Federal Court  Cour fédérale

Date: 20150206

Docket: IMM-1241-14

Citation: 2015 FC 150

Montréal, Quebec, February 6, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARKIS JULIEN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, a 40-year-old citizen of Turks and Caicos, was convicted in August 1996 of attempted murder in the second degree without a firearm and kidnapping with a firearm, in the State of Florida, USA. Upon completion of his sentence, in May 2007, the Applicant was deported to Turks and Caicos.

[2] Approximately one year later, the Applicant arrived in Canada on April 12, 2008. In August 2013, the Applicant married a Canadian citizen, with whom he had previously had a child, born in August 2009.

[3] In August 2013, the Applicant filed an application for permanent residence sponsored by his wife, based on humanitarian and compassionate [H&C] grounds.

[4] In September 2013, the Applicant filed an application for rehabilitation and was interviewed by an immigration officer who issued a positive recommendation.

[5] In July 2013, an immigration officer drafted an inadmissibility report on grounds of serious criminality pursuant to subsections 44(1) and 44(2), and paragraph 36(1)(*b*) of the *Immigration and Refugee Protection Act* [IRPA], LC 2001, c 27, referring the Applicant for an admissibility hearing before the Immigration Division [ID].

[6] The Applicant seeks judicial review of a decision by the ID of the Immigration and Refugee Board, whereas the Applicant was found inadmissible on grounds of serious criminality, under paragraph 36(1)(*b*) of the IRPA.

II. Impugned Decision

[7] In its reasons, upon review of the evidence, the ID finds that the Applicant was convicted of kidnapping under paragraph 787.01(1)(*a*) of the 1997 Florida Statutes [Florida Statutes].

[8] The ID then considers whether the foreign offence of kidnapping under the Florida Statutes is equivalent to the offence of kidnapping under subsection 279(1) of the *Criminal Code of Canada* [Code]. Relying on the jurisprudence, the ID determines that the offence of kidnapping under the Code requires an element of transporting or moving a victim from one place to another; whereas this element is not present in the wording of subsection 787.01(1) of the Florida Statutes.

[9] The ID thus determines that the offence of kidnapping under the Florida Statutes is equivalent to the Canadian offence of forcible confinement, under subsection 279(2) of the Code.

[10] As a result, upon noting that forcible confinement is an indictable offence liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months, the ID finds that the Applicant is inadmissible on grounds of serious criminality under paragraph 36(1)(*b*) of the IRPA.

[11] In accordance with paragraph 229(1)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], the ID issued a deportation order against the Applicant.

III. Issues

[12] The Court considers the following issues to be determinative:

i) Did the ID breach its duty of procedural fairness in refusing to allow the Applicant's request for an adjournment?

ii) Did the ID err in finding the Applicant inadmissible on grounds other than those set out in the inadmissibility report?

IV. Legislation

[13] The following provisions of the IRPA are relevant to the present case:

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 :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(*b*) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	*b*) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable	*c*) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal

by a maximum term of imprisonment of at least 10 years.

d'au moins dix ans.

Admissibility Hearing by the Immigration Division

Enquête par la Section de l'immigration

Decision

Décision

45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:

45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :

(*a*) recognize the right to enter Canada of a Canadian citizen within the meaning of the Citizenship Act, a person registered as an Indian under the Indian Act or a permanent resident;

a) reconnaître le droit d'entrer au Canada au citoyen canadien au sens de la Loi sur la citoyenneté, à la personne inscrite comme Indien au sens de la Loi sur les Indiens et au résident permanent;

(*b*) grant permanent resident status or temporary resident status to a foreign national if it is satisfied that the foreign national meets the requirements of this Act;

b) octroyer à l'étranger le statut de résident permanent ou temporaire sur preuve qu'il se conforme à la présente loi;

(*c*) authorize a permanent resident or a foreign national, with or without conditions, to enter Canada for further examination; or

c) autoriser le résident permanent ou l'étranger à entrer, avec ou sans conditions, au Canada pour contrôle complémentaire;

(*d*) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

Procedure	**Fonctionnement**
162 (2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	**162** (2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

V. Applicant's Arguments

[14] The Applicant submits that the ID failed to observe a principal of natural justice in refusing to allow the requested six-month adjournment pending the decisions in both his rehabilitation and permanent residence applications. The Applicant submits that the ID failed to consider "whether allowing the application [for adjournment] would unreasonably delay the proceedings or likely cause an injustice", pursuant to subsection 43(2) of the Regulations.

[15] The Applicant also asserts that the ID erred by acting beyond its jurisdiction in determining that the Applicant's foreign offence conviction of kidnapping is equivalent to the Canadian offence of forcible confinement under the Code. The Applicant argues that this finding exceeds the wording of the subsection 44(1) Report filed by the Minister, which limits the scope of the hearing to the equivalency of the offence of kidnapping, in both relevant jurisdictions.

VI. Analysis

A. *Breach of the Principles of Natural Justice and Procedural Fairness*

[16] Adjournment of proceedings falls within the ID's discretionary powers. Administrative tribunals, such as the ID, are "masters of their own house" in that they control their own

procedures, within the limits of the law and their compliance with the rules of fairness and natural justice (*Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560 at para 17; *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at para 183).

[17] There is no legal requirement that an admissibility hearing be adjourned pending decisions in rehabilitation or permanent residency applications (*Alabi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 370 at paras 40-41). In other words, such pending applications do no prohibit a decision to be rendered on allegations of criminal inadmissibility.

[18] The Applicant was given the right to be heard before the ID, an independent and impartial decision-maker, and was given the opportunity to provide submissions relating to the equivalency of offences considered by the ID, in accordance with the principles of natural justice.

[19] Upon review of the ID's reasons, the parties' submissions and the evidence as a whole, the Court finds that the ID reasonably determined that an adjournment was unwarranted in the Applicant's particular circumstances. It was fully within the ID's jurisdiction and discretion to refuse such a request.

B. *The ID's Finding of Inadmissibility*

[20] The Applicant submits that the issue of the equivalency of forcible confinement was not before the ID, the Respondent having limited its report under subsection 44(1) to the issues of whether "this offence [the kidnapping under the Florida Statutes] if committed in Canada would constitute kidnapping which is an indictable offence under subsection 279(1) of the Canadian Criminal Code".

[21] According to the jurisprudence, equivalency of offences can be determined by one of three ways:

> […] 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.
>
> (*Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ 47).

[22] The ID provided a thorough analysis of the offences under consideration. The ID engaged in an analysis of the wording of the relevant provisions, the interpretation given to the offences in the jurisprudence and the parties' submissions.

[23] Relying on subsection 162(2) and section 165 of the IRPA, and Part I of the *Inquiries Act*, RSC 1985, c I-11, the Respondent submits that, in light of the inquisitorial and informal nature of the admissibility process, the ID may do what it considers necessary to provide a full and proper hearing. The ID is thus not bound by the arguments raised by the parties in the proceedings (*R. v Mian*, 2014 SCC 54 at para 38). The Court agrees with the Respondent's view, as it is consistent with the IRPA's legislative scheme and with the jurisprudence.

[24] The Respondent also rightfully submits, relying on paragraphs 3(1)(*h*) and (*i*) of the IRPA, that the admissibility process implements the IRPA's primary objectives of protecting the health, safety and security of Canadian society and "to promote international justice and security […] by denying access to Canada to persons who are criminals or security risks".

[25] The Court finds that it was open to the ID to address equivalency grounds which the ID considered more fitting or appropriate, and that found anchorage in the evidence, in assessing the Applicant's admissibility to Canada.

VII. Conclusion

[26] The ID's decision is reasonable and the deportation order against the Applicant is valid.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1241-14
STYLE OF CAUSE:	MARKIS JULIEN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	FEBRUARY 5, 2015
JUDGMENT AND REASONS:	SHORE J.
DATED:	FEBRUARY 6, 2015

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