Federal Court  Cour fédérale

Date: 20231016

Docket: IMM-3502-22

Citation: 2023 FC 1370

Ottawa, Ontario, October 16, 2023

PRESENT: Mr. Justice McHaffie

BETWEEN:

IBRAHIM ZEINE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Before finding a foreign national inadmissible on grounds of serious criminality under paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for having been convicted of an offence outside Canada, an immigration officer must assess whether the foreign offence is equivalent to a Canadian offence punishable by a maximum term of imprisonment of at least 10 years. The officer who found Ibrahim Zeine inadmissible for serious criminality because of a prior conviction in Lebanon did not conduct a reasonable equivalency

analysis. Their inadmissibility finding on this ground was therefore unreasonable and must be set aside.

[2] The same officer also found Mr. Zeine inadmissible for misrepresentation, as he did not disclose the conviction underlying the serious criminality finding in his application for permanent residence. While this finding was itself reasonable, it was unreasonable for the officer not to address Mr. Zeine's plea for relief on humanitarian and compassionate (H&C) grounds. Although Mr. Zeine did not expressly refer to section 25 of the *IRPA*, his request for compassionate relief and his identification of grounds for that request were sufficient to require the officer to consider it.

[3] This application for judicial review is granted in part, and Mr. Zeine's application for sponsored permanent residence is referred back for redetermination on the issues of serious criminality and H&C relief.

II. Issues and Standard of Review

[4] Mr. Zeine raises the following issues on this application for judicial review:

A. Did the immigration officer err in finding Mr. Zeine inadmissible for serious criminality by not conducting a proper equivalency analysis?

B. Did the immigration officer err in finding Mr. Zeine inadmissible for misrepresentation without considering whether H&C considerations were sufficient to overcome the inadmissibility?

[5] The parties agree that these issues, which go to the merits of the officer's decision, are reviewable on the reasonableness standard: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Cruz v Canada (Citizenship and Immigration*), 2020 FC 455 at paras 13–14. When applying this standard, the Court will only interfere with an administrative decision if it is unreasonable, that is, if it is internally incoherent or fails to show the requisite hallmarks of justification, transparency and intelligibility, considered in relation to the relevant factual and legal constraints that bear on the decision: *Vavilov* at paras 99–107. The principles of justification and transparency include a requirement that the reasons given for a decision meaningfully account for the key issues and central arguments raised by the parties: *Vavilov* at paras 127–128.

III. Analysis

A. *The officer's finding of inadmissibility for serious criminality was unreasonable*

(1) Relevant legal framework

[6] Paragraph 36(1)(b) of the *IRPA* provides that a permanent resident or 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."

[7] In two leading cases, *Hill* and *Li*, the Federal Court of Appeal established the requisite legal framework for making an assessment under what is now paragraph 36(1)(b): *Hill v Canada*

(Minister of Employment and Immigration), [1987] FCJ No 47 (CA); *Li v Canada (Minister of Citizenship and Immigration)*, [1997] 1 FC 235 (CA).

[8] In *Hill*, the Court of Appeal overturned an adjudicator's finding that Mr. Hill was inadmissible under the predecessor to paragraph 36(1)(b) based on a burglary conviction in Texas. In concurring reasons for the majority of the Court, Justice Urie referred to the determination of whether a foreign offence "would constitute an offence … in Canada" as a determination of the "equivalency" between the foreign offence and the relevant provision in the Canadian statute. He held that this equivalency could be determined in three ways: (1) by comparing the precise wording in each statute—through documents and, if available, expert evidence—to determine the essential ingredients or elements of the respective offences; (2) by examining the evidence adduced before the adjudicator to ascertain whether the evidence was sufficient to establish that the essential elements of the offence in Canada had been proven in the foreign proceedings; or (3) through a combination of (1) and (2).

