Federal Court  Cour fédérale

Date: 20211122

Docket: IMM-4802-20

Citation: 2021 FC 1274

Ottawa, Ontario, November 22, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

RH

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of an Officer's decision to deny the Applicant his Authorization to Return to Canada ("ARC") on grounds of the Applicant's being inadmissible to Canada under s. 36(2)(b) of *Immigration and Refugee Protection Act* (SC 2001, c 27) ("*IRPA*"). The Respondent had already consented to the Judicial Review being granted, and sent back to be re-

determined, but the Applicant did not agree to this remedy. The Applicant seeks the remedy of granting a declaration that he no longer needs an ARC to travel to Canada.

II. Background

[2] The Applicant received an Order for anonymity from Justice Ahmed upon a motion from the Applicant.

[3] The Applicant is a US citizen who was convicted of impaired driving in Canada in 2007. As a result of this conviction, a removal order was issued, which was *enforced* in September 2007. In 2017, the Applicant received a *Criminal Records Act*, (RSC, 1985, c C-47) ("*CRA*") record suspension for this conviction.

[4] In 2013, the Applicant pleaded guilty to the offence of "driving while ability impaired by the consumption of alcohol" in the state of New York. For this offense, he received a sentence of a conditional discharge, the terms of which he completed.

[5] The Applicant attempted to enter Canada on April 19, 2013, for the purpose of a shopping trip without first having obtained an ARC. He was denied entrance, and allowed to leave.

[6] In June 2019, the Applicant applied for an ARC. In support of his application, he provided his record suspension regarding his Canadian Conviction, as well as legal opinions, which indicated that his US Conviction did not render him inadmissible under the *IRPA*. These

legal opinions indicated that the offense committed in the US did not constitute a criminal conviction in Canada, and that he had been conditionally discharged.

[7] The application for an ARC was denied in a decision dated September 10, 2020. The Global Case Management System ("GCMS") notes accompanying the denial indicate the refusal was on the basis of the Applicant's inadmissibility under s. 36(2)(b) of the *IRPA* due to his US Conviction. The Officer determined that the US Conviction was the equivalent of a violation of s. 253 of the *Criminal Code of Canada*, which is a hybrid offense punishable by up to 5 years imprisonment. To summarize, the Officer was not satisfied there were sufficient reasons to warrant the issuance of an ARC. The Officer based his finding on the Applicant's earlier noted removal and attempt to return to Canada for a shopping trip without an ARC (a negative factor), his criminal inadmissibility to Canada, and "negligible positive factors." The Officer did note that the Applicant may be eligible for rehabilitation, and that Immigration, Refugees and Citizenship Canada, Los Angeles, had advised him to apply for rehabilitation.

[8] The Respondent agreed that this judicial review should be granted, given that the decision was unreasonable. I also agree.

III. Issue

[9] The issue in this case is whether to grant a declaration that the Applicant is no longer required to seek an ARC to return to Canada.

IV. Analysis

A. *Submissions on Remedy*

[10] The Applicant seeks a declaration that he is no longer required to seek an ARC to return to Canada. He was originally required to seek an ARC because of the 2007 removal order stemming from his Canadian Conviction. The Applicant submits that, pursuant to s. 2.3(b) of the *CRA*, the record suspension he received "removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament."

[11] As a result, the Applicant argues that – while the original removal order was lawful – an obligation to seek an ARC would constitute a disqualification or obligation. Such a disqualification or obligation would run contrary to s. 2.3(b) of the *CRA*.

[12] The Applicant cites *Smith v Canada (MCI)*, [1998] 3 FC 144 [*Smith*], a case where Mr. Smith had been deported from Canada on the basis of a drug trafficking conviction. The National Parole Board granted him a pardon 8 years later. Justice MacKay found that this pardon did not vacate the original removal order – which was issued prior to the pardon – but did find that the pardon had to be given effect prospectively. Thus, any disqualification that flowed from the pardoned conviction would violate paragraph 5(b) of the *CRA* (now s. 2.3(b), the section at issue here). In the view of Justice MacKay, there was a sufficient link between the convictions and the exclusion order such that the disqualification it introduces flows from the conviction, and thus the exclusion order could not be enforced without violating the *CRA*. This was the case from the

time the pardon was granted onward. It should be noted that this case took place under the *Immigration Act*, the predecessor to the *IRPA* and the wording is different.

[13] The Applicant then asserts that *Smith* has been repeatedly and approvingly cited in several cases, such as *Canada (Minister of Citizenship and Immigration) v Saini*, 2001 FCA 311, for the proposition that a Canadian pardon removes the disqualifications resulting from a conviction.

[14] The Applicant relies *on Boroumand v Canada (Citizenship and Immigration),* 2011 FC 643 [*Boroumand*], for further support of this proposition. In *Boroumand*, the applicant was convicted of drug trafficking offenses and deported. He applied for refugee protection, but was denied on the basis that the drug offences rendered him excluded. He applied for a Pre-Removal Risk Assessment ("PRRA"), which was denied, and while he successfully applied for judicial review, before redetermination, he was granted a pardon for his drug trafficking offenses. In that case the Minister's counsel conceded that he was no longer inadmissible for serious criminality under s. 112(3)(b) of the *IRPA*, but maintained that he was still caught by s. 112(3)(c) applying to those whose claim to refugee protection was rejected on the basis of section F of Article 1 of the *United Nations Convention Relating to the Status of Refugees.* Justice Tremblay-Lamer found that this argument amounted to a disqualification on a prospective basis. Based on this, she found that by virtue of the pardon and *CRA*, the applicant should no longer be subject to this disqualification. The Applicant submits that this is analogous to the case at bar.

[15] The Applicant distinguishes the case at bar from that of *Strungmann v Canada (Citizenship and Immigration)*, 2011 FC 1229, where Mr. Strungmann pled guilty to a count of mischief, was deported to Germany, successfully appealed his conviction. At his new trial, he was acquitted of the charge. That case dealt with an extension of time, and thus the pertinent issue for the purposes of the case at bar was not dealt with. The Applicant also cites an Immigration Appeal Decision ("IAD") decision, *Patel c Canada (Citoyenneté et Immigration)*, 2015 CanLII 97880 (CA IRB), for a similar principle as well as *Kelly v Canada (PSEP)*, 2006 CanLII 65674 (CA IRB) [*Kelly*]. In *Kelly*, the IAD found that that "to continue (a stay in response to a pardon) would be to preserve disqualifications and obligations that the pardon is supposed to remove."

[16] As a result, the Applicant submits that continuing to require an ARC would violate the *CRA*, as the basis of the need for an ARC was the 2007 conviction, for which the Applicant has received a record suspension.

B. *Statutory Framework*

[17] The requirement for a foreign national who was subject to the enforcement of a removal order to obtain an ARC, and any possible exceptions thereto, are set out in ss. 52(1) and (2) of the *IRPA.* They state as follows:

52(1): If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.	52 (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.
52(2): If a removal order for which there is no right of appeal has been enforced and is	52(2) L'étranger peut revenir au Canada aux frais du ministre si la mesure de

subsequently set aside in a judicial review, the foreign national is entitled to return to Canada at the expense of the Minister.	renvoi non susceptible d'appel est cassée à la suite d'un contrôle judiciaire.

[18] Thus, the three possible exceptions where an ARC is not required are (a) when a removal order is set aside by judicial review; (b) when the applicant is authorized by an officer; and (c) in other prescribed circumstances. None of these apply to the case at bar.

[19] I begin by noting that almost exclusively this Court in granting a judicial review of an Immigration matter is to refer the matter back to a decision-maker for redetermination (section 18.1(3)(b) of the *Federal Courts Act*; see: *Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31 at paras 13-14). Declaratory relief is an exceptional remedy to be utilized in only the clearest of circumstances, such as when there is only one reasonable outcome (*Canada (Citizenship and Immigration) v Tennant*, 2019 FCA 206 at para 87).

[20] The statutory framework is further supplemented by s. 226(1) of the *Immigration and Refugee Protection Regulations*, (SOR /2002-227) ("*IRPR*"), which states that subject to s. 52(2) of the *IRPA*'s exception, a removal order requires a foreign national to obtain a written authorization (ARC) in order to return to Canada after the removal order was enforced.

[21] This statutory framework makes it clear that the relevant occurrence after which a foreign national is required to obtain an ARC to return to Canada is the *enforcement* of a removal order. There are no statutory exceptions for instances where the conviction resulting in the removal order are subject to a record suspension. The only possible applicable exception is the aforementioned s. 52(2) of the *IRPA*, wherein the underlying removal order itself has been set

aside or rendered invalid. If this is not the case, it is clear that the Applicant must apply for an ARC to return to Canada.

[22] In this case, the underlying removal order that the Applicant is subject to has not been set aside or rendered invalid so the Applicant must apply for an ARC to return to Canada. The next step is to ask whether the record suspension retrospectively renders the removal order invalid.

[23] In order to do so, the record suspension would need to apply retrospectively, rather than prospectively. Here, I should briefly note that in the case law across many areas of law, Courts and parties frequently use these terms interchangeably, while they are in actuality not interchangeable. What we are dealing with here is retrospectivity. It is settled law that, in situations where a removal order was issued before the pardon or record suspension, pardons and record suspensions under the *CRA* do not take effect retrospectively, but prospectively (see, e.g. *Smith*; *Johnson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 2 at para 23). In *Therrien c Quebec*, 2001 SCC 35 [*Therrien*], the Supreme Court of Canada ("SCC") held that such a pardon does not operate to retrospectively wipe out the conviction, but operates as an expression of the fact that although the conviction continues to exist, future consequences are to be minimized.

[24] The removal order in this case was issued and enforced in 2007, prior to the record suspension. Thus, to render the removal order invalid would require it to apply retrospectively, rather than prospectively. This is not consistent with the case law so the record suspension does not render the removal order invalid. As a result, the aforementioned exception under s. 52(2) of

the *IRPA*, wherein the underlying removal order itself has been set aside or rendered invalid, does not apply, and by operation of law, the Applicant is required to apply for an ARC to enter Canada.

[25] The other possibility wherein I may find that the Applicant is not required to apply for an ARC to enter Canada is if applying for an ARC is found to be a disqualification or obligation arising by reason of the conviction. If this is the case, such a requirement would run contrary to s. 2.3(b) of the *CRA*, which provides that a record suspension removes any disqualification or obligation to which the application is, by reason of the conviction, subject under any Act of Parliament.

[26] The Applicant cited the aforementioned case of *Smith*, for the proposition that an exclusion order was sufficiently proximate (read: insufficiently remote) that its enforcement would violate paragraph 5(b) of the *CRA* (what is now s. 2.3(b)). This case is sufficiently differentiable on the facts from the case at bar, as submitted by the Respondent. In *Smith*, while the deportation order was issued, it had not been *enforced.* As set out in s. 52(1) of the *IRPA*, it is the enforcement of a removal order which gives rise to the requirement for an ARC. On the other hand, in the case at bar, the removal order has been *enforced*. **While it is the conviction itself which gives rise to the issuance of the removal order, it is the enforcement of the removal order which gives rise to the requirement for an ARC**. The conviction is sufficiently remote from the enforced removal order that the requirement for an ARC does not run contrary to the s. 2.3(b) provision that a record suspension removes any disqualification or obligation to which the application is subject to by reason of the conviction.

[27] I find that the requirement to apply for the ARC, while an obligation, does not arise from the conviction itself, and is thus not sufficiently related to the conviction itself to run contrary to s. 2.3(b). The requirement to apply for an ARC arises from the enforcement of the removal order (as specified in s. 52(1) of the *IRPA*), not the conviction itself. While the removal order arose from the conviction itself, I concluded in the previous subsection that the Applicant's record suspension did not render the removal order invalid – retrospectively – but rather, as the SCC in *Therrien* put it, "operates as an expression of the fact that although the conviction continues to exist, future consequences are to be minimized."

[28] Additionally, as mentioned earlier, declaratory relief – rather than referring the matter back to the decision-maker – is an exceptional remedy, the requirements for which I am by no means satisfied are met here.

[29] I will not grant the declaration that the Applicant does not require an ARC, but I will grant the remedy that the matter will be returned to be re-determined by a different decision-maker. The Applicant should be allowed to file further materials if they wish.

V. Costs (Rule 22)

[30] Rule 22 of the *Federal Courts Citizenship, Immigration, and Refugee Protection Rules,* SOR/2002-232, s. 11, states that "(n)o costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders." This is a very high threshold, as noted in *Shekhtman v Canada (Citizenship and Immigration),* 2018 FC 964.

[31] The Applicant sought special costs, arguing that the circumstances were sufficiently special given that the Respondent did not file any material at the leave stage, so the Applicant had to perfect their leave application without knowing the Respondent's position. I cannot agree that the Respondent's lack of material at the leave stage has caused the Applicant prejudice. The Respondent at an early stage once they had the Certified Tribunal Record agreed to have this matter re-determined. Further, the Applicant was not successful in obtaining the remedy of a declaration he sought after the Respondent consented to the application being granted. This hearing would seem to be a waste of judicial resources and not a case where I will exercise my discretion to grant costs.

VI. Certified Question

[32] At trial, the Applicant raised a possible question for certification, and provided it to the Court and opposing counsel afterward. The Applicant submitted that it would let the Federal Court of Appeal give this area finality. The Question submitted is:

> If a person is deported and removed from or otherwise leaves Canada, and later obtains a pardon or record suspension for the original conviction that gave rise to the deportation order, is it a violation of s. 2.3 of the Criminal Records Act, to require that person to obtain the Minister's consent under s. 52(1) of the IRPA?

[33] The Respondent submitted that the issue must be determinative and this question only relates to the remedy, so is not a proper question to certify.

[34] The test for whether a question ought to be certified is well settled, and was set out well in *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paragraph

36. 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 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 at paras 15, 35).

[35] On the facts, issues, and law before me, I am of the view that this is not a proper question for certification. This is a highly fact intensive case, and I am not persuaded that the question transcends the interests of the parties and raises an issue of broad significance of general importance. I will not certify this question.

JUDGMENT IN IMM-4802-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted, and is sent back for re-determination by a different decision-maker;
2. No special costs are ordered;
3. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4802-20
STYLE OF CAUSE:	RH v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 12, 2021
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	NOVEMBER 22, 2021

APPEARANCES:

James Anderson	FOR THE APPLICANT
Emma Gozdzik	FOR THE RESPONDENT

SOLICITORS OF RECORD:

James Anderson Barrister & Solicitor Ottawa, Ontario	FOR THE APPLICANT
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT