Federal Court  Cour fédérale

Date: 20150917

Docket: IMM-8320-14

Citation: 2015 FC 1090

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, September 17, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

WILFREDO ROMERO ORTIZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Preliminary

[1] When the offences committed by an applicant are offences under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, the applicant is found inadmissible on the grounds of serious criminality. Sections 271 and 151 of the *Criminal Code*,

RSC 1985, c C-46 [CrC], provide for sentences of imprisonment for a term of not more than 10 years for indictable offences. It matters little that these offences may be prosecuted by way of indictment or on summary conviction since paragraph 36(3)(*a*) provides that hybrid offences are deemed to be indictable offences, even if they have been prosecuted summarily (*Kim v Canada (Minister of Citizenship and Immigration)*, 2015 FC 122 at para 12 [*Kim*]; *Omobude v Canada (Minister of Citizenship and Immigration)*, 2015 FC 602 [*Omobude*]).

II. Introduction

[2] This is an application for leave and for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [LIPR], from a decision of the Immigration Division [ID] of the Immigration and Refugee Board, dated December 9, 2014, in which a removal order was issued against the applicant, making his refugee protection claim ineligible.

III. Facts

[3] The applicant, Wilfredo Romero Otiz, is 42 years old and a citizen of Honduras. In his statement of facts, the applicant alleges that he received a number of death threats from armed men in Honduras. These armed men apparently had ties to the owner of the agricultural land on which the applicant's family were living. According to the applicant, his safety started to be at risk in 1989, after the murder of his brother, Santos Donaldo, by assailants with ties to the owner of the agricultural land. The applicant alleges that his brother was murdered because of his role as the leader of a group of agricultural growers. Since his brother's death, the applicant has been

back and forth between Honduras and the United States (United States between 1995 and 1999; Honduras from 1999 to 2001; United States from 2001 to 2009; Honduras from 2009 to 2011, and the United States in 2011). The applicant arrived in Canada on a date that cannot be determined from the inconclusive evidence concerning his entry into Canada. When he fled Honduras for the first time in 1995, the applicant obtained refugee status and a work permit in the United States.

[4] On November 8, 1997, while he was in the United States, the applicant committed a number of criminal offences to which he pleaded guilty. On November 2, 1998, before the Suffolk Superior Court, the applicant was found guilty of several criminal offences, which, had he committed them in Canada, would constitute the following offences: sexual assault (section 271 of the CrC), sexual interference (section 151 of the CrC) and assault (section 266 of the CrC). Following his guilty plea, the applicant was sentenced to two years' probation and five months' imprisonment. In March 1999, the applicant was released from prison and left the United States for Honduras following his own request for voluntary departure.

[5] Subsequently, the applicant went back and forth between Honduras and the United States. On October 11, 2011, alleging other threats to his life, the applicant left Honduras for the United States and arrived in Canada on an unknown date.

IV. Decision

[6] The decision that is subject to judicial review is the ID's decision dated December 9, 2014, in which a removal order was issued against the applicant because of his inadmissibility in

Canada on grounds of serious criminality, under paragraph 36(1)(*b*) of the IRPA, and of criminality, under paragraph 36(2)(*b*) of the IRPA. At the hearing before the ID, the applicant admitted that he had committed the alleged offences and did not challenge their criminal equivalency. In its decision, the ID rejected the applicant's argument that he had been rehabilitated in accordance with paragraph 36(3)(*c*) of the IRPA and section 18 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

V. Issue

[7] Even though the applicant makes several arguments, the Court finds that the only relevant issue raised is the following:

> Did the ID err in determining that the applicant does not satisfy the conditions to be deemed to have been rehabilitated?

VI. Statuary provisions

[8] The following provisions from the IPRA, the IRPR and the CrC apply:

Sections 33 and 36 of the IRPA:

Rules of interpretation	**Interprétation**
33. 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	**33**. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

occur.

Serious criminality

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

…

(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

Grande criminalité

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

[…]

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

Criminality

(2) A foreign national is inadmissible on grounds of criminality for

…

(*b*) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

[…]

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

Application

(3) The following provisions govern subsections (1) and (2):

(*a*) 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

Application

(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

a) l'infraction punissable par mise en accusation ou par procédure sommaire est assimilée à l'infraction punissable par mise en

prosecuted summarily;	accusation, indépendamment du mode de poursuite effectivement retenu;
…	[…]
(*c*) the matters referred to in paragraphs (1)(*b*) and (*c*) and (2)(*b*) and (*c*) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;	*c*) les faits visés aux alinéas (1)*b*) ou *c*) et (2)*b*) ou *c*) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

Section 18 of the IRPR:

Rehabilitation	**Réadaptation**
18. (1) For the purposes of paragraph 36(3)(c) of the Act, the class of persons deemed to have been rehabilitated is a prescribed class.	**18**. (1) Pour l'application de l'alinéa 36(3)c) de la Loi, la catégorie des personnes présumées réadaptées est une catégorie réglementaire.
Members of the class	**Qualité**
(2) The following persons are members of the class of persons deemed to have been rehabilitated:	(2) Font partie de la catégorie des personnes présumées réadaptées les personnes suivantes :
(*a*) persons who have been convicted outside Canada of no more than one offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, if all of the following conditions apply, namely,	*a*) la personne déclarée coupable, à l'extérieur du Canada, d'au plus une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation si les conditions suivantes sont réunies :
(i) the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years,	(i) l'infraction est punissable au Canada d'un emprisonnement maximal de moins de dix ans,

…	[…]
(*b*) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences under any Act of Parliament, if all of the following conditions apply, namely,	*b*) la personne déclarée coupable, à l'extérieur du Canada, de deux infractions ou plus qui, commises au Canada, constitueraient des infractions à une loi fédérale punissables par procédure sommaire si les conditions suivantes sont réunies :
…	[…]
(*c*) persons who have committed no more than one act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, if all of the following conditions apply, namely,	*c*) la personne qui a commis, à l'extérieur du Canada, au plus une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation si les conditions suivantes sont réunies :
(i) the offence is punishable in Canada by a maximum term of imprisonment of less than 10 years,	(i) l'infraction est punissable au Canada d'un emprisonnement maximal de moins de dix ans,
…	[…]
(vii) the person has not been convicted outside of Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.	(vii) elle n'a pas été déclarée coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation.

[Emphasis added.]

Sections 151, 266 and 271 of the CrC:

Sexual interference	**Contacts sexuels**
151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an	**151**. Toute personne qui, à des fins d'ordre sexuel, touche directement ou indirectement, avec une partie de son corps ou

object, any part of the body of a person under the age of 16 years

avec un objet, une partie du corps d'un enfant âgé de moins de seize ans est coupable :

(*a*) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or

a) soit d'un acte criminel passible d'un emprisonnement maximal de quatorze ans, la peine minimale étant de un an;

(*b*) is guilty of an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of 90 days.

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de deux ans moins un jour, la peine minimale étant de quatre-vingt-dix jours.

Assault

Voies de fait

266. Every one who commits an assault is guilty of

266. Quiconque commet des voies de fait est coupable :

(*a*) an indictable offence and is liable to imprisonment for a term not exceeding five years; or

a) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;

(*b*) an offence punishable on summary conviction.

b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

Sexual assault

Agression sexuelle

271. Everyone who commits a sexual assault is guilty of

271. Quiconque commet une agression sexuelle est coupable :

(*a*) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one

a) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans ou, si le plaignant est âgé de moins de seize ans, d'un emprisonnement maximal de quatorze ans, la peine minimale étant de un an;

year; or	
(*b*) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than 18 months or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.	*b*) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois ou, si le plaignant est âgé de moins de seize ans, d'un emprisonnement maximal de deux ans moins un jour, la peine minimale étant de six mois.

VII. Position of the parties

[9] The applicant advances two arguments. First, the applicant submits that in its analysis of section 36 of the IRPR and section 18 of the IRPR, the ID should have considered the maximum sentence provided according to whether the offence was prosecuted summarily or by way of indictment. Second, he submits that the conditions set out in section 18 of the IRPR are not cumulative.

