Federal Court  Cour fédérale

Date: 20240705

Docket: IMM-1612-23

Citation: 2024 FC 1053

Toronto, Ontario, July 5, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

WANDA ZOFIA KOWALSKA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Immigration Division [ID] of the Immigration and Refugee Board of Canada, dated January 27, 2023 [the Decision]. In the Decision, the ID found the Applicant inadmissible to Canada pursuant to paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Paragraph 36(1)(b) of the *IRPA* provides that a permanent resident or a foreign national is inadmissible on grounds of

serious criminality for having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

[2] As explained in more detail below, this application is dismissed, because the Applicant's arguments do not undermine the reasonableness of the Decision.

II. Background

[3] The Applicant is a citizen of Poland and is of Roma ethnicity. The Applicant first left Poland in or around 1980, when she travelled to the United States [US] with her husband to escape discrimination she alleges they both faced in Poland. She was removed from the US to Poland, and she subsequently returned to the US multiple times over the years.

[4] The Applicant and her husband arrived in Canada in July 2018. They sought refugee protection in November 2019.

[5] On March 9, 2021, an officer issued a report pursuant to subsection 44(1) of the *IRPA*, providing their opinion that the Applicant is inadmissible to Canada for serious criminality under paragraph 36(1)(b) of *IRPA*. The report stated that it was based on the following:

> Also known as Ewa Krulik -Is not a Canadian citizen; is not a permanent resident of Canada; is not a registered Indian under the Indian Act; Ms. Kowalska has been convicted of an offence; namely, Burglary on or about 09 November 1992 at or near Centre County, Pennsylvania, USA. This offence, if committed in Canada, would constitute an offence that may be punishable by way of indictment under paragraph 348(1)(d) of the Criminal Code of Canada and for which a maximum term of imprisonment for life may be imposed.

[6] As noted above, the section 44 Report was issued on the basis that the Applicant was also known as Ewa Krulik. An Ewa Krulik was found guilty of burglary in Pennsylvania on November 9, 1992.

[7] On March 30, 2021, an officer with Canada Border Services Agency [CBSA] made a statutory declaration [Statutory Declaration], stating:

> I was assigned the task of reviewing the refugee claim made by [the Applicant] and her accompanying family member. Due to her admission of having previously used a fraudulent identity, and having been removed from the United States as a result of being charged with a criminal offence, I ran a check on the National Crime Information Center (NCIC) database using her biographic Information, The query resulted in a positive match to FBI number: 426644X2 and confirmed that she was also known as Ewa Krulik amongst 23 other aliases.
>
> To ascertain that this was in fact the same Individual, on the 28, September 2020, I submitted [the Applicant's] biometrics to the RCMP to have them run against the NCIC database.
>
> On the 28, September 2020 I received an email from the RCMP that contained a positive reply from the USA confirming an identical biometric match to FBI number 426644X2.

[8] Pursuant to subsection 44(2) of the *IRPA*, a Minister's delegate reviewed the section 44(1) Report prepared by the Officer. On September 28, 2022, the delegate referred the report to the ID for an admissibility hearing.

[9] By letter dated October 17, 2022, CBSA advised the Applicant that it had referred a report to the ID for an inadmissibility hearing under subsection 44(2) of the *IRPA* and attached a copy of the material that CBSA had provided to the ID concerning the allegations related to her inadmissibility. Those materials included copies of the section 44 report and subsequent referral.

[10] The Applicant's hearing before the ID took place on December 7, 2022. On January 27, 2023, in the Decision which is now the subject of this judicial review application, the ID found that the Applicant was inadmissible under *IRPA* paragraph 36(1)(b). The ID therefore issued a deportation order against the Applicant.

III. Decision under Review

[11] Before the ID, CBSA alleged that the Applicant, under the name of Ms. Ewa Krulik, had been found guilty on November 9, 1992, in the Court of Common Pleas of Centre County, Pennsylvania, for committing the offence of burglary by unlawfully and intentionally entering a building or occupied structured on October 19, 1992. It was alleged that the same act, if committed in Canada, would constitute the Canadian offence of breaking and entering with intent, contrary to section 348 of the *Criminal Code* of Canada, punishable by a maximum term of life in prison.

[12] In the Decision, the ID noted that the Applicant testified, but was unable to speak to the foreign offence due to memory issues, and that she did not remember the name Ewa Krulik or the circumstances of the offence in question.

[13] The Decision also explains that the ID began by considering the Applicant's request, raised at the commencement of the hearing, that it decline to hear the matter or adjourn the matter. The Applicant's counsel argued that he and the Applicant were not served with adequate notice of either the intent to prepare the section 44 Report or the intent to refer the report to the ID, which precluded counsel from making submissions on humanitarian and compassionate [H&C] grounds and rehabilitation. The Applicant argued that this was procedurally unfair. The

ID denied this request, finding that sections 44 and 45 of *IRPA* constrain the outcomes available to the ID and that, save for the narrow ability to order a remedy for an abuse of process, the ID was unable to dispose of the matter in a manner other than as contemplated by section 45 of the IRPA.

[14] The ID further noted that, after hearing evidence and during closing submissions, the Applicant asked the ID to determine that the alleged breach of procedural fairness amounted to an abuse of process, which the ID interpreted as a request for a stay of proceedings based on abuse of process. The ID noted the explanation in *Kazzi v Canada (MCI)*, 2017 FC 153 [*Kazzi*] at paragraph 53, that it is not the ID's role to determine if the process leading up to an inadmissibility report was procedurally unfair.

[15] The ID also referenced *Canada (MPSEP) v Najafi*, 2019 FC 594 [*Najafi*] and *Ismaili v Canada (MPSEP*), 2017 FC 427 [*Ismaili*] to note that the ID enjoys a very limited ability to consider whether there has been an abuse of process, the authorities having restricted their consideration of abuse of process to the period of time after the section 44(1) report had been prepared. The ID therefore found *Kazzi* dispositive in confirming that the ID does not have the authority to examine whether the procedure leading up to the creation of the report amounted to an abuse of process.

[16] The ID also found that, even if it had requisite jurisdiction, it would decline to exercise it to issue a stay, because the circumstances would fail the test for a stay based on an abuse of process set out in *R v Babos*, 2014 SCC 16 [*Babos*]. In applying that test, the ID found: (a) that the Applicant's right to a fair inadmissibility hearing would not be impacted, because her chief

procedural fairness complaint was that she had been precluded from making arguments on H&C grounds and rehabilitation, which arguments were outside the discretion of the ID; and (b) that the Applicant had an adequate alternative remedy of seeking redress against the process leading to the section 44 report through the judicial review process before the Federal Court. The ID therefore concluded a stay of proceedings was unwarranted.

[17] The ID next considered whether there was sufficient evidence adduced by the Minister linking the Applicant to Ewa Krulik. The ID reviewed the Statutory Declaration and considered the Applicant's submissions that the Minister's evidence was insufficient. The Applicant argued that the Minister's evidence did not include the documents supporting the claim in the Statutory Declaration that there was a biometric match between the Applicant and the referenced FBI file involving Ms. Kulik [Supporting Documents]. The Applicant also argued that she had no memory of being Ms. Krulik. The Minister argued before the ID that the information contained in US records and shared with Canadian officials was protected under investigative privilege and could not be disclosed.

[18] Citing *Wang v Canada (MPSEP)*, 2016 FC 493, the ID disagreed with the Minister's assertion that investigative privilege would prevent the disclosure of the Supporting Documents, as the Minister's counsel provided insufficient justification as to why the privilege ought to apply. The ID also noted it would have preferred to see the actual documents from the US government and the physical evidence underpinning their finding. However, the ID concluded that, given the detail in the Statutory Declaration and the fact that the Applicant did not dispute that she was Ewa Krulik, the Statutory Declaration was sufficient to provide reasonable grounds to believe the two people were the same. The ID also noted it was not bound by any legal or

technical rules of evidence, such as the best evidence rule, and that it preferred the evidence of the sworn testimony of an officer over that of an individual suffering memory issues.

