Federal Court  Cour fédérale

Date: 20090629

Docket: T-18-09

Citation: 2009 FC 672

Ottawa, Ontario, June 29, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

SYED ALI ASGHAR IQBAL AHMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Syed Ali Asghar Iqbal Ahmed's application for citizenship was refused because of the citizenship judge's finding that Mr. Ahmed was facing criminal charges in relation to indictable offences at the time of his citizenship hearing. For the reasons that follow, I have concluded that the Citizenship Judge erred in law in finding that Mr. Ahmed was subject to a statutory bar. As a consequence, the appeal will be allowed.

Background

[2] The facts in this matter are simple, and not in dispute. Mr. Ahmed came to Canada from Iran in May of 2003. He fulfilled the statutory residency requirements, and applied for Canadian citizenship in June of 2006.

[3] In January of 2008, Mr. Ahmed was involved in an altercation with his wife, and the police were called. He was charged with two counts of assault, contrary to section 266 of the *Criminal Code*, and one count of uttering threats, contrary to section 264.1(1)(a) of the Code. Although not strictly relevant to the issue on this appeal, it appears that several weeks after his citizenship hearing, the charges were withdrawn by the Crown, upon Mr. Ahmed agreeing to enter into a peace bond.

[4] Mr. Ahmed appeared before a Citizenship Judge on October 3, 2008. The Citizenship Judge found that although Mr. Ahmed had met all of the requirements of the *Citizenship Act*, R.S., 1985, c. C-29, he was prohibited from being granted citizenship by virtue of paragraph 22(1)(b) of the Act, which provides that:

22. (1) Despite anything in this Act, *a person shall not be granted citizenship* under subsection 5(1), (2) or (4) or 11(1) or take the oath of citizenship …	22. (1) Malgré les autres dispositions de la présente loi, *nul ne peut recevoir la citoyenneté* au titre des paragraphes 5(1), (2) ou (4) ou 11(1) ni prêter le serment de citoyenneté …
(b) *while the person is charged with*, on trial for or subject to or a party to an appeal relating to an offence under subsection 29(2) or (3) or *an indictable*	b) *tant qu'il est inculpé pour* une infraction prévue aux paragraphes 29(2) ou (3) ou *pour un acte criminel prévu par une loi fédérale*, autre qu'une

offence under any Act of Parliament, other than an offence that is designated as a contravention under the Contraventions Act; [my emphasis]	infraction qualifiée de contravention en vertu de la Loi sur les contraventions, et ce, jusqu'à la date d'épuisement des voies de recours; [je souligne]

[5] Mr. Ahmed represented himself on the appeal, and essentially threw himself on the mercy of the Court, asking that he be granted citizenship so as to allow him to travel outside of Canada with his wife and child.

[6] The offences of assault and of uttering threats are both "hybrid" offences. That is, they may proceed either by way of indictment, or as summary conviction offences, at the option of the Crown. I had noted from my pre-hearing review of the file that on January 21, 2008, the Crown Attorney charged with responsibility for prosecuting Mr. Ahmed had elected to proceed by way of summary conviction in relation to all of the charges.

[7] At the hearing of the appeal, I asked the parties whether Mr. Ahmed was in fact "charged with … an indictable offence" at the time of his citizenship hearing, in light of the Crown's election to proceed summarily. As neither party was in a position to address the issue at the hearing, leave was given for the parties to file additional written submissions with respect to this question.

Analysis

[8] The issue before the Court is whether the essential character of a criminal offence is changed by virtue of a Crown election to proceed summarily, or whether the offence remains an indictable offence for the purposes of paragraph 22(1)(b) of the *Citizenship Act*.

[9] The submissions of the parties, coupled with the Court's own research, have revealed that what may have first appeared to have been quite a simple question is in actual fact one that has no easy answer, as the judicial opinions on this point are somewhat divided.

