Federal Court  Cour fédérale

Date: 20250217

Docket: IMM-5645-23

Citation: 2025 FC 298

Toronto, Ontario, February 17, 2025

PRESENT: The Honourable Justice Battista

BETWEEN:

YEIDER QUINTERO GELVEZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of decisions made by an officer (Officer) and Minister's Delegate (MD) pursuant to subsections 44(1) and (2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The Officer's decision was a report expressing the opinion that the Applicant is inadmissible for serious criminality under paragraph 36(1)(a) of the IRPA. The MD's decision referred the Applicant to the Immigration Division (ID) for an inadmissibility hearing, after finding the Officer's report to be well-founded.

[2] The Applicant submits that the decisions are unreasonable for failing to consider the best interests of the child (BIOC), limiting the hardship analysis only to financial hardship, and erroneously disregarding the psychological evidence.

[3] For the reasons described below, the decision is justified in relation to its legal and factual constraints in the context of section 44 reports. It is therefore reasonable (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) at para 99) and the application for judicial review is dismissed.

II. Background

[4] The Applicant has been a permanent resident since February 2, 2013. He has a Canadian common-law spouse and is stepfather to a young child. He has "extensive" ties to Canada.

[5] The Applicant was tried and convicted twice for sexual assault, but maintains his innocence. In 2017, the Applicant was found guilty of sexual assault and sentenced to 42 months' imprisonment. He appealed both his conviction and the sentence. A retrial was ordered, and in 2019 he was convicted and sentenced to approximately 51 months' imprisonment. He once again appealed the conviction and sentence; the former was dismissed, and the latter was outstanding at the time of the decisions.

[6] The Applicant was sent a procedural fairness letter dated July 28, 2022, informing him that a subsection 44(1) report could be prepared against him. In response, he outlined the circumstances of his offence, the possibility of rehabilitation and reoffending, and humanitarian and

compassionate (H&C) considerations—in particular his spouse, stepson, and family in Canada. He submitted that he was the "only father figure" known to his stepchild, and that it would be emotionally difficult for his stepchild and his spouse if he was not in Canada with them.

III. Decisions Under Review

[7] For a permanent resident who is inadmissible to Canada for serious criminality, the process involves:

- An officer who forms an opinion regarding inadmissibility and decides whether to recommend referral to the ID for the issuance of a removal order;
- A review of the Officer's opinion and recommendation by the MD, who decides whether to refer the matter to the ID for the issuance of a removal order; and,
- If a referral is made, a decision by the ID regarding whether a removal order should be issued.

[8] The Applicant challenges the first two decisions.

[9] The Officer who expressed the opinion that the Applicant is inadmissible for serious criminality and recommended the referral to the ID did so primarily on the bases of the severity of the offence, the lack of remorse, and the lack of rehabilitation. Regarding the BIOC, the Officer acknowledged the emotional interdependence between the Applicant, his spouse, and the child, but found that although the Applicant was the primary income earner, the spouse appeared to have

been able to support herself in the past. The Officer also found that the Applicant could support the family through employment abroad and liquidating assets to support them.

[10] Regarding the nature of the offence and rehabilitative factors, the Officer noted the serious and disturbing nature of the offence and did not accept the Applicant's claim of innocence. The Officer noted that many of the factors identified by the psychologist as indicating a low risk of recidivism—such as employment and family ties—were present at the time that the offence was committed.

[11] The MD who referred the Applicant to the ID found the Officer's report to be well-founded. The MD placed great emphasis on the "extremely egregious" nature of the crime and the fact that the Applicant did not accept responsibility and did not express remorse. For the MD, the Applicant's lack of responsibility and remorse indicated low prospects of rehabilitation. The MD agreed with the Officer's conclusion that the Applicant's spouse had previously been able to support herself and her son, and that financial stress would be mitigated based on familial and governmental support. The MD considered hardship to be a neutral factor, giving more weight to the seriousness of the crime and lack of remorse/responsibility than the H&C considerations.

IV. Issue

[12] The sole issue is whether the decisions of the Officer and MD are reasonable pursuant to the Supreme Court's description of that standard of review in *Vavilov*. Decisions are reasonable if they exhibit rationality internal to the reasoning process and are justified in light of their legal and

factual constraints (*Vavilov* at para 101). Decisions must also be responsive to an applicant's submissions on core issues (*Vavilov* at para 127).

V. Analysis

[13] The decisions are reasonable given their legal and factual constraints.

[14] The legal constraint on the decisions involves the context of section 44 proceedings. These proceedings are not remedial in nature; their purpose is not to provide relief for individuals to which they apply. Section 44 proceedings are part of the legal mechanism to effect the removal of an inadmissible person.

[15] In summarizing the principles guiding section 44 proceedings, Justice William Pentney has recently stated that officers and MDs under these proceedings "have a very limited discretion to consider the personal circumstances of the individual (generally referred to as H&C factors)" and there is "'no general obligation… to explain why [such factors] were not considered sufficient to offset other factors supporting a decision to refer a case for an admissibility hearing'" (*Ramsuchit v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 1019 at para 24, citing *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 at para 29). Furthermore, officers' reasons in their report "form part of the MD's reasoning" (*Marogi v Canada (Public Safety and Emergency Preparedness)*, 2024 FC 418 at para 31, citing *Burton v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 753 at para 16).

[16] The factual constraints in this case involve a permanent resident with over a decade of Canadian residence and family connections in Canada. They also include two convictions—an original conviction and conviction after retrial—of a very serious offence, as well as the Applicant's claim of innocence. The Officer and MD found the nature of the crime and the Applicant's lack of remorse and responsibility to be controlling.

[17] Both decisions were responsive to the Applicant's submissions on BIOC and hardship (*Vavilov* at para 127). While the Officer focused on financial hardship, it was not the sole consideration. The Officer acknowledged the Applicant's role in his stepson's life, that emotional reliance exists, and that the Applicant "plays an active role in [the stepson and spouse's] lives".

[18] In the context of section 44 proceedings and the evidence provided, there was no need for the decision makers to conduct a deeper BIOC analysis as required by an application on H&C grounds under subsection 25(1) of the IRPA, given that section 44 proceedings are a different legal regime and do not legislatively require a BIOC analysis.

[19] The Officer also provided a reasonable explanation for disagreeing with the psychological report's finding that the Applicant was at a moderate-low risk of reoffending. The Officer acknowledged the report's description of re-offence deterrents such as a "stable romantic relationship", employment, and "lack of any substance abuse concerns", but the Officer found that many of these factors also existed at the time of the offence. The commission of the offence notwithstanding these factors contradicted the psychological report's finding concerning the moderate-low risk of recidivism, in the opinion of the Officer. The Officer did not fundamentally

misapprehend the evidence; and the Court cannot reweigh the evidence (*Vavilov* at paras 125-126). The treatment of the psychological report is not unreasonable.

VI. Conclusion

[20] The decisions rendered by the Officer and MD addressed the concerns raised by the Applicant, but gave greater weight to the seriousness of the Applicant's conviction and his lack of acceptance of responsibility and lack of remorse. Given the legal and factual constraints presented in the Applicant's case, the decisions were therefore reasonable. Legal and factual constraints upon a decision are contextual, and such constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov* at para 90).

JUDGMENT in IMM-5645-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no order regarding costs and no question for certification.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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