Federal Court Cour fédérale

Date: 20171026

Docket: IMM-3288-16

Citation: 2017 FC 958

Ottawa, Ontario, October 26, 2017

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

GIGA ODOSASHVILI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Giga Odosashvili [the Applicant] seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision made by the Immigration Division [ID] of the Immigration and Refugee Board of Canada on July 26, 2016 [the Decision]. The ID found that the Applicant was inadmissible to Canada on the grounds of organized criminality, contrary to paragraph 37(1)(a) of the *IRPA*. As a result, a deportation order was issued against the Applicant.

[2] The Applicant argues that the ID misconstrued the evidence when it found that he was a member of a criminal organization. He alleges the finding of organized criminality was speculative and was made because he shares a common ethnicity (Georgian) with others who were in trouble with the police. The Applicant also relies on the fact that he has no convictions for any criminal offences and that the police have brought no charges of organized criminality against the alleged criminal organization or any of the alleged members.

[3] Overall, the Applicant says the evidence before the ID could, at best, only create a mere suspicion that a criminal organization existed. The evidence did not rise to the required level of reasonable grounds to believe that such an organization existed or that the Applicant was a member of it.

[4] The Respondent says the Applicant is asking the court to reweigh the evidence. The ID was only required to have reasonable grounds to believe the Applicant was a member of a criminal organization and there was more than enough evidence, both oral (i.e. testimony from the lead police investigator) and documentary, to meet that threshold.

[5] For the reasons that follow, this application for judicial review is dismissed. Although the Applicant has urged otherwise, it is largely premised on a disagreement with how the evidence was weighed by the ID. It is my view that the ID identified and applied the correct test to the facts and did so in a reasonable way. It is also clear both how and why the ID arrived at the decision. The Decision falls within the range of possible, acceptable outcomes defensible on the facts and law.

II. **Background Facts**

[6] The Applicant arrived in Canada in 2008 and made a successful refugee claim as a Georgian national. He became a permanent resident in 2013. From 2008 to 2013, he lived in Toronto, where he was employed as a window and door installer. While it appears that the nationality of the Applicant was called into question after the Decision, that information was not before the ID and it is not relevant to this application.

[7] In 2009, the York Regional Police [YRP] began to notice some similarities in a string of breaking and entering offences [B&Es]. The YRP and the Toronto Police Services [TPS] engaged in a number of joint task force investigations of what, at the time, appeared to be small-time crime. As a result of YRP team investigations in 2011 and 2012, the police began to believe that there was a pattern — that people arrested for many of the B&Es knew each other. The police came to believe those crimes were part of a criminal organization composed largely of Georgian nationals.

[8] While the Applicant was not initially a suspect in the B&Es in the York region, he was seen multiple times in the company of people who had been charged for B&Es. As a result, the Applicant was considered by the YRP to be a "known associate" of individuals involved in B&E crime.

[9] In December 2013, two individuals were observed committing a B&E by a neighbour who described them to police. The police arrested the Applicant and Mr. Sidamonidze in the vicinity of the B&E shortly afterward based on those descriptions. The Applicant was found wearing a puffy red jacket as reported by the neighbour to the police. The Applicant and Mr. Sidamonidze were subsequently connected to three other B&Es based on forensic matching

of the Applicant's footwear with footprints left at those B&Es. There was also a TPS video of a break-in showing that one of the perpetrators wore a red puffy jacket.

[10] The Applicant was charged with all four B&Es; however, the charges were later stayed by the Crown because they were unable to find a court-certified Georgian translator. By the time a translator was found, it was beyond the one-year period for the Crown to revive the charges.

[11] By the time of the ID hearing, the Applicant had had continued interactions with police. He was arrested on further B&E charges with Mr. Sidamonidze and another co-accused, Mr. Chokelli, in Toronto and was released on bail. There was another charge for a B&E committed while on recognizance for which the Applicant was awaiting disposition at the time of the Decision. There were further charges for assault with a weapon, possession of dangerous weapons, criminal harassment, and failure to comply with a recognizance. It does not appear that the Applicant had been arraigned on those further charges at the time of the hearing by the ID.

[12] On February 12, 2014, the Canada Border Services Agency [CBSA] issued a report under s. 44 of the *IRPA* alleging that the Applicant was inadmissible on the grounds of organized criminality. He was then arrested and placed in detention by the CBSA on February 21, 2014. His detention was upheld at the seven-day review, but, upon judicial review, the detention decision was overturned by Mr. Justice Zinn on March 31, 2014. Justice Zinn found that the Applicant's detention review had not been conducted fairly. Counsel for the Minister had made unequivocal statements that two associates of the Applicant were known members of a criminal organization although criminal charges had been withdrawn and no criminal court had made any such determination.

[13] At some point thereafter, the Applicant fled to Calgary. He testified before the ID that the YRP was applying psychological pressure and constantly threatening to deport him. Because he believed that fighting deportation was futile, he decided to flee Toronto to avoid deportation. As a result, the Applicant did not appear for a joint inadmissibility hearing scheduled for the Applicant and Mr. Sidamonidze on July 21 and 22, 2015. At the hearing, Mr. Sidamonidze was found to be inadmissible. The Applicant also failed to appear for his criminal charge so a bench warrant was issued for his arrest. Another warrant was issued for the Applicant's arrest when his surety on bail withdrew.

III. **Preliminary Matters**

[14] Before addressing the merits of the decision, there are two preliminary matters to consider.

A. *Procedural Fairness Issues*

(1) The Al Jazeera Video

[15] At the hearing of this application, counsel for the Applicant raised an issue he categorizes as one of procedural fairness. The Applicant did not raise it in his written materials. The issue concerns a video made by Al Jeezera that discusses Romanian and Georgian criminal gangs that were operating in France. The Applicant submits that the video, mentioned in the Decision, was entirely irrelevant to the circumstances that were before the ID. At the hearing of this application, counsel for the Applicant said he would have asked different questions at the ID hearing had he known the video would be important. He indicated that he had wondered why it was even part of the Minister's disclosure as it seemed to have no bearing on the case.

[16] The Respondent points out that the video was disclosed to the Applicant prior to the hearing and it was up to counsel to prepare accordingly.

[17] I agree with the Respondent. If counsel did not understand why the video was disclosed, he ought to have made some effort to determine the reason. I also note that, at the opening of the hearing, the ID indicated that it had received a CD with some videos on it and then confirmed with counsel for the Applicant that he had also received it. That provided counsel with an opportunity to raise his concern as to the relevance of the material but he did not do so.

[18] Whether to allow an argument to be made on judicial review that was not made to the tribunal is a matter of judicial discretion: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–27, [2011] 3 SCR 654. In this instance, the ID placed little to no reliance upon the video other than to mention it as one of the pieces of evidence it considered. The Applicant could have made inquiries in advance and could have raised it as a concern at the ID hearing; as it was not put to the ID, there is no way at this time to know how it would have been handled by the ID. On the facts of this case, I will not exercise my discretion to accept the argument now.

(2) The Intelligence Report

[19] The Applicant also objected to the suggestion that a crackdown in France in 2009 may have led to an influx of Georgian immigrants to Canada, a suggestion which he says was made without foundation. This suggestion arose from a February 2014 Intelligence Report that was prepared by an analyst with YRP. The Applicant strongly objected to the last sentence of the Intelligence Report, which asserted that no person should be allowed to enter Canada with the intent to exploit the immigration policies and drain Canadian social services.

[20] I note however that, during his submissions to the ID, counsel for the Applicant raised the impugned sentence as an issue. Counsel suggested to the ID that the last sentence of the 20-page report indicated that racial profiling lay behind the report and that there was no actual evidence of an organization. The ID indicated it had read the language of the sentence and found that it was not really appropriate. However, the ID did not make a finding of racial profiling. That the ID did not make such a finding does not indicate the process was procedurally unfair to the Applicant. Rather, the ID did not accept the submissions of counsel.

B. *Motion to Consider Fresh Evidence as Part of the Judicial Review*

[21] Approximately two months after the hearing was held, the Applicant brought a motion in writing under rule 312(c) of the *Federal Court Rules*, SOR/98-106, for leave to produce fresh evidence as part of his application by way of affidavit. In the event the motion succeeded, he then wished to permit the Respondent to cross-examine the affiant.

[22] The evidence sought to be introduced is that the criminal charges against the Applicant that were outstanding at the time of the ID hearing and the issuing of the application for judicial review had been withdrawn by the Crown on the direction of a judge of the Ontario Court of Justice who believed there was no reasonable prospect of conviction. The Applicant, relying on the Federal Court of Appeal decision in *Bernard v Canada (Revenue Agency)*, 2015 FCA 263, 479 NR 189, wishes to introduce the evidence under rule 312 to show that the Respondent was wrong when it indicated that the charges against the Applicant were stayed due to technicalities. Instead, the charges were stayed due to insufficient evidence to have a prospect of conviction.

[23] The Respondent objects that the Applicant is trying to reopen its case before this Court to include information that arose after the hearing much as counsel might try to reopen a trial, the grounds for which do not exist.

[24] The Respondent also objects to the introduction of such new evidence on two other grounds: (1) the evidence is being introduced by way of an affidavit of one of his solicitors, without having obtained leave of the Court, contrary to rule 82; and (2) there is no ground to accept the new evidence.

[25] Having reviewed the material, I am not prepared to give leave to the Applicant to file the affidavit. Not only was the information not before the ID, the affidavit does not meet any of the identified exceptions that would permit me to consider such evidence, and I am not persuaded this is a situation in which the categories ought to be expanded.

[26] The affidavit does not provide general background to help the Court understand the issues; it does not bring attention to a procedural defect that cannot be found in the ID's record; it does not show that there was a complete absence of evidence before the ID; and it does not speak to the procedural fairness of the matter before either the ID or this Court. I am also not convinced that, if the evidence had been before the ID, the outcome would have been any different given the facts and the law, particularly in light of section 33 of the *IRPA*.

[27] As explained later in these reasons, whether there were charges against the Applicant or not and whether there were criminal convictions or not is not determinative of the question of whether there were reasonable grounds to believe the Applicant is or was a member of a criminal organization. There was an abundance of evidence before the ID that, when applying the proper

test of reasonable grounds to believe, the Applicant, together with many others with whom he associated, was a member of a criminal organization as contemplated in paragraph 37(1)(a) of the *IRPA*. While the Applicant keeps trying to assert that a criminal standard of proof should apply in this application, that is simply not the standard set out in the *IRPA*. The material the Applicant seeks to add to the record is not determinative. Fairness does not require it be admitted.

[28] The motion is denied.

IV. The Applicable Legislation

[29] There are two provisions of the *IRPA* to consider in this matter, as well as one provision of the *Criminal Code,* RSC 1985, c C-46 [*Criminal Code*], all of which are set out below.

[30] The Applicant was found inadmissible to Canada by virtue of paragraph 37(1)(a) of the *IRPA*:

Organized criminality	**Activités de criminalité organisée**
37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	**37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of	**a)** être membre d’une organisation dont il y a des motifs raisonnables de croire qu’elle se livre ou s’est livrée à des activités faisant partie d’un plan d’activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d’une infraction à une loi fédérale punissable par mise en accusation ou de la

the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or	perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;
[…]	[…]

[31] In *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704 [*B010*], the Supreme Court of Canada considered paragraph 37(1)(b) of the *IRPA* in light of the definition in subsection 467.1(1) of the *Criminal Code.* The Supreme Court held that, in reading subsection 37(1) of the *IRPA* as a whole, it was clear that paragraphs 37(1)(a) and (b) were both introduced to deal with organized criminal activity pursuant to Canada's international obligations. The Supreme Court held, at paras 42–46, that "organized criminality" in the *IRPA* and "criminal organization" in subsection 467.1(1) of the *Criminal Code* should be given consistent, harmonious interpretation.

[32] Paragraph 467.1(1) of the *Criminal Code* reads as follows:

Definitions	**Définitions**
467.1 (1) The following definitions apply in this Act.	**467.1 (1)** Les définitions qui suivent s'appliquent à la présente loi.
criminal organization means a group, however organized, that (a) is composed of three or more persons in or outside Canada; and (b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would	***infraction grave*** Tout acte criminel — prévu à la présente loi ou à une autre loi fédérale — passible d'un emprisonnement maximal de cinq ans ou plus, ou toute autre infraction désignée par règlement. (*serious offence*) ***organisation criminelle*** Groupe, quel qu'en soit le

likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.	mode d'organisation :
	a) composé d'au moins trois personnes se trouvant au Canada ou à l'étranger;
	b) dont un des objets principaux ou une des activités principales est de commettre ou de faciliter une ou plusieurs infractions graves qui, si elles étaient commises, pourraient lui procurer — ou procurer à une personne qui en fait partie — , directement ou indirectement, un avantage matériel, financier.
It does not include a group of persons that forms randomly for the immediate commission of a single offence. (*organisation criminelle*)	La présente définition ne vise pas le groupe d'individus formé au hasard pour la perpétration immédiate d'uneseule infraction. (*criminal organization*)
serious offence means an indictable offence under this or any other Act of Parliament for which the maximum punishment is imprisonment for five years or more, or another offence that is prescribed by regulation. (*infraction grave*)	

