Federal Court  Cour fédérale

Date: 20230111

Docket: IMM-7816-21

Citation: 2023 FC 46

Ottawa, Ontario, January 11, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

RICARDO ALBERTO SILVA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Immigration Appeal Division [IAD], dated October 14, 2021. The IAD found a deportation order against the Applicant, a citizen of Portugal, was valid in fact and law based on his admitted serious criminality. The IAD assessed all relevant factors and concluded among other things the Applicant's extensive criminal record entailing 39 criminal and drug convictions in the previous

20 years, his lack of remorse and regret, failure to accept responsibility, inadequate understanding of underlying reasons for his criminality, insufficient prospects of rehabilitation, repeated failure to comply with Court orders, his efforts at the IAD to minimize his offences (including downplaying the fake kidnapping involving his mother and his cousin, and his suggestions that multiple car thefts and thefts were somehow normal youthful joyriding—notwithstanding he was then in his thirties), his attempts to blame a former girlfriend for his conduct, his lack of supports in Canada, lack of evidence of hardship in removal to Portugal and other matters outweighed the length of time he has been in Canada (establishment), the care provided to his mother, and the best interests of the children such that the Applicant failed to meet his onus to establish sufficient humanitarian and compassionate considerations to warrant special relief.

[2] In effect and with respect, this Applicant asks the Court to reassess and reweigh the totality of evidence in this case and come to a different conclusion than the IAD such that a new hearing should be ordered. That, with respect, is not part of the Court's function on judicial review according to both the Supreme Court of Canada in *Vavilov* and the Federal Court of Appeal in *Doyle* referred to later. Therefore, this application for judicial review will be dismissed.

II. Facts

[3] The Applicant is a 49-year-old citizen of Portugal who became a permanent resident of Canada in 1974 with his parents before the age of two. The Applicant is unmarried and lives with his elderly mother whom he helps on a daily basis. The Applicant has three sons, two of whom

are adults and one a teenager who lives in another city with his mother—he was unable to name the son's city of residence or his school. He also has a new grandson who was a month or so old at the time of the assessment.

[4] At the age of 17, the Applicant dropped out of high school and began working on and off in construction for most of his adult life. While he is a citizen of Portugal and speaks Portuguese, he has not returned to Portugal in some 20 years. He filed no evidence of hardship in Portugal.

[5] On May 26, 2020, the Applicant was reported for serious criminality pursuant to section 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The report, made pursuant to section 44(1) *IRPA*, referred to Applicant's June 24, 2014, conviction for conspiracy in relation to extortion, under paragraph 465(1)(c) of the *Criminal Code,* RSC, 1985, c. C-46, [entailing a fake kidnapping involving his mother and cousin], and to his November 13, 2015, conviction of possession of property obtained by crime over $5000, under subsection 355(a) of the *Criminal Code*.

[6] The Applicant's criminal record began at the age of 27 for causing an individual to fear personal harm. That matter was disposed with a peace bond. The Applicant has been convicted of 39 crimes under the *Criminal Code* and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[7] The Applicant submitted his long criminal record is a result of his ongoing struggle with drug addiction, which he alleges he has now overcome.

[8] The appeal of the deportation order was heard by the IAD on April 20, 2021, during which the Applicant and his mother both testified, and at which he was represented by counsel.

III. Decision under review

A. *Validity of the removal order*

[9] The IAD begins by noting that the Applicant's deportation order was based on his conviction for possession of property obtained by crime, which is an indictable offence and carries a term of imprisonment not exceeding 10 years under section 355(a) of the *Criminal Code*. Pursuant to section 36(1)(a) of the *IRPA*, the removal order is therefore valid in law.

[10] The panel notes that the IAD may order a stay of the execution of the removal order or allow an appeal from the removal order if the Applicant is able to establish a case for discretionary relief as per the factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL). These factors are:

> the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality.
>
> [Emphasis added]

[11] The IAD notes that per the Supreme Court of Canada's decision in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, this list is illustrative, not exhaustive, and the weight to be accorded to any particular factor will depend on the circumstances of the case.

B. *The offences*

[12] The IAD remarks that the underlying offence concerned the theft of a vehicle in October 2015. The panel found this to be at the lower end on the sale of seriousness and affirms that no violence was involved. While the IAD considered this specific offence to be less serious, the Applicant's complete criminal record and more recent convictions were considered problematic. Specifically, the panel notes that the Applicant has numerous convictions beginning in 2000, which includes ten convictions for failing to comply, theft, assault, four property related convictions, failure to provide a breathalyzer, driving while disqualified and operating a vehicle while impaired. In the IAD's view, for the appeal to have been allowed or the removal order stayed, the humanitarian and compassionate factors must be commensurate with the seriousness of the Applicant's criminality.

[13] Ultimately, the IAD found that the Applicant's many criminal convictions over the span of twenty years puts the seriousness factor at a higher level.

C. *Remorse has not been demonstrated by the Applicant*

[14] The IAD found that remorse was not a factor in favour of the Applicant given that he had not met his onus to demonstrate remorsefulness. In the panel's view, the Applicant provided little insight into the reasons behind his many convictions beyond admitting that he had made some bad mistakes. The panel noted that given the length of the Applicant's criminal record, he was not able to recall details of several of the incidents and what led to them; nor did he express any remorse or regret when asked about specific incidents. The IAD noted that he blamed his addiction to drugs and association with certain people as triggering his criminal behaviour.

D. *Numerous remaining issues considered by the IAD*

[15] There is no reason to review the Decision in more detail. Suffice it to say the IAD carefully and in a detailed fashion weighed and assessed the evidence and also concluded rehabilitation is not a factor in favour of the Applicant, the length of time and establishment in Canada are in the Applicant's favour, the negative impact on the Applicant's mother is a family hardship factor in favour of the Applicant, family and community support is not in favour of the Applicant, best interests of the children was a neutral factor, and that hardship caused by his removal from Canada is also neutral. In the last respect I note the Applicant speaks Portuguese, he has spent time in Portugal albeit not in the last twenty of his fifty years, and has some cousins there. I also note Portugal is a member country of the European Union. The Applicant led no evidence of adverse country evidence in Portugal.

IV. Issues

[16] The Applicant submits the only issue is whether the IAD panel erred in its assessment that the Applicant failed to establish sufficient humanitarian and compassionate grounds to warrant humanitarian and compassionate relief.

V. Standard of Review

[17] Both parties agree, as do I, the correct standard of review in this case is that of reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant

> factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[18] That said, the Supreme Court of Canada in *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". No such circumstances exist in the case at bar. The Supreme Court of Canada instructs as follows:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[19] In addition, the Federal Court of Appeal recently held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
>
> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.
>
> [Emphasis added]

VI. Analysis

[20] In my view, the Applicant asks this Court to reweigh and reassess the evidence in this case. He submits he is not doing this but instead is asking the Court to look at the totality of the evidence and determine the IAD made a reviewable error. With respect, I am unable to differentiate between looking at the totality of the evidence and coming to a different result from reweighing and reassessing the evidence and coming to a different result.

[21] He asks for a second chance. In my view, the Applicant has had many chances over the last two decades and more to show he is able to live responsibly in Canadian society. However he failed to persuade the IAD, which acted reasonably, that the deportation order against him should be enforced.

[22] Moreover, and as both the Supreme Court of Canada and Federal Court of Appeal instruct, reweighing and reassessing evidence are functions specifically withheld from this Court on judicial review. I am far from persuaded "exceptional circumstances" exist in this case as per *Vavilov* at para 125, and am therefore obliged to and decline the Applicant's request to reweigh and reassess the evidence in this case.

[23] In addition, I also note it is well-established that the IAD in assessing humanitarian and compassionate factors is entitled to considerable deference. I see no reason to interfere with the deference the IAD is owed.

[24] Finally, I am not persuaded the IAD made any reviewable error in charging itself on the relevant constraining legal principles or in its detailed application of the *Ribic* factors to the evidence in this case.

VII. Conclusion

[25] This application will be dismissed.

VIII. Certified Question

[26] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-7816-21

THIS COURT'S JUDGMENT is that this application is dismissed, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7816-21
STYLE OF CAUSE:	RICARDO ALBERTO SILVA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 9, 2023
JUDGMENT AND REASONS:	BROWN J.
DATED:	JANUARY 11, 2023

APPEARANCES:

Simon Trela	FOR THE APPLICANT
Maria Green	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Capital City Law Barrister and Solicitor Edmonton, Alberta	FOR THE APPLICANT
Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT