Federal Court  Cour fédérale

Date: 20100228

Docket: IMM-3167-10

Citation: 2011 FC 231

Ottawa, Ontario, February 28, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

ARTUR TOMCHIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Mr. Artur Tomchin, a citizen of Israel, came to Canada in 2003 and married a Canadian citizen in 2006. In October 2008, the Applicant made a second application for permanent residence in Canada under the Spouse-in-Canada class.

[2] As part of his application, the Applicant disclosed that, in 2003, he had been charged with and convicted of keeping property that was suspected to be stolen (specifically seven passports in the names of different women). He was given six-month conditional sentence and a fine of 3,000 shekels. In 2008, he was granted a pardon under Israeli law.

[3] In a decision dated May 26, 2010, the application for permanent residence was rejected by an immigration officer (the Officer). The rejection was based on a determination that the Applicant's conviction in Israel was equivalent to a conviction in Canada, pursuant to s. 354 of the Criminal Code of Canada, RSC 1985, c C-46 (the Criminal Code), for possession of property obtained by crime, an offence punishable by a maximum term of imprisonment not exceeding 10 years where the subject-matter of the offence exceeds $5000 or 2 years if the subject-matter of the offence does not exceed $5000 (the Criminal Code, s. 355). Accordingly, the Officer held that the Applicant was inadmissible for "criminality" pursuant to s. 36(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA).*

[4] The Applicant now seeks to quash the Officer's decision.

II. Issues

[5] The sole issue before me is whether the Officer's reasons are adequate. In this case, I agree with the Applicant that the reasons of the Officer are inadequate.

III. Analysis

[6] The parties acknowledge that the approach to the issue of equivalency is that set out by the Federal Court of Appeal in *Hill v Canada (Minister of Employment and Immigration)* (1987), 1 Imm LR (2d) 1, 73 NR 315 at paragraph 16:

> … equivalency can be determined in three ways: first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining there from the essential ingredients of the respective offences; two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; and three, by a combination of one and two.

[7] In my view, even before I can begin to consider whether the equivalency analysis was reasonable, I must consider whether the Officer complied with the duty to provide adequate reasons (see, for example, *Via Rail Canada Inc. v Lemonde*, [2001] 2 FC 25, 193 DLR (4th) 357 at paragraphs 21-22). In my view, the Officer's reasons were inadequate in two respects.

[8] The Officer's reasons are extremely brief, consisting, in their entirety, of the following:

> The applicant submitted court documents from Israel with his application which shows a conviction in Israel in 2003 for keeping property that was suspected to be stolen. The court documents submitted by the applicant indicate that the applicant admitted to being in possession of seven (7) passports in the names of seven (7) different women. This conviction equates to Section 354 of the Criminal Code of Canada, making the applicant inadmissible to Canada under section 36(2)(b) of the Immigration and Refugee [P]rotection Act.

> Although the applicant received a pardon from the State of Israel under Section 18 of the law of the Criminal Records and Pardons Act of 1981, resulting in a cancellation of his criminal record, Case Management Branch Officials have assessed this section, and it was found not to equate to a Canadian pardon owing to the differences in content and effect. As a result, persons in these circumstances must be viewed as convicted persons for the purposes of assessing admissibility to Canada.
>
> Consequently, the applicant Mr. Tomchin is inadmissible to Canada and he is ineligible for Permanent Residence in Canada per R72(1)(e)(i). As a result, his application for Permanent Residence under the Spouse or Common-law partner in Canada Class is hereby refused.

[9] The first problem that I have with the Officer's reasons is that there is no consideration of either the language of the two offences or the elements of the foreign offence. Moreover, beyond a general description of the offence in Israel, the Officer did not highlight which law the Applicant was convicted of.

