Federal Court  Cour fédérale

**Date: 20120611**

**Docket: IMM-5723-11**

**Citation: 2012 FC 727**

**Ottawa, Ontario, June 11, 2012**

**PRESENT: The Honourable Mr. Justice Near**

**BETWEEN:**

**RAOUL ANDRE BURTON**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Raoul Andre Burton, seeks judicial review of a decision of the Immigration Division of the Immigration and Refugee Board (the Board), dated August 3, 2011. He was found inadmissible to Canada under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) based on subsections 36(1)(a) related to criminality and 37(1)(a) for organized criminality. Consequently, a Deportation Order was issued against him.

[2] For the reasons set out below, I am dismissing his application.

## I. Facts

[3] The Applicant is a citizen of Jamaica. On November 17, 1993, he became a permanent resident of Canada at the age of 10 years old.

[4] On March 9, 2005, he pled guilty to one count of participating in a criminal organization known as the Malvern Crew under subsection 467.11(1) of the *Criminal Code of Canada*, RSC 1985, c C-46. In a letter regarding the plea agreement, Crown Counsel indicated that "[b]ased upon consultation, CBS-Immigration [*sic*] does not have any intent to initiate any enforcement action at this time."

[5] On December 27, 2006, the Applicant was convicted of two counts of possession for the purposes of trafficking contrary to subsection 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19.

[6] As a result of these convictions, a report on his inadmissibility was made under subsection 44(1) of the IRPA. An initial hearing on the matter was cancelled. On January 14, 2011, however, a new report was issued against the Applicant.

[7] The reports were reviewed by the Minister's Delegate and the matter was referred to the Immigration Division for an admissibility hearing that took place on April 20, 2011 and May 11, 2011.

## II. Decision Under Review

[8] The Board denied the request of Counsel for the Applicant to issue subpoenas to individuals who would testify to an alleged agreement between the Crown Attorney and Canada Border Services Agency (CBSA) related to the initial conviction. The Board stated that it lacked jurisdiction to look into the report and referral of the Applicant for an admissibility hearing.

[9] Counsel for the Applicant also objected to the inclusion of documentary evidence on the referral for inadmissibility based on the alleged agreement with CBSA. The Board did, however, admit these documents as recounted in its reasons "[t]he interplay of these matters of witnesses, exclusion of evidence, and adjournment request was ruled on by the panel, essentially against Mr. Burton."

[10] The Board appears to have accepted the position of the Minister that the Crown Attorney's letter "is couched in ephemeral terms, there is no conclusive evidence that a representation was made by the CBSA that enforcement action against Mr. Burton would never be taken" [emphasis in original]. It therefore dismissed the Applicant's legitimate expectations argument, noting that he was given the opportunity to make representations and was consulted on the matter.

[11] In light of his convictions for trafficking a controlled substance, an offence punishable for a term of imprisonment of at least ten years, the Board was satisfied that the Applicant was inadmissible for serious criminality under subsection 36(1)(a).

[12] Considering documentary evidence and prior criminal case law, there were also reasonable grounds to believe that the Malvern Crew was a criminal organization as contemplated by subsection 37(1)(a). The Board noted the Malvern Crew's involvement in the trafficking, importation and distribution of drugs as well as other offences of theft, robbery, firearms and murder.

[13] While a finding of inadmissibility for organized criminality does not require a conviction, the Board placed "considerable reliance" on the Applicant's guilty plea and conviction to establish his membership in the Malvern Crew and participation in its criminal activities.

[14] The Board summarized the Applicant's level of involvement with the organization as follows:

> [132] The incidents recounted above, the observed gang-related activity, and the judgment, all show that Mr. Burton was right in the thick of things, an active member of the Malvern Crew, actively participating in the activities of the organization, and that he may have occupied a rather influential or responsible place in the organization.
>
> [133] He is a person who has been identified as a member of the Malvern Crew by means of video, physical and wire-tap evidence, and by reliable police source information [...]
>
> [134] The Tribunal finds that Mr. Burton's involvement with the Malvern Crew was significant. He was obviously fully integrated and well-invested into the organization, having done what was required

> to gain acceptance and recognition within that group. Not only was he a member, but he was also prepared to engage in criminal activities on a significant scale for the benefit of the organization, and he thereby enhanced the ability of the organization to commit crime. [...]

[15] Overall, the Board was satisfied that the Minister had discharged his burden of proving the facts exist to support that the Applicant was inadmissible under subsection 37(1)(a). He was a member of the Malvern Crew, an organization that on reasonable grounds is believed to be engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable by indictment. The Applicant was also inadmissible for engaging in activity that is part of such a pattern.

## III. Issues

[16] This application raises various issues of procedural fairness that arose from the Board proceeding with the admissibility hearing at the time, namely:

(a) Did the Board err in issuing a removal order given the questions raised as to the validity of the Minister's referral?

(b) Did the Board err by refusing to issue a summons requested by Applicant's counsel in relation to the validity of the referral?

(c) Did the Board err in denying an adjournment for the Applicant to pursue an application for leave and judicial review of the referral?

[17] Also before the Court is the Board's finding that the Applicant was inadmissible for organized criminality under subsection 37(1)(a) as this deprives him of the right of an appeal on humanitarian and compassionate grounds to the Immigration Appeal Division. More specifically, the questions to be considered are as follows:

(d) Did the Board err by relying on findings of fact from other courts or tribunals?

(e) Did the Board err in emphasizing the Applicant's conviction under section 467 of the *Criminal Code* to find the Applicant described in subsection 37(1)(a) of the IRPA?

(f) Did the Board err in relying on concessions made by Applicant's counsel at the hearing?

IV. Standard of Review

[18] Questions of law, jurisdiction and procedural fairness demand the correctness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, 2009 CarswellNat 434 at para 43).

[19] By contrast, the Board's findings of fact as to membership in a criminal organization should be reviewed based on reasonableness (see *Tang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 292, [2009] FCJ no 671 at para 17; *Castelly v Canada (Minister of Citizenship and Immigration)*, 2008 FC 788).

[20] Under this standard, the Court will only intervene where the decision does not reflect the principles of justification, transparency and intelligibility or falls outside the range of possible, acceptable outcomes (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Khosa*, above at para 59

## V. Analysis

[21] As a preliminary matter, I note that counsel were invited to prepare submissions for consideration by the Court on the issue of *res judicata*, given the order of Justice Robert Barnes in IMM-6499-11 denying leave to the Applicant for judicial review as to the lawfulness of his referral for an admissibility hearing and the denial of an adjournment. The Court has reviewed these submissions. However, in light of my conclusion with respect to the issues raised in this application, it is unnecessary for me to make a finding with respect to *res judicata*. Though I do note (by way of *obiter*) that, given the strict requirements for the application of *res judicata*, the Court should be very cautious where the prior judgment relied upon is an order denying leave for judicial review without reasons.

### A. *Procedural Fairness*

[22] The Applicant asserts that the Minister's referral to an admissibility hearing was invalid based on the terms of the plea agreement he entered into in 2005 for the charge of participating in a criminal organization. He insists the clear intent of that agreement as recorded in a letter from the

Crown Attorney was to protect him from removal. As a consequence, CBSA's conduct in making the referral breached his legitimate expectations and constituted an abuse of process.

[23] For the doctrine of legitimate expectations to apply, there must be conduct or representations that are "clear, unambiguous and unqualified" and induced in the Applicant a reasonable expectation that he would retain a particular benefit, in this instance protection from removal by CBSA (see for example *Canada Union of Public Employees v Ontario (Minister of Labour),* 2003 SCC 29, [2003] SCJ no 28 at para 131; *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] SCJ no 43).

[24] Considering the letter at issue, I must agree with the Respondent and the Board's initial finding that the requirements for establishing legitimate expectations are not present. To the contrary, the letter is unclear, ambiguous and qualified. Enforcement action would not be pursued "at this time." This did not foreclose the possibility of such action in the future, particularly if other offences were subsequently committed as was the case with the Applicant. Indeed, the letter is contradictory in that it expressly contemplates any initiated enforcement actions by excluding members of the Toronto Police Service from appearing as witnesses.

[25] As to the allegations of abuse of process, I am not convinced that this would apply under the circumstances or that the requirements would be met in the Board's decision to proceed on the basis of the referral. Abuse of process only relates to proceedings that are "oppressive and vexatious" and would violate the fundamental principles of justice underlying the community's sense of fair play and decency. It is intended to protect an abuse of the court's process (see the summary of this

concept in *Toronto (City) v Canadian Union of Public Employees (CUPE) Local 79*, 2003 SCC 63, [2003] SCJ no 64 at paras 35-37). In *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] SCJ no 43 it was suggested that proceedings "must be unfair to point that they are contrary to the interests of justice."

[26] As discussed, the agreement relied on by the Applicant does not eliminate the possibility of future referrals. The admissibility hearing proceeded on the basis of a referral documenting the Applicant's convictions, including those that occurred in 2006 following the plea agreement and form the basis of the inadmissibility finding under subsection 36(1)(a).

[27] The Applicant further contends that the Board erred in finding it lacked jurisdiction to address the validity of the referral and, consequently, declining to issue the requested summons to have individuals testify as to the nature of the plea agreement.

[28] He relies on *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2005] FCJ no 533 at paras 77 where Justice Judith Snider determined that a referral was invalid and therefore quashed the decision of the Board because it lacked jurisdiction to proceed with the admissibility hearing. This determination proves to be of limited assistance to the Applicant as Justice Snider was concurrently considering the nature of the report and referral as well as its impact on the issuance of a Deportation Order. Her finding regarding admissibility naturally flowed from the invalidity of the referral. Until the Applicant establishes that the initial referral is invalid, it is no consequence for the Board's decision. As noted, the application for judicial review of the referral (IMM-6499-11) was recently dismissed.

[29] The Applicant also points to the finding of Justice Luc Martineau in *Wong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 971, [2011] FCJ no 1193 that quashed a decision to uphold a removal order where there were "strong doubts" as to whether the report had been reviewed and validated. However, that is not the situation facing the Applicant. As the Respondent stresses, he could have raised concerns regarding the referral and the nature of the plea agreement during his interview or otherwise prior to the admissibility hearing. Once the matter was placed with the Board for a hearing, the only question for determination was the Applicant's inadmissibility.

[30] Though the Applicant insists the requested summons should have been granted as it would have allowed individuals to testify who had relevant knowledge of the plea agreement, there was no requirement to do so. In my view, the suggestion of Justice Martineau in *Wong*, above that the Minister could have had officials testify as to what occurred with the report and referral in that case does not lead to a requirement to grant the Applicant's request to have individuals testify or accept his characterization of the agreement. It was merely an *obiter* comment.

[31] At the stage of the admissibility proceeding, the Applicant's referral was not directly at issue as the Board stressed at the outset of its reasons. The summons was not necessary for a full and proper hearing under the *Immigration Division Rules*, SOR/2002-229, s 33. The appropriate forum for challenging the referral was not the Board, but an application for judicial review before this Court.

[32] However, I see no requirement that Board should have granted the adjournment. The Applicant was not prejudiced in his ability to seek judicial review before this Court following the hearing. It was not necessary to further delay the hearing. In *Philistin v Canada (Minister of Citizenship and Immigration)*, 2011 CF 1333, [2011] ACF no 1860, for example, a decision by the Board to refuse an adjournment to challenge the referral was found reasonable.

[33] I therefore find no breaches of procedural fairness in the Board's handling of the proceedings despite allegations of invalidity of the referral, and the requests for summons and adjournment. The Applicant has yet to establish that the referral was invalid under the circumstances.

B. *Organized Criminality*

[34] The Applicant takes issue with the Board's reliance on findings of fact from criminal courts to determine that the Malvern Crew constitutes a criminal organization. He insists that the Board had an obligation to consider "credible and trustworthy evidence." He also refers to various decisions of this Court that caution against directly importing such factual findings.

[35] I note, however, that many of these decisions referred to by the Applicant expressed that principle in rather different contexts, such as accepting findings regarding constantly evolving country conditions in making refugee determinations.

[36] In this instance, the Board did not rely solely on the findings of other courts or tribunals as the Applicant implies. Although the Board relied significantly on this information, its reasons also discuss corroborating documentary evidence. The judicial pronouncements were highly relevant in discussing the activities of the Malvern Crew and mentioning the Applicant's involvement. I fail to see how this evidence was not ultimately "credible and trustworthy in the circumstances", particularly since the Board does not have to adhere to strict rules of evidence and has considerable flexibility in examining what is relevant (see *Thanaratnam v Canada (Minister of Citizenship and Immigration)*, [2004] 3 FCR 301 at para 7, reversed on other grounds, [2006] 1 FCR 474 (FCA)).

[37] The Applicant also insists that the Board erroneously relied on his conviction under section 467 of the *Criminal Code* as a "determinative factor" in finding that he was inadmissible under subsection 37(1)(a) of the IRPA. *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2006] FCJ no 1512 at para 40 rejected the argument that criminal jurisprudence and international instruments should inform the meaning of a criminal organization for interpretation stating "[t]he wording in paragraph 37(1)(a) is different, because its purpose is different."

[38] While the terms as considered in criminal and immigration jurisprudence are distinct, the Board was not precluded from assigning significant weight to the Applicant's conviction in this regard. Despite the Board's use of the word "determinative", as the Respondent stresses, it proceeded to consider the "facts and conclusions underlying that conviction."

[39] I find the Board's reliance on his conviction as a critical factor in concluding that there were "reasonable grounds to believe" he was involved with the criminal activities of the Malvern Crew appropriate in the circumstances (see the factors relevant to this analysis as discussed in *Thanaratnam*, above).

[40] The Applicant now claims that he pled guilty to the offence of participating in a criminal organization under threat of deportation, reinforcing that the Board cannot rely solely on his conviction in the circumstances. In support of this argument, he references a similar finding in *Tang*, above.

[41] The Respondent distinguishes the ruling in *Tang* as that individual pled guilty in a foreign jurisdiction. It is also emphasized that the Applicant did not raise this argument with the Board and provided no evidence to support it.

[42] At paragraph 19 of the *Tang*, Justice Michael Phelan emphasized:

> [19] As a general proposition, a conviction may form the basis for a conclusion of inadmissibility but does not necessarily always do so. A conviction may form that basis where there is reason to believe that the allegations on which the conviction is based are a true statement of facts. However, to rely upon a conviction does require an inquiry into the meaning of the conviction and may engage an analysis of the circumstances surrounding it. For example, a plea bargain may raise different considerations than a finding of guilt after a trial.

[43] The Board's conclusion was consistent with these principles in examining the conviction and surrounding circumstances. While there was a guilty plea in this instance, that should not in itself call into question the validity and relevance of a conviction in assessing inadmissibility. The

Applicant did not demonstrate to the Board or before this Court that the facts as presented based on the conviction are somehow inaccurate in light of the guilty plea or other reasons.

[44] The Applicant also draws this Court's attention to various authorities relating the incompetence of counsel in the proceedings. He disputes his previous counsel's concession at the hearing as contrary to his instructions that he was involved with a criminal organization and is therefore inadmissible. However, he does not protest the concession made as to criminality under subsection 36(1)(a). The Respondent insists that the Applicant failed to properly raise these allegations of incompetence at an earlier stage.

[45] Regardless, I find it unnecessary to further address the jurisprudence on this matter as the Board's decision acknowledges the concessions but proceeds to conduct a detailed analysis as there must "be a sufficient evidentiary basis to support a finding of inadmissibility." The concessions ultimately proved immaterial and no breach of procedural fairness resulted for the Applicant under the circumstances.

[46] I am not persuaded that the Board's assessment of the Applicant's inadmissibility as it relates to involvement in a criminal organization was unreasonable and warrants the Court's intervention.

## VI. Conclusion

[47] Given that there was no breach of procedural fairness and the Board's finding as to organized criminality was reasonable, this application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is dismissed.

" D. G. Near "

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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