Federal Court  Cour fédérale

Date: 20190823

Docket: IMM-3480-18

Citation: 2019 FC 1092

Ottawa, Ontario, August 23, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

ANTHONY MARCUSA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] On July 13, 2018, the applicant, who is an American citizen, and his common-law partner Lauren Bovaird, who is Canadian, attempted to enter Canada from the United States at the Fort Erie Port of Entry. They were returning to Toronto by car after visiting members of the applicant's family in Delaware. The Canada Border Services Agency [CBSA] officer who questioned the applicant at the border formed the opinion that the applicant was inadmissible

because he was attempting to enter Canada with the intention of residing here permanently but he did not have the requisite visa. The officer wrote up a report to this effect under section 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Another CBSA officer, acting as a delegate of the Minister of Public Safety and Emergency Preparedness, reviewed the report under section 44(2) of the *IRPA.* The Minister's delegate interviewed the applicant and Ms. Bovaird and considered other information. He concluded that the inadmissibility report was well-founded and made an exclusion order against the applicant under section 228(1)(c)(iii) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]. The order was effective for a year.

[2] The applicant applies for judicial review of the exclusion order under section 72(1) of the *IRPA.* He argues that the order was made in a procedurally unfair manner and that it is unreasonable. For the reasons that follow, I do not agree with either submission. The application for judicial review will therefore be dismissed.

II. BACKGROUND

[3] The applicant was born in Columbia, Maryland in 1985. When he was still a child, he and his family moved to a town near Buffalo, New York. After completing high school there, in September 2003 the applicant took up undergraduate studies at the University of Toronto. He graduated in June 2007 with an Honour's Bachelor of Arts degree. The applicant had valid study permits throughout the time he was a student in Canada.

[4] After graduating, the applicant obtained a Post-Graduate Work Permit, which was valid from September 2007 until August 2008. He remained in Canada working to establish himself as a freelance journalist. The applicant decided to return to school for a few years and, once again, he obtained the necessary study permits. The last of these expired in January 2011.

[5] Despite the expiry of his visa, the applicant remained in Canada and continued to work as a freelance journalist. He applied twice for permanent resident status in Canada but both applications were refused, evidently because the applicant did not meet the applicable criteria for the programs under which he applied. He continued to live and work in Canada.

[6] The applicant and Ms. Bovaird met in Toronto in October 2016. A short time later, they became romantically involved. They began to live together in Toronto in March 2017.

[7] The applicant continued to work as a freelance journalist based in Toronto. Despite having had more or less steady employment for several years, he did not file tax returns in the United States (or anywhere else). He returned to the United States from time to time to visit with friends and family or to travel.

[8] When first questioned at the Fort Erie Port of Entry on July 13, 2018, the applicant informed the CBSA officer that he was seeking entry to Canada as a visitor and that he would be staying with his girlfriend (Ms. Bovaird) in Toronto. Upon further questioning, however, the applicant confirmed to the officer that he had been living and working in Toronto. When asked if he was "currently living" in Canada, the applicant replied "Yes." When asked where he was

currently living, he gave the address where he and Ms. Bovaird lived in Toronto. The applicant could not provide any evidence that he actually resided in the United States. He stated that he knew he needed to apply for permanent residence in order to live in Canada, that he intended to make an application, but he had not done so.

[9] The CBSA officer concluded that the applicant was attempting to enter Canada with the intention of residing here permanently. Lacking the requisite visa, this put the applicant in contravention of section 20(1)(a) of the *IRPA* (read together with section 6 of the *IRPR*). This, in turn, made the applicant inadmissible to Canada under section 41(a) of the *IRPA*. The officer wrote up a report under section 44(1) of the *IRPA* stating his conclusions and the basis for them. The officer recommended that an exclusion order be made.

III. DECISION UNDER REVIEW

[10] The Minister's delegate had two determinations to make in reviewing the inadmissibility report under section 44(2) of the *IRPA*. The first was whether the report is well-founded. The second was whether, if the report is well-founded, an exclusion order should be made under section 228(1)(c)(iii) of the *IRPR* (this being the applicable type of removal order for a foreign national who is inadmissible to Canada under section 41 of the *IRPA* for having failed to establish that they hold the requisite visa).

[11] The Minister's delegate found that the applicant was attempting to enter Canada with the intention of residing here permanently. In his view, the applicant had admitted as much to the first CBSA officer and had confirmed this to the Minister's delegate in the interview. The

applicant also acknowledged that he had not applied for a permanent resident visa before attempting to enter. On this basis, the Minister's delegate concluded that the section 44(1) report was well-founded.

[12] The Minister's delegate then considered whether an exclusion order should be issued. He recognized that this was a matter within his discretion. He acknowledged that making the order would have an adverse impact on the applicant, on Ms. Bovaird and on their relationship. However, he concluded that an exclusion order was warranted despite this because of the applicant's "long-term and continuous disregard for Canada's immigration laws and regulations by remaining and working [in Canada] without authorization."

IV. STANDARD OF REVIEW

[13] The jurisprudence concerning how I should approach the issues raised in this application is well-settled.

[14] With respect to procedural fairness, I must determine for myself whether the process the Minister's delegate followed satisfied the level of fairness required in all the circumstances (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54). If it did, there is no basis to intervene on this ground.

[15] With respect to the decision to issue the exclusion order, it is reviewed on a reasonableness standard. I owe deference to the Minister's delegate because of the largely fact-

based nature of the decision (*Eberhardt v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 1077 at para 18). I should examine the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). I may intervene on this ground only if the result or the reasons given, viewed in the context of the record, fail this test. It is not for me to reweigh the evidence or to substitute my own view of a preferable outcome (*Khosa* at paras 59 and 61).

V. ANALYSIS

A. *The admissibility of the applicant's affidavit*

[16] The applicant filed an affidavit (sworn on September 21, 2018) in support of his application for judicial review. He provides a narrative of events on July 13, 2018. He also provides a detailed account of his personal circumstances, including circumstances which he submits should have been considered by the Minister's delegate in deciding whether or not to issue an exclusion order. In a number of respects, the information in the affidavit goes well beyond the information that was before the Minister's delegate on July 13, 2018, when he made his decision.

[17] Before considering the merits of the grounds of review advanced by the applicant, it is necessary to determine whether the affidavit (in whole or in part) is admissible on this application and to identify the permissible uses to which any admissible contents may be put.

[18] The general rule is that the evidentiary record on an application for judicial review of an administrative decision is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 13 [*Bernard*]). The rationale for this rule is grounded in the respective roles of the administrative decision-maker and the reviewing court (*Access Copyright* at paras 17-18; *Bernard* at paras 17-18). The decision-maker decides the case on its merits. The reviewing court determines the overall legality of what the decision-maker has done.

[19] However, as discussed in *Access Copyright* (at para 20) and *Bernard* (at paras 19-28), this general rule admits of exceptions. I am satisfied that, at least to some extent and for certain limited purposes, the new information in the applicant's affidavit is admissible.

[20] The applicant's narrative of events on July 13, 2018, provides helpful background and context which is otherwise not reflected in the record. The respondent does not dispute its accuracy or, in fairness, its admissibility. Similarly, the applicant's statement in his affidavit that he was cut short by the Minister's delegate when he was attempting to explain why he should not be excluded from Canada provides the necessary factual foundation for the alleged breach of procedural fairness. I am also of the view that the more detailed information which the applicant states that he was prevented from providing to the Minister's delegate is relevant to the question of whether the applicant was prejudiced by the alleged breach of procedural fairness. On the other hand, none of that new information may be considered when assessing the reasonableness

of the Minister's delegate's decision since that would be tantamount to substituting my decision on the merits for his.

B. *Were the requirements of procedural fairness respected?*

[21] The applicant contends that the requirements of procedural fairness were not respected because the Minister's delegate did not allow him to give as full an account as he would have liked of why he was not inadmissible and why he should not be excluded from Canada. I do not agree.

[22] The jurisprudence is clear that the duty of fairness owed to a foreign national in the applicant's situation is at the low end of the scale. Regarding section 44(2) of the *IRPA* generally, see *Cha v Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 409, 2006 FCA 126, at paras 42-52 [*Cha*], and *Sharma v Canada (Public Safety and Emergency Preparedness)*, [2017] 3 FCR 492, 2016 FCA 319, at paras 29-34 [*Sharma*].

[23] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*], the Supreme Court of Canada emphasized that the common law duty of procedural fairness is "flexible and variable" (*Baker* at para 22). Several factors must be considered in determining what is required in the specific context of a given case, including: (1) the nature of the decision being made; (2) the nature of the statutory scheme under which the decision is made; (3) the importance of the decision to the individual(s) affected; (4) the legitimate expectations of the party challenging the decision; and (5) the procedures followed by the decision-maker itself and its institutional constraints (*Baker* at paras 21-28).

[24] Having regard to these factors and to the general statements in *Cha* and *Sharma* concerning determinations under section 44(2) of the *IRPA*, in my view the applicant was entitled to be informed of the facts that triggered the inquiry, to be informed of the possible consequences of the inquiry, to be given an opportunity to provide a response, and to have any response taken into consideration by the decision-maker.

[25] As it happened, the facts that triggered the inquiry were provided by the applicant himself. He was informed that there was a question about his admissibility given his lack of a visa and his apparent intention to reside permanently in Canada. The applicant was told he could face exclusion from Canada if he was found to be inadmissible. He was given a chance to address these issues not only with the Minister's delegate but also with the first CBSA officer, before he wrote up his report. Once the report was written up, the applicant was given a copy of it.

[26] Unfortunately for the applicant, his answers to the questions posed by the first CBSA officer and later by the Minister's delegate only reinforced the concern about his inadmissibility. On review, the applicant has not been able to point to any probative evidence that could have assuaged that concern that he was prevented from providing to the Minister's delegate.

[27] Section 44(2) of the *IRPA* provides that in the case of a foreign national with respect to whom a report on inadmissibility is well-founded the Minister (or his delegate) "may make a removal order" [emphasis added]. The use of the permissive "may" makes it clear that this is a

matter upon which discretion is to be exercised. However, this discretion has been described as limited and, even then, its extent varies depending on the specific circumstances of the case (*Cha* at paras 21-22; *Sharma* at para 23).

[28] At this point of the Minister's delegate's analysis, the applicant had been determined to be an inadmissible foreign national. Having attempted to enter Canada without the visa he required given his intention to reside here permanently (as found by the Minister's delegate), he faced exclusion from Canada for a year. The Minister's delegate undertook a somewhat truncated analysis of whether the applicant should be exempted from the consequences of the inadmissibility finding on humanitarian and compassionate grounds. There may be some question as to whether it was necessary or even appropriate for the Minister's delegate to do so (see *Cha* at para 37 and *Rosenberry v Canada (Citizenship and Immigration)*, 2010 FC 882 at para 36). However, in my view, the Minister's delegate elected to undertake this inquiry and, having done so, it was incumbent upon him to inform the applicant of the question in issue and to provide him with an opportunity to put forward his views and evidence.

[29] Once again, I am satisfied that these requirements were met. Even if the applicant feels that he was prevented from providing as full an account of his relationship with Ms. Bovaird and her parents as he was later able to set out in his affidavit, this does not mean that the requirements of procedural fairness were not respected. It is clear that the Minister's delegate informed the applicant of the grounds upon which he could exercise his discretion not to order the applicant's exclusion from Canada. It is clear that the applicant was given an opportunity to attempt to persuade the Minister's delegate to exercise discretion in his favour and not exclude

him from Canada. It is also clear that the Minister's delegate took the applicant's representations into account in making his decision. Bearing in mind the specific circumstances of this case – the determination at a Port of Entry as to whether an inadmissible foreign national ought nevertheless to be permitted to enter Canada – I am satisfied that the applicant was provided with an opportunity to state his case that was sufficient to meet the requirements of procedural fairness applicable in those circumstances.

C. *Is the Minister's delegate's decision unreasonable?*

[30] The determinative consideration in this case is whether, on July 13, 2018, the applicant was attempting to enter Canada with the intention of residing here permanently. In my view, the Minister's delegate's conclusion that he was is altogether reasonable. The applicant answered the questions he was asked truthfully. The information he himself provided to the first CBSA officer and, later on, to the Minister's delegate, reasonably supported the conclusion that he was already residing in Canada permanently; indeed, he had been doing so for the last several years. His returning to Canada on July 13, 2018, simply maintained the *status quo*. In these circumstances, it was entirely reasonable for the Minister's delegate to conclude that, on July 13, 2018, the applicant was attempting to enter Canada with the intention of residing here permanently.

[31] The applicant argues that the Minister's delegate erred by failing to consider that the applicant had a long-term intent eventually to become a permanent resident and that this did not *per se* exclude him from entering Canada on a temporary basis as a visitor on July 13, 2018 (cf. *IRPA*, s 22(2)). I do not agree, essentially for two reasons. First, the issue of dual intent was not

raised by the applicant at the time. It emerged only later, in the affidavit sworn in support of his application for judicial review and in his counsel's submissions. Second, and more importantly, given the information available to him, it was not unreasonable for the Minister's delegate to take the applicant at his word when he answered affirmatively the question "Is it your intention to reside in Canada on a permanent bases [sic] today?" The applicant suggests that he misunderstood the question and thought the officer was referring to long-term as opposed to short-term intentions. Be that as it may, given that he was already living in Canada on what could only be described as a permanent basis, and given that he had already tried twice to secure permanent resident status, there was no reasonable basis for the Minister's delegate to parse the applicant's unequivocal answer into short-term and longer-term intentions. The circumstances reasonably suggested that the applicant's intent on July 13, 2018, was to return to Canada where he would continue to reside on a permanent basis notwithstanding his lack of a visa. It was not unreasonable for the Minister's delegate not to address the question of dual intent.

[32] The circumstances of *Sibomana v Canada (Citizenship and Immigration)*, 2012 FC 853, which the applicant relies upon in support of his position, are entirely distinguishable from those of the present case. While the circumstances of *Jewell v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1046, are more similar, the result there obviously turns on the facts of that case, just as the result here turns on the facts of this case. It does not entail that the Minister's delegate's factual determination in the present case, based as it was on the evidence before him regarding this applicant's actions and intentions, is unreasonable.

[33] The Minister's delegate's decision to issue an exclusion order meets the requirements of *Dunsmuir*. The reasons given explain how the Minister's delegate reached the conclusion he did. I do agree with the applicant that the Minister's delegate's consideration of the legal characterization of his relationship with Ms. Bovaird is flawed. However, that issue was essentially irrelevant in the circumstances and, most importantly, the Minister's delegate did not question the genuineness of the relationship. The erroneous considerations mentioned by the Minister's delegate in his decision could not reasonably have affected his ultimate balancing of interests in the exercise of his discretion. Particularly bearing in mind the very limited discretion available to the Minister's delegate in the circumstances of a case like this, the result falls within the range of possible outcomes which are acceptable having regard to the facts and the law. There is no basis for me to interfere.

VI. CONCLUSION

[34] For these reasons, the application for judicial review is dismissed.

[35] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

[36] Finally, the applicant named the Minister of Citizenship and Immigration as the respondent. It is common ground that the correct respondent is the Minister of Public Safety and Emergency Preparedness. As part of the Court's judgment, the style of cause will be amended accordingly.

JUDGMENT IN IMM-3480-18

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to reflect the Minister of Public Safety and Emergency Preparedness as the correct respondent.
2. The application for judicial review is dismissed.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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