Federal Court  Cour fédérale

Date: 20210427

Docket: IMM-4183-19

Citation: 2021 FC 368

Ottawa, Ontario, April 27, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

ZANETA STOJKOVA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Zaneta Stojkova, is a citizen of the Czech Republic of Romani ethnicity. She entered Canada in July 2014 and sought refugee protection in March 2015.

[2] On August 22, 2017, an officer of the Canada Border Services Agency [CBSA] prepared a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[IRPA], alleging there were reasonable grounds to believe the Applicant is inadmissible to Canada pursuant to paragraph 37(1)(*a*) of the IRPA on the grounds of organized criminality. The Minister's Delegate referred the report to the Immigration Division [ID] for an admissibility hearing on August 25, 2017.

[3] The Applicant's admissibility hearing proceeded on October 17, 2018 and November 15, 2018. The Applicant was the only witness.

[4] After the hearing, the Applicant sought an extension of time to provide her written submissions on the basis that she had recently been informed of a decision by another ID member that would impact her submissions. The decision in question was her sister's admissibility decision. The ID concluded in that case that the Respondent had not discharged its burden of establishing the sister's inadmissibility under paragraph 37(1)(*a*) of the IRPA and issued a decision in favour of the Applicant's sister. The Applicant and the Respondent were granted an extension of time to file their final submissions.

[5] On June 14, 2019, the ID concluded that the Applicant was inadmissible to Canada pursuant to paragraph 37(1)(*a*) of the IRPA and issued a deportation order against her the same day.

[6] The Applicant seeks judicial review of the ID's decision. While she raises three (3) issues in her memorandum of argument, I find that one is dispositive of the application for judicial

review. I agree with the Applicant that the ID unreasonably relied on police occurrence reports to establish the facts of inadmissibility.

II. Analysis

[7] The standard of reasonableness applies to inadmissibility decisions by the ID on grounds of organized criminality (*Pascal v Canada (Citizenship and Immigration)*, 2020 FC 751 at para 6 [*Pascal*]; *Demaria v Canada (Citizenship and Immigration)*, 2019 FC 489 at para 35 [*Demaria*]).

[8] Where the standard of reasonableness applies, the Court shall examine "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 83 [*Vavilov*]). It must ask itself "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[9] The Applicant submits that the evidence tendered by the CBSA in support of the inadmissibility allegation consisted of three (3) classes of evidence. The first class was the Applicant's two (2) convictions for theft: (1) an offence committed on October 7, 2015, where she acted alone; and (2) an offence committed on April 4, 2017, where she acted with her sister and her niece. The second class of evidence is the Applicant's testimony during which she admitted to having committed two (2) other thefts in February 2017 where she acted alone. The third class of evidence consisted of twelve (12) police occurrence reports. Nine (9) of those

reports pertained to charges that were withdrawn by the Crown in January 2018. Two (2) of the reports were for charges against the Applicant dating back to December 2014 and October 2015, that had been laid and likewise withdrawn. A final report was for a charge laid against the Applicant's sister, her sister's husband and a third person for theft committed in May 2017. The Applicant does not appear to have been involved in the commission of that offence.

[10] The Applicant argues that her one (1) conviction and two (2) admissions of stealing on her own combined with a single conviction for stealing with others are insufficient to find that she was engaged in a "pattern" of organized criminality. As a result, the ID's ultimate finding of inadmissibility under paragraph 37(1)(*a*) of the IRPA necessarily turned on the acceptance of some of the facts contained in five (5) police occurrence reports pertaining to withdrawn charges and in a sixth police occurrence report for an incident in which the Applicant was not involved.

[11] The Applicant submits that the only evidence in the reports connecting her to the events described in the police occurrence reports relating to the withdrawn charges was the surveillance footage of the offences. The reports simply state that the Applicant was identified on "video surveillance" or "store surveillance". In the Applicant's view, these bald statements in the police occurrence reports provide no objective basis for the ID to assess the credibility and trustworthiness of the identification. She argues that it was unreasonable for the ID to conclude that the evidence contained in the five (5) police occurrence reports was credible and trustworthy.

