Federal Court  Cour fédérale

Date: 20210208

Docket: IMM-3518-19

Citation: 2021 FC 128

Ottawa, Ontario, February 8, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

ANDREW CLARKE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Clarke, a Jamaican citizen and permanent resident of Canada, pled guilty and was convicted of possession of cocaine for the purpose of trafficking, contrary to subsection 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. Further to his conviction, the Immigration Division [ID] deemed Mr. Clarke inadmissible to Canada on the basis of serious

criminality pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The ID thus issued a deportation order to Mr. Clarke.

[2] Originally charged with conspiracy to import cocaine, Mr. Clarke also was deemed inadmissible under paragraph 37(1)(b) of the *IRPA* on the basis of organized criminality for engaging, in the context of transnational crime, in the trafficking of cocaine in his case. Consequently, the ID rendered a second deportation order to Mr. Clarke.

[3] Only Mr. Clarke's inadmissibility under paragraph 37(1)(b) is at issue in this judicial review, including the test for "organized criminality." Having considered the issues Mr. Clarke articulates, I find the sole issue for determination is the reasonableness of the ID's decision.

[4] The presumptive standard of review is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10. This includes matters of statutory interpretation, which are not treated uniquely but rather are examined in the context of the decision as a whole, including the decision maker's reasons and the outcome: *Vavilov*, at paras 115-116. I therefore am satisfied that none of the circumstances which may rebut the presumption of reasonableness is present in the matter before me.

[5] To avoid judicial intervention, the decision must bear the hallmarks of reasonableness – justification, transparency and intelligibility: *Vavilov*, at para 99. A decision may be unreasonable if the decision maker misapprehended the evidence before it: *Vavilov*, above at

paras 125-126. The party challenging the decision has the onus of demonstrating that the decision is unreasonable: *Vavilov*, at para 100.

[6] For the reasons that follow, I am not persuaded that the ID's decision was unreasonable. I find the ID neither failed to articulate and apply the legal test for determining "organized criminality" nor failed to consider important evidence pointing to a contrary conclusion. I therefore dismiss this judicial review application.

II. Background

[7] Briefly, the events that led to Mr. Clarke's arrest and conviction are as follows:

- The Canada Border Services Agency [CBSA] intercepted a Canada Post package containing cocaine that was sent from Jamaica consigned to "Dion Taylor" at Mr. Clarke's home address; Dion Taylor did not live at such address nor was this someone known to Mr. Clarke;
- The RCMP removed the majority of the illicit substance before posing as Canada Post workers and delivering the package to Mr. Clarke's home that he shared with his half brother, Lucien Williams, his older brother and his mother who was on dialysis;
- Mr. Clarke's half brother answered the door; when the undercover officers initially asked if Dion Taylor (to whom the package was addressed) could accept the package, the brother said no one by that name lived at the residence;
- Mr. Williams, however, apparently went upstairs to where Mr. Clarke was sleeping, returned to the door after he spoke with Mr. Clarke and informed the RCMP officer that Dion Taylor was there and sleeping upstairs because he worked nights; Mr. Williams then accepted the package on behalf of Dion Taylor and signed for it using his real name;

- A short time later, the Mr. Clarke's friend, Allister Christie, arrived at the home;
- At this point, the RCMP entered the home and arrested Mr. Williams, Mr. Christie and Mr. Clarke;
- The controlled package was opened in Mr. Clarke's bedroom, where 32.5 grams of additional suspected cocaine in bags were found, outside the package that was delivered;
- Also found in Mr. Clarke's bedroom was a previously-delivered package, similar to the one delivered in this instance, along with drug paraphernalia including drug cutting agents, a razor blade coated with white granular substance, and a weigh scale;
- On the basis of their investigation, the RCMP concluded Mr. Clarke was involved in the importation of cocaine into Canada, and that he and two others were involved in trafficking.

[8] At the criminal trial, the judge noted that Mr. Clarke was not the "architect of the scheme," but that he played a large part in the criminal activity; he knew what was in the package when it was opened in the room where he was present. Mr. Clarke agreed with the trial judge in these respects.

[9] The CBSA interviewed Mr. Clarke after his conviction. Mr. Clarke stated that he did not know: anyone by the name of Dion Tylor; that there was cocaine in the package; and what a cutting agent was. He also alleged that he and Mr. Christie were going to start a flea market, and Mr. Christie used Mr. Clarke's address to send samples of what they were going to sell. Further, he admitted having multiple cell phones, and said that they were for his personal use, to give to family members. Because they did not believe his version of events and because Mr. Clarke

incurred other outstanding criminal charges, the CBSA referred Mr. Clarke to the ID for an admissibility hearing.

III. Relevant Provisions

[10] See Annex “A” below.

IV. ID Decision

[11] In arriving at its inadmissibility conclusion regarding the *IRPA* s 37(1)(b), the ID notes that the *IRPA* s 33 prescribes the applicable standard of proof (regarding facts that constitute inadmissibility under sections 34 to 37) as reasonable grounds to believe (that they have occurred, are occurring or may occur). This involves more than a mere suspicion but less than a balance of probabilities; reasonable grounds will be found to exist if there is an objective basis for the belief based on compelling and credible information. In that regard, the ID places significant weight on the RCMP summary of facts and the transcripts from the criminal proceeding before the Ontario Court of Justice.

[12] The ID notes discrepancies between the court transcripts and Mr. Clarke’s oral testimony. For example, Mr. Clarke indicated in oral testimony that he had no knowledge that there were illicit drugs in the package sent to him (he thought it was the samples - towels and the bags - from Jamaica). This is not what Mr. Clarke said before the Ontario Court of Justice, however, as noted above.

[13] Mr. Clarke indicates that he only pled guilty to the offence on the advice of his lawyer; that it was a plea bargain. In light of the seriousness of the offence, however, the ID is not persuaded and states that: “I find it difficult to believe that you would actually in those circumstances plead guilty if in fact you were not.” The ID also questions Mr. Clarke’s credibility based on his guilty plea, on his contrary oral testimony that he had no knowledge there were illicit drugs in the package sent to him, as well as on his inability to explain much of the drug paraphernalia found in his room. This included boxes of small baggies, cutting agents used for cocaine, loose razor blades coated with white substance, and weigh scale, which related specifically to the charges with respect to trafficking of cocaine.

[14] The ID further notes that all three initially were charged with conspiracy to import a controlled substance, importing a controlled substance, conspiracy to possess a controlled substance for trafficking and possession of a controlled substance for trafficking. It is unclear whether Mr. Christie pled guilty to the offences but it appears that the charges against Mr. Williams were dropped or withdrawn.

[15] The ID then sets out the four-part test required to meet paragraph 37(1)(b) of the *IRPA* and whether the elements of the test had been met. First, there is no dispute that Mr. Clarke is a permanent resident of Canada. Second, with respect to the element of organized criminality, the ID notes that membership is not required, but rather only that the criminality is organized; it found that the activity in question was organized by a number of persons. The ID acknowledges the parties’ dispute regarding the minimum number of persons – two (as asserted by the Minister) or three (as asserted by Mr. Clarke). The ID is satisfied, however, that Mr. Clarke’s

half brother, Lucien Williams was a participant, and that he would not have signed for the package, after being told by Mr. Clarke to do so, had he not known what was in the package. The ID notes their close relationship and that Mr. Clarke lived with Mr. Williams. The ID thus finds that at least three people participated in the organization of the criminal activity.

[16] The third element for a the finding of inadmissibility under paragraph 37(1)(b) is the establishment of the transnational context of the crime, with reference to Article 3 of the *United Nations Convention against Transnational Organized Crime*, 2225 UNTS 209 [*UNCTOC*, also known as the *Palermo Convention*] to aid in interpreting the term transnational. The ID finds that Mr. Clarke was engaged in illegal activity that was transnational in nature because it involved the importation of cocaine from another country, Jamaica. Mr. Christie was the person who went to Jamaica, on several occasions, allegedly to source products for the booth Mr. Clarke intended to establish in a flea market in Canada. Because Mr. Clarke had no business plan nor any idea really about the cost to run a booth, the ID considers the alleged reason for Mr. Christie's travel to Jamaica concocted.

[17] Regarding the fourth element, the ID states that the courts have indicated activities such as people smuggling, trafficking in persons or money laundering are simply examples of activities in which one could engage that would satisfy paragraph 37(1)(b), and not an exhaustive list. The ID determines there are other activities that could fall into that, specifically possession for the purpose of trafficking cocaine and, therefore, concludes that all four elements have been met and established on reasonable grounds.

V. Analysis

[18] Contrary to Mr. Clarke's assertions, I find that the ID did not err in the following two respects, both relating to the meaning of "organized criminality" in the *IRPA* s 37(1)(b). First, Mr. Clarke argues the ID failed to analyze whether there was any "structure and continuity" pursuant to the Supreme Court's definition of "criminal organization" in *R v Venneri*, 2012 SCC 33 [*Venneri*] at paras 27, 35 and 36. Second, he submits the ID's finding that Mr. Williams was a participant in the organized criminality was unreasonable. I deal with each of these assertions separately below.

(a) *Structure and Continuity*

[19] Mr. Clarke argues, in contradistinction to the Respondent, that the *Criminal Code* definition of "criminal organization" as explained in *Venneri*, including the features of structure and continuity, is applicable in the present case having regard to the Supreme Court of Canada decision in *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 [*B010*]. While not disagreeing, I find that features of structure and continuity, in the context of *IRPA* s 37(1), are eminently variable and wholly fact dependent on the circumstances of each case. As explained below, I find it was reasonable for the ID to conclude that there were reasonable grounds to believe the essential elements of *IRPA* s 37(1)(b) were met.

[20] *Venneri* addresses the definition of "criminal organization," as defined in subsection 467.1(1) of the *Criminal Code*, RSC 1985, c C-46, meaning essentially a group, however organized, composed of three or more persons and having as its main purpose the commission of

serious offences resulting in direct or indirect material benefit, including financial benefit, by the group or any of its members. The words "however organized" are used in the sense of differently structured organizations: *Venneri*, above at para 31. "[W]hile the definition must be applied 'flexibly', structure and continuity are still important features": *Venneri*, above at para 27.

[21] Subsection 467.1(1) of the *Criminal Code* reflects Canada's obligation under the *UNCTOC* to establish criminal offences targeting participation in an "organized criminal group" [Art. 5]. The *UNCTOC* defines "organized criminal group" as a structured group of three or more persons existing for a period of time and acting in concert to commit serious crimes to obtain, directly or indirectly, a financial or other material benefit [Art. 2(a)]. Further, a "structured group" is one that is not randomly formed but does not need to have formally defined roles for, or continuity of, members, nor a developed structure [Art. 2(c)]; nonetheless the organized criminal group must be structured: *Venneri*, above a paras 32-33.

[22] Similarly, paragraph 37(1)(b) of the *IRPA* was enacted pursuant to Canada's obligation under *UNCTOC*: *B010*, above at para 43. Contextually, subsection 37(1) introduces the concept of inadmissibility on grounds of organized criminality; paragraphs (a) and (b) provide instances of organized criminality: *B010*, above at para 37. In grappling with the "ordinary and grammatical sense" of the words used in paragraph 37(1)(b), the Supreme Court examined two questions: whether the provision is limited to activity directed at "financial or other material benefit;" and whether any limits can be inferred from the wording "on grounds of organized criminality" and "in the context of transnational crime."

[23] The Supreme Court held generally that "[w]hile 'organized criminality' and 'criminal organization' are not identical phrases, they are logically and linguistically related and, absent countervailing considerations, should be given a consistent interpretation": *B010*, at para 42. More specifically, in answer to the first question, the Court held that paragraph 37(1)(b) should be interpreted harmoniously with the *Criminal Code*'s definition of "criminal organization" as involving a material, including financial, benefit: *B010*, above at para 46 [not emphasized in original].

[24] In answer to the second question, the Supreme Court held that the words "in the context of transnational crime" should be read together with "organized criminality" to find a harmonious meaning for paragraph 37(1)(b) as a whole and when that is done, the words "transnational crime" refer to "organized transnational crime" and do not include non-organized individual criminality: *B010*, above at para 35. In sum, "[t]he wording of s. 37(1)(b), its statutory and international contexts, and external indications of the intention of Parliament all lead to the conclusion that this provision targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime": *B010*, above at para 72.

[25] The focus in *B010* was the interpretation of paragraph 37(1)(b) of the *IRPA*, albeit harmoniously with subsection 37(1) in which it resides. The decision did not address head on, however, the issue of whether "a number of persons" in paragraph 37(1)(a) of the *IRPA* must be read as "three or more persons" specified in the *Criminal Code* as one of the criteria of a criminal organization. Subsequent Federal Court case law has not settled the issue. At least one case

suggests that such interpretation is warranted because of the Supreme Court's finding that "organized criminality" and "criminal organization" are logically and linguistically related and, thus, should be interpreted consistently: *Saif v Canada (Citizenship and Immigration)*, 2016 FC 437 at para 15. Others take a more cautious approach by not making a final determination on the issue: see, for example, *Pajazitaj v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 540 [*Pajazitaj*] at para 35; and *Denha v Canada (Citizenship and Immigration)*, 2020 FC 168 [*Denha*] at para 23.

[26] Like my colleagues Justice Norris in *Pajazitaj* and Justice Fothergill in *Denha*, I find it unnecessary to make a determination on this point in relation to "structure and continuity." As explained below, I find the ID's inclusion of Mr. Clarke's half brother, Lucien Williams, in the group engaged in the scheme, as termed by the Ontario Court of Justice, was not unreasonable.

[27] So where does this leave us regarding "structure and continuity" in the context of "organized criminality?" The overarching theme in *Venneri* and in case law involving subsection 37(1) of the *IRPA* is flexibility. "The words 'however organized' suggest that it must be organized in some fashion": *Thanaratnam v Canada (Minister of Citizenship and Immigration)*, 2004 FC 349 at para 30. Further, organized criminal groups tend to have loose, informal structures that can vary substantially; this calls for "a rather flexible approach in assessing whether the attributes of a particular group meet the requirements of the *IRPA* given their varied, changing and clandestine character": *Sittampalam v Canada (Citizenship and Immigration)*, 2006 FCA 326 at para 39. It is sufficient that the group be somewhat organized and that it has coordinated its activities for some indeterminate period of time; it can be characterized as

criminal, regardless of whether it also may have legitimate objects: *Nguesso v Canada (Citizenship and Immigration)*, 2016 FC 1295 at para 61. Finally, *Venneri* underscores the need for flexibility by emphasizing that care must be taken not to transform the shared characteristics of one type of criminal organization into a checklist that needs to satisfied in every case: *Venneri*, above at para 38.

[28] In sum, whether there are reasonable grounds to believe that the facts constituting inadmissibility under *IRPA* s 37(1), including a loose, informal structure and sufficient continuity, have occurred, are occurring or may occur is very much dependent on the circumstances of each case. In the case before me, I find it clear on the face of the ID's reasons that the ID relied on the RCMP investigation report, which concluded Mr. Clarke was involved with the importation of cocaine into Canada (from Jamaica) and that he and two others were involved in trafficking, and on the Ontario Court of Justice decision, which identified Mr. Clarke as having a big part in the scheme (of which he was not the architect) involving illicit importation or possession of illegal drugs such as cocaine. The ID also found it more likely than not that Mr. Clarke shared a close relationship with the brother who resided with him.

[29] The fact that charges against Mr. Williams were either withdrawn or dropped did not suggest to the ID that he was not part of the organized criminality. I find this is consistent with applicable case law which holds, "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": *Odosashvili v Canada (Citizenship and Immigration)*, 2017 FC 958 at para 64. I also find Mr.

Clarke's assertion that Mr. Christie and Mr. Williams were not friends or even associates is not determinative of whether they were participants in the scheme or had engaged in activity that is a part of a pattern of criminal activity.

[30] Further, in addition to the package delivered by RCMP cum Canada Post workers, the RCMP discovered in Mr. Clarke's room a similar package that had been delivered previously, drug paraphernalia including agents and a weigh scale. Based on the latter discoveries, as well as all the information the ID had before it, the ID concluded "that there are reasonable grounds to believe that you have engaged in this activity, quite possibly over a period of time, and on other occasions other than the ones for which you were eventually convicted which was possession for the purpose of trafficking in cocaine."

[31] It must be remembered that "the role of this Court is not to decide whether, on the evidence before the [ID], there were 'reasonable grounds to believe' that the essential elements of section 37 were satisfied, but only whether it was reasonable for her to conclude that the[y] were": *Nguesso v Canada (Citizenship and Immigration)*, 2016 FC 1295 at para 53, citing (*Canada (Minister of Citizenship and Immigration) v Thanaratnam*, 2005 FCA 122 at paragraphs 32-33). Having considered the record on this basis, and noting that "reasonable grounds to believe" means "more than a mere suspicion but less than … the balance of probabilities" (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at para 114), I conclude it was reasonable for the ID to determine that Mr. Clarke "engaged in organized criminality that is transnational in nature, namely the unauthorized importation of cocaine to Canada."

(b) *Mr. Williams was a participant in the organized criminality*

[32] As noted above, although charges against Mr. Clarke's half brother, Lucien Williams, were withdrawn or dropped, this is not determinative of his involvement. I cannot agree with Mr. Clarke's assertion that the ID's decision is unreasonable because the ID member "based her reasoning on a false dilemma: either Applicant's half brother knew about the drugs and therefore signed for the package or he didn't know about the drugs and wouldn't have signed for the package[; t]here is at least one other possibility: he didn't know about the drugs, but was told to sign for the package and the applicant did so." A conclusion is not unreasonable, however, merely because inferences different from those of the decision maker reasonably could be drawn from the evidence; when considered cumulatively, the evidence was sufficient to ensure that the ID's decision could not be characterized as unreasonable: *Canada (Minister of Citizenship and Immigration) v Thanaratnam*, 2005 FCA 122 at para 34.

VI. Conclusion

[33] For the foregoing reasons, I dismiss this judicial review application.

[34] Following the hearing of this matter, the Respondent proposed the following question of general importance for possible certification: "Does 'organized criminality' as it applies to s 37(1)(b) of *IRPA* require more than two people?" Because the question is not determinative in this case, I decline to certify it.

JUDGMENT in IMM-3518-19

THIS COURT'S JUDGMENT is that this judicial review application is dismissed; no question will be certified; and there are no costs.

"Janet M. Fuhrer"
Judge

Annex "A" – Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27, ss 33 and 37**

Rights and Obligations of Permanent and Temporary Residents	**Droits et obligations des résidents permanents et des résidents temporaires**
Right of permanent residents **27 (1)** A permanent resident of Canada has the right to enter and remain in Canada, subject to the provisions of this Act.	**Droit du résident permanent** **27 (1)** Le résident permanent a, sous réserve des autres dispositions de la présente loi, le droit d'entrer au Canada et d'y séjourner.
Conditions **(2)** A permanent resident must comply with any conditions imposed under the regulations or under instructions given under subsection 14.1(1).	**Conditions** **(2)** Le résident permanent est assujetti aux conditions imposées par règlement ou par instructions données en vertu du paragraphe 14.1(1).
Inadmissibility **Rules of interpretation** **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.	**Interdictions de territoire** **Interprétation** **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.
Organized criminality **37 (1)** A permanent resident or a foreign national is inadmissible on grounds of organized criminality for **(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 the commission of an offence outside Canada that, if committed in Canada,	**Activités de criminalité organisée** **37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants : **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 perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se

would constitute such an offence, or engaging in activity that is part of such a pattern; or **(b)** engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.	livrer à des activités faisant partie d'un tel plan; **b)** se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

***Criminal Code*, RSC 1985, c C-46, s.467.1(1)**

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.
	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*)
criminal organization means a group, however organized, that	***organisation criminelle*** Groupe, quel qu'en soit le mode d'organisation :
(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 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.	**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, notamment 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'une seule 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*)	

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3518-19
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APPEARANCES:

Jeremiah Eastman	FOR THE APPLICANT
Kristina Dragaitis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jeremiah Eastman Eastman Law Offices Oakville, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT