Federal Court  Cour fédérale

Date: 20210625

Docket: IMM-3409-20

Citation: 2021 FC 652

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 25, 2021

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

MAMADOU BHOYE BARRY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mamadou Bhoye Barry is seeking judicial review of a decision by the Immigration Division of the Immigration and Refugee Board [ID], dated July 14, 2020, concluding that he was inadmissible and issuing a deportation order against him.

[2] For the reasons set out below, Mr. Barry's application for judicial review is dismissed.

II. Background

[3] Mr. Barry is a citizen of Guinea, who obtained permanent resident status in the United States, where he was admitted as a refugee. On or around September 7, 2019, Mr. Barry entered Canada from the United States and made a claim for refugee protection.

[4] On September 16, 2019, an officer of the Canada Border Services Agency [CBSA] issued a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The officer recorded that Mr. Barry was a foreign national, not authorized to enter Canada and, in the officer's opinion, inadmissible under paragraph 36(2)(b) of the Act. In his report, the officer stated that on March 18, 2011, in the United States, Mr. Barry was convicted of the offence of "Domestic Assault - Bodily Harm" under section 39-13-111 of the *Tennessee Code*. The officer indicated that, if committed in Canada, this offence would constitute an offence under section 266 (rather than section 265) of the *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*], and described the offence as "assault". The officer then noted the punishment under section 266(a) of the *Criminal Code*, which provides that every person who commits an assault is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

[5] On the same day, a Minister's delegate referred the above-mentioned report to the ID for an admissibility hearing, pursuant to subsection 44(2) of the Act, so that it could determine whether Mr. Barry falls under paragraph 36(2)(b) of the Act.

[6] Subsection 36(2) of the Act provides that a foreign national is inadmissible on grounds of criminality for certain facts. Paragraph 36(2)(b) specifically provides for the fact of having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.

[7] Paragraph 36(3)(a) of the Act further provides that an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily.

[8] Finally, section 33 of the Act provides that the facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are "reasonable grounds to believe" that they have occurred, are occurring or may occur.

[9] The ID heard the case on February 4, 2020. According to the transcript of the hearing contained in the Certified Tribunal Record (CTR), the Minister filed nine exhibits while Mr. Barry filed none. Counsel for Mr. Barry confirmed that he had no objection to the filing of documents in English. Mr. Barry then generally denied that he had been convicted of the offence described above on March 18, 2011, in Tennessee, but paradoxically acknowledged that he had been sentenced there (page 13 of the transcript). Mr. Barry alleged that there were errors in the Minister's filings as Mr. Barry is not "Asian" and his daughter's first name is not "Angela", as recorded. Mr. Barry then also questioned the preparation of the report under subsection 44(1) of the Act. At the hearing, the Minister acknowledged that the report erroneously referred to

section 266 of the *Criminal Code* and that it should instead have referred to section 265, which defines the offence of assault. The member read section 265 of the *Criminal Code* for the record, before the parties presented their arguments. The Minister also pointed out that Mr. Barry had been found guilty of "Domestic Assault-Bodily Harm", but that the same document confirms that he had not caused any "Harm".

[10] Before the ID, Mr. Barry argued that the US offence was not equivalent to the *Criminal Code* offence of assault. He submitted that the US offence was not equivalent to the *Criminal Code* offence of assault because (1) the US offence was a "misdemeanor" and therefore a summary conviction offence, not an indictable offence; (2) this type of situation would never result in a sentence of five years' imprisonment in Canada; (3) the Minister's record did not contain the necessary conviction; (4) Canadian criminal law did not contain a provision that specifically addresses spousal abuse; (5) the Minister did not present any doctrine or expert evidence on the section of the US statute; and (6) the CBSA had erred with respect to the section of the *Criminal Code* cited in its report and the type of pre-removal risk assessment (PRRA) offered.

[11] Before the ID, the Minister (1) admitted that the section 44(1) report should have referred to section 265 of the *Criminal Code*; (2) pointed out that the type of PRRA offered to Mr. Barry had had to be changed when the CBSA learned that Mr. Barry had been recognized as a refugee in the US; (3) equivalency looks at the maximum penalties for each offence being compared; and (4) the offence in section 265 covers spousal abuse.

[12] After the hearing, the Minister provided the ID with an additional exhibit, the record of an interview of Mr. Barry by a CBSA officer on September 7, 2019. Mr. Barry objected to the filing of this exhibit with the ID.

III. The ID's decision

[13] On July 14, 2020, in conclusion of the admissibility hearing, the ID determined that the offence for which Mr. Barry was convicted in the US is equivalent to the offence of "assault" as defined in paragraph 265(1)(a) of the *Criminal Code*. The ID concluded that Mr. Barry was therefore inadmissible under paragraph 36(2)(b) of the Act and issued a deportation order against him.

[14] In its decision, the ID noted that the Minister had filed 10 exhibits and Mr. Barry had filed none, so his evidence was limited to his testimony. The ID did not accept the Minister's additional evidence, i.e., the report of the interview of September 7, 2019, received after the hearing.

[15] The ID summarized Mr. Barry's testimony and the parties' submissions, and then proceeded to analyze the record. The ID confirmed that the onus was on the Minister to show that the essential ingredients of paragraph 36(2)(b) of the Act had been established, and set out the applicable standard of proof under section 33 of the Act, namely, that of "reasonable grounds to believe that [the facts] have occurred, are occurring or may occur", as interpreted by the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114 [*Mugesera*].

[16] The ID found that the Minister had provided sufficient credible and trustworthy evidence to discharge his burden. The ID added that Mr. Barry's version, a general denial, did not allow the ID to question his conviction. The ID found that greater weight had to be given to the material filed by the Minister. The ID also noted that, while Mr. Barry had denied committing the offence, he could not explain the probation imposed on him and had not filed any additional evidence.

[17] The ID then considered the equivalency of the statutory provisions. The ID noted the options described by the Court in *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 [*Hill*]; relying on the second method, it noted that it was sufficient that the essential ingredients of the foreign offence were similar to those of the offence in Canada. The ID reproduced the relevant provisions and the essential ingredients of the offences involved (paragraphs 31 and 37 of the decision) and adopted the second method in *Hill*.

[18] The ID noted that the Minister had made no submissions regarding section 265 of the *Criminal Code specifically*, and it did not follow the Minister's explanation on this issue. Indeed, the ID declined to rule on the relevance of the absence of harm, the Minister having argued that it was irrelevant. Rather, the ID noted that section 265(2) of the *Criminal Code* covers all forms of assault, regardless of whether the assault causes harm and is committed against a spouse (the foreign statute requires both of these ingredients).

[19] Ultimately, the ID concluded that, considering the context and the evidence, which was found to be credible and trustworthy, the Canadian offence equivalent to the US offence is the

one set out in paragraph 265(1)(a) of the *Criminal Code*. The ID noted that the Canadian provision was broader than the Tennessee provision, but concluded, in light of the facts submitted in evidence, that if these offences had been committed in Canada, they would have fallen under section 265 of the *Criminal Code*.

[20] Finally, the ID noted that paragraph 265(1)(a) of the Criminal Code is a hybrid offence and that paragraph 36(3)(a) of the Act provides that "an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily".

IV. Parties' submissions and analysis

[21] Mr. Barry is asking the Court to determine (1) whether the conclusion that he is inadmissible is reasonable; (2) whether the ID erred in its assessment of the requirements for establishing equivalency between the US offence and the Canadian offence; and (3) whether the ID properly exercised its discretion during the investigation.

A. *Standard of review*

[22] The parties agree that the Court must analyze the ID's decision against the standard of reasonableness. Indeed, in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the Supreme Court of Canada established the presumption that reasonableness is the applicable standard in all cases (at para 16). This presumption can only be rebutted in three types of situations, none of which apply in this case.

[23] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). A court must consider "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). This Court must therefore determine "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, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 47, 74; and *Catalyst Paper Corp v North Cowichan* (*District*), 2012 SCC 2 at para 13).

[24] Some of the arguments advanced by Mr. Barry come under procedural fairness. In *Vavilov*, the Supreme Court did not deal with the standard applicable to allegations of breach of procedural fairness, except to reiterate the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (at para 77). In addition, the Federal Court of Appeal recently reiterated that "[t]he standard of review for procedural fairness issues is currently in dispute in this Court" (see *Bergeron v Canada (Attorney General)*, 2015 FCA 160, at paras 67 to 71). In a recent decision, the Court of Appeal confirmed that the Supreme Court has not given any guidance on this in its decision in *Vavilov* (*CMRRA-SODRAC Inc v Apple Canada Inc*, 2020 FCA 101 at para 15).

[25] In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56, the Federal Court of Appeal noted as follows:

> No matter how much deference is accorded administrative tribunals in the exercise of their discretion to make procedural choices, the ultimate question remains whether the applicant knew the case to meet and had a full and fair chance to respond. It would be problematic if an *a priori* decision as to whether the standard of review is correctness or reasonableness generated a different answer to what is a singular question that is fundamental to the concept of justice—was the party given a right to be heard and the opportunity to know the case against them? Procedural fairness is not sacrificed on the altar of deference.

B. *Reasonableness of the ID's decision*

[26] First, Mr. Barry submits that the ID erred in assessing the evidence by ignoring his testimony, accepting the Minister's evidence as relevant, despite its irregularities, and drawing a negative inference from the lack of corroboration of his testimony. Mr. Barry points out that the burden was on the Minister and that to accept altered evidence violates the presumption of truthfulness of testimony (*Kaur v Canada (Minister of Employment and Immigration)* (1993), 21 IMM LR; *MalDonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302). He adds that the ID could not find him inadmissible in the absence of a certificate of his conviction (*Singleton v Canada (Minister of Employment and Immigration)*, 1983 CarswellNat 547).

[27] The Minister responds that the assessment of the evidence submitted was reasonable. He states that the standard of proof is "reasonable grounds to believe" under section 33 of the *Immigration Act*, and that the ID reasonably concluded that the evidence submitted by the Minister was sufficient to establish inadmissibility.

[28] The Minister adds that the evidence, namely, the criminal record and the police report, meet this standard of proof and that it has been established under *Liu v Canada (Citizenship and Immigration)*, 2020 FC 576 at para 85, that documents issued by foreign authorities are presumed to be truthful.

[29] The Minister notes that the ID's conclusion regarding the value of the documents is reasonable and that the two errors do not undermine said documents, as the basic information is not in dispute. In addition, Mr. Barry acknowledged that he was sentenced to serve probation, a situation he had difficulty explaining since he denied pleading guilty or having any criminal convictions in Tennessee.

[30] The Minister adds that it was reasonable for the ID to raise the lack of documents corroborating Mr. Barry's testimony as the latter contradicted the documentary evidence, which consisted of documents obtained from foreign authorities and was found to be credible and trustworthy (citing *Castrañeda v Canada (Citizenship and Immigration)*, 2010 FC 393 at para 18; *Bhagat v Canada (Citizenship and Immigration)*, 2009 FC 1088; *Ortiz Sosa v Canada (Citizenship and Immigration)* at para 19).

[31] Mr. Barry has not persuaded me that the decision is unreasonable. First, the ID did not ignore Mr. Barry's testimonial evidence, but rather accepted the contradictory documentary evidence. Indeed, the ID considered Barry's general denial of guilt to be less than credible in light of his paradoxical admission of having received a sentence and in light of the documentary evidence confirming his conviction. Furthermore, the ID did not ignore the irregularities in the

documents as raised by Mr. Barry, particularly with respect to his ethnic origin, but rather concluded that these irregularities did not call into question the authenticity or content of the documents. One of the reasons for this conclusion was that the identifying information in the documents was accurate. In accordance with *Vavilov*, the Court must consider the "outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (at para 15). The ID's conclusion is intelligible and justified as regards the evidence. It is particularly reasonable under the applicable standard of proof, which is a higher standard than mere suspicion, but lower than the balance of probabilities. There must be an objective basis for the conclusion which is based on compelling and credible information (*Mugesera* at para 114 [*Mugesera*]). The conclusion is therefore an extraordinary condemnation, as inadmissibility can be based on evidence that does not meet the balance of probabilities standard.

[32] The ID was familiar with this standard of proof, having correctly stated it at paragraph 21 of its decision. Mr. Barry's argument that a certificate of conviction should have been required here, in addition to the documents submitted by the Minister, is hard to justify given the applicable standard of proof.

[33] Mr. Barry's arguments as to the value of his testimony must also fail. His testimony is not, as he states, uncontradicted and therefore presumed to be truthful. Rather, Mr. Barry was attempting to contradict the authenticity of the documents produced by the Minister and the truthfulness of the information contained therein. The authorities cited by Mr. Barry do not allow me to conclude that his testimony as to the inauthenticity of the documents can be presumed to

be truthful, and it was open to the ID to conclude that Mr. Barry's testimony did not diminish the probative value of these documents. This conclusion is exacerbated by the fact that Mr. Barry provided an inconsistent factual account, generally denying his guilt while acknowledging that he had received a sentence. It was also open to the ID to note that Mr. Barry did not produce any documentary evidence.

[34] In judicial review the role of this Court is not to reweigh the evidence or substitute its assessment of the evidence, which is what Mr. Barry is asking. He has not shown that the ID's decision is unreasonable.

C. *Assessment of the requirements for establishing equivalency in Canada*

[35] Mr. Barry submits that the Minister failed to establish equivalency between the foreign offence and the equivalent Canadian offence, and submits that the US offence of "Domestic Assault Bodily Harm" has no equivalent in the *Criminal Code*. In addition, Mr. Barry submits that the offence is a minor or summary offence in Tennessee. He cites *Dayan v Canada (Minister of Employment and Immigration)*, [1987] 2 FC 569, and *Hill* to the effect that there must be some equivalency between the two offences, and that the onus is on hearing officers to adduce relevant evidence on foreign law and definitions. Mr. Barry submits that the precise wording in each statute reveals that the essential ingredients of the respective offences do not match, and that, furthermore, the offence with which Mr. Barry was charged would never be prosecuted by indictment in Canada.

[36] Mr. Barry also submits that procedural fairness was not respected since opposing counsel did not make any submissions with respect to section 265 of the *Criminal Code* specifically at the hearing and that the ID compensated for that breach. Furthermore, at the hearing, Mr. Barry abandoned his argument with respect to the documents written in English.

[37] The Minister responds that the ID's decision on equivalency is reasonable. The Minister submits that the ID applied the second of the three methods set out in *Hill*, as reiterated by the Federal Court in *Touré v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 752 (at para 14), that is, a comparison of the essential ingredients of the respective offences. The Minister adds that the ID had sufficient information, assessed the provisions and determined that the offence was equivalent to the one defined in paragraph 265(1)(a) of the *Criminal Code*, as the police report reveals that Mr. Barry had used force against his spouse by intentionally hitting her in the head and punching her in the back without her consent. This hybrid offence is an indictable offence under paragraph 36(3)(a) of the Act. The Minister reiterates that, in accordance with *Vavilov*, it is not the Court's role to reweigh the evidence or substitute its assessment of the evidence for that of the panel.

[38] Mr. Barry has not persuaded me that the ID erred in its assessment of the requirements for establishing equivalency in Canada. The ID explained that it used the second method set out in *Hill*, that is, examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings.

[39] The ID set out the essential ingredients of the offences and noted, among other things, that sentences are not an essential element of an equivalency test, which has been validated by the case law of this Court (*Lu v Canada (Minister of Citizenship and Immigration*), 2011 FC 1476 para 16), and that the two provisions are not identical, which is not required (*Patel v Canada (Minister of Citizenship and Immigration*), 2013 FC 804). The ID compared the essential ingredients of the offence with the facts on the record and justified its conclusion that the acts committed in Tennessee meet the requirements of paragraph 265(1)(a) of the *Criminal Code*. The ID's analysis is internally coherent and rational and is justified in relation to the facts and law that constrain the decision maker, as is required by *Vavilov.* Accordingly, the ID's conclusion is reasonable.

[40] The Court notes that a reading of the transcript of the hearing before the ID does not support Mr. Barry's arguments regarding a breach of procedural fairness. The ID had the relevant provisions before it and reproduced them in its decision, clearly identifying the essential ingredients. Moreover, a reading of the transcript of the hearing demonstrates that the parties made detailed submissions about the nature of the offence committed in Tennessee and its equivalent in Canadian law—and in particular about section 265 of the *Criminal Code*, which the member read into the record. Mr. Barry has not persuaded me that the fact that the ID identified the specific paragraph constitutes a breach of procedural fairness or that it is an error that warrants this Court's intervention, given all the circumstances of this case.

D. *The exercise of discretion*

[41] Mr. Barry submits that, in light of the points he raised regarding the equivalency of the offences, the panel improperly exercised its discretion by substituting itself for opposing counsel, who had the burden of establishing “reasonable grounds to believe” in the existence of facts underlying his inadmissibility.

[42] This argument refers to the arguments raised above. The same conclusions apply.

V. Conclusion

[43] In sum, the ID’s decision is reasonable. The application for judicial review is dismissed.

JUDGMENT in IMM-3409-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"Martine St-Louis"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

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