Federal Court  Cour fédérale

Date: 20240424

Docket: IMM-6584-23

Citation: 2024 FC 624

Ottawa, Ontario, April 24, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KEVIN DASS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Kevin Dass, seeks judicial review of a decision of a delegate (the "Delegate") of the Minister of Public Safety and Emergency Preparedness ("Minister") dated April 4, 2023, referring the Applicant for an admissibility hearing pursuant to section 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[2] The Applicant submits that the Delegate failed to acknowledge the Applicant's submissions and erred in considering the humanitarian and compassionate ("H&C") factors, thereby rendering an unreasonable decision.

[3] For the following reasons, I find that the decision is unreasonable. This application for judicial review is granted.

II. **Analysis**

A. *Background*

[4] The Applicant is a 51-year-old citizen of Trinidad and Tobago, and a permanent resident of Canada. He has resided in Canada for over thirty years.

[5] The Applicant had a troubled upbringing. He stated that his father was a physically and emotionally abusive alcoholic. The Applicant realized at a young age that he was gay, but feared revealing this to others in Trinidad and Tobago, stating that Trinidadian society was "extremely homophobic, and not accepting at all of gay people."

[6] In 1991, the Applicant arrived in Canada and enrolled at the University of Toronto. He became involved in Toronto's gay community and started to form relationships. In 1996, however, an aunt of his discovered that he was gay and informed his parents, who stopped speaking to and financially supporting him. He did not return to Trinidad and Tobago and in 2002, received permanent residence in Canada.

[7] In approximately 2005-2006, the Applicant began suffering from mental health afflictions. He was diagnosed with schizophrenia and prescribed medication to help him with his symptoms. In 2010, the Applicant's mother died, which strained his mental health and saw him begin to seek aid from the Ontario Disability Support Program.

[8] In 2016, the Applicant began using crystal methamphetamine and stopped taking his prescribed medication. In 2017, he became homeless. He states that his psychosis persisted and he began using crystal methamphetamine more frequently. The Applicant states that from 2018-2022, he was "in and out of hospital and jail."

[9] In 2021, the Applicant was convicted of multiple crimes. On December 23, 2021, he was sentenced for mischief and failure to comply and attend court, as well two counts of arson. He received a suspended sentence, approximately four-and-a-half months' credit for pre-sentence custody, a prohibition order, and two years' probation.

[10] In 2022, the Applicant was convicted of further crimes. On August 22, 2022, he was sentenced for arson, two counts of assault, and one count of committing an indecent act. He received, respectively, approximately three months' imprisonment, approximately five months' credit for pre-sentence custody, and three years' probation. Regarding this conviction, the Officer stated: "[t]otal term imposed before credit granted - 9 months. Due to length of sentence, [the Applicant] would lose his appeal rights."

[11] Since July 2022, the Applicant had continued to receive treatment for his schizophrenia. Since December 2022, he lived in housing that supports individuals who suffer from mental health issues. He states that he is motivated to continue his medication and that he has not used drugs since mid-2022, nor does he have any "urge or intention to use drugs and go back to any state of psychosis, and mess up my life."

[12] During this time, the Minister began initiating inadmissibility proceedings against the Applicant. In March 2022, the Minister initiated a report pursuant to section 44(1) of the *IRPA* for the Applicant's 2021 arson conviction. In October 2022, a second section 44(1) report was initiated for the Applicant's 2022 arson conviction.

[13] In a decision dated April 3, 2023, the Officer recommended that the Applicant be referred to for an admissibility hearing. The Officer's report, which provides the rationale for this recommendation, "is considered to be part of the Minister's Delegate's reasons" (*McLeish v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 705 at para 37, citing *Burton v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 753 at para 16).

[14] The Officer relied upon findings from the sentencing judge regarding the Applicant's crimes to communicate their seriousness, as well as findings regarding his history of drug use and mental ailments. The Officer found that the Applicant was a repeat offender and had a history of non-compliance, and that the Applicant's actions "placed the general public at risk as evident by his criminal recidivism and disregard for Canada's laws." The Officer found the Applicant had minimized his drug abuse and shown himself to be unpredictable through his past

relapses. The Officer acknowledged the Applicant was remorseful, but found that "it would be premature to assume he will be successful at rehabilitation." The Officer concluded that the Applicant had a potential to relapse and reoffend and that because he had recent convictions and several arson convictions, he posed a "serious risk to the general public."

[15] The Officer acknowledged that the Applicant had been in Canada for over thirty years, with twenty of them spent as a permanent resident. The Officer also acknowledged that the Applicant had been unemployed since 2011, relying upon government assistance from that time onwards, as well as the Applicant's lack of family ties in Canada, with his only remaining relative living in the United States and his father "presumably" living in Trinidad and Tobago. The Officer found that "[a]lthough there may be some level of readjustment when he returns to Trinidad and Tobago, there are support groups that can help him as well as various services and organizations that can assist in his reintegration and rehabilitation in Trinidad and Tobago." The Officer thus concluded that H&C factors did not outweigh the seriousness of the Applicant's conviction and did not justify a warning letter, rather than referral to an inadmissibility hearing.

[16] In a decision dated April 4, 2023, the Delegate agreed with the Officer for largely the same reasons and referred the report under section 44(2) of the *IRPA* to the Immigration Division ("ID") for an admissibility hearing.

B. *Issue and Standard of Review*

[17] This application for judicial review raises the sole issue of whether the Delegate's decision is reasonable.

[18] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[19] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13; 75; 85). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A decision that is reasonable as a whole 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[20] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100).

C. *The decision is unreasonable*

[21] The Applicant submits that the decision is unreasonable for failing to account for his submissions and in the analysis of his personal circumstances. I agree. The decision was not

alert to central arguments raised by the Applicant (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 ("*Mason*") at para 74, citing *Vavilov* at paras 127-128). There were also other errors that were "sufficiently serious" so as to render the decision unreasonable as a whole (*Vavilov* at para 100).

[22] The Applicant submits that the decision ignored his requests that a referral be made for his less serious criminal offences or that the decision to refer the Applicant to an admissibility hearing be held in abeyance until the outcome of his criminal appeal. The Applicant cites the fact that these requests were made so as to retain the Applicant's right of appeal to the Immigration Appeal Division ("IAD"), and the decision is unreasonable in failing to address these requests. The Applicant further maintains that the Delegate bore the discretion to not refer this report and that the Applicant was held to the incorrect standard for his prospect of rehabilitation in the analysis, and the establishment and hardship analyses were erroneous.

[23] The Respondent submits that it was reasonable to refer the report for the Applicant's more serious offence, especially in light of the limited discretion afforded to officers in the referral process. The Respondent submitted that while there was limited discretion to consider the Applicant's personal circumstances, the Applicant's circumstances were considered reasonably. The Respondent submits that there was no error in the treatment of the Applicant's prospect of rehabilitation, nor in the establishment and hardship analyses.

[24] This matter raises the nature of discretion in the section 44 referral process.

[25] The Applicant submits that a report does not have to be referred under section 44 of the *IRPA*. The Applicant submits that the Court's decision in *Sidhu v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1681 ("*Sidhu*") does not remove the discretion to not refer, holding that the discretion instead is "very limited" and that the Court nonetheless found that a section 44(2) decision must still reflect that the central arguments raised were meaningfully grappled with (*Sidhu* at paras 60, 24). Additionally, the Applicant submits that *Sidhu* did not address the issue raised in this application; namely, the discretion to choose which of the two valid section 44 reports to refer.

[26] The Respondent concedes that the Officer and Delegate retained an "extremely limited" discretion to consider the Applicant's personal circumstances, and that such analysis need not be extensive. The Respondent cites numerous decisions in support of this argument.

[27] From these submissions, the Court must ask: What exactly is the form of "discretion" at play in the section 44 referral process?

[28] In my view, there are two. The first form of discretion is the discretion to refer a report to the ID or not. The second is the discretion to consider an individual's personal circumstances or not.

[29] The first form of discretion undoubtedly exists. The Supreme Court of Canada has held as much. At issue in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 ("*Tran*") was a decision by a Minister's delegate to refer the appellant's matter to an

admissibility hearing (at paras 15, 21). The focus of the Supreme Court's decision was the delegate's "assumed interpretation of s. 36(1)(a)" of the *IRPA* (at paras 23-53), rather than the proper exercise of discretion under section 44(2) of the *IRPA* (see para 54).

[30] However, the Supreme Court's guidance on the discretion to refer a report is clear: "even if [the Minister] is of the opinion that the report is well founded, the Minister retains some discretion not to refer it to the Immigration Division" (*Tran* at para 6, cited in *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at para 6 and *Moretto v Canada (Citizenship and Immigration)*, 2019 FCA 261 at para 6).

[31] This holding from the Supreme Court can be seen as reflected in the Court's decision in *Sidhu*, as the Court in *Sidhu* acknowledged the "very limited" discretion afforded to officers and delegates in the section 44(1) and 44(2) referral process (at para 60, citing *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 ("*Obazughanmwen*") at paras 27, 29). Here, the decision was to not issue a warning letter to the Applicant, instead referring him to an admissibility hearing; but I do not find, following the Supreme Court in *Tran*, that the discretion to issue a warning letter and not refer the Applicant to an admissibility hearing was foreclosed.

[32] The second form of discretion exists for officers and delegates in the section 44 referral process as well. Specifically, I do not find that a lack of discretion to consider an individual's circumstances, as held in *Sidhu*, is an effect of *Obazughanmwen.*

[33] *Obazughanmwen* and *Sidhu* both provided extensive discussions of the discretion of immigration officers and ministerial delegates to consider H&C factors in the section 44(1) and (2) referral process (*Sidhu* at paras 42-60; *Obazughanmwen* at paras 29-39).

[34] *Obazughanmwen* was an appeal of a Federal Court decision dismissing the application for judicial review of a delegate referring the appellant to the ID for an admissibility hearing (at paras 13-22). The Federal Court of Appeal in *Obazughanmwen* was provided with the following certified question from the Federal Court:

> May a Minister's Delegate under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] consider complex issues of fact and law including the best interests of children [BIOC] and/or humanitarian and compassionate [H&C] issues, in relation to a possible referral of a permanent resident under section 37 of *IRPA* to an admissibility hearing before the Immigration Division of the Immigration and Refugee Board of Canada, in relation to which IRPA bars consideration of H&C and may bar BIOC factors? (at para 22)

[35] The Federal Court of Appeal dismissed the appeal, finding that the certified question had been certified improperly, and that the delegate's decision was nonetheless "reasonable and consistent with past jurisprudence" (at para 5).

[36] The Federal Court of Appeal in *Obazughanmwen* held that jurisprudence reflected that the section 44 referral process is to conduct a "screening exercise," whereby only the facts concerning admissibility are examined, rather than the adjudication of "controversial and complex issues of law and evidence" (at paras 37-38).

[37] However, upon reviewing the jurisprudence surrounding this issue and noting that the certified question on this issue had "been put to rest," the Federal Court Appeal found that an "overall consensus seems to coalesce" that officers and delegates "had very limited discretion, and that there was no general obligation to consider H&C factors nor to explain why they were not considered sufficient to offset other factors supporting a decision to refer a case for an admissibility hearing" (*Obazughanmwen* at para 29 [emphasis added], cited with approval in *Sidhu* at para 51). The Federal Court of Appeal confirmed that the ministerial delegate's "discretion pursuant to section 44 of the *IRPA* is limited and he was not obliged to consider H&C and BIOC matters" (at para 55 [emphasis added]).

[38] After *Obazughanmwen* came the Federal Court's decision in *Sidhu*. At issue in *Sidhu* was the reasonableness and procedural fairness of an officer and a delegate's decisions, respectively, resulting in the applicant being referred to the ID for an admissibility hearing (at paras 5-9). The Court in *Sidhu* took *Obazughanmwen* and held that that there was no longer any uncertainty about decision-makers' discretion to consider H&C factors in the section 44 referral process (at paras 57-59), the discretion of officer and delegates being "very limited, especially in cases of serious criminality and organized criminality" (at para 60, citing *Obazughanmwen* at paras 27 and 29).

[39] The holdings from *Obazughanmwen* provided above regarding the discretion of officers and delegates to consider personal circumstances warrant close reading.

[40] Stating that there is no obligation to consider personal circumstances does not mean that the officers and delegates cannot consider personal circumstances, despite the Court's holding in *Sidhu* that these circumstances are "beyond the reach" of officers and delegates, including H&C considerations (at para 60, citing *Obazughanmwen* at paras 31, 39, 44-45, quoting *Cha v Canada (Minister of Citizenship and Immigration (F.C.A.)*, 2006 FCA 126 at para 35, 37, and also citing *Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 862 at para 20, aff'd 2021 FCA 81).

[41] Rather than bearing an obligation to consider these circumstances, the decision-maker bears the discretion to consider them, and they will not be faulted if they do not. The Respondent concedes this "very limited discretion to consider personal circumstances in a referral decision" in their written submissions, submissions provided after *Sidhu* had been published.

[42] In the case at hand, the Officer and the Delegate did consider the Applicant's personal circumstances. As such, this aspect of the decision comes within the ambit of *Vavilov* and will be reviewed for its reasonableness.

[43] I agree with the Applicant that the decision was insufficiently responsive to the Applicant's submissions regarding a report being issued for the Applicant's less serious offences or having the matter held in abeyance until the determination of a criminal appeal. The Applicant made these requests clearly, submitting that the referral report for the Applicant's less serious offence would allow him to retain an appeal to the IAD, and led evidence that there was

"strong merit" to a sentence appeal and sufficient grounds to advance a conviction appeal, with both having "considerable chances on appeal." As noted above, the discretion remained to not refer the report.

[44] But the decision was not responsive to these requests, despite acknowledgment of the Applicant losing a right of appeal and despite choosing to recommend a referral to an admissibility hearing. The Officer was clearly aware of the Applicant's other criminal offenses, acknowledging that the Applicant was a "repeat offender and his criminal convictions are not an isolated incident." The Officer, however, chose not to rely on this evidence with regard to the Applicant's requests. The Delegate similarly acknowledged that the Applicant was convicted of three counts of arson, which included both his 2021 and his 2022 arson convictions. This reasoning was a failure to address key issues raised by the Applicant and a failure in responsive justification, both of which are fundamental features of reasonableness review (*Mason* at paras 74, 76, citing *Vavilov* at paras 127-128, 133-135).

[45] The Respondent's submissions largely ask the Court to supplement the decision's reasons concerning the Applicant's requests. I do not find that would be appropriate (*Vavilov* at para 96). I am particularly troubled by the Respondent citing a country conditions article stating that there are "many other facilities that seek to provide assistance for the homeless" in support of the submission that the Applicant "provided mixed evidence about social issues in Trinidad and Tobago." This submission appears to accept that the Applicant would be homeless in Trinidad and Tobago, but that there would be facilities to assist him.

[46] Accepting an understanding of "hardship" that accepts that an individual could be removed from the country they have lived in for over three decades to a country where they will be homeless, but that such homelessness would not amount to "hardship," is both cruel and ignorant to what people who do not have homes suffer. I do not accept it.

[47] Moreover, I agree with the Applicant that the Officer erred by finding that "it would be premature to assume [the Applicant] will be successful at rehabilitation," as confirmed by the Delegate stating that "it would be premature to assume that [the Applicant] would be successful at rehabilitation." This is not a matter of reweighing evidence, which is prohibited on judicial review (*Vavilov* at para 125). Rather, this is a matter of determining whether the reasons are justified in relation to binding legal and factual constraints (*Vavilov* at paras 99-101).

[48] I find here that a relevant legal constraint is that the threshold for the Applicant was not that his rehabilitation will be successful, but rather, in considering the "relevant facts" that were related to his criminal conviction in the section 44 referral process, that he was "likely to reoffend or to be rehabilitated" (*Hernandez v Canada (Minister of Citizenship and Immigration) (F.C.)*, 2005 FC 429 at para 36 [emphasis added]; see also paras 29-35). In considering the Applicant's rehabilitation and requiring that he demonstrate he "will" or "would" be rehabilitated, the threshold was elevated beyond what was required.

[49] Furthermore, I agree with the Applicant that the finding that "there are support groups that can help [the Applicant] as well as various services and organizations that can assist in his reintegration and rehabilitation in Trinidad and Tobago" raises more questions than it answers,

and is impermissibly vague without further elaboration. It is neither justified nor transparent (*Vavilov* at para 15).

[50] In my view, these features of the decision, as well as the lack of responsiveness to the Applicant's submissions, are sufficiently serious to render the decision unreasonable as a whole (*Vavilov* at para 100).

[51] A final note. Decision makers for referrals in the section 44(1) and section 44(2) process, in my view, are neither precluded from nor obligated to consider personal circumstances in the discretionary decision to refer a report for an admissibility hearing or not. They retain the discretion to consider these circumstances, albeit one tempered by their role in the process. And they further retain the discretion to refer the report or not, even if it is well founded.

[52] However, once decision makers provide reasons regarding an individual's personal circumstances, their reasons are subject to the strictures of reasonableness review. Holding otherwise would see the exercise of public power go unchecked, offending an elemental principle of administrative law that this exercise "must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95). Furthermore, refusing to review provided reasons regarding an individual's circumstances in the referral process under section 44 of the *IRPA* would also see the Court create a *de facto* privative clause where Parliament has not. Reasonableness review respects Parliament's "choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court" (*Vavilov* at para 12). It does not make them.

[53] Thus, decision makers who take up an individual's circumstances in sections 44(1) and (2) referral proceedings must render decisions that are justified, transparent, and intelligible, and justified in relation to the legal and factual constraints bearing upon them (*Vavilov* at para 99). Their decisions must, in others words, be reasonable.

III. **Conclusion**

[54] This application for judicial review is granted. The Delegate's decision is unreasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-6584-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The underlying decision is quashed and remitted to a different decision-maker for redetermination.

3. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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