Federal Court Cour fédérale

Date: 20211028

Docket: IMM-1170-21

Citation: 2021 FC 1152

Ottawa, Ontario, October 28, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

RANJIT SINGH KHALSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of a member of the Immigration Division ("ID") of the Immigration and Refugee Board ("IRB"), which found the Applicant to be inadmissible to Canada under s. 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for having been a member of the International Sikh Youth Federation ("ISYF"). The ISYF became a listed terrorist entity in Canada on June 18, 2003.

II. Background

[2] The Applicant, Ranjit Singh Khalsa, (herein the "Applicant") is a citizen of India. He entered Canada in 1988 and made a refugee claim. The refugee claim was not determined, but rather the Applicant became a permanent resident of Canada under the refugee backlog project in 1992. He applied for citizenship on March 16, 1994, and after significant delay, filed an application for mandamus with the Federal Court on December 16, 2003. Shortly thereafter, the Canada Border Services Agency ("CBSA") invited the Applicant to attend an interview with an Officer on January 15, 2004. Following this interview, the CBSA on February 2, 2004, wrote a report against him under s. 44(1) of the *IRPA,* finding him inadmissible to Canada under s. 34(1)(f) of the *IRPA* for his membership in the ISYF. The Applicant has not been granted citizenship.

[3] In April 2004, a Minister's delegate referred the s. 44(1) report for an admissibility hearing. The Applicant, through his counsel, submitted both a Ministerial Relief application under s. 34(2) and submissions on the s. 44(1) report, arguing that proceeding to an admissibility hearing was an abuse of process because of delay in bringing the matter forward. On this, counsel argued that the relevant information had been in the CBSA's possession for years and that no action was taken prior to the mandamus application. They noted that because of this delay, the Applicant would no longer have access to a humanitarian appeal before the Immigration Appeal Division ("IAD").

[4] The CBSA agreed to withdraw the referral for admissibility, and hold the s. 44 process in abeyance until the Minister determined the Applicant's application for ministerial relief. His request for ministerial relief was refused on June 13, 2007. He applied for judicial review of this, for which leave was granted on December 2, 2014, and on December 14, 2014, the parties entered into an agreement resolving this application for judicial review. The parties agreed that the CBSA would initiate a new inadmissibility determination process under s. 44 of the *IRPA*.

[5] A procedural fairness letter ("PFL") was provided to the Applicant by CBSA on January 6, 2015. After the Applicant's submissions in relation to the PFL, on June 29, 2015, a CBSA Officer prepared a report under s. 44(1) of the *IRPA* outlining that he was inadmissible to Canada on security grounds under s. 34(1)(f) pertaining to s. 34(1) (c) of the *IRPA*. This report stated that there were reasonable grounds to believe that the Applicant was a member of the ISYF, a listed terrorist entity in Canada since 2003, and that he was President of the entity from 1999-2002. On October 8, 2015, the CBSA reviewed the s. 44(1) report, as well as the Applicant's submissions, and determined that the report was well-founded and pointed toward a referral to ID. Thus, the CBSA referred the report to the ID for a hearing to determine the Applicant's admissibility to Canada. The Applicant filed an application for leave and judicial review of the s. 44 report, alleging an abuse of process due to delay, which was dismissed at the leave stage on April 21, 2016.

[6] The admissibility hearing at the ID was further delayed, and on September 12, 2017, the Applicant filed an interlocutory application before the ID to stay the hearing, once again arguing abuse of process due to delay as well as arguing the delay prejudiced his ability to defend

himself. This application was denied in a decision dated November 23, 2018, where the ID determined it could not find the CBSA committed an abuse of process because it did not have jurisdiction and could only consider delays arising before the ID itself. The Applicant applied for judicial review of this decision, but leave was not granted.

[7] At this point, the admissibility hearing took place, beginning with a pre-hearing conference on June 28, 2019, written arguments between December 2019 and April 2020, and ultimately, a decision by the ID dated February 25, 2021, finding the Applicant inadmissible to Canada pursuant to s. 34(1)(f) due to his membership in the ISYF. The ID Member also issued a deportation order.

III. Issues

[8] The issues are:

A. Was the ID decision reasonable?

  i. Did the ID err in the treatment of evidence?

  ii. Did the ID err in concluding they did not have jurisdiction to decide on the abuse of process allegation?

  iii. Did the ID fail to consider the impact of delays on the Applicant?

IV. Standard of Review

[9] As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 23 , “where a court reviews the

merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." As such, the standard of review in this case is that of reasonableness. In conducting reasonableness review, a court is to begin with the principle of judicial restraint and respect for the distinct role of administrative decision-makers (*Vavilov*, at para 13). When conducting reasonableness review, the Court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov*, at para 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov,* at paras 81, 83, 87, 99). A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov,* at paras 81, 85, 91, 94-96, 99, 127-128).

V. Analysis

A. *Did the ID err in the treatment of evidence?*

[10] The Applicant submits that the ID's decision that there was reasonable grounds to believe that the Applicant was a member of the ISYF was unreasonable based on the manner in which they dealt with a number of pieces of the evidence before them. Reasonable grounds to believe is a low threshold, below the criminal threshold of "beyond a reasonable doubt" and lower than the civil threshold of "balance of probabilities." All that is required is proof beyond mere suspicion

on an objective basis, based on compelling and credible information (*Mugesera v Canada (MCI)*, 2005 SCC 40).

[11] First, the Applicant asserts that the ID erred in finding credibility concerns exist with the Applicant after he initially responded that he was “never” “involved with” the ISYF, and later questioning revealed that he had some association with them both in attempted recruitments, newspaper ownership, as well as possibly membership and presidency. The Applicant’s argument is that this conclusion was based erroneously on the ID Member’s overbroad interpretation of the word “involved with,” which he took to mean no association whatsoever.

[12] I find that there are two possible inferences to be drawn, both of which are reasonable. It may be the case that the Applicant is correct, and the Applicant initially took “involved with” to mean something other than “any type of affiliation” and his changing story during the interview is evidence of his broadening understanding of what the ID Member is asking him. However, there is a second reasonable interpretation – and that is the interpretation of the ID Member in this case, that the Applicant was not initially telling the truth with his answer to the inquiry about his involvement, and changed his story as he realized what the ID Member knew. In determining this, I find the ID Member’s decision, in line with *Vavilov* at paragraph 86, falls within a range of possible, acceptable outcomes, which are defensible in respect of the facts and law. Thus, I find it to be reasonable.

[13] Second, the Applicant takes issue with the ID Member’s interpretation of the Applicant’s statement that he was involved with the Chardhi Kala newspaper for “two to three years.” The

ID Member made the inference that, since this statement was made in January 2004, the Applicant was likely involved from January 2001 to January 2004. While the ID Member is able to draw their own conclusions and make inferences based on what is before them, their conclusions must fall within a range of possible outcomes. I find this inference not to be within this range. It is unreasonable to conclude that two to three years necessarily means precisely three years from the month the statement is made. However, I do not find this unreasonableness to be determinative in this case, given the other evidence that does support the finding, such as the evidence that another newspaper (in addition to the others noted) referred to the Applicant as being associated with the ISYF during the relevant time period.

[14] Third, the Applicant argues that the ID Member dealt unreasonably with the evidence presented by two witnesses identifying the Applicant as a member of the ISYF. The Applicant asserts that the first witness made, among other issues, verifiable errors in his testimony, and that the second witness had a dislike for the Applicant, which influenced the evidence he gave. Regarding the first witness, I find that the various issues pointed out by the Applicant go to the weight of the evidence afforded by the ID Member. For instance, at paragraph 53 of their Memorandum of Argument ("MOA"), the Applicant explicitly disagrees with the weight placed by the ID Member on this witness's evidence. This type of reweighing of evidence that was before the decision-maker is not the role of judicial review (*Vavilov,* at para 125). This same analysis applies to the evidence of the second witness. The Applicant, at paragraph 69 of their MOA, asserts that this evidence is not credible, and in the preceding paragraph takes issue with various portions of the ID Member's weighting. Further, as set out by Justice Gleason in *Rahal v Canada (Citizenship and Immigration),* 2012 FC 319 [*Rahal*], "the starting point in reviewing a

credibility finding is the recognition that the role of this Court is a very limited one" because of the advantageous role of the decision maker in hearing and assessing evidence. Further, the decision-maker "has expertise in the subject matter at issue that the reviewing court lacks… it is therefore much better placed to make credibility findings" (*Rahal,* para 42). The ID Member determined that the minor flaws with the second witness's evidence did not impugn his overall reliability or credibility as a witness on the Applicant's membership within the ISYF. This was in part because he was a member of the organization alongside the Applicant.

[15] It may be that the ID Member dealt with these pieces of evidence in a way which differs from how the Applicant would prefer. However, the Applicant's argument reads as a line-by-line treasure hunt for error. This is not the role of reasonableness review (*Vavilov,* at para 102). The Applicant does not contest, for instance, copies of various news articles in the *Vancouver Sun* and *Vancouver Province* that were before the ID Member, which he gave weight to, and which identify the Applicant as a member of the ISYF. This is similarly the case with respect to the written submissions from his former counsel, which uncontested by the Applicant in their submissions and identifies the Applicant as president of the ISYF from 1999 to 2002. Even if some of the above contested pieces of evidence were removed, I find that there is still sufficient evidence from which it was within the ID Member's possible range of decisions to conclude that he had reasonable grounds to believe the Applicant was a member of the ISYF, based on the low bar of "reasonable grounds to believe." The Minister did not, as asserted by the Applicant at paragraph 71 of their MOA, find that "the remaining evidence did not establish membership," but rather repeatedly found that none of the pieces of evidence in isolation established the

Applicant's membership, but taken together, the many pieces of evidence did. I find the determination to be reasonable.

B. *Did the ID err in concluding that they did not have jurisdiction to decide whether delays in the proceeding amounted to an abuse of process?*

[16] The Applicant argues that the ID does have jurisdiction and that the delay is an abuse of process.

[17] But I find that the Applicant sought leave on the issue of abuse of process, and leave was not granted, so resultantly he cannot now bring up the same argument in this judicial review. The settled practice of this Court (as well as the Federal Court of Appeal ("FCA") and Supreme Court of Canada) is to not give reasons for decisions on motions for leave to appeal (*Raincoast Conservation Foundation v Canada (Attorney General),* 2019 FCA 224). Given there are no reasons as to why leave was denied, it is somewhat difficult to pinpoint on what issue was leave denied on but I would argue it was denied on all the issues including the issue of the delay being an abuse of process. It is clear that the actual decision was before the Court and was denied leave and should not now be reargued.

[18] In the alternative to the argument above on this issue, the Applicant argues that the ID's decision that – it did not have jurisdiction to decide whether delays in the proceeding amounted to an abuse of process – was an error. The ID relied on *Ismaili v Canada (Public Safety and Emergency Preparedness),* 2017 FC 427 [*Ismaili*] and *Torre v Canada (Citizenship and Immigration),* 2015 FC 591 [*Torre*], and the Applicant asserts these are no longer good law in

light of *Canada (PSEP) v Najafi*, 2019 FC 594 [*Najafi*] and *Brown v Canada (MCI),* 2020 FCA 130 [*Brown*].

[19] In *Najafi*, ACJ Gagné concluded that the ID did have very limited jurisdiction to grant a stay for delay since a significant, 13-year delay took place between the s. 44 report and the date the proceedings were referred to the ID, noting that this was not inconsistent with *Torre* and *Ismaili*. In *Brown*, the FCA set out that the ID has a duty to exercise this discretion in a manner consistent with the *Charter*, in the context of the conditions of an inadmissible applicant's detention prior to removal and a constitutional challenge to his immigration detention.

[20] I do not see how either of these cases establish that the ID had jurisdiction here. Not only were the decisions in *Najafi* and *Brown* issued after the ID had rendered their decision regarding their jurisdiction in this case, but the Applicant's interpretation of the law from these cases is based on a highly selective reading of them. It is with this selective reading that the Applicant uses these quotes to argue the ID erred in concluding they did not have jurisdiction here. They assert that *Najafi* and *Brown* overturn *Torre* and render the ID's decision unreasonable, despite the fact that *Najafi* at paragraph 40 specifically says that *Torre* is still good law. In *Najafi*, the applicant arrived in Canada in 1992 as a protected person, applied for Permanent Residence in 1994, no decision was made because of concerns regarding inadmissibility, he made a mandamus application in 2002, which was dismissed, and CBSA requested an admissibility hearing in 2016. This was a case of significant delay with no action and no contribution on the applicant's part that in any way caused the delay, which is contrasted with the case at bar where there was far more action by both the applicant and respondent in the intermediary time between

the withdrawal of his mandamus application and the admissibility hearing. Further, at paragraph 17 of *Najafi*, the Court notes that the delay was actually a period of more than 20 years in that case. As mentioned, the Court in *Najafi* specifically notes that *Torre* is still good law, but that the ID can have some limited jurisdiction, particularly when there is a significant delay between the Minister's decision to prepare a report under s. 44 of the *IRPA* and the ID's admissibility finding.

[21] I find this is sufficiently differentiable from the circumstances here – as the CBSA agreed to withdraw the s. 44 report in 2004 in order to allow the Applicant to apply for ministerial relief, which he did, with a result rendered in 2007, and then the admissibility proceedings taking place beginning in 2015. *Najafi* demonstrates that *Torre* is still good law and that the ID may have some limited discretion to grant such a stay – not, as the applicant asserts, that they must in this case. *Brown* is similarly distinguishable, given that it is a case where the applicant was challenging the constitutionality of an immigration detention regime on charter grounds, and I am unconvinced that it stands for what the Applicant cites it for in this context.

C. *Did the ID err in failing to consider the prejudice and unfairness caused by the delay?*

[22] The Applicant argues that the ID unreasonably dismissed arguments as to the prejudice and unfairness caused by this lengthy passage of time. The ID found that the Applicant already made this argument elsewhere, and that it would be redundant to consider it. The Applicant argues that this previous decision (by the ID) was made based on jurisdiction alone, and thus it was not considered before. The Applicant then argues that the ID erred in conducting merely a perfunctory analysis of the prejudice to the Applicant and concluding that there was insufficient

evidence, when in fact there was a clinical diagnosis and five different medications, as well as psychotherapy, being used to treat him.

[23] The Applicant notes that the ID Member faulted the Applicant for not leading evidence or witnesses, but argues that this is the very thing he was prejudiced in his ability to do. The Applicant argues that in concluding this, the ID Member unreasonably ignored the psychiatrist's evidence linking severe stress and other psychological maladies to his situation. In sum, the Applicant submits that the delay was prejudicial to the Applicant, and that the ID Member unreasonably dismissed these arguments.

[24] Given my finding that the ID did not have jurisdiction, this is a non-issue, or at best a collateral attack as presented by the Applicant.

[25] Regardless, the Applicant argues that if the ID had jurisdiction to hear this, and they had, they would have found there to be prejudice, and thus that their finding that there was no prejudice from the delay was unreasonable. They cite a variety of negative impacts on the Applicant allegedly stemming from the delay – including a diagnosis for cognitive impairment, medication, and the fact that the ID faulted the Applicant for not adducing witnesses (which they say he was unable to do because of the delay). In finding that there was no prejudice as a result of the delay, they resultantly assert that the ID ignored key evidence from a Doctor. In the ID Member's reasons, it is noted that he has examined the Doctor's note. I will afford deference to the weight given by the ID Member, given that they clearly noted this evidence, assessed it, and determined it was insufficient. However, I am mindful of the Applicant's argument that the ID

Member concluded there was no clinical diagnosis, given that there appears to be one. However, the ID Member in his reasons does not base his finding entirely on this. He finds the submission of prejudice based on this to be "speculative, particularly (because of the lack of a clinical diagnosis)" and concludes that there is insufficient evidence to conclude that the Applicant's mental state is at such a deficient level that he would be incapable of providing testimony at the hearing. Thus, it appears that while the ID Member may have been improper in their dealing with the psychiatrist's note, this is not determinative and does not render the decision unreasonable.

[26] In sum, I find the decision – which is long, detailed, and grapples with the major issues – to be reasonable. The ID Member dealt reasonably with the evidence before them, and demonstrated a logical chain of analysis that was justified in light of the facts and law before them.

[27] The parties did not present any questions for certification.

JUDGMENT IN IMM-1170-21

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;
2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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