

Federal Court



Cour fédérale

Date: 20230713

Docket: IMM-8833-22

Citation: 2023 FC 960

Ottawa, Ontario, July 13, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

RAZVAN POPOVICI

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Razvan Popovici [Applicant] seeks judicial review of an August 2, 2022 decision [Decision] of the Refugee Appeal Division [RAD] upholding the Refugee Protection Division's [RPD] determination that he is neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant's refugee claim was severed from his family's claim due to inadmissibility proceedings before the Immigration Division [ID] and the Immigration Appeal Division [IAD], discussed in more detail below.

[3] The application for judicial review is dismissed. The Applicant has not demonstrated that the Decision, as a whole, is unreasonable.

II. Background

[4] The Applicant is a Romanian national who, prior to his arrival in Canada, resided in the United Kingdom [UK] with his family. The Applicant and his family shared a rental unit with members of the Corduneanu Clan [Clan], a Romanian criminal organization.

[5] While in the UK, the Applicant worked as an Uber driver. He also drove his housemates and Clan members to places where they trafficked illegal drugs and participated in the sex trade industry.

[6] In December 2017, a Clan member left a bag of pills in the Applicant's room with the expectation that he sell the pills. The Applicant refused to do so and, fearing reprisals from the Clan, he and his family left for Canada in January 2018.

[7] In October 2018, the Applicant and his family made refugee claims in Canada. On March 9, 2020, the RPD rejected the family's claims. On February 16, 2021, the RAD rejected their appeals. The Minister of Citizenship and Immigration [Minister] requested that the ID suspend

consideration of the Applicant's refugee claim because he had participated in activities with a criminal group rendering him inadmissible pursuant to paragraph 37(1)(a) of *IRPA*. The ID refused the Minister, and rejected the Minister's position that the Applicant was inadmissible to Canada for activities related to organized crime.

[8] The Minister appealed to the IAD, which confirmed the ID's decision. The IAD noted that since the Applicant is a foreign national and the Clan is an organization involved in criminal activity, the only issue on appeal was whether the Applicant's activities "constitute engaging in an activity that is part of a pattern of criminal activity as described in paragraph 37(1)(a)". The IAD concluded that because the Applicant was acting as a driver for various activities including non-criminal ones, and because he was not delivering pills himself, he was not "a person acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment".

[9] The Minister intervened in the Applicant's RPD proceeding on the basis that the Applicant is excluded from protection by virtue of section 98 of *IRPA*. The Minister asserted that the Applicant committed a serious non-political crime outside of Canada by trafficking a controlled substance contrary to the UK's *Misuse of Drugs Act 1971*, Chapter 38, prior to his admission to Canada. The RPD agreed with the Minister.

[10] The Applicant appealed to the RAD, submitting that the RPD failed to follow the principle of judicial comity in finding differently from the ID and IAD.

III. The Decision

[11] The RAD confirmed the RPD's decision and dismissed the appeal.

[12] The RAD noted that the Applicant focussed exclusively on the allegation that the RPD violated the principle of judicial comity by not following the findings of the IAD and ID.

[13] The RAD found that sections 37(1)(a) and 98 of *IRPA*, including Article 1F(b) of the Refugee Convention, are different in scope, and as such, the RPD did not violate the principle of judicial comity. The legal issue to be determined under these two provisions of *IRPA* are not the same. For paragraph 37(1)(a), the ID and IAD was required to determine whether the Applicant was inadmissible by reason of his membership in an organization which—there were reasonable grounds to believe—engaged in criminal activity for the purpose of committing a criminal offence outside Canada that would also constitute an offence in Canada. However, under Article 1F(b) of the Convention, the issue to be determined was whether the applicant committed a serious non-political crime outside the host country.

[14] The RAD also noted that the main purpose of Article 1F(b) of the Refugee Convention is to ensure that those who commit serious non-political crimes prior to their arrival cannot obtain Canada's protection, and the Minister has the burden of proving that a claimant is excluded under this provision. In this instance, the Minister's evidence established serious reasons to consider that the Applicant committed serious non-political crimes.

[15] Finally, the RAD found that the RPD was also clear in its explanation of the differences between the scopes of paragraph 37(1)(a) and Article 1F(b). The RPD noted that the test “for serious reasons to consider is lower than the standard of proof beyond a reasonable doubt that would apply in a criminal proceeding and is lower than the standard of proof on a balance of probabilities that would apply in a civil proceeding” but “is higher than mere suspicion” (*Okolo v Canada (Citizenship and Immigration)*, 2021 FC 1100 at para 26 [*Okolo*]).

[16] Given that the Applicant did not challenge the RPD’s analysis of various exclusion factors, the RAD concluded that the RPD’s decision was correct.

IV. Issue and Standard of Review

[17] The only issue is whether the Decision is reasonable.

[18] I agree with the parties that the merits of the Decision is subject to a reasonableness review. None of the exceptions outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] arise in this matter (at paras 16-17).

A reasonableness review requires the Court to examine outcome of the decision and its underlying rationale to assess whether the decision, as a whole, “bears the hallmarks of reasonableness—intelligibility, transparency, and justification—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at paras 87, 99). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether it falls within the range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86).

V. Analysis

A. *Applicant's Position*

[19] The RAD erred by not respecting the principle of judicial comity. Specifically, the RAD inexplicably decided that the legal issue to be determined at the RPD and RAD is not the same as the one before the ID and IAD. The question at hand before the IAD and the RAD were, in fact, the same, namely: whether or not there are reasonable grounds to believe that the Applicant committed the crime of drug trafficking in the UK before coming to Canada.

[20] The RAD also erred in finding that the burden of proof is different under paragraph 37(1)(a) of *IRPA* than under Article 1F(b) of the Refugee Convention.

B. *Respondent's Position*

[21] The principle of judicial comity does not apply to the exclusion proceedings. First, paragraph 37(1)(a) and section 98 of *IRPA* concern different legal frameworks. Pursuant to paragraph 37(1)(a) of *IRPA*, an individual is inadmissible where “there are reasonable grounds to believe they have engaged in activity as part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence.” Section 98, on the other hand, states that a person described under Article 1F or E is not a Convention refugee, and Article 1F(b) states that the Refugee Convention does not apply to any person where there are serious reasons to consider that the person “has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.” As such, the RAD’s analysis is reasonable within the context of the record before it, as

it found that both the issue and the factual basis of the exclusion proceedings before the RPD and RAD differed from the inadmissibility proceedings before the ID and IAD.

[22] Second, the principle of judicial comity must also be read in light of the statutory scheme. Specifically, pursuant to subsection 162(1) of *IRPA*, each division of the Immigration and Refugee Board [IRB] has “sole and exclusive jurisdiction to hear and determine all questions of law and fact” on proceedings brought before it. Further, paragraph 171(c) of *IRPA* indicates that a decision of a three-member panel of the RAD has, for the RPD and single member RAD panel, the same precedential value as a decision of an appeal court to a trial court. These provisions indicate that the RAD is not bound by separate proceedings before the IAD and the concepts of binding authority and precedent flowing from IRB decisions is limited.

[23] Third, the evidentiary record between the ID and IAD and the RPD and RAD differed. There were separate oral hearings in both proceedings nearly one year apart and the Applicant’s testimony before the RPD supported the conclusion that the Applicant was not operating as an Uber driver when transporting Clan members.

[24] Lastly, the RAD correctly identified the standard of proof to an Article 1F(b) assessment as “serious reasons to consider” (*Jain v Canada (Citizenship and Immigration)*, 2023 FC 539 at para 25 [*Jain*]).

C. *Conclusion*

[25] I agree with the Respondent that, as a whole, the Decision is reasonable. The principle of judicial comity applies to questions of law (*R v Sullivan*, 2022 SCC 19 at para 44). I am persuaded by the Respondent's submissions that the ID/IAD and RPD/RAD were not considering the same question of law. Rather, they considered two different legal frameworks, and as such, the principle of judicial comity has no application in the circumstances.

[26] The ID and IAD proceedings concerned paragraph 37(1)(a) of *IRPA*, which requires that the Minister establish, on a reasonable grounds to believe standard, that the Applicant is inadmissible on the grounds of organized criminality (*Stojkova v Canada (Citizenship and Immigration)*, 2021 FC 368 at para 13; *Wang v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 226 at para 47; *Pascal v Canada (Citizenship and Immigration)*, 2020 FC 751 at para 9). The sole issue on appeal to the IAD was whether the Applicant's activities constituted engaging in activity that is a part of a pattern of criminal activity. The IAD found that the Applicant was a "driver for hire for various activities including non-criminal ones", and by refusing to deliver the drugs himself, he was not "a person acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment".

[27] The Minister's intervention before the RPD, however, was on the basis that the Applicant was excluded from protection under section 98 of *IRPA*, namely Article 1F(b) of the Refugee Convention. This provision required a determination of whether the Minister demonstrated that there were serious reasons to consider that the Applicant committed a serious non-political crime outside Canada before seeking protection. Generally, an act constitutes a "serious" crime

where a maximum sentence of ten years or more could have been imposed had the crime been committed in Canada (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68). Factors relevant to assessing the seriousness of a crime include the elements of the crime, the mode of prosecution, the penalty prescribed, the facts, and the mitigating and aggravating circumstances underlying the conviction (*Jayasekara v Canada (Citizenship and Immigration)*, 2008 FCA 404 at para 44).

[28] Accordingly, I disagree with the Applicant's submission that the question at hand before the ID and IAD and the RPD and RAD was the same, and therefore, the principle of judicial comity applied. I also note that, contrary to the Applicant's submission, that the RAD "inexplicably" decided that the legal issue to be determined was different. The RAD explicitly addressed this point and outlined the differing issues at play in proceedings under paragraph 37(1)(a) and Article 1F(b) of the Refugee Convention.

[29] Conversely, and contrary to the Applicant's submissions, the RAD made no explicit finding regarding the burden of proof under paragraph 37(1)(a) than under Article 1F(b). The RAD may have oversimplified matters when it stated that "[t]he RPD was also clear in its explanation of the differences between the scopes of paragraph 37(1)(a) and Article 1F(b) by referring to *Okolo*", as *Okolo* only refers to the standard of "serious reasons to consider" that applies to Article 1F(b) of the Refugee Convention. *Okolo* does not consider the standard of "reasonable grounds to believe" that applies to paragraph 37(1)(a) of *IRPA*. In any event, this oversimplification is not sufficiently central to render the entire Decision unreasonable, as that the RAD identified the correct standard of proof applicable to Article 1F(b) (*Vavilov* at para 100;

Jain at para 25). I agree with the Respondent that neither the RPD nor the RAD were required to analyze the standard of proof under paragraph 37(1)(a) of *IRPA*.

[30] Accordingly, the Applicant has not met his burden of demonstrating that the RAD's Decision was unreasonable.

VI. Conclusion

[31] The application for judicial review is dismissed.

[32] The parties have not raised a question for certification and I agree that none exists.

JUDGMENT in IMM-8833-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question for certification.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-8833-22

STYLE OF CAUSE: RAZVAN POPOVICI v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JULY 5, 2023

JUDGMENT AND REASONS: FAVEL J.

DATED: JULY 13, 2023

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