Federal Court Cour fédérale

Date: 20211215

Docket: IMM-833-20

Citation: 2021 FC 1419

Ottawa, Ontario, December 15, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JAAMAL HASSAN ALI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Ali asks the Court to set aside the January 14, 2020, decision of a member of the Immigration Division [the Member] determining that he is inadmissible to Canada for engaging in serious criminality.

Background

[2] The Applicant is a foreign national who previously resided in the United States.

[3] On April 4, 2003, the Applicant was convicted in Minnesota of burglary in the second degree. He pled guilty to this offence. The Applicant was also charged with two other offences arising from the same incident: interfering with an emergency call and criminal damage to property. The Applicant was not convicted of those two offences. The Applicant submits that he was acquitted, but the court records indicate that the charges were dismissed.

[4] As the Applicant pled guilty, there was no trial or judicial findings of fact. However, the record includes police reports. According to these reports, the Applicant allegedly broke into a building where his ex-girlfriend and child lived. The Applicant's ex-girlfriend's statement to the police was that after breaking in, the Applicant kicked in the door to her bedroom, tried to damage the phone she was using to make a 911 call, and then ripped the phone out of the wall.

[5] On January 14, 2020, the Member found that the Applicant was inadmissible due to serious criminality.

The Decision

[6] In her decision, the Member set out that she must answer the following questions: (1) is the Applicant a permanent resident or foreign national, (2) has the Applicant been convicted of an offence outside Canada, and (3) if that offence were to be committed in Canada, would it constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years? The Member noted that the standard of proof was whether there are reasonable grounds to believe that the facts occurred.

[7] The Member noted that the Applicant's status is undisputed: he is a foreign national.

[8] The Member found that documents from Minnesota established on reasonable grounds that the Applicant was convicted of burglary in the second degree of a dwelling house on April 4, 2003, contrary to subsection 609.582.2(a) of the *Minnesota Statutes* [the Minnesota Offence].

[9] Turning to the third question, the position of the Minister of Public Safety and Emergency Preparedness [the Minister] was that the equivalent Canadian offence was breaking and entering to commit an indictable offence, under section 348 of the *Criminal Code*, RSC, 1985 c C-46 [the Canadian Offence]. Both offences are reproduced in full in Annex A.

[10] Both offences require the intent to commit, or the actual commission of, an additional offence. The Member recognized that unlike the Minnesota Offence, the Canadian Offence requires that the additional offence be an indictable offence. The Member recognized that the Canadian Offence was narrower and therefore, pursuant to *Hill v Canada (Minister of Employment and Immigration)* (1987), 1 Imm LR (2d) 1 [*Hill*], she must look to the actual events surrounding the offence. The position of the Minister was that the Applicant had committed the indictable offence of mischief under section 430 of the *Criminal Code*. The Applicant argued that the only offence that occurred other than the breaking and entering, was trespass, which in Canada is a provincial offence, not an indictable offence.

[11] The Member reviewed the circumstances of the Applicant's conviction. She noted that, based on the evidence, it was more likely than not that the Applicant was not a resident of the

dwelling into which he broke. He entered the building by breaking a window to access a door and, once inside, he kicked in a locked bedroom door, attempted to damage a phone that was being used to call 911 by damaging it with a weight, and then ripped the phone out of the wall. The value of the damaged property did not exceed $5,000.

[12] The Member found that the Applicant's actions once he entered the building, if they had occurred in Canada, would constitute indictable mischief. Therefore, while the Canadian Offence is narrower than the Minnesota Offence, the Applicant's actions, had they occurred in Canada, would still fall within paragraph 348(1)(b) of the *Criminal Code* and would be an indictable offence with a maximum penalty of life imprisonment.

[13] Accordingly, the Member found the Applicant to be inadmissible and made a deportation order.

Issues

[14] Two issues are raised on this application:

1. What is the appropriate standard of review?
2. Is the Decision reasonable/correct, depending on the standard of review?

Analysis and Discussion

1. Standard of Review

[15] The Applicant submits that the proper standard of review is correctness. He submits that this case turns on the identification of the essential elements of the Canadian Offence, which is a severable question of law. The Applicant submits that this is a question of general law that is of both central importance to the legal system as a whole and outside the Member's specialized area of expertise, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 60 [*Dunsmuir*].

[16] The Applicant submits that the *Criminal Code* is not the Member's home statute and interpretation of the *Criminal Code* must be uniform and consistent. The Applicant supports this position with *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 [*Mugesera*], where the Supreme Court of Canada at para 59 held that while the Immigration Division is generally entitled to deference, "no such deference applies when it comes to defining the elements of the crime."

[17] The Respondent submits that the proper standard of review is reasonableness. The Minister submits that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], established that reasonableness is the presumptive standard of review and says that the Applicant has failed to rebut this presumption.

[18] The Respondent submits that *Mugesera* is no longer good law as it reflects the law in 2005, well before *Vavilov*. While *Vavilov* maintains an exception for general questions of law of central importance to the legal system as a whole, the Respondent submits that the Applicant has failed to demonstrate how a provision of the *Criminal Code*, in and of itself, is sufficient to fit within this exception.

[19] The Respondent also submits that the Federal Court has previously noted that assessing equivalency of laws may lead to more than one reasonable outcome, particularly when taking into account the highly factual determination of equivalency: see *Ulybin v Canada (Minister of Citizenship and Immigration*), 2013 FC 629 at para 21; *Moscicki v Canada (Minister of Citizenship and Immigration)*, 2015 FC 740 at para 15.

[20] As set out in *Vavilov*, reasonableness is the presumptive standard of review. At paragraph 30 of *Vavilov*, the Supreme Court of Canada notes that the concept of the decision maker's "home statute" and expertise no longer plays an appreciable role in determining the standard of review. Accordingly, the Applicant's submissions on this point are unpersuasive.

[21] *Vavilov* sets out a narrow list of exceptions to this presumption, including for general questions of law of central importance to the legal system as a whole. I agree with the Respondent that the Applicant has failed to demonstrate how the equivalency analysis in this case falls within the exception.

[22] The analysis preformed by the Member involved both legal determinations, in assessing the content of the two offences, and factual determinations, in assessing whether the circumstances of the Applicant's conviction fell within the ambit of the Canadian Offence. This assessment relies on the factual matrix of this case. The question asked was not whether the two offences were identical but whether the Applicant's conviction also constituted an indictable offence punishable by 10 years' imprisonment in Canada. This question is not of central importance to the legal system as a whole.

[23] *Mugesera* is not relevant in determining the standard of review. The Supreme Court's comments in that case were made in 2005, well before the current method for determining the standard of review adopted by the Supreme Court in *Vavilov*. Indeed, it even predates the previous standard of review framework from *Dunsmuir*.

2. Reasonableness of the Decision

[24] The Applicant makes a number of submissions that the decision is unreasonable.

[25] The Applicant submits that the Member erred because she failed to articulate the essential elements of the foreign and domestic offences. The Applicant also submits that where a foreign offence is broader than the Canadian offence, equivalency can only be found if all of the elements of the Canadian offence are covered by the acts committed.

[26] The Applicant submits that the Member failed to recognize that the Canadian Offence contains a presumption of intention that is not present in the Minnesota Offence.

[27] The Applicant submits that the Member improperly relied on allegations that were never tested in court. The Applicant submits that the Member disregarded the actual disposition of the Applicant's other charges. The Applicant notes that he was "acquitted" of interfering with an emergency call and criminal damage to property. The Applicant submits that where charges have been dismissed, this is *prima facie* evidence that those crimes were not committed: see *Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454 [*Pineda*].

[28] The Applicant submits that the Member failed to consider the available defences and that this represents an error. The Applicant submits that there was evidence that the Applicant lived at the dwelling and was intoxicated at the time of the offence. The Member made no assessment of his ability to raise a defence that he had a colour of right to enter the building or lacked the intent to commit an indictable offence due to intoxication. The Applicant submits that the availability of such defences may affect equivalency.

[29] The Applicant submits that the Member exceeded her jurisdiction by considering section 430 of the *Criminal Code*. The Applicant notes that paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 requires the Applicant to have actually been convicted of a given offence. The Applicant was acquitted of property damage. The Applicant notes that this was an acquittal by a judge and not a dismissal of charges at the discretion of the prosecutor.

[30] The Applicant notes that he received a very minor sentence for his conviction, which in his submission indicates that the offence was treated effectively as a misdemeanour and not an indictable offence, and therefore could not have met the sentencing requirements for serious criminality.

[31] For the reasons that follow, I reject all of these submissions.

[32] The Member properly followed the framework set out in *Hill*.

[33] The Member considered the Canadian and Minnesota Offences and determined that the Canadian Offence was narrower. While the Applicant submits that the Canadian Offence contains a presumption that is not present in the Minnesota Offence, both offences can be made out in cases in which an accused breaks and enters into a dwelling and, having done so, actually commits an indictable offence. The Member made it clear that she was considering these circumstances. Therefore, the presumption in the Canadian Offence is irrelevant and the Member's analysis hinges on whether the Applicant committed an indictable offence after having entered the building.

[34] The Member determined that the Applicant had committed the offence of mischief by damaging property. The Member arrived at this conclusion by reviewing witness statements in the police record. Even assessing the damage of that property as being below $5,000, this would constitute an offence that could proceed by indictment.

[35] The Applicant submits that he was acquitted of interfering with an emergency call and criminal damage to property and that the Member mischaracterized these acquittals as the charges being dismissed. This is not what the evidence shows. The Minnesota Register of Actions shows that the Applicant pled not guilty to those offences, but that the final disposition was that the charges were "Dismissed."

[36] The Applicant relies on *Pineda* for the proposition that the dismissal of charges is *prima facie* evidence that those crimes were not committed. In *Pineda*, Justice Gauthier made the following comments at para 31 regarding dismissed charges:

> [T]he value of the charges laid in a country like the United States is greatly diminished when such charges are dismissed. In fact, I would think that in such a case, the dismissal of the charges is *prima facie* evidence that those crimes were not committed by the refugee claimant and that the Minister cannot simply rely on the laying of charges to meet his burden of proof. The Minister must either bring credible and trustworthy evidence of the commission of the crime *per se* or show that in the particular circumstances of the case, the dismissal should not be conclusive because it does not affect the basic foundation on which the charges were laid. Again, for example, this could be achieved by establishing that crucial evidence on the basis of which the charges were laid was excluded for a reason that does not bind the RPD and does not totally destroy its probative value.

[37] In *Pineda*, the main evidence was the statement of the alleged victim, which was later recanted. There was no other evidence in the investigative file.

[38] *Pineda* is distinguishable. While the Applicant's property damage charge was dismissed, he was still convicted of an offence. There was no presumption that no offence occurred. The offence with which he was charged specifically requires intention to commit or actual commission of another offence. Therefore, there was reason to believe than another offence may have occurred and it was reasonable for the Member to look further into the record to determine what this offence might have been.

[39] Due to the lack of trial on the merits of the action, there is no evidence other than the Applicant's testimony and the police records regarding the events leading to the Applicant's conviction. The police records contain a witness statement alleging that the Applicant damaged property upon breaking into the building. While this evidence was not tested in court, there are at least reasonable grounds to believe that these are the facts underlying the Applicant's

conviction absent clear evidence to the contrary. The Member did not err by relying on the witness statements to establish a reasonable grounds to believe that the Applicant had committed acts that would have amounted to indictable mischief.

[40] I reject the Applicant's submissions regarding a failure to consider available defences. The Member explicitly indicated that she did not accept that the Applicant lived in the building and gave detailed reasons for doing so. With respect to intoxication, the Member explicitly indicated that she was not basing her analysis on the provisions dealing with an intent to commit and offence, but rather on those dealing with cases in which an offence was actually committed. Absent arguments and evidence that the Applicant was so severely intoxicated as to be akin to automatism, there was no need to consider the availability of the defence of intoxication.

[41] The Member's jurisdiction to consider section 430 of the *Criminal Code* and the relevance of the sentencing provisions were not raised before the Member. As a result, these arguments cannot be raised here on judicial review: see *Khan v Canada (Minister of Citizenship and Immigration*), 2016 FC 855 at para 37.

Conclusion

[42] In summary, the Member's conclusion that the Applicant is inadmissible is reasonable. She properly reviewed the circumstances of the Applicant's conviction and, based on the evidence available to her, it was reasonable to conclude that the Applicant's actions after breaking into the building would have constituted indictable mischief had they occurred in Canada, rendering him inadmissible to Canada because of serious criminality.

[43] The application improperly names as respondent the Minister of Immigration, Refugee and Citizenship, and it will be ordered amended with immediate effect to name the proper respondent, the Minister of Citizenship and Immigration.

[44] No question was proposed for certification.

JUDGMENT IN IMM-833-20

THIS COURT'S JUDGMENT is that the style of cause is amended, with immediate effect, to name as respondent the Minister of Citizenship and Immigration, the application is dismissed, and no question is certified.

