Federal Court  Cour fédérale

Date: 20220314

Docket: IMM-5716-21

Citation: 2022 FC 345

Ottawa, Ontario, March 14, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

YINGZHENG SHI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Manager of the National Security/Organized Crime Unit of the Inland Enforcement Section of the Canada Border Services Agency [the "Delegate"], dated August 8, 2021, to refer a report on inadmissibility to the Immigration Division for an inadmissibility hearing pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the "*Act*"], [the "Decision"].

II. Background

[2] The Applicant, Yingzheng Shi, is a 29-year-old male permanent resident of Canada and citizen of China. The Applicant came to Canada as an international student in 2010 and became a permanent resident in 2014. He received his secondary and post-secondary education in Canada.

[3] The Applicant's 4-year-old son is a Canadian citizen. The Applicant and his wife have been separated since January 2019 and the two were in the process of obtaining a divorce when the Decision was issued. His wife and son no longer reside in Canada.

[4] The Applicant's mother is a permanent resident of Canada and resides alone in Vancouver. In his submissions to the Canada Border Services Agency [CBSA], the Applicant noted that his mother takes prescription medication for high blood pressure, is not proficient in English, and does not have a driver's licence. As such, the Applicant claimed his mother requires his assistance to see doctors, refill prescriptions, and for other tasks requiring communication in English or travelling long distances.

[5] In May 2019, the Applicant was charged with one count of keeping a common gaming or betting house pursuant to subsection 201(1) of the *Criminal Code*, RSC 1985, c C-46. He and his co-accused pled guilty and received an absolute discharge from the British Columbia Provincial Court in December 2020. The charges related to allegations that the Applicant and at least three others, including the co-accused who was sub-leasing a room in the Applicant's apartment at the time, were operating illegal poker games in the Applicant's apartment in Richmond, BC.

[6] On January 26, 2021, a CBSA Officer [the "Officer"] prepared a report pursuant to subsection 44(1) of the *Act* [the "s. 44 Report"] finding there were reasonable grounds to believe that the Applicant is inadmissible according to paragraph 37(1)(a) of the *Act*. The grounds for the potential inadmissibility finding were involvement in organized criminality and membership in an organization involved in criminality that if committed in Canada would constitute an indictable offence.

[7] The findings in the s. 44 Report were based on information received from the Combined Forces Special Enforcement Unit [CFSEU] – made up of RCMP and Municipal Police in Richmond, BC. The information sources included a Report to Crown Counsel [the "RTCC"] prepared by the CFSEU's Joint Illegal Gaming Investigation Team [JIGIT].

[8] In March 2021, the Officer provided the Applicant with copies of the s. 44 Report and RTCC, as well as a "Procedural Fairness Letter" outlining the reasons to believe the Applicant was inadmissible and inviting the Applicant to make submissions.

[9] In response, on June 30, 2021, the Applicant provided detailed submissions and argued that:

i. Contrary to the RTCC, only the Applicant and the co-accused were involved in the poker games and that paragraph 37(1)(a) of the *Act* was inapplicable, as a criminal organization cannot consist of just two people;

ii. The message exchanges between the Applicant and his friends over WeChat were mistranslated from Chinese in the RTCC. The Applicant had requested copies of

the original Chinese messages from the RCMP, the Officer, and Crown counsel without success;

iii. The poker games were distinct from a criminal organization, in terms of structure and organization and because the Applicant had no intention of profiting from the poker games; and

iv. The Applicant had organized the poker games because he is a gambling addict and wanted a casual setting where he could play poker with his friends while keeping his addiction under control, as he had lost a lot of money at casinos and had signed a Voluntary Self-Exclusion Agreement with the British Columbia Lottery Corporation.

[10] The Applicant also made submissions regarding his personal circumstances and humanitarian and compassionate [H&C] factors relating to his mother and son.

[11] The Officer summarized the reasons for completing the s. 44 Report in the "Subsection 44(1) and 55 Highlights" report [the "Highlights Report"] dated July 17, 2021 and found the Applicant's submissions regarding the alleged organized criminality and H&C grounds were overshadowed by the seriousness of the organized criminality allegations. The Officer recommended in the Highlights Report that the Delegate refer the Applicant to the Immigration Division for an admissibility hearing and issue him a deportation order.

[12] The Delegate reviewed the Officer's s. 44 Report and Highlights Report and in the Referral Under Subsection 44(2), dated August 8, 2021, referred the s. 44 Report to the Immigration Division for an admissibility hearing.

[13] The Applicant seeks:

i. An Order quashing the Decision to refer the s. 44 Report to the Immigration Division for an inadmissibility hearing;

ii. An Order setting aside the Decision and referring the matter back to the tribunal for determination in accordance with such directions as are considered appropriate; and

iii. Such further and other orders or relief as this Honourable Court deems just.

III. Decision Under Review

[14] The Parties agree that the Decision includes the notice letter to the Applicant, as well as contemporaneous notes written by the Delegate, which were also included with the notice. The Applicant argues that the Highlights Report should not be considered in the Decision and this issue will be discussed further below in the reasonableness analysis.

[15] The Delegate reviewed the s. 44 Report, the Applicant's submissions in response to the s. 44 Report, all of the evidence on file, and the recommendations of the Officer in the Highlights

Report. In addition, the Delegate weighed the following personal circumstances and H&C factors:

i. The Applicant's age at the time he entered Canada;

ii. The best interests of the Applicant's son;

iii. The Applicant's length of residence and degree of establishment in Canada;

iv. The location of family support and responsibilities of the Applicant;

v. The conditions in the Applicant's home country of China;

vi. The Applicant's criminality; and

vii. The Applicant's history of non-compliance and current attitude.

[16] In their notes, the Delegate noted the following:

i. The Applicant's ex-spouse is a US citizen and not a citizen or permanent resident of Canada. Thus, while the Delegate placed weight on the Applicant having a child who is a Canadian citizen, they noted that the child may move to the US with their mother;

ii. The Applicant's mother is a permanent resident with no other family in Canada and would face hardship if the Applicant were removed and she could not go with him. The Delegate placed weight on this fact;

iii. The Applicant submitted support letters from friends and his submissions related to his gambling addiction, but the Applicant moved to Canada as an adult and moving back would not be a drastic change; and

iv. The Applicant downplayed his involvement in the events described in the RTCC and had not sought counselling for his gambling addiction.

[17] Upon review of the above, the Delegate decided to refer the s. 44 Report to an inadmissibility hearing because he believed the Applicant is inadmissible under paragraph 37(1)(a) of the *Act*. The Delegate believed that there were insufficient H&C considerations to overcome the seriousness of the allegations under the *Act*.

IV. Issues

[18] The issues to be decided on this judicial review are:

(1) Was the Decision procedurally fair?

(2) Was the Decision reasonable?

V. Standard of Review

[19] The parties agree that the standard of review for a decision to write and refer a s. 44 Report to the Immigration Division is reasonableness [*Canada (Minister of Citizenship and*

Immigration) v. Vavilov, 2019 SCC 65 at paragraph 139; *Sharma v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at paragraph 15 [*Sharma*]].

[20] Issues that relate to a breach of procedural fairness are reviewed on the standard of correctness or a standard with the same import [*Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paragraphs 34-35 and 54-55, citing *Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79].

VI. Analysis

A. *Preliminary issue – amendment of the style of cause*

[21] The proper Respondent in this matter is the Minister of Public Safety and Emergency Preparedness; the style of cause is hereby amended accordingly.

B. *Preliminary issue – prematurity*

[22] The Applicant submits that, though the Decision is not a final decision, it is appropriate to engage in a judicial review because the Delegate has the discretion to consider humanitarian and compassionate factors and the Applicant cannot appeal an Immigration Division decision. The Respondent made no submissions in this regard.

[23] I find this application for judicial review is not premature in line with previous jurisprudence in the same context [*Zhang v. Canada (Public Safety and Emergency*

Preparedness), 2021 FC 746 at paragraph 22; *XY v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 831 [*XY*] at paragraph 42].

C. *Was the Decision procedurally fair?*

[24] A permanent resident is inadmissible on grounds of organized criminality and membership in an organization involved in criminality that if committed in Canada would constitute an indictable offence [paragraph 37(1)(a) of the *Act*].

[25] An officer who is of the opinion that a permanent resident who is in Canada is inadmissible may prepare a report setting out the relevant facts, and this report shall be transmitted to the Minister of Immigration, Refugees, and Citizenship [the "Minister"] [subsection 44(1) of the *Act*].

[26] Under subsection 44(2) of the *Act*, if the Minister is of the opinion that the report referred to in subsection 44(1) is well founded, the Minister may refer the report to the Immigration Division of the Immigration and Refugee Board of Canada for an admissibility hearing.

[27] Pursuant to section 3 of the *Immigration Division Rules*, SOR/2002-229 [the "*Rules*"], when the Minister requests the Immigration Division to hold an admissibility hearing, the Minister must provide to the permanent resident any relevant information or document that the Minister may have, including any evidence that they may present at the hearing. This disclosure obligation is reinforced by section 26 of the *Rules*.

[28] However, at the stage of the process being judicially reviewed by the Applicant (*i.e.* the decision to refer the s. 44 Report to the Immigration Division), the Officer and the Delegate are merely engaged in a fact finding exercise akin to a screening process [*XY* at paragraph 98; *Jeffrey v. Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1180 at paragraph 30]; *McLeish v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 705 at paragraphs 56, 60].

[29] While decisions under section 44 of the *Act* generally attract a more relaxed level of procedural fairness, the nature of a subsection 44(1) and 44(2) decision favours a more nuanced level of procedural fairness than simply applying a "lower level." The duty of procedural fairness requires that the applicant be afforded an opportunity to provide submissions on the substance of the inadmissibility allegations and an appropriate level of disclosure to understand the case against him [*XY* at paragraphs 58 and 88].

[30] The Court also acknowledges that the options for a permanent resident found inadmissible on the basis of organized criminality under section 37 of the *Act* are limited. There is no further right of appeal to the IAD and an exemption based on H&C grounds is not available.

[31] Jurisprudence of this Court has established that an applicant is entitled to disclosure in the course of the section 44 process under the *Act*, "where the information sought is material and otherwise unknown and unavailable" [*XY* at paragraph 92].

[32] The Applicant submits that the Delegate breached their duty of fairness to the Applicant by not disclosing the original Chinese WeChat messages, which the Applicant claims are mistranslated in the RTCC, and by not disclosing the Officer's recommendations to the Delegate or the basis for those recommendations in the Highlights Report. This lack of disclosure prevented the Applicant from being able to know and fully respond to the case against him.

[33] The Respondent submits the Delegate met the minimal duty of fairness required and that there was no obligation for the Delegate to provide the Applicant with the requested information relied on by the Officer since that information is already in the Applicant's possession or knowledge.

[34] The Respondent also argues that the Applicant received the RTCC relied on by the CBSA, which, along with other documents, would have been disclosed to him during his criminal trial. Further, the WeChat messages relied on by the CBSA were those referenced in the RTCC. The CBSA did not have any other text messages in its possession.

[35] I find that the Applicant knew the information relied on by the Delegate, the case to meet, and the nature of the possible consequences of the Decision. The Applicant was in possession of the information necessary to answer the evidence of inadmissibility held by the CBSA. He received the Decision itself, a Procedural Fairness letter, the RTCC, the s. 44 Report, and had an opportunity to respond to the allegations against him, which he did in his submissions in response to the s. 44 Report with legal representation.

[36] The Applicant was in possession of the WeChat messages since he was a participant in this messaging and as evidence during his criminal proceedings. In addition, the Respondent states that they do not possess the original WeChat messages.

[37] The Highlights Report simply summarizes the Officer's reasons for completing the s. 44 Report based on all of the information that was included in the Applicant's submissions, as well as the other reports and documents, which were either already in the possession or knowledge of the Applicant or disclosed to the Applicant.

