Federal Court

Cour fédérale

Date: 20240708

Docket: IMM-4766-23

Citation: 2024 FC 1063

Ottawa, Ontario, July 8, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

CHRISTINE BOLIES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Christine Bolies [Applicant] seeks judicial review of a decision by a delegate of the Minister of Citizenship and Immigration [Delegate] dated March 28, 2023 [Reconsideration Decision] refusing her request to reconsider a previous decision dated March 4, 2022 to refer a report pursuant to section 44 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]

to the Immigration Division so they may hold an admissibility hearing. The Delegate refused the request to reconsider on the basis that there were insufficient factors to reopen her case.

[2] For the reasons set out below, this application for judicial review is granted. The Applicant has demonstrated that the Reconsideration Decision was unreasonable as the Delegate's reasons did not grapple with the Applicant's submissions to the request for reconsideration.

II. Background and Decision under Review

[3] The Applicant came to Canada as a child in 1967. Despite being a permanent resident and residing in Canada since her arrival, she did not obtain citizenship.

[4] In 1995, the Applicant was convicted of fraud under the *Criminal Code*, RSC, 1985, c. C-46 [*Criminal Code*] for embezzlement of funds from her employer. She was sentenced to three years imprisonment and to pay restitution of $125,000. Following this conviction, the Minister commenced inadmissibility proceedings against the Applicant, where she was found to be inadmissible for serious criminality and a deportation order was issued. She filed an appeal and her removal was subsequently stayed in 2001.

[5] In November 2021, the Applicant was again convicted of fraud under the *Criminal Code* and given a three-year custodial sentence and restitution order of $214,334.58. This conviction arose from the embezzlement of funds of over a quarter of a million dollars from another employer.

[6] The Applicant was serving her sentence at a Healing Lodge in Saskatchewan when she received a procedural fairness letter from the Canada Border Service Agency's [CBSA] dated January 27, 2022 [Procedural Fairness Letter]. The Procedural Fairness Letter advised the Applicant that a report under section 44(1) of the IRPA for referral for an admissibility hearing will be prepared. The Applicant may make written submissions providing reasons why a removal order should not be sought and outlined the kind of details relevant to the case that may be provided. The Applicant was advised that she must respond within 15 days of receiving the letter, and that she may not have appeal rights to the Immigration Appeal Division should a removal order be issued citing the language in subsection 64(1) and (2) of the IRPA.

[7] Four days later, the Applicant submitted a response to the Procedural Fairness Letter. In a letter dated March 14, 2022, the Applicant was informed that CBSA has referred a report concerning the Applicant to the Immigration Division of the Immigration and Refugee Board [ID] and requested an admissibility hearing pursuant to section 44(2) of the IRPA.

[8] On June 17, 2022, the Applicant attended a virtual hearing with the ID. At this hearing, the member asked whether the Applicant was planning to have counsel to represent her. She replied that she was wanting to find out what the hearing was about and wanting to get background information. The member allowed an extension of time for the Applicant to retain counsel.

[9] On February 17, 2023, counsel for the Applicant sent a letter to the CBSA manager of Inland Enforcement and Removals asking for reconsideration of the Section 44(2) referral.

[10] In the Reconsideration Decision dated March 28, 2023, the Delegate denied the request for reconsideration of the previous decision dated March 4, 2022. The Delegate reviewed the case and concluded that there were insufficient factors to warrant reopening the case, highlighting key points to justify the Reconsideration Decision.

[11] The Delegate underscored the seriousness and repetitive nature of the Applicant's criminal offences. Despite being a long-term permanent resident in Canada, the Applicant had engaged in significant criminal behaviour that included embezzling over a quarter of a million dollars from a Canadian business. This crime, which mirrored her previous embezzlement offence in 1995 but on a larger scale, demonstrated a pattern of recidivism and disregard for legal and ethical standards.

[12] The Delegate acknowledged the amount of time the Applicant had been a permanent resident in Canada but emphasized that this factor alone was insufficient to overshadow the gravity of her actions. The repetitive nature of her crimes, coupled with the fact she committed the fraud whilst holding a position of trust with the employers as a bookkeeper and the substantial financial impact on the victims, highlighted a severe breach of trust and legal obligations expected of a permanent resident. The courts had recognized the seriousness of her offences, as evidenced by the significant incarceration time imposed.

[13] The Delegate indicated that, given she had previously undergone a similar legal process with her prior conviction, the Applicant would have been well aware of the potential ramifications of her criminal convictions on her immigration status. Recognizing that the circumstances of the two offences were different, the Delegate noted that the outcome of how the Applicant had tended

to address her own financial issues by reoffending further demonstrated a disregard for the law and the obligations of a permanent resident. The Delegate also noted that the Applicant had been informed in January 2022 that, if her case were referred for an admissibility hearing and resulted in a removal order, she would not have appeal rights.

[14] In evaluating the request for reconsideration, the Delegate considered the support from the Applicant’s family and her establishment in Canada. However, the Delegate found that the lack of formal correspondence from her family during the original submission made it difficult to assess the extent of this support. Additionally, the Delegate highlighted that the Applicant’s professional future in her previous career as a bookkeeper was jeopardized by her criminal record, further complicating her prospects for rehabilitation and reintegration. Ultimately, the Delegate was guided by the objectives of the IRPA, which emphasize the obligation of permanent residents to behave lawfully in Canada and the necessity to treat criminals with less leniency. The Delegate referenced the Federal Court of Appeal ruling in *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 and the Supreme Court's decision in *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, which reaffirmed that the uprooting and disruption caused by deportation are typical consequences of removal and are justified in cases involving serious criminality.

[15] Based on these considerations, the Delegate concluded that there were no exceptional circumstances to justify reopening the Applicant's case. The decision to proceed with the admissibility hearing was therefore maintained, reflecting a commitment to uphold public safety and the legal standards expected of permanent residents in Canada.

III. Issues and Standard of Review

[16] The Applicant submits two issues in this case. First, the Applicant submits that the Reconsideration Decision was procedurally unfair because the Applicant was misinformed of her appeal rights in the Procedural Fairness Letter and was not advised to retain legal counsel; second, the Reconsideration Decision is unreasonable because the Delegate made mistaken findings of fact that were contradicted by the evidence before them.

[17] At the outset, I underline that the Reconsideration Decision of March 28, 2023 is the subject of judicial review. As such, any proper issue related to breaches of procedural fairness in this case would have to relate to whether the process in respect to the Applicant's request for reconsideration was fair. However, that is not the question, as the Applicant raises a breach of procedural fairness with respect to the Procedural Fairness Letter and the circumstances surrounding the Applicant's answer to that letter.

[18] The only issue properly raised in this case is whether the Reconsideration Decision was unreasonable.

[19] As such, the applicable standard of review of the merits of the Reconsideration Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 25 [*Vavilov*]). The decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review

(*Vavilov* at para 90). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

IV. Analysis

[20] An immigration officer has the jurisdiction to reconsider their decisions based on new evidence and/or further submissions (*Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 at para 3-4 [*Kurukkal*]).

[21] The first stage of the reconsideration process is whether the officer will exercise their discretion and "open the door to reconsideration." The second step is to reconsider the decision on its merits if the officer so decides (*A.B. v Canada, (Citizenship and Immigration)*, 2021 FC 1206 at para 21 [*A.B.*]).

[22] The onus is on an applicant to show that reconsideration is warranted "in the interests of justice" or because of the "unusual circumstances of the case" (*A.B.* at para 22).

[23] In deciding whether to reopen a decision and move to the second stage (i.e., the actual reconsideration of the decision), it is "inevitable that an officer will need to examine the reasons put forward to re-open a decision" (*A.B.* at para 31).

[24] An assessment of the intelligibility and justification of a refusal to reopen should consider the nature of the material submitted and the specific context of the case. The requirement to justify

a refusal to reopen a decision is not at the high end of the scale, and much depends on the actual circumstances of the case and the nature of the request (*Jaworski v Canada (Citizenship and Immigration),* 2024 FC 393 at para 19 [*Jaworski*], citing *A.B.* at para 44). If the decision-maker failed to engage to a certain degree with the new evidence and submissions at the first stage, this would raise a valid concern about the reasonableness of a refusal to reopen a decision (*Jaworski* at para 14).

[25] The Respondent indicates that the Delegate did not err by considering the previous March 4, 2022 decision to refer the 44(1) report to the ID for an admissibility hearing. Indeed, the assessment of the reasonableness of a request for reconsideration cannot be done in the abstract, without also looking at the previous decision underlying the reconsideration request (*Xu v Canada (Citizenship and Immigration)*, 2024 FC 839 at para 26 [*Xu*]).

[26] The Respondent argued arduously that the Procedural Fairness Letter was not ambiguous. The Respondent contends that the Applicant's allegation that she was unable to make fulsome submissions because of this ambiguity was both inappropriate and unsubstantiated. The Respondent argued that the Procedural Fairness Letter accurately set out the relevant statutory provisions, and that the Applicant knew or ought to have known to seek legal counsel, among other things. She cannot make a decision not to retain counsel and then after receiving an unfavourable decision, claim a breach of procedural fairness based on having no legal representation. I understand the position that the Respondent has taken.

[27] However, in this case, I agree with the Applicant that the Reconsideration Decision was more akin to a reiteration and justification of the previous decision without grappling with the Applicant's submissions made in support of her reconsideration request.

[28] The Reconsideration Decision is silent on the extensive submissions dated February 17, 2023 submitted by Applicant's counsel on the reasons supporting reopening her case. Reading the Reconsideration Decision holistically, I cannot find that the Delegate grappled with the Applicant's submissions why the Delegate ought to reconsider her case. This would raise a valid concern about the reasonableness of a refusal to reopen a decision (*Jaworski* at para 14).

[29] The Delegate simply stated that the Applicant should have been aware of serious immigration consequences due to previous removal proceedings she faced after her first conviction in the 1990s. Finally, the Delegate stated that the Procedural Fairness Letter was clear that she would not have appeal rights. However, both the Delegate and the parties confirm that the legislation applicable to admissibility and the Applicant's 1995 conviction is different compared to the 2021 conviction. The Applicant also submitted evidence in support of her request, including letters from her spouse and son, among others.

[30] I am cognizant that, as they are not authorized or required to make findings of fact in the section 44 process, a Delegate's reasons do not need to be detailed and extensive (*Lin v Canada (Public Safety and Emergency Preparedness),* 2019 FC 862 at para 16). However, the reasons in this case do not satisfy me that the Delegate addressed either the "interests of justice" or "unusual circumstances of the case" when the bulk of the Reconsideration Decision addressed the merits of

the previous decision. This does not meet the threshold of intelligibility and justification (*Vavilov* at para 81).

[31] Finally, the Delegate stated that “all factors have been taken into consideration.” If the statement was intended to assert that they reviewed the Applicant’s submissions to reopen her case, it is not sufficient. The Delegate’s choice to not exercise their discretion must actually grapple with the circumstances of the case (*Xu* at para 26, citing *Kurukkal* at para 5 and *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 74). If the statement was intended to speak to the considerations of section 44(1) of the IRPA, then it does not address the issue before the Delegate, which was whether reconsideration is warranted in the interests of justice or because of the unusual circumstances of the case.

V. Conclusion

[32] For the above reasons, I find that the Reconsideration Decision is unreasonable. The application for judicial review is therefore granted. The matter is remitted for redetermination.

[33] The parties both confirm that they had no questions to certify. I agree that in the circumstances of this case, none arises.

JUDGMENT in IMM-4766-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. There are no questions for certification.

"Phuong T.V. Ngo"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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