

Federal Court



Cour fédérale

Date: 20151021

Docket: IMM-7846-14

Citation: 2015 FC 1192

Ottawa, Ontario, October 21, 2015

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

OFER COHEN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Is the form of poker known as “No limit Texas Hold’em” more a game of skill or more a game of chance? If more a game of skill, the deportation order issued by a member of the Immigration Section of the Immigration and Refugee Board of Canada against Mr. Cohen was unreasonable and must be set aside. He was found to be inadmissible because he was instrumental in setting up an online poker platform geared to the Israeli market, which in the member’s view was a criminal offence there.

[2] On his arrival to Canada as a visitor, Mr. Cohen, an Israeli citizen, who is not a Canadian permanent resident, was noted to be wanted in Israel on the following criminal charges:

- a. Prohibition of lottering and betting
- b. Prohibition of keeping or managing a place of lottering and betting
- c. Conspiracy to commit a felony
- d. Conspiracy to commit a misdemeanour
- e. Prohibition of money laundering
- f. Prohibition of performing a prohibited transaction with property

[3] He was deemed inadmissible to Canada on the grounds of serious criminality, criminality and for being a member of organized crime. This was not an extradition hearing.

[4] The relevant portions of the *Immigration and Refugee Protection Act* are found in Division 4 thereof, titled "Inadmissibility". Section 33 provides that facts are assessed on whether "there are reasonable grounds to believe that they have occurred, are occurring or may occur". Serious criminality and criminality are covered by s 36 and organized criminality by s 37. They are annexed hereto. Distinctions are drawn between permanent residents and foreign nationals; whether the act or acts in question were committed in Canada or, if not, whether the applicant was convicted in the foreign jurisdiction. If convicted outside Canada, the issue is simply whether the acts would have constituted an offence in Canada.

[5] Mr. Cohen had not been convicted in Israel and so the first step in a two-step process was for the member of the Immigration Division to determine if the acts constituted an offence in

Israel. If so, the second step was to determine whether those acts if committed in Canada would constitute an offence here.

[6] The Member concluded that Mr. Cohen's acts constituted an offence in Israel and, had they been committed in Canada, would have offended sections 202 and 207 of the *Criminal Code*. Section 202 sets out 10 circumstances in which recording or registering bets, and pools and the like constitute an offence, while section 207 deals with unlicensed lotteries.

[7] The Federal Court of Appeal has set out various approaches in considering what the equivalent offence would have been had the acts been carried out in Canada. See *Hill v Minister of Employment and Immigration*, [1987] FCJ No 47 (QL) and *Li v Minister of Citizenship and Immigration*, [1996 FCJ No 1060 (QL)]

[8] In my opinion, it is not necessary to consider whether Mr. Cohen's acts would have constituted a criminal offence, if committed in Canada. I am satisfied that his acts, which relate to online gambling, were not criminal in Israel. Thus, I need not consider Mr. Cohen's submission that the acts were not carried out in Israel because the server was in Germany. In so deciding, I have reviewed the member's decision on the standard of reasonableness.

I. The Facts

[9] Mr. Cohen, who apparently is very knowledgeable in IT matters, was developing an internet online poker platform. He needed financing and came to make an arrangement with two other Israelis, Sharon Alaluf and Uri Luzon. Through them, he obtained additional financing in

order to get his platform up and running. Parts of the arrangements were that the platform was to meet Messrs. Alaluf and Luzon's specifications, and the platform was to be leased to them for a period of time.

[10] The poker game in question was "No limit Texas Hold'em". The website was operational from about July until September 2009. Following the arrest of Mr. Luzon on unrelated drug charges in September 2009, the website was shut down. Messrs. Alaluf and Luzon were charged and pleaded guilty to various offences relating to the online gambling website. Once Mr. Cohen's involvement came to light, a warrant for his arrest was issued by the Israel authorities. However, he had already left the country.

II. Analysis

[11] Although poker is, without question, a form of gambling, gambling as such is not illegal in Israel. Section 225 of the *Israeli Penal Law* provides that if a person who has organized or conducted a "prohibited game" or a lottery or betting may be liable to three years imprisonment.

[12] A prohibited game is defined in s 224 as a game in which the outcome depends "more on chance than on understanding or ability". A lottery is an arrangement in which by drawing lots or otherwise there is an opportunity to win money, the win depending again more on chance than on understanding or ability. Betting is defined is an arrangement whereby it is possible to win money based on a guess.

[13] Before the Immigration Division, Mr. Cohen filed an affidavit from Professor Randal Heeb, PhD, an economist with impressive credentials, who has taught techniques in game theory and the application thereof to business problems. He has been trained in econometrics, the branch of mathematics and statistics involving the application of statistical techniques to economic data. His opinion that “No limit Texas Hold’em” poker is best characterized as a game of skill, rather than a game of chance, is based on over 25 years of personal poker play at the highest level of international tournament competition, as well as his expertise as a statistician and econometrician. In preparing a report for a US court, he reviewed some 415 million actual hands of online “No limit Texas Hold’em” poker.

[14] “Texas Hold’em” begins with each player being dealt two cards facedown (the hole). Then three cards are dealt face up (the flop), followed by a fourth card (the turn) dealt face up. Finally, a fifth card (the river) is also dealt face up. Each deal is followed by a betting round as in other poker games, players may check, raise or hold during each betting round. The best five-card poker hand is selected from cards in the hole or those face up.

[15] Professor Heeb noted that tournament play is more skilful than internet play in that in addition to reading the cards, one may read one’s opponents and find a “tell”, a facial expression or movement which would indicate a particularly good hand or a bluff.

[16] He pointed out that there are a great many variables. He assessed 241 variables related to strategy and game tactics, in both unlimited and limited stakes. Higher skilled players came

ahead in at least 60% of all simulations. He concluded that “No limit Texas Hold’em” is a game in which skill clearly predominates over chance.

[17] On the other hand, the Minister produced evidence that Messrs. Alaluf and Luzon had pleaded guilty, and that there was a warrant out for Mr. Cohen’s arrest. Strictly speaking, he has not even been charged as he first must be arrested and arraigned in court. It is unreasonable to conclude that because Messrs. Alaluf and Luzon pleaded guilty Mr. Cohen committed the same offences. There may well have been plea bargaining as Mr. Luzon was already in jail on unrelated drug charges, and Mr. Cohen’s involvement may have been peripheral.

[18] The crucial finding on the member’s part is that she preferred an article in a book filed by the Minister titled “*Gaming Law, Jurisdictional Comparisons*”, written by the Israeli law firm of Herzog Fox and Neeman. In that article, the authors state that the Israel courts have held that “certain forms of poker constitute “prohibited games” as defined in s 224 of the Law.” They went on to say:

Poker – poker is not defined by any Israeli legislation. Nevertheless, in several decisions (few of them rendered many years ago) Israeli courts opined that certain forms of poker constitute a ‘prohibited game’ as defined in section 224 of the Law.

[19] It is to be noted that the Israeli courts have not held that all forms of poker are prohibited games. There has not been a blanket condemnation of poker as such, and the article contains not one word about Texas Hold’em.

[20] Findings as to foreign law are findings of fact, albeit facts of a somewhat special nature. In court, a judge usually decides what foreign law is after considering expert opinion from lawyers in the foreign jurisdiction in question. However, rules of evidence are more relaxed in administrative tribunals.

[21] The standard of review is reasonableness. Thus, it is not for me to assess the evidence directly, but rather to decide whether or not the decision was reasonable. The Minister emphasizes that the only legal opinion as to Israeli law is from Israeli lawyers. However, that opinion is in a legal article and was not geared to Mr. Cohen's particular situation. More to the point, nowhere does it say that any Israeli court has ever held that Texas Hold'em is a prohibited game. Consequently, there was nothing for the member to compare, and so the decision must be considered unreasonable and be set aside. It is not necessary to refer the matter back to another member as Mr. Cohen has left the country and the alleged purpose of his visit to Canada, *i.e.* to visit a friend, is long gone. However, his situation was not moot in that he could have been prevented from ever returning here.

[22] In closing, as the Gambler said:

'If you're gonna play the game, boy

You better learn to play it right'

You got to know when to hold 'em

Know when to fold 'em

Know when to walk away [...]

JUDGMENT

FOR REASONS GIVEN;

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the Immigration and Refugee Board of Canada on the admissibility hearing of Ofer Cohen is quashed.
3. There is no serious question of general importance to certify.

“Sean Harrington”

Judge

ANNEX***Immigration and Refugee Protection Act
(S.C. 2001, c. 27)******Loi sur l'immigration et la protection des
réfugiés (L.C. 2001, ch. 27)***

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

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

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

(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

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;

(c) committing an act outside Canada that is an offence in the place where it was committed and 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.

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

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

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

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

(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;

(c) committing an 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; or

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

(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 prosecuted summarily;

(b) inadmissibility under subsections (1) and (2) may not be based on a conviction in respect of which a record suspension has been ordered and has not been revoked or ceased to have effect under the *Criminal Records Act*, or in respect of which there has been a final determination of an acquittal;

(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

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;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

(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 accusation, indépendamment du mode de poursuite effectivement retenu;

b) la déclaration de culpabilité n'emporte pas interdiction de territoire en cas de verdict d'acquittement rendu en dernier ressort ou en cas de suspension du casier — sauf cas de révocation ou de nullité — au titre de la *Loi sur le casier judiciaire*;

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

rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;

catégorie réglementaire de personnes présumées réadaptées;

(d) a determination of whether a permanent resident has committed an act described in paragraph (1)(c) must be based on a balance of probabilities; and

d) la preuve du fait visé à l'alinéa (1)c) est, s'agissant du résident permanent, fondée sur la prépondérance des probabilités;

(e) inadmissibility under subsections (1) and (2) may not be based on an offence

e) l'interdiction de territoire ne peut être fondée sur les infractions suivantes :

(i) designated as a contravention under the *Contraventions Act*,

(i) celles qui sont qualifiées de contraventions en vertu de la *Loi sur les contraventions*,

(ii) for which the permanent resident or foreign national is found guilty under the *Young Offenders Act*, chapter Y-1 of the Revised Statutes of Canada, 1985, or

(ii) celles dont le résident permanent ou l'étranger est déclaré coupable sous le régime de la *Loi sur les jeunes contrevenants*, chapitre Y-1 des Lois révisées du Canada (1985),

(iii) for which the permanent resident or foreign national received a youth sentence under the *Youth Criminal Justice Act*.

(iii) celles pour lesquelles le résident permanent ou l'étranger a reçu une peine spécifique en vertu de la *Loi sur le système de justice pénale pour les adolescents*.

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

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie

offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

(2) Paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

(2) Les faits visés à l'alinéa (1)a) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Daniel Kingwell

FOR THE APPLICANT

Stephen Jarvis

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mamann, Sandaluk & Kingwell LLP
Barristers & Solicitors
Toronto, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of Canada
Toronto, Ontario

FOR THE RESPONDENT