Federal Court  Cour fédérale

Date: 20190430

Docket: IMM-1222-18

Citation: 2019 FC 540

Ottawa, Ontario, April 30, 2019

PRESENT: The Honourable Mr. Justice Norris

BETWEEN:

AZLLAN PAJAZITAJ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] On the evening of January 26, 2012, two members of the RCMP's Integrated Border Enforcement Team were parked in the area of Boulevard Notre-Dame Est in Stanstead, Quebec. Earlier the officers had received information from U.S. Customs and Border Protection that there may be an attempt to smuggle people into the United States in the area of Stanstead that evening. Police set up surveillance in the area of Boulevard Notre-Dame Est, a dead-end street very close

to the Canada/U.S. border that was known for people smuggling. U.S. Customs and Border Protection agents also established surveillance in the area on their side of the border.

[2] The RCMP officers observed a black Dodge Caravan with out-of-province licence plates driving east on Boulevard Notre-Dame Est. They drove down Boulevard Notre-Dame Est and observed the vehicle completing a U-turn at the dead end of the street. Suspecting that someone may have been dropped off by the vehicle, the RCMP notified U.S. Customs and Border Protection to be on the lookout for illegal immigrants in the vicinity.

[3] The officers followed the vehicle to a nearby Petro-Canada gas station, where the driver purchased gas. Based on the information they had received and their judgment that the vehicle had been driving suspiciously in an area known as a smuggling route, the officers decided to stop the vehicle as it left the gas station. The applicant was the only person in the vehicle. Questioned about what he was doing in Stanstead and why he had been driving around the town suspiciously, the applicant told the officers that he had rented the vehicle in Kitchener, Ontario, earlier that day. He had planned to stay overnight at a hotel in Stanstead but had changed his mind and was heading for Montreal when he was stopped. The officers determined that they had grounds to arrest the applicant for conspiring to smuggle people into the United States. When they searched the applicant, the officers found an envelope containing $9,900 CAD in $100 bills in his left side breast jacket pocket. The applicant admitted later that it originally contained $10,000 but he had spent some money on gas and other items.

[4] The applicant was charged with conspiracy to commit an offence contrary to section 465(3) of the *Criminal Code*, RSC, 1985, c C-46. Eventually, on June 8, 2016, this charge was stayed by the Crown under section 579 of the *Criminal Code.* However, on that same date the applicant consented to the forfeiture of the cash seized from him on January 26, 2012, as proceeds of crime.

[5] On September 7, 2016, an Inland Enforcement Officer with the Canada Border Services Agency [CBSA] issued a report under section 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] stating the officer's opinion that the applicant is inadmissible to Canada under section 37(1)(b) of the *IRPA* on grounds of organized criminality for engaging, in the context of transnational crime, in people smuggling. The officer's opinion was based on information gathered with respect to events that had occurred on and leading up to January 26, 2012.

[6] The report was referred to the Immigration Division [ID] for a hearing. The applicant contested the allegation of inadmissibility, denying that he was knowingly involved in people smuggling on or about January 26, 2012. The hearing concluded on February 28, 2018. For reasons delivered on that date, the ID member determined that the applicant is inadmissible on grounds of organized criminality under section 37(1)(b) of the *IRPA*.

[7] The applicant now applies for judicial review of this decision under section 72(1) of the *IRPA*. He contends that the ID member unreasonably rejected his innocent explanation for his involvement in the events on January 26, 2012, and, in any event, the member erred in

determining that the Minister had established the constituent elements of people smuggling as a form of organized criminality under section 37(1)(b) of the *IRPA*.

[8] For the reasons that follow, this application will be dismissed.

II. BACKGROUND

A. *The Applicant's Personal Background*

[9] The applicant was born in Kosovo in January 1973. He is of Albanian descent. On December 14, 1996, he entered the United States on a fraudulent Italian travel document. After being arrested by the U.S. Immigration and Naturalization Service, the applicant made a refugee claim. He was granted refugee status in the United States on April 1, 1997. Shortly afterwards, he returned to Kosovo. He remained there for four years. In March 2001, the applicant's common law wife and their child entered the United States. The applicant followed a few months later. The applicant attempted to sponsor his family for status in the United States but he was unsuccessful. He and his family remained there without status.

[10] On April 23, 2008, the applicant pled guilty in Connecticut to possession of marijuana with intent to sell. He received a three-year suspended sentence, two years' probation, and a fine of $10,000. The applicant was directed to report to immigration officials in New York. Fearing deportation, the applicant arranged for himself and his family to be smuggled into Canada. They entered Canada on May 25, 2008, at the Windsor land border in the back of a tractor trailer. The applicant and his family subsequently made inland refugee claims in Kitchener in July 2008.

B. *The Alleged People Smuggling Operation*

[11] Shortly after 8:00 p.m. on January 26, 2012, U.S. Customs and Border Protection agents apprehended seven people in a field just over the Canada/U.S. border from Boulevard Notre-Dame Est in Stanstead. Four were nationals of Columbia, one of Mexico, one of the United States and one of Kosovo. The Columbian nationals were Wilson Arredondo Rengifo, his wife Ayda Rosa Toro Grajales, and their adult children Juan Arredondo Toro and Maria Camil Arredondo Toro. The Mexican national, Israel Manzo-Barrera, was the husband of Maria Camil Arredondo Torro. The U.S. national was their young child. The Kosovar national was Ismajl Mustafaj.

[12] Israel Manzo-Barrera provided a videotaped statement to RCMP officers on January 30, 2012. The statement was taken under oath after Mr. Manzo-Barrera was cautioned about the criminal consequences of providing false information to the police. In the statement, Mr. Manzo-Barrera described how he and the others came to be in that field that night.

[13] Mr. Manzo-Barrera and his family were living in Canada but they did not have status and they were concerned that they would be required to leave. In December 2011, they began trying to find someone who could help them enter the United States illegally. Mr. Manzo-Barrera was introduced to someone known to him as "Amigo" by a work colleague of his father-in-law's in Kitchener. (Amigo has been identified as Bisart Zekaj, a national of Kosovo who, like the applicant, is of Albanian descent.) Mr. Manzo-Barrera met Amigo twice prior to January 26, 2012. Amigo agreed to facilitate the smuggling of Mr. Manzo-Barrera and the other

five members of his extended family into the United States for $15,000 CAD. Of this, $5000 CAD was paid in advance as a deposit.

[14] Mr. Manzo-Barrera and his family were picked up at the Kitchener Holiday Inn at about 11:15 a.m. on January 26, 2012, by a black Dodge Caravan. Three men were already in the vehicle: the applicant was the driver; Amigo was sitting in the front passenger seat; the third man (later identified as Mr. Mustafaj) was sitting in the first row of the rear passenger seats. Mr. Manzo-Barrera was told that the third man was also going to be crossing the border with them. The group drove straight from Kitchener to Stanstead, stopping along the way for food and health breaks at a McDonald's and at a Tim Hortons not far from where they crossed the border. Mr. Manzo-Barrera's father-in-law had $10,000 CAD in $100 bills in a brown envelope to complete payment. While they were stopped at the Tim Hortons, Mr. Manzo-Barrera saw his father-in-law hand the envelope with the money towards the front seats of the vehicle. He did not see whether it was Amigo or the applicant who took the envelope.

[15] Surveillance video showed the black Dodge Caravan drive east along Boulevard Notre-Dame Est shortly before 7:30 p.m. and then return driving west. Mr. Manzo-Barrera stated that when the group reached the area of the border crossing, everyone but the applicant got out of the vehicle. They were directed to walk through the woods. Amigo led the way. He was speaking on his cell phone with someone who Mr. Manzo-Barrera believed was the person who would be picking them up on the U.S. side of the border. As they were walking, the others had difficulty keeping up with Amigo and eventually lost sight of him. Shortly afterwards, the group was apprehended by U.S. Customs and Border Protection agents. They never saw Amigo again.

[16] There was compelling evidence connecting the group to the vehicle the applicant was driving when he was stopped by police in Stanstead that evening. For example, Mr. Manzo-Barrera described the vehicle he and the others travelled in as a rented black Dodge Caravan with licence plate BLTA 194 or BLTA 19A. The applicant was driving a rented black Dodge Caravan with licence plate BLTA 145. Mr. Manzo-Barrera told investigators he had left his Sony laptop, among other things, in the vehicle and gave them the password for it. This laptop and the other items were found in the vehicle the applicant was driving. Mr. Mustafaj's driver's licence and a Citizenship and Immigration Canada document in his name were found in the glove compartment. The applicant ultimately did not contest that he was the driver of the vehicle that had brought the group from Kitchener to the border crossing at Stanstead.

[17] Mr. Mustafaj was also interviewed by authorities after his apprehension. He said he had entered Canada about a year earlier. He said he had paid $1000 CAD to be smuggled into the United States so he could see his cousin in New York. He did not say when or where this payment was made. He said he had been picked up by a van – possibly a Dodge – in Kitchener. He did not know the colour of the van. Two men were in it when he was picked up. He said he could not describe either of them.

III. DECISION UNDER REVIEW

[18] The ID member instructed herself in accordance with section 33 of the *IRPA* and the decision of the Supreme Court of Canada in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 [*Mugesera*] (as will be discussed further below). Further, citing the decision of the Supreme Court of Canada in *B010 v Canada (Citizenship and Immigration)*, 2015

SCC 58 [*B010*], the member instructed herself that the Minister must establish three "aspects" of inadmissibility for people smuggling under section 37(1)(b) of the *IRPA*: (1) procuring the illegal entry of people into a country; (2) in order to obtain, directly or indirectly, a financial or other material benefit; and (3) that this occurred in the context of transnational organized crime. With respect to the last aspect, the member instructed herself that section 37(1)(b) of the *IRPA* should be interpreted in light of the definition of "criminal organization" in section 467.1 of the *Criminal Code*. As a result, the member determined that "organized criminality" under section 37(1)(b) required, among other things, that there be a group composed of three or more persons (however organized), that it have as one of its main purposes or activities the commission of one or more serious offences (as described), and that it not have been formed randomly for the immediate commission of a single offence.

[19] An extensive amount of evidence was tendered before the ID member by the Minister including RCMP reports, recordings and transcripts of RCMP interviews, U.S. Customs and Border Protection reports, surveillance videos, the rental contract for the black Dodge Caravan, and the transcript of the applicant's preliminary inquiry on the conspiracy charge. As well, the applicant himself testified at the admissibility hearing.

[20] Based on the evidence she found credible, the ID member made the following key findings:

- There were reasonable grounds to believe the applicant was involved in procuring illegal entry into the United States by seven persons on January 26, 2012.

- There were reasonable grounds to believe the applicant obtained a financial benefit from so doing in the form of the $10,000 CAD payment made on January 26, 2012.

- There were reasonable grounds to believe that this occurred in the context of transnational organized crime. In particular, the applicant had engaged in this activity with at least three others – Amigo, Mr. Mustafaj and the unidentified individual who was to pick up the individuals on the U.S. side of the border. There was a considerable amount of time, energy, planning and coordination involved in the venture. The group had not formed randomly for the immediate commission of a single offence. In the member's view, the applicant was in fact the ringleader of the group.

[21] As noted, the applicant testified at the admissibility hearing. His position was that on January 25, 2012, Amigo had asked him to rent a vehicle and to drive a group of people to Montreal. He would be paid $300 plus expenses for doing so. The applicant agreed. He rented the vehicle the next day and picked the others up in Kitchener. As they neared Montreal, Amigo directed the applicant to drive to Stanstead. The applicant testified that he had no idea that the purpose of the trip was to smuggle the other individuals into the United States until everyone else suddenly got out of the vehicle on Boulevard Notre-Dame Est and he realized how close they were to the Canada/U.S. border. The money he had when he was arrested actually belonged to Amigo, which the latter had left behind in the vehicle. The applicant testified that, since the events in January 2012, Amigo had contacted him or his family members several times demanding to be repaid and threatening the applicant if he was not.

[22] The ID member rejected the applicant's exculpatory evidence in its entirety.

[23] On the basis of these findings, the ID member concluded that there were reasonable grounds to believe that the applicant is inadmissible for people smuggling under section 37(1)(b) of the *IRPA*. Accordingly, she issued a deportation order against the applicant under section 45(d) of the *IRPA* and section 229(1)(e) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

IV. STANDARD OF REVIEW

[24] The Supreme Court of Canada has held that a court deciding an application for judicial review must engage in a two-step process to identify the proper standard of review (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 62 [*Dunsmuir*]). First, "it must consider whether the level of deference to be accorded with regard to the type of question raised on the application has been established satisfactorily in the jurisprudence." It is necessary to turn to the second stage only if "the first is unfruitful or if the relevant precedents appear to be inconsistent with recent developments in the common law principles of judicial review. At this second stage, the court performs a full analysis in order to determine what the applicable standard is" (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48).

[25] In my view, the standard of review has been established satisfactorily in the jurisprudence and it is that of reasonableness. In *B010*, the Supreme Court of Canada only dealt with the standard of review applicable to the ID's interpretation of section 37(1)(d) of the *IRPA* but even then it left the question open. It did not find it necessary to address at all the standard of review for the ID's application of section 37(1)(b) to a particular set of circumstances (see paras 22-26 of the judgment). However, in the decision below (reversed on other grounds), the Federal Court

of Appeal had held that in this context findings of mixed fact and law could be set aside on judicial review only if they were unreasonable (*B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 at para 52). See also *Appulonappar v Canada (Citizenship and Immigration)*, 2016 FC 914 at para 21. This is consistent with the standard applied to findings of inadmissibility for organized criminality under section 37(1)(a) of the *IRPA* (*Uthman v Canada (Citizenship and Immigration)*, 2018 FC 583 at para 36; *Toor v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 68 at paras 10-11; *Demaria v Canada (Citizenship and Immigration)*, 2019 FC 489 at para 35 [*Demaria*]). Further, the parties agree that the ID member's application of section 37(1)(b) to the particular circumstances of this case is reviewed on a reasonableness standard.

[26] Reasonableness review "is concerned with the reasonableness of the substantive outcome of the decision, and with the process of articulating that outcome" (*Canada (Attorney General) v Igloo Vikski Inc*, 2016 SCC 38 at para 18). The reviewing court examines the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determines "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). These criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16). The reviewing court should intervene only if these criteria are not met. It is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a

preferable outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61).

[27] As discussed below, an issue of statutory interpretation could have arisen in this matter but, in the end, it does not. As a result, it is not necessary for me to address what standard of review would apply to the ID member's interpretation of section 37(1)(b) of the *IRPA*.

V. ISSUE

[28] The applicant raises a number of discrete issues with respect to the ID member's decision but the ultimate issue is whether the decision is unreasonable.

VI. ANALYSIS

A. *The Elements of Inadmissibility under IRPA section 37(1)(b)*

[29] Section 37(1)(b) of the *IRPA* provides that a permanent resident or foreign national is inadmissible on grounds of organized criminality for "engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime."

[30] The meaning of "organized criminality" is not defined in section 37(1)(b) of the *IRPA* but, as the Supreme Court of Canada held in *B010* (at para 37), both paragraphs (a) and (b) of section 37(1) address instances of "organized criminality" and they are to be read together. Under section 37(1)(a), one is inadmissible on grounds of organized criminality for "being a

member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned or organized by a number of persons acting in concert in furtherance of" the commission of one of a number of types of offences that are then listed. Section 37(1)(b) deals specifically with organized criminality in the form of people smuggling and related activities. As the Court explains in *B010* (at para 45), this subsection was enacted pursuant to Canada's obligations under the *United Nations Convention against Transnational Organized Crime*, 2225 UNTS 209 (generally known as the "*Palermo Convention*") and the related *Protocol against the Smuggling of Migrants by Land, Sea and Air*, 2241 UNTS 480. Further, the Court found that the apparent similarity between the *IRPA* concept of "organized criminality" and the *Criminal Code* concept of "criminal organization" (as defined in section 467.1) "is no coincidence. Both provisions were enacted to give effect to the same international regime for the suppression of transnational crimes such as people smuggling. Section 37(1)(b) should be interpreted harmoniously with the *Criminal Code*'s definition of "criminal organization" as involving a material, including financial, benefit" (at para 46).

[31] The Supreme Court of Canada also held in *B010* that, informed by the *Palermo Convention*, the phrase "in the context of transnational crime" under section 37(1)(b) "captures the acts of (1) participating in the group's actual criminal activities with knowledge the group has a criminal aim […]; (2) participating in non-criminal acts of the group, with knowledge that the acts will further the group's criminal aim […]; or (3) organizing, abetting or counselling a serious crime involving the organized criminal group […]" (at para 65).

[32] In *B010*, the Supreme Court of Canada did not discuss the characteristics of an "organized criminal group" for purposes of an inadmissibility finding under section 37(1) of the *IRPA*. The leading case in this respect continues to be the decision of the Federal Court of Appeal in *Sittampalam v Canada (Citizenship and Immigration)*, 2006 FCA 326, which involved section 37(1)(a) of the *IRPA*. The Court held there (at para 39):

> These criminal organizations do not usually have formal structures like corporations or associations that have charters, by-laws or constitutions. They are usually rather loosely and informally structured, which structures vary dramatically [*sic*]. Looseness and informality in the structure of a group should not thwart the purpose of the 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.

As a result, the ID enjoys "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)" (*ibid.*).

[33] This is also consistent with the definition of "criminal organization" in section 467.1 of the *Criminal Code*, which speaks of a group (of three or more persons) "however organized." In *R v Venneri*, 2012 SCC 33 [*Venneri*], the Supreme Court of Canada held that a flexible approach to the meaning of this term favours the objectives of the legislation (at para 29). Still, as Justice Fish noted for the Court, "by insisting that criminal groups be 'organized,' Parliament has made plain that some form of structure and degree of continuity are required to engage the organized crime provisions that are part of the exceptional regime it has established under the *Code*" (*ibid.*). As Justice O'Reilly had held earlier in *Thanaratnam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 349 at para 30, the words "however organized" suggest

that the group "must be organized in some fashion, but there are no minimum or mandatory attributes that the group must have." Nevertheless, disregarding the requirement of organization "would cast a net broader than that intended by Parliament" (*Venneri* at para 31).

[34] A question has arisen as to whether it is necessary for the group in question to have three or more members (as required by the definition of "criminal organization" in section 467.1 of the *Criminal Code*) to constitute "organized criminality" for purposes of section 37(1)(b) of the *IRPA*. The applicant contends that this minimum level of membership applies and submits that the evidence does not reasonably support a finding that it is met here. The respondent contends that the ID member's findings about the membership of the group are reasonably supported by the evidence but argues, in the alternative, that as few as two members would suffice in any event and the evidence reasonably supports such a finding here.

[35] While I am strongly inclined to agree with the view of Justice Barnes in *Saif v Canada (Citizenship and Immigration)*, 2016 FC 437, that this question was answered definitively in the affirmative by the Supreme Court of Canada in *B010*, it is not necessary for me to take a final position. This is because, as I explain below, while I have found that it was unreasonable for the ID member to conclude that Mr. Mustafaj was a member of the group that arranged the people smuggling operation, it was reasonable for her to conclude that there were at least three individuals who were involved – the applicant, Amigo, and the unidentified person who was to pick the group up on the U.S. side of the border. Thus, the minimum membership of a criminal organization under section 467.1 of the *Criminal Code* is still met despite the erroneous finding with respect to Mr. Mustafaj. There is, therefore, no need to decide whether a smaller number of

members would have sufficed. (For the sake of completeness, I note that there has never been any suggestion that the family of six were members of the group for the purpose of establishing organized criminality, even though they were party to the arrangements for them to be smuggled into the United States.)

[36] There is otherwise no issue between the parties that the member set out the elements of inadmissibility for organized criminality in relation to people smuggling correctly in light of *B010*.

B. *The Standard of Proof with respect to Inadmissibility*

[37] Section 33 of the *IRPA* establishes the Rules of Interpretation that govern, *inter alia*, ss 37(1)(a) and (b). It states as follows:

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.

[38] The onus is upon the Minister to establish "reasonable grounds to believe." As noted above, the ID member instructed herself regarding this standard of proof in accordance with the decision of the Supreme Court of Canada in *Mugesera* – namely, that the "reasonable grounds to believe" standard "requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities [citations omitted]." "In

essence," the Supreme Court continued, "reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information" (at para 114). No issue can be taken with the member's understanding of the standard of proof, which tracks the language of *Mugesera* exactly.

[39] In making its determination, the ID is not bound by any legal or technical rules of evidence and can base its conclusions upon what it considers credible or trustworthy. Sections 173(c) and (d) of the *IRPA* provide as follows:

173 The Immigration Division, in any proceeding before it,	173 Dans toute affaire dont elle est saisie, la Section de l'immigration :
…	…
(c) is not bound by any legal or technical rules of evidence; and	c) n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(d) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.	d) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

[40] Nevertheless, as Justice Russell noted recently, this latitude in evidentiary matters "does not mean that the ID has complete discretion over what will support inadmissibility. There must be 'facts' and these facts must give rise to more than a 'mere suspicion'" (*Demaria* at para 66). Section 173 of the *IRPA* broadens the range of admissible evidence beyond what would ordinarily be admissible in a court proceeding. However, it does not lower the standard of proof with respect to either the ultimate issue or the "facts that constitute inadmissibility." There must

be “compelling and credible information” that provides an objective basis for the belief. See also *Ariyarathnam v Canada (Citizenship and Immigration)*, 2018 FC 162 at para 70; *Chiau v Canada (Minister of Citizenship & Immigration)*, [2001] 2 FC 297 at para 60; and *Canada (Citizenship and Immigration) v Tran*, 2016 FC 760 at para 21.

C. *The Finding of Inadmissibility*

[41] The applicant does not dispute that there was a plan to smuggle the family of six and Mr. Mustafaj from Canada into the United States on January 26, 2012, or that he drove the family, Mr. Mustafaj and Amigo from Kitchener to the place where they crossed the border. He contends, however, that the ID member’s conclusion that he was a knowing participant in that scheme – indeed, that he was the “ringleader” of the group that planned it and carried it out – is unreasonable. According to the applicant, at most the evidence supports the conclusion that the plan was Amigo’s alone. The applicant was nothing more than an unwitting participant in Amigo’s scheme and it was unreasonable for the member to conclude otherwise.

[42] For the reasons that follow, I disagree.

(1) Is the ID member’s determination that the applicant was a knowing participant in the people smuggling plan unreasonable?

[43] As set out above, the applicant maintained that he knew nothing about the people smuggling plan until the very last minute and that he did not knowingly do anything to facilitate it. The ID member rejected the applicant’s exculpatory account. In my view, it was not unreasonable for her to do so. As the member found, it is implausible that the applicant would

simply agree, no questions asked, to rent a vehicle and drive a group of people from Kitchener to Montreal for $300 plus expenses. There is credible evidence that the applicant received a substantial part of the proceeds of the illegal undertaking (I discuss this issue further below). The applicant lied to the authorities repeatedly about what he was doing in Stanstead on January 26, 2012, consistently distancing himself from any suggestion that there had been others with him in the vehicle that day. As late as his interview with a CBSA Enforcement Officer in August 2016, the applicant was maintaining that he had driven from Kitchener to Quebec alone and that he had gotten lost and ended up in Stanstead. He denied knowing anything about the individuals who were apprehended in the United States.

[44] The member preferred the evidence of Mr. Manzo-Barrera in particular to that of the applicant when it came to understanding the applicant's actions on January 26, 2012, and his role in the undertaking. It is not unreasonable for her to have done so, even though Mr. Manzo-Barrera did not testify at the admissibility hearing while the applicant did. The member found that, in "stark contrast" to the applicant and Mr. Mustafaj, Mr. Manzo-Barrera and other members of the family of six "provided detailed specific information and assisted authorities as best they could." This finding is well-supported by the record before the member and reasonably supports the member's determination that their evidence deserved "significant weight."

[45] While there was no direct evidence of the applicant's involvement in the scheme prior to January 26, 2012, the member reasonably determined that the evidence she found credible indicated that the applicant was directing events that day. The fact that he took the entirety of

the payment made on January 26, 2012, for himself also reasonably suggests that he played the most senior role in the affair.

(2) Is the ID member's determination that the applicant received a financial benefit from the people smuggling operation reasonable?

[46] The ID member concluded that the applicant received a financial benefit from the people smuggling operation – specifically, the payment of $10,000 made on January 26, 2012. There is credible evidence that the applicant was in possession of the funds paid by the family of six on January 26, 2012, when he was arrested later that night. When first asked by police about the large sum of money found in his pocket, the applicant did not deny that it was his. On June 8, 2016, the applicant consented to the forfeiture of the $9,900.00 CAD that was seized from him by police when he was arrested (having spent $100 CAD before he was stopped) as proceeds of crime. In doing so, he specifically admitted that the entire sum of money seized from him "belonged solely to him, and that the money was acquired in contravention of the law." Further, the written consent signed by the applicant, his counsel, and counsel for the Crown stated:

> The present Admissions are made in a free and voluntary manner by the Accused, without any promise or threats, and the Accused acknowledges having been duly assisted and represented by the attorney of his choice, and in consequence thereof, the Accused renounces to [*sic*] any further hearings or representations concerning the present sum of money.

[47] On the record before her, it is entirely reasonable for the member to have held the applicant to his admissions that the funds were his alone and that they were acquired unlawfully,

to find that they were proceeds of the human smuggling operation, and to reject the suggestion that they actually belonged to Amigo.

(3) Is the ID member's determination that the people smuggling was carried out by a criminal organization unreasonable?

[48] In the circumstances of this case, whether the Minister had established reasonable grounds to believe that the people smuggling was carried out by a criminal organization came down to two questions: (1) Were the requisite number of people part of the group that planned and carried out the undertaking? (2) If so, was the group sufficiently organized to constitute a criminal organization?

[49] With respect to the number of members of the group, I have already indicated that, in my view, it was unreasonable for the member to find that Mr. Mustafaj was part of the group. No evidence implicated him directly in the planning or execution of the people smuggling operation. The ID member's conclusion that he was part of the group was based on the finding that Mr. Mustafaj had had something to hide when he was questioned by authorities following his apprehension in the United States. The member found that he had not been forthcoming and then reasoned as follows:

> His inability to provide salient details, which ought to have been known to him, suggests he has been untruthful and that he has a vested interest in concealing information regarding [the applicant] and Amigo, likely because of his relationship with [the applicant], and the fact that he was aiding and abetting in the smuggling attempt.

[50] While it was reasonably open to the member to find that Mr. Mustafaj was not entirely forthcoming when questioned by the authorities, without more, this does not reasonably support a finding that he was a member of the group that organized the smuggling operation. At most this provides a basis for suspicion. It falls well short of providing an objective basis for the belief that he was a member.

[51] Three other points bear noting. First, after they were caught, Mr. Mustafaj told Mr. Manzo-Barrera that he had paid Amigo $1000 to be part of the group being smuggled. This does not suggest membership in the group that was organizing the venture. Second, the fact that Amigo left Mr. Mustafaj to be apprehended on the other side of the border while he made his own escape also does not suggest any allegiance between Mr. Mustafaj and the others. Third, in written submissions to the ID, the Minister argued that, in the event that three or more persons were required to form a group, this was established here because there was sufficient evidence to implicate the applicant, Amigo, the individual known as “Omar” who referred the group to Amigo, and the person who was to pick the individuals up on the U.S. side of the border. Significantly, the Minister did not suggest that Mr. Mustafaj was part of this group.

[52] The applicant accepts that Amigo was involved in the smuggling operation. I have already explained why it was reasonable for the ID member to conclude that the applicant was also involved. So who was the third member of the group if it was not Mr. Mustafaj?

