Federal Court  Cour fédérale

Date: 20160331

Dockets: IMM-4831-15
IMM-5145-15

Citation: 2016 FC 365

Toronto, Ontario, March 31, 2016

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

TAMAZI GECHUASHVILI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] These are applications for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of two distinct but linked decisions involving the applicant. The first [IMM-4831-15] is a decision of a member of the Immigration Division [ID] of the Immigration and Refugee Board of Canada finding the Minister met its burden in

establishing the applicant inadmissible to Canada pursuant to paragraph 37(1)(b) of the IRPA, as reasonable grounds exist for believing that the applicant engaged in organized criminality in the context of international crime, in the activity of people smuggling.

[2] The second decision is a decision of a Senior Immigration Officer with Citizenship and Immigration Canada [CIC] refusing the applicant's application for permanent residence under the spouse/common-law partner in Canada class after finding the applicant inadmissible under paragraph 37(1)(b) of the IRPA, relying upon the ID's decision outlined above to support the decision.

[3] The parties agree that finding a reviewable error requiring a reconsideration of the ID's decision in IMM-4831-15 would of necessity result in a finding that the CIC decision under review in IMM-5145-15 also be returned for reconsideration.

[4] I conclude that the applications should be allowed for the reasons that follow.

II. Background

[5] The applicant is a 64 year old male citizen of Georgia who, on February 1, 2011, applied for permanent residence from within Canada under the spousal/common law partner in Canada class.

[6] In June, 2011, officers with the RCMP, assisted by the OPP, arrested the applicant near the U.S. border with two other Canadian citizens, Robert Cormeau and Michael Robertson and

two foreign nationals. In interviews, Mr. Cormeau and Mr. Robertson separately stated to the authorities that they were in the process of a smuggling operation, bringing two foreign nationals across the border from the U.S. into Canada. They also stated that the applicant was the leader of the operation and was to pay Mr. Cormeau and Mr. Robertson for their role.

[7] In November, 2013 the Canadian Border Services Agency [CBSA] issued a subsection 44(1) report against the applicant expressing the opinion that the applicant is inadmissible pursuant to paragraph 37(1)(b) of the IRPA due to involvement in a transnational criminal activity, having planned, organized and participated in the illicit smuggling of persons across the U.S. border into Canada. CBSA referred the applicant for an admissibility hearing.

[8] The admissibility hearing occurred on two separate dates before the ID in June, 2015 and concerned both the applicant and Mirian Vashakidze. The latter is not an applicant on this judicial review application.

[9] In post-hearing written submissions, the applicant applied to the ID under Rule 38 of the *Immigration Division Rules*, SOR/2002-229 seeking that the ID defer rendering its decision until the Supreme Court of Canada resolved the legal issues relating to the Federal Court of Appeal's decision in *JP v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 262, 368 DLR (4th) 524 [*JP*] and the British Columbia Court of Appeal's decision in *R v Appulonappa*, 2014 BCCA 163, 373 DLR (4th) 1. The Minister opposed that request.

[10] On September 30, 2015, and before the Supreme Court of Canada resolved the legal uncertainty surrounding the interpretation of paragraph 37(1)(b) of the IRPA, the ID rendered its decision, finding the Minister discharged its burden in establishing the applicant and Mirian Vashakidze inadmissible to Canada and issued a deportation order against both individuals. The ID did not expressly address the applicant's application under Rule 38 in post-hearing submissions.

[11] The ID held at paragraph 30 of its decision that "It is reasonable to define inadmissibility for "people smuggling" under s. 37(1)(b) by relying on section 117(1) of the *IRPA* (*M.P.S.E.P. v. J.P. and G.J.,* 2013 FCA 262)." The ID cited *JP* again when setting out the required elements to satisfy the applicable provisions under the IRPA. Finally, the ID relied on Chief Justice McLachlin's decision in *Mugesera v Canada (Minister of Citizenship and Immigration)*, [2005] 2 SCR 100 at para 116 for the proposition that the standard of proof for questions of fact is the reasonable grounds to believe standard.

[12] On November 27, 2015 the Supreme Court of Canada in *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras 5, 76-77, 390 DLR (4th) 385 [*B010*] overturned the Federal Court of Appeal decision in *JP* and held that paragraph 37(1)(b) only applies to people who act to further illegal entry of asylum seekers in order to obtain, directly or indirectly a financial or other material benefit in the context of transnational organized crime. On the same day, Chief Justice McLachlin released a unanimous decision in *R v Appulonappa*, 2015 SCC 59, 390 DLR (4th) 425 allowing the appeal in that case as well. I focus only on the findings in *B010* for the purpose of this judicial review.

III. Issue and Analysis

A. *Issue*

[13] The applicant raises a number of issues relating to the failure of the ID to expressly address the section 38 application, the interpretation of the *mens rea* requirement under paragraph 37(1)(b), and the reasonableness of the decision. However, in light of my conclusions on the impact of *B010*, I need only address the reasonableness of the decision based on the following issue: in light of the Supreme Court of Canada's decision in *B010*, did the ID err in failing to make an express or implied determination on whether the applicant obtained a direct or indirect financial or other material benefit from people smuggling in the context of organized transnational crime.

B. *Analysis*

(1) The Law

[14] In rendering its decision, the ID explicitly relied on the Federal Court of Appeal's decision in *JP*, where the Court concludes at paragraphs 79, 84 and 144:

> [79] The Board's decision to interpret paragraph 37(1)*(b)* of the *IRPA* with reference to subsection 117(1) thereof, as it then read, is not only reasonable, but in my view also the correct interpretation of that provision.
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> […]
>
> [84] I therefore conclude that this Court is bound by the *B010 Appeal Decision* with respect to the following issues:
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> […]

> (b) That the Board acted reasonably by referring to subsection 117(1) of the *IRPA*, as it then read, to define the concept of "people smuggling" in paragraph 37(1)*(b)* without the requirement of a financial or material gain or advantage; and
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> […]
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> 144 Finally, I would answer the questions certified by Zinn J. as follows in the case concerning Mr. Hernandez:
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> […]
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> **Question 2:** Does the phrase "people smuggling" in paragraph 37(1*)(b)* of the *IRPA* require that it be done by the smuggler in order to obtain, "directly or indirectly, a financial or other material benefit" as is required in the *Smuggling of Migrants Protocol?*
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> **Answer 2:** No.

[15] This interpretation of paragraph 37(1)(b) of the IRPA was reversed by the Supreme Court of Canada in *B010* , where Chief Justice McLachlin writing on behalf of a unanimous Court states at paragraphs 5 and 76:

> [5] I conclude that s. 37(1)(b) of the IRPA applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. In coming to this conclusion, I outline the type of conduct that may render a person inadmissible to Canada and disqualify the person from the refugee determination process on grounds of organized criminality. I find, consistently with my reasons in the companion appeal in *R. v. Appulonappa,* 2015 SCC 59, that acts of humanitarian and mutual aid (including aid between family members) do not constitute people smuggling under the IRPA.
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> […]
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> [76] The tools of statutory interpretation -- plain and grammatical meaning of the words; statutory and international contexts; and legislative intent -- all point inexorably to the conclusion that s. 37(1)(b) applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or

> indirectly, a financial or other material benefit in the context of transnational organized crime. I conclude that a migrant who aids in his own illegal entry or the illegal entry of other refugees or asylum-seekers in their collective flight to safety is not inadmissible under s. 37(1)(b).

[16] In oral submissions I sought the views of the parties on the issue of whether or not these applications are to be considered based on the current state of the law or the law as it existed at the time the ID rendered its decision. The respondent expressed the view that the Court is bound to apply the law as it exists today, a position that is consistent with the jurisprudence - developments in the common law have retroactive and retrospective effect (*British Columbia v Imperial Tobacco Canada Ltd*, [2005] 2 SCR 473 at para 72; *Ipex Inc v Lubrizol Advanced Materials Inc*, 2015 ONSC 6580 at paras 22-25).

(2) Financial or Other Material Benefit

[17] A review of the decision and the record leads me to conclude that the ID did not consider or make an express or implied finding on the question of whether or not the applicant, directly or indirectly, obtained a financial or other material benefit from transnational crime.

[18] The ID explicitly relied on *JP* for the purpose of defining inadmissibility for people smuggling and in identifying the elements required to satisfy paragraph 37(1)(b) and subsection 117(1) of the IRPA (ID Decision at paras 30, 33). The elements cited did not include a requirement that the applicant have acted in order to obtain, directly or indirectly a financial or other material benefit in the context of transnational organized crime. Furthermore, as the

applicant submitted, the ID does not address a potential financial or other material benefit accruing to the applicant.

[19] Further, the Minister made the following submissions in response to the applicant's request that the ID delay its decision pending the Supreme Court of Canada's decision in *B010* (Certified Tribunal Record, Vol 1 at pages 317-318):

> Mr. Gechuashvili alleges that the current state of the law with regards people smuggling is uncertain. He submits there are several judicial reviews pending are set to rule on the substantive issues at bar in his case, namely whether section 117(1) of the IRPA should require a direct or indirect, financial or other material benefit and/or whether the section itself is constitutionally overbroad.
>
> *Section 38 Application for Postponement Sine Die*
>
> The Minister submits that the current state of the law is clear; that section 117(1) of the IRPA is not overbroad and that there is no current requirement for a material or financial benefit for findings to be made under section 37(1)(b) of the IRPA. Allowing Mr. Gechuashvili's application pursuant to rule 38 for the decision to be held in abeyance would be inappropriate as it is only speculation that the Supreme Court of Canada's decisions in *J.P.* or *Appulonappa* will actually impact the case at bar. The Court may very well agree with the *status quo* and uphold the current state of the law as they did when dismissing the leave to appeal application in *B010*. From a fairness perspective, then, the case must be assessed on the current state of the law. **Should the law be overturned in the future, Mr. Gechuashvili can seek the appropriate remedy at that time, should one exist** [emphasis added].

[20] In oral submissions, the respondent pointed the Court to a number of paragraphs in the decision where the ID makes reference to evidence indicating that the smuggling operation was carried out for purposes of financial gain. The evidence does indicate that other members of the group were to be compensated for their involvement and that the applicant was the leader. The

question then is whether or not the presence of these facts provides a sufficient basis for this Court to supplement the reasons of the ID (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708 at para 15 [*Newfoundland Nurses*]). In my view they do not, particularly in light of the Minister's submission to the ID, a submission the ID appears to have accepted by necessary implication through its above-referenced reliance on *JP*.

[21] In reaching this view I am mindful that the Supreme Court of Canada has endorsed the view of Professor Dyzenhaus on the meaning of reasonableness in the context of reviewing a decision maker's reasons: "That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them [emphasis in original]" (*Newfoundland Nurses* at para 12). However it has also been recognized by the Supreme Court that respectful attention to the reasons that could have been offered based on the record is not an invitation to reformulate a tribunal's decision: "In some cases, it may be that a reviewing court cannot adequately show deference to the administrative decision maker without first providing the decision maker the opportunity to give its own reasons for the decision" (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, [2011] 3 SCR 654 at paras 54-55; *JMSL v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 114 at paras 29, 38, 372 DLR (4th) 567 [*JMSL*]).

[22] In this case the ID decision is silent on what is a critical issue in considering paragraph 37(1)(b) and as such I adopt the view expressed by Justice Rennie in *Komolafe v Canada*

(Minister of Citizenship and Immigration), 2013 FC 431 at paras 10-11, 16 Imm LR (4th) 267, where he states:

> [10] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 does not save the decision. Newfoundland Nurses ensures that the focus of judicial review remains on the outcome or decision itself, and not the process by which that outcome was reached. **Where readily apparent, evidentiary lacunae may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn** [emphasis added]. A reviewing court looks to the record with a view to upholding the decision.
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> **[11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue** [emphasis added]. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[23] The ID was silent on a critical issue, an issue that the Minister, not the applicant has the onus under paragraph 37(1)(b) of the IRPA to establish before the ID. This Court on judicial review is not in a position to find the Minister discharged the onus on this point particularly where the ID did not address the issue either expressly or by necessary implication. Therefore, the Court cannot be confident that the ID would have reached the same result by addressing this issue of whether the applicant derived a financial or other material benefit, directly or indirectly, from people smuggling in the context of transnational organized crime, and it follows that the

decision was unreasonable and both matters should be sent back for redetermination (*JMSL* at paras 38-39).

IV. Certified Question

[24] Finally, the applicant has advanced the following questions for certification as set out at paragraph 20 of the Reply:

> (a) whether, on the proper interpretation of sections 37 and 38 of the *Immigration Division Rules,* SOR/2002-229 [IDR], the ID is required to "voice", either orally or in writing, its interlocutory decision to the parties prior to issuing, or as part of, its final decision? and
>
> (b) on the proper interpretation of section 49 of the IDR, do the words "may do whatever is necessary to deal with the matter" entitle the ID, as the Respondent appears to suggest, to decide interlocutory applications without issuing its decision to the parties?

[25] The respondent opposed the applicant's request for the above-referenced questions for certification submitting neither question satisfies the requirements set out by the Federal Court of Appeal.

[26] The Federal Court of Appeal has set out the test for certification of issues for the purposes of an appeal under paragraph 74(d) of the IRPA on a number of occasions (*Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89 at paras 10-12, 36 Imm LR (3d) 167;*Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9, 28 Imm LR (4th) 231). These authorities establish that this Court may certify a question under paragraph 74(d) only where it (1) is dispositive of the appeal and (2) transcends the interests of

the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. Furthermore, the question must arise from the case itself. Here the application has been decided based on the ID's failure to address a critical issue: whether the applicant derived a financial or other material benefit from the activity of people smuggling in the context of transnational crime, not on the basis of the matters identified in the applicant's proposed questions for certification. I therefore conclude that this case does not raise questions that are appropriate for certification under paragraph 74(d) of the IRPA.

V. Conclusion

[27] Having found the ID's decision in IMM-4831-15 was unreasonable, and noting that the decision of the Senior Immigration Officer with CIC in IMM-5145-15 relied upon the ID's decision, both decisions are set aside. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications are granted, the decisions are quashed and the matters are remitted for reconsideration by the decision makers. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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