[10] In turn, the respondent argues that paragraph 36(3)(*a*) of the IRPR is clear, and consequently, the ID's decision to consider the maximum sentence provided for offences prosecuted by way of indictment was reasonable. The applicant does not meet the criteria set out in section 18 of the IRPR for persons deemed to have been rehabilitated.

VIII. Standard of review

[11] The issue at bar requires determining whether the ID correctly interpreted the relevant provisions of the IRPA, a statute that is closely connected to its function, based on the facts

before it. As this is a question of fact and of law, the Court must show deference and apply the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 54; *Canada (Public Safety and Emergency Preparedness) v JP*, 2013 FCA 262 at para 74).

IX. Analysis

[12] One of the objectives expressed in the IRPA is to protect the safety of the Canadian population (*Medovarski v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 539 at para 10; paragraph 3(1)(*h*) of the IRPA). The IRPA provides mechanisms through which foreign nationals can be found inadmissible. Recognizing that, in some circumstances, individuals can be rehabilitated, the IRPA also provides a mechanism through which foreign nationals may be deemed to have been rehabilitated and may overcome an inadmissibility finding.

[13] In the matter at bar, the Court is satisfied that there are reasonable grounds to believe that the applicant committed the alleged offences, in accordance with section 33 of the IRPA. The applicant admitted, with evidence in support, that he was convicted for criminal offences before the Suffolk Superior Court in the County of the Commonwealth of Massachusetts. The Canadian equivalents for two of these offences (the offences described in sections 271 and 151 of the CrC) are hybrid offences, punishable by a maximum sentence of 10 years if the offence is prosecuted by way of indictment, or a maximum of 18 months if it is prosecuted summarily.

A. *Inadmissibility on grounds of serious criminality*

[14] If the offences committed by the applicant were offences under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, the applicant would be found inadmissible on grounds of serious criminality. As noted previously, sections 271 and 151 of the CrC provide for maximum sentences of 10 years if the offences are prosecuted by way of indictment. It matters little that these offences may be prosecuted by way of indictment or summarily since paragraph 36(3)(*a*) provides that hybrid offences are deemed to be indictable offences, even if they have been prosecuted summarily (*Kim* above at para 12; *Omobude*, above).

[15] This Court ruled on a similar case to this one *in Sun v Canada (Minister of Citizenship and Immigration)*, 2011 FC 708 (CanLII). In that case, Justice Gauthier, then a judge of the Federal Court, explained that the expression "maximum term of at least ten years" under subsection 36(1) of the IRPA means "ten years or more" and that, in the CRC, "term not exceeding ten years" means "ten years or less". Justice Gauthier found therefore that section 18 of the IRPR only applied to offences punishable by a maximum of less than 10 years, meaning up to 9 years, 364 days.

> [19] . . . c. Pursuant to paragraph 36(3)(*c*) of *IRPA* and section 18 of the *Regulations*,the benefit of deemed rehabilitation only applies to offences punishable by a maximum of less than ten years, meaning up to 9 years, 364 days.

[16] The Canadian equivalents of the offences of which the applicant was found guilty are punishable by maximum terms of imprisonment of 10 years if prosecuted by way of indictment. It was reasonable for the ID to find as it did.

[17] Given that it was reasonable for the ID to find the applicant inadmissible under paragraph 36(1)(*b*) of the IRPA and that section 18 of the IRPR was not applicable in this case, there is no need to consider the arguments concerning paragraph 36(2)(*b*) of the IRPA.

X. Conclusion

[18] For these reasons, the Court concludes that the ID's decision is reasonable. Consequently, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. There is no question of importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8320-14
STYLE OF CAUSE:	WILFREDO ROMERO ORTIZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	SEPTEMBER 16, 2015
JUDGMENT AND REASONS:	SHORE J.
DATED:	SEPTEMBER 17, 2015

APPEARANCES:

Manuel Centurion	FOR THE APPLICANT
Alain Langlois	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Manuel Centurion Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT