Sogi v. Canada (Minister of Citizenship and Immigration), 2004 FC 853 (CanLII)

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IMM-9571-03

2004 FC 853

Bachan Singh Sogi (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

Indexed as: Sogi v. Canada (Minister of Citizenship and Immigration) (F.C.)

Federal Court, Simpson J.--Toronto, May 20; Ottawa, June 11, 2004.

Citizenship and Immigration -- Exclusion and Removal -- Inadmissible Persons -- Judicial review of Minister's delegate's denial of Immigration and Refugee Protection Act, s. 112 protection application -- Applicant found inadmissible on security grounds because of membership in terrorist organization -- Pre-removal risk assessment finding applicant at risk of torture if deported -- Restriction assessment finding applicant present, future danger to security of Canada -- Minister's delegate balancing two reports, deciding to deport applicant -- S.C.C. holding in Suresh v. Canada (Minister of Citizenship and Immigration) decision to deport to torture product of balancing risk to individual, threat to Canada -- Possibility of lawful deportation to torture in exceptional circumstances -- Here, deportation decision not addressing alternatives to deportation to torture presented by applicant, even though required to -- Decision patently unreasonable -- Decision also not adequately defining, explaining threat to national security -- This also reviewable error -- Application adjourned pending revised decision.

This was an application for judicial review of a decision by a Minister's delegate denying the applicant's application for protection under section 112 of the *Immigration and Refugee Protection Act* (IRPA).The applicant claimed refugee status on his arrival in Canada in May 2001 but, following an IRPA, subsection 44(1) report and the IRPA, subsection 44(2) hearing that ensued, he was found to be inadmissible on security grounds because of his membership in a Sikh terrorist organization (the Babbar Khalsa International).A pre-removal risk assessment was prepared, which found that the applicant would be at risk of torture if deported to India. However, a restriction assessment was also prepared, wherein it was determined that the applicant represented a present and a future danger to the security of Canada. The Minister's delegate balanced these two assessments and decided to deport the applicant to India (the deportation decision). This was the decision under review.

Held, the application should be adjourned so that a revised deportation decision can be filed.

In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court of Canada held that a decision to deport to torture, in order to satisfy the Charter, must be the product of a balancing of the risk to the individual and any threat to Canada. The Supreme Court left open the possibility of a lawful deportation to torture in

exceptional circumstances. In the case at bar, because of the Court's decision with respect to the deportation decision, it was not necessary to decide, at this time, whether this was an exceptional case.

In the deportation decision, the Minister's delegate did not address any alternatives to deportation to torture, even though the applicant had made submissions relating to such alternatives. A decision to deport to torture requires that alternatives proposed to reduce the threat to the security of Canada be considered. It was thus patently unreasonable for the Minister's delegate to decide to deport the applicant without considering his proposal. The Minister's delegate also erred in that the decision did not adequately define and explain the threat to national security. The deportation decision was referred back to the Minister's delegate to prepare a revised decision in accordance with these reasons.

statutes and regulations judicially

considered

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act*, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44].

Criminal Code, R.S.C., 1985, c. C-46 , s. 83.05 (as enacted by S.C. 2001, c. 41, ss. 4, 143).

Immigration Act, R.S.C., 1985, c. I-2 , s. 53(1) (as am. by S.C. 1992, c. 49, s. 43).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 34(1)(*b*), (*c*), 44(1), (2), 86, 87, 97, 112, 113.

Immigration and Refugee Protection Regulations, SOR/2002-227 , s. 172(2).

cases judicially considered

applied:

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3; (2002), 208 D.L.R. (4th) 1; 37 Admin. L.R. (3d) 152; 90 C.R.R. (2d) 1; 18 Imm. L.R. (3d) 1; 281 N.R. 1; 2002 SCC 1.

considered:

Sogi v. Canada (Minister of Citizenship and Immigration), 2003 FC 1429 (CanLII), [2004] 2 F.C.R. 427; (2003), 113 C.R.R. (2d) 331; 242 F.T.R. 266; 34 Imm. L.R. (3d) 106; 2003 FC 1429.