[19] The ID further noted that the Applicant could have cross-examined the officer who provided the Statutory Declaration. The ID considered the Applicant's submission that she could not cross-examine someone without an affidavit and that a statutory declaration was less probative than an affidavit, but the ID could identify no authority to support those submissions and therefore rejected them.

[20] Accepting that the Applicant was Ewa Krulik, the ID found that the Information in the Court of Common Pleas showing a guilty plea by Ms. Krulik to the offence of burglary, combined with the terms of that Court's order, were sufficient evidence, on the reasonable grounds to believe standard, to demonstrate that a conviction for the offence of burglary had been entered against Ms. Krulik.

[21] In the remainder of the Decision, the ID considered the equivalence of the foreign offence to the Canadian offence of breaking and entering with intent to commit an indictable offence therein, including arguments by the Applicant as to why she should not be found inadmissible. As those portions of the ID's analysis are not challenged in this application for judicial review, I need not set them out in these Reasons.

[22] In conclusion, the ID found that the Applicant had been convicted of a crime in the US that, had it been committed in Canada, equated to an offence under Canadian law that is

punishable by a maximum term of imprisonment by at least 10 years. The ID therefore issued a deportation order against her.

IV. Issues

[23] The Applicant is advancing the following issues for the Court's determination:

A. Whether the ID erred by not refusing to hear this case due to CBSA's failure to provide the s. 44(1) referral and to allow the Applicant an opportunity to make submissions prior to that referral;

B. Whether the ID erred by failing to grant a postponement of the hearing to allow the process prior to the hearing to be remedied;

C. Whether the ID erred in finding that the Applicant is actually the person named Ewa Krulik who was allegedly found guilty of one offence of burglary in Pennsylvania, US on October 19, 1992.

[24] I note that, in the body of the Applicant's Memorandum of Fact in Law, she also appears to advance an argument that an abuse of process occurred in the hearing before the ID, because she was not provided with the Supporting Documents underlying the Statutory Declaration. However, the Respondent notes that there is no evidence that the Applicant advanced this argument before the ID. Rather, her argument surrounding the Supporting Documents was that, in their absence, the Minister's evidence was insufficient and ran afoul of the best evidence rule. As such, the Minister argues that it is not available to the Applicant to raise this argument for the first time on judicial review.

[25] At the hearing of this application for just review, the Applicant's counsel conceded that the Respondent is correct that this particular abuse of process argument was not made before the ID. Based on my review of the transcript of the hearing before the ID, I also agree. As such, the Court will not adjudicate the issue that was not raised before the ID (see, e.g., *Ajarmah v Canada (Citizenship and Immigration)*, 2024 FC 646 at para 22).

[26] The reasonableness standard of review applies to all the issues the Court is addressing (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 23, 25). In arriving at that conclusion, I am conscious that the first two issues articulated above engage the Applicant's arguments that the ID did not appropriately respond to her position that she was deprived of procedural fairness in the section 44 process that preceded the ID's involvement. However, the ID's determination of whether there was a breach of procedural fairness in the section 44 process is one aspect of the merits of its Decision and is presumptively subject to review for reasonableness (see *Ahmad v Canada (Citizenship and Immigration)*, 2021 FC 214 at para 13). Where the issue before the reviewing court involves consideration of the decision-maker's finding that there was no breach of procedural fairness, as opposed to an allegation that the decision-maker itself has breached procedural fairness, the reasonableness standard applies.

V. Analysis

A. *Whether the ID erred by not refusing to hear this case due to CBSA's failure to provide the s. 44(1) referral and to allow the Applicant an opportunity to make submissions prior to that referral*

B. *Whether the ID erred by failing to grant a postponement of the hearing to allow the process prior to the hearing to be remedied*

[27] I will analyse the first two issues together, as the Applicant's arguments related to these issues are materially the same.

[28] The Applicant submits that she was deprived of procedural fairness before issuance of the section 44 Report and the subsequent referral to the ID, in that she was afforded no opportunity to make submissions related to H&C considerations or rehabilitation, which might have influenced the decision makers under section 44 of *IRPA* to decline to make the decisions that resulted in the admissibility hearing before the ID. To address this alleged deprivation of procedural fairness, the Applicant asked the ID either to decline to hear the matter before it or to postpone the hearing until she had an opportunity to pursue rectification of the procedural fairness issue.

[29] In declining to grant either category of relief requested by the Applicant, the ID explained that it did not have jurisdiction to police the procedures utilized by the Minister during the process of creating the inadmissibility report. In support of this conclusion, the ID relied on *Kazzi* at paragraph 53, in which the Court held as follows:

> 53. I note that it is not the ID's role to determine if the process leading to the inadmissibility report was procedurally unfair, as the only question for the ID is whether the person is inadmissible, and the ID has "no other option than to make a removal order against the foreign national or the permanent resident is he or she is inadmissible" (*Sharma* at para 19). Therefore, Mr. Kazzi's assertion that the ID should have taken into account the CBSA's actions toward him is ill-founded. When an inadmissibility report is deferred to the ID for an admissibility hearing, the ID has no discretion. If the person is inadmissible, the ID must issue a removal order (*Torre v Canada (Citizenship and Immigration*), 2015 FC 591 at para 22, aff'd 2016 FCA 48; *Sharma* at para 19). Here, the ID carried its duties in the manner provided in the IRPA and the case law. No breach of procedural fairness has occurred.

[30] The Applicant submits that *Kazzi* is distinguishable, as it involved consequences for the applicant therein that were less severe than in the case at hand. The Applicant did not expand on this submission, and I note that both *Kazzi* and the case at hand involved decisions by the ID that the relevant applicant was inadmissible to Canada. Regardless, I do not consider the Applicant's argument to represent a principled basis on which to find that the conclusion explained in *Kazzi* does not apply in the present case. I therefore find nothing unreasonable in the ID's conclusion that it did not have authority to examine the Minister's procedure under section 44 of *IRPA*.

[31] Moreover, I note that the ID also conducted an alternative analysis, in reliance on authority that it enjoyed a very limited ability to consider whether there had been an abuse of process (see *Najafi* and *Ismaili*). The ID explained that, even if it were to find that it had the jurisdiction to police the Minister's procedures, it would decline to exercise that limited jurisdiction to afford relief to the Applicant. Employing the test in *Babos*, the ID considered whether the procedural fairness concerns raised by the Applicant warranted a stay for abuse of process. However, it concluded that those concerns did not prejudice the Applicant's right to a fair admissibility hearing before the ID and that the Applicant had the benefit of alternative remedies through the ability to seek judicial review of the Minister's section 44 processes.

[32] As I read this portion of the Decision, the ID recognized the jurisdiction available to it to consider whether there has been an abuse of process but applied that jurisdiction in a manner consistent with the *Babos* test and a recognition of the constraints of its own role, *i.e.*, limited to the fairness of the process before the ID itself and the substantive matters with which it was

concerned under section 45 of *IRPA*. In my view, the ID's analysis is intelligible, as required to withstand reasonableness review under *Vavilov*.

C. *Whether the ID erred in finding that the Applicant is actually the person named Ewa Krulik who was allegedly found guilty of one offence of burglary in Pennsylvania, US on October 19, 1992*

[33] As she argued before the ID, the Applicant submits that the evidence at the hearing, and in particular the Statutory Declaration without the Supporting Documents, was insufficient to link the Applicant with the Ewa Krulik who committed the 1992 Burglary in Pennsylvania.

[34] However, the ID considered that argument, weighed the evidence, and (in the context of the Applicant's memory issues and the fact that she did not directly dispute that she was Ewa Krulik) concluded that the evidence was sufficient to find reasonable grounds to believe that the two individuals are the same. The Applicant's arguments before the Court amount to a request that the Court re-weigh the evidence, which is not its role in judicial review.

VI. Conclusion

[35] Having considered the Applicant's arguments, I find that they do not undermine the reasonableness of the Decision. As such, this application for judicial review will be dismissed. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-1612-23

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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