Federal Court  Cour fédérale

**Date: 20160912**

**Docket: IMM-4731-15**

**Citation: 2016 FC 1034**

**Ottawa, Ontario, September 12, 2016**

**PRESENT: The Honourable Madam Justice Gagné**

**BETWEEN:**

**KARAMDEEP SINGH BAGRI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Nature of the Matter

[1] Mr. Karamdeep Singh Bagri has brought an application for judicial review of a decision of the Immigration Division [ID] finding that he is inadmissible for having engaged in people smuggling pursuant to paragraph 37(1)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Based on this finding, the ID made a deportation order against the Applicant.

[2] Shortly after the ID rendered its decision in the present matter, the Supreme Court of Canada issued its decision in *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 [*B010 SCC*] where, although in vastly different circumstances, it somewhat restricted the scope of paragraph 37(1)(*b*) of the IRPA.

[3] The main question raised by this application is therefore the extent to which the Supreme Court imported the *Criminal Code*, RSC 1985, c C-46 [Criminal Code] definition of organized criminality, for the purpose of interpreting paragraph 37(1)(*b*) of the IRPA or whether, pursuant to that provision, a single person or two persons could be found inadmissible to Canada for people smuggling, trafficking in persons or laundering money or other proceeds of crime.

## II. Background

[4] The Applicant is an Indian citizen, permanent resident of Canada and, at all relevant times, he held a United States B1/B2 visitor's visa. On January 12, 2015, he was arrested by the United States Border Patrol [USBP], in the state of Washington, for his role in the smuggling of five Indian nationals from Canada to the United States. On that same day, the USBP returned the Applicant to the Canada Border Services Agency [CBSA] at the Abbotsford-Huntingdon Port of Entry.

[5] On January 12, 2015, CBSA Officer Marcella McKenney interviewed the Applicant. The Applicant told her that he had rented a vehicle and driven from Surrey, British Columbia to Washington State using his US visitor's visa. At the border crossing, the Applicant had stated that he intended to shop in the US. However, he had actually been hired by a person named

"Babba" to pick up two individuals and drive them to a location in the US. He was to be paid $1,000 for the job. The Applicant was supposed to meet Babba at a Walmart in Bellingham, Washington; instead, Babba phoned him and gave him directions to go to the border to pick the two individuals up. When the Applicant arrived at the border, he saw five persons walking on the road. Babba told him to let them in his vehicle and start driving. After two or three miles, the Applicant was pulled over by the USBP.

[6] The Applicant explained that he had met Babba one year before at the Dashmesh Darbar Temple in Surrey. Babba had asked him to help take people across the border twice before, but the Applicant had become too afraid on those occasions. This was the first time he had implemented the plan, but he was ultimately caught. The Applicant admitted to Officer McKenney that he was aware that the people he was to carry had Canadian visas but could not enter the US, and that he had helped them do something illegal.

[7] The information collected during this first interview was forwarded to the Pacific Region Inland Enforcement Section [PRIES] of CBSA for further investigation.

[8] On January 16, 2015, CBSA Officer Alvin Nath, accompanied by another officer, attended the Applicant's residence in Surrey to interview him about the incident. The Applicant largely repeated what he had told Officer McKenney. With respect to his previous border crossings, he clarified that Babba had instructed him to go to the US approximately two to three times between October and November 2014 to familiarize himself with the area. On one of these occasions, Babba instructed him to drive to a Walmart in the US, and told the Applicant he

would call him when he had crossed into the US with the foreign nationals that the Applicant was supposed to pick up. Babba later called the Applicant and told him that someone else would pick the people up, and instructed him to return to Canada. Then, on January 8 or 9, 2015, Babba called and asked him to drive to the US on January 10. On the evening of January 11, Babba called the Applicant and instructed him to go to the Walmart on the morning of January 12.

[9] On January 21, 2015, Officer Nath, along with a CBSA Enforcement Assistant and a Punjabi interpreter, conducted a third interview with the Applicant, at the PRIES office in Vancouver. Officer Nath indicated that he knew that the Applicant "speak[s] English very well but just to make sure everything is understood one hundred percent I'd like to use the interpreter to translate." When the Applicant later suggested that he would speak English and use the interpreter only if he got "stuck", Officer Nath insisted that he use the interpreter so that there would be "no issue about – like further down the road – about whether or not you understood any of my questions". He added: "Having said that if you don't understand any of my questions or don't understand the interpreter you make sure you let us know and we'll clarify things for you. Do you understand?" The Applicant answered: "Yes, sir."

[10] Again, the Applicant repeated most of what he had said during his two previous interviews, and added further clarifications. Here is a relevant excerpt from the interview:

> A: Yeah, at that time [Babba] said per person he would give me $500.
>
> Q: Ok, so that was his rate every time. 500 per person.
>
> A: Yeah, that was the rate. You can call it rate. 500 per person.

> Q: Was Babba clear with you that these people were going to be entering the United States illegally? Without proper immigration papers?
>
> A: He told me these people are legally in Canada. I thought that he bringing them – he said don't worry I'll bring them to the states and hand them over to you and then I said they must be illegal that he's doing this.
>
> Q: Even though Babba didn't straight out tell you they were going to enter the states illegally that was your understanding?
>
> A: Yes. Whenever I asked him about their status he would just tell me don't worry. They are legally in Canada because I was assuming they might even be illegal even in Canada. But he would just tell me know don't worry they are legally in Canada.
>
> Q: Ok, so just to confirm he told you they were legal in Canada but you were still of the understanding that those people were being brought illegally from Canada to the United States?
>
> A: Yes.
>
> (Transcript of interview on January 21, 2015, Certified Tribunal Record [CTR] at 67.)

[11] The Applicant told Officer Nath that on January 9 or 10, 2015, he checked into a motel, then he explained what happened next:

> A: Previous night to the 12th [Babba] called me and said tomorrow morning get up really early. I will call you. I was ready by 8 am. So, he said ok now you leave from there. So, I got a coffee and he instructed me to go and wait at the Walmart. I told him listen I'm already late. I have to go to work. Already I took some holidays so I'm getting late so he said ok carry on you just come over. I was getting closer. I was telling him where I was. My location, what street I am and he said just keep on coming. He was giving me instruction to go this way, that way, whatever. When I was very close there then he said – all of a sudden he said to me there are five people. So, I started arguing with him that how can I take these five people. Now you are telling me there are five. He said don't worry I'll pay you. He said when you come to Dafford (*sic*) Street just call me. When I went to Dafford Street those people

> were standing there. I picked them. (Inaudible) carry on, carry on. When I crossed the casino (inaudible).
>
> Q: Ok, don't talk over each other.
>
> A: I saw police vehicles in front of me.
>
> Q: Rewind to when Babba tells you to go Dafford Street or whatever right?
>
> …
>
> Q: So, at that point was it your understanding that those people had just crossed illegally into the US?
>
> A: Because initially he said he would literally hand them over to me but when I saw them standing there by themselves then it came to my mind right away that this is something wrong here. They must be illegal.
>
> Q: Ok, it was your understanding at that time that they had crossed into the US illegally? Is that correct?
>
> A: Yes.
>
> (Transcript of interview on January 21, 2015, CTR at 69-70.)

[12] At the end of the interview, Officer Nath indicated that the CBSA had concerns about his smuggling activities and that the Applicant could make written submissions within fifteen days, after which the Officer would decide whether to recommend an admissibility hearing. Officer Nath later received an occurrence report from the US Department of Homeland Security, outlining the events of January 12, 2015. The Applicant provided submissions on March 3, 2015 and on April 8, 2015, he was referred to an admissibility hearing which was held on October 6, 2015.

[13] At the admissibility hearing before the ID, the Applicant testified through a Punjabi interpreter. During the examination-in-chief, he indicated that he believed that the people he was

picking up had permanent status in Canada and "they had all the documents and visas." Here is a relevant excerpt from that examination-in-chief:

> Q: On the day in question, January 12th, what was it your understanding that you were doing on that day?
>
> A: Once Baba [*sic*] showed me the documents and Babine (phonetic) told me that everything is correct, according to my understanding what I was doing was helping them and giving them a ride.
>
> Q: And were you – where were you going to give them a ride from and to?
>
> A: I was supposed to pick them up from a point and he told me that (indiscernible) I could give them a ride to California.
>
> Q: And were you being paid for that?
>
> A: I had not yet received the money or he had not given to me but whatever I was going to be paid for it was the reason of giving them a ride.
>
> Q: Were you aware of their status in the US?
>
> A: I did not know about it but I assumed that everything must be correct because of the documents that were shown to me.
>
> Q: Then why did you, in your interviews that are in – that my friend has referred to today, say that you know that they were illegal?
>
> A: There were two reasons. I would say, first of all, I got very nervous. And secondly, in regards to my understanding of English, I do understand but sometimes I do not understand everything.
>
> Q: Did you suspect that they were – that these people had no status in the US?
>
> A: No. I had no suspicion about it at all.
>
> (Transcript of the ID hearing, CTR at 16-17.)

[14] In cross-examination, the Minister's counsel confronted the Applicant with the fact that during the January 21, 2015 interview, the officer acknowledged that the Applicant spoke English very well but he insisted on using the Punjabi interpreter to translate in order to ensure that the Applicant understood everything. The Applicant stated that sometimes the questions were posed in a way that he did not fully comprehend. However, he admitted that he never raised that with the officer, because he was nervous and fearful. The Minister's counsel also asked him why he never mentioned that Babba had shown him the Indian nationals' Canadian documents. The Applicant stated that he remembered giving this information but he did not remember to whom.

[15] When the ID asked the Applicant whether it was true that he had told Officer McKenney that the Indian nationals couldn't go into the US, the Applicant answered: "I – I wouldn't say that what the officer wrote is not correct but all I can say is that maybe I was mistaken or misunderstanding in my mind." On further cross-examination, the Minister's counsel asked him whether that same explanation applied to his statement to Officer McKenney, that he was aware that he had helped the Indian nationals do an illegal thing. The Applicant answered: "It wasn't illegal. If the visas and everything were there, it's just legal." Later, he added: "… I was not aware that I was doing anything illegal. According to me, I was doing legal."

## III. Impugned Decision

[16] The ID rendered an oral decision at the end of the hearing. It began by noting that the definition of human smuggling in section 117 of the IRPA had changed since *B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 [*B010 FCA*], so did the definition of people

smuggling in section 37 of the IRPA. It stated that if the situation involves smuggling into the US from Canada, the person being smuggled must be going into the US; that smuggling is in contravention of US immigration law; the smuggler was organizing, inducing, aiding or abetting the coming of the person into the US; and the smuggler knew or was reckless as to whether the coming into the US would be a contravention of US law. The ID added to that definition the elements of paragraph 37(1)(*b*) of the IRPA, which require that the person concerned be a foreign national or a permanent resident of Canada, and that the crime be transnational.

[17] Applying the law to the facts, the ID concluded that there were reasonable grounds to believe that the Applicant is a permanent resident of Canada and that the smuggling was from Canada to the US, which provides the transnational element as set out in Article 3(2) of the United Nations Convention against Transnational Organized Crime, 12 December 2000, 2225 UNTS 209 (entered into force 29 September 2003) [Palermo Convention]. The ID stated it did not believe the testimony given by the Applicant at the hearing, namely, that he did not know that the Indian nationals lacked the required documents to cross into the US or that there was anything wrong with them going into the US. The ID pointed to the Applicant's previous three interviews in which it was clear he knew he had been involved in something wrong, and he knew he was not just giving some people a ride to California.

[18] According to the ID, not only were there reasonable grounds to believe that the Indian nationals did not have proper documentation, but there were reasonable grounds to believe that they came into the US at a place other than at a designated port of entry – a contravention of US

law – because they were walking on the road near the border before getting into the Applicant's vehicle.

[19] The ID found that the Applicant was aiding and abetting the Indian nationals' coming into the US because his part in the scheme was to pick them up on the US side of the border. Based on the evidence, the ID was satisfied that the Applicant knew or at the very least was reckless as to whether their coming into the US would be in contravention of US law. The ID made a deportation order against the Applicant on the same day.

## IV. Issues and standard of review

[20] This application for judicial review raises the following issues:

A. *Did the ID err in its analysis of whether the Applicant was engaged in people smuggling in the context of organized transnational criminality, as per paragraph 37(1)(b) of the IRPA?*

B. *Did the ID err in finding that the Applicant's testimony was not credible?*

[21] With respect to the ID's interpretation of its home statute and its application to the facts of this case, the applicable standard of review is that of reasonableness (*B010 FCA*, above at paras 58-72 - in *B010 SCC* the Supreme Court did not find necessary to rule on that issue; *Appulonappar v Canada (Citizenship and Immigration)*, 2016 FC 914, at para 21).

[22] As for the question of the ID's findings on credibility, the applicable standard of review is also reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Canada (Citizenship*

*and Immigration) v Khosa*, 2009 SCC 12 at para 63; *SC v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 491 at para 20).

## V. Analysis

### A. *Did the ID err in its analysis of whether the Applicant was engaged in people smuggling in the context of organized transnational criminality, as per paragraph 37(1)(b) of the IRPA?*

[23] The Applicant argues that the ID may have come to a different conclusion based on the Supreme Court's findings in *B010 SCC* with respect to paragraph 37(1)(*b*) of the IRPA, as well as its findings in *R v Appulonappa*, 2015 SCC 59, regarding the interpretation of section 117 of the IRPA. In *B010 SCC*, at paragraph 42, the Supreme Court found that the definition of "criminal organization" in the Criminal Code and the definition of "organized criminality" in paragraph 37(1)(*b*) of the IRPA "are logically and linguistically related and, absent countervailing considerations, should be given a consistent interpretation."

[24] The Criminal Code definition of "criminal organization" requires that the group be composed of three or more persons in or outside Canada. Based on the reasoning in *B010 SCC*, the Applicant argues this requirement should apply to paragraph 37(1)(*b*) of the IRPA as well, which would mean that these circumstances would not fall under that provision, as he was only working with one other individual, Babba. Thus, he argues that he should not have been found inadmissible.

[25] The Respondent argues that the ID had reasonable grounds to believe that the Applicant aided and abetted people smuggling into the US. The only questions to be determined are whether the Applicant is inadmissible on the grounds of "organized criminality" under paragraph 37(1)(*b*) of the IRPA, and whether he was participating in a transnational crime.

[26] Contrary to the Applicant's interpretation of *B010 SCC*, the Respondent argues that in that case, the Supreme Court only referred to the definition of "criminal organization" in the Criminal Code as an interpretive aid to confirm that the purpose of paragraph 37(1)(*b*) of the IRPA is to target those who engage in people smuggling in order to obtain a financial or other material benefit. The Respondent argues that the Supreme Court did not intend to incorporate the Criminal Code definition into paragraph 37(1)(*b*) of the IRPA; if it did, it would have done so expressly.

[27] Moreover, the Supreme Court did not address the question of the composition of a criminal organization in the IRPA context. It did, however, indicate that "non-organized individual criminality" is not included in the definition of "transnational crime" under paragraph 37(1)(*b*) of the IRPA (*B010 SCC*, above at para 35).

[28] The Respondent highlights that while both the Criminal Code and the IRPA provisions share the requirement of a financial or other material benefit, the Supreme Court was alive to their separate origins (*B010 SCC*, above at paras 44, 52). The Criminal Code definition responds to Canada's obligations under the Palermo Convention, whereas the requirement of a financial or other benefit in paragraph 37(1)(*b*) of the IRPA derives from the definition of "migrant

smuggling" in Articles 3(a) and 6 of the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 12 December 2000, 2241 UNTS 480 (entered into force on 28 January 2004).

[29] The Respondent also emphasizes that the Supreme Court held that the provisions should be given a consistent interpretation "absent countervailing considerations" (*B010 SCC*, above at para 42). The Respondent submits that such countervailing considerations include the different international origins of the provisions and the differing purposes of the Criminal Code and the IRPA.

[30] Overall, the Respondent argues that the Applicant's narrow and technical interpretation of "organized criminality" as requiring a group of three or more persons is contrary to the Supreme Court's approach, disconnected from the purposes of the IRPA, and would lead to a perverse result.

[31] Since *B010 SCC* was issued by the Supreme Court, this Court has had two occasions to apply its interpretation of subsection 37(1) of the IRPA. In *Saif v Canada (Citizenship and Immigration)*, 2016 FC 437, although the ID had found that the applicant fell under the scope of paragraph 37(1)(*a*) of the IRPA, Justice Barnes held that since paragraphs 37(1)(*a*) and (*b*) are both subject to the opening language of subsection 37(1), which refers to inadmissibility "on grounds of organized criminality", the Supreme Court's finding in *B010 SCC* was clearly applicable. He adds at paragraph 15 of his reasons:

> … the Court's views about the meaning and range of "organized criminality" apply equally to paragraphs 37(1)(a) and 37(1)(b), including its interpretive importation of the Criminal Code definition of "criminal organization" requiring a group of three or more persons. …

[32] Although Justice Barnes acknowledges that the Criminal Code's requirement of at least three persons to form a criminal organization is more consistent with the language of paragraph 37(1)(*a*), which requires "a number of persons", he reads the decision in *B010 SCC* as having fully incorporated the Criminal Code definition of "criminal organization" into subsection 37(1) of the IRPA.

[33] However, Justice Fothergill's reading of *B010 SCC* seems different in *Appulonappar*, above, a decision rendered after the hearing was held in the present case. At paragraph 29, Justice Fothergill restricts the effect of *B010 SCC* to the removing of the following activities from the definition of people smuggling:

> a) the provision of humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers, or assistance to family members;
>
> b) the mere provision of aid in the illegal entry of other refugees or asylum-seekers in the course of a collective flight to safety; and
>
> c) acts that are not knowingly connected to and do not further transnational organized crimes or criminal aims.

[34] The Applicant heavily relies on *Saif*, whereas the Respondent argues it was wrongly decided.

[35] Instead, the Respondent relies on *Appulonappar* and argues that for the purpose of paragraph 37(1)(*b*) of the IRPA, proof of membership in an organization is not required but, "[p]ursuant to B010, those who act in knowing furtherance of a criminal aim of criminal organizations, or who abet serious crimes involving such organizations, continue to be inadmissible to Canada" (para 32). In the alternative, if the Court decides that its finding in *Appulonappar* is not determinative, in that the composition of the criminal organization remains relevant, the Respondent asks the Court to certify the following question:

> Does the requirement in s. 467.1(1)(*a*) of the Criminal Code, that a criminal organization means a group, however organized, that is…composed of three or more persons in or outside Canada, apply to the words "organized criminality" for the purpose of paragraph 37(1)(*b*) of the Immigration and Refugee Protection Act?

[36] The Applicant did not take a position as to the impact of this Court's finding in *Appulonappar* on the present case, nor did he take a position on the proposed question for certification.

[37] The Respondent finally argues that even if the ID was required to find that an organization involved in people smuggling must be composed of at least three persons, there is sufficient evidence in the record for the ID to have made that finding: i) the Applicant told Officer McKenney that Babba worked for a man in Toronto named "Balkar"; ii) he told her that his friend "Tarri" also works for Babba, and that there were other people too; and iii) the Applicant told Officer Nath that prior to January 12, 2015, he had crossed into the US to pick up migrants, but Babba had phoned him to say that "someone else" had picked them up.

[38] Having considered all of both parties' arguments, I do not believe I have sufficient factual information to fully assess this case. Under these circumstances, I prefer to refer the matter back to the ID rather than substituting my own assessment of the partial evidence that was before the ID or considering arguments that were not put to the ID.

[39] Considering the state of the jurisprudence at the time the impugned decision was rendered, the ID did not require and fully assess the evidence. It is true that there is little evidence of the involvement of other individuals in Babba's organization but neither party focused on that aspect of the evidence at the hearing before the ID, as the number of participants was not an issue at the time.

[40] As the ID did not focus on the issue of the number of participants involved in the smuggling of illegal migrant into the US, it did not have the opportunity to assess which of paragraph 37(1)(*b*) or paragraph 36(1)(*c*), through section 117 of the IRPA, would apply to people smuggling organized by a single individual or by two persons. If the latter provision applies, the determination must be based on a balance of probabilities (paragraph 36(3)(*d*) of the IRPA) rather than on reasonable grounds to believe that they have occurred, are occurring or may occur (section 33 of the IRPA).

[41] I am of the view that the parties'arguments should be put to the ID, who would benefit from a complete evidentiary file. It is for the ID, as a specialized Tribunal, to answer those questions in first instance.

B. *Did the ID err in finding that the Applicant's testimony was not credible?*

[42] The Applicant contends that he had problems understanding English and that the ID should have reasonably allowed for a possible mistake in the Applicant's evidence before it, as well as in the three previous interviews (*Tran v Canada (Citizenship and Immigration)*, 2013 FC 1080 at paras 4, 8). Moreover, the Applicant argues that little weight should be given to the first two interviews, which were conducted without an interpreter or any audio/video recording.

[43] The Applicant argues that the ID erred in concluding that he had knowledge that the Indian nationals were illegally entering the US, because this key fact is not completely supported by the evidence. Given the Applicant's lack of complete fluency in English and his reasonable belief that the Indian nationals possessed legal paperwork for entry into Canada, the ID could not infer that the Applicant had such knowledge.

[44] I find that it was reasonable for the ID to conclude that the Applicant was not credible. The Applicant's first three interviews with the CBSA were consistent with each other. However, there were numerous inconsistencies between these and the Applicant's testimony at the hearing. As this Court held in *Ishaku v Canada (Citizenship and Immigration)*, 2011 FC 44 at para 53, "[a] person's first story is usually the most genuine and, therefore, the one to be most believed". I also find that it was reasonable for the ID to reject the Applicant's argument that he lacked complete fluency in English.

[45] The Applicant's testimony to the ID that he expected to drive to California contradicts his previous statement that he was concerned he was going to be late for work in Canada on January 12, 2015, if there were delays in picking up the Indian nationals. The Applicant's testimony that

he did not know that what he was doing was illegal also contradicted his previous statements. As for his testimony regarding Babba having shown him the Indian nationals' passports and visas, it was reasonable for the ID to not believe the Applicant. The ID also had reasonable grounds to believe that the Applicant knew the Indian nationals had not crossed the border at a designated port of entry, which is illegal in the US.

[46] With respect to the Applicant's argument that his prior inconsistent statements were all a mistake based on his "lack of complete fluency" in English, I find that it has no merit. Officer Nath noted that the Applicant spoke English very well, and the Applicant even offered to forego the Punjabi interpreter during the third interview. The decision in *Tran*, above, is distinguishable since it deals with the tribunal's error in failing to consider the applicant's native language as evidence of identity; this is not the case here.

[47] Despite the fact that I am of the view that the ID's finding that the Applicant lacked credibility is reasonable, this case will nevertheless be remitted back to the ID for redetermination for the reasons outlined above.

## VI. Conclusion

[48] This application for judicial review is allowed, and the decision is remitted to the ID for a redetermination in accordance with these reasons. Considering this outcome, it would be premature to certify the question proposed by the Respondent.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is granted and the decision of the Immigration Division of the Immigration and refugee Protection Board, dated October 6, 2015, is set aside;
2. The file is remitted back to a different member of the Immigration Division for a new determination;
3. No question of general importance is certified; and
4. No costs are granted.

"Jocelyne Gagné"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4731-15 |
| **STYLE OF CAUSE:** | KARAMDEEP SINGH BAGRI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
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| **DATE OF HEARING:** | AUGUST 10, 2016 |
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| **DATED:** | SEPTEMBER 12, 2016 |

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