"Russel W. Zinn"

Judge

ANNEX A

Minnesota Statues, 609.582 as it appeared on 1 January 2003

609.582 Burglary

Subd. 2. **Burglary in the second degree.** Whoever enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building, either directly or as an accomplice, commits burglary in the second degree and may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both, if:

(a) the building is a dwelling;

(b) the portion of the building entered contains a banking business or other business of receiving securities or other valuable papers for deposit or safekeeping and the entry is with force or threat of force;

(c) the portion of the building entered contains a pharmacy or other lawful business or practice in which controlled substances are routinely held or stored, and the entry is forcible; or

(d) when entering or while in the building, the burglar possesses a tool to gain access to money or property.

Criminal Code, RSC 1985, c C-46	*Code criminel, LRC 1985, c C-46*
Breaking and entering with intent, committing offence or breaking out	**Introduction par effraction dans un dessein criminel**
348 (1) Every one who	**348 (1)** Quiconque, selon le cas :
(a) breaks and enters a place with intent to commit an indictable offence therein,	**a)** s'introduit en un endroit par effraction avec l'intention d'y commettre un acte criminel;
(b) breaks and enters a place and commits an indictable offence therein, or	**b)** s'introduit en un endroit par effraction et y commet un acte criminel;
(c) breaks out of a place after	**c)** sort d'un endroit par effraction :
(i) committing an indictable offence therein, or	**(i)** soit après y avoir commis un acte criminel,
(ii) entering the place with intent to commit an indictable offence therein, is guilty	**(ii)** soit après s'y être introduit avec l'intention d'y commettre un acte criminel, est coupable

(d) if the offence is committed in relation to a dwelling-house, of an indictable offence and liable to imprisonment for life, and

(e) if the offence is committed in relation to a place other than a dwelling-house, of an indictable offence and liable to imprisonment for a term not exceeding ten years or of an offence punishable on summary conviction.

d) soit d'un acte criminel passible de l'emprisonnement à perpétuité, si l'infraction est commise relativement à une maison d'habitation;

e) soit d'un acte criminel passible d'un emprisonnement maximal de dix ans ou d'une infraction punissable sur déclaration de culpabilité par procédure sommaire si l'infraction est commise relativement à un endroit autre qu'une maison d'habitation.

Presumptions

(2) For the purposes of proceedings under this section, evidence that an accused

(a) broke and entered a place or attempted to break and enter a place is, in the absence of evidence to the contrary, proof that he broke and entered the place or attempted to do so, as the case may be, with intent to commit an indictable offence therein; or

(b) broke out of a place is, in the absence of any evidence to the contrary, proof that he broke out after

(i) committing an indictable offence therein, or

(ii) entering with intent to commit an indictable offence therein.

Présomptions

(2) Aux fins de poursuites engagées en vertu du présent article, la preuve qu'un accusé :

a) s'est introduit dans un endroit par effraction ou a tenté de le faire constitue, en l'absence de preuve contraire, une preuve qu'il s'y est introduit par effraction ou a tenté de le faire, selon le cas, avec l'intention d'y commettre un acte criminel;

b) est sorti d'un endroit par effraction, fait preuve, en l'absence de toute preuve contraire, qu'il en est sorti par effraction :

(i) soit après y avoir commis un acte criminel,

(ii) soit après s'y être introduit avec l'intention d'y commettre un acte criminel.

Definition of *place*

(3) For the purposes of this section and section 351, place means

(a) a dwelling-house;

(b) a building or structure or any part thereof, other than a dwelling-house;

Définition de *endroit*

(3) Pour l'application du présent article et de l'article 351, endroit désigne, selon le cas :

a) une maison d'habitation;

b) un bâtiment ou une construction, ou toute partie de bâtiment ou de construction, autre qu'une maison d'habitation;

(c) a railway vehicle, a vessel, an aircraft or a trailer; or

(d) a pen or an enclosure in which fur-bearing animals are kept in captivity for breeding or commercial purposes.

c) un véhicule de chemin de fer, un navire, un aéronef ou une remorque;

d) un parc ou enclos où des animaux à fourrure sont gardés en captivité pour fins d’élevage ou de commerce.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Quinn Campbell Keenan	FOR THE APPLICANT
Leila Jawando	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chapnick & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Toronto, Ontario	FOR THE RESPONDENT