Federal Court  Cour fédérale

Date: 20161014

Docket: IMM-4662-15

Citation: 2016 FC 1144

Ottawa, Ontario, October 14, 2016

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

MIRIAN VASHAKIDZE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant has applied for judicial review of a decision of the Immigration and Refugee Board, Immigration Division [ID] dated September 30, 2015 [the Decision] in which the ID found the applicant to be inadmissible to Canada pursuant to section 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on the grounds of organized criminality.

[2] The applicant is a 48 year old citizen of Georgia and a permanent resident of Canada who has been here since 2001.

I. Background

[3] On June 6, 2011, at approximately 1:20 a.m., two RCMP Constables discovered a parked vehicle on Hill Island, Ontario. Tamazi Gechuashvili (T.G.) was inside the car. He said he was lost.

[4] The Constables searched T.G.'s vehicle and found, among other things, a patch kit for a rubber raft and a backpack containing a letter belonging to a man named Robert Comeau. T.G. was arrested.

[5] Shortly after discovering T.G., the Constables were notified that the United States Border Patrol had intercepted three individuals. One was Michael Robertson, a Canadian citizen. He admitted that the two foreign nationals who accompanied him were to be smuggled into Canada. He also said that there were individuals on the Canadian side waiting for a signal to row across the St. Lawrence River to pick them up.

[6] A canine search was organized and the applicant and Robert Comeau were found hiding on the Canadian side of the river. They were also arrested. A rubber raft, two paddles, a pump, and a small duffle bag were found at their place of arrest. No fishing equipment was located during this search.

[7] When interviewed, Comeau admitted that he was to be paid $3,000 for his part in the people smuggling. He also said that Robertson was to be paid $1,200 and that T.G. led the operation. T.G. claimed that he did not know Comeau or the applicant and maintained that he had been lost. The applicant admitted that he knew Comeau through work and T.G. through the Georgian community in Toronto, but he denied any wrong doing and claimed that he was merely fishing.

[8] On the American side, Robertson admitted that he, Comeau, T.G. and the applicant had been smuggling the two foreign nationals. Robertson had transported them from New York City to the border. He claimed that T.G. was in charge of the operation and was to pay him $1,000. He said that he and the applicant had previously brought T.G.'s daughter and a male individual into Canada, and had also taken a young male into the United States.

[9] The Minister of Public Safety and Emergency Preparedness alleged that both T.G. and the applicant were inadmissible under section 37(1)(b) of the IRPA. The Minister successfully brought an application to join their admissibility hearings.

[10] The joint admissibility hearing was held before a member of the ID on June 8 and 10, 2015. Neither the applicant nor T.G. gave evidence. The evidence consisted of the testimony of RCMP Constable Hataley and documentary evidence which included the statements given by Robertson and Comeau.

[11] In its Decision, the ID concluded that the Minister had met his burden of establishing that both the applicant and T.G. were inadmissible pursuant to section 37(1)(b) of the IRPA because reasonable grounds existed for believing that both had engaged in organized criminality in the context of international crime; specifically, the activity of people smuggling. Deportation Orders were made against both T.G. and the applicant. The ID relied on the Decision of the Federal Court of Appeal in *Canada (Minister of Public Safety and Emergency Preparedness) v JP*, 2013 FCA 262, 368 DLR (4th) 524 [*JP*] which held that when considering inadmissibility for people smuggling under the IRPA, there was no requirement to show that people smugglers received a financial or other material benefit. Accordingly, the ID did not address this issue in its Decision.

[12] However, two months later, on November 27, 2015, the Supreme Court of Canada released its Decision in *B010 v. Canada (Minister of Citizenship and Immigration),* 2015 SCC 58, [2015] 3 S.C.R. 704 [*B010*]. It overturned the Federal Court of Appeal's decision in *JP*, and concluded that people smuggling, for the purpose of section 37(1)(a) of the IRPA, only occurred if the smugglers received a financial or other material benefit.

[13] T.G. and the applicant made separate applications for judicial review of the Decision. T.G.'s application was decided by Mr. Justice Gleeson on March 31, 2016: see *Gechuashvili v Canada (Minister of Citizenship and Immigration)*, 2016 FC 365. Mr. Justice Gleeson found that the Decision was unreasonable because the ID had not made a finding that T.G. had received a financial or other material benefit.

[14] Mr. Justice Shore initially dismissed the applicant's application for leave and judicial review. However, he reconsidered the matter following Justice Gleeson's decision and granted the application for leave.

II. The Issues

[15] The first issue is whether the Decision is unreasonable because it does not address whether the applicant received a financial or other material benefit for his people smuggling activity.

[16] The second issue is whether a re-consideration is necessary or whether, on the record before the ID, I can conclude that the applicant was to be paid for his role in the people smuggling operation.

[17] The third issue is whether the ID acted unreasonably when it relied on the statements made by Robertson and Comeau.

III. Discussion and Conclusions

[18] Since the applicant had an outstanding opportunity to apply for judicial review, a final decision about his inadmissibility had not been made when the Supreme Court of Canada changed the law in *B010.*

[19] Because the common law has retrospective effect in cases where final decisions have not been made, the applicant is entitled to have his inadmissibility considered using the principles set forth by the Supreme Court of Canada in *B010*.

[20] This entitlement would normally require reconsideration by the ID. However, counsel for the respondent submits that I should supplement the Decision with a conclusion that there are reasonable grounds to believe that the applicant was to be paid.

[21] The Respondent submits that such a conclusion would be supported by:

a) Robertson's statement that the applicant was a participant in the people smuggling operation on June 6, 2011, and that the applicant had smuggled people on earlier occasions;

b) The fact that the applicant's statement that he was "fishing" was not credible given that he was hiding in the dark with people smuggling equipment and without any fishing gear in the company of an admitted people smuggler;

c) The statements of Robertson and Comeau which showed that all other participants were to be paid; and

d) Evidence which suggested that the applicant joined the people smuggling operation because he was short of money.

[22] In other words, it is submitted that the evidence in the record, which was accepted by the ID, provides reasonable grounds to believe that the applicant participated in and would have been paid for his role in the people smuggling operation.

[23] In my view, although relevant evidence was in the record, the ID was silent on a critical issue. It did not turn its mind to the question of a financial or other material benefit because, at the time, by reason of the decision of the Federal Court of Appeal in *JP*, there was no

requirement to do so. Since the issue never arose, it is my conclusion that I should not supplement the Decision and that the question of a financial or material benefit ought to be decided by the ID.

[24] For these reasons, and because the applicant has indicated through his counsel that he wishes to testify and call two other witnesses on the question of whether he was to receive a financial or other material benefit, I have concluded that a reconsideration is necessary. However, it is to be limited as follows:

a) The Member of the ID who made the Decision is to preside on the reconsideration if she is available;

b) Unless the presiding Member directs otherwise, the reconsideration of the applicant's inadmissibility for criminality is to deal only with whether there are reasonable grounds to believe that the applicant, as a participant in the people smuggling operation, was going to receive a financial or other material benefit;

c) The record before the ID in the earlier hearing is to be evidence on the reconsideration and is not to be challenged;

d) The applicant may cross-examine any respondent's witnesses and he may testify himself and call two witnesses who are to be T.G. and Irina Berko; and

e) The respondent may call further evidence and may cross-examine the applicant and his two witnesses.

[25] Lastly, I have reviewed the Decision (paras 39 to 51) as it describes the reasoning behind the weight the ID assigned to the statements of Messrs. Robertson and Comeau, and have found no basis for concluding that the treatment of the statements was unreasonable. This conclusion is supported by section 173(c) of the IRPA which provides that the ID is not bound by any legal or technical rules of evidence.

IV. Certification

[26] No questions were posed for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and a reconsideration is to be undertaken on the existing record following the directions given in paragraph 24 of the above Reasons.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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