Federal Court  Cour fédérale

Date: 20161017

Docket: IMM-5833-15

Citation: 2016 FC 1143

Ottawa, Ontario, October 17, 2016

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

FRANCISCO JAVIER BELTRAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Beltran seeks judicial review of the December 21, 2015 decision of the Immigration Division (ID) of the Immigration and Refugee Board of Canada (IRB), finding him inadmissible to Canada on grounds of serious criminality under paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] Mr. Beltran is a citizen of Mexico who acquired permanent resident status in Canada in October 2008. In December 2008, a Court in Texas issued an arrest warrant after Mr. Beltran failed to appear in Court. He was arrested and unsuccessfully fought extradition to the United States.

[3] On February 1, 2013, Mr. Beltran pled guilty to one count of wire fraud, contrary to 18 USC §1343, in the United States District Court in the Southern District of Texas. He was sentenced to 51 months imprisonment and was also ordered to pay over $1,000,000 in restitution.

[4] After being awarded credit for time served, Mr. Beltran was released on September 19, 2013 and was deported to Mexico. He returned to Canada on November 4, 2013.

[5] On October 8, 2014, a section 44 report under IRPA was prepared alleging reasonable grounds to believe that Mr. Beltran is inadmissible to Canada on grounds of serious criminality.

[6] An admissibility hearing was held by the ID on December 10 and 21, 2015 following which Mr. Beltran's deportation was ordered. Mr. Beltran seeks judicial review of this decision. He asserts that the ID did not respect his procedural fairness rights during the admissibility hearing by failing to consider his defence of duress.

[7] For the reasons that follow, I conclude that the ID hearing was fair to Mr. Beltran and there was no breach of his rights. This application for judicial review is therefore dismissed.

I. Issues

[8] Mr. Beltran alleges that his procedural fairness rights were breached by the ID. Allegations of procedural unfairness are reviewed on the standard of correctness: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43.

[9] The issues are as follows:

A. Did the ID member err by refusing to admit the documentary evidence?

B. Did the ID member err by failing to allow Mr. Beltran to testify?

C. Was the ID member impartial?

II. Analysis

A. *Did the ID member err by refusing to admit the documentary evidence?*

[10] At the ID hearing, Mr. Beltran tendered approximately 400 pages of documents to explain the circumstances surrounding the offence and the defence of duress that could have been mounted in Canada. He claims that he was being extorted by a powerful Mexican criminal gang.

[11] The defence of duress was not raised in the US criminal proceedings.

[12] The ID member requested submissions from the parties regarding the relevance of the documentary evidence which the Applicant sought to introduce. The Applicant argued that the

documents were relevant to the issue of equivalency and the defence of duress in Canada in comparison to the United States. Mr. Beltran argues that the deference of duress is narrower in Texas, as it contains an immediacy requirement versus in Canada, where as a result of the decision *R v Ruzic*, 2001 SCC 24 [*Ruzic*], the defence of duress is broader.

[13] The ID member consequently adjourned the hearing to determine the relevance of the tendered documents. Legal counsel for Mr. Beltran objected to the ID member determining the equivalency issue without hearing any evidence. The ID member explained that there would be no need to consider the documentary disclosure if the defences are equivalent.

[14] The ID member reviewed the wording of the defence of duress in the Texas Penal Code and noted that it appears to be equally as broad as the Canadian defence post-*Ruzic*. Counsel for the Applicant submitted that the American jurisprudence had narrowed the defence, and the ID member received the American case authority relied on by the Applicant in support of this position.

[15] The ID member noted that the Supreme Court of Canada in *Ruzic* surveyed the American jurisprudence and found that several American authorities adopted a broad and flexible approach to the defence, despite using the language of immediacy.

[16] When the matter resumed on December 21, 2015, the ID member went through the equivalency analysis and noted that in doing so, the role of the ID is to determine whether the conduct giving rise to the foreign conviction would constitute an offence in Canada. It is not to

assess whether or not the Applicant may have been convicted of the equivalent offence if tried in Canada. The ID cited *Li v Canada (Minister of Citizenship and Immigration)*, [1997] 1 FC 235 (CA) [*Li*] for the proposition that what was being examined is the comparability of the offences, not the comparability of possible convictions in the two countries. The ID found it sufficient that the offence of wire fraud as set out in 18 USC §1343 would, if committed in Canada, be equivalent to the offence of fraud under section 380(1) of the *Criminal Code*, RSC, 1985, c C-46, punishable by a maximum term of imprisonment of 14 years.

[17] The test for inadmissibility under this provision of IRPA is one of equivalency. The offence in question must be sufficiently similar such that the conduct of the Applicant would fall within the purview of an equivalent Canadian offence. In other words, the ID is to consider whether the acts committed and punished abroad would have been punishable here: *Lo v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1155 at para 37. This involves comparing the wording of the foreign and domestic statutes, analyzing the evidence to determine whether there is sufficient evidence to establish the essential ingredient of the offence in Canada, or a combination of these methods: *Hill v Canada (Minister of Employment and Immigration)* (1987), 73 NR 315 at para 16 (FCA).

[18] It was not unfair for the ID member to base her decision on the comparison of the two offences. The test for equivalency considers the sufficiency of the evidence to establish the essential ingredient of the offence in Canada. However the test does not contemplate the ID weighing evidence of a possible defence not raised in the foreign jurisdiction in order to determine whether the impugned conduct would have resulted in a conviction in Canada.

[19] The record of the hearing indicates that the ID member turned her mind to the defence of duress in the two jurisdictions. This is not a case where the defence of duress was unavailable to the Applicant in the foreign jurisdiction. Mr. Beltran chose not to raise the defence of duress in the US proceedings.

[20] As the ID member correctly stated, it cannot "essentially hold a criminal hearing" to determine if the defence of duress would have been successful in Canada. See *MM v United States of America*, 2015 SCC 62 at para 2.

B. *Did the ID member err by failing to allow Mr. Beltran to testify?*

[21] Mr. Beltran argues that he was not allowed to give evidence at the hearing.

[22] However, there is no indication in the record that the ID member refused to allow Mr. Beltran to testify.

[23] The ID member did indicate that she wished to move the matter along in the interests of expediency, but there is no indication that counsel for the Applicant made a request for Mr. Beltran to testify, and that this request was denied.

[24] Thus, the Applicant's contention that he was not permitted to testify is not an accurate account of what transpired.

[25] No breach of procedural fairness arises on this basis.

C. *Was the ID member impartial?*

[26] Mr. Beltran submits that the ID member took an unconventional approach to the hearing, which caused a breach of procedural fairness. He takes issue with the fact that the ID member chose to recess the hearing to consider the issue of receiving the documents he sought to introduce into evidence.

[27] The ID member is entitled to prescribe procedures in accordance with its statutory mandate, and is not bound by the formal procedural requirements of a court. The rules of evidence are likewise relaxed in the administrative proceeding setting. There is no requirement that the documentary evidence be formally admitted in any way. *Canadian Recording Industry Assn. v Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 322 at paras 20-21.

[28] The ID member considered the documents Mr. Beltran sought to introduce and found that an assessment of the evidence relevant to duress was unnecessary for the equivalency analysis. The ID member correctly stated that her role is not to weigh the evidence of a possible defence of duress in Canada versus the United States, and then compare the prospect of convictions in both countries. Rather, her task is to consider whether the conduct of Mr. Beltran gives rise to an equivalent offence in Canada. The ID found that the United States offence of wire fraud was equivalent to the offence of fraud under section 380(1) of the *Criminal Code*, RSC, 1985, c C-46. Thus, the Applicant's United States conviction for this offence would be punishable by a maximum term of imprisonment of 14 years.

[29] Following this analysis the ID concluded that Mr. Beltran was inadmissible to Canada on grounds of serious criminality under paragraph 36(1)(b) of the IRPA. In my view, this conclusion is reasonable and was reached in a manner that did not breach Mr. Beltran's rights of procedural fairness.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is dismissed; and

2. There is no question of general importance certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5833-15
STYLE OF CAUSE:	FRANCISCO JAVIER BELTRAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 9, 2016
JUDGMENT AND REASONS:	MCDONALD J.
DATED:	OCTOBER 17, 2016

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