Federal Court Cour fédérale

Date: 20210526

Docket: IMM-6817-19

Citation: 2021 FC 487

Ottawa, Ontario, May 26, 2021

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

JBL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

Heard by online video conference hosted by the Registry on April 29, 2021.

I. <u>Nature of the Matter</u>

[1] This is an application by JBL (the "Applicant"), pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*] for judicial review of a decision by the Minister's delegate (the "Decision-Maker") made on October 2, 2019. The Decision-Maker opined that JBL was inadmissible for serious criminality under paragraph 36(1)(*a*) of the *IRPA* in

that he poses a danger to the public. This conclusion permits JBL's *refoulement,* under paragraph 115(2)(*a*) of the *IRPA,* to his country of origin, Liberia, subject, of course, to a risk assessment, which includes compassionate and humanitarian considerations.

[2] The sole issue before me is whether the danger assessment meets the test of reasonableness as outlined in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65. See also, *Dunsmuir v. New Brunswick*, 2008 SCC 9; *Makomena v. Canada (Citizenship and Immigration)*, 2019 FC 894 at para. 25 [*Makomena*]; and *Nagalingam v. Canada (Minister of Citizenship and Immigraiont)*, 2008 FCA 153 at para. 32 [*Nagalingam*]). The Decision-Maker is entitled to a high degree of deference.

[3] For the reasons set out below, I grant the application for judicial review.

II. Relevant Facts

[4] JBL is a citizen of Liberia, born in Monrovia on September 1, 1960.

[5] JBL fled from Liberia to Nigeria, in the 1980s when the First Liberian Civil War erupted. He remained in Nigeria for approximately two (2) years. He then traveled to Israel where he remained for four (4) years. On February 16, 1993, he entered Canada where he made a claim for refugee status at Montreal's Mirabel International Airport. Canada granted the Applicant Convention refugee status on August 23, 1993. He met his spouse in 1995 and they married in 1997. Together, they have four (4) children born between 1996 and 2004. At the time of the Decision-Maker's opinion, the children were 23, 21, 16 and 15 years of age.

[6] On September 10, 2012, the Applicant was arrested and charged with eight (8) offences of repeated sexual assaults upon, and sexual interference of, his eldest daughter. The abuse started in 2006, when his daughter was nine (9) years of age and continued until she was 15. The Applicant was released on bail in September of 2012, and remained on bail until his eventual convictions in March of 2015. There is no evidence of any violations of the bail conditions during the period between September of 2012 and March of 2015.

[7] The Applicant pled non-guilty to all charges. On March 27, 2015, he was found guilty of the following offences:

A. Incest (2 counts) contrary to s. 155(2) of the *Criminal Code*, R.S.C., 1985, c. C-46 [*Criminal Code*];
B. Sexual interference (2 counts) contrary to s. 151(a) of the *Criminal Code*;
C. Invitation to sexual touching (2 counts) contrary to s. 152(a) of the *Criminal Code*;
D. Sexual exploitation contrary to s. 153(1)(*a*) of the *Criminal Code*; and
E. Sexual exploitation contrary to s. 153(1)(*b*) of the *Criminal Code*.

[8] Following his convictions, the Applicant was released on his own recognizance, which included, among other conditions, a condition that he have no contact with his spouse or his four (4) children. The following day, he was found in his home in the presence of two (2) of his children, including the victim of the above-noted offences. He was arrested and subsequently pled guilty to breach of recognizance, contrary to s. 145(3) of the *Criminal Code*.

[9] On August 7, 2015, the Applicant was sentenced to six (6) years of imprisonment on each of the offences, to be served concurrently, and one (1) day of imprisonment for the breach of recognizance. The sentencing judge also imposed an order prohibiting unsupervised communication with his children.

[10] During the early months of his incarceration, the Applicant continued to deny responsibility for the offences. He appealed both the convictions and sentence. The appeals were dismissed on July 13, 2016.

[11] An expert opinion prepared on June 5, 2015 by Dr. Jonathan Gray, Staff Psychiatrist at the Integrated Forensic Program at the Royal Ottawa Hospital, concluded JBL's risk to reoffend "in a sexual or violent manner" is low. Additionally, evidence from the Special Sex Offender Assessment prepared by the staff at the Joyceville Institution concluded that JBL was "within the Low Risk Category for being charged and convicted with another sexual offence. This nominal risk category reflects that [JBL] is no more likely to re-offend sexually than non-sexual offenders".

[12] By letter dated March 20, 2018, the Canada Border Services Agency (the "CBSA") informed JBL of its formal request for the Minister's opinion that he posed a danger to the public. JBL, through counsel, provided submissions on June 4 and August 14, 2018. I note here that he became eligible for statutory release on August 7, 2019. Correctional Services Canada did not oppose his release.

[13] On October 2, 2019, the Decision-Maker rendered her opinion. She concluded that JBL posed a danger to the public as contemplated by s. 115(2)(*a*) of the *IRPA*. The Decision-Maker appropriately concluded that JBL is inadmissible to Canada based upon serious criminality, pursuant to paragraph 36(1)(*a*) of the *IRPA*. She then addressed the test for "danger to the public" as set out in *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 646, 212 N.R. 63 [*Williams*]. Applying that test, the Decision-Maker was required to provide a good faith opinion about whether JBL is a possible re-offender, whose presence in Canada poses an unacceptable risk. Given that any offender may re-offend, the crux of the analysis is on whether JBL's presence in Canada poses an unacceptable risk.

[14] The Decision-Maker noted the laudable efforts at rehabilitation undertaken by JBL. She referred to the certificates he had received for having completed courses while incarcerated, the support he receives from his spouse and family, the supportive evidence set out in a Sexual Behaviours Assessment and a Referral Decision Sheet prepared by Correctional Services Canada. The Decision-Maker also acknowledged that JBL's risk to reoffend, as assessed in 2015, was low. She then weighed these positive factors against the serious nature of the criminal offences, his initial lack of remorse, and the fact he did not enter a guilty plea, among others, to conclude that he represents a present and future danger to the public.

[15] All parties agree that for purposes of the Decision-Maker's opinion and this review, the Canadian public, per s. 115(2)(*a*), constitutes JBL's children. Expert evidence, apparently accepted by the Decision-Maker, opines that the Applicant is not a pedophile.

III. Submissions of the Parties

A. *Did the Senior Decision Maker err in concluding that the Applicant poses a danger to the public within the meaning of s. 115(2)(a) of the IRPA?*

[16] JBL contends that an inquiry made under s. 115(2)(*a*) is focused exclusively on the risk of recidivism (*Makomena* at para. 28). He says the Decision-Maker did not focus on his risk of recidivism, rather, she placed undue weight on the morally repugnant nature of the offences and the consequent harm to the victim. JBL submits that the Decision-Maker failed to consider the present and future danger posed by him to the public.

[17] JBL says the Decision-Maker ignored the expert criminological evidence in the record, including that of Dr. Gray. He acknowledges that while the Decision-Maker was not obliged to accept the expert opinion, she should have distinguished it, or explained why she did not find it persuasive. He argues that she was not entitled to ignore it (*Soe v. Canada (MPSEP)*, 2018 FC 557, 293 A.C.W.S. (3d) 600 at para. 99 [*Soe*]; *Makomena* at para. 25; and *Ahmed v. Canada (MPSEP)*, 2020 FC 507, 318 A.C.W.S. (3d) 303 at para. 24).

[18] JBL contends that his past criminal wrongdoing does not, standing alone, weigh in favour of a finding of recidivism. He argues, among other factors, that the children's age at the time of the decision, should have been taken into consideration in assessing the risk of future acts of incest. Additionally, he contends the Decision-Maker unreasonably placed weight on the fact he pled non-guilty and proceeded to trial. He argues that this should have been a neutral factor (*Nash v. R.*, 2009 NBCA 7, [2009] N.B.J. No. 17 at para. 47 and *R. v. Watt*, 2015 BCPC 343, [2015] B.C.J. No. 2661 at para. 15).

[19] The Respondent argues that it is trite law that a decision-maker is presumed to have considered all the documentary evidence unless the contrary is shown (*Florea v. Canada (MCI)*, [1993] F.C.J. No. 598, [1993] F.C.J. No. 598 (FCA)). The Respondent submits that the Decision-Maker's opinion was based on the entirety of the record that was before her. While the Decision-Maker did not specifically mention Dr. Gray's report, proof she had considered it, is evidenced by the fact that she acknowledged the Applicant's risk to re-offend is low. She, according to the Respondent, reasonably determined that the favourable evidence was insufficient to mitigate the risk posed by the Applicant.

[20] The Respondent notes that the expert reports relied on by JBL were completed in 2015, shortly after his conviction and years prior to his release. None of the reports addressed the risk of recidivism upon his release in 2018. Moreover, the purpose of the reports was not to assess his risk of recidivism. Rather, they were prepared for sentencing purposes, potential treatment of the Applicant and the security level to which he would be assigned while incarcerated. The Respondent contends JBL is essentially asking this Court to re-weigh the evidence.

[21] The Respondent candidly acknowledges that the Decision-Maker placed great weight on the Applicant's pleas of "not guilty" and his insistence on proceeding to trial. The Respondent says this was reasonable in the circumstances and observes that the Federal Court of Appeal has warned against the direct application of criminal law principals in the immigration context (*Nagalingam* at para. 67).

IV. Analysis

[22] The question before the Court is not whether I believe JBL should remain in Canada. Furthermore, that is not the question the Decision-Maker was called upon to address. The question, based upon the jurisprudence is whether, looking forward, the Applicant poses an unacceptable risk to Canadians. As indicated above, the pool of Canadians against whom the risk is to be measured is identified by the parties as being the Applicant's immediate family.

[23] The Decision-Maker identified the proper test for determining whether JBL poses a danger to the public within the meaning of s. 115(2)(*a*). It is within the discretion of the decision-maker to determine the weight to attach to expert evidence. This Court should not re-weigh that evidence. However, the decision-maker must provide a valid reason for rejecting or discounting expert opinions (*Soe* at para. 99).

[24] I am satisfied that, in the circumstances, the decision does not meet the test of reasonableness for the following reasons.

[25] First, the opinion made pursuant to paragraph 115(2)(*a*) of the *IRPA* sets out the Applicant's name and then lists his birthdate as September 1, 1969. His birthdate is, in fact, September 1, 1960. The opinion is dated October 2, 2019. There is no evidence of any corrigenda to the opinion to indicate that the improper date constitutes a typographical error. In fact, in the request for the opinion, the Canada Border Services Agency also lists the Applicant's birthdate as September 1, 1969. The Court cannot determine whether the Decision-Maker's decision would have been different had she known the Applicant was 60 years old at the time of her opinion, rather than 51. While there is no evidence before me regarding the propensity of a

60 year-old to commit such crimes as compared to a 51 year-old, the accurate age would, in my experience, be something a decision-maker should know and something he or she should consider in the deliberative process. An age difference of 9 years may also be relevant to the issue of risk upon return to the country of origin.

[26] Second, the parties provided submissions regarding the identity of the Canadian “public” for purposes of the offences committed by the Applicant. The Respondent eloquently advanced that the Canadian public constitutes JBL’s immediate family. As indicated above, I accept her position. That being the case, it was incumbent upon the Decision-Maker to consider the pool of potential victims as at the time of the preparation of her opinion. At that time, the youngest person in the pool was 15 years of age. The evidence is that the victim was 15 when the incest stopped in 2013, it having started when she was 9. The Decision-Maker failed to consider the ages of those in the pool of potential victims in reaching her conclusion that the Applicant posed an unacceptable risk to Canadians.

[27] Perhaps the ages of those within the potential victim pool would have weighed in favour of the opinion ultimately made by the Decision-Maker. However, once again, that is something that should have formed part of the analysis in assessing the possibility of re-offending.

[28] Third, the Decision-Maker stated:

> I afford significant weight to the fact that he did not enter a guilty plea, which led to his daughter having to testify at trial, an experience she described as being re-victimized.

[29] With respect, absent relevant evidence regarding the impact of a “not guilty” plea on the risk of reoffending, that observation by the Decision-Maker was both wholly irrelevant and highly prejudicial. She acknowledged it as being highly prejudicial when she afforded it “significant” weight. The Decision-Maker was required to focus on the possibility of future occurring events, not to exact additional punishment for past crimes.

[30] I acknowledge that criminal law principles should not necessarily be transferred to matters of immigration law and policy. However, the legislator has done precisely that by enacting s. 36 of the *IRPA (*see, s. 55, s. 58, s. 64, s. 77, s.101, s. 113 and s. 115, which deal with serious criminality). I am of the view that a not guilty plea should, if it merits mentioning at all, be considered a neutral factor in the circumstances (see, *Nash v. R.* 2009 NBCA 7 at para. 47) of this case. This conclusion would of course, be subject to an exception where there exists relevant evidence, which demonstrates that a not-guilty plea, given the circumstances of the crime and the circumstances of the accused, including his or her criminological profile, psychological testing, and other factors, militates in favour of re-offending.

[31] In the present case, I am of the view the decision is unreasonable regardless of the significant weight afforded to the not guilty plea. A decision-maker does not make a reasonable opinion in circumstances such as those presented in the within circumstances, without making some reference to the accurate age of the potential perpetrator and the age of the persons in the potential pool of victims. These factors, combined with the apparent rejection of the evidence favourable to the Applicant, makes it impossible to understand the reasons which led the decision-maker to arrive at her conclusion regarding JBL’s prospects of re-offending. As the

Supreme Court indicated in *Vavilov*, "the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (para. 83).

V. Certified Question

[32] The Applicant proposed the following question for certification:

> In deciding whether a person constitutes a danger to the public under s. 115(2)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, can a decision-maker, as a matter of law, treat an individual's decision to exercise her/his right under s.11(d) and (where applicable) (f) of the *Charter* and proceed to trial on criminal charges as an aggravating factor in the analysis, or otherwise draw an adverse inference from it?

[33] This Court should only certify a question in the following circumstances. The question must be dispositive of the appeal and transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. Consequently, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge's reasons (*Xiong Lin Zhang v. The Minister of Citizenship and Immigration*, 2013 FCA 168 at para. 9).

[34] As I have already acknowledged, there may be some case with an evidentiary basis in which an expert opines that a not-guilty plea and successive appeals militate in favour of re-offending. I would not close the door on the possibility of such evidence being considered in future opinions. If the Federal Court of Appeal is to be called upon to close that door for all future opinions, it is my view a question should be certified in circumstances where there is some

relevance to considering the not guilty plea. In the circumstances of this case, I consider there was no relevance to the not guilty plea and it should not have been considered by the Decision-Maker.

[35] In the circumstances, I decline to certify a question for consideration by the Federal Court of Appeal.

VI. Conclusion

[36] In the result, I allow the application for judicial review and refer the matter for re-determination by another Decision-Maker. I decline to certify a question for consideration by the Federal Court of Appeal.

[37] In light of the present circumstances, I consider it essential to anonymize the style of cause and will make an order doing so, effective immediately.

[38] No claim for costs were made in the within matter and no costs are ordered.

JUDGMENT in IMM-6817-19

THIS COURT'S JUDGMENT is that :

1. The Application for judicial review is allowed, without costs. The matter is remitted to another Decision-Maker for redetermination;

2. The style of cause be anonymized; and

3. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6817-19
STYLE OF CAUSE:	JBL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	APRIL 29, 2021
REASONS FOR JUDGMENT AND JUDGMENT:	BELL J.
DATED:	MAY 26, 2021

APPEARANCES:

Anthony Navaneelan	FOR THE APPLICANT
Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Anthony Navaneelan Refugee Law Office Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT