Federal Court  Cour fédérale

Date: 20210715

Docket: IMM-6536-19

Citation: 2021 FC 746

Ottawa, Ontario, July 15, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

GUANQUN ZHANG

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Guanqun Zhang, is alleged to be inadmissible to Canada for organized criminality under subsection 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") on the ground of engaging in money laundering. The basis for that allegation was set out in an inadmissibility report prepared by a Canada Border Services Agency ("CBSA") officer pursuant to section 41(1) of the *IRPA* (the "Inadmissibility Report"). A

delegate (the "Delegate") of the Minister of Public Safety and Emergency Preparedness (the "Minister") found the Inadmissibility Report was well-founded and referred it to the Immigration Division (the "ID") of the Immigration and Refugee Board (the "IRB") for an admissibility hearing pursuant to subsection 44(2) of the *IRPA*. The Applicant now seeks judicial review of the Delegate's decision.

[2] The Applicant asserts the Delegate erred by not considering the irregularities underlying the Inadmissibility Report, and by not considering the certificates provided by the Applicant displaying that his parents do not have a criminal conviction in China (the "no conviction certificates"), among other things.

[3] In my view, the Delegate's decision is unreasonable and was not made in accordance with the principles of procedural fairness. The Inadmissibility Report pre-dates the evidence it purportedly considers, thus obscuring whether the CBSA officer who authored the Inadmissibility Report considered the relevant evidence. In addition, the Delegate failed to consider the Applicant's no conviction certificates, as the certificates are not addressed in the Delegate's decision and are absent from the Certified Tribunal Record (the "CTR"). I therefore grant this application for judicial review.

II. Facts

A. *The Applicant*

[4] The Applicant is a 28-year-old citizen of China. He first entered Canada in April 2012 as a student and has remained as a foreign worker.

[5] On February 2, 2017, a CBSA officer issued the Inadmissibility Report, which is based on the evidence outlined in the "Subsection 44(1) and 55 Highlights" report (the "Highlights Report"), dated December 13, 2017. The CBSA officer that authored the Inadmissibility Report is the same officer that authored the Highlights Report.

[6] The Highlights Report found there were reasonable grounds to believe the Applicant is inadmissible to Canada for engaging in transnational money laundering. It considered the following evidence, among other things:

- The Applicant's parents, both of whom currently reside in Canada, are wanted by the authorities in China to serve a sentence for the alleged fraud of approximately $200 million from 60,000 investors.
- Several reports from the Financial Transaction and Reports Analysis Centre of Canada, which indicate the Applicant has been involved in international money transfers totalling over $30 million, some of which were marked as suspicious.

- A report by Public Works and Government Services Canada, dated October 1, 2015, which found the Applicant's money transfers included several indicators of money laundering (the "PWGS Report").

- The Applicant purchased and sold properties in Canada, including an approximately $2 million house.

- A CBSA currency seizure involving the Applicant at the Montréal-Pierre Elliott Trudeau International Airport in August 2012, wherein the Applicant failed to declare he was above the $10,000 currency threshold upon entering Canada.

- A police interview with a former business associate of the Applicant's parents, who witnessed the parents transfer $40-50 million into the Applicant's Canadian bank account.

B. *Decision Under Review & Subsequent Procedural History*

[7] In a decision dated March 19, 2018, the Delegate found the Inadmissibility Report was well-founded and referred the report to the ID for an admissibility hearing. The Delegate's decision is the decision under review in this application.

[8] On October 16, 2019, the Applicant received a disclosure package dated July 23, 2019, which outlined the evidence that the CBSA intended to rely upon at the Applicant's admissibility hearing.

[9] On October 24, 2018, the Applicant provided the CBSA with his no conviction certificates, displaying that his parents had not received any criminal convictions in China.

III. Statutory Framework

[10] Under subsection 37(1)(b) of the *IRPA*, permanent residents and foreign nationals are inadmissible to Canada on grounds of organized criminality for engaging in money laundering in the context of transnational crime:

Organized criminality	**Activités de criminalité organisée**
37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	37 (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :
[…]	[…]
(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.	b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

[11] CBSA officers are empowered to investigate allegations of inadmissibility. If their investigations lead them to believe an individual is inadmissible, they must prepare a report detailing the grounds of inadmissibility and other relevant information. Such reports are then submitted to the Minister pursuant to subsection 44(1) of the *IRPA*:

Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

[12] Under subsection 44(2) of the *IRPA*, the Minister reviews the CBSA's inadmissibility report and if the Minister is of the opinion the report is well-founded, the Minister may refer the report to the ID for an admissibility hearing:

Referral or removal order	**Suivi**
44 (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	44 (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[13] In *Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862 ("*Lin 2019*"), aff'd 2021 FCA 81, Justice Barnes aptly described the exercise of the Minister's discretion under subsection 44(2) of the *IRPA* as follows:

> [16] Neither the Officer nor the Delegate is authorized or required to make findings of fact or law. They conduct a summary review of the record before them on the strength of which they express non-binding opinions about potential inadmissibility. This is no more than a screening exercise that triggers an adjudication. It is at the adjudicative stage where controversial issues of law and evidence can be assessed and resolved. As the Federal Court of Appeal held in *Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at paras 47 and 48, [2007] 1 FCR 409, the referral process is intended only to assess readily and objectively ascertainable facts concerning admissibility. It does not call for a long and detailed assessment of issues that can be properly assessed and fully resolved in later proceedings. To the extent that there is any discretion not to make a referral to the ID, it is up to the Officer and the Delegate to determine how that will be exercised and what evidence will be applied to the task.
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> [emphasis added]

IV. Preliminary Issue: Is the Application Premature?

[14] The Respondent submits this application should be dismissed because it is premature. According to the Respondent, seeking judicial review of the Delegate's decision at this juncture is improper because the ID may provide the Applicant an adequate remedy when it adjudicates the Applicant's alleged inadmissibility.

[15] The general rule is that judicial review should not be brought until, absent exceptional circumstances, all available and adequate administrative remedies are exhausted. This rule seeks

to avoid the fragmentation of the administrative process and the costs associated with hearing an interlocutory judicial review when the Applicant may still succeed at the end of the administrative process (*Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 at paras 31-33).

[16] The Federal Court of Appeal recently affirmed in *Lin v Canada (Public Safety and Emergency Preparedness)*, 2021 FCA 81 ("*Lin 2021*"), that judicial review of the Minister's decision under subsection 44(2) of the *IRPA* should only be granted in exceptional circumstances, as the IRB is generally capable of providing an adequate alternative remedy:

> [4] In the present cases, the delegates of the Minister, acting under section 44, expressed evidence-based beliefs that the circumstances are sufficient to warrant a more formal inquiry and an adjudicated decision on inadmissibility by the Immigration Division and, if necessary, the Immigration Appeal Division. The process is akin to a screening exercise in that there is no finding of inadmissibility, nor alteration of status. The appellants will have a full opportunity to adduce evidence and advance their factual and legal arguments and concerns regarding the relevant issues in the Immigration Division and the Immigration Appeal Division. This includes any procedural fairness or substantive issues regarding the section 44 screening process that undermine the Immigration Division's ability to proceed. It also includes whether there were any misrepresentations giving rise to the grant of permanent residence, the relevant knowledge of the appellants, and any humanitarian and compassionate considerations. Thus, in the present cases, proceedings before the Immigration Division and the Immigration Appeal Division are both available and adequate.
>
> [5] The general rule is that judicial review should not be brought until all available and adequate administrative recourses are pursued. Buttressing this is the prohibition in para. 72(2)(a) of the *Immigration and Refugee Protection Act* that forbids judicial review until all administrative appeals are exhausted.
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> [citations omitted]

[17] The Respondent's argument is compelling; however, I find *Lin 2021* is distinguishable from the case at hand.

[18] The appellants in *Lin 2021* were alleged to be inadmissible for misrepresentation under subsection 40(1) of the *IRPA* and therefore had the right to appeal the ID's admissibility decision to the Immigration Appeal Division ("IAD"). The Applicant, in contrast, is barred from appealing the ID's decision to the IAD by virtue of subsection 64(1) of the *IRPA* if he is found inadmissible for organized criminality under subsection 37(1) of the *IRPA*.

[19] Unlike the ID, the IAD may consider humanitarian and compassionate factors under subsection 67(1)(c) of the *IRPA*. As the Applicant cannot appeal the ID's decision to the IAD if he is found inadmissible, the IRB process cannot provide the Applicant with humanitarian and compassionate considerations. The Applicant is also barred from seeking permanent resident status through a humanitarian and compassionate grounds application under subsection 25(1) of the *IRPA*.

[20] The Delegate therefore offers the Applicant a remedy not available before the IRB or elsewhere in the administrative process, as the Delegate has the discretion to consider humanitarian and compassionate factors under section 44(2) of the *IRPA* (*Singh v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1170 at paras 23-25, 34-35). While the Delegate is not obligated to consider humanitarian and compassionate factors, especially in instances such as these where a foreign national is alleged to be criminally inadmissible, I nonetheless find the Delegate retains some discretion to do so (*McAlpin v Canada (Public Safety*

and Emergency Preparedness), 2018 FC 422 at para 65; *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363 at para 34).

[21] I note the Minister is precluded from considering humanitarian and compassionate factors under subsection 44(2) of the *IRPA* in the context of a foreign national allegedly inadmissible for criminality under section 36 (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 ("*Cha*") at para 35). However, I am not convinced this preclusion extends to a foreign national allegedly inadmissible for organized crime under subsection 37(1) of the *IRPA*. Unlike under section 36, inadmissibility under subsection 37(1) does not require a conviction, and the specified removal order required under subsection 228(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as considered in *Cha*, does not apply.

[22] In summary, I find this application for judicial review is not premature. I make this determination in light of the factors enumerated in *Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 42, and in particular the finding that the IRB does not have the same remedial capacity as the Delegate with respect to humanitarian and compassionate considerations for individuals who are barred from proceeding to the IAD. As the Applicant is one such individual, the circumstances of this case warrant this Court exercising its discretion to hear this application for judicial review on its merits (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 36).

V. Issues and Standard of Review

[23] This application for judicial review raises the following issues:

A. *Is the Delegate's decision unreasonable?*

B. *Did the Delegate breach their duty of fairness?*

[24] The first issue is reviewed upon the reasonableness standard (*Harms-Barbour v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 59 at para 18, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 10, 16-17), whereas the second issue is reviewed upon what is best reflected in the correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[25] 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).

[26] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

[27] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 ("*Baker*") at paras 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

VI. Analysis

A. *Is the Delegate's decision unreasonable?*

[28] The Applicant asserts the Delegate erred by not considering how the Inadmissibility Report is dated February 2, 2017, and thus pre-dates the December 13, 2017 Highlights Report.

[29] I am persuaded by the Applicant's argument. The conclusion in the Inadmissibility Report that the Applicant is inadmissible is based on the evidence contained in the Highlights Report. The fact that the Inadmissibility Report pre-dates the Highlights Report thus raises the concern that the Inadmissibility Report was rendered before the evidence it relies upon was authored.

[30] I note the Delegate's decision to refer the Inadmissibility Report is akin to a screening exercise and thus does not call for a long and detailed assessment of controversial issues (*Lin 2019* at para 16). However, the discrepancy in dates between the Inadmissibility Report and the Highlights Report is troubling. As I cannot discern the Delegate's rationale for justifying this

issue in their reasons or the record, I find the Delegate's decision is unreasonable (*Vavilov* at para 98).

[31] The Respondent submits that the Inadmissibility Report pre-dates the Highlights Report because the date of the Inadmissibility Report reflects when it was initiated, not when it was determined. This argument is not supported by evidence in the record; therefore, I proceed on the standard that decisions are rendered when they are signed and dated. The Inadmissibility Report concludes that the Applicant has engaged in the transnational crime of money laundering based on the evidence contained in the Highlights Report. As there was no evidence to explain why the Inadmissibility Report is based on findings that pre-date its conclusion, I find it was unreasonable for the Delegate not to question this discrepancy.

[32] The Applicant further argues that the Delegate, in determining the Applicant is inadmissible, relied solely on his parents' alleged acts of fraud and the fact that he is wealthy. The Delegate's reasoning, according to the Applicant, amounts to "guilt by association."

[33] I agree with the Applicant that the Inadmissibility Report lacks evidence of the Applicant's engagement in money laundering. The Inadmissibility Report discusses how "the final stage" of money laundering is "integration," which pertains to the integration of money back into the economy in a manner that makes it appear to be a legitimate transaction. According to the PWGS Report, integration creates an apparent legal origin for unlawful proceeds, such as by creating fictitious loans, sales, or capital gains.

[34] The Inadmissibility Report relied primarily upon the findings in the PWGS Report as evidence of the Applicant's alleged acts of integration. In addition, the Inadmissibility Report noted how the Applicant's purchase of an approximately $2 million home is "highly suspicious and could be considered an attempt to integrate funds which he had received from his parents."

[35] In my view, it was unreasonable for the Delegate to conclude the PWGS Report had sufficient information to establish that the Applicant's alleged acts of integration were well-founded.

[36] The evidence pertaining to integration in the PWGS Report are minimal. The author of that report stated "[w]hile I did not have sufficient documentation to fully document the integration of spending back into the economy, I was able to observe the following examples that could be evidence of such integration and possibly money laundering." The examples then provided are several large money transfers between the Applicant's bank account and various entities, including his father.

[37] The Delegate did not discuss how the above purchases and transfers constituted integration. While it was reasonable for the Delegate to find the Applicant has moved large amounts of money around in a suspicious manner, movement is not laundering. The evidence affirms that money laundering requires integration, a process of conversion that disguises the origins of the Applicant's money to make it appear as if it was earned legitimately. Integration is what ostensibly distinguishes money laundering from legitimate business transactions. However,

neither the PWGS Report nor the Delegate explained how transferring money or purchasing a home constitute integration.

[38] According to the record, integration is an essential component of money laundering. I therefore find it was essential for the Delegate to determine that the Applicant's alleged integration was well-founded. As I cannot discern the Delegate's rationale for that determination, either in the Delegate's reasons or the record, I find the Delegate's decision is unreasonable (*Vavilov* at para 98).

B. *Did the Delegate breach their duty of fairness?*

[39] The duty of fairness requires administrative decision-makers to provide an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered (*Baker* at para 22). As affirmed in *Vavilov* at paragraph 77, the content of the duty of fairness in a particular case depends on the circumstances and is assessed by considering the following factors enumerated in *Baker*:

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme;
- the importance of the decision to the individual or individuals affected;
- the legitimate expectations of the person challenging the decision; and
- the choices of procedure made by the administrative decision maker itself.

[40] Applying the above factors, I find the duty of fairness owed by the Delegate in this instance falls at the lower end of the spectrum. Nonetheless, the principles of procedural fairness at their most basic level provide the Applicant with the right to be heard.

[41] In this case, the Delegate breached their duty of fairness by not including the Applicant's no conviction certificates in the CTR, which represents the evidence that the Delegate considered. This omission amounts to a denial of the right to be heard (*Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at paras 16-19, citing *Vulevic v Canada (Citizenship and Immigration)*, 2014 FC 872 at paras 5-6).

[42] I find the Delegate could have considered the Applicant's no criminal conviction certificates, which were provided to the CBSA on October 24, 2018. The CTR does not reflect what was before the Delegate on March 19, 2018, the date of their decision, thus displaying that the evidence before the Delegate was not fixed at that time. For example, the CTR contains a March 23, 2018 letter confirming receipt of the Applicant's permanent residence application. The CBSA's disclosure package was also not finalized until July 23, 2019, approximately nine months after the date of the Delegate's decision.

[43] The above irregularities in the record establish that the evidence before the Delegate spanned beyond the date of their decision. I therefore find the Delegate was able to consider the no conviction certificates submitted by the Applicant, but did not.

[44] During oral submissions, the Respondent objected to the Applicant's arguments on this issue on the basis that they were not raised in the Applicant's Memorandum of Argument. I am not persuaded by the Respondent's argument. In paragraphs 28 and 29 of the Applicant's Supplementary Memorandum, the Applicant asserts that a failure to consider relevant information may constitute a breach of procedural fairness. Additionally, at paragraph 33 of that memorandum, the Applicant asserts that the Delegate received the Applicant's no conviction certificates before rendering their decision, as is evidenced by the finalization of the disclosure package on July 23, 2019.

VII. Conclusion

[45] I find the Delegate's decision is unreasonable and that the Delegate breached their duty of fairness. I therefore grant this application for judicial review.

[46] The parties have not submitted a question for certification, and I agree that none arises.

JUDGMENT IN IMM-6536-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The matter is remitted to a different decision-maker for redetermination.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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