Federal Court Cour fédérale

Date: 20231229

Docket: IMM-777-21

Citation: 2023 FC 1769

Ottawa, Ontario, December 29, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

JOSE ANTONIO DA SILVA PARDO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review, brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], seeking to set aside a decision made by the Immigration Division [ID] on January 25, 2021 to issue a deportation order to the Applicant [Decision].

[2] The Applicant is a citizen of Venezuela. After being sponsored by his father, he has been a permanent resident of Canada since August 12, 1998. He has two Canadian born children.

[3] The Applicant seeks to overturn the Decision based on the 13-year long procedural delay between the date he was convicted of possession for the purpose of trafficking a controlled substance (November 21, 2005) or, the date he was sentenced to eleven months less a day custody (March 21, 2007) and the issuance of a subsection 44(1) Report, made under the *IRPA*, on July 8, 2020.

[4] For the reasons that follow, this application is granted.

II. **Legislation referred to in the Decision**

[5] The Decision was made under subsection 45(d) of the *IRPA* and paragraph 229(1)(c) of the *Immigration* and *Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[6] Subsection 45(d) of the *IRPA* states the ID, at the conclusion of an admissibility hearing, shall "make the applicable removal order … against … a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible" [my emphasis].

[7] Paragraph 229(1)(c) of the *IRPR* provides that "[f]or the purpose of subsection 45(d) the applicable removal order is … a deportation order, in the case of a permanent resident inadmissible under subsection 36(1) of the IRPA."

[8] In this case, the subsection 44(2) Report found the Applicant inadmissible under paragraph 36(1)(a) of the *IRPA* on the ground of serious criminality for having been convicted in Canada of an offence under an Act of Parliament punishable by a term of imprisonment of at least 10 years, or for which a term of imprisonment of more than six months had been imposed.

[9] At the time of the Applicant's conviction on November 21, 2005, subsection 64(1) of the *IRPA* provided, in the case of a permanent resident, that no appeal to the Immigration Appeal Division [IAD] was available if the permanent resident was inadmissible with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

[10] As of June 19, 2013, the *Faster Removal of Foreign Criminals Act, SC 2013, c 16,* [*FRFCA*] received Royal Assent. It changed the grounds for serious criminality in subsection 64(1) of the *IRPA* to "at least six months" instead of "at least two years". The ID found that as the Applicant was sentenced to more than six months in prison, and he did not appeal his sentence, he was inadmissible. As a result, at the time of the subsection 44(1) Report, the Applicant's pre-existing right to appeal to the IAD was no longer available to him.

III. **The Decision**

[11] The Member's oral decision was relatively brief, the essence of it being as follows:

> … both you and your counsel have expressed your concerns with the fact that after 2012 -- actually, specifically after 2013, the law had changed in light of the Faster Removals Act of Foreign Nationals, which is Bill C [*sic*] for you.
>
> Now, I do acknowledge the arguments that are being made and the concerns that you have, however, I -- I do also acknowledge that these are very unfortunate circumstances and that you have --

> conviction -- that dates back to 2005, and a sentence which is less than two years that was imposed upon you in 2007.
>
> However, I have to look at the report and the referral that is before me. As well as, I have to apply the law that is before me at the time of this referral, and I note that this is a referral that was made in October of 2020, and we are today, January 25th of 2021.
>
> Therefore, I have to look at the relevant and current law when making my decision, and with that in mind, I will turn my attention to my decision now. [My emphasis.]

[12] The Applicant argues that both he and his representative before the ID raised abuse of process as an argument. While the phrase "abuse of process" was not explicitly stated, he submits that, in substance, their concerns with the legislative amendments and unfair delay were clearly put to the Member.

[13] The Respondent argues that this is a mischaracterization of the interaction. The Respondent suggests that these were merely concerns arising from misunderstandings of law for which the Applicant's representative sought clarification of how their client would be impacted by the legislative amendment.

[14] After reviewing the record, and considering the foregoing submissions, I find it clear that both the Applicant and the consultant were asking the ID to clarify why the Applicant was caught by the change in the law.

[15] Accordingly, I am unable to find that the Applicant was clearly raising an abuse of process argument.

IV. **Issues**

[16] The Applicant raised four issues:

1. Whether abuse of process was raised before the ID.
2. Whether the ID has jurisdiction to consider abuse of process.
3. Whether a delay between the conviction and the subsection 44(1) Report, can be considered by the ID in assessing whether there has been an abuse of process.
4. Whether the doctrine of legitimate expectations applies.