APPLICATION for judicial review of a Minister's delegate's denial of a protection application made under section 112 of the *Immigration and Refugee Protection Act*. Application adjourned.

appearances:

Lorne Waldman and *Brena Parnes* for applicant.

Ian Hicks for respondent.

solicitors of record:

Waldman & Associates, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the interim reasons for decision on judicial review rendered in English by

[1]Simpson J.: On December 2, 2003, G.C. Alldridge (the Minister's delegate) denied an application made by Bachan Singh Sogi (the applicant) for protection under section 112 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA). These reasons deal with the application for judicial review of that decision.

The Procedural History

[2]The applicant claimed refugee status on his arrival in Canada on May 8, 2001. However, he became the subject of a report made under subsection 44(1) of the IRPA. This report led to an admissibility hearing under subsection 44(2) of the IRPA. Thereafter, in a decision dated October 8, 2002, a member of the Immigration Division concluded that the applicant's name is Gurnam Singh and that he is inadmissible because he is a member of a Sikh terrorist organization known as the Babbar Khalsa International (the BKI). Its objective is the establishment of a separate Sikh state called Khalistan in the area which is now the Punjab. The BKI is prepared to use violence to achieve its ends. The BKI is a "listed entity" under section 83.05 [as enacted by S.C. 2001, c. 41, ss. 4, 143] of the *Criminal Code*, R.S.C., 1985, c. C-46. The finding of inadmissibility on security grounds under paragraphs 34(1)(*b*) and (*c*) of the IRPA was upheld on judicial review in a decision of MacKay J. dated December 8, 2003 [[2004] 2 F.C.R. 427 (F.C.)]. The Federal Court of appeal dismissed the appeal of that decision on May 28, 2004 [[2005] 1 F.C.R. 171].

[3]Since the applicant was found to be inadmissible, two assessments were prepared pursuant to subsection 172(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. The first was a pre-removal risk assessment (the PRRA). The PRRA was conducted under paragraph 112(3)(*a*) and subparagraph 113(*d*)(ii) of the IRPA. These provisions provide that applicants who are inadmissible on security grounds will have their PRRA applications considered based only on the factors in section 97 of the IRPA. The PRRA was dated June 26, 2003 and concluded that the applicant would be at risk of torture if deported to India. The second assessment was a restriction assessment dated August 8, 2003, wherein it was determined that the applicant represented a present and a future danger to the security of Canada. The Minister's delegate balanced these two assessments and, in so doing, relied on submissions from the applicant's counsel and on the secret evidence described below. On December 2, 2003 he decided to deport the applicant to India, despite the likelihood that he would be tortured. This decision will be described as the "deportation decision".

[4]The applicant was arrested on August 8, 2002 and, at the time this application was heard in May of 2004, he remained in detention.

The Secret Evidence--Procedural History

[5]At the admissibility hearing, the secret evidence (which is presently Exhibit A to a secret affidavit sworn on April 8, 2004) was the subject of a non-disclosure order pursuant to section 86 of the IRPA. However, the secret evidence was summarized and given to the applicant in a document dated August 16, 2002. On the subsequent judicial review, Mr. Justice MacKay made a non-disclosure order dated May 8, 2003, under section 87 of the IRPA. The same secret evidence was before the Minister's delegate when he made the deportation decision. In this application for judicial review of the deportation decision, a non-disclosure order dated May 20, 2004 was also made under section 87 of the IRPA. The secret evidence has not changed since it was summarized for the applicant.

The Issues

[6]The issues are:

(i) In its decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3 (*Suresh*), did the Supreme Court of Canada leave open the possibility that Canada could deport an inadmissible person to torture in exceptional circumstances?

(ii) If the answer to (i) is affirmative, is this a case in which the circumstances are exceptional?

(iii) In his deportation decision, did the Minister's delegate err in failing to consider alternatives to removal and in failing to adequately explain his conclusion that the applicant posed a threat to Canada's national security?