[38] As a part of the disclosure for this Application, the Applicant has been provided the Highlights Report as part of the Certified Tribunal Record. According to *Rule* 3, the Applicant would also have the right to the Highlights Report (or something similar) ahead of an inadmissibility hearing. However, at the stage of the process being judicially reviewed here, the Applicant was afforded an opportunity to provide submissions on the substance of the inadmissibility allegations and was provided an appropriate level of disclosure to understand the case against him. Therefore, the Officer and the Delegate did not breach their duty of procedural fairness by not providing these to the Applicant.

D. *Was the Decision reasonable?*

[39] The Applicant submits that the Decision is unreasonable because it fails to adequately address how the Decision was reached and other key issues, such as the grounds of inadmissibility, the Applicant's H&C factors, and the Applicant's criminality.

[40] The Applicant further submits that the Highlights Report should not be considered in this Court's review of the Decision, though the Delegate's contemporaneous notes may be. The Applicant claims that, though the Highlights Report was mentioned in the Decision, its non-disclosure is problematic and its inclusion would cause the Court to speculate on the Delegate's reasons.

[41] There is no reason to draw a distinction between the inclusion of the Delegate's notes and the Officer's Highlights Report as the Applicant is requesting. The Highlights Report was provided to the Delegate before their rendering of the Decision; the Delegate references the Highlights Report in their Decision; and the Delegate signed the Highlights Report on August 8, 2021, the same date as the Decision. There would be no act of speculation in incorporating the Highlights Report, as well as the notes as part of the reasons for the Decision.

[42] As stated above, the lack of disclosure of the Highlights Report did not breach the duty of procedural fairness owed to the Applicant. The Applicant has made no procedural fairness argument in regards to the Delegate's notes.

[43] In summary, the letter dated August 8, 2021 providing notice of the Decision, the Delegate's contemporaneous notes, and the Highlights Report will all be considered together as the Decision proper in my analysis. In any event, the contents of the Highlights Report, in the context of the evidence as a whole, does not change my decision based on the evidence.

[44] For the reasons below, I find that the Decision is reasonable.

[45] The Applicant appears to often conflate the Decision to refer the s. 44 Report to the Immigration Division with an actual finding of inadmissibility. The Decision at issue in this case is simply a referral for an inadmissibility hearing, not the result of an inadmissibility hearing – there has been no finding of inadmissibility.

[46] In addition, the Applicant appears to be asking this Court to reweigh the factors and evidence that were before the Officer and the Delegate. This is not the role of the Court on judicial review; the reviewing court does not determine how it would have resolved an issue on the evidence, nor does it reassess or reweigh the evidence on the merits. The task of the reviewing court is to assess whether the decision maker reviewed and drew conclusions from the evidence and submissions in a manner that conforms to *Vavilov* principles.

[47] Further, the Applicant appears to base their claims of unreasonableness by analysing each of the three documents that make up the Decision separately, rather than looking at them as a whole.

[48] The Delegate reviewed the Officer's recommendation, considered the Applicant's personal circumstances consistent with the case law, and agreed with the recommendation to refer the matter for an inadmissibility hearing before the Immigration Division.

[49] The Delegate ascertained and reported the basic facts that underlie the opinion that the Applicant is inadmissible to Canada. The Delegate had a very limited discretion to consider personal circumstances, and they exercised that discretion reasonably, weighing the personal

circumstances against the nature of the alleged criminality. The Delegate considered the Applicant's ties to Canada, his son's status as a Canadian citizen, the possibility that his son may depart to the United States with the Applicant's ex-spouse, the fact that the Applicant's mother is a permanent resident of Canada and would face some hardship if she was unable to move back to China with the Applicant, as well as the Applicant's establishment in Canada. The Delegate also noted that the Applicant's gambling addiction likely played a role in the offense, but noted that the Applicant's submissions did not indicate that the Applicant had sought counselling for his addiction.

[50] The Delegate was not obligated to conduct a full H&C analysis, as would be done under a subsection 25(1) application. Rather, the Delegate undertook an appropriate review and consideration of the personal circumstances presented by the Applicant and weighed them against the alleged criminality. Consideration of H&C factors under section 44 is a limited exercise [*McAplin v Canada (Public Safety and Emergency Preparedness*), 2018 FC 422 at paragraph 70].

[51] The Delegate's Decision to refer to the Immigration Division for an admissibility hearing on the basis of paragraph 37(1)(a) of the *Act* was reasonable since there were reasonable grounds to believe that the Applicant was involved in a running an illegal gaming housing with three other individuals, contrary to subsection 201(1) of the *Criminal Code*.

[52] Section 33 of the *Act* sets out that the standard of proof for assessing inadmissibility is whether there are reasonable grounds to believe that the acts under sections 34 to 37 of the *Act*

have occurred, are occurring, or may occur. The standard of “reasonable grounds to believe” is a relatively low evidentiary standard requiring more than mere suspicion but less than proof on a balance of probabilities [*Mugesera v Canada (MCI)*, 2005 SCC 40 at paragraph 114; *Canada (MPSEP) v Gaytan*, 2021 FCA 163 at paragraph 40].

[53] The Applicant argues that only two persons were involved in the management of the poker games, and thus the “numerical” definition for organized criminality under paragraph 37(1)(a) has not been met.

[54] However, the evidence before the Delegate and the Officer in the RTCC implicated the Applicant and at least three other individuals in an illegal gambling operation, contrary to subsection 201(1) of the *Criminal Code*, and the Applicant also pled guilty to that offence.

[55] The evidence of the illegal gambling operation occurring at the Applicant’s residence included: a luxury poker table, a collapsible poker table, poker chairs, poker chips, card shufflers, a few thousand dollars, and score sheets. Further, text messages from devices seized by police showed various discussions between the Applicant and his co-conspirators related to the illegal gaming house, ranging from discussions on the potential name for the gambling house, to discussions on the type of apartment to rent, as well as ways to minimize authorities’ suspicions regarding profits from the gambling house. Based on this evidence, it was reasonable for the Delegate to refer the matter to the Immigration Division on the basis that there were reasonable grounds to believe that the Applicant was inadmissible pursuant to paragraph 37(1)(a) of the *Act*.

[56] Further, the question of whether three or more persons are required to comprise a criminal organization under the *Act* is an unsettled question of fact and law. While in the *Saif v. Canada (MCI)*, 2016 437 decision relied upon by the Applicant, Justice Barnes does hold that three or more persons are required for a criminal organization, other more recent Federal Court jurisprudence in cases suggest that the issue is unsettled [see for example *Clarke v Canada (Minister of Public Safety and Emergency Preparedness)*, 2021 FC 128 at paragraphs 25-26; *Denha v. Canada (MCI)*, 2020 FC 168 at paragraphs 22-23; *Pajazitaj v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2019 FC 540 at paragraph 35].

[57] As stated above, at the section 44 stage, the Delegate decision is not a final decision, and neither the Delegate nor the Officer is required to make findings of fact or law. Instead, complex arguments of fact or law are better put to the Immigration Division who is empowered to make the final admissibility decision [*Obazughanmwen v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 683 at paragraphs 24 and 26 (certified question on this issue before the Federal Court of Appeal)].

[58] The question of how a criminal organization is defined under *Act* is a complex question of fact and law that neither the Delegate nor the Officer was required to answer at the section 44 stage in issue here. This statutory interpretation question should be put to the Immigration Division, as it is the Immigration Division who will make the final admissibility finding.

[59] The Officer established the reasonable grounds on which they had come to the opinion that the Applicant is inadmissible under paragraph 37(1)(a) and, based on their review, it was reasonable for the Delegate to refer the s. 44 Report to the Immigration Division.

JUDGMENT in IMM-5716-21

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. The proper Respondent in this matter is the Minister of Public Safety and Emergency Preparedness; the style of cause is here by amended accordingly.
3. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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