V. **Standard of Review**

[17] Abuse of process and whether the Applicant had a legitimate expectation each raise a question of procedural fairness. In considering issues of procedural fairness, the reasonableness standard of review does not apply. Technically, whether the duty of procedural fairness has been met does not require a standard of review analysis, although it is often referred to as a correctness review. The ultimate question to be answered by a reviewing Court when considering procedural fairness is whether the Applicant knew the case to be met and had a full and fair chance to respond: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [*CPR*] at para 56.

[18] The party challenging a decision has the burden to show it is unreasonable. To do so, it must show that the decision contains a serious flaw that is more than merely superficial or peripheral to the merits of the decision: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 100.

[19] The scope of discretion engaged by an Officer or the Minister to respectively write and refer a section 44 report is reviewed on the standard of reasonableness: *XY v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 831 at para 32, citing *Vavilov*.

[20] Reviewing courts must ordinarily refrain from deciding the issue that was before the decision maker and must respect the decision maker's role and expertise: *Vavilov* at para 83.

[21] The decision maker may assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court however must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125.

VI. **Was Abuse of Process raised at the ID?**

[22] Whether the Applicant or their immigration consultant raised abuse of process at the ID is the critical issue that is contested between the parties.

[23] At the ID hearing, the Applicant was represented by the immigration consultant who submitted the documents for the hearing. During the hearing, the consultant made submissions to the ID. The Respondent noted the submissions contained no mention of an allegation of abuse of process. Rather, the Applicant indicated he did not understand why the 2013 change in the definition of serious criminality in paragraph 36(1)(a) applied to him when his conviction was from 2005.

[24] The Applicant argues that both he and his representative before the ID raised abuse of process as an argument. While "abuse of process" was not explicitly stated, he says that, in substance, their concerns about the legislative amendments and unfair delay were clearly put to the Member.

[25] The Respondent argues that this is a mischaracterization of the interaction. The Respondent submits that these were merely concerns arising from misunderstandings of the law and the Applicant's representative sought clarification of how their client would be impacted by the legislative amendment.

[26] The Applicant told the ID that he "did everything possible to make sure my conviction in 2007 would be less than two years so I could keep an appeal but until 2020, neither CBSA nor Canadian immigration told me my immigration status was going to be taken. I know I have done wrong but I was really hoping I could tell them all about my life and not just the crime I did."

[27] In this application, the Applicant submits that he and his representative were not confused about the law, they were concerned about the delay between his conviction in 2005 and the change to the legislation made in 2013.

[28] The Applicant notes that because the passage of the *FRFCA* amended subsection 64(1) of the *IRPA*, he lost his pre-existing right to appeal to the IAD as the test for serious criminality was reduced from being defined as punishment in Canada for a term of at least two years to a term of at least six months.

[29] In this application, the Applicant submits the delay in rendering the subsection 44(1) Report was an abuse of process which he raised before the ID but which they did not address.

[30] In that respect, the transcript of the audio recording of the ID hearing shows that at the end of the ID hearing the Applicant said:

> Well, the concern that I have is -- is to -- when I was convicted of the charges -- like, the law that time was that any sentences that were two years plus a day will be a concern to immigration.
>
> And if -- if I'm not mistaken, the law change [*sic*] on 2012 to six months.
>
> So, my concern is in that time when I was convicted of the -- of charges, there was a -- there was a two year plus a day. You would -- you would need to have a two years plus a day conviction in order to have problems with immigration. So, I'm not understanding how, now, after -- I believe, it's 13 years, when I'm 14, how is there an issue to you guys and offence where -- when I was convicted the law was different than what it is now. [My emphasis.]
>
> Like -- so, that -- that's -- that's where -- that's where my concern comes in. As you know, prior to 2012, is immigration laws that if -- if you were happen to have any convictions of two years plus a day, that's when you would have an issue with immigration.

[31] After the Applicant answered a few questions from the ID, his immigration consultant made the following submissions to the ID:

> So, the only thing that I do want to go ahead and talk about in regards to this specific conviction to which the -- this report at s.44(1) has commenced, is the fact that the appellant, indeed, was only sentenced to 329 days, and that was not a conviction that was longer than two years.
>
> And at the time that this conviction took place, which was March 21st, 2007, it was prior to the change of the *Foreign Nationals Act* [*sic*].

