Federal Court Cour fédérale

Date: 20211208

Docket: IMM-678-20

Citation: 2021 FC 1380

Ottawa, Ontario, December 8, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MARK SINGH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Mark Singh, is a citizen of India. In 2017, he submitted a permanent residence application to Immigration, Refugees and Citizenship Canada ("IRCC") under the Manitoba Provincial Nominee Program. On November 19, 2018, the Applicant was charged with sexual assault. The Applicant seeks judicial review of a decision of an Inland Enforcement officer of Canada Border Services Agency (the "CBSA Officer") to issue a report (the "Report")

written pursuant to section 44(1) of the *Immigration and Refugee Protection Act* SC 2001, c 27 (“*IRPA*”). The Report was referred to IRCC contains the CBSA Officer’s opinion that the Applicant is inadmissible to Canada under subsections 41(1) and 16(1) of the *IRPA* for failing to disclose information about a sexual assault charge, as required by IRCC.

[2] The Applicant submits that the CBSA Officer’s decision to issue the Report is unreasonable. The Applicant argues the same CBSA Officer made representations to the Applicant that IRCC was aware of the Applicant’s pending criminal case, and that the Applicant’s permanent residence application would be placed on hold pending the outcome of his criminal case. The Applicant further submits that the CBSA Officer breached procedural fairness while investigating the Applicant’s admissibility.

[3] In my view, it was reasonable for the CBSA Officer to convey the Report to the IRCC because they were of the opinion that the Applicant is inadmissible to Canada for failing to provide all relevant evidence and documentation related to his sexual assault charge, as was required by IRCC. The Applicant was sent three letters from IRCC: the first letter required the Applicant to alert IRCC if he was subject to criminal charges, and the two subsequent letters required the Applicant to provide more information about his sexual assault charge. All of these letters went unanswered by the Applicant. I therefore dismiss this application for judicial review.

II. **Facts**

A. *The Applicant*

[4] The factual background of this case is the same as in 2021 FC 1379. For the sake of brevity, I shall only highlight the facts relevant to the CBSA Officer's Report.

[5] In a statutory declaration made on April 26, 2019 and filed in the Provincial Court of Manitoba as part of the Applicant's criminal proceedings, the CBSA Officer confirmed that the Canada Border Services Agency ("CBSA") was in possession of the Applicant's passport and that the passport had been seized for investigative reasons. The CBSA Officer also declared that an official at IRCC had advised them that the Applicant's permanent residence application would be placed on hold pending the outcome of his criminal trial, and that IRCC no longer required the Applicant's passport.

[6] On May 22, 2019, the Applicant's counsel provided a Use of a Representative Form to the CBSA Officer to request the Applicant's passport.

[7] Once IRCC became aware of the Applicant's criminal charge, two subsequent procedural fairness letters were sent to the Applicant on May 2, 2019 and June 17, 2019, requiring that he provide documentation showing the disposition of the criminal charge for sexual assault or proof of an upcoming court date. These communications were sent directly to the Applicant and were not provided to the Applicant's counsel.

[8] By letter dated August 12, 2019, IRCC notified the Applicant that his application for permanent residence was refused for failure to disclose information related to his pending criminal charge. The letter was posted to the Applicant's MyCIC account and was emailed to the Applicant's email address.

B. *Decision under Review*

[9] On December 20, 2019, the CBSA Officer issued the Report pursuant to subsection 44(1) of the *IRPA* and transmitted it to the Minister of IRCC. The decision to issue the Report is the subject of this judicial review.

[10] The Report contains the CBSA Officer's opinion that the Applicant is inadmissible to Canada pursuant to subsections 41(a) and 16(1) of the *IRPA* for failing to provide IRCC with further information regarding his criminal charges. In the Report, the CBSA Officer noted:

a) That the Applicant had been charged with sexual assault in Canada;

b) That IRCC sent the Applicant a letter on April 12, 2019 regarding the next steps in his application for permanent residency and listing the condition that the Applicant was required to advise IRCC immediately if he had been charged or convicted of a criminal offence;

c) That IRCC sent subsequent letters to the Applicant on May 2, 2019 and June 17, 2019, advising him that IRCC was aware of his criminal charge and that the

Applicant was required to provide further information pertaining to his criminal charge;

d) That the Applicant received a letter from IRCC on August 12, 2019, advising him that his application for permanent residency had been refused for failing to answer truthfully all questions put to him in his application and failing to provide the evidence requested by IRCC.

[11] The CBSA Officer's reasons are outlined in a report titled "Subsection 44(1) and 55 Highlights – Inland Cases" that accompanies the Report and forms part of the Certified Tribunal Record ("CTR"):

(i) Subject failed to comply with the requirement to answer truthfully any questions posed to him and to provide any evidence to IRCC as requested. Specifically, he failed to advise IRCC that he had been charged with Sexual Assault and subsequently did not provide documentation requested by IRCC on two separate occasions.

(ii) Subject has litigation in Federal Court asking for the return of his passport.

(iii) Subject submitted application for Permanent Residence in 2017.

(iv) Failed to disclose to IRCC that he had been charged with Sexual Assault.