[9] In *Li*, the Court of Appeal concluded that assessing the essential elements of the offence for purposes of the equivalency analysis described in *Hill* requires consideration of both the elements and defences particular to the offence: *Li* at paras 18–19; *Canada (Public Safety and Emergency Preparedness) v Gaytan*, 2021 FCA 163 at para 70.

[10] *Hill* and *Li* have been applied on many occasions by this Court as the applicable framework for conducting an equivalency analysis for purposes of paragraph 36(1)(b): see, *e.g.*, *Kathirgamathamby v Canada (Citizenship and Immigration)*, 2013 FC 811 at paras 23–24;

Nshogoza v Canada (Citizenship and Immigration), 2015 FC 1211 at paras 27–28; *Liberal v Canada (Citizenship and Immigration)*, 2017 FC 173 at paras 23–32. This framework, established in binding precedents, represents a "legal constraint" on the officer's decision, such that failure to apply paragraph 36(1)(b) in accordance with it is "quite simply unreasonable": *Vavilov* at para 112.

(2) Mr. Zeine's conviction

[11] In June 1996, Mr. Zeine was involved in a family altercation that resulted in him shooting his brother in the leg. The dispute appears to have arisen over a decision made by Mr. Zeine's father about where Mr. Zeine's niece should live. When the dispute led to blows, the father locked Mr. Zeine and two of Mr. Zeine's brothers in his house. The brothers broke free and started hitting the father. Mr. Zeine grabbed a Kalashnikov rifle and fired shots. On his version, he fired two shots in the air to get his brothers off his father, and when someone tried to take the gun from him, it accidentally went off and a ricocheting bullet hit his brother's leg. His brother agreed that the shooting was an accident and "bad luck," and waived his right to any lawsuit against Mr. Zeine.

[12] On November 29, 1996, Mr. Zeine was convicted of three criminal offences in association with the incident by the Penal Court of Zahle, Lebanon. The judgment of the Penal Court was before the officer, in the original Arabic and in translation. In it, the judge gives the following brief recitation of their findings:

> Whereas it appears from the declarations, the waiver, all the investigations, the seized Kalashnikov and the medical report that the defendant, in the date of 25/06/1996 and for family disputes

> has fired from an unlicensed military weapon on the plaintiff waiver Ali who was injured in his leg so that he had a sick leave for three months
>
> Whereas the defendant's act consisting in shooting intentionally towards the plaintiff waiver's leg in order to hurt him constitutes the offence stipulated and punished in the article 576/Penal Code
>
> Whereas his act consisting in having an unlicensed military weapon constitutes the offense stipulated and punished in the article 72/Weapon
>
> Whereas his act consisting in shooting in a residential place constitutes the offense stipulated and punished in the article 75/Weapon
>
> According to the waiver, the court considers granting the defendant extenuating circumstances according to the article 254/Penal Code
>
> [Emphasis added; typography corrected.]

[13] Based on these findings, and after applying reductions in sentence as mitigating measures, the Court sentenced Mr. Zeine to a total of one month in prison and a fine of 200,000 Lebanese pounds for the three offences. About half of the prison sentence was satisfied by pre-trial detention. The remainder was enforced in 1999, together with the fine.

(3) Mr. Zeine's application for permanent residence

[14] In August 2019, Mr. Zeine applied for permanent residence as a member of the family class, sponsored by his wife, a Canadian citizen. In the standard Background/Declaration form included in his application, Mr. Zeine responded to a question about whether he had ever been "convicted of […] a crime or offence, or subject of any criminal proceedings in any other country[…]" with a check mark in the box marked "NO."

[15] After a review and related inquiries, an officer with Immigration, Refugees and Citizenship Canada [IRCC] concluded in March 2020 that the relationship was genuine. However, a judicial record check by IRCC turned up information regarding the 1996 conviction and 1999 enforcement. In response to a request letter from IRCC in July 2021, Mr. Zeine filed court documents regarding the conviction, including the judgment quoted above.

[16] IRCC sent Mr. Zeine a procedural fairness letter in August 2021, stating that he had been convicted of "shooting a firearm towards someone and injuring the person under section 576 of the Lebanese Penal Code on 29 November 1996." The letter indicated that the offence, if committed in Canada, would be equivalent to an offence under section 267 of the *Criminal Code* and that Mr. Zeine was therefore likely inadmissible for serious criminality under paragraph 36(1)(b) of the *IRPA*. It also raised a concern that Mr. Zeine may be inadmissible for misrepresentation under paragraph 40(1)(a) of the *IRPA* for failing to disclose the prior conviction in his application.

[17] Mr. Zeine's response to the procedural fairness letter provided information and context regarding the 1996 conviction and addressed the failure to disclose it in his application.

(4) The officer's decision

[18] On March 19, 2022, a Migration Officer in the Beirut office of IRCC reviewed Mr. Zeine's application for permanent residence. The officer concluded Mr. Zeine was inadmissible for serious criminality under paragraph 36(1)(b) of the *IRPA* and for misrepresentation under paragraph 40(1)(a) of the *IRPA*.

[19] The officer's reasons for decision are set out in a refusal letter dated March 30, 2022, and in their notes in the Global Case Management System [GCMS]. The GCMS notes refer to the factual context of the dispute and the shooting. The notes then state the following, which constitutes the officer's substantive conclusion on the issue of equivalency and the application of paragraph 36(1)(b):

> As noted previously, the incident in question, for which PA [principal applicant] was convicted of shooting and causing harm, is equivalent to section 267 of the Criminal Code (assaul[t] with a weapon or causing bodily harm). This is an indictable offence and is punishable by a term of imprisonment not exceeding 10 years. Therefore, PA is inadmissible to Canada for serious criminality pursuant to paragraph 36(1)(b) of IRPA.

[20] The reference to "noted previously" in the passage above appears to be to an earlier entry in the GCMS, made by a different officer at the time the procedural fairness letter was sent in August 2021:

> Subject was convicted of threats or aiming to shoot someone, using an unauthorized firearms (a Kalashnikov). […] The PA was convicted in 1996 under sections of the Lebanese Penal [Code], notably 576 (threats using firearms) to 1 month imprisonment and 100,000 LBP fine. […]
>
> Under the [*Criminal Code*], this appears to be equivalent to 267 (assault with a weapon or causing bodily harm) which is an indictable offence punishable up to 10 years jail.

(5) The officer's decision was unreasonable

(a) *Elements of the offences*

[21] I agree with Mr. Zeine that the officer's decision does not show that they conducted the equivalency analysis required by *Hill* in concluding that Mr. Zeine's conviction in Lebanon was

for an offence equivalent to section 267 of the *Criminal Code*. In particular, there is no indication that the officer compared "the precise wording in each statute" (the first approach described in *Hill*), ascertained whether the essential elements of the Canadian offence had been proven in the foreign proceedings (the second approach), or engaged in some combination of these (the third approach).

[22] With respect to the first approach, the officer's reasons do not set out the precise wording of either section 576 of the Lebanese Penal Code or section 267 of the *Criminal Code*, and do not engage in a comparison of the statutes. There is no indication that section 576 of the Lebanese Penal Code was even before the officer, as no version of it appears in the certified tribunal record or in the various court documents. Indeed, on the record before this Court, there is nothing to confirm that section 576 covers "shooting and causing harm" (the officer's language) or "threats using firearms" (the language of the earlier officer), let alone what the constituent elements of such an offence might be. Given the absence of any discussion at all of the wording of section 576 of the Lebanese Penal Code, the officer's analysis also cannot have fallen into the third approach described in *Hill*, namely a combination of the first and second approaches.

[23] This leaves the second approach. Given the officer's statement that "the incident in question […] is equivalent to section 267 of the Criminal Code," it appears the officer may have been comparing the facts of the Lebanese case—the "acts actually committed"—to the Canadian offence: *Li* at para 13. However, the officer engages in no consideration of the essential elements of the offence in Canada, nor of whether the facts that were "proven in the foreign proceedings"

[emphasis added] met those elements. The officer's statement that "the incident in question, for which PA was convicted of shooting and causing harm, is equivalent to section 267 of the Criminal Code (assaul[t] with a weapon or causing bodily harm)" is simply a conclusion of equivalency, rather than an analysis of it. As Justice Diner noted in *Liberal*, "mere reference to the relevant provisions, followed by a brief statement of their equivalency, is not a reasonable analysis": *Liberal* at para 32; see also *Kathirgamathamby* at para 24.

[24] The Minister argues that no further analysis was required since "[t]he answer is obvious. The essential elements of the provisions are the same." Given that there is no evidence at all of either the text or essential elements of article 576 of the Lebanese Penal Code, there is no evidentiary basis for the Minister's assertion that the essential elements of the two provisions are the same. The Lebanese Court's brief conclusion that "shooting intentionally towards the plaintiff waiver's leg in order to hurt him" constitutes the offence stipulated in article 576 sets out neither the text nor the essential elements of this provision.

[25] The Minister's submissions also contain what is effectively an abbreviated analysis of the facts of the case compared to the elements of the Canadian offence. In addition to not setting out in full the elements of the offence as accepted in Canadian case law, the Minister effectively attempts to supplement the officer's reasons with an analysis that might have been performed but was not. This goes beyond what the Court can accept or undertake on judicial review, and stating that the answer is "obvious" does not change this: *Vavilov* at paras 96–98.

[26] In any case, even accepting that there may be cases in which the equivalency between a foreign offence and a domestic one might potentially be "obvious," I cannot conclude that the equivalency between the offence for which Mr. Zeine was convicted in Lebanon, about which there is only limited information, and section 267 of the *Criminal Code* falls into this category. As Mr. Zeine points out, the Court of Appeal in *Hill* concluded that such equivalency could not simply be assumed even with respect to the offence of "theft," given the legal nuances related to that offence.

(b) *Self-defence*

[27] Mr. Zeine also argues the officer failed to consider the potential defence of self-defence. While Mr. Zeine raises this as an issue separate to that of the equivalency analysis, the Court of Appeal in *Li* was clear that consideration of defences is part of the equivalency analysis: *Li* at paras 18–19.

[28] Section 34 of the *Criminal Code* sets out a defence of self-defence, which replaced the former self-defence regime: *R v Khill*, 2021 SCC 37 at paras 29–49. Without needing to get into detail, section 34 now states that a person is not guilty of an offence in certain defined circumstances where (a) they reasonably believe that force or a threat of force is being used or made against them or another person; (b) they act for the purpose of defending or protecting themselves or the other person; and (c) the act is reasonable in the circumstances. The former provisions, in force in 1996, were different in scope, but still provided a defence of self-defence: *Khill* at paras 29–34; *R v McIntosh*, [1995] 1 SCR 686 at paras 5, 18–30, 43–46.

[29] I agree with Mr. Zeine that the issue of self-defence was sufficiently raised in the material before the officer to require consideration. In particular, Mr. Zeine's letter of explanation, provided in response to the procedural fairness letter, stated that his actions in grabbing a gun and shooting it in the air were "out of fear for [his] father's safety, and seeing [his] father getting brutally hit." The shot that hit his brother was then fired when someone tried to take the weapon from him, a statement consistent with Mr. Zeine's statement to police after the incident. These statements assert that Mr. Zeine believed that force was being used against another person (his father) and that his actions were committed for the purpose of defending or protecting the other person, relevant elements of section 34 of the *Criminal Code*.

[30] However, in addition to not considering the elements of the offence contained within section 267 of the *Criminal Code*, the officer did not consider whether section 34 applied such that the Lebanese crime would not, if committed in Canada, constitute an offence. This is inconsistent with the required analysis set out in *Li*.

[31] The Minister argues there was no evidence of self-defence since the Lebanese evidence regarding the crimes makes no reference to any possible defence, and Mr. Zeine raised no issue of self-defence in the Lebanese documents. However, Mr. Zeine's statement to Lebanese police similarly indicates that he took the gun and shot in the air as a result of his brothers attacking his father. In any event, in the absence of any information regarding the availability of self-defence in Lebanese criminal proceedings, it is difficult to draw any conclusions regarding the limited discussion of the issue in the Lebanese court documents.

[32] The Minister also argues that the defence of self-defence cannot possibly apply given Mr. Zeine's assertion that the shot that injured his brother was accidental. In the Minister's submission, the shot could either be an accident or self-defence, but not both. I am unwilling to accept this submission in the absence of supporting authority or argument regarding the scope of section 34 of the *Criminal Code*, or how it might intersect with the requisite *mens rea* for section 267. In any event, this was not part of the analysis undertaken by the officer.

[33] Mr. Zeine could certainly have raised the issue of self-defence more clearly in his submissions. However, I conclude that the factual context of Mr. Zeine's conviction and his explanation regarding that context were such that the officer had to consider self-defence in assessing whether the facts that were proven in the Lebanese criminal case met the essential elements of section 267 of the *Criminal Code*: see *Garcia v Canada (Citizenship and Immigration)*, 2021 FC 141 at paras 26–28.

[34] I therefore conclude that the officer failed to reasonably conduct the equivalency analysis required by the binding jurisprudence, including *Hill* and *Li*. For clarity, in reaching the above conclusion, I make no findings of whether the current or prior version of the self-defence provisions in the *Criminal Code* ought to be considered, or whether the differences between them are relevant in the present case: see *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paras 35–36, 53.

B. *The officer's failure to consider humanitarian and compassionate relief was unreasonable*

[35] The officer also concluded Mr. Zeine was inadmissible for misrepresentation pursuant to paragraph 40(1)(a) of the *IRPA*. That paragraph provides that a permanent resident or a foreign national is inadmissible for misrepresentation for "directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of [the *IRPA*]." The officer concluded Mr. Zeine's failure to declare the Lebanese conviction, through his "NO" response to the question about foreign convictions and charges, was an omission of relevant information that resulted in his inadmissibility for serious criminality, and that this constituted a material misrepresentation within the meaning of paragraph 40(1)(a).

[36] In doing so, the officer rejected the explanation Mr. Zeine offered in his response to the procedural fairness letter, namely that his sister helped him complete the forms since he could not speak English. His sister, who was living in Canada in June 1996, was unaware of the incident, and said that in completing the form she had relied on a Lebanese police report showing he had no convictions and did not ask Mr. Zeine the question. The officer concluded that it was Mr. Zeine's responsibility to ensure that his sister completed the forms accurately, and that he should have ensured his sister asked him the relevant questions before completing the answers.

[37] Mr. Zeine does not challenge the officer's finding of inadmissibility on grounds of misrepresentation itself. However, he argues it was unreasonable for the officer not to address his request for compassionate relief and, in particular, not to assess whether the H&C factors in the

circumstances, especially the fact that Mr. Zeine's Canadian son was growing up in the absence of his father, warranted relief from inadmissibility for misrepresentation. I agree.

[38] As Mr. Zeine recognizes, his submissions to the officer did not refer to "humanitarian and compassionate considerations," section 25 of the *IRPA*, or the "best interests" of his child. However, his application raised the family's circumstances and made an express request for compassionate relief. In 2020 and again twice in 2021, his wife and sponsor wrote to IRCC seeking an update on the processing of the application, noting that their infant child was growing up without his father. In August 2021, Mr. Zeine's response to the procedural fairness letter regarding inadmissibility included statements from him and his sister. His sister's statement concluded with the following plea:

> He has a wife and a 2 year old son [who] was born in Canada and should not have to pay the price of living and growing up without his father. Please reconsider as I am appealing to you for compassionate reasons.
>
> [Emphasis added.]

[39] After this submission, Mr. Zeine's wife again enquired as to the status of his application in November 2021, again raising the issue that their son was growing up without his father. In the same correspondence, she added that "[l]ife in Lebanon is getting bad and hard" and that she was concerned about Mr. Zeine and his son from his first marriage, who was a dependent applicant on his application for permanent residence.

[40] Citing the Court of Appeal's decision in *Owusu*, the Minister argues that an officer is not obliged to consider an H&C factor that was not adequately raised: *Owusu v Canada (Minister of*

Citizenship and Immigration), 2004 FCA 38 at para 8; see also *Suleiman v Canada (Citizenship and Immigration)*, 2017 FC 395 at para 81. Nonetheless, this Court has recognized on a number of occasions that an application for permanent residence that raises H&C issues may give rise to a duty to consider H&C relief "when the facts or submissions imply a request to consider such factors," even if the applicant does not expressly invoke section 25 of the *IRPA*: *Brar v Canada (Citizenship and Immigration)*, 2011 FC 691 at para 58; *Do Nascimento v Canada (Citizenship and Immigration)*, 2012 FC 1424 at paras 17–20; *Canada (Citizenship and Immigration) v Mora*, 2013 FC 332 at paras 35–38; *Garcia Balarezo v Canada (Citizenship and Immigration)*, 2017 FC 1060 at paras 18–23. Indeed, even in *Owusu*, the Court of Appeal's conclusion that the officer was not obliged to inquire about or further consider the best interests of the children was based on its assessment that the identification of the children's best interests was "too oblique, cursory and obscure to impose a positive obligation on the officer": *Owusu* at para 9; see also *Sultana v Canada (Citizenship and Immigration)*, 2009 FC 533 at para 36.

[41] In the present circumstances, I conclude that the repeated references to Mr. Zeine's family situation and the interests of his son and the specific request that the officer reconsider "for compassionate reasons" are sufficient to imply a request to consider H&C factors as a basis to exempt Mr. Zeine from the effects of his misrepresentation, and impose upon the officer an obligation to consider those factors in their decision. As Mr. Zeine concedes, this does not mean that the officer was obliged to grant the H&C relief requested; simply that they were obliged to consider the request. The officer's failure to do so in the circumstances was unreasonable: *Do Nascimento* at para 21.

IV. Conclusion

[42] Mr. Zeine asks that the officer's decision be quashed in its entirety. However, Mr. Zeine made no arguments regarding the officer's conclusion that his nondisclosure of his prior convictions constitutes a misrepresentation within the meaning of paragraph 40(1)(a). His arguments with respect to this aspect of inadmissibility pertained only to the officer's failure to consider H&C relief.

[43] I will therefore grant the judicial review in part, setting aside the officer's refusal of Mr. Zeine's sponsored application for permanent residence, including in particular their decision that Mr. Zeine is inadmissible for serious criminality, and sending his application back for redetermination. The officer reviewing the matter on redetermination will not be required to reconsider whether Mr. Zeine's failure to disclose his conviction in Lebanon in 1996 was a misrepresentation falling within the scope of paragraph 40(1)(a), but must consider Mr. Zeine's request that he be relieved from the consequences of that misrepresentation on H&C grounds.

[44] Neither party proposed a question for certification, and I agree that none arises in the matter.

JUDGMENT IN IMM-3502-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed in part. The refusal of Mr. Zeine's application for permanent residence is set aside and his application is remitted for redetermination on the issue of his inadmissibility for serious criminality and the issue of whether humanitarian and compassionate considerations justify granting him relief from the consequences of misrepresentation.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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