Federal Court  Cour fédérale

Date: 20231212

Docket: IMM-12758-22

Citation: 2023 FC 1669

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 12, 2023

PRESENT: The Honourable Mr. Justice Régimbald

BETWEEN:

JEISSON GIOVANNI RAVELO YOMAYUSA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In a decision dated November 29, 2022, the Immigration Division [the ID or the panel] of the Immigration and Refugee Board of Canada determined that Mr. Yomayusa, a citizen of Colombia claiming refugee protection, was inadmissible to Canada on grounds of serious

criminality, as he was convicted of an offence outside Canada that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years. The applicant is therefore inadmissible to Canada under paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA].

[2] The applicant is seeking judicial review of the ID decision [the Decision] under section 72 of the IRPA. He submits that the Decision is unreasonable because the ID made a factual assessment that lacks a legal basis and incorrectly applied case law principles.

[3] For the reasons that follow, the application for judicial review is dismissed. The ID decision is clear, justified and intelligible in relation to the evidence filed (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99 [*Vavilov*]). The applicant has not discharged his burden of showing that the ID decision was unreasonable.

II. Factual background

[4] The applicant, Jeisson Giovanni Ravelo Yomayusa [applicant] is a citizen of Colombia. While he was working as a security guard at a parking lot, his supervisor gave him a revolver to monitor the parking lot with.

[5] The applicant did not ask any questions or seek to obtain any information when his employer gave him the weapon. For one month, he carried the weapon as part of his duties. His supervisor was on site only from time to time.

[6] One day, when his supervisor was absent, police officers conducted an inspection and found that the applicant was carrying a weapon at the workplace. Although he had the weapon as part of his duties, neither he nor his employer had been authorized by a competent authority to have the weapon in question.

[7] The applicant was therefore arrested and convicted of possession of a defensive weapon under section 365 of Colombia's Penal Code. Before the ID, the applicant admitted that he had been in possession of the weapon, that the weapon in question was a revolver and that he had known he was in possession of a weapon without a licence.

III. Issues and standard of review

[8] The only issue before the Court is whether the ID decision that the applicant is inadmissible under paragraph 36(1)(b) of the IRPA is reasonable.

[9] The applicable standard of review is reasonableness. A decision is reasonable if it is justified, transparent and intelligible and falls within a range of possible outcomes in light of the facts and law (*Vavilov*, at paragraph 99).

IV. Analysis

A. *The ID decision is reasonable*

[10] The parties agree that the standard of proof applicable to an inadmissibility determination is that of "reasonable grounds to believe". This standard requires something more than mere

suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 39).

[11] A person will therefore be inadmissible to Canada if there are reasonable grounds to believe that he or she is inadmissible under section 36 of the IRPA, even if this has not been established on a balance of probabilities. The standard of reasonable grounds to believe applies only to questions of fact.

[12] In this case, the ID had to determine whether the crime committed by the applicant in Colombia constituted an offence under an Act of Parliament with a maximum term of imprisonment of at least 10 years.

[13] To determine whether the applicant fell under paragraph 36(1)(b) of the IRPA, the ID applied the third method described by the Court of Appeal in *Hill v Canada (Minister of Employment and Immigration)* (FCA), [1987] FCJ No 47 [*Hill*], which consists of combining a review of the wording of the offence and the evidence with respect to the facts that led to the conviction.

[14] Colombia's Penal Code was amended in 2007, and, as a result, either of the following provisions could have applied to the applicant when he was charged:

[TRANSLATION] Every person who, without authorization from the competent authority, imports, traffics, manufactures, transports, stores, distributes, sells, supplies, repairs or carries firearms for self-defence as well as ammunition or explosives incurs a punishment of	[TRANSLATION] Every person who, without authorization from the competent authority, imports, traffics, manufactures, transports, stores, distributes, sells, supplies, repairs or carries firearms for self-defence and ammunition, incurs a punishment of ... .

[15] The offence that corresponds to the offence in section 365 of Colombia's Penal Code is in section 92 of Canada's *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*].

Possession of firearm knowing its possession is unauthorized **92(1)** Subject to subsections (4) and (5) and section 98, every person commits an offence who possesses a firearm knowing that the person is not the holder of **(a)** a licence under which the person may possess it; and **(b)** a registration certificate for the firearm. … **Punishment** **(3)** Every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable **(a)** in the case of a first offence, to imprisonment for a term not exceeding ten years; **(b)** in the case of a second offence, to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; and	**Possession non autorisée d'une arme à feu — infraction délibérée** **92 (1)** Sous réserve des paragraphes (4) et (5) et de l'article 98, commet une infraction quiconque a en sa possession une arme à feu sachant qu'il n'est pas titulaire d'un permis qui l'y autorise et du certificat d'enregistrement de cette arme. … **Peine** **(3)** Quiconque commet l'infraction prévue au paragraphe (1) ou (2) est coupable d'un acte criminel passible des peines suivantes : **a)** pour une première infraction, un emprisonnement maximal de dix ans; **b)** pour la deuxième infraction, un emprisonnement maximal de dix ans, la peine minimale étant de un an;

(c) in the case of a third or subsequent offence, to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of two years less a day.

Exceptions

(4) Subsections (1) and (2) do not apply to

(a) a person who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition while the person is under the direct and immediate supervision of a person who may lawfully possess it, for the purpose of using it in a manner in which the supervising person may lawfully use it; or

(b) a person who comes into possession of a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any prohibited ammunition by the operation of law and who, within a reasonable period after acquiring possession of it,

(i) lawfully disposes of it, or
(ii) obtains a licence under which the person may possess it and, in the case of a firearm, a registration certificate for the firearm.

…

c) pour chaque récidive subséquente, un emprisonnement maximal de dix ans, la peine minimale étant de deux ans moins un jour.

Réserve

(4) Les paragraphes (1) et (2) ne s'appliquent pas :

a) au possesseur d'une arme à feu, d'une arme prohibée, d'une arme à autorisation restreinte, d'un dispositif prohibé ou de munitions prohibées qui est sous la surveillance directe d'une personne pouvant légalement les avoir en sa possession, et qui s'en sert de la manière dont celle-ci peut légalement s'en servir;

b) à la personne qui entre en possession de tels objets par effet de la loi et qui, dans un délai raisonnable, s'en défait légalement ou obtient un permis qui l'autorise à en avoir la possession, en plus, s'il s'agit d'une arme à feu, du certificat d'enregistrement de cette arme.

…

[16] In addition to the requirement of knowing that the person does not hold a licence or certificate permitting possession of the weapon, the major distinction between the two offences is that, in Canada, there is a defence in subsection 92(4) that does not exist in Colombia, namely, if the defendant in possession of a weapon was under the direct and immediate supervision of a person who, for example, held a licence to carry a weapon.

[17] The ID therefore first assessed whether the applicant met the elements of the offence under section 92 of the *Criminal Code* and concluded that those elements were met.

Section 92	Admitted facts
Knowing that the person is not the holder of a licence under which the person may possess it and a registration certificate for the firearm	Possession of the firearm in the course of his employment knowing that he did not hold a licence to possess that firearm
Possession	Possession
Of a firearm	Revolver

[18] Since the applicant committed the acts he was accused of that correspond to the elements of the offence under section 92 of Canada's *Criminal Code*, the only issue is whether the applicant could demonstrate that he could avail himself of the additional defences that exist in Canada. If he was able to do so, the exclusion set out in paragraph 36(1)(b) of the IRPA would not apply to him.

[19] The ID then examined whether the applicant could rely on the defences set out in subsection 92(4) of Canada's *Criminal Code*. The ID concluded that, to rely on that defence, the applicant needed to show that he was under the "immediate and constant supervision" of his supervisor, who had to hold a licence [ID Decision at paras 23–28]. The panel concluded that this was not the case here, as the applicant testified that he monitored the parking lot while his supervisor was absent. The ID also noted that the applicant did not show due diligence since he did not ask his supervisor any questions about whether he was the owner or holder of the necessary authorizations.

[20] The applicant alleges that, in concluding that the concept of direct supervision means both “immediate and constant supervision”, the panel interpreted subsection 92(4) of Canada’s *Criminal Code* narrowly and strictly, which is not supported by the wording of the provision or by case law. The applicant submits that he was necessarily monitored and supervised by a superior simply because of the principle of subordination. Finally, the applicant submits that requiring that the supervisor be present every second of the day, without being able to leave for any period of time, is not reasonable and does not reflect the purpose of subsection 92(4) of the *Criminal Code*.

[21] The respondent submits in response that the ID’s interpretation is reasonable because the *Criminal Code* clearly specifies “direct and immediate supervision”, not intermittent supervision. In addition, the evidence shows that the supervisor was on site only from time to time and that he gave the applicant no information or training on carrying a firearm.

[22] In *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, at paragraph 69, the Supreme Court of Canada notes that an administrative tribunal’s interpretation of a legislative provision must be “consistent with the ‘modern principle’ of statutory interpretation, which focuses on the text, context and purpose of the statutory provision”. The decision maker must demonstrate in its reasons that it was alive to those essential elements (see also *Vavilov* at para 120).

[23] That is exactly what the ID did in this case. The ID examined the text and purpose of the *Criminal Code*. The ID noted at paragraph 28 of its Decision that “the possession of a firearm in

Canada is strictly regulated and controlled". The ID added that "the purpose of these laws and regulations is to ensure the safety of the population through prohibition of conduct constituting a danger to public safety and strict regulation of the possession of weapons by subjecting it to many conditions, such as training and licensing conditions. The panel is of the opinion that a person being able to possess a firearm without training and a licence, and without the direct and immediate supervision of a qualified person who ensures a safe and legal use, would run counter to the purpose of these laws." Finally , the ID cross interpreted the English and French versions of the text of subsection 92(4) of Canada's *Criminal Code* and concluded that the English version of the provision, which uses the words "direct and immediate", is clearer (the French version contains only the word "direct") and is consistent with the purpose of subsection 92(4) (ID Decision at para 27).

[24] The ID therefore correctly applied the principles of statutory interpretation and clearly explained the basis for its interpretation. Its conclusion that an individual must demonstrate "immediate and constant supervision" to be able to rely on the defence is reasonable.

[25] Turning to the evidence, the ID concluded that, although the applicant was a supervisee in the circumstances, the applicant testified that his supervisor came to the workplace only occasionally. In addition, the supervisor did not give the applicant any information or training on handling the firearm. Finally, the applicant took no steps to ensure that his supervisor held the required certificates and licences. As a result, the conclusion that he was not under "immediate and constant supervision" and that he therefore could not rely on the defence is reasonable.

[26] Finally, in his memorandum, the applicant submits that the ID erred in concluding that the applicant's mistaken belief that his supervisor held a licence was neither relevant nor sufficient to exonerate him since a mistaken belief is a mistake of law that does not exonerate the applicant from committing the offence. The applicant submits that it is rather a mistake of fact because the applicant incorrectly assessed the circumstances surrounding the offence – while a mistake of law is an incorrect assessment of a rule of law that led to the commission of an act, which he believed to have been well founded (see *R v Forster*, [1992] 1 SCR 339; *R v Macdonald*, 2014 SCC 3 at paras 56–60).

[27] In reality, the issue is not whether the applicant mistakenly believed that his supervisor held the licences needed to carry a weapon. A mistaken belief, whether a mistake of law or fact, does not give rise to the defence set out in subsection 92(4) of Canada's *Criminal Code* because, regardless of whether his supervisor held a licence, the applicant was not under his "immediate and constant supervision". Thus, regardless of whether the applicant's belief is a mistake of fact or law, the elements of the offence are met under both Columbia's Penal Code and Canada's *Criminal Code.* As the ID explained, these elements involve only (1) the applicant knowing that he did not personally hold a licence and (2) was in possession (3) of a firearm. Those three elements were admitted. Finally, as discussed above, the elements of the defence of "immediate and constant supervision" were not met.

[28] The ID decision concerning this aspect is therefore reasonable. And, for the reasons above, the ID decision on applying the defence set out in subsection 92(4) of Canada's *Criminal Code* is also reasonable.

V. Conclusion

[29] The ID's reasons are logical, coherent and rational as required by *Vavilov* at paragraph 86. The application for judicial review is dismissed.

[30] The parties proposed no question of general importance for certification, and I agree that there is none.

JUDGMENT in IMM-12758-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Guy Régimbald"
Judge

Certified true translation
Margarita Gorbounova

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET	IMM-12758-22
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