Federal Court Cour fédérale

Date: 20240726

Docket: IMM-8899-23

Citation: 2024 FC 1194

Ottawa, Ontario, July 26, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ALBERTO JAVIER SANTIAGO CRUCETA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Alberto Javier Santiago Cruceta, seeks judicial review of the decision of a member (the "Member") of the Immigration Division ("ID") dated June 21, 2023, finding the Applicant inadmissible to Canada for serious criminality under section 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant maintains that the decision is unreasonable for having been insufficiently responsive to his submissions.

[3] For the following reasons, I find that the Member's decision is unreasonable. This application for judicial review is granted.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 40-year-old citizen of the Dominican Republic.

[5] In 2017, while living in the United States, the Applicant was convicted of "alien in possession of a firearm" pursuant to section 922(g)(5(A) of Title 18 of the *United States Code*. He was sentenced to time served and supervised release for a period of three years.

[6] The Applicant testified that he understood he could not have a firearm in the United States as an undocumented individual. However, he also stated that that the firearm in his possession was one that he found in a home he moved into, and that he did not call the police owing to his undocumented status. He testified that he put the gun out of his children's reach, having removed the bullets and separating the gun and the bullets.

[7] In 2018, a report under section 44(1) of the *IRPA* was issued against the Applicant providing an opinion that he was inadmissible under section 36(1)(b) of the *IRPA* for the United States conviction. This report was subsequently referred to the ID.

B. *Decision under Review*

[8] In a decision dated June 21, 2023, the Member found that the Applicant was inadmissible under section 36(1)(b) of the *IRPA*.

[9] Finding the Applicant to be both a foreign national and that the Applicant had been convicted in the United States of "alien in possession of a firearm," the Member turned to an analysis of whether the respective offences in the United States and Canada were equivalent. The alleged equivalent offence in Canada was section 92(1)(b) of the *Criminal Code*, RSC, 1985, c C-46 ("*Code*"). For reference, both the United States and Canadian offences are reproduced in the "Legislative Scheme" section.

[10] The ID used the hybrid approach for assessing equivalency under subsection 36(1)(b) of *IRPA*, which involves comparing both the precise wording of the offences and examining the evidence to see whether the offences' essential elements were met (*Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 (CA) at para 16).

[11] The Member found that equivalency had not been established when examining the wording of the two provisions, the United States statute relating to firearms or ammunition, with the *Code* referring only to firearms, as well as the United States provision being silent on *mens*

rea. The Member found that this meant that the United States offence was broader than the Canadian offence.

[12] The Member turned to whether the particular circumstances of the offence could see them fall within the scope of the Canadian offence. The Member found that, with a view to the essential elements of section 92(1)(b) of the *Code*, the evidence established that the Applicant had been in possession of a prohibited firearm in the United States and that the Applicant knew he was not to have been in possession of a firearm.

[13] The Member considered whether any defences were available to the Applicant for this offence. The Member acknowledged the circumstances of the offence, including that the Applicant plead guilty to the offence, that the firearm had been found in his closet, that he had not disposed of it, and that he did not have a permit for the gun, finding that the Applicant would not have been able to raise Canadian defences (citing *Ward v Canada (Citizenship and Immigration)*, 1996 CanLII 3948 (FC)). The Member concluded by noting that, section 92(1)(b) of the *Code* carrying a maximum punishment of ten years, the Applicant was captured under section 36(1)(b) of the *IRPA*.

[14] For these reasons, the Member found that the Applicant was inadmissible under section 36(1)(b) of the *IRPA*.

III. **Legislative Scheme**

[15] Section 922(g)(5)(A) of Title 18 of the *United States Code* provides that:

> **(g)** it shall be unlawful for any person […]
>
> **(5)** who, being an alien […]
>
> **(A)** is illegally or unlawfully in the United States […]
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[16] Section 92(1)(b) of the *Code* provides that:

92 (1) Subject to subsection (4), every person commits an offence who possesses a prohibited firearm, a restricted firearm or a non-restricted firearm knowing that the person is not the holder of	**92 (1)** Sous réserve du paragraphe (4), commet une infraction quiconque a en sa possession une arme à feu prohibée, une arme à feu à autorisation restreinte ou une arme à feu sans restriction sachant qu'il n'est pas titulaire :
(a) a licence under which the person may possess it; and	**a)** d'une part, d'un permis qui l'y autorise;
(b) in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.	**b)** d'autre part, s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, du certificat d'enregistrement de cette arme.
[…]	
(4) Subsections (1) and (2) do not apply to	**(4)** Les paragraphes (1) et (2) ne s'appliquent pas :
(a) a person who possesses a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may	**a)** au possesseur d'une arme à feu prohibée, d'une arme à feu à autorisation restreinte, d'une arme à feu sans restriction, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé ou de munitions prohibées qui est sous la surveillance directe

lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or	d'une personne pouvant légalement les avoir en sa possession, et qui s'en sert de la manière dont celle-ci peut légalement s'en servir;
(b) a person who comes into possession of a prohibited firearm, a restricted firearm, a non-restricted firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,	**b)** à la personne qui entre en possession de tels objets par effet de la loi et qui, dans un délai raisonnable, s'en défait légalement ou obtient un permis qui l'autorise à en avoir la possession, en plus, s'il s'agit d'une arme à feu prohibée ou d'une arme à feu à autorisation restreinte, du certificat d'enregistrement de cette arme.
(i) lawfully disposes of it, or	
(ii) obtains a licence under which the person may possess it and, in the case of a prohibited firearm or a restricted firearm, a registration certificate for it.	

IV. **Issue and Standard of Review**

[17] This application raises the sole issue of whether the Member's decision is reasonable.

[18] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16–17, 23–25). I agree.

[19] 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).

V. **Analysis**

[20] The Applicant maintains that the Member failed to consider that it was a legal impossibility for the Applicant to have acted such that he would have fallen under the exception to the offence available under section 92(4) of the *Code*. Additionally, the Applicant submits that the Member failed to consider that the immigration status noted in the US offence is a fundamental difference from the provision under the *Code*.

[21] The Respondent submits that the Member reasonably considered that the Applicant did not dispose of the firearm and thus would not have been able to raise the Canadian defences.

[22] I agree with the Applicant. At the ID hearing, counsel for the Applicant raised that it would be both legally and practically impossible for the Applicant to have disposed of the firearm. The Member acknowledged that the Applicant raised the defence of legal impossibility,

but found that the evidence established that the Applicant would not have been able to raise "the Canadian defences."

[23] The defence of "impossibility" that the Applicant raised before the Member is a defence whereby one asserts that one could not physically or morally comply with the law (see *R c Villeneuve*, 2021 QCCQ 8214 at para 72; *R v Syncrude Canada Ltd*, 2010 ABPC 229 at para 129; *R v 605884 Saskatchewan Ltd*, 2004 SKPC 16 at para 60). It must be recalled that common law defences to a charge are defences available in Canadian law unless otherwise they are altered by or inconsistent with the *Code* or other Acts of Parliament (*Code*, s 8(3)).

[24] Whether this defence would (or even could) apply to the Applicant's circumstances, I find that the Member had to meaningfully address this submission, especially given the consequences of a finding of inadmissibility and ensuing removal from Canada (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 ("*Mason*") at paras 74, 76, citing *Vavilov* at paras 127-128, 133-135). The Member did not. In my view, this lack of responsiveness is a serious enough shortcoming to render the Member's decision unreasonable (*Vavilov* at para 100).

[25] I am mindful of the Federal Court of Appeal's holding that the analysis of the essential elements of the two offences in an equivalency analysis includes comparing "defences particular to those offences or those classes of offences" (*Li v Canada (Minister of Citizenship and Immigration (CA)*, [1997] 1 FC 235, 1996 CanLII 4086 (FCA) at para 19). Again, the decision could have been made finding that the defence of impossibility did not apply to the Applicant's

circumstances. But that decision was not made, and I will not supplement the Member's reasons. My role is the review of the decision "actually made" (*Vavilov* at para 15).

VI. **Conclusion**

[26] The application for judicial review is granted. The ID's decision is insufficiently responsive and therefore unreasonable (*Mason* at paras 74, 76). No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-8899-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The Member's decision is quashed, and the matter remitted to a different member for redetermination.

3. No question is certified.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8899-23
STYLE OF CAUSE:	ALBERTO JAVIER SANTIAGO CRUCETA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 11, 2024
JUDGMENT AND REASONS:	AHMED J.
DATED:	JULY 26, 2024

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