Federal Court Cour fédérale

Date: 20221128

Docket: IMM-8469-21

Citation: 2022 FC 1635

Ottawa, Ontario, November 28, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

IRFAN URAJ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of the decision of the Immigration Division ("ID") dated November 8, 2021, which found the Applicant inadmissible to Canada on the grounds of serious criminality under subsection 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant tried to leave the United Kingdom ("UK") in 2015 using a false passport and was convicted under section 4 of the *Identity Documents Act 2010* (UK), c 40 ("IDA"), the offence of possession of false identity documents with improper intention. The Applicant made a refugee claim in Canada in 2018. The Minister of Public Safety and Emergency Preparedness (the "Minister") sought a finding of inadmissibility under subsection 36(1)(b) of *IRPA*, on the grounds of serious criminality for having been convicted of an offence that, if committed in Canada, would constitute an offence punishable by a maximum term of 10 years in prison. The ID agreed with the Minister and found the Applicant inadmissible under subsection 36(1)(b).

[3] The Applicant submits that the ID erred in finding that the section 133 defence is not available to the Applicant, failed to properly apply the legislation to the Applicant's factual scenario, and misconstrued this Court's jurisprudence regarding section 133. The Applicant does not dispute the ID's findings on the equivalency of the offences.

[4] For the reasons that follow, I find the ID's decision is reasonable. This application for judicial review is therefore dismissed.

II. <u>Facts</u>

A. *The Applicant*

[5] The Applicant is a 29-year-old citizen of Albania. He is a bisexual man and claims to have faced discrimination on the basis of his sexuality for many years. He claims that he did not

see a possible future for himself in Albania. The Applicant fled Albania in December 2013, travelling through Montenegro and Belgium to arrive in the UK illegally.

[6] Once in the UK, the Applicant met with a lawyer to discuss making a refugee claim. The lawyer advised the Applicant that his claim would have a low chance of success because he entered the UK illegally. The Applicant therefore never made a refugee claim in the UK and instead continued to work there illegally from 2013 to 2015. He claims that he always intended to come to Canada and make a refugee claim.

[7] In September 2015, the Applicant paid an individual £10,000 for a false Italian passport. He claims that the only purpose for this passport was to travel to Canada and make a refugee claim, and he never used it for any other reason.

[8] On November 18, 2015, UK Border Force officers arrested the Applicant for using a false passport at Gatwick Airport, while trying to board a flight to Toronto, Canada. He was charged under section 4 of *IDA*, the offence of possession of false identity documents with improper intention, and held in custody for one month. The Applicant plead guilty on December 17, 2015, and was convicted under section 4 of *IDA* in Lewes, England. The Applicant served five months of his 12-month sentence in the UK. He was deported back to Albania on April 20, 2016.

[9] In December 2017, the Applicant tried to come to Canada again using a false Slovenian passport. He was stopped in Mexico and returned back to Albania.

[10] On September 27, 2018, the Applicant traveled through Montenegro and France to arrive in Montreal, Quebec, using a false Danish passport.

[11] On December 19, 2018, the Applicant filed a refugee claim in Canada. The Minister sought a finding of inadmissibility on the grounds of serious criminality under subsection 36(1)(b) of *IRPA*. His refugee claim is suspended pending an admissibility determination.

B. *Decision Under Review*

[12] In a decision dated November 8, 2021, the ID found the Applicant inadmissible under subsection 36(1)(b) of *IRPA*.

[13] The ID found that the UK offence is equivalent to a Canadian offence punishable by a maximum term of 10 years, and the defence of section 133 of *IRPA* does not apply to the Applicant's circumstances. For reference, both the UK and Canadian offences are reproduced in the "Legislative Scheme" section.

(1) Equivalency

[14] The Minister submitted that section 4 of *IDA* is equivalent to subsection 368(1) of the *Code*, the offence of use, trafficking or possession of a forged document.

[15] The ID used the hybrid approach for assessing equivalency under subsection 36(1)(b) of *IRPA*, which involves both comparing the precise wording of the offences and examining the

evidence to see whether the offences' essential elements were met (*Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 (CA) at para 16). The ID compared the elements in section 4 of *IDA* with those in subsection 368(1) of the *Code*, and considered whether each element was met on the evidence.

[16] The first element of the UK offence requires "possession or control" of the identity document and the *Code* offence only requires possession. The second element of the UK offence requires an "identity document", while the *Code* offence does not specify the kind of document, therefore including an identity document. The ID therefore found that both the first and second elements of the offences are equivalent.

[17] The third element of the UK offence requires that the individual "knows or believes" the document is false, while the ID states that the *Code* offence contains a narrower requirement of knowing the document is false. It is worth noting here that the *Code* offence under subsection 368(1) also states "knowing or believing" that a document is forged, like the UK offence. It is subsection 366(1), the offence of forgery, which requires knowledge that a document is false. Nonetheless, the ID applied the narrower standard and considered whether the Applicant knew that the passport was false. The ID referred to subsection 366(2) of the *Code,* which states that a document is forged when it has been materially altered or a material addition has been made to it. The ID found that this element was met because the Applicant's false Italian passport was altered to show his photograph and he knew about and participated in this alteration, knowing the document was false. The ID found that this establishes equivalency on the third element.

[18] The fourth element in the UK offence is an “improper intention”, which contains two sub-elements: (a) the intention to use the document for establishing personal information, or (b) the intention of allowing or inducing someone else to establish, ascertain or verify their personal information. The *Code* offence similarly requires the “intent to commit an offence”, which also contains two sub-elements: (a) the intent to use, deal or act on a document as if it was genuine, or (b) the intent to cause or attempt to cause someone else to do the same. The ID determined that both the UK and Canadian intent elements were satisfied because the Applicant’s false passport was intended to verify personal information about him, and he attempted to cause UK authorities to act as if the passport was genuine.

[19] Finding that the *Code* offence is punishable by a maximum term of imprisonment of 10 years, pursuant to the requirement under subsection 36(1)(b) of *IRPA*, the ID found all elements of the offences are equivalent.

(2) Section 133 Defence

[20] The ID acknowledged that an equivalency analysis also requires a comparison of any available defences (*Li v Canada (Minister of Citizenship and Immigration)*, [1997] 1 FC 235). The Minister submitted that section 133 of *IRPA* is equivalent to section 31 of the *Immigration and Asylum Act 1999* (UK), c 33 (“*IAA*”).

[21] The ID found that the two defences are not equivalent because the UK statute requires the individual to have come directly from the country of persecution and immediately made a refugee claim. Section 133 of *IRPA* contains neither of these requirements.

[22] The Minister further submitted that even if the two defences are not equivalent, the Applicant would not have access to section 133 in this case. The Minister argued that the reasoning in *Bellevue v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 560 ("*Bellevue*"), applies to the case at hand. In *Bellevue*, the applicant was convicted for using a false passport in the United States and could not use the section 133 defence because he did not have a refugee claim at the time of the offence (*Bellevue* at paras 75-76).

[23] On the other hand, the Applicant submitted that *Bellevue* does not apply because the whole purpose of using the false Italian passport was to come to Canada to make a refugee claim. The Applicant submitted that in *Uppal v Canada (Minister of Citizenship and Immigration),* 2006 FC 338 ("*Uppal*"), this Court found that the individual was not inadmissible for using a false document where the document was used to come to Canada to make a refugee claim. The Applicant argued that *Uppal* is more analogous to his case and he can therefore benefit from the section 133 defence.

[24] The ID ultimately agreed with the Minister. The Court in *Bellevue* found that the individual could not benefit from section 133 because he did not have a pending refugee claim when he was convicted of the American offence. The ID found that the same reasoning applies in the Applicant's case because he never made a claim in the UK, where the facts occurred.

[25] The ID preferred *Bellevue* as being more applicable than *Uppal* to the case at hand, finding that several factors that were considered in *Bellevue* were not considered by this Court in *Uppal*. For instance, the Court in *Uppal* did not consider whether the individual was

inadmissible on the basis of a false passport, or whether the person had to have made a refugee claim at the time of the conviction. The Court considered these factors in *Bellevue*, which the ID found more applicable to the Applicant's situation. Therefore, section 133 would not have applied to the Applicant because he did not have a pending refugee claim in the UK.

III. Legislative Scheme

[26] Section 4 of *IDA* states:

> **Possession of false identity documents etc with improper intention**
>
> **(1)** It is an offence for a person ("P") with an improper intention to have in P's possession or under P's control—
>
> > **(a)** an identity document that is false and that P knows or believes to be false,
> >
> > **(b)** an identity document that was improperly obtained and that P knows or believes to have been improperly obtained, or
> >
> > **(c)** an identity document that relates to someone else.
>
> **(2)** Each of the following is an improper intention—
>
> > **(a)** the intention of using the document for establishing personal information about P;
> >
> > **(b)** the intention of allowing or inducing another to use it for establishing, ascertaining or verifying personal information about P or anyone else.
>
> **(3)** In subsection (2)(b) the reference to P or anyone else does not include, in the case of a document within subsection (1)(c), the individual to whom it relates.
>
> **(4)** A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for a term not exceeding 10 years or a fine (or both)

[27] Section 368(1) of the *Code* states:

Use, trafficking or possession of forged document	**Emploi, possession ou trafic d'un document contrefait**
368 (1) Everyone commits an offence who, knowing or believing that a document is forged,	**368 (1)** Commet une infraction quiconque, sachant ou croyant qu'un document est contrefait, selon le cas:
(a) uses, deals with or acts on it as if it were genuine;	**a)** s'en sert, le traite ou agit à son égard comme s'il était authentique;
(b) causes or attempts to cause any person to use, deal with or act on it as if it were genuine;	**b)** fait ou tente de faire accomplir l'un des actes prévus à l'alinéa a), comme s'il était authentique;
(c) transfers, sells or offers to sell it or makes it available, to any person, knowing that or being reckless as to whether an offence will be committed under paragraph (a) or (b); or	**c)** le transmet, le vend, l'offre en vente ou le rend accessible à toute personne, sachant qu'une infraction prévue aux alinéas a) ou b) sera commise ou ne se souciant pas de savoir si tel sera le cas;
(d) possesses it with intent to commit an offence under any of paragraphs (a) to (c).	**d)** l'a en sa possession dans l'intention de commettre une infraction prévue à l'un des alinéas a) à c).

[28] Moving to the defences, section 133 of *IRPA* states:

Deferral	**Immunité**
133 A person who has claimed refugee protection, and who	**133** L'auteur d'une demande d'asile ne peut, tant qu'il n'est

came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.	statué sur sa demande, ni une fois que l'asile lui est conféré, être accusé d'une infraction visée à l'article 122, à l'alinéa 124(1)a) ou à l'article 127 de la présente loi et à l'article 57, à l'alinéa 340c) ou aux articles 354, 366, 368, 374 ou 403 du Code criminel, dès lors qu'il est arrivé directement ou indirectement au Canada du pays duquel il cherche à être protégé et à la condition que l'infraction ait été commise à l'égard de son arrivée au Canada.

[29] Section 31 of the *IAA* states:

> **31 Defences based on Article 31(1) of the Refugee Convention.**
>
> **(1)** It is a defence for a refugee charged with an offence to which this section applies to show that, having come to the United Kingdom directly from a country where his life or freedom was threatened (within the meaning of the Refugee Convention), he—
>
> > **(a)** presented himself to the authorities in the United Kingdom without delay;
> >
> > **(b)** showed good cause for his illegal entry or presence; and
> >
> > **(c)** made a claim for asylum as soon as was reasonably practicable after his arrival in the United Kingdom.

IV. Issue and Standard of Review

[30] The application for judicial review raises the sole issue of whether the ID's decision on the section 133 defence is reasonable.

[31] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[32] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

V. Analysis

[33] The Applicant submits that the ID erred in finding that section 133 of *IRPA* does not apply to the circumstances. He submits that the ID failed to properly apply the facts to the legislation and misconstrued relevant jurisprudence regarding section 113. The Applicant does not dispute the reasonableness of the ID's equivalency analysis.

[34] A bulk of the Applicant's submissions are reanalyzing the record that was before the ID. On reasonableness review, the onus is on the applicant to point to a lack of "the requisite degree of justification, intelligibility and transparency" in the decision as a whole (*Vavilov* at para 100). Instead, the Applicant's submissions appear to propose factual reasons that the ID should have

decided differently. This kind of “reweighing and reassessing” of the evidence is not the Court’s role on review (*Vavilov* at para 125).

[35] The Applicant’s counsel also requests the Court to determine “what is required for the s. 133 immunity to apply” and in both written and oral submissions, emphasises that upholding the ID’s decision on section 133 would frustrate or undermine the core purpose of the defence. A reviewing court “does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable” (*Vavilov* at para 289). A desire to clarify an area of the law does not sufficiently warrant judicial intervention in an administrative decision, if that decision is justified, intelligible and transparent.

[36] The Applicant submits that it was unreasonable for the ID to prefer *Bellevue* over *Uppal* in assessing the Applicant’s scenario. *Vavilov* sheds light on the common law constraints on decision-makers that should be considered in a reasonableness review, at paragraph 112:

> Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body’s decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court’s interpretation does not work in the administrative context: M. Biddulph, “Rethinking the Ramifications of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law” (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply

> or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35 to 37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.
>
> [Emphasis added]

[37] In light of these constraints, the ID's justification for finding the reasoning in *Bellevue* more applicable to the Applicant's scenario is not a reviewable error. The ID clearly and thoroughly provided reasons for departing from this Court's finding in *Uppal* and for finding the factual record in *Bellevue* to be more analogous to the Applicant's case. This was not based upon mischaracterizations of the Court's reasoning in either case, nor was it based on an inconsistent interpretation of section 133. The ID's application of *Bellevue* is based upon valid factors that creates a "line of analysis" that is "rational and logical" (*Vavilov* at para 102).

[38] The Applicant also submits that the ID's analysis of the two decisions was unreasonable because the Federal Court undertook the wrong analysis in *Bellevue.* The role of judicial review is to consider whether the decision bears the hallmarks of reasonableness, and not to perform a *de novo* analysis of the case or challenge the validity of other decisions (*Vavilov* at para 124). The ID in this case clearly explains why *Bellevue* is analogous to the Applicant's case and why a similar reasoning to that in *Bellevue* is appropriate here. Its determination on the matter of section 133 is therefore reasonable.

VI. **Conclusion**

[39] The application for judicial review is dismissed. The ID's decision that the Applicant is inadmissible on the grounds of serious criminality under subsection 36(1)(b) of *IRPA* is reasonable. The ID's finding that the defence under section 133 of *IRPA* does not apply to the Applicant's scenario is justified, intelligible and transparent. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-8469-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Bjorn Harsanyi, Q.C.	FOR THE APPLICANT
Justine Lapointe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Sharma Harsanyi Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT