Date: 20060426

Docket: A-390-05

Citation: 2006 FCA 151

CORAM: **NADON J.A.**

SEXTON J.A.

EVANS J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

JASINDAN RAGUPATHY

Respondent

Heard at Toronto, Ontario, on April 24, 2006.

Judgment delivered at Toronto, Ontario, on April 26, 2006.

REASONS FOR JUDGMENT BY:
EVANS J.A.

CONCURRED IN BY:
NADON J.A.

SEXTON J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] Jasindan Ragupathy, a citizen of Sri Lanka of Tamil ethnicity, was recognized as a refugee in Canada in 1999, when he was almost seventeen years of age, and was granted permanent residence status. He was subsequently convicted of criminal offences. Following a report by immigration officials requesting a "danger opinion", a delegate of the Minister of Citizenship and Immigration formed the opinion that Mr Ragupathy's continued presence in Canada presented a high level of danger to the public and that this outweighed the small chance that he would be persecuted or tortured if he was returned to Sri Lanka.

[2] As a result, Mr Ragupathy was liable to be deported, despite his status as a protected person, pursuant to the *Immigration and Refugee Protection Act* ("*IRPA*"), paragraph 115(2)(*a*).

115(1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where	115(1) Ne peut être renvoyée a un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions

they would be at risk ofpolitiques, la torture ou des persecution for reasons of race,traitements ou peines cruels et religion, nationality, membershipinusités, la personne protégée ou in a particular social group orla personne dont il est statué que political opinion or at risk ofla qualité de réfugié lui a été torture or cruel and unusualreconnue par un autre pays vers treatment or punishment. lequel elle peut être renvoyée.	
115(2) Subsection (1) does not apply in the case of a person	115(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :
(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada;	*a*) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

[3] Mr Ragupathy applied for judicial review of the delegate's "danger opinion". A Judge of the Federal Court set it aside, on the ground that the delegate's reasons were inadequate because they did not contain "a clear, distinct and separate rationale" for the determination that he was a danger to the public. The Judge was also of the view that the delegate ought to have determined whether Mr Ragupathy was a danger to the public on the basis of his criminal record, before considering whether removal would expose him to a risk of persecution if he was returned to Sri Lanka. A balancing of risk and danger is required to determine if the removal of a protected person will violate his or her rights under section 7 of the *Canadian Charter of Rights and Freedoms*.

[4] The Federal Court's decision is reported as *Ragupathy v. Canada(Minister of Citizenship and Immigration)*,2005 FC 834. The Judge certified the following as a serious question of general importance pursuant to paragraph 74(*d*) of the *IRPA*:

Does the opinion that a "protected person" ("the person") constitutes a danger to the public in Canada, as contemplated by paragraph 115(2)(*a*) of the *Immigration and Refugee Protection Act*, require a preliminary determination by the Minister's delegate concerning the person's criminality, supported by a clear, distinct and separate rationale: (a) without regard to any of the risk factors which the person may face if returned to the country from which refuge was sought; and (b) independently from any consideration and balancing of the competing interests, as may be required by section 7 of the *Canadian Charter of Rights and Freedoms* and *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, concerning the person's presence in Canada and the injustice that could be caused to the individual upon deportation?

[5] The Minister has appealed, arguing that the Applications Judge erred in law by requiring the delegate to deal in a particular order with the various elements relevant under subsection 115(2). Further, he submitted that, by finding that the delegate had not made a definitive finding that Mr Ragupathy was a danger to the

public, the Judge imposed too high a standard on what is required for reasons to be sufficient in law.

[6] In my opinion, the principal issues to be decided in this appeal are whether, when read in their entirety, the reasons given by the delegate demonstrate that she concluded that Mr Ragupathy is a danger to the Canadian public, reached this conclusion on the basis of the relevant factors, and adequately explained the bases of her decision.

[7] I agree with the Applications Judge's clear and helpful analysis of the distinct elements in a subsection 115(2) "danger opinion". I also agree that the delegate's reasons leave something to be desired in terms of their clarity. However, with the greatest respect to the learned Judge, I am not persuaded that the delegate's reasons either fall short of the standard of adequacy required by law, or indicate that she otherwise erred in law. While analytical clarity will generally be enhanced if the delegate considers the criminal aspects of the "danger opinion" before opining on the gravity of the risk of persecution, if necessary, and balancing one against the other, I am of the view that this format is not legally required.

[8] Consequently, I would allow the appeal and answer the certified question accordingly.

B. THE DELEGATE'S REASONS FOR DECISION

[9] In full reasons, the delegate first briefly set out the applicable law and the facts. She then summarized the factual bases for Mr Ragupathy's fear of persecution in Sri Lanka, reviewed more recent evidence of country conditions, and concluded that the risk of persecution that Mr Ragupathy would face if returned to Sri Lanka is "minor".

[10] In the next section of her reasons, "Danger Assessment", the delegate described Mr Ragupathy's criminal convictions and sentences: namely, attempted theft under $5,000 and possession of break-in instruments, for which he was sentenced in August 2000 to 20 days' imprisonment and put on probation for 18 months; and aggravated assault and possession of a weapon, for which he was sentenced in July 2001 to imprisonment for three years and one year consecutively. The delegate then set out the official version of the circumstances surrounding these offences. After describing the process leading up to the opinion, she stated:

> In summarizing the danger Mr. Ragupathy poses to Canadians, I must rate it as high. I am cognisant of the work Mr. Ragupathy has done while incarcerated, and I applaud his efforts. On the other hand, these offences are very serious. I note that this is not his first conviction since his arrival in Canada, and that he was on probation when this most recent offence occurred.

[11] After making some brief factual observations about Mr Ragupathy's family situation under the heading "Humanitarian and Compassionate considerations", the delegate has a section in her reasons entitled "Rationale". Here, she starts by reviewing evidence of present country conditions in Sri Lanka and assessing the risk that he would suffer persecution, torture or other personalized hardships if returned. In

the following long paragraph in the same section, the delegate provides more detail about the circumstances of Mr Ragupathy's crimes, and describes a report from Correctional Services Canada noting the absence of any expression of remorse for the serious personal injuries he had caused his victims, and the observation that inmates with his profile are estimated to have a 50% chance of re-offending.

[12] In the final substantive paragraph of her reasons, the delegate repeats the very critical comments made by the judge on sentencing Mr Ragupathy in 2001, and concludes as follows:

> After fully considering and balancing all facets of this case, including the humanitarian aspects and the need to protect Canadian society, I find that the latter outweighs the former. The interests of Canadian society outweigh considerations around Mr. Ragupathy's continued presence in Canada. I therefore, find that Mr. Ragupathy constitutes a danger to the public in Canada and I have signed the attached decision to that effect.

C. ISSUES AND ANALYSIS

Issue 1: Were the Board's reasons sufficient to discharge her duty to give reasons for the danger opinion under subsection 115(2)?

(i) t*esting the adequacy of reasons*

[13] It was common ground that a delegate must provide reasons for an opinion given under subsection 115(2). The disputed issue is whether the reasons given in this case were adequate to discharge that duty or were otherwise legally erroneous. In *Suresh v. Canada(Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, where the danger concerned state security, the Court said (at para. 126):

> The reasons must also articulate why, ... the Minister believes the individual to be a danger to the security of Canada as required by the Act.

[14] Whether reasons provide an adequate explanation of a decision can be tested by referring to the functions performed by a reasons requirement. Of the functions identified by Sexton J.A. in *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.), two are particularly pertinent to the present case. First, reasons help to ensure that the decision-maker has focused on the factors that must be considered in the decision-making process (at para. 17). Second, they enable the parties to exercise their right to judicial review (at para. 19) and the court to conduct a meaningful review of the decision.

[15] Although trite, it is also important to emphasize that a reviewing court should be realistic in determining if a tribunal's reasons meet the legal standard of adequacy. Reasons should be read in their entirety, not parsed closely, clause by clause, for possible errors or omissions; they should be read with a view to understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression.

(ii) *elements of a "danger opinion" under paragraph 115(2)(a)*

[16] In order to determine the adequacy of the reasons given by the delegate in the present case, it is relevant to start by identifying the elements in a "danger opinion", and here I agree entirely with the analysis of the learned Applications Judge. First, paragraph 115(2)(*a*) expressly requires that the protected person is inadmissible on grounds of serious criminality. It is not disputed that the offences committed by Mr Ragupathy render him inadmissible on this ground.

[17] Second, paragraph 115(2)(*a*) provides that, before being liable to deportation, a protected person must also be, in the opinion of the Minister, a danger to the public. This determination is to be made on the basis of the criminal history of the person concerned, and means a "present or future danger to the public": *Thompson v. Canada (Minister of Citizenship and Immigration)* (1996), 118 F.T.R. 269 at para. 20. At this stage of the inquiry, the delegate's task is to form an opinion on whether the person concerned is a danger to the public, rather than to determine the relative gravity of any danger that he may pose, in comparison to the risk of persecution: *Suresh v. Canada (Minister of Citizenship and Immigration),* [2000] 2 F.C. 592 (C.A.) at para. 147.

[18] If the delegate is of the opinion that the presence of the protected person does not present a danger to the public, that is the end of the subsection 115(2) inquiry. He or she does not fall within the exception to the prohibition in subsection 115(1) against the *refoulement* of protected persons and may not be deported. If, on the other hand, the delegate is of the opinion that the person is a danger to the public, the delegate must then assess whether, and to what extent, the person would be at risk of persecution, torture or other inhuman punishment or treatment if he was removed. At this stage, the delegate must determine how much of a danger the person's continuing presence presents, in order to balance the risk and, apparently, other humanitarian and compassionate circumstances, against the magnitude of the danger to the public if he remains.

[19] The risk inquiry and the subsequent balancing of danger and risk are not expressly directed by subsection 115(2), which speaks only of serious criminality and danger to the public. Rather, they have been grafted on to the danger to the public opinion, in order to enable a determination to be made as to whether a protected person's removal would so shock the conscience as to breach the person's rights under section 7 of the Charter not to be deprived of the right to life, liberty and security of the person other than in accordance with the principles of fundamental justice. See *Suresh v. Canada (Minister of Citizenship and Immigration),* especially at paras. 76-9.

(iii) *were the delegate's reasons adequate?*

[20] The delegate's reasons may not have been perfect: the reasons of decision-makers (mine included) never are. Nonetheless, I am satisfied that in this case the delegate determined that Mr Ragupathy was a danger to the public by considering his criminality and its surrounding circumstances.

[21] I reach this conclusion on the basis of the following statements in her reasons:

> In summarizing the danger Mr. Ragupathy poses to Canadians, I must rate it as high. I am cognisant of the work Mr. Ragupathy has done while incarcerated, and I applaud his efforts. On the other hand, these offences are very serious. I note that this is not his first conviction since his arrival in Canada, and that he was on probation when this most recent offence occurred.

[22] The delegate elaborates her reasoning on the following page, under the heading "Rationale", where she identifies the factors that she has taken into account, including the statistical evidence on the likelihood that Mr Ragupathy will commit other indictable offences. In my opinion, on reading her reasons, Mr Ragupathy would be left in no doubt that the delegate was of the opinion that he was a present or future danger to the public, and why this was her opinion. Moreover, the reasons seem sufficiently detailed to enable both Mr Ragupathy to exercise his right to seek judicial review and the court to review the reasonableness of the delegate's "danger to the public" conclusion.

[23] In his able submissions, counsel for Mr Ragupathy advanced two arguments which he said indicated that the delegate's reasoning was flawed. First, he argued that, in the passage quoted above, the delegate should not have categorized the level of danger that Mr Ragupathy posed by virtue of his criminality; her task at this stage was simply to form an opinion on whether he was a danger.

[24] Counsel argued that the delegate's reasons suggest that she may have erroneously adopted a relative concept of dangerousness. That is to say, she may have thought that the degree of danger to the public which Mr Ragaputhy posed was a function, not only of his criminal record, but also of the risk of persecution. Since she had found the risk to be "minor", she may have been more inclined to conclude that he was a danger to the public.

[25] I do not agree. In the paragraph quoted above where the delegate summarizes the danger to the public, she bases her assessment on the seriousness of the offences committed by Mr Ragupathy and the fact that he committed the second, more serious, offence while on probation following his first conviction. In her "Rationale", the delegate spells out in more detail the bases of her conclusion. I am not persuaded that, given the facts about his criminality which she details, her "danger to the public" assessment was coloured by her prior finding that he faced only a minor risk of persecution if returned to Sri Lanka.

[26] I do accept, however, that, in the interests of clarity, it will normally be good practice for delegates of the Minister to categorise the degree of danger to the public posed by the continued presence in Canadaof a protected person only if, and when, they reach the point of balancing danger and risk.

[27] Second, counsel relied on the delegate's conclusion, where she said:

> After fully considering and balancing all facets of this case, including the humanitarian aspects and the need to protect Canadian society, I find that the latter outweighs the former. The interests of Canadian society outweigh considerations around Mr. Ragupathy's continued presence in Canada. I

> therefore, find that Mr. Ragupathy constitutes a danger to the public in Canada and I have signed the attached decision to that effect.

In particular, counsel pointed to the sentence following her balancing of risk and danger, "I therefore find that Mr Ragupathy constitutes a danger to the public ...". This also shows, he said, that the delegate erroneously thought that she was to form her opinion as to whether Mr Ragupathy was a danger to the public by weighing risk and danger.

[28] I agree that the delegate's conclusion is expressed in a somewhat puzzling manner. It would have been more clear and accurate if, instead of the last sentence in the passage quoted above, she had said something along the following lines: "I therefore find that Mr Ragupathy may be deported despite subsection 115(1), since removal to Sri Lanka would not violate his rights under section 7 of the Charter."

[29] However, when the delegate's reasons are read in their entirety, I am not satisfied that the impugned sentence should be understood to mean what counsel suggests. As I have already indicated, the delegate earlier in her reasons made what I regard as a sufficiently clear finding of danger to the public based solely on criminality. The explanation for the way in which she expresses her final conclusion may well be that the opinions given under subsection 115(2) are commonly known as "danger opinions", although they are not limited to determining whether the protected person's criminal conduct poses a danger to the public. This is because, even if it does, the person will not be removed if the degree of danger is outweighed by the risk of persecution.

[30] To summarize, I am not persuaded that the delegate's reasons are legally inadequate, as being either incomplete or incoherent, or as revealing a flawed appreciation of the nature of the inquiry that she was required by law to conduct.

Issue 2: Were the delegate's reasons defective because they considered risk before danger?

[31] For the reasons given above, I agree that, since a finding that a protected person is a danger to the public by virtue of his criminality is a prerequisite of removal, this is a logical starting point in a delegate's analysis. For, without a positive opinion on this issue, the delegate's inquiry must end, because the person cannot be deported. Proceeding in this manner also avoids the possibility that the delegate will assess whether a protected person is a "danger to the public" by having regard to the risk of persecution.

[32] However, neither the text of the *IRPA*, nor the jurisprudence dictates as a matter of law in what order the Minister's delegates' reasons must deal with the various elements of the "danger opinion". To my mind, this is more a matter of elegance than substance and does not rise to the level of a legal requirement, especially given the degree of discretion entrusted to delegates in the formation of their opinion. In my respectful opinion, the preferred ordering is not required either for a protected person to understand the bases of a delegate's opinion, or for a court to determine whether the delegate had committed reviewable error in performing the legal tasks entrusted to her.

D. CONCLUSIONS

[33] For these reasons, I would allow the appeal, set aside the decision of the Federal Court, restore the delegate's opinion, and dismiss the application for judicial review. I would answer the certified question as follows:

"Paragraph 115(2)(*a*) of the *IRPA* requires the Minister's delegate to form an opinion on whether a protected person is "a danger to the public" without having regard to the risk of persecution, or other humanitarian or compassionate circumstances, and to provide an adequate explanation of the bases for that opinion.

However, it does not also require that the delegate's reasons deal with whether the protected person is a "danger to the public" before she assesses risk, and balances risk and danger."

"John M. Evans"

J.A.

"I agree

M. Nadon"

J.A.

"I agree

J. Edgar Sexton"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-390-05

(APPEAL FROM A JUDGMENT OF THE HONOURABLE THE CHIEF JUSTICE OF THE FEDERAL COURT DATED AUGUST 11, 2005, IMM-3377-04)

STYLE OF CAUSE: THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. JASINDAN RAGUPATHY

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 24, 2006

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: NADON J.A.

SEXTON J.A.

DATED: April 26, 2006

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