[12] I agree.

[13] The Respondent bears the onus of establishing, on a reasonable grounds to believe standard, the elements of inadmissibility (*Pascal* at para 14; *Demaria* at para 65). This standard has been described as establishing a standard of proof that is "more than a flimsy suspicion but less than the civil test of balance of probabilities. […] It is a bona fide belief in a serious possibility based on credible evidence" (*Pascal* at para 14, citing *Chiau v Canada (Minister of Citizenship and Immigration*), [1998] 2 FC 642 at para 27, aff'd [2001] 2 FC 297 (FCA) at para 60; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114 [*Mugesera*]). In *Mugesera*, the Supreme Court of Canada held that reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information (*Mugesera* at para 114).

[14] In making its decision, the ID is not bound by any legal or technical rules of evidence and it can base its conclusion on evidence adduced in the proceedings that it considers credible and trustworthy (IRPA at paras 173(*c*) and 173(*d*)).

[15] Despite this latitude in evidentiary matters, the ID must base its decision on facts that provide reasonable grounds to believe. Its discretion must be exercised reasonably (*Pascal* at para 15; *Demaria* at paras 66, 121).

[16] In *Canada (Citoyenneté et Immigration) c Solmaz*, 2020 CAF 126 [*Solmaz*], the Federal Court of Appeal reiterated the principle that evidence of withdrawn or dismissed charges cannot be used, in and of themselves, as evidence of an individual's criminality. The evidence underlying a withdrawn or dismissed charged can be accepted provided the decision maker

determines that the evidence is credible and trustworthy. The conclusions drawn from the evidence must be the result of an independent review by the decision maker (*Solmaz* at paras 73, 85; *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at paras 49-50).

[17] I agree with the Respondent that the ID understood the limitations of police occurrence reports and that it assessed their probative value in conjunction with the Applicant's testimony. I find, however, that the ID's analysis of the credibility and trustworthiness of the police occurrence reports is flawed and therefore, unreasonable.

[18] The police occurrence reports demonstrate that the Applicant was not arrested at the scene of the alleged offences and that she was not identified by any of the witnesses at the time of the offence. She was only charged several months later after allegedly being identified on surveillance footage of the offence. The question the ID needed to ask itself was whether the evidence of the surveillance identification was credible and trustworthy as there was no other evidence to confirm the circumstances underlying the charges, or to link the Applicant to the underlying offences in the police occurrence reports, including the Applicant's testimony, who denied any involvement in these incidents. The statements in the reports that the Applicant was identified by video surveillance were allegations, not facts. The Respondent did not tender the actual surveillance footage or photo stills that could have permitted the ID to assess the reliability of the identification. There were no sworn statements from either the police officer or a witness who identified the Applicant on the video surveillance. While I recognize that it may be reasonable to rely on police reports, even where the facts described in them are not separately

corroborated by the testimony of police officers or witnesses, the ID's reasons disclose no assessment of whether the video surveillance was reliable or trustworthy.

[19] Moreover, the ID mostly ignored the inconsistencies and unanswered questions in the video surveillance descriptions found in the record. In the police occurrence report for the first offence allegedly committed on January 28, 2017, the complainant reported that she was in aisle one when her purse was stolen. After reviewing the store camera footage, she identified the suspect leaving the grocery store with her purse. The suspect was described as "male, south Asian, early 40's, 6' tall, medium build, large brown birthmark over the right side of his forehead above the eyebrow – very pronounced –, glasses, short dark hair, black jacket". The report also states that there was no camera footage in aisle one. The report then states that on February 26, 2017, a CCTV surveillance DVD was received from the store and that the disk was submitted "to property without reviewing due to standalone computer technical errors/work order". The next entry in the report mentions that the police reviewed the video surveillance on May 4, 2017, and that the theft of the purse was not captured on video. It further states that the quality of the video makes it hard to make a positive identification of the suspects. Despite this, the next entry indicates that on July 11, 2017, the Applicant was identified on video surveillance with her sister and a third individual. No further details are provided in the report.

[20] I agree with the Applicant that the report, as written, leaves the following three (3) questions unanswered:

i. How was the Applicant identified in surveillance on July 11, 2017, when the quality of the video made it difficult to identify the suspect?

ii. How was the Applicant identified as committing the offence on July 11, 2017, when the review on May 4, 2017, establishes that the theft of the purse was not captured on video?

iii. How are three (3) people identified as committing the offence when the complainant previously only identified one suspect leaving the store with her purse on the video of the store's surveillance?

[21] In addition to these unanswered questions, the report also inconsistently identifies the store where the offence was committed as either Freshco or Food Basics.

[22] In the absence of answers to these questions, the ID could not reasonably find that the identification of the Applicant was credible and trustworthy.

[23] There are similar problems in the only other report where the Applicant is alleged to have committed an offence with the same individuals on January 28, 2017. In describing the theft, the police occurrence report states that the victim indicated that there were two (2) males and one (1) female following her prior to the incident. She also observed these parties flee through the store's exit door after the incident occurred. The report also mentions that the DVD video surveillance was reviewed on February 6, 2017, and yielded negative results. As in the previous police occurrence report, this report also states that on July 11, 2017, the Applicant was identified on video surveillance committing the offence with her sister and the same third individual.

[24] The police occurrence report does not resolve how the gender of the perpetrators changed between the victim's statement and the video identification on July 11, 2017. The ID attempted to address this flaw by stating that the police took their time and eventually were able to identify the three (3) individuals. Except for the fact that it took approximately six (6) months to make the identification, it is unclear to me from the record how the ID could conclude that the police "took their time" and how this led to a positive identification. It is also unclear how the ID could find that the descriptions of the third individual across the two (2) reports were consistent. The victim identified the suspects twice in this incident. Yet, there is no mention of the "large birthmark over the right side of his forehead above the eyebrow – very pronounced".

[25] The ID assumed the police occurrence reports were reliable, credible and trustworthy because of the video surveillance. However, the lack of clarity regarding the video surveillance impeded the ID's ability to rely on the police occurrence reports since that evidence was the only thing connecting the Applicant to the incidents described in the police occurrence reports. In the absence of these reports, the ID's conclusion was based on three (3) thefts where the Applicant acted alone combined with a single conviction for stealing with others. Based on this evidence, including the Applicant's testimony denying any involvement in the "group" incidents, the ID could not reasonably conclude that the Respondent had met its onus of demonstrating that there were reasonable grounds to believe that the Applicant was a member of an organization that engaged in a pattern of criminal activity pursuant to paragraph 37(1)(*a*) of the IRPA.

[26] To conclude, I am not convinced that the ID's decision meets the required threshold of reasonableness as set out in *Vavilov*. For this reason, the application for judicial review is allowed.

[27] The Applicant proposes the following question for certification:

> Under s.37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, does the reference to "an offence" in the phrase "in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment" incorporate the definition of a "serious offence" under s.467.1(1) of the *Criminal Code*, R.S.C. , 1985, c. C-46?

[28] The criteria for certification are well established. The proposed question must be a serious question that is dispositive of the appeal. It must transcend the interests of the parties and raise an issue of broad significance or general importance. Furthermore, the question must have been dealt with by the Federal Court and must arise from the case itself rather than from the way in which the Federal Court may have disposed of the case. A question in the nature of a reference or whose answer turns on the unique facts of the case cannot ground a properly certified question (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paras 46-47; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178 at paras 15-17; *Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21 at para 4; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168 at para 9; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at paras 28-29; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at paras 11-12; *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637 (FCA) at para 4).

[29] Given that I have disposed of the application for judicial review on other grounds and have not pronounced myself on the issue raised by the Applicant's proposed question, it would not be dispositive of an appeal.

[30] Accordingly, no question will be certified.

JUDGMENT in IMM-4183-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The decision is set aside and the matter is remitted back to a different panel for redetermination; and

3. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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