Federal Court  Cour fédérale

Date: 20231017

Docket: IMM-5509-22

Citation: 2023 FC 1381

Ottawa, Ontario, October 17, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

TAMAS POLGAR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Tamas Polgar, seeks judicial review of a decision by the Immigration and Refugee Board of Canada's Immigration Division [the ID], rendered May 26, 2022. The ID found him inadmissible to Canada pursuant to paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, (SC 2001, c 27) [the Immigration Act] and issued a deportation order against him as prescribed at section 229 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [the Immigration Regulations].

[2] For the reasons that follow, I will dismiss the application. I have considered the reasons for the decision, the evidence that was adduced before the ID, the parties' documents and submissions, as well as the applicable law, and have not been convinced the decision is unreasonable or that procedural fairness was breached.

II. Background

[3] Mr. Polgar is a citizen of Hungary. On December 18, 2012, he was involved in an altercation, in Hungary. On December 17, 2014, a court in Hungary convicted him of two counts of felony of public nuisance and one count of felony of serious bodily harm.

[4] In or around December 27, 2016, Mr. Polgar arrived in Canada and on January 18, 2018, he claimed refugee protection inland. He disclosed his conviction from the outset and outlined that it had been erased before he arrived in Canada.

[5] On January 24, 2018, Mr. Polgar was found eligible to have his claim for refugee protection referred to the Refugee Protection Division [RPD] for adjudication. However, the RPD suspended his claim process to consider his admissibility.

[6] On February 2, 2018, an Enforcement Officer wrote a report under subsection 44(1) of the Immigration Act [the 441(1) report]. The Officer noted that Mr. Polgar was convicted of one count of felony of serious bodily harm (battery) on or around December 17, 2014, contrary to the Hungarian *Criminal Code* at section 164(1)(3). The Officer also noted that this offense, if committed in Canada, would equate to assault causing bodily harm, contrary to the Canadian *Criminal Code* at section 267(b), an indictable offense and liable to imprisonment for a term not exceeding ten years.

[7] The Officer opined that Mr. Polgar is inadmissible to Canada pursuant to paragraph 36(1)(b) of the Immigration Act. The Officer stated that there are reasonable grounds to believe he is inadmissible because of serious criminality for having been convicted of an offense outside Canada, which if committed in Canada, would constitute an offense under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

[8] The 44(1) report was referred to the Minister's Delegate who found it well-founded and referred the file to the ID for an admissibility hearing, pursuant to subsection 44(2) of the Immigration Act. At the same time, a Canada-wide arrest warrant was issued against Mr. Polgar. On February 19, 2018, Canada Border Services Agency's [CBSA] officers arrested and detained him and on March 13, 2018, he was released from detention on conditions, on bail.

[9] On September 1, 2018, Mr. Polgar moved from Waterloo, Ontario to Longueuil, Quebec. He informed the CBSA of his address change the day prior, and this address change was registered in the CBSA's nationwide address on September 5, 2018. Mr. Polgar did not notify the ID or the RPD.

[10] On September 14, 2018, the ID sent a Notice to Appear for a scheduling conference to Mr. Polgar, in Waterloo, and to the Minister. Mr. Polgar did not receive the Notice to Appear because he no longer lived at that address in Waterloo. On September 28, 2018, he therefore did not present himself at the scheduling conference to set a date for his admissibility hearing. On October 1, 2018, the ID sent him a Notice for Failure to Appear.

[11] Three (3) years later, on September 1, 2021, and after Mr. Polgar enquired about the status of his file, the ID sent a second Notice to Appear to both the Minister and Mr. Polgar at his then current address. On December 2, 2021, the ID held the admissibility hearing.

[12] After the admissibility hearing, Mr. Polgar applied for a stay of proceedings, essentially arguing that the delay between the issuance of the inadmissibility report and the admissibility hearing caused him prejudice.

[13] On January 25, 2022, in an interlocutory decision, the ID denied the stay of proceedings and on March 24, 2022, Mr. Polgar applied for a reconsideration of this decision.

[14] On May 26, 2022, the ID issued its decision, which is the subject of this judicial review.

III. The Decision under Review

[15] In its reasons, the ID provided an overview of the facts and addressed the request Mr. Polgar presented for a reconsideration of the January 25, 2022, interlocutory decision refusing to stay the proceedings.

[16] The ID decided not to reconsider its interlocutory decision. The ID noted that Mr. Polgar had not argued that its interlocutory contained an error and that if so, it would not be the proper forum to review the matter. Still in regards to the reconsideration, the ID first noted in any event that Mr. Polgar had not informed the ID of a change of address; he only informed the CBSA, and the reason for not proceeding at that period was thus attributed to him. The ID also noted that, more determinatively, the delays caused before the admissibility hearing could take place were not considered unusual, detrimental or unfair to an extent that it would affect the public's sense

of decency and fairness and justify a stay of proceedings. The ID found Mr. Polgar was not able to demonstrate such a high threshold.

[17] On the merits, the ID first determined that the following facts were established:

- The person concerned is a foreign national, citizen of Hungary. He is not a Canadian citizen nor a Permanent Resident of Canada.

- He was convicted of an offense in Hungary on December 17, 2014, of "Felony of serious bodily harm" as per [s]ection 164(1)(3) of the Hungarian *Criminal Code.*

[18] Applying one of the analyses stated in *Hill v Canada (Minister of Employment and Immigration)* (1987), 73 NR 315, 1 Imm LR (2d) 1 (FCA), the ID determined that the Minister had demonstrated reasonable grounds to believe that the conviction in Hungary equates to the offense of assault with a weapon or causing bodily harm, as described at section 267(b) of the *Criminal Code* of Canada.

[19] The ID considered the arguments raised by Mr. Polgar: (1) he had obtained a pardon for the conviction (per the Certificate of Good Conduct) and his criminal record was expunged; (2) his criminal trial was flawed; and (3) convictions under section 267(b) of the *Criminal Code* of Canada are seldom given the maximum sentence of 10 years and it is a hybrid offense, therefore for both reasons it should not be considered serious criminality under the Immigration Act.

[20] Responding to the first argument regarding pardon and expungement and to the Minister's argument that the Certificate of Good Conduct should be disregarded, the ID found there was insufficient information to question the validity of the March 2018 Certificate of Good

Conduct from Hungary which Mr. Polgar had submitted. The ID noted that during the virtual hearing, Mr. Polgar had in his possession a copy of another Certificate of Good Conduct issued at a later date.

[21] The ID went on to cite the test set out by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Saini*, 2001 FCA 311 [*Saini*], with respect to the effect to be given to a foreign discharge or pardon. The ID noted that Mr. Polgar had not demonstrated that the rules around granting a pardon in Hungary are similar to the Canadian system of pardons. The ID thus concluded that Mr. Polgar had not demonstrated that the Certificate of Good Conduct is equivalent to a pardon or discharge in Canada as expressed in the first factor of the Saini decision.

[22] Responding to the second argument, that his trial was flawed, the ID found that it could not revisit his conviction. The ID noted case law outlining that when there is a foreign conviction on the merits, the Federal Court has upheld that it cannot be challenged before the ID (*Brannson v Canada (Minister of Employment and Immigration)*, [1981] 2 FC 141 (CA) at para 37; *Li v Canada (Minister of Citizenship and Immigration)*, [1997] 1 FC 235 (CA), at para 25; *Ward v Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm LR (2d) 102 (FCTD at para 15.) The ID also noted that in any event, Mr. Polgar had not demonstrated that he faced injustice in his own trial (*Gurbuz v Canada (Citizenship and Immigration)*, 2018 FC 684 [*Gurbuz*]).

[23] Responding to the third argument, the ID determined that: (1) if an offense can lead to an imprisonment of a maximum term of 10 years, it falls within the definition of paragraph 36(1)(b) of the Immigration Act and that the sentence he received in Hungary is irrelevant; (2) hybrid offenses are deemed to be indictable offenses per paragraph 36(3)(a) of the Immigration Act and

(3) Mr. Polgar's arguments based on case law that applies Article 1F(b) of the *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 (entered into force 22 April 1954) [*Refugee Convention*] are not relevant here since there is a difference between exclusion matters and admissibility proceedings.

[24] The ID determined that the Minister had demonstrated reasonable grounds to believe that the person concerned was convicted of an offense, which if committed in Canada would equate to an offense punishable by a maximum term of imprisonment of at least 10 years. The ID determined that Mr. Polgar is described at paragraph 36(1)(b) of the Immigration Act and issued a deportation order against him as prescribed at section 229 of the Immigration Regulations.

IV. Issues raised by the Applicant

[25] Before the Court, Mr. Polgar confirmed the equivalency was not an issue. He raised the following individual questions:

A. What is the standard of review?

B. Did the IRB ID err when [it] disregarded that the Applicant's conviction had long been expunged?

C. Did the IRB ID breach procedural fairness?

D. Did the IRB ID err in its finding that the conviction constituted serious criminality?

E. Did the IRB ID fail to reasonably engage with the evidence or misapprehend evidence?

V. Analysis

A. *The standard of review*

[26] The determination of inadmissibility to Canada, in this case the inadmissibility per paragraph 36(1)(b) of the Immigration Act, is essentially a question of equivalency, although this aspect is not in dispute here. The Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] established that there is a presumption of reasonableness and in any event nothing displaces the presumption in this case given the issues raised (*Liberal v Canada (Citizenship and Immigration)*, 2017 FC 173 at para 12; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at para 21; *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at para 61.)

[27] Under the reasonable standard, the reviewing court must consider "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome", to determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker". (*Vavilov* at paras 83, 85; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31).

[28] For the one issue of procedural fairness, the Court must determine whether, taking into account the particular context and circumstances at issue, the process followed by the decision-maker was fair and offered the parties the right to be heard and the opportunity to know and

respond to the case against them (*Makoundi v Canada (Attorney General*), 2014 FC 1177 at para 35; *Canadian Pacific Railway Company v Canada (AG)*, 2018 FCA 69 at paras 40-41.)

[29] I will now consider the issues as raised by Mr. Polgar.

B. *Did the ID err when it considered whether the conviction had been expunged ?*

[30] Mr. Polgar submits that the ID erred when it disregarded that his conviction had been long expunged because: (1) the *Saini* test does not apply in his case as his conviction was expunged and not pardoned; (2) the language and verb tense used in paragraph 36(1)(b) of the Immigration Act is such that he cannot be declared inadmissible because he "had been convicted" but not "has been convicted"; and (3) his Certificate of Good Conduct cannot be disregarded.

[31] I find the ID did not err when it considered whether the conviction had been expunged.

[32] First, Mr. Polgar alleges that the test set out in *Saini* does not apply because his conviction was not pardoned, but was expunged. This argument fails for three reasons. First, Mr. Polgar did not raise this distinction before the ID, and he himself used both words, i.e., pardon and expungement, interchangeably in his opening submissions and in his submissions for the hearing. Second, he cited *Saini* to the ID and argued that the criteria were met in his case, again making no distinction as between expungement and pardon. Third, in any event, Mr. Polgar made no meaningful distinction between expungement and pardon, and I have not been convinced that the *Saini* test does not apply to both expungements and pardons. I am satisfied the ID properly applied the *Saini* test.

[33] Second, the argument in regards to the verb tense used in paragraph 36(1)(b) of the Immigration Act is of no moment. Mr. Polgar's arguments cannot succeed.

[34] Third, the ID did not disregard the Certificate of Good Conduct. In fact, it rejected the Minister's opposition, considered and assessed the Certificate, and even noted that two such documents were issued at different dates.

C. *Did the ID breach procedural fairness ?*

[35] Mr. Polgar submits that the ID breached procedural fairness because: (1) the ID caused an inordinate delay, originally caused by the Minister failing to provide his correct address to the ID; (2) the ID erred in finding that he caused the delay, whereas he updated his address with the Minister (through the CBSA) as required under his conditional release; (3) the Minister did not properly request the hearing in 2018 because he was required to provide his current address in the request; (4) the delay affects the public perception of fairness by depriving him of the right to have his case processed without unreasonable delay; (5) the ID failed to examine the reasons for the delay and subsequently failed to allow him to adduce evidence related to this delay; (6) the ID erred in finding that his complaint was brought too late; (7) the delay caused him irreparable prejudice because one of his key witnesses passed away in the interim; and (8) he suffered psychological trauma.

[36] The Minister responds, essentially, that in the case at bar, the fact that Mr. Polgar had undoubtedly advised CBSA of his change of address does not imply that the ID was also informed of the change. He adds that the ID did not err when concluding that the delay was

attributable to the Applicant. The Minister also adds that in any event, the ID's decision that the delay does not constitute an abuse of process is reasonable. I agree.

[37] I find the ID did not breach procedural fairness.

[38] Clearly, Mr. Polgar had not informed the ID, or the RPD, of his change of address in September 2018. He does not contest this. Furthermore, and in any event, it was reasonable for the ID to conclude that the delays caused before the admissibility hearing could take place were not considered unusual, detrimental or unfair to an extent that it would affect the public's sense of decency and fairness. In this regard, the Supreme Court of Canada in *Blencoe v British Columbia (Human Rights Commission*), 2000 SCC 44 at para 122 stated that :

> The determination of whether a delay has become inordinate depends on the nature of the case and its complexity, the facts and issues, the purpose and nature of the proceedings, whether the respondent contributed to the delay or waived the delay, and other circumstances of the case. As previously mentioned, the determination of whether a delay is inordinate is not based on the length of the delay alone, but on contextual factors, including the nature of the various rights at stake in the proceedings, in the attempt to determine whether the community's sense of fairness would be offended by the delay.

[39] In addition, the ID considered Mr. Polgar's contention that the delay had caused him prejudice because an essential witness had sadly passed away before the admissibility hearing. The ID concluded he had submitted ample evidence and that no prejudice was caused. Although the situation was certainly unfortunate, the ID's conclusion was not shown to be unreasonable in light of the record, as Mr. Polgar had the opportunity to present his evidence by other means. The ID also took into account Mr. Polgar's allegations of psychological trauma, but determined that

there was no evidence to corroborate the diagnosis of a trauma. This has not been shown to be unreasonable in light of the record.

D. *Did the ID err in its finding that the Applicant was inadmissible on the grounds of serious criminality per paragraph 36(1)(b) of the Immigration Act ?*

[40] Mr. Polgar submits that the ID erred when it found that his conviction constituted serious criminality because: (1) the ID ignored *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 by applying the 10 year rule mechanistically, without applying the test set out in *Jayasekara v Canada (Minister of Citizenship and Immigration*), 2008 FCA 404 for the interpretation of a "serious non-criminal crime", and also ignored other case law, such as Victor v Canada (Minister of Public Safety and Emergency Preparedness) 2013 FC 979; and (2) the ID failed to consider Tran v Canada (Minister of Public Safety and Emergency Preparedness), 2017 SCC 50, and therefore erred in considering that his milder-than-conditional sentence rendered him inadmissible.

[41] I find the ID did not err in its finding that the Applicant was inadmissible on the grounds of serious criminality per paragraph 36(1)(b) of the Immigration Act.

[42] As the ID indicated, Mr. Polgar conflates the inadmissibility under paragraph 36(1)(b) of the Immigration Act and the exclusion under Article 1F(b) the *Refugee Convention*. However, the jurisprudence on exclusion under Article 1F(b) is not relevant in this matter since exclusion matters are different from admissibility proceedings. The Court has already clearly distinguished the two analyses that must be executed and confirmed that the analysis under Article 1(F) is different than the one under paragraph 36(1)(b) (*Gurbuz* at paras 28 to 30).

[43] Mr. Polgar also conflates the analysis under paragraph 36(1)(b) of the Immigration Act, which relates to a conviction abroad, with other parts of the legislative regime, such as paragraph 36(1)(c). This comparison is misplaced, as the analysis to be performed under paragraph 36(1)(b) has been decided, as noted above. Under paragraph 36(1)(b) of the Immigration Act, the ID must not consider the sentence received abroad; the ID must determine whether the offense for which Mr. Polgar was convicted, if committed in Canada, would constitute an offense which could be punishable by a maximum term of imprisonment in Canada of at least 10 years. The ID found that it did. The ID did not err in this regard.

[44] The ID also reasonably concluded that if an offense can lead to an imprisonment of a maximum term of 10 years, it falls within the definition of paragraph 36(1)(b) of the Immigration Act and that the sentence he received in Hungary is irrelevant; and that hybrid offenses are deemed to be indictable offenses per paragraph 36(3)(a) of the Immigration Act.

E. *Did the ID fail to reasonably engage with the evidence or misapprehend evidence ?*

[45] Mr. Polgar submits that the ID failed to reasonably engage with the evidence or that it misapprehended evidence as it: (1) dismissed both his experts; (2) disregarded the documentary evidence demonstrating serious procedural violations during the trial; and (3) disregarded a collection of personal declarations by high profile lawyers, judges, and members of lawmaking bodies who confirmed the abysmal state of justice in Hungarian courts.

[46] As mentioned earlier, the ID’s role is not to re-do the trial that was conducted in Hungary. The ID’s conclusion that Mr. Polgar has not shown that his trial was unfair is reasonable in light of the record.

[47] I find that Mr. Polgar has not demonstrated that the ID failed to reasonably engage with the evidence or misapprehend evidence.

VI. Conclusion

[48] Mr. Polgar has not demonstrated that the decision is unreasonable or that procedural fairness was breached. I find the ID based the decision on "an internally coherent and rational chain of analysis" which is "justified in relation to the facts and law that constrain the decision maker." (*Vavilov* at para 85.) I see no reason for the Court to intervene.

[49] Finally, Mr. Polgar did not convince me that the question he raised is dispositive of the appeal, transcends the interests of the parties, nor that it raises an issue of broad significance or general importance.

JUDGMENT in IMM-5509-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

4. The style of cause is amended to name only the Minister of Public Safety and Emergency Preparedness as Respondent.

"Martine St-Louis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5509-22
STYLE OF CAUSE:	TAMAS POLGAR v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 18, 2023
JUDGMENT AND REASONS:	ST-LOUIS J.
DATED:	OCTOBER 17, 2023

APPEARANCES:

Tamas Polgar	SELF REPRESENTED
Me Simone Truong	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Tamas Polgar Anjou, Quebec	SELF REPRESENTED
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT