Federal Court  Cour fédérale

Date: 20240422

Docket: IMM-2021-24

Citation: 2024 FC 608

Ottawa, Ontario, April 22, 2024

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

WANDERSON DOS SANTOS FREITAS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Public Safety and Emergency Preparedness [Minister] seeks judicial review of a production order issued by the Immigration Division [ID] of the Immigration and Refugee Board on January 22, 2024. The ID ordered the Minister to produce all records that are relevant to an ongoing inadmissibility hearing, regardless of whether those records are in the

possession or control of the Canada Border Services Agency [CBSA] or the Royal Canadian Mounted Police [RCMP].

[2] The records were sought by the Respondent Wanderson Dos Santos Freitas in connection with a hearing into his potential inadmissibility to Canada for serious criminality, organized criminality, and transnational criminality pursuant to ss 36(1)(b), 37(1)(a) and 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The Minister alleges that Mr. Freitas engaged in human smuggling as part of a transnational criminal organization.

[3] The ID misapprehended the statutory framework that governs the relationship between the Minister, the CBSA and the RCMP, and misconstrued the nature of the Minister's responsibility for the agencies within his portfolio. In so doing, the ID failed to grasp the distinction in law between first party and third party disclosure in administrative proceedings. Its decision to issue the production order was therefore unreasonable.

[4] The application for judicial review is allowed, and the production order is quashed. Mr. Freitas remains at liberty to seek further disclosure of records from the CBSA and, if necessary, from the RCMP as a third party, in accordance with these Reasons for Judgment.

II. Background

[5] Mr. Freitas is a citizen of Brazil. He attained Canadian permanent residence in October 2014, sponsored by his wife.

[6] On March 14, 2019, Mr. Freitas launched a jet ski into the Niagara River from Fort Erie, Ontario and transported two individuals from Canada to the United States. Neither of the two passengers had authorization to enter the United States. Each had agreed to pay Mr. Freitas $3,000.

[7] Mr. Freitas was apprehended by US authorities, and on June 24, 2020 he pleaded guilty to one count of Bringing Aliens to the United States for Commercial Advantage or Private Financial Gain contrary to Title 8 of the United States Code, s 1324(a)(2)(B)(ii). He was sentenced by the United States District Court, Western District of New York to 18 months' imprisonment.

[8] Following his conviction in the United States for human smuggling, a CBSA officer prepared a report on inadmissibility pursuant to s 44(1) of the IRPA. According to the report:

> There are reasonable grounds to believe that Mr. Dos Santos Freitas is inadmissible to Canada on the grounds of organized criminality for engaging in the context of transnationals [*sic*] crime, and being a member of an organization that is believed on reasonable grounds to have been engaged in an activity that is part of a pattern of criminal activity, planned and organized by a number of persons acting in concert in furtherance of the commission of an offence under an Act of Parliament. Specifically, human smuggling for material benefit or financial gain.
>
> In addition, there are reasonable grounds to believe that Mr. Dos Santos Freitas is inadmissible on the grounds of serious criminality for being convicted of an offence outside of Canada that if convicted in Canada would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

[9] On January 25, 2023, a CBSA Inland Enforcement Supervisor, acting as the Minister's delegate, referred the report to the ID for an inadmissibility hearing. Mr. Freitas sought a production order requiring the Minister to disclose all relevant records, including records in the possession or control of the RCMP pertaining to its criminal investigation of Mr. Freitas and eight other individuals who were allegedly involved in the human smuggling.

III. Decision under Review

[10] The ID's Production Order reads as follows:

> The Minister of Public Safety is ordered to disclose all relevant records in its possession or control (whether those records are in the possession of the CBSA or the RCMP) with respect to the investigation of the Respondent Mr. Freitas for involvement in human smuggling or organized criminality, as well as all relevant records in its possession or control with respect to the investigation of the criminal organization(s) of which the Respondent is alleged to have been a member, including but not limited to the investigations of: Ernane Jorge Dos Santos, Rafael Santos Vivaldo, Ricardo Dias Gomez, Renan Portela Bandeira de Souza, Tiago Mello Lima, Yure Rodriguez Rezende, Fernano Silva, and Tulio de Mata Vanconcelos.

[11] The ID's reasons for issuing the production order include the following (transcript at page 22):

> […] there is a fairly high level of procedural fairness that is owed in the context of an admissibility hearing. This is so, given the potential very serious consequences for Mr. Freitas, if a finding of inadmissibility is made under section 37 of the IRPA. The Minister is under a heightened disclosure obligation pursuant to the common law principles and those set forth in the case of *Stinchcombe* and developed in case law thereafter.

[12] With respect to the ID's power to compel the production of records in the possession or control of the RCMP, the reasons state (transcript at page 25):

> So, I will turn now to what has been alleged to be a distinction by the Minister between the CBSA and the RCMP, when it comes to records in the possession and control of the Minister of Public Safety. I ultimately conclude that there should not be any such distinction found, given that fundamentally, the applicant party here is the Minister of Public Safety, not the CBSA, and particularly, in fact, in light of the fact that here, the applicant minister oversees and is responsible for both investigative agencies, the RCMP and the CBSA alike.

IV. Issue

[13] The sole issue raised by this application for judicial review is whether the ID's decision to issue the production order was reasonable.

V. Analysis

[14] The ID's decision to issue the production order is subject to review against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). The Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[15] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls

within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[16] Section 3 of the *Canada Border Services Agency Act*, SC 2005, c 38 [CBSA Act] establishes the CBSA as a "body corporate". Section 6 of the CBSA Act states that the Minister is "responsible for the Agency." Pursuant to ss 5(2) of the CBSA Act:

The Agency may provide support, through the provision of services, to departments and agencies for which the Minister is responsible, in accordance with agreements or arrangements entered into with those departments and agencies.	Elle peut en outre appuyer, par la prestation de services, les ministères ou organismes relevant du ministre, conformément à tout accord ou entente conclu avec eux.

[17] It is therefore clear that the CBSA is a distinct legal entity from the Minister, as are the other departments and agencies for which the Minister is responsible. The Minister is responsible for the Department of Public Safety and Emergency Preparedness, in addition to five agencies and three review bodies.

[18] In *Yeager v Canada (Public Safety and Emergency Preparedness)*, 2019 FCA 98, the Federal Court of Appeal held that requests for access to records are properly dealt with by the government institution that holds the records, not the responsible Minister. This case arose in the context of access to information legislation, but the principle has broad application.

[19] In *Seyoboka v Canada (Minister of Citizenship and Immigration)*, [2010] 2 FCR 3 [*Seyoboka*], Justice Yves de Montigny (as he then was) ruled that the CBSA and the RCMP are divisible for the purpose of disclosure in proceedings before the ID (at paras 40-43):

> Contrary to the applicant's submissions, the CBSA and the RCMP were divisible for the purpose of disclosure. Each agency was conducting separate investigations against the applicant for administrative law and criminal law purposes, respectively. The cooperation between the RCMP, CBSA, and the Department of Justice does not put an end to the divide between the police and the government. […]
>
> The applicant relied on a few cases where the RCMP and the Crown were found to be indivisible for disclosure purposes. But each of these cases can be distinguished on their facts. […]
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> […] First of all, the relationship between the Crown and the material in the hands of the police for which the Crown was held to be in constructive possession was much more intimate in both of these cases than was the case here between the CBSA and the RCMP. Second, the duty to disclose was applied in the context of a criminal prosecution, and it was the information gathered for other purposes that was ordered disclosed; here, it is the information collected as a result of an ongoing investigation that is sought in the context of an administrative procedure.

[20] As in this case, *Seyoboka* concerned a demand for disclosure of information collected in a criminal investigation for the purposes of an administrative proceeding. Even if one accepts the ID's finding that Mr. Freitas is entitled to a level of disclosure comparable to the one mandated by the Supreme Court of Canada in *R v Stinchcombe*, [1991] 3 SCR 326 [*Stinchcombe*], Justice de Montigny's observation in paragraph 44 of *Seyoboka* is equally applicable here:

> […] In *Stinchcombe*, the Supreme Court held that prosecutors have a duty to disclose relevant matters which the investigation of the crime has disclosed and which are within the control of the prosecutor. If the information is within the control of a third party, a separate procedure has to be followed, as laid out in *R. v.*

> *O'Connor*, [1995] 4 S.C.R. 411. It would set a dangerous precedent if this demarcation line was to be blurred, under the pretext that the Crown and the police were indivisible. Except in the most exceptional circumstances, an administrative agency should not have access to the file of a police force gathered as a result of an ongoing investigation, let alone be held responsible for not disclosing that information.

[21] The ID sought to distinguish *Seyoboka* on the ground that, in that case, the RCMP had no role in the CBSA's investigation. The ID also observed that *Seyoboka* was an old precedent, and Justice de Montigny did not have the benefit of the Supreme Court of Canada's decision in *R v McNeil*, 2009 SCC 3 [*McNeil*].

[22] In *McNeil*, the Supreme Court of Canada (*per* Charron JA) said the following (at para 13):

> Third, to the extent that the operative terms of the production order below may suggest that records in possession of one Crown entity are deemed to be in the possession of another, this interpretation should be discarded. The notion that all state authorities constitute a single indivisible Crown entity for the purposes of disclosure finds no support in law and, moreover, is unworkable in practice. Accordingly, Crown entities other than the prosecuting Crown are third parties under the *O'Connor* production regime. As I will explain, however, this does not relieve the prosecuting Crown from its obligation to make reasonable inquiries of other Crown entities and other third parties, in appropriate cases, with respect to records and information in their possession that may be relevant to the case being prosecuted. The Crown and the defence in a criminal proceeding are not adverse in interest for the purpose of discovering relevant information that may be of benefit to an accused.

[23] In *May v Ferndale Institution*, 2005 SCC 82, the Supreme Court of Canada confirmed that "the Stinchcombe principles do not apply in the administrative context". Nevertheless, a

heightened disclosure obligation akin to *Stinchcombe* may be afforded in the administrative context where the potential consequences of the tribunal's decision are sufficiently serious (*Sheriff v Canada (Attorney General)*, [2007] 1 FCR 3 (FCA); *Canada (Citizenship and Immigration) v Jozepovic*, 2021 FC 536).

[24] In *McNeil*, the Supreme Court of Canada reiterated the "corollary obligation" of the police to disclose to the Crown all records that may be relevant to a criminal prosecution (at para 14):

> […] The Crown's obligation to disclose all relevant information in its possession to an accused is well established at common law and is now constitutionally entrenched in the right to full answer and defence under s. 7 of the *Canadian Charter of Rights and Freedoms*. The necessary corollary to the Crown's disclosure duty under *Stinchcombe* is the obligation of police (or other investigating state authority) to disclose to the Crown all material pertaining to its investigation of the accused. For the purposes of fulfilling this corollary obligation, the investigating police force, although distinct and independent from the Crown at law, is not a third party. Rather, it acts on the same first party footing as the Crown.

[25] Applying *McNeil* by analogy to the administrative proceeding currently before the ID, the RCMP may be under a corollary obligation to disclose all relevant information, including exculpatory information, to the CBSA for the purposes of the inadmissibility hearing. However, this does not mean that the RCMP is itself subject to a production order issued by the ID (*Seyoboka* at paras 40-44).

[26] In correspondence sent to the Court following the hearing of this application, the parties jointly submitted that:

> The authority to refer an admissibility report to the Immigration Division has been delegated to a set of CBSA officials at the managerial level (as appears from item 210 of the Instrument of Delegation), and that set, notably, does not include Hearings Officers (compare, e.g., to item 209 of the Instrument of Delegation).
>
> As such, the role of CBSA Hearings Officers before the Immigration Division is to represent the Minister, and they are not so acting pursuant to a delegated legislative authority. This arrangement is specifically provided for at section 12 of the *Canada Border Services Agency Act* […]

[27] The important delegation in this case concerns the authority to refer an inadmissibility report to the ID. There is no dispute that this authority has been delegated to the CBSA. Accordingly, the CBSA is the "Crown" for the purposes of inadmissibility hearings. The duty of disclosure rests with the CBSA, not the hearing officer appointed to represent the Crown before the ID in a particular matter. As counsel for Mr. Freitas acknowledged during the hearing, the Crown's representative before the ID is not necessarily a CBSA officer, and may in some cases be a lawyer employed by the Department of Justice (Canada).

[28] The CBSA, as the Minister's delegated authority seeking Mr. Freitas' inadmissibility, has a duty to make reasonable inquiries of other Crown agencies or departments concerning the availability of relevant records. In *McNeil* at paragraph 49, the Supreme Court of Canada adopted the New Brunswick Court of Appeal's description of this duty in *R v Arsenault* (1994), 153 NBR (2d) 81 (CA) (*per* Ryan JA):

> When disclosure is demanded or requested, Crown counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence. Counsel cannot be excused for any failure to make reasonable inquiries when to the knowledge of the

> prosecutor or the police there has been another Crown agency involved in the investigation. Relevancy cannot be left to be determined by the uninitiated. If Crown counsel is denied access to another agency's file, then this should be disclosed to the defence so that the defence may pursue whatever course is deemed to be in the best interests of the accused. This also applies to cases where the accused or defendant, as the case may be, is unrepresented.

[29] Once again, applying *McNeil* by analogy to the administrative proceeding before the ID, the CBSA should make reasonable inquiries of the RCMP to obtain all records, including exculpatory records, that may be relevant to the inadmissibility hearing before the ID. If the CBSA is denied access to the RCMP's file, then this should be disclosed to counsel for Mr. Freitas so he may pursue the course of action he considers most appropriate.

[30] If the RCMP declines to disclose relevant records to the CBSA, one possible avenue for Mr. Freitas is to seek a summons from the ID pursuant to s 165 of the IRPA to compel disclosure from the RCMP as a third party, in the manner contemplated by *R v O'Connor*, [1995] 4 SCR 411. Alternatively, Mr. Freitas could seek a stay of proceedings on the ground of procedural unfairness, or dismissal of the Minister's application on the ground that the applicable evidentiary threshold has not been met.

[31] The ID misapprehended the statutory framework that governs the relationship between the Minister, the CBSA and the RCMP, and misconstrued the nature of the Minister's responsibility for the agencies within his portfolio. In so doing, the ID failed to grasp the distinction in law between first party and third party disclosure in administrative proceedings.

[32] The ID's decision to compel records from the Minister, "whether those records are in the possession of the CBSA or the RCMP", does not exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100). It is therefore unreasonable.

VI. Conclusion

[33] The application is allowed, and the ID's production order is quashed.

[34] The CBSA has an obligation to make reasonable inquiries of the RCMP to obtain all records, including exculpatory records, that may be relevant to the inadmissibility hearing before the ID, and to produce those records to Mr. Freitas.

[35] If the CBSA is denied access to the RCMP's file, then this should be disclosed to counsel for Mr. Freitas so he may pursue the course of action he considers most appropriate.

[36] Neither party has sought costs, or proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the production order issued by the Immigration Division of the Immigration and Refugee Board on January 22, 2024 is quashed.

2. Wanderson Dos Santos Freitas remains at liberty to seek further disclosure of records from the Canada Border Services Agency and, if necessary, from the Royal Canadian Mounted Police as a third party, in accordance with the Reasons that accompany this Judgment.

3. No costs are awarded, and no question is certified for appeal.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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