Issue I--Deportation to Torture

[7]The applicant relied on the language in paragraphs 75 and 78 in *Suresh* to support his submission that removal to torture is not possible under any circumstances including those in which there is a risk to national security. He says that the fact that the Supreme Court indicated that there might be a case with exceptional circumstances did

not mean that there would ever actually be such a case. He added that the issue of whether Canada can deport to torture in exceptional circumstances has not been decided and that this case is the first in which the issue is squarely before the Court.

[8]Mr. Suresh was from Sri Lanka and, unlike the applicant in this case, Suresh was accepted as a Convention refugee. However, he was refused permanent resident status and was eventually apprehended under a security certificate on the basis that he was a member of a terrorist organization called the Liberation Tigers of Tamil Eelam (the LTTE). He was ordered deported and the Minister had to opine under subsection 53(1) [as am. by S.C. 1992, c. 49, s. 43] of the former *Immigration Act*, R.S.C., 1985, c. I-2 about whether Suresh constituted a danger to the public in Canada. If so, he could have been removed to a country where his life or freedom was threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion. The Minister concluded that Suresh was a threat and that he should be removed.

[9]The Supreme Court of Canada's decision turned on the failure to provide Suresh with a copy of the Minister's decision. The case is also distinguishable because Suresh was shown to be a supporter of and a fund-raiser for the LTTE. He was not shown to be an active participant in its terrorist activities.

[10]In spite of these conclusions, the Court took the opportunity to consider the lawfulness of a decision to deport to torture and, on my reading of the decision, concluded that, to satisfy the Charter [*Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]], such a decision had to be the product of a balancing of the risk to the individual (the risk) and any threat to Canada (the threat). The respondent, herein, says that Parliament met this requirement when it enacted section 97 and subparagraph 113(*d*)(ii) of the IRPA. They provide as follows:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

. . .

113. Consideration of an application for protection shall be as follows:

. . .

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

. . .

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

[11]I am satisfied that, in *Suresh*, the Supreme Court left open the possibility of a lawful deportation to torture in exceptional circumstances. At paragraph 25 of the decision, which sets out the issues, the Court asked, whether the former *Immigration Act* permitted deportation to torture contrary to the Charter. There is no doubt that the issue was before the Court.

[12]The Court concluded that, in Canada, torture is seen as fundamentally unjust and that government sanctioned torture is rejected. At paragraph 58, the Court reached the following conclusion about the Canadian perspective:

Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state's genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere.

[13]The Court held, at paragraph 65, that the prohibition against torture in international law is an emerging peremptory norm and, at paragraph 75, the Court noted that international law rejects deportation to torture even when national security is at stake.

[14]At paragraphs 76, 78 and 129, the Court conclu-ded that:

. . .both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*.

. . .

. . .because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.

. . .

We conclude that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the *Charter*'s s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss. 7 or 1 of the *Charter*.

[15]Based on this review, it is my conclusion that, in an exceptional/extraordinary case, it is open to the Minister to balance the risk and the threat and order a deportation to torture.

Issue II--Exceptional Circumstances

[16]The evidence before the Minister's delegate showed that:

· the applicant, on behalf of the BKI, used an alias to facilitate his plan to assassinate the Chief Minister of the Punjab (Prakash Singh), his son (Sukhbir Singh Badal) and the former Chief of Police of the Punjab

· a *Times of India* article dated June 9, 2001 described the assassination plot and said that, had it succeeded, it would have destabilized the Indian government

· information "corroborated by reliable sources" verified that the applicant is the same person as the Gurnam Singh mentioned in the article

· the BKI is implicated in the bombing of Air India flight 182

· the secret evidence showed that the applicant has used six aliases including the name Gurnam Singh

· the applicant has failed to admit to the use of aliases

· the applicant is skilled in the use of sophisticated weapons and explosives

· two letters were sent by the Immigration and Nationality Directorate of the U.K. Home Office to the applicant's Montréal address stating that Gurbachan Singh (with other aliases) was excluded from the U.K., on the basis that he was involved in international terrorist activities

· these letters were found to be genuine and not the result of a conspiracy as the applicant had alleged

· the letters suggest that, contrary to the applicant's statement in his PRRA application (that he had never claimed refugee status elsewhere), the applicant is a failed U.K. refugee claimant

[17]These facts make it clear that this case is very different from *Suresh*. The applicant is a skilled BKI assassin who will lie to protect himself. However, because of the decision reached below with respect to issue number III, it is not necessary to decide, at this time, whether this is an exceptional case.

Issue III--The Deportation Decision

[18]It is my view that, in the deportation decision, the Minister's delegate erred in two respects. Firstly, the decision does not address any alternatives to deportation to torture. Counsel for the applicant indicated, in the submission he made in letters dated July 15 and August 18, 2003, that his client would observe curfews and reporting requirements in order to avoid deportation. In submissions before me, he said his client would wear a tracking device or consent to house arrest or even detention to avoid being returned to India. In my view, a decision to deport to torture must consider, in the balancing exercise, any alternatives proposed to reduce the threat. I have concluded that, in the unusual circumstances of this case, it was patently unreasonable to decide to deport the applicant without considering the applicant's proposal.

[19]The second error concerns the analysis of the threat. There is neither a description of the threat nor a discussion of how and in what time frame it might be realized. The Minister's delegate appears to have assumed that, given the applicant's history and credentials, he is automatically a serious threat to national security. At pages 8 and 9 of the deportation decision he said:

There is no doubt that this is a difficult decision to make. However, in my view the circumstances in the case of Mr. Sogi fall within the exceptional provisions outlined by the Supreme Court. Mr. Sogi is a member of a terrorist organization that has used violence in order to establish a separate nation state of Khalistan carved out of India. He himself has been identified as the person who was to assassinate a Minister of the Government of India, his son and the former Chief of Police for the Indian State of Punjab. This fact plus his deliberate and secretive use of aliases makes Mr. Sogi a danger to the security of Canada. Mr. Sogi having accepted the task of assassinating these persons is an indication of a direct and intimate involvement in violent separatist politics. This goes far beyond mere membership. His participation in this violent group, Canada's commitment to fight terrorism by participating in international agreements, the objectives of IRPA to deny Canadian territory to persons who are security risks requires that he not be allowed to remain in Canada.

While acknowledging the principles outlined in the Supreme Court decision in Suresh, I feel that given the totality of the information outlined above, the overall interests of Canada and Canadian security must be given paramount consideration in this instance. In my view, the presence in Canada of terrorists, terrorist groups and terrorism in general is an anathema to the values and beliefs of Canadians. It would be unconscionable to allow him to remain in Canada.

The request of Mr. Bachan Singh Sogi is refused.

[20]These conclusions may well be accurate but, in *Suresh*, the Supreme Court of Canada made it clear that, before deciding to return a refugee to torture, there must be evidence of a serious threat to national security. I see no reason why the test should be different for those who are inadmissible. That being said, the deportation decision does not adequately define and explain the threat.

Conclusion

[21]With the consent of counsel for both parties, the deportation decision is referred back to the Minister's delegate who is to prepare a revised version of the deportation decision which considers the alternatives to deportation suggested by the applicant and which specifically defines and explains the threat and how it might be realized. To facilitate this process, I have ordered counsel for the applicant to provide respondent's counsel with a letter setting out his proposals for alternatives to deportation.

[22]This application will be adjourned *sine die* so that the revised decision can be filed on or before September 30, 2004.

Certification

[23]The applicant has asked that I certify the question set out below. The respondent opposed certification on the basis that the question was answered in *Suresh*. I have decided that the proper course is to deal with this question at the continuation of the hearing of this application.

Are there circumstances where the balancing set out in section 113 of IRPA can justify deportation back to torture or is the deportation of a person to a country where he or she faces a substantial risk of torture always a violation of section 7?