Federal Court  Cour fédérale

Date: 20160420

Docket: IMM-7628-13

Citation: 2016 FC 437

Ottawa, Ontario, April 20, 2016

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

HUSSAM HASSAN SAIF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review concerns a decision by the Immigration Division of the Immigration and Refugee Board [Board] by which Hussam Hassan Saif was found to be inadmissible under paragraph 37(1)(a) of the *Immigration Refugee and Protection Act*, SC 2001, c 27, [IRPA]. In particular, Mr. Saif challenges the Board's finding that he had 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 indictable offence.

I. Background

[2] The underlying circumstances of Mr. Saif's immigration difficulties are not in serious dispute. On September 15, 2011, he pleaded guilty to an offence under paragraph 465(1)(d) of the *Criminal Code*, RSC, 1985, c C-46, involving a conspiracy to commit a summary offence. This was a summary conviction offence for which Mr. Saif received a conditional sentence of five months. The conspiracy in question involved a scheme orchestrated by Ahmad El-Akhal whereby more than 300 Canadian permanent residents were afforded addresses of convenience and other documentation to fraudulently establish their Canadian residency.

[3] Mr. Saif's involvement was secondary to that of Mr. El-Akhal. Mr. Saif allowed his address to be used as a mail drop and his name to be used on falsified lease documents. He also carried out errands for Mr. El-Akhal to facilitate the scheme and for which he received payment. A Royal Canadian Mounted Police [RCMP] investigation report described Mr. Saif's role in the following way:

> Hussam SAIF assisted Mr. EL-AKHAL in these activities, allowing his name to be used as the lessor and his address to be used as an address of convenience on the forged lease documents that were created by Mr. EL-AKHAL for two of the addresses of convenience where SAIF was the actual tenant. Mr. SAIF passed himself off as being employed by Mr. EL-AKHAL and used a letter of reference from Mr. EL-AKHAL to secure a residential lease at one of the addresses of convenience, 3934 Bishopstoke Lane, Mississauga, Ontario. Mr. SAIF admitted in his KGB statement that he assisted Mr. EL-AKHAL with driving clients around, checking for mail providing a mailing address for his clients in exchange for money. SAIF also stated that Mr. EL-AKHAL had promised to teach him the business, but he never did. SAIF only stopped helping Mr. EL-AKHAL when his own citizenship was placed in jeopardy by CIC due to the over use of his address by Mr. EL-AKHAL's clients.

[4] Testimony provided to the Board by RCMP Corporal Robert Galloway indicated that no serious consideration had been given to bringing criminal organization charges against Mr. El-Akhal or Mr. Saif. According to Corporal Galloway, Mr. Saif was assisting Mr. El-Akhal in an employment relationship that did not appear to constitute a criminal organization under the Criminal Code.

[5] Notwithstanding the above evidence, the Board found that Mr. Saif's activities fell within the scope of "organized criminality" as that reference is used in paragraph 37(1)(a) of the IRPA. The Minister did not contend that Mr. Saif was a member of a criminal organization but only that he fell within the second part of the provision dealing with "activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert". The Board accepted the Minister's argument and gave the following reasons for its decision:

> [38] Given the evidence presented by both the Minister's Counsel and Counsel, by way of testimony from both Mr. Saif and the witness Corporal Robert Galloway, I find that Mr. Saif is a person described under the second part of 37(1)(a) of the *Immigration and Refugee protection Act*, as there are reasonable grounds to believe that he is a person who engaged in activity that is part of such a pattern-this pattern being: 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.
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> [39] It is evident from the information provided by all parties that there are reasonable grounds to believe that Mr. El-Akhal was the head of this scheme which defrauded the Canadian government out of hundreds of thousands of dollars (nearly $500,000). $110,000 US$ and $40,000 CDN were all or, in part, the proceeds obtained from the commission of an offence punishable by indictment and were found in Mr. El-Akhal's possession.
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> [40] RCMP Inspector Art Pittman explained that this scheme involved 300 people from the Middle East and El-Akhal and the others invented Ontario addresses for the new citizens, filed fake

income tax returns in their names and received rebates. "It's alleged that he was facilitating a significant number of people claiming to be living in Canada when in fact they were not and by virtue of the fact they claimed to be living in Canada they were able to claim tax benefits they were not entitled to." Information was gathered during a two-and-a-half-year investigation.

[41] The police report states that the cooperative working relationship between Mr. El-Akhal and Mr. Saif demonstrates the conspiracy between the two to aid and abet the clients to make false representations in relation to their citizenship applications contrary to section 465(l)(d) of the Criminal Code. Although this is a summary conviction, there were a total of 58 charges, many of which were hybrid in nature, which, under 36(3)(a), are to be considered indictable. The witness Corporal Robert Galloway testified that Mr. El-Akhal pleaded guilty to three to four of the charges and received a three-year sentence. Even though most of the 58 charges were withdrawn, there were a number of convictions and given the abundance of documentary evidence in AH-l referred to already in this decision, there are reasonable grounds to believe that these activities did occur, an indictable offence was committed, fraud against the Canadian government for example.

[42] There are clearly reasonable grounds to believe that there exists a pattern of activity, with major and more minor players (some known, others unknown, some in Canada, others in the Middle East), some leading, others following orders, whereby the Canadian government was defrauded of hundreds of thousands of dollars. Planning, scheming and co-operation were involved including emails, text messages with instructions. Mr. Saif, through his criminal lawyer, admitted in court to the facts read out: some of which are the following: Mr. El-Akhal instructed Mr. Saif to continue to pick up mail, including cheques while Mr. El-Akhal was out of the country, Mr. Sail picked up the mail at those addresses upon instruction from Mr. E1-Akhal. Mr. Saif's role in the scheme was as follows: Mr. El-Akhal was the main facilitator in this scheme and Mr. Saif assisted him. He collected mail for him at different addresses, allowing Mr. El-Akhal to use Mr. Saif's residential addresses in Mississauga as mailing addresses. He acted as a driver for the clients. Mr. Sail admitted receiving some financial compensation in return for the use of his addresses. Eventually, Mr. El,-Akhal disappeared and did not return phone calls and the clients began calling Mr. Saif. This scheme went on for years.

…

> [45] This pattern of activity went on for almost a decade. The investigation lasted two-and-a-half years and Mr. Saif was involved for at least two years. Numerous people were involved (300 plus). The government of Canada was abused and defrauded out of hundreds of thousands of dollars. Conspiracy was committed communication and planning took place. Orders were given and received. The area involved was Middle East, Montreal and GTA. Based on all of the evidence, I find that Mr. Saif is described in paragraph 37(1)(a). A Deportation Order is attached.
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> [Footnotes omitted]

[6] It is from this decision that the present application arises.

II. Issues

A. What is the appropriate standard of review?

B. Did the Board err in finding that Mr. Saif was inadmissible under paragraph 37(1)(a) of the IRPA?

III. Analysis

A. *Standard of Review*

[7] The determinative issue in this case concerns the interpretation of paragraph 37(1)(a) of the IRPA and, in particular, whether the Board erred in concluding that Mr. Saif's criminal conduct fell within the scope of that provision. Counsel for Mr. Saif argues that the decision must be reviewed on the standard of correctness. Counsel for the Minister contends that the deferential standard of reasonableness applies and relies on the Federal Court of Appeal decision in *B010 v Canada (MCI)*, 2013 FCA 87 at paras 70-72, [2014] 4 FCR 326 (FCA). When that decision was appealed, the Supreme Court of Canada found it unnecessary to resolve the

standard of review issue. Nevertheless, it did observe that the presumptive standard of review on questions of interpretation of the home statue is deferential: see *B010 v Canada (MCI)*, 2015 SCC 58 at paras 25-26, [2015] 3 SCR 704.

[8] Ordinarily I would agree with counsel for the Minister that reasonableness should be applied to issues of the sort raised here. However, insofar as the Supreme Court of Canada determined the issues of statutory interpretation that apply to the facts of this case, there remains no room for a differing view. My task is simply to determine whether the Board's interpretation of section 37 of the IRPA conforms to the interpretation subsequently adopted by the Supreme Court.

B. *Did the Board err in finding that Mr. Saif's conduct fell within the scope of paragraph 37(1)(a) of the IRPA?*

[9] I am of the view that the Board erred in its application of paragraph 37(1)(a) of the IRPA to the evidence bearing on Mr. Saif's conduct. Although the Board plainly considered some of the elements of paragraph 37(1)(a) what is notably lacking from its reasons is any clear consideration of the structural features required for a finding of organized criminality. This is not altogether surprising because, at the time, the jurisprudence on point was only broadly applicable. As the Board correctly noted, the term "organization" in paragraph 37(1)(a) had been given "a broad and unrestricted" meaning by the Federal Court of Appeal in *Sittampalam v Canada (MCI)*, 2006 FCA 326 at para 55, [2007] 3 FCR 198 (FCA). That decision provided the following broad analytical framework for identifying a criminal organization under subsection 37(1) of the IRPA:

> 37 Paragraph 37(1)(a) appears to be an attempt to tackle organized crime, in recognition of the fact that non-citizen members of criminal organizations are as grave a threat as individuals who are convicted of serious criminal offences. It enables deportation of members of criminal organizations who avoid convictions as individuals but may nevertheless be dangerous.
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> 38 Recent jurisprudence supports this interpretation. In *Thanaratnam v. Canada (Minister of Citizenship & Immigration)*, [2004] 3 F.C.R. 301 (T.D.), reversed on other grounds, [2006] 1 F.C.R. 474 (C.A.), O'Reilly J. took into account various factors when he concluded that two Tamil gangs (one of which was the A.K. Kannan gang at issue here) were "organizations within the meaning of paragraph 37(1)(a) of the IRPA. In his opinion, the two Tamil groups had "some characteristics of an organization, namely", namely "identity, leadership, a loose hierarchy and a basic organizational structure". (para.30) The factors listed in *Thanaratnam*, *supra*, as well as other factors, such as an occupied territory or regular meeting locations, both factors considered by the Board, are helpful when making a determination under paragraph 37(1)(a), but no one of them is essential.
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> 39 These criminal organizations do not usually have formal structures like corporations or associations that have charters, bylaws or constitutions. They are usually rather loosely and informally structured, which structures vary dramatically. Looseness and informality in the structure of a group should not thwart the purpose of IRPA. It is, therefore, necessary to adopt a rather flexible approach in assessing whether the attributes of a particular group meet the requirements of the IRPA given their varied, changing and clandestine character. It is, therefore, important to evaluate the various factors applied by O'Reilly J. and other similar factors that may assist to determine whether the essential attributes of an organization are present in the circumstances. Such an interpretation of "organization" allows the Board some flexibility in determining whether, in light of the evidence and facts before it, a group may be properly characterized as such for the purposes of paragraph 37(1)(a).

[10] What is noteworthy about the decision in *Sittampalam*, above, is the refusal by the Court to consider the Criminal Code definition of "criminal organization" or other similar references in

international instruments. According to the Court, those sources serve other unrelated purposes to the IRPA and are, therefore, unhelpful.

[11] After the Board's decision in this case, the Supreme Court of Canada addressed subsection 37(1) of the IRPA in the context of "people smuggling" under paragraph 37(1)(b): see *B010*, above. Despite the forceful attempts by counsel for the Minister to distinguish this decision, it is determinative of this application.

[12] The Minister contends that the interpretive analysis carried out in *B010*, above, should be confined to paragraph 37(1)(b) of the IRPA because only that provision was in issue. According to this view, the legislative history and purposes served by paragraphs 37(1)(a) and 37(1)(b) are different and they should, therefore, be considered independently of one another. The Minister further argued that, to the extent the Supreme Court commented on the language and intent of paragraph 37(1)(a), the remarks are merely obiter.

[13] The fundamental weakness in the Minister's position is that, paragraphs 37(1)(a) and (b) are both subject to the opening language of subsection 37(1) which refers to inadmissibility "on grounds of organized criminality". When read contextually and harmoniously "organized criminality" infuses all of the language that follows. No plausible interpretation of subsection 37(1) would allow for a different meaning of "organized criminality" as between paragraphs (a) and (b). Accordingly, the Supreme Court's interpretation of those words in the context of paragraph 37(1)(b) must also apply to paragraph 37(1)(a). The Supreme Court makes this point very clearly at para 37:

> 37 The first contextual consideration is the relationship between s. 37(1)(*b*) and the rest of s. 37(1). Subsection (1) introduces the concept of inadmissibility on grounds of organized criminality. Paragraphs (*a*) and (*b*) are instances of organized criminality.
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> Section 37(l)(*a*) makes membership in criminal organizations one ground of inadmissibility, while s. 37(1)(*b*) makes "engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering" another. Read in the context of s. 37(1) as a whole, it is clear that the focus of s. 37(l)(*b*), like that of s. 37(l)(*a*), is organized criminal activity.

[14] The same point is made by the Supreme Court where it frames one of the issues before it as "what limits may be inferred from s. 37(1), which provides that a person is declared inadmissible on the grounds of 'organized criminality'". The Court's views on this issue are, therefore, decidedly not obiter.

[15] It necessarily follows that the Court's views about the meaning and range of "organized criminality" apply equally to paragraphs 37(1)(a) and 37(1)(b), including its interpretive importation of the Criminal Code definition of "criminal organization" requiring a group of three or more persons. I would add to this that the Criminal Code numerical requirement for a criminal organization of at least three persons is more consistent with the language of paragraph 37(1)(a), which requires "a number of persons". If Parliament intended that an organization made up of "a number of persons" could consist of a pair of persons, presumably it would have used that or similar language: see, for example, section 465 of the Criminal Code.

[16] Counsel for the Minister argued that the 300 or so persons who benefited from the fraudulent conduct of Mr. El-Akhal and Mr. Saif should be taken to be part of their criminal

organization. I take the point that many, if not all, of these beneficiaries were engaged in unlawful conduct when they retained Mr. El-Akhal to misrepresent their Canadian residency. That fact is not, however, sufficient to include them within the definition of organized criminality found in subsection 37(1).

[17] Although an unrestricted and broad interpretation is to be given to the word "organization" as it is used in subsection 37(1), the provision still requires the existence of common organizational characteristics such as "identity, leadership, a loose hierarchy and a basic organizational structure": see *Sittampalam*, at paras 38-39, above. Third parties who individually transact with a criminal organization cannot reasonably be seen to be "members" nor can they be considered to be "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 indictable offence". By way of analogy, no one would consider a purchaser of narcotics, without further involvement, to be either a member of, or acting in concert with, a criminal organization established to sell the narcotics, even though both are engaged in common in a criminal transaction.

[18] The reviewable error made by the Board in the decision under review arises from the failure to apply the above-noted principles to the essentially undisputed facts of Mr. Saif's conduct. The Board apparently concluded that a long-standing criminal conspiracy between Mr. Saif and Mr. El-Akhal also involved "numerous people" and therefore fell within that part of paragraph 37(1)(a) concerned with a "pattern of activity". As I have noted above, the requirement of "organized criminality" is not established where the pattern of criminal conduct is

carried out by only two persons. This requirement is not overcome by the peripheral involvement of third parties whose participation falls outside of the underlying criminal conspiracy. That is so because, under any reasonable interpretation of paragraph 37(1)(a), those persons cannot be said to have engaged in activity that is part of a pattern of criminal activity planned and organized in concert with Mr. Saif and Mr. El-Akhal in furtherance of the commission of an indictable offence.

[19] For the foregoing reasons, the decision under review is set aside. The matter must be re-determined on the merits by a different decision-maker and in accordance with these reasons.

[20] Counsel for Mr. Saif proposed two certified questions, but in light of these reasons, the questions are moot. The Respondent has proposed no question for certification and, accordingly, no question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside with the matter to be re-determined on the merits by a different decision-maker.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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