[33] The *IRPA* also sets out rules of interpretation for section 37:

Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

[34] The result of these legislative provisions is that the ID had to determine whether there were reasonable grounds to believe that there was a criminal organization within the meaning of the Criminal Code. If it found that there was such an organization, then it had to determine

whether there were reasonable grounds to believe that the Applicant is or was a member of that organization.

V. **The Decision under Review**

A. *Review of the Law*

[35] The ID determined that the Applicant was inadmissible to Canada under paragraph 37(1)(a) of the *IRPA*. In arriving at that conclusion, it recognized that the standard of proof to be met by the Minister was to show that there were reasonable grounds to believe that the Applicant was a member of a criminal organization as defined in subsection 467.1(1) of the *Criminal Code*.

[36] The ID acknowledged that reasonable grounds to believe is a standard of proof that is significantly lower than the criminal standard and is also lower than the civil standard of a balance of probabilities. Relying on the Supreme Court of Canada's decision in *Mugesera v Canada (Minister of Citizenship and Immigration*), 2005 SCC 40 at para 114, [2005] 2 SCR 100 [*Mugesera*], the ID determined that reasonable grounds to believe required more than mere suspicion; an objective basis was required for the belief, based on compelling and credible information.

[37] The *Criminal Code* in subsection 467.1(1) states that a group "however organized" can be a criminal organization if it meets the stipulated criteria. The ID noted that "however organized" was interpreted by the Supreme Court of Canada in *R v Venneri*, 2012 SCC 33, [2012] 2 SCR 211 [*Venneri*], as being meant to capture differently structured criminal organizations (at para 31), although there must be some degree of structure and continuity to come within the section (at para 29).

B. *Evidence before the ID*

[38] The ID heard from two witnesses: Detective Tracey Turner [Detective Turner] of the YRP and the Applicant, who was represented by counsel. The ID hearing proceeded in both Vancouver, British Columbia and Calgary, Alberta through videoconference.

[39] The ID also considered documentary evidence including police reports from various police services in the Greater Toronto Area, the Intelligence Report, two past decisions of the ID in Toronto, and some video evidence.

(1) The ID's Analysis of the Evidence

[40] The video evidence consisted of five video files, four of which were surveillance videos of a different B&E that YRP believed to have been committed by the same criminal organization. Those videos were presented to give an indication of the organization's modus operandi. The fifth video was the one that counsel for the Applicant raised as being unfair because he did not anticipate it would be relevant: an Al Jazeera English documentary about Georgian criminal gangs operating in Europe. The Al Jazeera video was not shown during the hearing but was mentioned in passing in the Decision.

[41] The two decisions from the Toronto Region of the ID ordered the deportation of Mr. Sidamonidze and Mr. Pataraia, both associates of the Applicant, for being members of a criminal organization. The ID noted those decisions were not binding on it.

[42] The evidence from Detective Turner and the information in the Intelligence Report was summarized by the ID as showing that "these guys seem all connected but we don't quite know how". The testimony was that there were linkages between a variety of Georgian nationals

involved in B&Es and other criminal activity. They were often seen together and acted as sureties for each other on bail. The YRP concluded that a group of approximately 100 people were suspected of co-ordinated involvement in approximately 450 criminal incidents in the Greater Toronto Area from 2009 onwards. Detective Turner said that the YRP suspected who the mid-tier management and upper-level leadership were of the organization but, as it was an ongoing investigation, she did not provide the names of those suspects to the ID.

[43] The ID found that Detective Turner’s testimony was credible and that she was clearly convinced from her experience that there was a criminal organization made up of Georgian nationals committing B&Es in the Greater Toronto Area. She described a hierarchy consisting of those who commit the B&Es, the local bosses that give directions, and a leader who may not be in Canada. The group members were described as being fluid with membership dependent on who was caught, imprisoned, or deported.

[44] The Applicant’s testimony was reviewed in the Decision. He denied ever breaking into anyone’s home, admitted he knew Mr. Sidamonidze from their Church, denied being a member of a Georgian organized crime group, and said he fled Toronto when he was out on bail because the YRP threatened to deport him. With respect to the break-in with which he was charged, he said he was only in the area because he was looking to buy a car.

[45] The ID recognized that the Applicant had no criminal convictions although he did have outstanding charges, including one for a B&E in Toronto. The ID also acknowledged that four charges for B&Es were stayed in York because an interpreter was not available, which was viewed as a technicality not related to whether or not he committed the offences.

[46] Based on the collective evidence of Detective Turner, the Intelligence Report, the police reports, and the video describing the situation in France, the ID concluded that the offence pattern and shared acquaintances were more than a group of men who formed randomly to commit criminal acts.

VI. **Standard of Review**

[47] The parties in their written materials do not agree upon the standard of review. No argument was made at the hearing as to which standard to apply. I have therefore considered the arguments raised in the parties' respective memoranda.

[48] The Applicant says the ID was interpreting paragraph 37(1)(a) of the *IRPA* and the standard of review is therefore correctness. The Respondent submits the standard of review is reasonableness as the ID was interpreting its home statute. In support, the Respondent relies on *Canada (Minister of Citizenship and Immigration) v Tran*, 2016 FC 760 [*Tran*] and *B010*.

[49] I am satisfied the standard of review is reasonableness. The Federal Court of Appeal in *B010* found the applicable standard of review when interpreting paragraph 37(1)(b) of the *IRPA* to be reasonableness. On appeal, the Supreme Court of Canada did not address the standard of review. In *Tran*, Mr. Justice LeBlanc, reviewing a decision made under paragraph 37(1)(a) of the *IRPA*, found that the question of whether there was sufficient evidence to constitute reasonable grounds to believe a permanent resident was a member of a criminal organization is a question of mixed fact and law for which the standard of review is reasonableness.

[50] In this case, the ID correctly identified the test set out in *B010*. The Applicant disagrees with the application by the ID of the facts to the test. That also is a question of mixed fact and

law for which the standard of review is reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 51, 53, [2008] 1 SCR 190 [*Dunsmuir*].

[51] A decision is reasonable if the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law and if the decision-making process itself is justified, transparent, and intelligible (*Dunsmuir*, at para 47). Fundamental to the consideration of whether a decision is reasonable is the admonition in *Dunsmuir* that deference is both an attitude of the Court and the requirement of the law of judicial review; it imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law (at para 48).

[52] Generally speaking, if the reasons given by the tribunal enable the reviewing court to understand why the decision under review was made and permit it to determine whether the outcome falls within the range of possible outcomes, it will be reasonable: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Nfld Nurses*].

VII. **<u>Issues</u>**

[53] The parties agree that the issue is whether the ID erred in arriving at its finding that the Applicant was inadmissible on the grounds of organized criminality under paragraph 37(1)(a) of the *IRPA*.

[54] In arriving at that conclusion, the ID first determined that there was, in fact, a criminal organization; it then determined that Mr. Odosashvili is or was a member of that criminal organization. If either such determination was not reasonable, then the ID erred.

VIII. **Did the ID Reasonably Find that There Was a Criminal Organization?**

A. *Detective Turner's Evidence*

[55] At the hearing of this application, counsel for the Applicant urged upon me the position that the evidence of the lead investigator, Detective Turner, was not really evidence but was rather her opinion or belief, to which the ID deferred without there being any supportive objective evidence in the record. He also urged me to find that both Detective Turner and the author of the Intelligence Report were biased — Detective Turner because it was her investigation, and the Intelligence Report author because of the final sentence in his report in which he appears to be condemning Georgians for abusing the Canadian immigration system.

[56] In response, counsel for the Respondent notes that, at the relevant time, Detective Turner was a 25-year veteran of the Toronto Police who personally headed the investigation, had personal knowledge of the people involved and of the Applicant, and was the person who laid the charges against the Applicant. Her sworn testimony was not an opinion; it was credible evidence, and the ID, whose job it is to determine credibility, preferred Detective Turner's evidence over the denials of the Applicant. Counsel submitted that physical evidence in support of the testimony was not required as that would have turned the admissibility hearing into a criminal trial.

[57] I agree that Detective Turner provided her personal opinion in the sense that no court had adjudicated upon the charges faced by the Applicant. However, it was an informed opinion arrived at over the course of her years of investigation and intelligence gathering, in this very matter, beginning in 2009/2010 when the police noticed an increase in residential break and enters in the Greater Toronto Area. Her evidence was set out in some detail in the Decision and

need not be repeated here. Essentially, over the course of time, the police noticed that those who were being arrested for various B&Es or other property related offenses would subsequently be seen together. This included being in each other's company, posting sureties for one another, living together, driving each other's cars and, in at least one instance, three of them, including Mr. Odosashvili, attending at the police station together to retrieve a car that had been impounded. The cumulative evidence acquired over time caused the police to believe the B&Es were committed by various actors who were criminally associated.

[58] The Intelligence Report extensively details the many sources of information and the analysis that was conducted to come to the conclusion that there was an organized group of people of Georgian nationality committing the crimes. Included in the information gathering were intelligence officers from CBSA, TPS, and YRP. In addition to police sources, including surveillance videos, the analysts consulted open source information, presumably social media, where photos showed that the various persons of interest knew each other. Amongst the observations in the Intelligence Report was the fact that, following the arrests of various actors for B&Es, the number of B&Es "declined dramatically". Ultimately, the report indicates that there was "a deeply linked organized group of individuals involved in a plethora and variety of crimes".

[59] The ID had before it credible evidence upon which it could reasonably rely to determine that there were reasonable grounds to believe there was a criminal organization. The ID found that Detective Turner was a credible and sincere witness. The evidence of Detective Turner was based on personal observation of the Applicant, as well as a comprehensive understanding of the investigations into the rash of B&Es in the York Region, police reports of occurrences of B&Es,

and task force discussions. It was also supported by the Intelligence Report analysis of the crime reports and related police statistics.

[60] In my view, the underlying record contains ample foundation for Detective Turner's evidence given the standard of proof the ID was to apply. The Applicant's challenge to the evidence of Detective Turner amounts to an attempt to elevate the evidentiary burden on the Minister to the criminal standard rather than the legislated reasonable grounds to believe. While I appreciate that a definition in the *Criminal Code* is involved and the Applicant has been charged with criminal activity (which is true regardless of whether the charges proceeded or not), the legislation only requires that the ID have reasonable grounds to believe that there is a criminal organization and that the Applicant is or was a member of it. In this application, I am charged with determining whether the ID acted reasonably in making that determination. In relation to the Decision, it is my view that it was entirely reasonable for the ID to accept and rely upon the evidence of Detective Turner.

[61] In any event, the ID is required to assess the credibility of the evidence it receives. It is in the best position to determine whether to prefer the evidence of Detective Turner or that of the Applicant. It is not the role of this Court to second-guess that determination, particularly when the record supports it.

B. *The Detention Review Finding and No Criminal Organization Charge*

[62] The Applicant also relies upon comments by Mr. Justice Zinn in the Applicant's detention review to the effect that the opinion of the police was not relevant and no criminal court had opined on whether there was a criminal organization. I note, however, that the issue was not squarely before Mr. Justice Zinn for determination; he found the proceeding had been

procedurally unfair to the Applicant. Justice Zinn did not purport to comment on the same issues that are the subject of this application.

[63] Acknowledging that the ID only has to determine that it has reasonable grounds to believe that the Applicant is a member of a criminal organization, counsel for the Applicant also points out that this is the same standard the police must meet in order to lay a criminal charge. Despite a lengthy investigation, counsel suggests that the reason the police have yet to lay a charge against a suspected criminal organization is that there is simply not enough evidence to do so. The ID, however, accepted that charges had not been laid as there was still an ongoing investigation.

[64] In my view, nothing turns on the lack of such a charge on these facts. Once again, the Applicant is seeking to apply a higher standard of proof than that which is required. The evidence before the ID was that there were other issues involved with laying such a charge, including requiring approval from the Attorney General. It has been held that, given the burden of proof in these matters, it is not unreasonable to believe an individual is a member of a criminal organization for the purposes of the *IRPA* where no charges of criminal organization have been laid in the criminal context: *Lennon Sr v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1122 at para 21, 11 Imm LR (4th) 344.

C. *The Form of the Organization*

[65] The ID acknowledged the Supreme Court of Canada's decision in *Venneri*, above, in which the Court found that the definition of a criminal organization encompassed many different forms of criminal organization, but that there must be some degree of formal organization, including continuity and structure. Any other definition would encompass merely a series of

crimes committed by three or more persons for a material benefit, which would be indistinguishable from the conspiracy, aiding and abetting, and "common intention" provisions of the *Criminal Code*.

[66] The Applicant argues that the current jurisprudence requires a criminal organization to have both a structure and a hierarchy. The Applicant says that neither were in evidence before the ID and so the ID did not reasonably apply the facts when it interpreted the requirements of the *Criminal Code* with respect to whether there was a criminal organization. Further, the Applicant notes that the Federal Court of Appeal in *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at para 43, [2007] 3 FCR 198 [*Sittampalam*], has recognized the kind of indicia that can help determine whether a criminal organization exists, including leadership, an elementary form of hierarchy, the giving of instructions from a leader, a specific and identifying name, an occupied territory, and chosen locations for meeting within their specified territory. The Applicant states that no such indicia were identified here by the police investigators or the ID.

[67] I note that, in *Venneri*, the Supreme Court clearly said that the shared attributes of one form of criminal organization are not to be taken as a checklist. Instead, it is preferable to focus on the goal of the legislation, which is to identify and undermine groups of three or more persons that pose an elevated threat to society due to the ongoing and organized association of their members: *Venneri*, above, at paras 38, 40. The Federal Court of Appeal has similarly accepted that criminal organizations do not usually have formal structures; a flexible approach is required in assessing whether the essential elements of an organization are present in any particular case: *Sittampalam*, above, at para 39.

[68] The Intelligence Report indicates that the police had pieced together a group of over 100 people they suspected had co-ordinated involvement in over 450 crimes. Detective Turner testified that the police had suspects for mid-tier management and upper leadership in the organization but as the investigation was ongoing she could not provide the names to the ID.

[69] The ID found Detective Turner's testimony that there was a hierarchy was vague enough to describe any organization. But, it accepted her testimony that there was a suspected leader known to police. The ID found that just because the organization is not well understood, that does not mean it does not exist. The ID also noted that the fact that there is planning required for a B&E does not mean that a criminal organization is involved; there could be a conspiracy or a group of persons that form randomly for one-off offences, even if this happens more than once.

[70] The ID acknowledged that a criminal organization requires at least three persons. Acknowledging the Applicant's argument that there was no evidence of more than two persons at the B&Es with which he was charged, the ID found this irrelevant: there were clearly three or more people in the broader organization. The ID held that it did not matter if there were only two people in the Applicant's specific B&E if he carried it out as part of his membership in a larger organization of three or more people.

[71] The ID found it "highly improbable" that all the Georgians caught in B&Es were connected only by language, national origin, and criminal lifestyles, all committing the same kind of crime. The ID found evidence of continuity and, from the sheer volume of B&Es and their relative success, some kind of organization.

[72] As set out in the definition of criminal organization in the *Criminal Code*, the Applicant argues that there must be at least three people involved in the commission of an offence and there were only two: the Applicant and a co-accused. However, as the ID noted, the definition set out in the *Criminal Code* requires that the organization, not those involved in the commission of an offence, be composed of at least three members. I agree. The plain wording used in the definition is that the organization itself must be at least three persons.

[73] It may be that, in asserting that three people had to commit the offence in order to fall within the definition, the Applicant was relying on the comments made by Mr. Justice Barnes in *Saif v Canada (Minister of Citizenship and Immigration*), 2016 FC 437, 45 Imm. L.R. (4th) 47. If that is the case then, with respect, as I read the remarks by Justice Barnes, he was simply putting forward an example of why a third party who transacts with an organization cannot reasonably be considered to be a member of the organization. He did not say that three people had to participate in a particular crime to fall within the definition of being members of a criminal organization.

[74] What the ID found to be persuasive was that there were a high volume of crimes, serially committed by a group of men, in pairs or in threes, who all seem to know each other and have the same national origin, though the specific members of each team was fluid depending on who was caught, imprisoned, or deported.

[75] The Applicant is asking the court to look at individual pieces of evidence and not at the collective whole of the evidence put before the ID. A review of the transcript and the evidence given by Detective Turner, much of it elicited during cross-examination, shows that the police had much more than a mere suspicion that there was a criminal organization. On the record, it

was reasonable for the ID to rely on the evidence in arriving at the conclusion that there was a criminal organization.

IX. **Did the ID Reasonably Find that Mr. Odosashvili Is or Was a Member of That Criminal Organization?**

[76] On the issue of membership in an organization, the ID noted that the Applicant had no convictions, but had four outstanding charges in Toronto and had four B&E charges stayed in York Region for the technical reason of the lack of an interpreter. While the Applicant denied committing the crimes, the ID found Detective Turner's evidence on this point to be more credible. However, the ID decided it did not need to determine whether the Applicant was guilty or innocent. Rather, it found there were reasonable grounds to believe he had committed the offences and his links to other members of the organization and engagement in the same principal activity created reasonable grounds to find that he was a member of the organization.

[77] The ID found that Detective Turner was a credible witness and that her evidence about the Applicant committing B&Es was more credible than the Applicant's denials.

[78] The ID recognized as well that the Applicant was charged with two B&Es based on matching his footprints to ones left at the crime scenes and that, at the time of the hearing, there were outstanding charges against the Applicant. The ID acknowledged that the Applicant testified that he had never broken into anyone's home, he is not a member of a Georgian organized crime group, and, when he was arrested by YRP, he was in the area to look at a car.

[79] Specifically, with respect to the Applicant, Detective Turner gave evidence that on December 12, 2013 her team arrested the Applicant for a B&E on Forest Drive having viewed a video of a residential break and enter the day before at a meeting with other police officers. She

testified that the Applicantand Mr. Sidamonidze were seen on the video breaking into a home in Toronto and that when he was arrested, the applicant was wearing the same red coat as he was seen wearing in the video viewed the day before. In answer to the question by counsel for the applicant of whether she believed the applicant is a participant in the activities of the Georgian criminal organization Detective Turner said yes – because of the crimes with which he was charged and his association with other persons upon whom it gathered information. Her clear evidence was that “is definitely – definitely participating in a criminal organization”.

[80] Looking at the record once again it is my view that the ID did not err in finding there were reasonable grounds to believe that the Applicant was a member of a criminal organization. While the Applicant would like to raise the standard to be proof that he is a member of a criminal organization, that is simply not the test.

X. **Conclusion**

[81] The ID canvassed the evidence before him, considered the jurisprudence and the arguments of the Applicant, explained how and why it made certain findings, and then concluded that there were reasonable grounds to believe that there is a criminal organization and that the Applicant is or was a member of it. Applying the principles of judicial review taught by *Dunsmuir* and *Nfld Nurses*, I am satisfied, for the reasons given, that the Decision is reasonable as it falls within the range of possible, acceptable outcomes based on the facts and law. The decision-making process is transparent, intelligible and justifiable.

[82] The Applicant summarized his overall position in the following way in his written Reply Memorandum:

> [T]he thrust of the Applicant's argument remains the same: it sets a dangerous precedent to use the immigration process in the manner in which it is being used here, given the ultimate lack of evidence. An allegation under s. 37 of *IRPA* is very serious and should not be used against the Applicant unless a very clear case can be made that a) a criminal organization does exist and b) that the Applicant is in fact a member. If the Applicant is ultimately convicted of the crimes against him, he can be removed through the proper channels as a permanent resident, however, until that happens, the immigration process should not be used as an alternative method of removal in the way it is being done here.

[83] While I take the Applicant's point, it is at odds with what Parliament has determined as interpreted and applied by the Supreme Court of Canada in *B010* and the Federal Court of Appeal in *Sittampalam*. Parliament has clearly said in sections 33 and 37(1)(a) of the *IRPA* that the immigration process, with, in this instance, the much lower standard of reasonable grounds to believe, can in effect be used in lieu of a criminal conviction (obtained on the basis of beyond a reasonable doubt). It is not for the Applicant, the ID, nor this Court to determine otherwise.

[84] The application is denied. No serious question of general importance was raised by the parties nor does one exist on these facts.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is denied. There is no question of serious importance for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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