> So, I do ask for some clarification in regards to why this was put forth.
>
> My understanding was that matters that had been given a sentence of two years or longer, are to be inadmissible.
>
> So, that is probably just a confusion that I might file [*sic*] from myself -- my -- the appellant or [inaudible] you why this was started after so long. [My emphasis.]
>
> And secondly, having him be so close to the date of applying for a record suspension, and having the opportunity of having this conviction, in fact, be removed and not being able to be placed as a leave in [*sic*] for removal from Canada.
>
> That's pretty much what I have to say in regards to the opposing.

[32] Clarification of the change in the law is not something the ID is charged with providing to an applicant. The ID did indicate though that "I have to look at the relevant and current law when making my decision" which, in effect, answered the Applicant's question.

VII. **Was there a Legitimate Expectation that a particular administrative process would be followed?**

[33] A legitimate expectation arises when a government official makes "clear, unambiguous and unqualified" representations within the scope of their authority to an individual about an administrative process that the government will follow: *Canada (Attorney General) v Mavi*, 2011 SCC 30 [*Mavi*] at para 68.

[34] Such representations will be considered sufficiently precise for purposes of the doctrine of legitimate expectations if, had they been made in the context of a private law contract, they would be sufficiently certain to be capable of enforcement: *Mavi* at para 69.

[35] In addition, an important limit on the doctrine is that it cannot give rise to substantive rights. The Court may only grant appropriate procedural remedies to respond to a legitimate expectation: *Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36 (CanLII), [2013] 2 SCR 559 at para 97 [emphasis in original.]

[36] As noted above, the doctrine of legitimate expectations does not create substantive rights; it is merely a part of the rules of procedural fairness. Where the doctrine is applicable, it can create a right to make representations or to be consulted, as occurred in the case of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at page 840.

[37] The Applicant alleges that he did not receive any notice that his 2007 sentence might be a problem. The relevant length of sentence of concern in 2007 was two years. It was only after 2013 that the Applicant's sentence was captured by paragraph 36(1)(a) of the *IRPA*.

[38] Justice Décary observed in *Cha v Canada (Minister of Citizenship and Immigration)* (F.C.A.), 2006 FCA 126, [2007] 1 FCR 409 [*Cha*] at paragraph 46, that permanent residents may have the opportunity to challenge both the immigration officer's report and the Minister's delegate's decision before the ID. However, in either case, where criminality is alleged, the scope of the discretion afforded the officer and the Minister is very limited, reflecting Parliament's intention that non-citizens who commit certain types of crimes are not to remain in Canada.

[39] In *Hernandez v Canada (Minister of Citizenship and Immigration)* 2005 FC 429 [*Hernandez*] at paragraph 47, Justice Snider found fairness required that the subject of a subsection 44(1) inquiry called to an interview: (1) be advised of the purpose of the interview; (2) be allowed to make submissions; and (3) be given a copy of the officer's report. Justice Snider further observed that in a case involving serious criminality paragraph 45(d) of the *IRPA* requires the ID to "make the applicable removal order against a … permanent resident, if it is satisfied the … permanent resident is inadmissible; there is no room for any other finding."

[40] The Federal Court of Appeal [FCA] concluded in *Cha*, per Décary J.A., that the wording of sections 36 and 44 of the *IRPA* and of the applicable sections of the Regulations do not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it: *Cha* at para 35.

[41] In *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 [*Torre*], Madam Justice Tremblay-Lamer held, when considering the authority of the ID under subsection 44(2) of the *IRPA*, that "for the delay to qualify as an abuse of process, it must have been part of an administrative or legal proceeding that was already under way.": *Torre* at para 30.

[42] In this matter, the delay pre-dated the subsection 44(1) and (2) reports by 14 years and 8 months. As a result, for the reasons set out above in *Torre*, it did not qualify as an abuse of process.

[43] In *Awed v Canada (Minister of Citizenship and Immigration)*, 2006 FC 469 at paras 11 and 16, Mr. Justice Mosley held that "although the decision is highly important to the individual, it is also notable that the language of the statute in no way encourages a legitimate expectation that a wide range of procedural guarantees will be provided. Applying the test in Baker (supra) having in mind the nature of the decision as so concisely defined by Phelan J. in Correia (supra); namely, whether a conviction was made and what sentence was imposed; the clear implication emerges that a relatively low level of procedural fairness is owed when the initial s. 44(1) report is being prepared."

[44] Justice de Montigny determined in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*] at paragraph 24, that once a referral is made to the ID "the options of the ID appear to be very limited since it "shall make" a removal order if satisfied that the foreign national or the permanent resident is inadmissible, it would appear that the only discretion (albeit very limited) to prevent a foreign national or permanent resident from being removed rests with the immigration officer and the Minister or his delegate. As a result, I am prepared to accept that this factor favours a heightened level of procedural fairness."

[45] In *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*] at paragraph 133, the Supreme Court opined "delay in itself is not an abuse of process or a violation of the duty to act fairly."

[46] The leading case, from which many of the principles above are derived, is *Blencoe*. In *Blencoe*, the Supreme Court of Canada noted that delay on its own [my emphasis] will not be sufficient to warrant a stay of proceedings:

> [101] In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: *R. v. L. (W.K.)*, 1991 CanLII 54 (SCC), [1991] 1 S.C.R. 1091, at p. 1100*; Akthar v. Canada (Minister of Employment and Immigration)*, 1991 CanLII 13611 (FCA), [1991] 3 F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice, which results from an unacceptable delay.
>
> [My emphasis.]

[47] On considering the arguments and the facts as established above and taking into account the cases referred to, I do not find the delay in this case between the writing of the subsections 44(1) and (2) reports and the hearing by the ID was so lengthy as to be one of the extremely rare "clearest of cases" that constitute an abuse of process or that would prove significant prejudice to the Applicant.

VIII. **Proposed Questions for Certification**

[48] Prior to the hearing of this application, the Applicant submitted a letter of notice to the Court of his intention to propose the following questions for certification:

1. What is the applicable standard of review of the Immigration Division's jurisdiction to decide a stay of proceedings for abuse of process?
2. What is the relevant time period the Immigration Division can consider in assessing an abuse of process argument in a criminal removal order case? Is it the period from a conviction to the admissibility hearing or limited to the period between the decision to prepare the section 44 report to the referral for the hearing?

[49] The Applicant submits these questions are "serious" and of "general importance" and are dispositive of this application, as required by subsection 74(d) of the *IRPA*.

[50] The Respondent submits that it is not appropriate to certify these questions as the ID did not understand that the Applicant was making an abuse of process argument. For example, the Member did not opine on Abuse of Process or decline jurisdiction.

[51] Also, the Respondent notes that no motion was made, addressed or recognized for adjourning the hearing. I note though that the Applicant's consultant sought an adjournment so the Applicant could resolve his pending criminal matters after which "he could finalize the admissibility hearing."

IX. **The Test for Certification of a Question**

[52] It has been held by the FCA in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 23 (citing *Kunkel v Canada (Minister of Citizenship and*

Immigration), 2009 FCA 347 at paras 12-14; and *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paras 11-12), that for this Court to certify a question, there must be a serious question of general importance that transcends the interests of the parties to the litigation. The question must also be dispositive of the matter: *Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21 [*Lai*] at para 4; *Kunkel v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347 at paras 12-14; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 [*Zazai*] at paras 11-12.

[53] In addition to being dispositive of the appeal, the certified question must have been raised and decided by the court below and have an impact on the result of the litigation: *Zazai* at paras 11-12; *Lai* at para 4.

[54] A question that does not transcend the decision in which it arose should not be certified: *Boni v Canada* (*Minister of Citizenship and Immigration*), 2006 FCA 68 at para 10; *Zhang v Canada* (*Minister of Citizenship and Immigration*), 2013 FCA 168 at para 9.

X. **Conclusion**

[55] The Applicant has put forward the argument that this matter should be returned to the ID for further examination of the abuse of process issue as the ID erred in not acting on it.

[56] Before the ID, the Applicant and his representative highlighted their concern with the delay in CBSA issuing the section 44 Report and, following *Granados*, raised it again in the context of this judicial review of the deportation order issued following the ID hearing.

[57] As the ID failed to entertain the abuse of process concern, the CBSA was not required to respond to the delay and whether the delay was justified. There was also no evidence before the tribunal when the CBSA "decided" to pursue a section 44 report as opposed to formally executing the section 44 report.

[58] The Applicant submits that without that information, it cannot be said that the delay was *not* an abuse of process as the delay itself was not and could not have properly been examined.

[59] For all the reasons set out above, I will allow this application and return the Decision to the ID for redetermination of the abuse of process issue. Pending that redetermination, any removal of the Applicant is stayed.

JUDGMENT IN IMM-777-21

THIS COURT'S JUDGMENT is that:

1. This application is granted and this matter is returned to the ID for redetermination of the abuse of process issue.

2. Pending such redetermination, deportation of the Applicant is stayed.

3. There is no question for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-777-21
STYLE OF CAUSE:	JOSE ANTONIO DA SILVA PARDO v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 12, 2022
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	DECEMBER 29, 2023

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