Federal Court  Cour fédérale

Date: 20230721

Docket: IMM-7896-22

Citation: 2023 FC 1006

Ottawa, Ontario, July 21, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

JUN LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Background

[1] This is an Application for judicial review of an Exclusion Order issued by the Minister of Citizenship and Immigration's delegate [Minister's Delegate], dated July 26, 2022 [Exclusion Order].

[2] The Applicant is a 40-year-old citizen of China who entered Canada on a student visa in August 2001. His student visa expired in November 2002, but he remained in Canada continuously since then without status.

[3] The Applicant married a Canadian permanent resident and the couple have two Canadian children. In July 2021, an in-Canada spousal sponsorship application was submitted for the Applicant.

A. *Decision Under Review*

[4] The Applicant was interviewed by an inland enforcement officer on May 30, 2022. At that interview, the Applicant indicated he had not worked since the expiry of his student visa in 2002 and that he had not applied for an extension of his status.

[5] After this interview, a Subsection 44(1) Report was issued, recommending an Exclusion Order be issued against the Applicant, under subsections 41(a) and 29(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Subsection 44(1) Report noted that the Applicant had not obtained an extension of his status since it expired in 2002.

[6] The Applicant was interviewed by the Minister's Delegate on July 26, 2022. When asked by the Minister's Delegate if he had applied for an extension to stay in Canada longer, the Applicant responded 'no'.

[7] The Minister's Delegate found that pursuant to subsection 41(a) of the *IRPA*, on a balance of probabilities, there were grounds to believe that the Applicant was inadmissible for failing to comply with subsection 29(2) of the *IRPA*, which requires a temporary resident to leave Canada at the end of their authorized stay.

II. Relevant Legislation

[8] Section 41 of the *IRPA* states:

A person is inadmissible for failing to comply with this Act (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act.	S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

[9] Subsection 29(2) of the *IRPA* states:

A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.	Le résident temporaire est assujetti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

III. Issue and Standard of Review

[10] The Applicant raises both reasonableness and procedural fairness issues in this Application. As the Applicant did not make any substantive submissions on procedural fairness, I will only address the reasonableness of the Decision.

[11] The standard of review is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

IV. Analysis

[12] The Applicant submits that in issuing the Exclusion Order, the Minister's Delegate failed to consider his personal circumstances. In particular, he argues the Minister's Delegate was obligated to consider humanitarian and compassionate [H&C] factors including the best interests of his children [BIOC].

[13] There are two issues with this submission.

[14] First, there is no evidence the Applicant raised H&C or BIOC considerations at either of the two interviews with Canada Border Services Agency. Nor is there evidence that he requested that these factors be considered in any way. These factors appear to have been raised for the first time on judicial review. In the circumstances, the Minister's Delegate cannot be faulted for not considering an argument that was not raised.

[15] Second, the case law is clear that the Minister's Delegate is not required to consider H&C grounds in the context of an exclusion order. In *Bermudez v Canada (Citizenship and Immigration)*, 2016 FCA 131, the Federal Court of Appeal held "non-citizens, whether they be foreign nationals or permanent residents, do not have the right to have H&C considerations imported and read into every provision of the IRPA, the application of which could jeopardize their status" (at para 38).

[16] Specifically in the context of exclusion orders, the Federal Court has repeatedly held that a minister's delegate is not required to consider H&C factors, including the BIOC, when issuing an exclusion order under section 44 (see *Eberhardt v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 1077 at paras 58-59; *Rosenberry v Canada (Citizenship and Immigration)*, 2010 FC 882 at para 36 [*Rosenberry*]; and *Lasin v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1356).

[17] In *Rosenberry*, the Court held:

> [36] The substance of the decision did not require the Minister's delegate to consider the H&C application or H&C factors at all. Under section 44 immigration officials are simply involved in fact-finding. They are under an obligation to act on facts indicating inadmissibility. It is not the function of such officers to consider H&C factors or risk factors that would be considered in a pre-removal risk assessment. This was recently confirmed in *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409 at paragraphs 35 and 37.

[18] Accordingly, the Applicant's submissions that the Minister's Delegate was required to consider H&C factors is without merit.

[19] The Applicant also relies upon *Ouedraogo v Canada (Public Safety and Emergency Preparedness),* 2016 FC 810 [*Ouedraogo*] where Justice McVeigh held that the term 'may' in section 44(2) of the *IRPA* and subparagraph 228(1)(c)(iv) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 gave the minister's delegate limited discretion on whether to issue an exclusion order. In *Ouedraogo*, the applicant was within the 90 day period to restore his status in Canada and Justice McVeigh held "[t]he exercise of discretion is limited to examine whether on an overstay the applicant has applied for restoration or could have been implied to have applied within the 90 day period before he came to the attention of Immigration officials" (at para 24). Justice McVeigh concluded that the minister's delegate had not fettered their limited discretion in the circumstances, in considering a policy which reflected the competing objectives within the *IRPA* (at para 33).

[20] The facts in *Ouedraogo* are different from this case. Here, the Applicant did not apply for restoration of his status within 90 days and, in fact, remained in Canada without status for over 20 years. In any event, with respect to the Minister's Delegate discretion, this has been described as "limited, if not non-existent" in the context of issuing an exclusion order (*Diakité v Canada (Public Safety and Emergency Preparedness),* 2018 FC 1268 at para 13).

[21] Here, the Minister's Delegate was not required to exercise their limited discretion to consider any H&C factors, especially where there is no evidence that those arguments were raised by the Applicant.

[22] Overall, the Applicant failed to demonstrate that the Decision of the Minister's Delegate falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law as stated in *Vavilov*. The Minister's Delegate's Decision is therefore reasonable.

V. Conclusion

[23] This Application for judicial review is dismissed and there is no question for certification.

JUDGMENT IN IMM-7896-22

THIS COURT'S JUDGMENT is that:

1. The judicial review Application is dismissed; and

2. There is no question to be certified pursuant to section 74 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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