Federal Court  Cour fédérale

Date: 20180124

Docket: IMM-3016-17

Citation: 2018 FC 68

Ottawa, Ontario, January 24, 2018

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

INDERJIT SINGH TOOR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Inderjit Singh Toor, challenges a decision of the Immigration Division of the Immigration and Refugee Board [Board] declaring him inadmissible to Canada under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act* [*IRPA*]. That provision applies where a person is either found to be a member of a criminal organization or has engaged in serious organized criminal activity carried out by a number of persons acting in concert. It

was under the second part of this provision that Mr. Toor was found to be inadmissible and thereby subject to deportation.

[2] Mr. Toor either admitted or did not dispute most of the basic underlying facts relevant to the inadmissibility finding. It is common ground, for instance, that Mr. Toor is not a Canadian citizen and had been convicted in the United States for transporting a large quantity of cocaine for which he received a custodial sentence of five (5) years.

[3] What is in issue in this proceeding is the reasonableness of the Board's finding that Mr. Toor's proven conduct fell within the ambit of paragraph 37(1)(a) of the *IRPA*. In particular, he contends that no decision-maker acting reasonably could have concluded that the evidence supported a finding that he had engaged in activity that was part of a pattern of criminal activity planned and organized by a number of persons acting in concert in the commission of a designated offence. This argument is further broken down into three specific points:

(1) The Board failed to identify the criminal organization by name, size or recognized collective characteristics (e.g. leadership, hierarchy, or structure). Instead, the Board drew unreasonable inferences of a pattern of organized activity from evidence that could not be relied upon for that purpose;

(2) The Board erred by failing to reduce the organization to its smallest component and was thereby unable to reasonably determine if a pattern of criminal activity sufficient to satisfy paragraph 37(1)(a) was present; and

(3) The Board erred by failing to consider that Mr. Toor and the other 19 involved parties were not prosecuted in California under available organized crime provisions. According to Mr. Toor, this evidence was relevant to the application of paragraph 37(1)(a) to his situation but the Board made no mention of it.

[4] Because the issues raised by the Applicant involve the sufficiency of evidence, the applicable standard of review is reasonableness: see *Thanaratnam v Canada*, 2005 FCA 122 at paras 26-27, [2006] 1 FCR 474 (FCA) [*Thanaratnam FCA*].

[5] Before considering the Applicant's arguments, it is important to understand the basis for the Board's finding that the conditions of paragraph 37(1)(a) were satisfied. In coming to the conclusion that Mr. Toor was engaged in organized criminal activity, the Board relied upon the following matters:

(a) Mr. Toor was identified in the course of a coordinated, large-scale, and on-going police investigation of a number of individuals who were believed to be involved with the distribution of significant quantities of cocaine in the State of California;

(b) The police investigation involved physical surveillance and wiretaps of several suspects who appeared to be working collaboratively. Ten separate incidents between January and October 2008 were documented where cocaine was moved from person to person in a recurring pattern, usually between vehicles at a truck stop or shopping centre parking lot;

(c) Various members of the suspect group used coded language to communicate their plans (e.g. 38 hoses for 38 kilos);

(d) Various members of the suspect group had defined, albeit interchangeable, roles and communicated among themselves to set up drug deliveries;

(e) The wiretaps indicated that certain persons were more prominent or active than others. One person was involved in four of the ten identified transactions. Three others were involved in more than one transaction, including one of the two people who interacted with Mr. Toor. Those who were convicted (apart from Mr. Toor) were found guilty of criminal conspiracy. In total, 20 persons were charged; and

(f) The criminal activity appeared to originate in the areas of Pomona and Riverside and the police surveillance was focussed on two addresses in those cities.

This evidence was the basis for the Board's conclusion that the observed conduct represented a series of premeditated organized transactions involving several people with one common criminal goal and Mr. Toor was a party to that activity. Although the Board found the group to be "loosely structured", it was nevertheless a "criminal organization working together" to transport large quantities of cocaine through the State of California.

[6] The standard of proof required for a finding of inadmissibility under paragraph 37(1)(a) of the *IRPA* is that of "reasonable grounds to believe". It is an onus requiring evidence beyond a mere suspicion but less than a balance of probabilities: see *Mugesera v Canada*, 2005 SCC 40 at

para 114, [2005] 2 SCR 100. Such a finding need not be supported by evidence of an actual criminal conviction: see *Sittampalam v Canada*, 2006 FCA 326 at para 37, [2006] FCJ No 1512 [*Sittampalam*].

[7] Mr. Toor relies on the list of indicia of criminal organizations provided by Justice James O'Reilly in *Thanaratnam v Canada*, 2004 FC 349 at para 31, [2004] 3 FCR 301 [*Thanaratnam FC*] including identity, leadership, hierarchy, and structure. These characteristics, he says, are largely absent from the evidentiary record before the Board. Indeed, he contends that there was a compelling absence of evidence of an organizational structure to the group of persons arrested, charged, and convicted along with him. At most, there was evidence of an amorphous group of persons acting from time to time in relative proximity to one another but without proof of mutual coordination or planning.

[8] One weakness to Mr. Toor's argument is that the *Thanaratnam FC* case, above, involved criminal gang activities. A criminal gang is usually a cohesive and structured group that will often have features like a clear identity, a defined territory, leadership, hierarchy, membership criteria, and other structural elements.

[9] It is very clear, however, that persons who act together in the furtherance of ongoing criminal purposes can run afoul of paragraph 37(1)(a) of the *IRPA* whether or not the group amounts to a criminal gang. In *Sittampalam*, above, the Federal Court of Appeal recognized that the organizational characteristics identified by Justice O'Reilly in *Thanaratnam FC*, above, while helpful to an inadmissibility determination, are not individually decisive. That something

less definitive could still support an inadmissibility finding is made clear from the following passage at paragraph 39:

> [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).

What is also clear from this decision is that the Board is entitled to considerable judicial deference when it assesses the evidence bearing on the characteristics sufficient to satisfy a finding of paragraph 37(1)(a) inadmissibility.

[10] In *Aghevli v Canada*, 2017 FC 568, I had occasion to consider a very similar finding by the Board. In that case, Mr. Aghevli was a part-time street vendor of narcotics operating within a larger group of suppliers and sellers. The evidence was insufficient to identify or define the group with precision, but the Board was still satisfied that Mr. Aghevli was engaged in an ongoing criminal enterprise sufficient to support a finding of inadmissibility. In commenting on the degree of deference that the Board is owed on judicial review, I said the following:

> [9] The Board is, of course, entitled to considerable deference in the area of fact finding. It is also entitled some latitude in the interpretation of the *IRPA*. A helpful discussion about the applicable standard of review can be found in the following

passage from *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR. 708 [*Newfoundland Nurses*]:

> [11] It is worth repeating the key passages in *Dunsmuir* that frame this analysis:
>
> > Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
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> > . . . What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for

> the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" . . . . We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" . . . . [Emphasis added; citations omitted; paras. 47-48.]

[12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.
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> (David Dyzenhaus, "*The Politics of Deference: Judicial Review and Democracy*", in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)

> See also David Mullan, "*Dunsmuir v. New Brunswick, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!*" (2008), 21 C.J.A.L.P. 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2009), at p. 380; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63.

> [10] The Board's interpretation in this case of what constitutes a criminal organization is accordingly deserving of judicial respect. It does not seem unreasonable to me that the analogy used in *Saif*, above, was not applied by the Board to the relationships that existed in this case. Although there may well be varying degrees of organizational structure, leadership, and hierarchy in the distribution of drugs, everyone involved is presumably working in furtherance of a common goal – that is, to get the product into the hands of the users. Although Mr. Kara may have enjoyed a degree of independence from his own supplier or suppliers, the activity still required some planning within a network of participants acting together in the furtherance of the commission of an offence. The Board, by implication, found it sufficient that Mr. Kara had to have had an ongoing business relationship with a wholesale supplier and Mr. Aghevli must have known about it. I also do not accept that it was unreasonable for the Board to find a criminal organization in the face of Sgt. Koberly's testimony. Although Sgt. Koberly did speak to a level of independence commonly existing within narcotics distribution networks, he did not say that ongoing supply relationships did not exist among the participants.

[11] I accept that a different decision could have been made on the available evidence in this case but that is not the basis for obtaining relief on judicial review. The question is whether there was sufficient evidence to support the challenged decision on the basis of its justification, transparency, and intelligibility. As noted above in *Newfoundland Nurses*, a decision-maker enjoys a margin of appreciation within the range of acceptable and rational solutions. I would add that when the onus is that of "reasonable belief", the range of acceptable outcomes will typically be larger because the amount of evidence required to draw an inference will often be

less. Notwithstanding Ms. Acton's forceful and capable submissions, I am not satisfied that the decision on review is unreasonable. There was a sufficient evidentiary record before the Board to support a reasonable belief that Mr. Toor was actively engaged with a criminal organization as that term is understood and applied under paragraph 37(1)(a) of the *IRPA*.

[12] Mr. Toor argues that the Board erred by failing to reduce the organization in question to its smallest operational component. It was only then that an analysis of its structure and pattern of behaviour could be properly assessed. Tied to this is the argument that the Board had an obligation to precisely determine the size of the group. Support for this argument is said to be found in the decision of Madam Justice Tremblay-Lamer in *Amaya v Canada*, 2007 FC 549 at para 20 where she said: "The scope of organization as defined must be narrowed to the smallest component where the organizations are factionalized".

[13] I do not interpret the above statement as broadly as Mr. Toor. All that Justice Tremblay-Lamer was saying was that the existence of a common name across a range of operationally independent groups or cliques was, on its own, insufficient to permit an assessment of the organizational characteristics of the larger entity. It is the operational structure of each factional group that must be considered.

[14] In Mr. Toor's case, the evidence indicated that a number of the participants—including one of those in contact with him—were involved in the commission of several of the identified incidents of trafficking. This was sufficient to support the Board's belief that there was a cohesive and repetitive pattern of common behaviour behind the conspiracy to traffic among

those involved. I also do not accept that there is a requirement to establish with precision the size of the organization or all of the points of intersection among the participants. Such a burden would be impossible to meet.

[15] The suggestion that the Board erred by failing to consider the evidence that none of the criminal charges laid against those involved (including Mr. Toor) included an allegation of organized criminality is similarly without merit. While it is true that the Board did not address that evidence, in my view, it had no obligation to do so. The exercise of a prosecutorial discretion to bring criminal charges in a foreign jurisdiction has no possible relevance to the characterization of that conduct for the purposes of determining admissibility under paragraph 37(1)(a). It is the nature of the conduct that is relevant for Canadian immigration purposes, not the basis of how it was treated or prosecuted in the foreign jurisdiction. Indeed, even in a situation where no prosecution was undertaken, an inadmissibility finding can still be made in Canada.

[16] For the foregoing reasons, this application is dismissed.

[17] No question of for certification was proposed by the parties and no question will be certified.

JUDGMENT in IMM-3016-17

THIS COURT'S JUDGMENT is that the judicial review application is dismissed;

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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