Federal Court  Cour fédérale

Date: 20170213

Docket: IMM-2365-16

Citation: 2017 FC 173

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 13, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ROCHENEL LIBERAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision [the decision] rendered on May 18, 2016, by Louis Dubé, Member [Member] of the Immigration and Refugee Board's Immigration Division [ID]. The Member found that the applicant is inadmissible and issued a deportation

order against him under paragraph 36(1)(b) of the IRPA. The Member also found that the evidence filed by the respondent: (1) was reliable; (2) had probative value and was credible; and (3) established that there were reasonable grounds to believe that the applicant had several aliases, including Predelus, and that he had been convicted in Florida of serious criminal offences committed in 1989 that qualify under section 36 of the IRPA.

[2] The Court considers the Member's findings with respect to the applicant's identity to be reasonable. However, the Court finds that the Member erred in his assessment of equivalency. Consequently, the case will be referred back to the ID for reassessment of the issue of equivalency only.

II. Background

[3] The applicant, a Haitian citizen, was born on July 11, 1953. He has lived in Canada since August 3, 2005. He arrived in Canada via the United States. Before arriving in Canada, he lived in Miami, Florida, for two years. Upon his arrival in Canada, he filed a refugee claim, which was denied. He subsequently applied for permanent residence based on humanitarian and compassionate grounds. That application is still under review.

[4] On September 15, 2015, the Minister of Public Safety and Emergency Preparedness [Minister] referred for hearing a report on inadmissibility against the applicant, prepared by the Minister of Citizenship and Immigration under subsection 44(1) of the IRPA.

[5] The report, issued on June 29, 2015, concludes that the applicant is inadmissible on grounds of serious criminality because he was convicted, on February 16, 1990, in Orlando, in Orange County, Florida, of offences related to possession and trafficking of cocaine. Considering that the equivalent offence in Canada carries a maximum sentence of at least 10 years, the report states that there are reasonable grounds to believe that the applicant is inadmissible on grounds of serious criminality under paragraphs 36(1)(b) and 36(2)(b) of the IRPA.

[6] On April 27, 2016, the Member held a hearing on the investigation referred by the Minister concerning the applicant and rendered his decision on May 18, 2016. That decision is the subject of this judicial review.

[7] The Member found that the applicant is inadmissible on grounds of serious criminality. The Member's decision is based primarily on the finding that the applicant and a certain individual named Predelus are the same person, the latter being identified in Florida police and Federal Bureau of Investigation [FBI] reports.

[8] To arrive at that conclusion, the Member considered the following evidence, which he considered to be credible and probative: (a) fingerprint comparisons between the applicant and the person known as Predelus (taken in 2007 or 2008 and 2013); (b) police reports (from the FBI, Florida police and the Royal Canadian Mounted Police [RCMP]); (c) the RCMP's verification of the finding by American police that the fingerprints matched; (d) the physical descriptions of Predelus contained in the documents of U.S. authorities; and (e) the fact that the applicant and

Predelus had the same date of birth. However, the Member did not consider the photograph of Predelus that was included in the evidence on record because the quality was too poor.

[9] The Member also found that there were some credibility issues in the applicant's testimony, thus undermining its probative value, including: (i) the applicant's explanation as to how the birth certificates of his alleged five children had been obtained and their content; and (ii) certain inconsistencies and implausibilities between the applicant's testimony and the evidence, including: the allegation that he reportedly completed one year of elementary school when he was 19 years old; the discrepancy between when he reportedly left the family farm and obtained his driver's licence; and the allegation that he was illiterate (given that he could read the birth certificates). Furthermore, the Member found that the children's birth certificates did not confirm the applicant's presence in Haiti at the time the offences were committed by Predelus in Florida.

[10] Lastly, the Member found that the Minister had demonstrated that there were reasonable grounds to believe that the applicant had been convicted in Florida of an offence 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. The Member affirmed the inadmissibility finding under paragraph 36(1)(b) of the IRPA and thus issued a deportation order against the applicant.

III. Analysis

[11] The applicant argues that the finding about his identity is unreasonable because the Member applied the wrong standard of proof and did not reasonably assess the evidence on

record. The reasonableness standard of review applies to these two issues, the first being a question of mixed fact and law, and the second being a question of fact: *Nguesso v. Canada (Citizenship and Immigration)*, 2015 FC 879, at paragraph 61.

[12] The applicant also argues that the ID erred in its analysis of the issue of equivalency. This question is also one of mixed fact and law, subject to the reasonableness standard (*Nshogoza v. Canada (Citizenship and Immigration)*, 2015 FC 1211, at paragraph 21).

A. *Was the Member unreasonable in (a) applying the "reasonable grounds to believe" standard of proof to the matter of identity, or (b) assessing the evidence on record?*

[13] Section 33 of the IRPA provides that facts arising from offences set out in sections 34 to 37 must be assessed according to the "reasonable grounds to believe" standard. Justice Gagné, at paragraph 46 of *Athie v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 425, provides a good explanation of the scope of this standard:

> To conclude that there are "reasonable grounds to believe" that the acts attributed to the applicant have occurred, are occurring or may occur, within the meaning of section 33 of the IRPA, more than a mere suspicion must exist, but less than proof on a balance of probabilities. There must be an objective basis for the belief which is based on compelling and credible information (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at paragraph 114; *Talavera*, above, at paragraph 11).

[14] At paragraph 22 of *Edmond v. Canada (Citizenship and Immigration)*, 2012 FC 674, Justice Tremblay-Lamer writes that the scope of section 33 is non-restrictive and "allows the Minister to consider the occurrence of a broad range of events and facts".

[15] Furthermore, it should also be noted that the primary objective of section 36 is to protect the Canadian public (*Casimiro Santos v. Canada (Citizenship and Immigration)*, 2013 FC 425, at paragraph 35). To achieve that objective, the standard of proof applicable to sections 34 to 37 of the IRPA (including inadmissibility on grounds of serious criminality) is not necessarily equivalent to that which would otherwise be applied in a civil (balance of probabilities) or criminal (beyond a reasonable doubt) context.

[16] In *Victor v. Canada (Public Safety and Emergency Preparedness)*, 2013 FC 979 [*Victor*], the applicant had been charged with possession of firearms in New Jersey, in the United States. He argued before the ID and the RPD that it was a case of mistaken identity, meaning that he was not the same person who had been arrested in New Jersey. In assessing his identity, the ID applied the "reasonable grounds to believe" standard of proof set out in section 33 of the IRPA and, on that basis, found that it was reasonable to believe that the applicant and the man in New Jersey were the same person (*X (Re)*, 2012 CanLII 100214 (CA IRB), at paragraph 16).

[17] Before our Court, Mr. Victor conceded that a judicial review based on the reasonableness standard could not lead to a result that was favourable to him. He did not admit, however, that he was the individual in New Jersey. Nevertheless, despite Mr. Victor's continued denial, Justice Roy noted that the ID's findings with respect to his identity were reasonable (*Victor*, at paragraph 20). Although the circumstances in the case at hand are not identical to Mr. Victor's case, since the latter was not disputing the standard of proof applicable to issues of identity itself, the Court is of the opinion that the general observations of Roy J. are relevant and useful in this case.

[18] Therefore, in light of the case law cited, the Court is of the opinion that identity in the context of section 36 is a question of fact subject to the standard of proof set out in section 33, that is, to the "reasonable grounds to believe" standard.

[19] To conclude my analysis of the applicable standard of proof, the Court would like to point out that the idea of unravelling the many facts pertaining to an offence under section 36 in order to apply different standards of evidence seems quite illogical. In my view, had Parliament intended to impose such an exception, meaning a standard of proof specific to identity issues, it would have done so.

[20] With respect to the second issue, relating to the assessment of the evidence, the Court finds that the Member's conclusions are based on all the evidence on record, including the fingerprint reports, the applicant's testimony and the other evidence presented in section II of these Reasons (Background). In light of all the evidence, the findings concerning the applicant's credibility and the case law cited above, the Court disagrees with the applicant that the ID erred in finding that there are reasonable grounds to believe that the applicant and Predelus are the same person.

[21] In the case at hand, the ID applied the "reasonable grounds to believe" standard of proof to the question of identity. As mentioned above, the Member based his analysis on certain pieces of evidence, both oral and written, to conclude that the applicant had been convicted in Florida.

[22] Although counsel for the applicant argued before the Court, as well as before the ID, that the results from the fingerprint matching were unreliable, the Court is of the opinion that, in light of all the evidence on record, including the RCMP and CBSA reports, as well as the numerous implausibilities the Member identified, the panel's findings are reasonable.

B. *Did the Member err in failing to conduct a comparative review of the constituent elements of the offence committed in the United States to establish the equivalent offence in Canadian law?*

[23] To determine whether an offence committed abroad would constitute, if committed in Canada, an offence under an Act of Parliament, it must be established that the essential elements of both offences are equivalent. The Federal Court of Appeal set out the guidelines for this analysis in *Hill v. Canada (Minister of Employment and Immigration)*, [1987] FCJ No. 47 (QL) at paragraph 4 [*Hill*]:

> This Court in the *Brannson* case did not limit the determination of so-called "equivalency" of the paragraph of the Code, there in issue, to the essential ingredients of any offence specifically spelled out in the statute being compared therewith. Nor is it necessary in this case. It seems to me that because of the presence of the words "would constitute an offence ... in Canada", the equivalency can be determined in three ways: - first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences. Two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not. Third, by a combination of one and two.

[24] In *Brannson v. Canada (Minister of Employment and Immigration)*, [1981] 2 FC 141 (WL), to which *Hill* refers, the Federal Court of Appeal wrote the following at paragraph 8 of its Reasons:

> ... the necessity for the Adjudicator to determine whether the offence for which the applicant was convicted would constitute an offence if committed in Canada, requires, at least in circumstances where the scope of the offence is narrower in compass than that in the foreign jurisdiction, ascertainment of particulars of the offence for which the person concerned was convicted. It is neither possible nor desirable to lay down in general terms the requirements applicable in every case. Suffice it to say that the validity or the merits of the conviction is not an issue and the Adjudicator correctly refused to consider representations in regard thereto. However, she did have the obligation to ensure that the conviction in issue arose from acts which were encompassed by the provisions of section 19(2)(*a*).

[25] The panel's requirements for equivalency analysis established by the Federal Court of Appeal were not satisfied in this case. In this case, the Member expressed the finding in a single paragraph that the wording and constituent elements of U.S. offence 893.13 in the *Florida Statutes* were analogous to the offence of trafficking in substance provided in the *Controlled Drugs and Substances Act*, SC 1996, c 19, without explanation, description or reasonable comparison. The Member noted the following in that paragraph:

> [27] The wording of the American offence 893.13 of the Florida Statutes [exhibit C-8] and the Canadian offence is similar and the key elements are very similar. The equivalence of the two offences has been established.

[26] Exhibit C-8 is a copy of Chapter 893 of the 2015 *Florida Statutes*.

[27] I note that a 1997 version of said legislation is found in exhibit C-11 of the certified tribunal record. However, the Member did not refer to that version. Moreover, it is unclear whether the 1997 version was the one in force when the individual named Predelus committed the offences in 1989. It is also clear from the case law that the ID did not conduct a reasonable assessment of how the equivalence of the two offences would be established.

[28] At paragraph 31 of *Nshogoza v. Canada (Citizenship and Immigration)*, 2015 FC 1211 [*Nshogoza*], Justice Gascon wrote that, while the analysis of equivalency may be brief, the constituent elements of the foreign and Canadian offences must at least be described and the references to the applicable provisions must be specific.

[29] Similarly, Justice Heneghan held that, without evidence in the record and without reasons explaining the administrative decision-maker's conclusions on equivalency, the criteria of transparency and intelligibility cannot be met (*Kathirgamathamby v. Canada (Citizenship and Immigration)*, 2013 FC 811, at paragraph 24 [*Kathirgamathamby*]).

[30] Moreover, as Justice McVeigh clearly explains in *Moscicki v. Canada (Citizenship and Immigration)*, 2015 FC 740, at paragraph 28:

> The key point is that it is not necessary for the Board to determine whether there was sufficient evidence for an *actual conviction in Canada*. It is whether there are *reasonable grounds to believe* that the Applicant would be convicted if the same act were committed in Canada. Consequently, the equivalence is between the provisions and not the comparability of possible convictions. Furthermore, the equivalence analysis allows for different statutory wording (*Brannson*, above).

[31] At paragraph 27 of his reasons reproduced above, the Member found that the main constituent elements were very similar. He therefore concluded that equivalency had seemingly been established by applying the first test in *Hill*. That conclusion is unreasonable for two reasons. First, the Member cited the 2015 legislation without analyzing that which was in force at the time of the criminal conviction in Florida. Second, the member was required to explain how the main constituent elements were similar.

[32] A mere reference to the relevant provisions, followed by a brief statement of their equivalency, is not a reasonable analysis. To support this finding, the Court reiterates the remarks of Gascon J., who, at paragraph 28 of *Nshogoza*, clearly summarizes the state of the law in this area:

> The Court must further look at the similarity of definition of the two offences being compared and the criteria involved for establishing the offences (*Li v. Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1060 (FCA) [*Li*] at para 18). As explained by Mr. Justice Strayer, “[a] comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences” (*Li* at para 19). In *Brannson*.. ., the Federal Court of Appeal further stated that the essential elements of the relevant offences must be compared, no matter what are the names given to the offences or the words used in defining them.

[33] The fact that the Member was so succinct in this part of his Reasons may be related to the lack of attention to the matter of equivalency demonstrated by counsel for the applicant before the ID. In fact, the Member stated the following at paragraph 16 of his Reasons:

> In conclusion to his oral arguments, Mr. Kasenda Kabemba did not accept the equivalence between the American and Canadian offence, without explaining why. He considers that he does not

> need to elaborate on this topic because his client and Predelus are two different individuals.

[34] Despite the fact that counsel for the applicant barely addressed the matter of equivalency before the ID, it was still required to provide transparent and justifiable reasons (*Kathirgamathamby*, at paragraph 24). The Court finds that the ID erred in this regard and that this error is determinative.

IV. Conclusions

[35] The application is allowed. The case will be referred back to the ID for reassessment of the matter of equivalency, which must satisfy the requirements established by the case law.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, and the case will be referred back to the ID for reassessment of the equivalency issue;

2. No questions for certification were proposed by the parties, and none arise from this application;

3. No costs are awarded.

"Alan S. Diner"
Judge

Certified true translation
This 29th day of November 2019

Lionbridge

APPENDIX

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 occur.	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.
Serious criminality	**Grande criminalité**
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.
Criminality	**Criminalité**
(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	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à

offences under any Act of Parliament not arising out of a single occurrence;	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;	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) 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	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) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.	d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

FEDERAL COURT

SOLICITORS OF RECORD

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