[53] In my view, the ID member reasonably concluded that there was someone on the U.S. side of the border the night of January 26, 2012, who was part of the group that planned and

carried out the smuggling operation. While I might have taken a different view if the only evidence that there was such a person was a bare representation to the family of six that someone would be there to pick them up, the evidence went well beyond this. Amigo himself crossed the border with the family. He is unlikely to have done so unless he expected there to be someone on the other side. As he guided the others across the border, he was apparently speaking on his cell phone with the person who would be picking them up. Finally, the fact that Amigo was able to avoid apprehension by U.S. Customs and Border Protection agents suggests that, if he did actually cross the border, there was someone there to pick him up. All of this evidence reasonably supports the conclusion that there are reasonable grounds to believe that at least one person on the U.S. side of the border was involved in the people smuggling operation.

[54] The member also found that there were reasonable grounds to believe that Omar, the person who originally introduced the family of six to Amigo, "knowingly and actively participated in the plan to smuggle these people to the United States." Given that it is sufficient for there to have been the three members of the group identified above, it is not necessary for me to decide whether this conclusion with respect to Omar is reasonable.

[55] Turning to whether the group had a sufficient degree of organization to constitute a criminal organization within the meaning of section 37(1)(b) of the *IRPA*, the ID member's reasons for finding that it did are relatively brief. The member found that "there was a considerable amount of time, energy, planning and coordination involved." This point was essentially conceded by the applicant, who acknowledged in written submissions before the ID that the acts in question "do comprise a single event that was not random, it was likely planned

and organized in advance by whoever was involved." (The applicant's position was that he had nothing to do with this planning and organizing.) This is sufficient to rule out the exception built into the definition of "criminal organization" in section 467.1 of the *Criminal Code* – i.e. it does not include "a group of persons that forms randomly for the immediate commission of a single offence." But if, as *B010* directs (at para 42), the terms "organized criminality" in section 37(1) of the *IRPA* and "criminal organization" in section 467.1 of the *Criminal Code*, "absent countervailing considerations, should be given a consistent interpretation," *Venneri* entails that for section 37(1)(b) of the *IRPA* to be engaged, the people smuggling must have been carried out by a group with "some form of structure and degree of continuity" (*Venneri* at para 29).

[56] The group in question appears to have been simply a loose association of individuals acting together in furtherance of an unlawful object but the ID member did identify it and its members with precision. This distinguishes the present case from *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at paras 192-97, which was relied on by the applicant. While there was not a great deal of evidence to support the member's conclusion that there were reasonable grounds to believe that the applicant was the "ringleader" of the group, there was some (e.g. Mr. Manzo-Barrera's evidence that the applicant was directing events on January 26, 2012, and the amount of the proceeds that went to the applicant). This finding was reasonably open to her given her credibility findings with respect to the evidence before her. As well, while not specifically mentioned by the member, the fact that Amigo must have had a reputation for being able to facilitate the illegal entry of people into the United States (hence Omar's introduction of the family of six to him) and the fact that the undertaking was arranged in a relatively short period of time would support the conclusion that the group had a degree of

continuity that made it an appropriate target for this legislation (cf. *Venneri* at para 36). Thus, the member's determination that there are reasonable grounds to believe that the group was sufficiently organized to meet the broad requirements for being a criminal organization under section 37(1) of the *IRPA* (as discussed in paras 32-33, above) is reasonable.

VII. CONCLUSION

[57] For all of these reasons, the ID member's conclusion that the applicant is inadmissible for organized criminality under section 37(1)(b) of the *IRPA* because of his involvement in people smuggling on or about January 26, 2012, is reasonable. The application for judicial review is, therefore, dismissed.

[58] It was common ground at the hearing of this application that whether any questions warranting certification under section 74(d) of the *IRPA* arose would depend on how the issues raised in the application were resolved. I would therefore ask counsel for the parties to confer between themselves and to serve and file their respective positions and submissions, if necessary, with respect to whether any question(s) ought to be certified no later than 4:00 p.m. EST on May 7, 2019. If additional time is required, counsel may contact the Court.

JUDGMENT IN IMM-1222-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.
2. The parties shall serve and file their respective positions and submissions, if necessary, with respect to whether any question(s) ought to be certified under section 74(d) of the *IRPA* no later than 4:00 p.m. EST on May 7, 2019.
3. If additional time is required, counsel may contact the Court.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1222-18
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PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 31, 2018
JUDGMENT AND REASONS:	NORRIS J.
DATED:	APRIL 30, 2019

APPEARANCES:

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