Federal Court  Cour fédérale

Date: 20140528

Docket: IMM-5436-13

Citation: 2014 FC 516

Ottawa, Ontario, May 28, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

KAILASH NATH MAHAPATRA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This case is concerned with the equivalency between an offence for which the applicant has been convicted abroad and a corresponding offence in Canada.

[2] This is an application for judicial review of a decision of the Immigration Division [ID], rendered on August 7, 2013, whereby a determination was made that the applicant is inadmissible to Canada pursuant to paragraph 36(1)(b) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [IRPA]. The judicial review is sought in accordance with section 72 of the IRPA.

[3] As a result of the finding of inadmissibility, a deportation order was issued concerning the applicant under section 229 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

I. Facts

[4] The facts of this case are relatively straight forward. The applicant, who was born in 1957, is a citizen of India who is neither a citizen nor a permanent resident of Canada.

[5] The applicant was convicted of second degree child molestation (sexual assault) under title 11, chapter 37, section 8.3 (§ 11-37-8.3) of the *State of Rhode Island General Laws*, R.I. Gen. Laws § 6-1-1. A jury found the applicant guilty of the offence and he was convicted on April 17, 2003. An appeal was launched to the Supreme Court of Rhode Island and the conviction was affirmed in July 2005.

[6] There is no issue that the applicant has been convicted of that offence. However, he continues to deny that the facts supporting the conviction actually occurred.

[7] The offence for which the conviction was entered occurred in 1997, when the victim was 13 years of age.

[8] The applicant was at the time an instructor at Yale University. In the judgment rendered by the Rhode Island Supreme Court, the facts are described in the following fashion:

> At a jury trial in January 2003, the complainant, whom we will refer to as Ashley, testified that defendant, a family friend, inappropriately had touched and kissed her on several occasions. The incident that gave rise to the criminal charges occurred in December 1997, when Ashley was thirteen years old. Ashley spent the night at a mutual friend's home in Coventry. After the children had retired to bed and the adults started watching a movie, defendant woke Ashley to play a game of air hockey. But when the table would not work, Ashley returned to bed. The defendant laid down beside her in a twin-sized bunk bed. As Ashley lay on her side, facing the wall, defendant rubbed her breasts from behind and attempted to put his hands down her underpants – she managed to prevent him from doing so by pressing against the wall and moving her body to evade his hand.

[9] The applicant was sentenced to a total of 10 years, to be served under house arrest for the first three years, and the remainder to be served in the community, but under probation.

II. Standard of Review

[10] The parties are in agreement that the appropriate standard of review on the issue of whether there is equivalency between offences described in two countries is reasonableness. I agree. Less than a year ago, our Court reviewed the matter and, supported by case law, concluded that the standard is that of reasonableness (*Patel v Canada (Citizenship and Immigration)*, 2013 FC 804). The question is one of mixed fact and law that calls for such a standard. As a result, the Court does not have to be satisfied that the decision of the ID is correct, but rather that the justification, transparency and intelligibility within the decision-making process are present. At the end of the day, the Court has to decide whether the decision falls

within the range of possible, acceptable outcomes, which are defensible in respect of the facts and law.

III. Arguments

[11] As a preliminary matter, the Crown argued that the Court should not be seized of the matter because the applicant does not come to this Court with clean hands. In the view of the Minister, the applicant has abused the immigration law system of this country by coming repeatedly to Canada on visitor's visas obtained without the full disclosure required by law. It is advanced that presences in Canada would have been authorized on some 12 occasions. Furthermore, when the applicant was finally arrested by the authorities, he would have tried to argue that this was a mistake. What we understand is that the applicant was coming to Canada in order to visit his family in the United States. Be that as it may, the refusal to disclose fully what is required by the law, including whether an offence has been committed in any other country, is a serious issue.

[12] However, given the conclusion that I have reached on the merits of this case, it will not be necessary to delve any further in the possible application, in the case at hand, of the clean hands doctrine.

[13] The applicant makes before this Court two reasons in support of his contention that his application for judicial review ought to be granted. First, he claims that the ID did not give reasons for why it concluded that there was equivalency between the offence for which the applicant was convicted in Rhode Island and section 271 of the Canadian *Criminal Code*, RSC,

1985, c C-46. The applicant does not dispute that the cases of *Hill v Canada (Minister of Employment & Immigration)* (1987), 73 NR 315 [*Hill*] and *Li v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 4086 (FCA) are those that have to find application here. Rather, the contention is that the ID does no more than reproduce the legislative provision, list the words contained in each without providing any further analysis to explain how the equivalency is established.

[14] The applicant also contends that the ID was not able to conduct an appropriate comparison between the facts underlining the conviction and the offence that could have been committed with those same facts in Canada.

IV. Analysis

[15] In spite of the able argument presented by counsel for the applicant, the Court must conclude that the judicial review application fails.

[16] The first step in the analysis would have to be a consideration of the provision under which a finding was made that the applicant is inadmissible. Paragraph 36(1)(b) of the IRPA reads as follows:

Serious criminality	**Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
…	…
(b) having been convicted of an offence outside Canada that, if committed in Canada, would	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au

constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

[17] The second step in that analysis is of course to consider the three methods that are available in order to determine equivalency between the offences. As already indicated, the case of *Hill*, of the Federal Court of Appeal, is the leading case. The Court summarized in the following fashion what decision makers should do:

> First, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences.
>
> Two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not.
>
> Third, by a combination of one and two.

[18] Not only is the finding made by the ID reasonable, but it is, in my view, unassailable. In careful analysis, the ID considered the legislation under which the applicant had been convicted, found its essential elements and compared those essential elements to the offence found in section 271 of the *Criminal Code*.

[19] Section 11-37-8.3 of the *State of Rhode Island General Laws* reads as follows:

> **§ 11-37-8.3 Second degree child molestation sexual assault**. – A person is guilty of a second degree child molestation sexual assault if he or she engages in sexual contact with another person fourteen (14) years of age or under.

[20] The act also defines what is a "sexual contact" which will take the reader to a definition of "intimate parts". Thus "sexual contact" is defined as "the intentional touching of the victim's or accused's intimate parts, clothed or unclothed, if that intentional touching can be reasonably construed as intended by the accused to be for the purpose of sexual arousal, gratification, or assault." As for "intimate parts" it "means the genital or anal areas, groin, inner thigh, or buttock of any person or the breast of a female."

[21] Obviously, the jury in Rhode Island came to the conclusion that the offence had been committed beyond a reasonable doubt. As in all systems inspired from the Common law and of the Anglo-Saxon tradition, each and every element of the offence must be proven beyond a reasonable doubt for a guilty verdict to be appropriate.

[22] Whatever the applicant may say now about the facts of this case, it cannot be disputed that the appropriate authority, a jury, has concluded that every essential element of the offence had been committed by him. The applicant does not dispute that he has been convicted. He submits that the facts did not happen the way they were described at trial. With all due respect, it cannot be a mistake for the ID to accept the jury verdict involving the applicant.

[23] There is only to consider whether the offence for which the applicant was convicted abroad would constitute an offence under an Act of Parliament punishable by at least 10 years' imprisonment. In the case at hand, the offence selected was section 271 of the *Criminal Code*.

[24] Section 271 of the *Criminal Code*, the offence of sexual assault, is punishable by a term of 10 years' imprisonment. If it can be said that the offence committed in Rhode Island would constitute the offence of sexual assault found at section 271 of the Canadian *Criminal Code*, the requirements of paragraph 36(1)(b) of the IRPA will obviously have been satisfied.

[25] As will be seen from an examination of the Rhode Island statute, the consent of the victim is not an essential element of the crime. It suffices that there be sexual contact, as defined, where the person is under the age of 14. At the other end of the analysis, the *Criminal Code* defines assault as:

Assault	**Voies de fait**
265. (1) A person commits an assault when	265. (1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas :
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;	a) d'une manière intentionnelle, emploie la force, directement ou indirectement, contre une autre personne sans son consentement;
…	…
Application	**Application**
(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.	(2) Le présent article s'applique à toutes les espèces de voies de fait, y compris les agressions sexuelles, les agressions sexuelles armées, menaces à une tierce personne ou infliction de lésions corporelles et les agressions sexuelles graves.

[26] It will be sufficient, for our purposes, to refer to the annotation found in *Martin's Annual Criminal Code, 2014 Edition*, (Edward L. Greenspan, The Honourable Justice Marc Rosenberg

& Marie Henein, *Martin's Annual Criminal Code, 2014* Edition, (Toronto: Canada Law Book, 2014) at 590) as to what is the meaning of sexual assault. One can read under the annotation for section 271 of the *Criminal Code*:

> Sexual assault is an assault, within anyone of the definitions of that concept in s. 265(1), which is committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: whether viewed in the light of all the circumstances the sexual or carnal context of the assault is visible to a reasonable observer. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats, which may or may not be accompanied by force, will be relevant. The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. The existence of such a motive is, however, merely one of many factors to be considered: *R. v. Chase*, [1987] 2 S.C.R. 293, 37 C.C.C. (3d) 97 (6:0).

[27] It would appear to be rather obvious that the definition of sexual assault under Canadian law captures the offence described under the Rhode Island law for which the applicant was convicted. The only difficulty that may arise is whether or not there is equivalency with respect to the issue of consent. Consent is not an element of the crime for which the applicant was convicted whereas, under Canadian law, it is possible to consent to the touching, or the imposition of force on one's body. However, Canadian law excludes from consideration the consent of the victim who is 13 years of age at the time of the commission of the offence. It is subsections 150.1(1) and (2) of the *Criminal Code* that find application in the circumstances. They read:

Consent no defence	**Inadmissibilité du consentement du plaignant**
150.1 (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.	150.1 (1) Sous réserve des paragraphes (2) à (2.2), lorsqu'une personne est accusée d'une infraction prévue aux articles 151 ou 152 ou aux paragraphes 153(1), 160(3) ou 173(2) ou d'une infraction prévue aux articles 271, 272 ou 273 à l'égard d'un plaignant âgé de moins de seize ans, ne constitue pas un moyen de défense le fait que le plaignant a consenti aux actes à l'origine de l'accusation.
Exception — complainant aged 12 or 13	**Exception — plaignant âgé de 12 ou 13 ans**
(2) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 12 years of age or more but under the age of 14 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused	(2) Lorsqu'une personne est accusée d'une infraction prévue aux articles 151 ou 152, au paragraphe 173(2) ou à l'article 271 à l'égard d'un plaignant âgé de douze ans ou plus mais de moins de quatorze ans, le fait que le plaignant a consenti aux actes à l'origine de l'accusation constitue un moyen de défense si l'accusé, à la fois :
(a) is less than two years older than the complainant; and	a) est de moins de deux ans l'aîné du plaignant;
(b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.	b) n'est ni une personne en situation d'autorité ou de confiance vis-à-vis du plaignant ni une personne à l'égard de laquelle celui-ci est en situation de dépendance ni une personne qui est dans une relation où elle exploite le plaignant.

[28] Given that the applicant was older than the complainant by more than two years, and that the complainant was 13 years of age at the time, the end result is that there is no defence

available to an accused in a case like this, whether the complainant is consenting or not. To put it another way, the issue of consent is not relevant.

[29] The applicant has contended that the proper analysis requires that "equivalency is shown from the foreign statute to the Canadian one." (Memorandum of Facts and Law of the applicant, para 26). I am less than certain that an analysis that would have started from the Canadian statute to see if it meets the foreign law would be inappropriate. At the end of the day, the first test from *Hill* calls for a comparison of the foreign statute to the Canadian offence. Whether one starts from one end, or the other, one has to meet the test of equivalency. Be that as it may, I have in the circumstances started from the American statute to compare it to a Canadian offence. Indeed, it is what I thought the ID did in the circumstances of this case.

[30] The argument put forward by the applicant is concerned with the reasons being, for all intents and purposes, inadequate. This deserves two comments. First, the adequacy of reasons is not sufficient in order to find a decision of a lower tribunal to be unreasonable. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*] one can read at paragraph 14:

> [14] Read as a whole, I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the

> qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).

[31] What the reviewing judge is looking for is an understanding of how the decision was arrived at. Once again, in *Newfoundland and Labrador Nurses' Union*, one can read at the end of paragraph 16: "In other words, 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, the *Dunsmuir* criteria are met."

[32] The analysis conducted by the ID in this case leaves nothing to interpretation. It examined the provisions carefully and, although it did not dot every "i" and cross every "t", the test of paragraph 16 of *Newfoundland and Labrador Nurses' Union* was amply met. Thus, my second observation is that we should not expect legal treaties where lower tribunals seek to determine equivalency. The clear findings about the essential elements of the foreign offence, together with the essential elements of the Canadian offence, led to the conclusion that did not require much of an explanation at paragraph 68 of the ID decision:

> [68] The panel finds that although there are differences in the wording of the offences of sexual assault in the Canadian *Criminal Code* and second degree child molestation sexual assault in section 11-37-8.3 of the General Laws of Rhode Island, the essential elements of the respective offences are equivalent when the complainant is 14 years of age or under.

I do not know what more could be expected in order to satisfy the test of reasonableness.

[33] That would have been sufficient to find, under the *Hill* test, that there is equivalency. Nevertheless, the ID went on to find that the second *Hill* test had been satisfied in the

circumstances. The ID found that it had to prefer the description of the facts given by the Rhode Island Supreme Court than that offered by the applicant. As I have pointed out earlier, that is completely reasonable. Indeed, it is inescapable. The applicant, before this Court, argued that it was a mistake to have preferred the version of the Rhode Island Supreme Court. The applicant's argument is that the better evidence would have been a reference to the reasons for judgment at trial.

[34] As already noted, this case was decided by a jury and there is no trial judgment to be retrieved for closer examination. The best evidence in this case is the finding by the jury that each of the essential elements of the offence had been proven beyond a reasonable doubt, as the finding of guilty establishes.

[35] As a result, the application for judicial review is dismissed. The parties indicated that, in their respective view, no question is to be certified. I share that view.

JUDGMENT

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

There is no question for certification.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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