Federal Court  Cour fédérale

Date: 20170509

Docket: IMM-4780-16

Citation: 2017 FC 480

Ottawa, Ontario, May 9, 2017

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MAN LI YIU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Visitors to Canada, such as Ms Yiu, are not permitted to work without authorisation. The Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada determined that she had so worked and issued an exclusion order against her. This is the judicial review of that decision.

[2] Most, but not all, of the facts are not in dispute. What is essentially in dispute are the inferences drawn by the IAD from the established facts.

[3] In 2015, after taking into account internet advertisements, the Ottawa Police raided a bawdy house. Ms Yiu was found in a closed bedroom. A shirtless man was putting on his trousers. A used condom was on the floor. What is in dispute is Ms Yiu's state of dress or undress. According to the police report, she was scantily clad on top, and wore nothing below. She maintains she was fully and properly dressed.

[4] There were other women in the house who were without question granting sexual favours for financial consideration.

[5] The police brought Ms Yiu's situation to the attention of the immigration authorities.

[6] Ms Yiu was here on a visitor's visa in order to visit her Canadian boyfriend (whom she subsequently married). Section 30(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) provides that a foreign national may not work or study in Canada unless authorised under the Act. Ms Yiu was not so authorised.

[7] "Work" is defined in the *Immigration and Refugee Protection Regulations*, as meaning "an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market". The competition aspect is not in issue.

[8] An officer prepared an inadmissibility report pursuant to section 44 of *IRPA* on the basis that she had failed to comply with the Act.

Ms Yiu's Story

[9] Ms Yiu strenuously denies that she was "working" in the house in question or that she was inappropriately dressed. She had lent her iPad to an acquaintance and had simply made arrangements to go to the house in question to retrieve it. She had no idea that the lady was a sex trade worker and that the house in question was a bawdy house. She had gone upstairs to use the washroom when one of the women in the house called out that the police had arrived. She rushed into the bedroom where, she understood, the iPad was kept in a closet. She did not want it seized. The bedroom door closed automatically. Her eyesight being terrible, she had no idea that there was a man in a state of undress in the room.

The Proceedings

[10] She succeeded in having the exclusion order set aside by the Immigration Division (ID) of the Immigration and Refugee Protection Board. She was found to be credible and was believed. The Minister had not met the burden of proving that she had been working.

[11] The Minister appealed, and succeeded. Essentially, the IAD preferred the police report over Ms Yiu's testimony and inferred, in the circumstances, that she had been working.

[12] The IAD relied upon the oft-cited passage from the Reasons for Judgment of Mr. Justice O'Halloran of the British Columbia Court of Appeal in *Faryna v Chorney*, [1952] 2 DLR 354, where he said at p 357:

> The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Issue

[13] The issue is not whether Ms Yiu was working. The issue is whether it was unreasonable for the IAD to decide that she was. This Court is not the trier of fact.

Decision

[14] Despite what I must say were truly herculean efforts on the part of Ms Yiu's counsel, I am of the opinion that the decision was reasonable and so the application for judicial review must be dismissed.

Analysis

[15] Prime among the many issues raised by Ms Yiu were:

(a) the IAD owed deference to the finding of the ID that she was not working;

(b) that it was wrong to rely upon the police report, over her own evidence, as the police in question had not filed affidavits and could not be cross-examined;

(c) a higher standard of proof was required because of the immoral undertones involved;

(d) the IAD reversed the burden of proof;

(e) the member made manifest, palpable and overriding errors in his findings of fact;

(f) crucial evidence was not considered; and

(g) conclusions were not reasonably drawn from inferences, but rather were the result of outright speculation.

[16] The appeal to the IAD is an appeal *de novo*. It is not an appeal limited to the record before the ID. Each side may call evidence, including evidence that was not before the ID. The IAD owes no deference to the ID in these circumstances. The authorities were fully reviewed by the Chief Justice in *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086.

[17] The IAD was entitled to rely upon the police report and to prefer it over Ms Yiu's own evidence. She had attempted, unsuccessfully, to have the police testify before the ID and does not appear to have pursued that matter before the IAD.

[18] The IAD is the master of its own procedure, so long as the principles of natural justice including procedural fairness are respected. Section 175(1)(b) of *IRPA* provides the IAD is not bound by any legal or technical rules of evidence.

