Federal Court Cour fédérale

Date: 20170501

Docket: IMM-4124-16

Citation: 2017 FC 427

Ottawa, Ontario, May 1, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MEDZIT ISMAILI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [Act or IRPA], of an Immigration Division [ID]'s September 12, 2016 negative decision [Decision], finding that there was no abuse of process, that the Applicant is inadmissible in Canada, and ordering removal accordingly. For the reasons explained below, I am dismissing this judicial review.

[2] The Applicant is a 60-year-old former Canadian citizen and current foreign national who was born in Yugoslavia. He became a Canadian permanent resident in 1983, and a citizen in 1987, but failed to inform Canadian officials of a past 1980 armed robbery conviction in the United States.

[3] In 1999, after the 1980 conviction was discovered by Canadian authorities, the Applicant was made aware of the Minister of Citizenship and Immigration [Minister]'s intent to revoke his citizenship. Citizenship revocation proceedings ensued, with the Minister filing a statement of claim in Federal Court in 2006. Pursuant to a consent agreement including Minutes of Settlement, the Court held, and the Applicant agreed, that he obtained his Canadian citizenship by knowingly concealing his 1980 conviction. This allowed the Minister to recommend citizenship revocation before the Governor-in-Council [GIC], which ultimately occurred some years later: on December 5, 2013, the Applicant received notification by way of letter that his citizenship had been revoked. Therefore, in sum, the citizenship revocation process lasted a total of 14 years (1999-2013). It is noted that the Applicant did not seek redress before this Court of this lengthy part of the process, which forms the majority of the alleged abuse of process delays now at issue (14 of 17 years).

[4] After his revocation, the Applicant ceased to be Canadian and became a foreign national, making him subject to IRPA. Consequently, a section 44 report was made and referred to the ID, leading to the 2016 admissibility process under sections 44-45, which is the subject of this judicial review.

[5] Before the ID, the Applicant argued that the 17-year delay between the first citizenship revocation notice in 1999 and the admissibility proceedings before the ID in 2016 amounted to an abuse of process warranting a stay of proceedings. The ID considered this argument, but relying on *Torre v Canada (Citizenship and Immigration)*, 2015 FC 591 at para 32 [*Torre FC*], held that it could only consider the delay in time from which the decision was made to prepare the section 44 report, a 2 year period. The ID, relying on the Supreme Court's leading case in *Blencoe v British Colombia (Human Rights Commission)*, 2000 SCC 44 [*Blencoe*], found that this delay in the admissibility process, while raising "serious doubts with regards to the efficacy of the Agency entrusted with Canada's Immigration enforcement program", did not amount to an abuse of process. As a result of facts agreed to, the ID found that the Applicant was inadmissible in Canada for serious criminality and ordered removal. Those findings are not challenged by the Applicant.

[6] The Applicant raises two issues, both of which relate to the ID refusing to issue a stay of proceedings based on delays within the revocation proceedings. First, the Applicant argues that the ID should have considered the full 17 year period, and not only the last two years of the process from the time that the subsection 44(1) report was prepared, to its subsection 44(2) referral to the ID. Second, the Applicant argued that the ID erred in finding that the lengthy process was not abusive, considering the medical evidence on the record proving prejudice in the form of chronic depression and other suffering (including of the family).

II. Analysis

[7] The Court will first consider whether or not the ID had jurisdiction to consider the abuse of process arguments underlying the remedy sought, which was a stay of proceedings, and second, whether an abuse of process occurred on the facts and the law. The parties agree that the applicable standard of review is correctness (*Torre FC* at para 17).

A. *The ID's jurisdiction to grant a permanent stay of proceedings based on an abuse of process for unreasonable delays*

[8] The issue of whether the ID has jurisdiction to grant a stay of proceedings for abuse of process due to unreasonable delays has been addressed by our Court in *Torre FC* at paras 18-25, where Justice Tremblay-Lamer held that the ID did not err when it declined to hear an application for stay of proceedings on jurisdictional grounds. After reviewing two key cases she identified regarding the Court's refusal to allow the ID to consider stay of proceeding motions for abuse of process (*Hernandez v Canada (Citizenship and Immigration)*, 2005 FC 429 [*Hernandez*] and *Wajaras v Canada (Citizenship and Immigration)*, 2009 FC 200 at para 11 [*Wajaras*]), as well as the Supreme Court's *Blencoe*, she concluded the following at paragraphs 24 and 30:

> Allowing the ID, therefore, to examine the issue of whether the delay before the admissibility hearing was excessive would amount to giving it the jurisdiction to examine the individual's ability to make a full answer and defence and the consequences of the removal order for the individual, issues that are at the centre of a debate on unreasonable delay. Following this review, the ID would then have to examine whether it should grant a stay of the proceeding it is obliged to hold quickly.
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> […]
>
> It is my opinion 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.

[9] For the reasons that follow, I see no reason to depart from the prevailing view of this Court in *Torre FC* and the case law cited therein, as well as that of the Federal Court of Appeal, which declined to address the certified question and dismissed the appeal in *Torre v Canada (Citizenship and Immigration)*, 2016 FCA 48 [*Torre FCA*]).

[10] In *Torre*, the applicant was a permanent resident in Canada, arrested for drug trafficking in 1996. Seventeen years later, in 2013, two section 44 reports were prepared and referred to the ID for an admissibility hearing. The ID refused to hear the applicant's motion for a stay of proceedings for unreasonable delay, holding that it lacked jurisdiction to do so. That said, the ID noted that the lapse of time was not fatal to the conduct of the hearing anyway, because the applicant's recollection of the 1996 arrest was excellent. The ID found the applicant to be inadmissible and ordered removal.

[11] Upon judicial review, it was argued that the ID erred in its decision to dismiss the applicant's stay of proceedings motion for unreasonable delays on jurisdictional grounds. Justice Tremblay-Lamer found that, in light of the IRPA's legislative framework, and in spite of its authority to consider questions of law (see IRPA, subsection 162(1)), the ID has little discretion in that it must "hold an admissibility hearing quickly, and if it finds the person inadmissible, it must make a removal order" (at para 22, relying on *Hernandez)*. As also mentioned above, she countenanced Justice Barnes' holding in *Wajaras* that the ID hearing is not the appropriate forum to consider compassionate and humanitarian-based arguments.

[12] Two cases released after both *Torre FC* and *FCA* further support the proposition that the latter remains good law regarding the ID's very limited ability to consider abuse of process.

[13] First, in *Kazzi v Canada (Citizenship and Immigration)*, 2017 FC 153 at para 53 [*Kazzi*], Justice Gascon wrote:

> I note that it is not the ID's role to determine if the process leading to the inadmissibility report was procedurally unfair, as the only question for the ID is whether the person is inadmissible, and the ID has "no other option than to make a removal order against the foreign national or the permanent resident i[f] he or she is inadmissible" […]

[14] Second, in *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at para 24 [*Sharma*], Justice de Montigny held that:

> Considering that, once referred, 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, <u>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 [during the preparation and/or referral of the s. 44 report]</u> [emphasis added].

[15] He also noted at para 25 that an ID removal order is not the end of the road in the deportation process:

> It is noteworthy that preparing a report under subsection 44(1) and referring it to the ID pursuant to subsection 44(2) does not necessarily entail removal. For instance, one may apply to the Minister for an exemption on humanitarian and compassionate grounds (IRPA, s. 25) upon the issuance of a deportation order, an opportunity which the appellant availed himself of. A pre-removal risk assessment (IRPA, s. 112) is another option available in such circumstances. Both of these processes allow for the provision of additional submissions that will be taken into account by the

> particular decision-maker. The subsection 44(1) report, the subsection 44(2) referral, and the ID's removal order are thus not necessarily determinative of whether the appellant will be removed from Canada, given the possibility of seeking relief via other provisions of the Act [emphasis added].

[16] It is therefore important to keep in mind that after an inadmissibility report is prepared and referred under section 44, the ID's sole purpose is to determine whether the permanent resident or foreign national is inadmissible, and, if so, order removal per subsection 45(d). If the ID confirms inadmissibility (in this case, for serious criminality) under subsection 45(d), IRPA allows for no appeal before the Immigration Appeal Division. Reading in a broader function for the ID would run counter to the role that Parliament assigned to it (*Torre FC* at para 25).

[17] The Applicant nevertheless relies on a wide range of administrative decisions from the ID and case law from this Court in support of his contention that the ID has jurisdiction to consider abuse of process arguments. The Applicant argues that *Torre FC* should be revisited because its analysis is brief and other decisions from this Court have concluded differently.

[18] I disagree, seeing no flaws in Justice Tremblay-Lamer's reasoning. These administrative decisions are not binding on this Court and in any event they were rendered pre-*Torre*, *Sharma* and *Kazzi*. The same is true of certain other Federal Court decisions presented by the Applicant: they have either been surpassed by the case law, or are distinguishable on their facts.

[19] For instance, first, in *Magalong v Canada (Citizenship and Immigration)*, 2014 FC 966 at para 53, Justice Gagné stated in obiter that the applicant could seek "from the ID a new stay of that hearing until he is no longer on probation". There, the Applicant sought a *mandamus* writ to

allow him to swear his citizenship oath notwithstanding ineligibility to take that oath resulting from a criminal conviction. Clearly, the Court's obiter statements arise in an entirely different context.

[20] Second, the Applicant raises *Montoya v Canada (Attorney General)*, 2016 FC 827, a case where the applicant challenged a GIC decision revoking his citizenship on the basis of old convictions in the United States through a subsequent fingerprint match. In a consent order (similar to this case), the Applicant agreed that the Minister may proceed to report to the GIC recommending citizenship revocation. The Court found that there was no evidence of significant prejudice arising from the long administrative delays (also many years, like in the present case), and any such prejudice would only materialize at the point of being deported, a fact which had not yet been determined. *Montoya* cited *Blencoe* and certain other cases, but not *Torre*, *Sharma* and *Kazzi*. That was likely because, in the case of *Torre*, the application came at a different juncture (challenging the GIC recommendation), unlike in the present case, and with respect to *Sharma* and *Kazzi*, before they were issued. In sum, *Montoya* does not speak to the ID's jurisdiction to consider a remedy for abuse of process, and therefore provides little assistance to the Applicant's position, as it arose in entirely different administrative proceedings than the present case.

[21] Third, the Applicant relies on *Chabanov v Canada (Citizenship and Immigration)*, 2017 FC 73 at para 85 [*Chabanov*], a judicial review of a citizenship revocation, where Justice Strickland found that the Applicant's section 7 *Charter* arguments were premature. In *Chabanov*, the Applicant's section 7 submissions included the argument that removal would place the

Applicant's life, liberty and security at risk (at para 32). Therefore, the constitutional challenge was not limited to the delay; rather, it was interwoven with removal. Justice Strickland consequently found the section 7 arguments to be premature, as the inadmissibility process had not commenced and, more importantly, it was unclear whether a report would be prepared and referred to the ID thereafter. To say that *Chabanov* stands for the proposition that abuse of process for unreasonable delay arguments should only be considered at time of removal, thus giving the ID the jurisdiction to do so, is a mischaracterization of that decision.

[22] The final two cases on which the Applicant relied in rejecting the *Torre* line of reasoning are *Chambers v Canada (Citizenship and Immigration)*, 2016 FC 1407 at paras 2-3 [*Chambers*], and *Clare v Canada (Citizenship and Immigration)*, 2016 FC 545 [*Clare*]. However, neither decision applies to the present case.

[23] *Chambers* addressed three related judicial reviews brought before the Federal Court: (i) the officer's decision to prepare a report pursuant to subsection 44(1) of the IRPA to the Minister of Public Safety and Emergency Preparedness' delegate; (ii) the decision of the Minister's delegate pursuant subsection 44(2) of the IRPA to refer the applicant to an admissibility hearing before the ID; and (iii) the ID's removal order from Canada. The preliminary issue before the Court was whether leave was separately required for each administrative decision, or if leave granted for the ID's removal order (administrative decision (iii)) allowed the Court to consider administrative decisions (i) and (ii). Justice Bell found that three separate leave applications were not required. A similar approach was taken in *Clare*. Thus, neither case is helpful to the

Applicant, focusing on a procedural aspect of how applications arising from section 44 and 45 inadmissibility decisions should properly be brought before the Court.

[24] In short, I find the Applicant's case law summarized above to be distinguishable; none of the cases speaks to the ID's (very limited) discretion to consider abuse of process arguments for the purposes of granting a stay of proceedings, or to have commented on the underlying purpose of section 45 and the ID's resulting role, as did *Torre, Kazzi*, and *Sharma.*

B. *Correctness of the ID's decision to find no abuse of process*

[25] At the hearing, the Applicant argued that by upholding the ID's decision, and given the case law he raises, he is in a no-win, catch-22, situation. That is because, according to him, the case law instructs that one must wait until deportation, and it is premature to raise abuse of process arguments earlier in the process because they would be rejected, such as in *Montoya* and *Chabanov*.

[26] I do not accept that those cases prevent the raising of the abuse of process argument earlier in the process. As explained, those cases failed for different reasons. One only has to look to a case such as *Canada (Citizenship and Immigration) v Parekh*, 2010 FC 692 [*Parekh*], where the abuse of process arguments that failed in *Torre FC* were successful. This is, at least in large part, because they were made earlier in the process at the time of citizenship revocation. In *Parekh*, the Applicant met all four grounds of *Blencoe* and the citizenship revocation proceedings were stayed. Justice Tremblay-Lamer, who later wrote *Torre FC*, held in *Parekh* at para 56:

> In these circumstances I find that the delays which have marred these proceedings are inordinate and indeed unconscionable. Nothing in the circumstances of the case justified them. They are not the consequence of the complexity of the case or of any dilatory tactics employed by the Defendants, but of bureaucratic indolence and failure to give the matter the attention it deserved given the rights and interests at stake. The evidence clearly establishes that the Defendants had repeatedly admitted to the misrepresentations and that all the information necessary to proceed with the revocation of their citizenship was already available to CIC.

[27] In the present case, the Applicant chose not to bring a similar application when the bulk of the delays took place: most of the time elapsed during the course of the citizenship revocation, from the time of the notice in 1999, until the revocation at the end of 2013.

[28] The ID held that it was too late to now challenge those 14 years: the train had already left the station, and for all the reasons explained above, it was too late for the ID to bring it back. It was simply outside of the scope of its limited discretion. Indeed, by the time the Applicant was before the ID, he was no longer a Canadian citizen, but rather a permanent resident who had been found inadmissible, and it was that determination (along with any attendant delays), that was within the purview of the ID.

[29] Turning to *Torre FC* once again, Justice Tremblay-Lamer, relying on Justice Bastarache's reasons in *Blencoe* at paras 120 and 132 and Justice Nadon's in *Canada (Minister of Citizenship and Immigration) v Katriuk*, [1999] 3 FC 143 at para 23, held that "the only delay this Court should consider in order to determine whether there was an abuse of process is the delay between the decision made by the Minister to prepare a report under section 44 of the

IRPA and the ID's admissibility finding. Any other period of time should not be used to calculate an unreasonable delay resulting in an abuse of process" (*Torre* at para 32).

[30] To that end, I agree that when this Court must decide whether an abuse of process merits a stay of admissibility proceedings before the ID, the clock starts when the immigration officer decides to prepare a report under subsection 44(1) of IRPA (*Torre* at para 32). Here, the time between the decision to prepare the section 44 report was made and the hearing before the ID was approximately two years. While a two-year delay cannot be considered speedy and indeed, as noted by the ID, may reflect poorly on the Minister, the delay does not taint the entire admissibility process or damage the public interest of fairness, nor am I convinced based on the evidence on the record that the two-year delay viewed in isolation was the cause of the Applicant's health-related issues. Therefore, the threshold of prejudice, in the relevant two year period, has not been established. Indeed, it is important to highlight that the Supreme Court in *Blencoe* at para 120 held that abuse of process findings will only be made in the clearest of cases and rarest of circumstances. This applies equally to the evaluation of both the quantum of time, and the level of prejudice suffered, both of which in this case were neither the clearest or rarest of circumstances.

III. Conclusion

[31] I find that the ID made no errors in its decision to refuse to grant a stay of proceedings, because (i) no abuse of process occurred – at least during the period which was properly before the Board, and (ii) the Applicant does not challenge the ID's inadmissibility findings. While I sympathize with the Applicant, I am simply unable to find that his circumstances meet the test

set out in *Blencoe*, and therefore cannot conclude that they amount to an abuse of process. Consequently, the removal order made against him stands. This application for judicial review is dismissed. No questions were submitted for certification, which I agree is the appropriate position given the factual backdrop.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. Counsel presented no questions for certification and none are certified.
3. No costs will be ordered.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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