(v) Failed to provide IRCC with required information once they became aware of subject's criminal charge, resulting in his application being denied.

(vi) Subject currently has status until 13 January 2020 on a work permit.

(vii) Recommend report be referred to an Admissibility Hearing. Subject failed to comply with requirement under the Act to answer truthfully and provide evidence as required.

III. **Preliminary Issues**

A. *Improper Evidence before the Court*

[12] The Respondent submits that the Applicant's further affidavit of July 19, 2021 contains facts that postdate the December 20, 2019 decision and were not before the CBSA Officer, and are thus inadmissible. Specifically, paragraphs 5-8 of the affidavit describe the scheduling of trial dates and the outcome of the Applicant's criminal proceedings.

[13] The Applicant conceded to this point during the hearing. The new evidence will therefore not be relied on since it was not before the CBSA Officer at the time the decision was rendered.

B. *Incomplete Certified Tribunal Record*

[14] The Applicant submits that the CBSA Officer's decision should be set aside because the CTR before the CBSA Officer was incomplete, thus rendering their decision unreviewable. The Applicant relies on *Parveen v Canada (Minister of Citizenship and Immigration)* 1999 CanLII 7833 (FC) ("*Parveen*") at paragraph 9 to support his argument:

> [9] Indeed, I think an incomplete record alone could be grounds, in some circumstances, for setting aside a decision under review. The respondent, as one of the parties before the Court, and being in control of how extensive a record is kept of these interviews, has a responsibility to ensure that the Court is provided with a complete and accurate record.

[15] The Applicant notes that the same CBSA Officer was involved in aspects of the Applicant's criminal proceedings before the Provincial Court of Manitoba regarding the Applicant's passport. Through the Applicant's criminal proceedings, the CBSA Officer received documents containing details related to the Applicant's criminal case. The Applicant argues that this material was provided to the CBSA Officer months before the CBSA Officer decided to write the Report, and that not all the details in the CBSA Officer's possession formed part of the CTR.

[16] The Applicant also submits that the same principle discussed in *Li v Canada (Minister of Citizenship and Immigration),* 2006 FC 498 ("*Li*") applies to this case. In *Li,* a decision was set aside when the Applicant's personal information form was referred to in the officer's reasons, but was not provided in the CTR. This Court affirmed, "the tribunal must prepare and produce a

record containing all documents relevant to the matter that are in the possession or control of the tribunal" (*Li* at para 15).

[17] The Respondent submits that the issue is not whether the CTR is complete, but whether this Court has sufficient material to properly review the decision.

[18] I am not convinced by the Applicant's argument. The issue before the Court in *Parveen* was that the record before the visa officer was stripped of pertinent information and documents found to be central to the Applicant's case. In this case, IRCC was aware of the criminal proceedings and requested more information directly from the Applicant, which it did not receive. Subsequently, the CBSA Officer relied on the fact that the Applicant did not provide information to IRCC pursuant to subsection 16(1) of the *IRPA* to write the Report. Although the same CBSA Officer was also involved in aspects of the Applicant's criminal proceedings before the Provincial Court of Manitoba regarding the Applicant's passport, the Report was issued because IRCC did not receive the information they requested in the context of the permanent residence application, not in the context of other proceedings. I find that there is sufficient information before me to review the decision.

IV. **Issues and Standard of Review**

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

A. *Was the CBSA Officer's decision to issue the Report reasonable?*

B. *Was there a breach of procedural fairness?*

[20] Aside from the issue of procedural fairness, I find that the applicable standard of review is reasonableness (*Ghirme v Canada (Public Safety and Emergency Preparedness),* 2019 FC 805 at para 16; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at para 10; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 687 at para 9).

[21] 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).

[22] 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).

[23] 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 paragraphs 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

V. **Analysis**

[24] Under subsection 41(a) of the *IRPA,* a foreign national is deemed inadmissible for failing to comply with the *IRPA*. Subsection 44(1) of the *IRPA* permits an officer to prepare a report for the Minister should they be of the opinion that a foreign national is inadmissible to Canada:

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.

A. *Was the CBSA Officer’s decision to issue the Report reasonable?*

[25] The Applicant submits that the CBSA Officer’s decision to issue the Report is unreasonable because it was not internally coherent with all the facts and evidence available to the CBSA Officer. The Applicant argues that, in the course of his criminal proceedings, the CBSA Officer acted as an agent of IRCC and represented to the Applicant that IRCC was aware of the Applicant’s criminal charge and that his permanent residence application was on hold.

[26] The Applicant asserts that he did not respond to the procedural fairness letters sent by IRCC on May 2, 2019 and June 17, 2019 because he understood that his permanent residence application would be put on hold pending the results of his criminal proceedings, as represented in the CBSA Officer's declaration. The Applicant states that he did not expect a decision from IRCC prior to a disposition on his criminal charge.

[27] The Applicant relies on *Yavari v Canada (Public Safety and Emergency Preparedness)* 2020 FC 469 ("*Yavari*"), in which this Court found that an officer's decision to issue a report pursuant subsection 44(1) of the *IRPA* was unreasonable because the officer's speculations about the applicant's involvement in a criminal organization and his failure to take responsibility for his actions were found to be highly prejudicial and not supported by the evidence.

[28] As explained in *Yavari,* the analysis under subsection 44(1) of the *IRPA* is a two-step process. First, the officer must form an opinion as to admissibility. Second, the officer must decide whether to prepare an inadmissibility report. If the officer considers the applicant's circumstances or humanitarian and compassionate factors, the assessment of those factors ought to be reasonable, having regard to the circumstances of the case (*Yavari* at para 55, citing *McAlpin v. Canada (Public Safety and Emergency Preparedness),* 2018 FC 422 at para 70).

[29] The Applicant argues that the evidence demonstrates that the CBSA, the Justice Department of Manitoba ("Manitoba Justice") and IRCC were sharing information. The Applicant notes that through communications with the CBSA and Manitoba Justice, IRCC was made aware of the Applicant's criminal charge. The Applicant states that IRCC was also aware

of the fact that he was contesting the charge, had hired defense counsel, had filed a Motion in the Provincial Court, and that the trial was not going to take place until April 2020. As such, the Applicant argues that it was unreasonable for IRCC to request information it already had access to through information sharing with CBSA, thus rendering the CBSA Officer's decision to issue the Report unreasonable.

[30] Under subsection 16(1) of the *IRPA,* a foreign national who applies to be a permanent resident in Canada is required to produce relevant evidence and documents required by an Officer of IRCC:

Obligation — answer truthfully	**Obligation du demandeur**
16 (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	16 (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.

[31] In my view, the CBSA Officer's decision to issue the Report was reasonably based on the Applicant's failure to provide IRCC with all the relevant evidence and documents that were requested pursuant to subsection 16(1) of the *IRPA*. It was the Applicant's responsibility to provide all the relevant information related to his criminal charges. It is not reasonable to expect that all relevant evidence and documentation will be provided to IRCC by the CBSA on the Applicant's behalf, regardless of whether the departments are capable of acquiring the information requested.

[32] Furthermore, the fact that IRCC had learned of some of the details of the Applicant's criminal proceedings indirectly does not mean that IRCC may not reasonably require information or documentation related to those proceedings directly from the Applicant himself. I also do not agree with the Applicant's argument that the CBSA Officer ought to have used his discretion to consider the reasons for the Applicant's failure to respond to IRCC's letters. For these reasons, I find the CBSA Officer's decision to issue the Report is reasonable.

B. *Was there a breach of procedural fairness?*

[33] The issue of whether there was a breach of the Applicant's right to procedural fairness was addressed in 2021 FC 1379, in the context of a judicial review of the decision to refuse the Applicant's permanent residence application. The Applicant raises the same arguments as those reviewed in 2021 FC 1379, notably:

a) The Applicant submits that he had legitimate expectations that his permanent residence application would be put on hold pending the outcome of his criminal matter; in providing a statutory declaration to the Provincial Court of Manitoba on April 26, 2019, the CBSA Officer acted as an agent of IRCC and represented to the Applicant that IRCC was aware of his criminal charge and that his permanent residence application was on hold pending the outcome of his criminal matters. The Applicant further submits that the distinction between CBSA and IRCC as separate entities was unrecognizable to him.

b) The Applicant submits that the CBSA Officer and IRCC breached the duty of fairness by sending IRCC communications directly to the Applicant instead of his legal representative.

[34] For the sake of brevity, I will not repeat the analysis related to this portion of the Applicant's arguments. In my view, there was no breach of procedural fairness concerning representations made by the CBSA Officer during the Applicant's criminal proceedings, or with regards to communications sent to the Applicant.

[35] The Applicant further submits that, given his reliance on the CBSA Officer's declaration that his permanent residence application would be placed on hold; the CBSA Officer was required to provide him additional procedural protection. Despite being aware that IRCC had requested additional documentation from the Applicant between May and August 2019, the Applicant submits that the CBSA Officer failed to bring this to the attention of the Applicant or his counsel. The Applicant states that the CBSA Officer ought to have at the very least notified him that his permanent residency application was no longer on hold. The Applicant also argues that the CBSA Officer ought to have informed IRCC that the Applicant was represented by legal counsel when the CBSA Officer received the Use of a Representative Form on May 22, 2019.

[36] The Respondent submits that the CBSA Officer explicitly told the Applicant's counsel on May 27, 2019, in an email regarding the Applicant's passport, that the Applicant was being investigated for potential inadmissibility. Based on the evidence in the record, the Respondent argues that the Applicant knew or ought to have known that IRCC was conducting a review of

his permanent residence application and that he was required to submit further information, as was requested by IRCC. I agree.

[37] In my view, there was no breach of procedural fairness. As with the Applicant's two other arguments, pursuant to subsection 16(1) of the *IRPA*, the onus remains on the Applicant to provide the information reasonably required by IRCC in the context of his permanent residence application.

VI. **Conclusion**

[38] I find that it was reasonable and not procedurally unfair for the CBSA Officer to issue the Report pursuant to subsection 44(1) of the *IRPA*. I therefore dismiss this application for judicial review.

[39] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-678-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

3. No costs are awarded.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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