Federal Court  Cour fédérale

Date: 20160405

Docket: IMM-4408-15

Citation: 2016 FC 377

Ottawa, Ontario, April 5, 2016

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

MARION VALDEZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] A Minister's Delegate determined that Marion Valdez should be referred to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing as a result of his serious criminality. Mr. Valdez seeks judicial review of this decision, alleging that it was unreasonable. Mr. Valdez further asserts that admissibility proceedings should be stayed on the basis that they constitute an abuse of process because of the lengthy delay between his only reportable conviction and the referral decision.

[2] For the reasons that follow, I have concluded that the Minister's Delegate's decision was reasonable, and that the circumstances of this case do not constitute an abuse of process. Consequently, Mr. Valdez' application for judicial review will be dismissed.

I. Background

[3] Mr. Valdez and his family came to Canada from the Philippines in 1993, when he was 28 years old. He is currently a permanent resident of Canada.

[4] In 1999, Mr. Valdez was charged with uttering a forged document, contrary to section 368 of the *Criminal Code*, R.S.C., 1985, c. C-46. Mr. Valdez had been providing in-home nursing assistance to a bedridden, dying man. After the patient's wife refused to provide him with a loan, Mr. Valdez stole a blank cheque from his employer, made it out to himself in the amount of $1,500, and attempted to negotiate it. Mr. Valdez' explanation for his conduct was that he wanted to get an apartment and needed money for his first and last month's rent.

[5] Mr. Valdez pled guilty to the charge and received a suspended sentence and 12 months of probation. There is no dispute between the parties that this offence constitutes "serious criminality", rendering Mr. Valdez inadmissible to Canada under subsection 36(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[6] In 2000, Mr. Valdez found out that he was HIV positive. He says that he was infected with the virus as a result of a needle stick that he suffered some four years earlier while he was working at the Wellesley Hospital, although the evidence before me on this point is far from persuasive. I mention the alleged cause of Mr. Valdez' HIV infection only because he relies on

his claim to have been infected in the workplace as a humanitarian and compassionate consideration that should have been taken into account in this case.

[7] According to Mr. Valdez' affidavit, he developed a gambling addiction starting in 2001, which led to him becoming significantly in debt.

[8] In 2008, Mr. Valdez created a scam, whereby he promised to help individuals obtain employment and immigration status in Canada for their family members in exchange for a $1,000 fee. Mr. Valdez admits that he never had any intention of ever providing such services, and that he never did so.

[9] Mr. Valdez' continued perpetrating his scam for more than five years, continuing even after he was arrested in 2011. He was subsequently charged with dozens of counts of fraud. On September 18, 2013, Mr. Valdez pleaded guilty to 27 counts of fraud under $5,000. He was sentenced to a total of 12 months in jail (with credit for time spent in pre-trial detention), and was ordered to make restitution to his victims in the amount of $80,000. Mr. Valdez was released on parole after serving two months of his sentence.

[10] The parties agree that because Mr. Valdez's 12 month sentence was actually comprised of multiple 30-day sentences for individual counts of fraud, these offenses do not constitute "serious criminality" for the purposes of subsection 36(1) of *IRPA*.

II. Mr. Valdez' Immigration Proceedings

[11] The uncontroverted evidence before me is that the Canada Border Services Agency did not become aware of Mr. Valdez' 1999 conviction until April 19, 2011, when it was contacted

by the Toronto police after Mr. Valdez' 2011 arrest. At that point, Mr. Valdez had only been charged with seven counts of fraud under $5,000 and three counts of fraud over $5,000.

[12] Upon receipt of this information, the CBSA requested a Canadian Police Information Centre search for Mr. Valdez. As a result of the CPIC search, the CBSA discovered that Mr. Valdez had been convicted of uttering a forged document in 1999. The CBSA attempted to obtain court records with respect to this conviction, but these records were no longer available. The CBSA was, however, able to obtain a copy of the police report relating to this offence from the York Regional Police.

[13] On September 29, 2011, the CBSA called Mr. Valdez, requesting that he attend for an interview. The interview took place on November 9, 2011. During the course of the interview, Mr. Valdez was told the purpose of the interview, and he was questioned about both his 1999 conviction and his more recent charges.

[14] The CBSA actively monitored the progress of Mr. Valdez' criminal case after the interview. On March 20, 2014, the CBSA learned that Mr. Valdez had been convicted of multiple counts of fraud, at which point a draft report was prepared referring Mr. Valdez for an admissibility hearing under section 44(1) of *IRPA*.

[15] Mr. Valdez was provided with the opportunity to make submissions on the referral question, which he did some three months later.

[16] The Minister's Delegate signed the report referring Mr. Valdez for an admissibility proceeding on December 23, 2014. This report was sent to the Immigration Division for it to

schedule an admissibility hearing for Mr. Valdez. On September 2, 2015, a letter was sent to Mr. Valdez advising him of the date of his admissibility hearing.

[17] In the interest of completeness, I would add that the Immigration Division has now issued a removal order against Mr. Valdez, which is now on appeal to the Immigration Appeal Division.

III. Was the Minister's Delegate's Decision Reasonable?

[18] I agree with the parties that the decision to refer an individual to an admissibility hearing is a discretionary one, and that the Minister's Delegate's decision is reviewable on the standard of reasonableness.

[19] Mr. Valdez argues that the focus of the Minister's Delegate's analysis was on his 2013 convictions for fraud under $5,000, submitting that his more recent convictions were used as a pretext to revive his 1999 conviction. Given that the offenses of which Mr. Valdez was convicted in 2014 were "non-reportable" offences, in that they could not serve as the basis for finding him to be inadmissible to Canada for serious criminality, Mr. Valdez contends that it would be contrary to Parliament's intent to base an inadmissibility referral on non-serious criminal offenses.

[20] I do not accept this submission. As was noted earlier, Mr. Valdez admits that his 1999 conviction was for an offence that constituted "serious criminality" for the purposes of subsection 36(1) of *IRPA*. When regard is had to the reasons provided by the Minister's Delegate, it is apparent that, in exercising her discretion, she considered whether Mr. Valdez's 1999 conviction could be considered to be a "one-off" lapse in judgment, or part of a pattern of fraudulent behaviour. This was clearly a relevant consideration.

[21] Mr. Valdez also argues that the Minister's Delegate erred in failing to consider the leniency of the sentence that was imposed on him for the 1999 conviction in making her decision. While it is true that the Minister's Delegate does not expressly address the leniency of the sentence imposed on Mr. Valdez in 1999 in her reasons, she was clearly aware of the nature of his sentence as it is specifically noted in the decision. As the Supreme Court observed in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, "a decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion": 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708.

[22] Mr. Valdez also says that the Minister's Delegate's decision is unreasonable because she failed to properly consider the humanitarian and compassionate factors in his favour, including his HIV status and addiction issues, his family support in Canada, and his efforts at rehabilitation.

[23] While a Minister's Delegate has the power to consider humanitarian and compassionate factors in deciding whether or not to exercise his or her discretion to refer an individual for an admissibility hearing, it is not necessary that the Delegate carry out a full H&C review, as would be the case in an application for permanent residence on humanitarian and compassionate grounds brought under section 25 of *IRPA*. This is especially so where, as here, Mr. Valdez will have the opportunity to have the humanitarian and compassionate factors on which he relies fully considered by the Immigration Appeal Division in his appeal of the removal order that has been issued against him.

[24] It is clear from a review of the Minister's Delegate's decision that she was fully aware of the humanitarian and compassionate factors that Mr. Valdez was advancing, including his HIV status and addiction issues, the availability of medical care in the Philippines for those infected with HIV, Mr. Valdez' family support in Canada and his efforts at rehabilitation. Mr. Valdez is essentially asking me to reweigh the evidence on these issues and come to a different conclusion. That is not the role of this Court on judicial review.

[25] Mr. Valdez further argues that the Minister's Delegate's finding that he was at risk of re-offending was not reasonable, given that the Ontario Parole Board saw fit to release him (albeit with conditions) after he had served just two months of his sentence, and his treating physician had expressly stated that he was at low risk of re-offending.

[26] I place little weight on the opinion of Mr. Valdez' physician, as there is nothing in her report that would indicate that she was aware that Mr. Valdez had been convicted of fraud in 1999 – *before* suffering the stressors of the HIV diagnosis and gambling addiction that she believes contributed to his later offences.

[27] Moreover, while it is true that the Parole Board was of the view that Mr. Valdez' risk could be managed in the community, the 2014 reasons of the sentencing judge amply support the Minister's Delegate's finding that Mr. Valdez was at risk of re-offending.

[28] The sentencing judge found that the facts of Mr. Valdez' case were "egregious and disturbing". He had victimized approximately 130 people over a four-year period, mostly vulnerable members of his own Filipino community, through a carefully planned, sophisticated

fraudulent scheme. The judge further found that Mr. Valdez' actions had had a devastating effect on many people.

[29] Particularly noteworthy is the fact that Mr. Valdez had continued to offend, even after the initial charges were laid in 2011, while he was out on bail. Indeed, Mr. Valdez only ceased offending after he had been arrested for the third time in connection with the scam.

[30] Mr. Valdez also argues that he should have been provided with a letter warning him that his immigration status was in jeopardy after his 1999 conviction. CBSA was not, however, aware of that conviction at the time that it happened, and could not therefore have provided him with any such warning. Nor was it obliged to do so. The portion of the Enforcement Manual relied upon by Mr. Valdez in this regard clearly contemplates a warning letter being sent after a decision is made *not* to refer an individual for an admissibility hearing. That is not what happened here: no decision was ever made in this case not to refer Mr. Valdez for an admissibility hearing.

[31] Finally, Mr. Valdez says that it was unreasonable to refer him for an admissibility hearing based upon a 15-year-old conviction, and that the Minister's Delegate "did not give sufficient credence" to this issue. This is essentially another invitation to have me to reweigh the evidence and does not reflect a reviewable error on the part of the Minister's Delegate.

[32] I will return to the issue of delay when I consider Mr. Valdez' abuse of process argument. Suffice it to say at this juncture, however, that the Minister's Delegate was aware of the gap between Mr. Valdez' 1999 offence and the 2011 charges. She was nonetheless satisfied that the 1999 offence was not an isolated incident, but part of an escalating pattern of fraudulent conduct

on Mr. Valdez' part. This was a finding that was reasonably open to the Minister's Delegate on the record before her.

[33] As for the post-2011 delay, I am satisfied that it was entirely reasonable for the Minister's Delegate to wait to see what happened in Mr. Valdez' more recent criminal proceedings before making a final decision as to whether or not to refer him to an inadmissibility hearing. Indeed, it would arguably have been unfair to make a referral decision based on the mere existence of outstanding charges, as the fact that someone has been charged with a criminal offense proves nothing: it is simply an allegation: *Thuraisingam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 607 at para. 35, 251 F.T.R. 282. There was always the possibility that Mr. Valdez would have been found not guilty of the 2011 charges, and he would undoubtedly have wanted this development to have operated in his favour.

[34] As a consequence, I am satisfied that the Minister's Delegate's decision was reasonable.

IV. Has There Been an Abuse of Process in this Case?

[35] Mr. Valdez also argues that the delay in this case has caused him prejudice, and has become otherwise oppressive. He argues that the proper remedy for this abuse of process is a stay of the admissibility proceedings. In support of this contention, he relies on this Court's decision in *Fabbiano v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 1219, 32 Imm. L.R. (4th) 84. *Fabbiano* is another case involving a referral to an inadmissibility hearing, where the Court found that there had been a lengthy delay that had caused significant prejudice to the applicant.

[36] Abuse of process is a common law principle that allows a Court to stay a proceeding that has become unfair or oppressive, including in situations where the unfairness results from an unacceptable delay that has resulted in significant prejudice: *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at para. 101, [2000] 2 S.C.R. 307.

[37] A stay of proceedings is an extraordinary remedy that should only be granted in the clearest of cases where a party has suffered actual prejudice that would offend the public's sense of decency and fairness: *Fabbiano*, above, at paras. 9-10.

[38] Each case will turn on its own facts, but in deciding whether to grant a stay, the Court must have regard to the following test:

1. There must be prejudice to the person's right to a fair trial or the integrity of the justice system;

2. There must be no adequate alternative remedy; and

3. If uncertainty remains after steps 1 and 2, the Court must weigh the interests in granting a stay against the public interest in having a decision on the merits.

R. v. Babos, 2014 SCC 16, at para. 32, [2014] 1 S.C.R. 309.

[39] As the party seeking to establish that the impact of an administrative delay has resulted in an unfairness, Mr. Valdez bears the burden of demonstrating the delay was unacceptable to the point of being so oppressive as to taint the proceedings and cause serious prejudice: *Blencoe*, above, at para. 121.

[40] Unacceptable delay may also amount to an abuse of process, even where the fairness of the hearing has not been compromised. As the Supreme Court observed at paragraph 115 of *Blencoe*, where inordinate delay has directly caused significant psychological harm to a person such that the system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The Court went on, however, to observe that few lengthy delays will meet this threshold, and that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable, and have directly caused a *significant* prejudice to amount to an abuse of process.

[41] Mr. Valdez submits that responsibility for the delay in this case lies entirely with the CBSA, which, he says, weighs in favour of granting a stay. There has, however, been no oppressive conduct on the part of the CBSA in this case as concerns the period between 1999 and 2011, as the CBSA was not aware of Mr. Valdez' 1999 conviction until 2011. This distinguishes the facts of this case from those in *Fabbiano*, where the Court found that the CBSA had been aware of the facts giving rise to the potential inadmissibility of the applicant in that case and did nothing to move the admissibility proceeding forward for seven years.

[42] Mr. Valdez also contends that the delay in this case has impaired his ability to answer the allegations against him, stating in his affidavit that he "has very little memory of the circumstances surrounding the [1999] charge and conviction", and that he is unable to obtain any evidence in relation to that conviction because it has be destroyed or misplaced.

[43] I do not accept this submission. Mr. Valdez clearly recalls the circumstances surrounding the 1999 offence and conviction quite well, as he was able to provide detailed information

regarding the circumstances leading up to his 1999 conviction during his interview with a CBSA officer in 2011.

[44] Mr. Valdez also has access to the police record of the 1999 charges, which provides the particulars of the one offence of which he was convicted and the sentence that was imposed on him. I asked Mr. Valdez' counsel what additional information was required for Mr. Valdez to be able to fairly defend himself in this proceeding. Counsel was unable to identify any specific information that could useful to Mr. Valdez' defence that is now unavailable to him, essentially saying only that there might have been something there that could have helped him. In my view, this falls far short of demonstrating the sort of actual prejudice that would justify a stay of proceedings.

[45] Mr. Valdez also argues that he could have applied for a pardon, had he known that his immigration status was in issue. There is nothing in his affidavit addressing this issue, however, and thus no evidence to support this submission. There was, moreover, nothing that would have prevented Mr. Valdez from applying for a pardon five years after he had completed his sentence for the 1999 offence, nor has any explanation been provided for his failure to do so.

[46] Finally, insofar as the period between 2011 and 2014 is concerned, I have already found that it was reasonable for the Minister's Delegate to wait to see what happened in Mr. Valdez' more recent criminal proceedings before making a final decision as to whether or not to refer him to an inadmissibility hearing. There was nothing oppressive about this approach, and Mr. Valdez has not demonstrated any prejudice that has resulted from it.

[47] As a consequence, I am satisfied that this is not one of the clearest of cases where an abuse of process had been established that would justify a stay of the admissibility proceedings.

V. Conclusion

[48] For these reasons, the application for judicial review is dismissed. I agree with the parties that the case is fact-specific, and does not raise a question for certification

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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