Federal Court  Cour fédérale

Date: 20200623

Docket: IMM-4663-19

Citation: 2020 FC 718

Ottawa, Ontario, June 23, 2020

PRESENT: Madam Justice Walker

BETWEEN:

JENNIFER SLEMKO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Ms. Jennifer Slemko seeks the Court's review of a decision of the Minister's delegate to refer her to the Immigration Division (ID) for an admissibility hearing following her 2019 convictions in Canada for trafficking a controlled substance. The referral decision was made under subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) on the grounds of serious criminality (paragraph 36(1)(a) of the IRPA).

[2] Ms. Slemko challenges both the fairness of the process that led to the referral decision and the reasonableness of the decision itself. I have found no breach of Ms. Slemko's right to procedural fairness but have concluded that the referral decision was not reasonable. The referral decision fails to provide Ms. Slemko with coherent reasons for the delegate's analysis of the humanitarian and compassionate (H&C) factors set out in her written submissions to the Canada Border Services Agency (CBSA). Therefore, the application will be allowed and the matter returned to another delegate for reconsideration.

I. Overview

[3] Ms. Slemko is a permanent resident of Canada and a citizen of the United Kingdom. She arrived in Canada in 1976. Ms. Slemko is now 69 years old and has extensive family in Canada, including two sisters, six children and a number of grandchildren.

[4] Ms. Slemko was charged and pled guilty to six counts of trafficking in a controlled substance, having sold cocaine through a "dial-a-dope" operation to an undercover police officer on six occasions in 2015. She was convicted on January 16, 2019 of trafficking contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, and sentenced to 24 months' imprisonment.

[5] The referral decision is based on the following sequence of correspondence and reports.

[6] On February 15, 2019, the CBSA sent Ms. Slemko a letter (CBSA Letter) informing her that she may be inadmissible to Canada because of the 2019 criminal convictions. The letter stated that a review of the circumstances of her case was to be carried out and that, if a report under subsection 44(1) of the IRPA were prepared, an admissibility hearing may ensue which could result in her removal from Canada. Ms. Slemko was informed that she had the opportunity to make written submissions explaining why a removal order should not be issued.

[7] On March 1, 2019, Ms. Slemko provided a handwritten letter and attachment explaining her circumstances and requesting that she be permitted to remain in Canada. She stated that she had arrived in Canada at the age of 25 and that all of her support and family members are here. Ms. Slemko also stated that she has no immediate family in the United Kingdom and that, apart from her 2019 convictions, she has no criminal record and has lived a very positive life. She detailed her health conditions (hepatitis C in 1982, 2015 heart attack, arthritis and C.O.P.D.) and gave a generic description of her employment over her many years in Canada.

[8] On June 4, 2019, a CBSA officer completed a report pursuant to subsection 44(1) of the IRPA stating that, in the officer's opinion, Ms. Slemko is inadmissible for serious criminality pursuant to paragraph 36(1)(a) due to her 2019 convictions for trafficking.

[9] In an addendum to the subsection 44(1) report, the officer described Ms. Slemko's offences and her sentence of 24 months. The officer stated that the sentencing judge emphasized that the offences involved planning and premeditation and that Ms. Slemko was involved in a commercial operation that was being carried out on more than a minimum scale. The officer

detailed Ms. Slemko's immigration history, the CBSA Letter and Ms. Slemko's response, and concluded:

> In arriving at my recommendation I have reviewed and considered all the attached material including the judge's reasons for sentence, the CSC reports and Ms. Slemko's submissions. I have reflected upon this case and taken into consideration all the case factors including Ms. Slemko's age at the time of her entry into Canada, family in and outside of Canada, support in Canada, criminal record, seriousness of the index offence, length of sentence imposed, her remorsefulness and potential for rehabilitation. Given the facts of this case I recommend Ms. Slemko be referred to an admissibility hearing and the appropriate removal order be issued.

II. Decision under review

[10] The Minister's delegate issued the referral decision on June 21, 2019 following receipt and review of the subsection 44(1) report. The referral decision is brief and consists of the decision to refer the report to the ID for an admissibility hearing pursuant to subsection 44(2) of the IRPA and the following handwritten notes:

> *– Insufficient H&C's – no letters of familial support. Crime of a serious enough nature to warrant a 2 yr sentence.
>
> – Appeal rights lost, however judge carefully considered this matter during sentencing and still rendered a 2 yr sentence.

III. Preliminary Issue – New Evidence

[11] The Respondent challenges the admissibility of portions of two affidavits filed by Ms. Slemko in support of this application on the basis that they contain new information that was not before the Minister's delegate. The information and documents in question are:

- Affidavit of Ms. Ng (legal assistant), dated September 23, 2019:
  - Paragraph 5 and Exhibit C: Referencing a July 16, 2019 request for reconsideration of the referral decision.

  - Paragraph 7 and Exhibit E: Referencing an access to information request (ATIP) dated August 9, 2019.

- Affidavit of Ms. Slemko dated September 19, 2019:
  - Paragraphs 4, 5 and 6: Referencing information not before the Minister's delegate, including the reconsideration request.

[12] The general rule is that the evidentiary record on an application for judicial review is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 (*Access Copyright);* see also *Namgis First Nation v Canada (Fisheries and Oceans)*, 2019 FCA 149 at para 7). The rule reflects the different roles Parliament has conferred on the decision-maker and the Court. The decision-maker decides the case on its merits based on the evidence before them. The reviewing court reviews the overall legality of the decision in light of that evidence and does not engage in a trial *de novo* of the questions before the decision-maker (*Access Copyright* at paras 17-19). The recognized exceptions to the general rule include the admission of new evidence that: provides general background information; addresses procedural fairness issues; or, highlights the complete absence of evidence before the administrative decision-maker (*Access Copyright* at para 20).

[13] Ms. Slemko submits that the evidence in question should not be excluded as it speaks to the procedural fairness defects that are an integral part of her objections to the referral decision. She argues that her reconsideration and ATIP requests highlight the fact that she had inadequate notice of the admissibility proceedings and that her ability to properly respond to the CBSA Letter was prejudiced.

[14] I do not find Ms. Slemko's submissions persuasive. The fact that she saw fit to take action in the guise of the reconsideration and ATIP requests after receiving the adverse referral decision cannot be used to bolster her position that the process leading to the decision was unfair. Similarly, the paragraphs of Ms. Slemko's affidavit that detail her post-decision retention of counsel and preparation of the request for reconsideration are reflective only of her personal decision as to how best to proceed. Accordingly, the impugned paragraphs of the two affidavits and Exhibits C and E to Ms. Ng's affidavit are struck from the record.

[15] At the hearing before me, an additional document in the record, a declaration by a CBSA officer dated June 24, 2019, was identified as post-dating the referral decision. This document too is struck.

IV. Issues

[16] Ms. Slemko raises the following issues in this application:

1. Was the referral decision reasonable?
2. Was the process leading to the issuance of the referral decision procedurally fair?

V. Standard of Review

[17] The parties submit and I agree that the merits of the referral decision are subject to review by this Court for reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23-25 (*Vavilov*)). In *Vavilov*, the majority of the Supreme Court of Canada (SCC) established reasonableness as the presumptive standard of review of the merits of administrative decisions, subject to specific exceptions "only where required by a clear

indication of legislative intent or by the rule of law" (*Vavilov* at para 10). There is no basis for departing from the presumptive standard of review in this case.

[18] The majority in *Vavilov* set out guidance for reviewing courts in the application of the reasonableness standard. I have applied that guidance in my review, exercising restraint but conducting a robust review of the referral decision for justification and internal coherence (*Vavilov* at paras 12-15, 85-86, 99; see also *Canada Post Corp. v Canada Union of Postal Workers*, 2019 SCC 67 at paras 28-29).

[19] Ms. Slemko's allegations of procedural unfairness leading to the issuance of the referral decision are subject to review for correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Mission Establishment v Khela*, 2014 SCC 24, at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69, at paras 34-56 (*Canadian Pacific*)). The decision in *Vavilov* does not change this conclusion (*Kyere v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 120 at paras 23-24 (*Kyere*)). I have assessed whether the process followed in this case was just and fair "with a sharp focus on the nature of the substantive rights involved and the consequences for" Ms. Slemko (*Canadian Pacific* at para 54).

VI. Analysis

1. Was the referral decision reasonable?

[20] Ms. Slemko submits that the brief reasons given by the Minister's delegate in the referral decision do not meet the requirements of coherence and justification emphasized by the SCC in

Vavilov in light of the severity of the consequences she faces (*Vavilov* at para 133). She argues that the Minister's delegate erred in focusing only on her lack of family support letters and in failing to consider and weigh all of the H&C considerations set out in her written submissions (*McAlpin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 422 at paras 74-75 (*McAlpin*)). I agree with Ms. Slemko.

[21] Subsection 44(2) referral decisions are administrative decisions whose purpose is to list the relevant information from an individual's file and to provide a brief rationale for a recommendation by the Minister's delegate (*Surgeon v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1314 at para 5 (*Surgeon*), citing *Lin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 682 and *Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at paras 33, 37). The officer's subsection 44(1) report forms part of the referral decision (*McAlpin* at para 20) but the two documents together must reflect a reasoned and coherent conclusion.

[22] The jurisprudence of the Federal Court of Appeal (FCA) and this Court focuses on three issues: (1) the existence of any discretion under subsections 44(1) and (2) for an officer or a Minister's delegate to consider H&C factors, particularly in a case involving serious criminality; (2) the scope of that discretion; and (3) the obligation of reasonable assessment of important H&C factors if that discretion is exercised. Chief Justice Crampton considered the existing jurisprudence in *McAlpin* and acknowledged the conflicting case law as to whether immigration officers and Minister's delegates have any discretion under subsections 44(1) and (2). He then stated that, in any event, any such discretion is very limited and it is clear that officers and

Minister's delegates have no general obligation to consider H&C factors. However, if an officer or Minister's delegate exercises their discretion and does consider H&C factors, they must do so intelligibly and must justify briefly their conclusion (*McAlpin* at para 70):

> 5. In this particular context, a reasonable assessment is one that at least takes account of the most important H&C factors that have been identified by the person who is alleged to be inadmissible, even only by listing those factors, to demonstrate that they were considered. A failure to mention any important H&C factors that have been identified, when purporting to take account of the H&C factors that have been raised, may well be unreasonable.

[23] This application centres on the third issue and whether the Minister's delegate reasonably considered the most important H&C factors identified by Ms. Slemko and provided a coherent explanation for the negative H&C conclusion in the referral decision.

[24] The officer who prepared the subsection 44(1) report considered the H&C factors set out in the written submissions Ms. Slemko provided in response to the CBSA Letter. The submissions were brief and it was reasonable to expect that the subsection 44(1) report would not be lengthy.

[25] In discharging their subsection 44(2) role, the Minister's delegate exercised their limited discretion and assessed H&C factors but concluded they were insufficient to overcome Ms. Slemko's serious criminality. However, the Minister's delegate did not refer to the H&C factors considered by the officer in the subsection 44(1) report, nor did the delegate cross-reference the officer's analysis. Rather, the delegate relied only on the fact that Ms. Slemko did not provide any letters of support from her family members in Canada. I am unable to determine

whether the Minister's delegate weighed Ms. Slemko's other H&C factors, as set out by the officer, or whether the delegate relied only on the absence of support letters in drawing the negative H&C conclusion.

[26] As a result, I find that the referral decision, when read with the officer's assessment in the subsection 44(1) report, does not reflect an internally coherent reasoning process and was not reasonable. The apparent reliance by the Minister's delegate solely on the absence of familial support letters and the delegate's failure to address a number of the important H&C factors identified by Ms. Slemko, including her length of residence in Canada and family in and outside of Canada, resulted in a decision that lacks justification (*McAlpin* at para 70; *Vavilov* at para 85).

[27] Ms. Slemko also submits that the Minister's delegate profoundly mischaracterized the sentencing judge's comments regarding her risk of deportation. In the referral decision, the Minister's delegate wrote that the sentencing judge carefully considered this matter but nevertheless imposed a two-year sentence. I agree with the Respondent's objection to Ms. Slemko's description of the delegate's reference to the sentencing decision. Ms. Slemko relies on one part of one paragraph in the sentencing decision as the basis for her submission. In contrast, the sentencing decision read in its entirety demonstrates that the sentencing judge did carefully consider Ms. Slemko's immigration status and the likelihood of her removal from Canada if she were sentenced to more than six months in jail. The Minister's delegate engaged in no mischaracterization.

2. Was the process leading to the issuance of the referral decision procedurally fair?

[28] Although my conclusion that the referral decision was not reasonable is determinative of this application, I will address Ms. Slemko's procedural fairness arguments. Ms. Slemko submits that, as a permanent resident of Canada for many years, the failure by either a CBSA officer or the Minister's delegate to interview her and to explain: the admissibility process; the scope of submissions she could make; the documents she could or should submit; the importance of retaining counsel; and, the risk of removal, breached her right to procedural fairness. Ms. Slemko argues that the CBSA Letter which alerted her to the admissibility process and to her right to make written submissions did not discharge the Respondent's duty of fairness. Ms. Slemko also submits that the Minister's delegate breached her right to know the case against her because she was not provided with copies of a series of Correctional Services Canada (CSC) reports prepared during her incarceration that were included in her admissibility file.

[29] I have considered each of Ms. Slemko's arguments but conclude that there was no breach of her rights to a just and fair process leading to the issuance of the referral decision.

[30] I turn first to the issue of whether Ms. Slemko was afforded adequate notice of the admissibility proceedings. In *Kyere*, Justice Boswell stated that referrals to the ID under subsections 44(1) and (2) of the IRPA attract minimal participatory rights of procedural fairness (*Kyere* at para 27). He also stated that this Court's jurisprudence confirms that there is usually no duty to interview an individual who is subject to a report under subsection 44(1) as long as the individual has an opportunity to make submissions and to know the case against them (*Kyere* at para 29).

[31] The CBSA Letter was received by Ms. Slemko while in detention, very shortly after her conviction and sentencing. The first paragraph of the letter stated that a report under subsection 44(1) of the IRPA may be prepared alleging that she is inadmissible to Canada due to her criminal conviction for trafficking cocaine. The letter went on to state:

> A decision to allow you to remain in Canada or to seek to have a removal order issued against you will be made in the near future. The next step in the process is to conduct a review of the circumstances of your case. If a report is prepared, the Director may cause an Admissibility Hearing to be held, which could result in a removal order being issued.
>
> You may make a written submission providing reasons why a removal order should not be sought. The submission may include details relevant to your case, including, but not limited to, your age at the time you acquired permanent residence; your length of residence in Canada; the location of family support and responsibilities; the conditions in your home country; your degree of establishment; your criminal history; any history of non-compliance and your current attitude; and any other relevant factors.

[32] I find that the CBSA Letter notified Ms. Slemko using straightforward language that she faced removal from Canada. The letter also made clear the fact that she had the opportunity to influence the assessment of her ability to remain in Canada by providing written submissions describing her particular circumstances.

[33] Ms. Slemko states that she did not appreciate the gravity of her situation and did not truly believe she could be deported from Canada but this statement contradicts the evidence in the record. First, the decision of the sentencing judge in January 2019 discussed in detail the possibility of Ms. Slemko's deportation and noted that "defence counsel has asked me to sentence her to one day less than six months". These issues were front of mind for Ms. Slemko

and her counsel. Second, the CSC's preliminary assessment report dated January 24, 2019, began with the following:

> Jennifer stated she intends to appeal her sentence. She is unhappy she got a two year sentence with no prior criminal history. She stated this could affect her ability to stay in Canada, as she is a citizen of England and has been in Canada on landed immigrant status since 1975. She was told that she will likely be deported. She plans to contact an immigration lawyer immediately.

[34] Ms. Slemko knew of her risk of deportation in January 2019. She recognized the importance of retaining counsel. Her submission that she could not be expected to take the February 2019 CBSA Letter at face value and understand the gravity of her situation is not well-founded.

[35] Ms. Slemko submits that the CBSA Letter made no reference to the importance of letters of support from her family. She argues that, to the extent the Minister's delegate determined that the omission of any such letters was an important gap in her submissions, the delegate should have informed her of this fact and provided her the opportunity to submit letters. I do not agree. It is not feasible to expect the CBSA Letter to have provided a comprehensive list of each supporting document Ms. Slemko could submit. As the Respondent correctly points out, Ms. Slemko was required to put her best evidence and arguments forward in her written submissions. Neither the CBSA officer nor the Minister's delegate was under an obligation to return to her and point out deficiencies in her submissions or supporting evidence.

[36] The second aspect of Ms. Slemko's procedural fairness arguments centres on the CSC Reports. She characterizes the reports as extrinsic evidence of which she had no knowledge and

states that the Minister's delegate was obligated to disclose the CSC Reports to her prior to making the referral decision. However, each CSC Report indicates on its face that the original report was placed in Ms. Slemko's file and that a copy was given to her. Ms. Slemko provided no evidence to the contrary. In particular, she made no statement in her affidavit of September 19, 2019 to the effect that she had not received her copy of the CSC Reports. As a result, I find that Ms. Slemko was aware of the contents of the CSC Reports and that the reports cannot be characterized as extrinsic evidence which should have been disclosed by the CBSA or the Minister's delegate (*Durkin v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 174 at paras 17-18).

[37] Finally, Ms. Slemko argues that the record does not indicate the authority under which the CSC Reports were provided to the CBSA and states that CSC may have breached the requirements of the *Privacy Act*, RSC 1985, c P-21, in disclosing the reports without her consent. There is insufficient information in the record to determine the route by which the reports came to the CBSA and I make no finding in this regard.

VII. Certified Question

[38] Ms. Slemko proposes the following question for certification:

> When seeking submissions from a permanent resident prior to referring a report to an admissibility hearing under section 44(2) of the IRPA, what considerations are the Minister's Delegate required to address in order to avoid "improperly restricting" his or her discretion?

[39] In the alternative, Ms. Slemko requests that the Court certify the same question as in *Surgeon* or that the Court hold this matter in abeyance pending the decision of the FCA in that case.

[40] The Respondent submits that Ms. Slemko's question does not meet the test for certification, arguing that it raises no question of general importance. The Respondent also argues that the facts of Ms. Slemko's case are very different from those in *Surgeon*, particularly as the *Charter* protections of equality and freedom from discrimination are not at issue, nor has Ms. Slemko raised other specific *Charter* breaches.

[41] The test for certifying a question pursuant to subsection 74(d) of the IRPA was confirmed by the FCA in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 (*Lunyamila*), where at paragraph 46 the court stated:

> This Court recently reiterated in *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para. 36, the criteria for certification. The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance. This means that the question must have been dealt with by the Federal Court and must arise from the case itself rather than merely from the way in which the Federal Court disposed of the application. An issue that need not be decided cannot ground a properly certified question (*Lai v. Canada (Public Safety and Emergency Preparedness*), 2015 FCA 21, 29 Imm. L.R. (4th) 211 at para. 10). Nor will a question that is in the nature of a reference or whose answer turns on the unique facts of the case be properly certified (*Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178, 485 N.R. 186 at paras. 15, 35).

[42] I conclude that the question posed for certification does not meet the criteria set out in *Lunyamila* because it is not dispositive of Ms. Slemko's application and does not raise an issue of general importance. Therefore, no certified question arises.

[43] As stated above, subsection 44(1) and (2) decisions involving allegations of criminality or serious criminality typically raise three issues for this Court: the existence of any discretion to consider H&C factors, the scope of any such discretion, and the obligation of reasonable assessment if that discretion is exercised (*McAlpin* at para 70; see also the very recent case of *McLeish v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 705). The dispositive issue in this application is the third issue, the obligation of a Minister's delegate who exercises their discretion to reasonably assess the important H&C factors that have been identified. Ms. Slemko's proposed question does not address this issue and, in any event, the obligation of the Minister's delegate in this regard is well-established in the jurisprudence.

[44] Further, I agree with the Respondent that it would not be appropriate to certify the same question as in *Surgeon* as that question is not dispositive of this application. I also agree that Ms. Slemko's application should not be held in abeyance pending the FCA's decision in *Surgeon*.

VIII. Conclusion

[45] The application is granted.

[46] I decline to certify the question proposed by Ms. Slemko.

JUDGMENT IN IMM-4663-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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