Federal Court  Cour fédérale

Date: February 10, 2016

Docket: IMM-2349-15

Citation: 2016 FC 179

Calgary, Alberta, February 10, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

KWOK KIN KWONG

Applicant

and

THE MINISTER OF CITIZENSHILP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant seeks judicial review of a decision of a Deputy Immigration Program Manager (Officer) denying his request for a Temporary Resident Permit [TRP] in order to visit his elderly mother in Canada. The Decision was based on an earlier decision made in 1999 with regards to a permanent resident application made by the applicant. In 1999, an officer found that the applicant was inadmissible to Canada on grounds of criminality and involvement with organized crime. The applicant was found to have been the keeper of several "bawdy houses" in

Hong Kong, an act which, if committed in Canada, would have been an offence under the prostitution laws at the time.

[2] The applicant submitted that the Officer erred by relying on the previous finding of inadmissibility, since the Supreme Court of Canada has since found that the "bawdy house" provision of the *Criminal Code*, RSC 1985, c C-46 is unconstitutional.

[3] The Minister responded to the application and recently brought a motion for an Order that documents subject to a confidentiality order issued on February 14, 2000, in Court file IMM-3804-99 (regarding the earlier visa decision relied on by the officer in this case) [the Confidential Documents], be removed from the Applicant's Record filed with the Court, that all copies of the Confidential Documents be re-sealed and returned by the applicant and his solicitors to the respondent, including any electronic copy of the Confidential Documents which are in the control and possession of the applicant, and that the applicant and his solicitors destroy any notes relating to the Confidential Documents.

[4] The Minister filed an affidavit attesting that the Confidential Documents were inadvertently included in a disclosure package sent to the applicant in response to a request under the Access to Information and Privacy Act [ATIP].

[5] The applicant opposes the motion.

[6] The previous Order was made by Justice Heneghan on February 14, 2000. It reads as follows:

> UPON *in camera* and *ex parte* MOTION made by the Deputy Attorney General of Canada on behalf of the Minister of Citizenship and Immigration dated the 18th day of October, 1999, for an Order pursuant to section 82.1(10) of the *Immigration Act* for non-disclosure to the Applicant and their counsel of information obtained in confidence, which was part of the materials before the visa officer;
>
> IT IS HEREBY ORDERED THAT: the Motion for non-disclosure pursuant to section 82.1(10) of the *Immigration Act* is granted and the confidential Affidavit of James Schultz sworn October 8, 1999 and the confidential Affidavit of Michel Gagne sworn February 7, 2000 be resealed, subject to further order of the Court.

[7] Section 82.1(10) of the former *Immigration Act* allowed for the confidentiality of information and other evidence provided by the Minister if, in the judge's opinion, its disclosure would be injurious to national security or endanger the safety of any person. It provided as follows:

82.1 (10) With respect to any application for judicial review of a decision by a visa officer to refuse to issue a visa to a person on the grounds that the person is a person described in any of paragraphs 19(1)(c.1) to (g), (k), and (l),	82.1 (10) (10) Dans le cadre de la demande de contrôle judiciaire d'une décision de l'agent des visas de refuser un visa au motif que l'intéressé appartient à l'une des catégories visées aux alinéas 19(1)c.1) à g), k) ou l) :
(a) the Minister may make an application to the Federal Court - Trial Division, in camera , and in the absence of the person and any counsel representing the person, for the non-disclosure to the person of information obtained in confidence from the government or an institution of	a) le ministre peut présenter à la Section de première instance de la Cour fédérale, à huis clos et en l'absence de l'intéressé et du conseiller le représentant, une demande en vue d'empêcher la communication de renseignements obtenus sous le sceau du secret auprès du gouvernement d'un État

a foreign state or from an international organization of states or an institution thereof:

étranger, d'une organisation internationale mise sur pied par des États étrangers ou l'un de leurs organismes;

(b) the Court shall, in camera, and in the absence of the person and any counsel representing the person,

b) la Section de première instance de la Cour fédérale, à huis clos et en l'absence de l'intéressé et du conseiller le représentant :

(i) examine the information, and

(i) étudie les renseignements,

(ii) provide counsel representing the Minister with a reasonable opportunity to be heard as to whether the information should not be disclosed to the person on the grounds that the disclosure would be injurious to national security or to the safety of persons;

(ii) accorde au représentant du ministre la possibilité de présenter ses arguments sur le fait que les renseignements ne devraient pas être communiqués à l'intéressé parce que cette communication porterait atteinte à la sécurité nationale ou à celle de personnes;

(c) the information shall be returned to counsel representing the Minister and shall not be considered by the Court in making its determination on the judicial review if, in the opinion of the Court, the disclosure of the information to the person would not be injurious to national security or to the safety of persons; and

c) ces renseignements doivent être remis au représentant du ministre et ne peuvent servir de fondement au jugement de la Section de première instance de la Cour fédérale sur la demande de contrôle judiciaire si la Section de première instance de la Cour fédérale détermine que leur communication à l'intéressé ne porterait pas atteinte à la sécurité nationale ou à celle de personnes;

(d) if the Court determines that the information should not be disclosed to the person on the grounds that the disclosure would be injurious to national

d) si la Section de première instance de la Cour fédérale décide que cette communication porterait atteinte à la sécurité nationale

security or to the safety of persons, the information shall not be disclosed but may be considered by the Court in making its determination.	ou à celle de personnes, les renseignements ne sont pas communiqués mais peuvent servir de fondement au jugement de la Section de première instance de la Cour fédérale sur la demande de contrôle judiciaire.

[8] The applicant in response to the Minister's motion states at paragraph 8a of his memorandum: "The confidentiality order issued in respect of Court proceeding IMM-3804-99 continues." I agree.

[9] The applicant further submits that where the Minister releases information in response to an ATIP request, "the recipient is entitled to assume that the Minister has properly determined that there is no [national security claim] over the material any longer." That may be so in the ordinary case; however, here the Minister asserts that it was disclosed inadvertently. Moreover, and more critically, there is an existing Order of this Court that the Confidential Documents are not to be disclosed to the applicant or his counsel. The disclosure made by the Minister is directly contrary to that Order. Until such time as the Order of Justice Heneghan is amended or superseded, it must be obeyed.

[10] For these reasons, the Minister's motion will be granted.

[11] The Minister brought a second motion for an Order dismissing this application as moot. The Minister notes that the application challenges a negative TRP application made March 2, 2015. He observes that "a separate TRP application was approved for the applicant" on January

27, 2016, and he takes the position that there is no longer any live controversy on the merits of the application and there would be no practical effect of a positive decision in this matter.

[12] In its application, the applicant sought the following relief, as stated in his reply memorandum: "The Applicant requests that … the decision of the officer be quashed and the matter remitted for reconsideration by a differently constituted tribunal." Basically, the applicant is seeking an opportunity to persuade an officer to issue him a TRP. That has happened.

[13] The applicant submits that there is a live controversy in the sense that the applicant may be refused a TRP in the future on the same basis as was done in the decision under review. I find that speculative, particularly in light of the fact that the applicant was recently granted a TRP to visit Canada; albeit for his mother's funeral.

[14] The applicant also says that there is a live controversy because he claims that, following *Canada (Attorney General) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 [*Bedford*], he is not inadmissible and so does not need a TRP; whereas the respondent claims that he is inadmissible, and so does need a TRP. He says that this controversy persists even though he has been granted a TRP.

[15] However, the applicant was considered inadmissible for two reasons: criminality and involvement with organized crime. The officer held that:

> For the criminality finding, [the applicant] has not been pardoned, has not been granted Rehabilitation by the Minister, nor is he deemed to have been rehabilitated. The finding of inadmissibility on his original application for PR is therefore still in effect, and the

> purpose of this review is not to examine that finding of criminal inadmissibility, but rather to determine if the applicant's need to enter Canada is compelling and sufficient enough to overcome the risks to Canadian society. For the organized crime finding, there is no indication that the applicant has been granted relief by the Minister of Public Safety.
>
> I am satisfied that the applicant remains inadmissible to Canada and thus to travel to Canada a TRP would be required.

[16] If the applicant were to succeed in this application on the merits, the best outcome he could hope for is a finding that the Officer's decision was unreasonable as he failed to consider the impact of the Supreme Court of Canada's decision that the offence the applicant was believed to have committed is no longer an offence in Canada. Such a finding would cause this Court to remit the application back to a different officer for determination; however, it could not lead to a determination that the applicant does not require a TRP to enter Canada. This is because, even assuming that the present application would result in a decision that the criminality finding is unreasonable, the issue of the applicant's involvement in organized crime remains a live issue.

[17] The criminality finding is completely based on the bawdy house finding, whereas the organized crime finding is, at best, only partially based on that fact. On this point, the officer's reasons from 1999 read as follows:

> On careful review and consideration of all available information I have determined that you are also inadmissible to Canada pursuant to *paragraph 19(1)(c.2) of the Immigration Act* because there are reasonable grounds to believe that you are for all practical purposes a member of an organized crime group.
>
> In making a determination of inadmissibility I have noted that you deny any form of criminal association since leaving the police force. I have not found your denials of more recent association

> with members of criminal organizations credible, however, particularly in view of the nature of your vice related activities, and the established control and/or influence exerted by criminal organizations on these kinds of activities in the local context. Although your evasiveness at interview has made it difficult to fully examine the nature and extent of your criminal associations, I have noted that the nature of your business in the local context, and in several of your particular geographic areas of operation, would inevitably bring you into close association, collaboration, and cooperation with members of organized crime. In addition, you were advised at interview that I had access to information provided in confidence by a reliable, credible and objective source about your association with a member of a criminal organization, which you failed to disclose, and to which you did not admit at interview.
>
> In assessing your inadmissibility under *paragraph 19(1)(c.2) of the Immigration Act* I have also noted that the network of "common bawdy houses" which you keep in effect entails a high degree of organization and planning, and a pattern of criminal activity which by its nature requires a number of persons acting in concert. I have concluded that this constitutes a separate, although related, basis for determining that you are for all practical purposes a member of a criminal organization. [emphasis added]

[18] In my view, the first basis of the organized crime finding stands even if keeping a common bawdy house is no longer an offence in Canada, because it involves the applicant's association with broader criminal organizations, rather than his keeping of bawdy houses *per se*. As such, the organized crime finding could not be affected by *Bedford*, and the applicant could be found inadmissible, based on the 1999 decision, even if the Officer's decision under review was quashed.

[19] Considering that there is no continuing adversarial context and the need for judicial economy, I am persuaded that the Court ought not hear this application and that it is moot.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Confidential Documents, being pages 90-101 of the Applicant's Record, are to be removed and returned to the Minister;

2. All copies of the Confidential Document in the control or possession of the applicant and his solicitors, including any electronic copy, are to be returned to the Minister;

3. The applicant and his counsel are to destroy any notes relating to the Confidential Documents, and are to advise the Minister in writing that this has been done; and

4. The application is moot and is dismissed and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2349-15
STYLE OF CAUSE:	KWOK KIN KWONG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 4, 2016
JUDGMENT AND REASONS:	ZINN J.
DATED:	FEBRUARY 10, 2016

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