[10] Many of the cases dealing with the characterization of criminal offences turn on the application of paragraph 34(1)(a) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which provides that:

34. (1) Where an enactment creates an offence,	34. (1) Les règles suivantes s'appliquent à l'interprétation d'un texte créant une infraction :
(a) the offence is deemed to be an indictable offence if the enactment provides that the offender may be prosecuted for the offence by indictment;	a) l'infraction est réputée un acte criminel si le texte prévoit que le contrevenant peut être poursuivi par mise en accusation;

[11] In determining whether Mr. Ahmed was still charged with an indictable offence at the time of his citizenship hearing, I will start by considering the jurisprudence of this Court that has

developed in the citizenship and immigration context. I will then have regard to the jurisprudence in the criminal law context.

Federal Court Jurisprudence

[12] Dealing first with Federal Court jurisprudence, the only citizenship case of which the Court is aware that appears to be on point is *Re Gulri* (1993), 65 F.T.R. 7 (F.C.T.D.). As in Mr. Ahmed's case, Mr. Gulri was charged with assault, and the Citizenship Judge refused his application for citizenship after concluding that he was facing charges in relation to an indictable offence.

[13] At the hearing of Mr. Gulri's application for judicial review, the Court found that there was nothing in the record to indicate whether the Crown had proceeded by way of indictment or summary conviction. As a consequence, the applications judge adjourned the appeal to allow the parties to obtain information as to how the charge had been prosecuted. On the resumption of the hearing, the Court determined that the charge had been prosecuted as a summary conviction offence, and that, like Mr. Ahmed's case, the assault charge had been either withdrawn or dismissed some time after the citizenship hearing, upon Mr. Gulri having entered into a recognizance to keep the peace.

[14] The Court held that the Citizenship Judge had erred in applying paragraph 22(1)(b) of the *Citizenship Act* to Mr. Gulri. As the Crown had proceeded summarily, the Court found that Mr. Gulri was not charged with an indictable offence at the time of his citizenship hearing.

[15] It does not appear that paragraph 34(1)(a) of the *Interpretation Act* was drawn to the Court's attention in *Re Gulri*, as no consideration was given to the impact of that provision on the proper characterization of the offence with which Mr. Gulri was charged.

[16] The respondent relies on the decision of this Court in *Ngalla v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 360, as authority for the proposition that an offence cannot be properly characterized as a summary conviction offence merely because the Crown elects to proceed summarily. In particular, the respondent points to the Court's statement that "A summary conviction offence, as compared to a hybrid offence, is one which must be prosecuted summarily and where no discretion is given to the Crown": *Ngalla*, at para. 13.

[17] Read in a vacuum, these comments could suggest that a Crown election will have no effect on the essential character of a hybrid offence, and that it will remain an indictable offence even after the Crown elects to proceed summarily. The Court's comments must, however, be read in context.

[18] *Ngalla* involved an inadmissibility finding, based upon the applicant's criminality. The applicant in that case had been charged with a hybrid offence, and the Crown had elected to proceed summarily. However, the provisions of the *Immigration Act* at issue in *Ngalla* provided that a person would be inadmissible if they had been "convicted in Canada of an indictable offence, *or of an offence for which the offender may be prosecuted by indictment*…" [my emphasis].

[19] There was no doubt that the criminal charge at issue in *Ngalla* could have been prosecuted by way of indictment, even though it was prosecuted summarily. As a consequence, the applicant in that case was properly found to have been inadmissible.

[20] In contrast, in the present case, paragraph 22(1)(b) of the *Citizenship Act* does not refer to an offence that "may be prosecuted by indictment", but rather to "an indictable offence under any Act of Parliament".

[21] Thus, read in context, the Court's comments in *Ngalla* are of limited assistance in this case.

[22] More problematic is the Court's decision in *Vithiyananthan v. Canada (Attorney General)* [2000] F.C.J. No. 409. In *Vithiyananthan*, the applicant was seeking judicial review of a discretionary decision of the Passport Office revoking his Canadian passport on the grounds that it had been used in committing an indictable offence under the *Immigration Act*. The offence in question was a hybrid offence, and the Crown agreed to proceed summarily, in exchange for a guilty plea by the accused.

[23] Thus, the question before the Court was whether, in these circumstances, the applicant's passport had been used to assist in "committing an indictable offence".

[24] In answering this question in the affirmative, the Court had regard to paragraph 34(1)(a) of the *Interpretation Act*. The Court found that paragraph 34(1)(a) made it clear that it is the terms of

the statute under which the accused is charged that creates the indictable offence, and that the Crown's election does not change the terms of the statute in question. The Court also observed that a Crown election is not necessarily determinative of the procedure which will ultimately be used to deal with the charges, as there have been cases where the Crown has changed its election after the accused has entered a plea: see *Vithiyananthan* at para. 18.

[25] This led the Court to conclude that hybrid offences are indictable offences even when summary proceedings are used to obtain a conviction: see *Vithiyananthan* at para. 21.

Other Canadian Jurisprudence

[26] As will be discussed below, there has been some disagreement over the years in the appellate level jurisprudence as to the proper interpretation of paragraph 34 (1)(a) of the *Interpretation Act*. However, the Court's interpretation of paragraph 34(1)(a) in *Vithiyananthan* is consistent with a substantial body of criminal law jurisprudence: see, for example, *Dallman v. The King*, [1942] S.C.R. 339, *Brown (Guardian ad litem of) v. Baugh*, [1984] S.C.J. No. 10, *R. v. Connors* (1998), 155 D.L.R. (4th) 391 (B.C.C.A.), at paragraphs 69 and 73, *R. v. S.P.*,[1996] O.J. No. 4620 (O.C.J.) at para 8, *R. v. Wilson*, [1997] O.J. No. 459 (O.C.J.); *R. v. J.W.D.*, [1997] O.J. No. 1069 (O.C.J.); and *R. v. Martin*, [1996] O.J. No. 434 (Prov. Ct.).

[27] However, it appears that more recent appellate-level jurisprudence interprets paragraph 34(1)(a) of the *Interpretation Act* in a somewhat different manner.

[28] For example, in *Trinidad and Tobago (Republic) v. Davis* [2008] A.J. No. 829; 2008 ABCA 275, the Alberta Court of Appeal held that:

> Canadian courts have consistently interpreted s. 34(1) of the Interpretation Act as deeming hybrid offences to be indictable *unless and until the Crown elects to proceed summarily*: see *R. v. Paul-Marr*, 2005 NSCA 73, 234 N.S.R. (2d) 6, and the authorities cited therein. The election may be express or it may be implied from the procedures followed in the prosecution, but in either scenario, *the offence is an indictable one until an election is made or deemed to be made*. [at para. 14, my emphasis]

[29] It is noteworthy that the Supreme Court of Canada denied leave to appeal in this case: see [2008] S.C.C.A. No. 421.

[30] The *Paul-Marr* decision cited in the *Trinidad and Tobago* case is a decision of the Nova Scotia Court of Appeal where Justice Cromwell, writing for a unanimous Court, held that the characterization of an offence:

> 18 … [D]epends on the application of s. 34 of the *Interpretation Act*, R.S.C. 1985 c. I-21. It provides that an offence that can be proceeded with summarily or by indictment *is to be deemed indictable until the Crown elects for summary procedure*….
>
> 19 The starting point, therefore, is s. 34[(1)](a) of the Interpretation Act … [statutory provision omitted]
>
> 20 This section means that where an offence may be prosecuted by either indictment or on summary conviction at the election of the Crown, *the offence is deemed to be indictable until the Crown elects to proceed by way of summary conviction*…
> [case citations omitted, my emphasis].

[31] Justice Cromwell went on to conclude that the effect of paragraph 34(1)(a) of the *Interpretation Act* may be displaced where, as here, there is an express Crown election to proceed summarily: *Paul-Marr*, at para. 24.

[32] The Ontario Court of Appeal has also interpreted paragraph 34(1)(a) of the *Interpretation Act* to mean that hybrid offences are deemed to be indictable offences unless, and until, the Crown elects to proceed summarily: see *R. v. Mitchell* (1997), 121 C.C.C. (3d) 139, at para. 4, and *R. v. Gougeon* (1980), 55 C.C.C. (2d) 218, at para. 47.

[33] The respondent, quite properly, has drawn these cases to the Court's attention, notwithstanding that they appear to be unhelpful to the respondent's position. The respondent argues, however, that the cases may be distinguished, as they deal not with the ongoing character of the offence in issue, but rather with questions of procedure and jurisdiction. In particular, the cases address the consequences that flow from the failure of Crown counsel to make an express election.

[34] It is true that several of the decisions discussed in the preceding paragraphs do deal with the procedural consequence flowing from the failure of Crown counsel to make an express election in relation to hybrid offences. However, that does not, in my view, take away from the fact that several appellate Courts have determined that a criminal offence loses its indictable character upon the Crown electing to proceed by way of summary conviction.

[35] Moreover, the *Trinidad and Tobago* case does not involve the procedural consequence resulting from the failure of Crown counsel to make an express election in relation to a hybrid offence.

[36] *Trinidad and Tobago* involves an extradition proceeding with respect to a Mr. Davis. Under the provisions of paragraph 3(1)(b)(i) of the *Extradition Act*, S.C. 1999, c. 18, in order for Mr. Davis to be extradited from Canada, he had to be facing prosecution for an offence in another country that would be punishable by up to five years' imprisonment, if prosecuted in Canada.

[37] The offence in issue was a hybrid offence, and Mr. Davis would not have been subject to extradition, if the matter were prosecuted summarily. Thus, the issue for the Alberta Court of Appeal was whether, in considering an extradition request, the Crown had the onus of demonstrating that the Crown would have proceeded by indictment rather than summary conviction in a Canadian prosecution of the offence in question.

[38] The Court of Appeal held that the question of whether the Canadian comparator offence was punishable by imprisonment for more than two years was a matter of statutory interpretation, and not of evidence. It was in this context that recourse was had by the Court to paragraph 34(1)(a) of the *Interpretation Act* – not to determine the procedure to be followed - but rather to ascertain the character of the offence in question. It was in this context that the Court of Appeal found that the hybrid offence in issue was properly characterized as an indictable offence, but only until such time as an election was either expressly made, or was deemed to have been made by the Crown, at which

time the effect of paragraph 34(1)(a) of the *Interpretation Act* would be displaced, and the matter would become a summary conviction offence.

[39] Given that there was no pending prosecution against Mr. Davis in Canada, it followed that no Crown election had been made, and, as a result, the Alberta Court of Appeal found that the comparator offence retained its indictable character.

[40] In light of the foregoing, I am satisfied that, in accordance with the current analysis of paragraph 34(1)(a) of the *Interpretation Act*, the character of a hybrid offense changes from indictable to summary conviction, upon the Crown electing to proceed summarily.

Application of the Law to Mr. Ahmed's Case

[41] Given that the Crown had expressly elected to proceed summarily in Mr. Ahmed's case long before his citizenship hearing, it follows that at the time of his citizenship hearing, he was no longer facing charges in relation to an indictable offence. As a consequence, the statutory bar contained in paragraph 22(1)(b) of the *Citizenship Act* did not apply. Therefore, the appeal will be allowed, and the decision of the Citizenship Judge will be set aside.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this appeal is allowed, and the matter is remitted to a different Citizenship Judge for re-determination in accordance with these reasons.

"Anne Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Syed Ali Asghar Iqbal Ahmed	FOR THE APPLICANT (Self represented)
Bridget A. O'Leary	FOR THE RESPONDENT

SOLICITORS OF RECORD:

None	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT