Federal Court  Cour fédérale

Date: 20100413

Docket: IMM-3823-09

Citation: 2010 FC 391

Ottawa, Ontario, April 13, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

QUN ZHU HE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration Division of the Immigration and Refugee Board of Canada dated June 10, 2009 wherein it was found that the applicant was a person described under paragraph 37(1)(a) of the IRPA.

[2] As such, the applicant was issued a deportation order pursuant to paragraph 45(d) of the Act and paragraph 229(1)(e) of the Regulations.

[3] The applicant waived her right to a Pre-Removal Risk Assessment and was deported to China in November 2009. However, both parties have requested that the Court issue a decision in this matter. There is authority, at subsection 52(2) of the IRPA, for the proposition that the applicant would be entitled to return at the Minister's expense if the inadmissibility decision was overturned. In that sense, there continues to be a live controversy between the parties.

[4] These are my reasons for dismissing the application.

Background

[5] Ms. He, the applicant, is a citizen of China. She arrived in Canada on or about January 15, 2008, and soon thereafter claimed refugee protection. Her refugee claim is currently suspended pending the outcome of this proceeding.

[6] On September 11, 2008, the applicant and others were arrested and charged with a number of criminal offences in connection with their involvement in an illegal marijuana grow operation at 366 Pine Valley Drive in Kitchener, Ontario.

[7] The applicant was charged with 7 *Controlled Drug Substance Act* (CDSA) and *Criminal Code* (CC) offences relating to the production, possession and trafficking of over 3 kg of cannabis

marijuana, in addition to conspiracy to commit an indictable offence, theft of electricity or gas, and obstruction/resisting peace officer.

[8] On March 6, 2009, the applicant plead guilty and was convicted of the offences of: production of marijuana, possession of marijuana for the purpose of trafficking, and theft of electricity. The sentencing court, taking into consideration177 days of pre-sentence custody, sentenced her to an additional 3 months imprisonment.

[9] On March 27, 2009, the Minister issued a Report under section 44 of the IRPA that the applicant was inadmissible to Canada on the grounds of organized criminality under paragraph 37(1)(a). The Report was referred to the Immigration Division for an Admissibility Hearing. Ms. He's pending refugee claim was suspended in light of the Report.

[10] The applicant was held on an immigration warrant as of May 6, 2009.

[11] The Immigration Division proceeded with the Admissibility Hearing on five dates (April 14, 30, May 8, 20 and 27). On June 10, 2009, the Immigration Division issued its decision, finding that the applicant was a person described by paragraph 37(1)(a) of the IRPA and thus inadmissible to Canada.

[12] Ms. He's detention reviews occurred on May 8, 14, June 11 and July 9, 2009. The applicant was denied release and was held at the Vanier Centre for Women on an immigration hold as of August 28, 2009.

[13] Having waived her right to a Pre-Removal Risk Assessment, the applicant was deported to China in November 2009.

Decision Under Review

[14] The member noted at the beginning of his reasons that paragraphs 173(c) and (d) of the IRPA state that "the Immigration Division, in any proceeding before it, (c) is not bound by any legal or technical rules of evidence; and (d) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances."

[15] Having considered the evidence at this admissibility hearing, along with the submissions by the parties and the documents contained in Exhibits #1 – 5, the member found that the applicant is a person described in paragraph 37(1)(a) of the IRPA.

[16] The member determined that the documentary evidence contained in Exhibit #1, in conjunction with the totality of the testimony provided by the applicant, particularly regarding what she did in the house and the activities of the other persons that she identified who worked with her, established that she was engaged in activity that was part of a pattern of criminal activity planned and organized by a number of persons acting together for the benefit of the continued success of this marijuana growth operation.

[17] The member was satisfied that the activities of the applicant and her co-workers constituted the furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment given that the applicant and her co-workers were all charged with indictable offences.

[18] The member also found the applicant's defence that she did not know what the plants were and that her actions were contributing to criminal activity were not credible in light of the convictions. The member did not question that the applicant's role was a small one relative to that of the others that were involved in the set up and maintenance of the operation. However, it was found that the applicant did have a role and that role assisted in the furtherance of this criminal activity.

[19] Although the evidence did not establish a clearly identifiable group in the conventional sense, the member found that it did establish, on a balance of probabilities, that there was a loosely formed group that acted together under the leadership and instruction of a person by the name of "Uncle." Therefore, the member was satisfied that Ms. He acted as part of a criminal organization.

[20] The member concluded that there are reasonable grounds to believe that Ms. He is a person as described in paragraph 37(1)(a) of the IRPA.

[21] Accordingly, the member issued a Deportation Order against the applicant in accordance with paragraph 45(d) of the Act and 229(1)(e) of the Regulations.

Issues

[22] The sole issue is whether the Immigration Division member erred when she found that the applicant is a person described in paragraph 37(1)(a) of the IRPA – namely that she is a member of a criminal organization.

Analysis

[23] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, the Supreme Court of Canada abandoned the patent unreasonableness standard leaving only two standards of review, correctness and reasonableness. The Supreme Court also held that a standard of review analysis need not be conducted in every instance. Where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review.

[24] As Justice Phelan found in *Tang v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 292, [2009] F.C.J. No. 671, at para. 17, I am also of the view that the determination of membership in a criminal organization is a fact-driven exercise and as such the standard of review is reasonableness:

> **17** The determination of membership itself is a fact-driven exercise. As such, it is subject to review on a standard of reasonableness (*Castelly v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 788). It is noteworthy that the issue is membership in an organization not whether there is belief based on reasonable grounds that the organization engaged in criminality. (…)

[25] The Immigration Division's analysis is central to its role as a trier of fact. As such, the Division's findings are to be given significant deference by the reviewing Court. The Division's

findings should stand unless its reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.

[26] In a case such as this one, there might be more than one reasonable outcome. However, as long as the process adopted by the Immigration Division and its outcome fits comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 59.

[27] No deference is due if the Court determines that an administrative decision-maker has failed to adhere to the principles of procedural fairness: *Canadian Union of Public Employees v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, [2003] S.C.J. No. 28, at para. 100. Such matters continue to fall within the supervising function of the Court on judicial review: *Dunsmuir*, above, at paras. 129 and 151. Accordingly, the issue of procedural fairness in this case will be subject to the standard of correctness: *Tang*, above, at para. 18.

[28] In this case, I am of the view that the member's finding that there were reasonable grounds to believe that Ms. He was a member of an organization involved in criminal activity was reasonable and supported by the evidence: *Castelly v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 788, [2008] F.C.J. No. 999, at para. 27.

[29] As Justice Martineau noted in *Castelly*, above, at para. 26, I agree that the case law has clearly established that it is not necessary to demonstrate that the person concerned is a member of an organization, but rather that there are reasonable grounds to believe that he or she is a member: paragraph 37(1)(a) and section 33 of the IRPA.

[30] I agree with the respondent that based on the "unrestricted and broad" interpretation to be given to the terms "member" and "organization", and given the evidence that was before the Immigration Division, it was reasonably open to the member to find that the applicant was, as described at paragraph 37(1)(a) of the IRPA, a member of an organization that is believed on reasonable grounds to engage in a pattern of organized criminal activity: *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2006] F.C.J. No. 1512, at para. 55; *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] F.C.J. No. 381, at para. 32.

[31] I emphasize that in *Sittampalam*, above, the Federal Court of Appeal determined that the Board must be given flexibility to evaluate all of the evidence in the light of the legislative purpose of IRPA to prioritize security in deciding whether a group is an organization for the purpose of paragraph 37(1)(a): *Sittampalam*, above, at para. 55.

[32] I am somewhat sympathetic to the applicant's argument that to find that the applicant was a member of a criminal organization was overreaching, given that there were not many of the normal *indicia* of such status present in this case. However, I am unable to overturn the member's decision

on that basis as I accept that there was sufficient "reasonable grounds to believe" that a criminal organization existed and the applicant was a member of it on the evidence before the tribunal.

[33] Accordingly, I am of the view that it was not clearly irrational for the member to conclude that there were reasonable grounds to believe that Ms. He was engaging in activity that was part of a pattern of organized criminal activity: *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 122, [2005] F.C.J. No. 587, at para. 33.

[34] However, I take the opportunity to note, as *obiter*, that I do not think it was necessary in this case for the member to rely on paragraph 37(1)(a) of the IRPA, "organized criminality". In my view, paragraph 36(2)(a) of the IRPA, respecting "criminality", would have been the more appropriate route to take as the applicant was convicted of an indictable offence. Paragraph 36(2)(a) also provides inadmissibility grounds, similar to paragraph 37(1)(a), and would not have required the member to search for the *indicia* to establish that the applicant was a member of a criminal organization.

[35] As the Federal Court of Appeal stated in *Sittampalam*, above, at para. 37, "paragraph 37(1)(a) appears to be an attempt to tackle organized crime, in recognition of the fact that non-citizen members of criminal organizations are as grave a threat as individuals who are convicted of serious criminal offences. It enables deportation of members of criminal organizations who avoid convictions as individuals but may nevertheless be dangerous."

[36] This case does not fall within the circumstances described by the Court of Appeal. It does not appear to have been necessary to treat this case as a matter of organized criminality simply because there was a group of individuals involved all of whom would be liable, under the partyship provisions of the *Criminal Code,* for the commission of the criminal acts. It is doubtful that Parliament intended paragraph 37(1)(a) to be used for this purpose. To do so is to risk trivializing or banalizing the significance of the concept of “organized crime”.

[37] The member's errors in finding that the applicant gave a false identity, that a total of four people were involved in the house and that there was improper speculation on the applicant’s continued involvement are not, in my view, material or an indication that the member has not adequately assessed the evidence: *Jouzichin v. Canada (Minister of Citizenship and Immigration),* (1994), 52 A.C.W.S. (3d) 157, [1994] F.C.J. No. 1886, at para. 4.

[38] I am unable to find that there was a breach of procedural fairness in this case. I note that there were five sittings in this matter in which three adjournments permitted the applicant to retain counsel and to prepare for the case, that the applicant was detained and that the Immigration Division has an obligation under IRPA to conduct hearings expeditiously. I am not persuaded that, in all of the circumstances, the denial of the adjournment requested by the applicant in the course of her examination was prejudicial to her. Counsel was unable to explain to my satisfaction how the adjournment would have made any difference in the conduct or outcome of the hearing. It would not have assisted her client, for example, for counsel to have determined whether the applicant was involved in organized criminal activity in China prior to coming to Canada. The case was about her actions in the few months since she came here and claimed refugee status.

[39] Regarding the applicant's argument that the additional disclosure received on May 21st, 2009 was late and constituted a breach of fairness, I am unable to find that disclosure received six days prior to the hearing of May 27th amounts to unfairness. Pursuant to subsection 162(2) of the IRPA, the Immigration Division must handle proceedings before it expeditiously. Also, pursuant to section 173 of the IRPA, the Immigration Division is not bound by any legal or technical rules of evidence. Lastly, pursuant to rule 26 of the *Immigration Division Rules*, I find that the disclosure of the additional documents to the applicant satisfied the requirement of "at least five days before the hearing."

[40] I agree with the respondent that as the applicant's counsel had an extra seven days (after the fourth sitting on May 20th and before the fifth sitting on May 27th) to obtain documents, to prepare the cross-examination and to make submissions, the applicant was provided with sufficient additional time to prepare and respond, and as such there is no breach of fairness: *Jouzichin*, above, at para. 3.

[41] Recognizing that the Immigration Division is entitled to control its own procedure and that it is mandated to assess claims as expeditiously as possible, this Court of review is unable to criticize the member in her decision to allow the disclosure of the additional document or to deny a request for a fourth adjournment, as it is not clear that in the circumstances of this case that a breach of natural justice or fairness has resulted from the decision: *Vairamuthu v. Canada (Minister of Employment and Immigration)* (F.C.A.), (1993), 161 N.R. 131, [1993] F.C.J. No. 772, at para. 2.

[42] The member's finding that the applicant was a person described under paragraph 37(1)(a) of the IRPA should stand as I accept that there were reasonable grounds to believe that Ms. He was engaging in activity that was part of a pattern of organized criminal activity. The resulting decision in this case falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above, at para. 47.

[43] As I have found that the outcome in this case is reasonable, it is not open to this Court to intervene: *Khosa*, above, at para. 59.

[44] Accordingly, this application must be dismissed.

[45] Counsel for the applicant proposed that I certify the same question as in *Castelly*, above, at para. 43:

> *"For the purposes of paragraph 37(1)(a) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, what is the general definition of "member", and what test must one apply to determine whether a person is or was a "member" of an "organization" described in that paragraph?"*

[46] Counsel for the applicant also proposed that I certify the following question regarding the scope of membership:

> *"If an organization is found to exist under paragraph 37(1)(a) of the IRPA, is membership to include any and all persons who had involvement with the said organization regardless of degree of significance?"*

[47] Counsel for the respondent is opposed to the proposed questions of the applicant but would want to make further submissions on remedy and the questions if I was to decide to grant the application. That will not be the case.

[48] In *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, [2004] F.C.J. No. 368, the threshold for certification was articulated by the Federal Court of Appeal as: "is there a serious question of general importance which would be dispositive of an appeal" (paragraph 11).

[49] In *Kunkel v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 347, [2009] F.C.J. No. 170, at para. 8, citing its 2006 decision in *Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68, [2006] F.C.J. No. 275, at para.10, the Federal Court of Appeal determined that a certified question must lend itself to a generic approach leading to an answer of general application. That is, the question must transcend the particular context in which it arose.

[50] In *Boni*, above, the Federal Court of Appeal stated that “it would not be appropriate for the Court to answer the certified question because the answer would not do anything for the outcome of the case (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage*, [1994] F.C.J. No. 1637, (1994) 176 N.R. 4).”

[51] I am of the view, in light of the particular facts in this case, that the certification of the questions proposed by the applicant would not meet the test articulated in *Kunkel* and *Boni* and

would not be dispositive of an appeal. Such questions would not lend themselves to a generic approach leading to an answer of general application.

[52] I am not convinced that either question proposed by the applicant should be certified.

JUDGMENT

IT IS THE JUDGEMENT OF THIS COURT that the application is dismissed. There are no questions to certify.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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