

Canada (Minister of Citizenship and Immigration) v. Zazai, 2004 FCA 89 at para. 11.

[32] In my view, none of the proposed questions are certifiable. They are not of general importance but relate to the specific circumstances of this case. Further, in my view, none would be dispositive of an appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The Application for Judicial Review is dismissed; and
2. No question is certified.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4433-07

STYLE OF CAUSE: CHRISTINO CHAND v.
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: May 20, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** ZINN J.

DATED: June 4, 2008

APPEARANCES:

Craig Costantino FOR THE APPLICANT

Keith Reimer FOR THE RESPONDENT

SOLICITORS OF RECORD:

Elgin, Cannon & Associates FOR THE APPLICANT
Vancouver, BC

John H. Sims, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, BC