Federal Court  Cour fédérale

Date: 20240313

Docket: IMM-12710-22

Citation: 2024 FC 418

Ottawa, Ontario, March 13, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ARTHUR MAROGI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Arthur Marogi, is a citizen of Iraq. He was 13 years of age when he arrived in Canada as a refugee with his family. He was granted permanent resident status in 2002. The Applicant has since acquired a lengthy criminal record and is currently incarcerated.

[2] Following his most recent convictions in 2021, a CBSA Officer [Officer] prepared a report pursuant to section 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] alleging the Applicant was inadmissible to Canada for serious criminality [44(1) Report]. A Minister's Delegate [MD] subsequently referred the matter to the Immigration Division [ID] for an admissibility hearing pursuant to subsection 44(2) of the IRPA. The Applicant now seeks judicial review, pursuant to subsection 72(1) of the IRPA, of the MD's September 14, 2022 decision.

[3] The Application is denied. As explained in the reasons that follow, the MD's limited function under section 44 of the IRPA does not include the determination of controversial and complex issues of law such as an assessment of humanitarian and compassionate [H&C] circumstances.

II. Background

[4] The Applicant was convicted of nine separate offences between 2008 and 2019. In 2011, he was served with a warning letter for serious criminality. After being convicted for trafficking cocaine in September 2018 and sentenced to 90 days in jail and 12 months probation, the ID issued a deportation order in March 2020.

[5] The Applicant appealed the removal order to the Immigration Appeal Division [IAD], seeking special relief on H&C grounds. In a decision dated February 23, 2022, the IAD granted him a 3-year stay of removal. The IAD noted that the Applicant's trafficking offence was moderately serious and that he had continued to offend despite having been warned of a possible

removal. However, the IAD also noted that there was a moderate possibility for rehabilitation, a moderate risk of re-offending, and that other positive factors, including his child's best interests, justified granting the special relief. The IAD imposed 14 conditions and directed that a final reconsideration of the removal order occur on or about the 20th day of February 2025. The IAD noted that, at the time of the hearing, the Applicant faced outstanding charges from an offence date of November 12, 2020 [November 2020 Offences].

[6] The November 2020 Offences referred to by the IAD followed the execution of a search warrant on the Applicant's residence where the police seized cocaine and a significant sum of cash. The Applicant was identified as a member of a criminal organization. In July 2021, the Applicant entered guilty pleas and was convicted of two counts of trafficking in a controlled substance, one count of possession for the purpose of trafficking, and one count of possession of the proceeds of crime. The Applicant was sentenced to 56 months imprisonment.

[7] The November 2020 Offences resulted in the preparation of a 44(1) Report. The Applicant was invited to make submissions in advance of the 44(1) decision and recommendation.

[8] In submissions, the Applicant relied on the IAD decision granting a stay of the previous removal order. The Applicant argued that the IAD decision was very recent, that the Applicant's circumstances had not changed, and that the IAD was aware the November 2020 Offences were pending at the time the IAD stayed the removal order. The Applicant further submitted that, in exercising discretion to write a 44(1) report and refer the matter under 44(2), H&C factors were

to be considered by the Officer and MD. This, the Applicant argued, was of particular importance because the inadmissibility for serious criminality coupled with the length of the imposed sentence denied the Applicant an appeal to the IAD pursuant to section 64 of the IRPA. The Applicant submitted the factors set forth in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 at para 14 [*Ribic* factors] were of application in the H&C analysis.:

> a) the seriousness of the offence or offences leading to the removal order;
>
> b) the possibility of rehabilitation or, alternatively, the circumstances surrounding the failure to meet the conditions of admission;
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> c) the length of time spent, and the degree to which the applicant is established, in Canada;
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> d) the family in Canada and the dislocation to the family that removal would cause;
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> e) the family and community support available to the appellant; and
>
> f) the degree of hardship that would be caused to the appellant by the appellant's return to his or her country of nationality.

[9] The Applicant concluded the subsection 44(1) submissions by stating that the circumstances warranted granting the Applicant "one last chance to show that he had turned his life around."

[10] The Officer completed a 44(1) Report for serious criminality, recommended an Admissibility Hearing and referred the Report to the MD for review. The MD concluded that the Officer's Report was well founded and referred the case for an Admissibility Hearing in

accordance with subsection 44(2) of the IRPA. It is the MD's decision that underlies this application for judicial review.