[19] Madam Justice Snider considered the reliability of an unsworn report in *Canada (Minister of Citizenship and Immigration) v Furman*, 2006 FC 993, at para 99. Indicia include whether the document was prepared by persons with no interest in the proceedings and not in contemplation of litigation, or were prepared contemporaneously.

[20] It was submitted that a higher burden of proof was required because of the nature of the work alleged: had she been alleged to be working as a cleaning lady, the burden would have been lower. Counsel referred to the decision of the Nova Scotia Supreme Court in *Reid v Halifax Insurance Co*, [1984] Carswell NS 372. That was an action for damages under a fire insurance policy. The underwriters were defending on the basis of misrepresentation and arson. It was held "where the allegation in a civil case is on conduct that is morally blameworthy, or that could have a criminal or penal aspect to it, the degree of proof that is required is a higher degree of probability than when there is not a morally blameworthy, criminal or penal aspect to it".

[21] However, that case can no longer be relied upon in the light of the decision of the Supreme Court in *FH v McDougall*, 2008 SCC 53, [2008] 3 SCR 41. The Court made it perfectly clear that in civil matters, absent legislation to the contrary, the burden is always on the balance of probability. That case dealt with allegations of sexual assault in the civil context.

[22] I do not agree that the IAD reversed the burden of proof. The overall burden was always on the Minister, but the evidentiary burden may shift depending upon what is put in the record and when.

[23] In my opinion, the IAD made no reviewable error in its findings of fact. The presumption that all the evidence was considered was not rebutted. This is not a case such as *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, where evidence not referred to in the reasons contradicted the decision-maker's findings. The fact that Ms Yiu's photo did not appear on the website does not lead to the conclusion that she was not working. The fact that other women in the house had luggage while she did not, does not indicate that she was not working there. Indeed, the evidence is that she was living with her boyfriend and had no need of luggage. Likewise, her boyfriend's evidence as to what she was wearing earlier in the day and the fact that, after she was released from detention, they retrieved the iPad, has no bearing on what she was or was not doing in the house.

[24] The issue is whether the IAD's conclusions were inferences properly drawn from the facts as opposed to outright speculation.

[25] In *Grant v Australian Knitting Mills Ltd & Ors*, [1936] AC 85, [1935] All ER Rep 209 (JCPC), Lord Wright stated at pp 213-14:

> Mathematical, or strict logical, demonstration is generally impossible: juries are in practice told that they must act on such reasonable balance of probabilities as would suffice to determine a reasonable man to take a decision in the grave affairs of life. Pieces of evidence, each by itself insufficient, may together constitute a significant whole, and justify by their combined effect a conclusion […].

[26] The common law has long recognized the difference between reasonable inference and pure speculation. As Lord Macmillan said in *Jones v Great Western Railway Co* (1930), 47 TLR 39, at p 45, 144 LT 194 p 202:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.

[27] *Jones* was applied by the Federal of Appeal in *Canada (Minister of Employment and Immigration) v Satiacum* (1989), 90 NR 171, [1989] FCJ No 505.

[28] Even if the police had it wrong in stating how she was dressed, there was still ample evidence to support the inference drawn that she was working (*Miranda v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 437, 63 FTR 81).

[29] When all is said and done, I am being asked to re-weigh the evidence, which is not the function of this Court on judicial review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15, [2011] 3 SCR 708).

[30] The decision was reasonable in the light of *Dunsmuir v New-Brunswick*, 2008 SCC 9, [2008] 1 SCR 190. As noted therein, at para 47, there may be a number of possible, reasonable conclusions. The decision fell within the range of possible, acceptable outcomes. It was not unreasonable for the IAD to conclude that Ms Yiu was working in the room in question, without authorisation, even though the ID reached a different conclusion.

Certified Question

[31] There is no appeal to the Federal Court of Appeal from my decision unless, in accordance with section 74(d) of *IRPA*, I certify that a serious question of general importance is involved and state the question.

[32] Ms Yiu proposes that the following question be certified:

> What is the standard of review for the finding of whether someone meets the elements of a contravention of law, or whether the Minister has discharged their burden of proof in the context of s 30(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27?

[33] As stated by the Court of Appeal, the issue is whether there is a serious question of general importance which would be dispositive of the appeal (*Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89), and which must transcend the interest of the immediate parties to the litigation (*Mudrak v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 178).

[34] The law is well settled as to the burden of proof and circumstantial evidence. Accordingly, there is no question for certification.

JUDGMENT

For reasons given, this application for judicial review is dismissed. There is no question to certify.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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