[10] I agree with the Applicant that this case falls squarely within principle enunciated by Justices Urie (at paragraph 6) and Ryan (at paragraph 38) of the Court of Appeal in *Brannson v Canada (Minister of Employment and Immigration),* [1981] 2 FC 141, 34 NR 411 regarding the adequacy of equivalency reasons:

> It is not sufficient, in my view, for the Adjudicator simply to look at the documentary evidence relating to a conviction for an offence under the foreign law. There must be some evidence to show firstly that the essential ingredients constituting the offence in Canada include the essential ingredients constituting the offence in the United States. Secondly, there should be evidence that the circumstances resulting in the charge, count, indictment or other document of a similar nature, used in initiating the criminal proceeding in the United States, had they arisen in Canada, would constitute an offence that might be punishable by way of indictment in Canada.

> [I]n determining whether the offence committed abroad would be an offence in Canada under a particular Canadian statutory provision, it would be appropriate to proceed with this in mind: Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that these essential elements correspond. One must, of course, expect differences in the wording of statutory offences in different countries. I cannot, however, even with this in mind, escape the conclusion that the sending or transmission of "letters or circulars" is an essential element of the Canadian offence. One could not be convicted of the offence if the material transmitted or delivered were neither letters nor circulars.
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> [Emphasis added.]

[11] In the case at bar, the Officer neglected to consider the essential elements of the offences before arriving at an equivalency determination. The Court of Appeal in *Brannson*, above, cautioned against using only the “the names given [to] the offences or the words used in defining them” in the analysis instead of considering the essential elements behind the offence. This was where the Officer erred in the case at bar. There was no analysis of the essential elements of either of the offences.

[12] The Respondent submits that the Applicant conceded that the provisions are equivalent. I do not agree. The Applicant did not contest that he was convicted of the subject offence in Israel. However, he did not concede that these two offences were equivalent. The Applicant’s counsel, in a letter dated July 15, 2009, stated that “at the highest” there might be equivalency to s. 354 of the Criminal Code. The onus is upon the Officer to make a determination of equivalency. The Officer neglected to do so in this case. I must conclude that this is a reviewable error occurred.

[13] The second problem that I have with the decision is that the Officer erred by failing to consider the equivalency of the Canadian and Israeli pardon regimes.

[14] The Respondent asserts that it was not unreasonable for the Officer to conclude that there are “differences in content and effect” between the Israeli law and Canadian law. I do not agree; it was not sufficient for the Officer to simply state that the laws differed in “content and effect” without reasons.

[15] The facts of the case before me and the short-comings of the Officer’s analysis are similar to those before Justice Gibson in *S.A. v Canada (Minister of Citizenship and Immigration)*, 2006 FC 515, 54 Imm LR (3d) 18. In concluding that the analysis of the officer was fatally flawed, Justice Gibson, at paragraph 15 stated as follows:

> The decision maker provides no analysis of the similarity or lack thereof between the Israeli legal system and that of Canada. While the decision maker would appear to have examined the aim, content and effect of the relevant Israeli law, the similarity or lack of similarity between that aim, content and effect to the aim, content and effect of Canada's pardon law is only very indirectly addressed in the decision under review. Finally, with great respect, the decision maker would appear to provide no valid reason not to recognize the effect of the relevant Israeli law.

[16] The Officer in the case at bar committed an analogous error. The Officer did not provide adequate, or valid, reasons why the two pardon regimes differed in “content and effect”.

[17] The Respondent now wishes to argue why the statutory pardon regimes differ in Canada and Israel. The Respondent may be correct in his analysis; however, these arguments did not form part of the Officer’s reasons and, thus, I do not accept them now.

IV. Conclusion on Equivalency

[18] Accordingly, based on the two significant errors made by the Officer, I am satisfied that there was not an adequate line of reasoning that would allow this Court to uphold the Officer's determination on equivalency. The Officer's reasons lacked "justification, transparency and intelligibility within the decision-making process" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47). The decision was unreasonable and warrants the intervention of this Court.

[19] Neither party proposed a question for certification. None will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that :

1. the application for judicial review is allowed, the decision is quashed and the matter remitted to a different panel of the Board for re-determination; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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