III. Relevant Legislation

[11] The Officer alleges the Applicant is inadmissible pursuant to paragraph 36(1)(a) of the IRPA, which states:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	**a)** être déclaré coupable au Canada d'une infraction prévue sous le régime d'une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction prévue sous le régime d'une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
[…]	[…]

[12] Subsection 44(1) of the IRPA, pursuant to which the Officer's Report was prepared, provides:

Preparation of report	**Rapport d'interdiction de territoire**
44 (1) An officer who is of the opinion that a permanent	**44 (1)** S'il estime que le résident permanent ou

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.	l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

[13] The MD's decision was made pursuant to subsection 44(2), which states:

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.

[14] An individual found to be inadmissible on the grounds of serious criminality by the ID may not appeal to the IAD where sentenced to a term of imprisonment of at least six months (IRPA ss 64(1) and (2)). As noted above, the Applicant was sentenced to 56 months imprisonment for the November 2020 Offences.

[15] A protected person, such as the Applicant, found to be inadmissible on grounds of serious criminality may only be removed to a country where they would be at risk of persecution where the Minister is of the opinion the person constitutes a danger to the public in Canada [Danger Opinion] (IRPA ss 115(2)).

IV. Issues

[16] The Applicant argues the MD erred by misapplying the applicable law, and rendering unreasonable findings of facts and law in deciding to refer the matter for a hearing. The Respondent submits the issues are (1) the applicable standard of review; (2) whether the matters raised by the Applicant are beyond the scope of the MD's role in the section 44 process; and (3) whether the MD's decision was reasonable.

[17] I have framed the issues as follows:

A. Was the MD required to consider and reasonably determine the H&C factors raised by the Applicant?

B. If so, was the MD's treatment of the H&C considerations reasonable?

V. Standard of Review

[18] The parties submit, and I agree, that the standard of review to be applied is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 [*Vavilov*]).

[19] A reviewing court applying the standard of reasonableness is to put the decision-maker's reasons first and examine those reasons with "respectful attention" and consider the decision "as a whole" (*Vavilov* at paras 84-85 and 99). The Court's focus is on whether a decision-maker's analysis and conclusion are justified, transparent and intelligible and fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Vavilov* at paras 86 and 97).

VI. Analysis

[20] Relying on *Mannings v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 823 [*Mannings*], the Applicant acknowledges the MD was not required to consider the Applicant's H&C-related submissions. However, having chosen to do so, the Applicant argues the MD was required to undertake a reasonable consideration of those H&C factors.

[21] As Justice Catherine Kane noted in *Mannings*, the MD's referral decision under subsection 44(2) of the IRPA requires the MD to choose between issuing a warning letter on the one hand, or referring the permanent resident or foreign national to the ID for an admissibility hearing on the other hand (*Mannings* at para 75). The MD's role and the discretion being exercised are limited:

> [73] In [*Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 [*Sharma*]], the Federal Court of Appeal stated that while a report under 44(1) and referral under 44(2) "are important in the sense that they trigger the process that may ultimately strip the appellant of his permanent residency, they are of no immediate and practical consequence for the appellant."
>
> [74] As explained in the jurisprudence (for example, *Sharma* at para 29, *Lin* at paras 10-13) a recommendation and referral at the section 44 stage is not a final decision. The section 44 process is to

> determine, based on the Officer's opinion and Minister's Delegate's review of that opinion, whether the foreign national or permanent resident should be referred to the ID for an admissibility hearing. The Officer and Minister's Delegate do not determine admissibility. The ID makes the determination of admissibility and submissions on factual and legal issues can be made at that stage.

[22] As was also noted in *Mannings*, the jurisprudence has recognized some uncertainty relating to the scope of the discretion to consider H&C factors under section 44 of the IRPA (*Mannings* at paras 76-78, citing *McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422).

[23] However, since *Mannings*, the Federal Court of Appeal [FCA] has again addressed the scope of the discretion an officer or MD exercises under section 44 in *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 [*Obazughanmwen*], and in doing so, has clarified any uncertainty regarding an MD's discretion under subsection 44(2) to consider H&C factors (*Obazughanmwen* at paras 29-33, 37). *Obazughanmwen* was more recently considered and applied by Chief Justice Paul Crampton in *Sidhu v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1681 [*Sidhu*].

[24] In *Obazughanmwen*, the issue was before the FCA in the context of a certified question under IRPA paragraph 37(1)(a), organized criminality, where the consequences of a declaration of inadmissibility are similar to those that result where an offender is declared inadmissible under paragraph 36(1)(a) for reasons of serious criminality. Although the FCA held that the certified question was not properly before it – the roles of CBSA officers and MDs in the section

44 process having been well settled – the FCA took the opportunity to provide clarification (*Obazughanmwen* at paras 41-42).

[25] Relying on prior jurisprudence, the FCA described the function of officers and MDs acting under section 44 as being an administrative screening function intended to consider "readily and objectively ascertainable facts" related to the question of admissibility (*Obazughanmwen* at para 37). The function of an officer and MD acting under section 44 is not to determine controversial and complex issues of law and evidence, including H&C considerations (*Obazughanmwen* at paras 27, 30, 33-37).

[26] In *Sidhu*, the Chief Justice undertook a detailed review of *Obazughanmwen* and the prior jurisprudence relied upon by the FCA. He notes that "prior uncertainty as to whether officers and ministerial delegates could consider H&C factors in exercising their discretion under subsections 44(1) and (2)… has now been eliminated" (*Sidhu* at para 59). The Chief Justice then summarizes the general principles applicable to the scope of the discretion contemplated under section 44 following *Obazughanmwen*:

> [60] Consequently, it is appropriate to restate the general principles applicable to the scope of the discretion contemplated by subsections 44(1) and (2) of the IRPA as follows:
>
> 1. The scope of discretion held by immigration officers under subsection 44(1) and by ministerial delegates under subsection 44(2) of the IRPA is very limited, especially in cases of serious criminality and organized criminality: *Obazughanmwen*, at paras 27 and 29.
>
> 2. In this context, immigration officers and ministerial delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond the reach of those decision-makers: *Obazughanmwen*, at

> paras 31 and 39 (quoting *Cha*, at para 35). Such excluded personal circumstances include H&C considerations: *Obazughanmwen*, at paras 31 (quoting *Cha*, at paragraph 37) and 44-45; see also *Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862 at para 20 [*Lin*], aff'd 2021 FCA 81.
>
> 3. For greater certainty, the exercise contemplated by subsections 44(1) and (2) is an administrative screening function that is only meant to look into readily and objectively ascertainable *facts concerning admissibility*: *Obazughanmwen*, at para 37; see also paras 27 and 30.
>
> 4. These principles apply equally to foreign nationals and permanent residents: *Obazughanmwen*, at para 32; see also *Lin*, at paras 17-18. They also apply with equal force to sections 36 and 37 of the IRPA: *Obazughanmwen*, at para 41. [Emphasis added.]

[27] As noted in *Sidhu*, the FCA's analysis in *Obazughanmwen* is binding on this Court. The Chief Justice further notes that, to the extent guidance provided to decision-makers by the Respondent is inconsistent with the FCA's analysis, it merits revision and cannot assist the Applicant (*Sidhu* at para 57).

[28] *Obazughanmwen* has clarified that the consideration of H&C factors under subsection 44(2) of the IRPA is beyond the reach of the discretion extended to MDs under that subsection. The mandate under section 44 of the IRPA is limited to finding facts concerning admissibility to support the choice to refer, or to not refer, the permanent resident or foreign national to the ID for an admissibility hearing.

[29] In the absence of a mandate to consider H&C factors, the MD cannot commit a reviewable error should they exceed that mandate and embark on a consideration of those

factors. The MD could not have acted unreasonably by failing to engage in a more comprehensive or meaningful analysis of those considerations as alleged by the Applicant. As the Chief Justice stated in *Sidhu*, after noting that any consideration of H&C factors exceeded the statutory mandate, "it can hardly be maintained that [the MD] ought to have given even greater consideration to considerations that were beyond his remit in the first place" [Emphasis added.] (Sidhu at para 62).

[30] In light of the limited discretion being exercised under section 44, it is important to highlight that the Applicant will have the opportunity to advance substantive arguments relating to risk in the context of the pending Danger Opinion and that the Applicant maintains the option of pursuing an H&C application pursuant to subsection 25(1) of the IRPA.

[31] Having concluded the MD could not have erred in considering factors that exceed the section 44 mandate, it is not necessary to address the reasonableness of the MD's treatment of the H&C factors. However, in light of the parties' written submissions and for reasons of completeness, I am satisfied that the MD's brief consideration and weighing of the H&C factors, when read together with the 44(1) Report that forms part of the MD's reasoning (*Burton v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 753 at para 16), was reasonable in light of the jurisprudence as it existed prior to *Obazughanmwen* and *Sidhu*. The MD identified the Applicant's desire to remain in Canada, referenced difficulties in adjusting to life in Iraq and broadly acknowledged that the "H&C considerations of this case" had been weighed against the aggravating factors.

VII. Conclusion

[32] For the above reasons, the Application is dismissed.

[33] The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-12710-22

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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