Federal Court  Cour fédérale

Date: 20150325

Docket: IMM-7936-13

Citation: 2015 FC 379

Toronto, Ontario, March 25, 2015

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

JERMAINE IAN THOMPSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a determination of a Member of the Immigration Division dated November 25, 2013, wherein it was held that the Applicant is inadmissible under subsection 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 ("IRPA") for having engaged in activity that is part of a pattern of criminal activity similar to that of a street gang knowns as the Bloods although there was no reasonable grounds for believing that he was a member of the Bloods.

[2] The Applicant is an adult male person born in Jamaica who became a permanent resident in Canada in 1995 having been sponsored by his father. In the period from 2001 to 2006, he was convicted of numerous offences including trafficking and possession of prohibited substances, manslaughter, obstruction of justice, and failure to comply with recognizance and probation.

[3] The Applicant admitted at his hearing that he had been a drug dealer in a territory in Toronto claimed by the Bloods, a criminal gang. He denied being a member of the Bloods although some of his friends were members. He asserted that his drug dealing activities were small-time and tolerated by the Bloods. The Member found that the value of the drugs sold by the Applicant were not petty amounts.

[4] The Applicant raises three issues:

I. Was the evidence of Detective Oliver properly admitted at the hearing?

II. Was there a denial of procedural fairness by the Member's refusal to hear the evidence of Mr. Clarke?

III. Was the decision itself reasonable?

I. DETECTIVE OLIVER

[5] The Member permitted the Minister's Counsel to have Detective Oliver testify at the hearing. He was examined by the Member's Counsel and cross-examined by the Applicant's Counsel. He was also questioned by the Member following which the Member invited further questions from Counsel for each of the parties.

[6] Detective Oliver was very experienced in gang activities in Canada including gangs such as the Bloods in Toronto. He was able to give extensive expert testimony in that regard. That testimony was consistent with the documentary evidence of record.

[7] However, Detective Oliver had no involvement with the Applicant; he had never heard of the Applicant before his involvement in this case; he was not involved in the investigation of this case.

[8] Applicant's Counsel drew the Court's attention to the recent decision of the Supreme Court of Canada in *R. v Sekhon*, 2014 SCC 15. That decision related to an arrest of an accused on the basis of a suspicion that he was trafficking in cocaine. The Trial Judge admitted the evidence of a police officer who had not personally dealt with the accused or encountered a blind courier which was critical to the issues. The Supreme Court, Moldaver J. for the majority at paragraph 50 of his decision, held that the evidence should have been excluded for lack of relevance or probative value; however, he also dealt with another ground, to hold that such evidence, on the issue of *mens rea*, would turn a trial into a battle of experts. He wrote:

> *50 The lack of relevance or probative value is, in my view, sufficient to justify the exclusion of the Impugned Testimony. However, it is worth noting the prejudicial effect that such evidence may have on a trial. I agree with Newbury J.A. to the extent that she found little to no difference between the Impugned Testimony in this case and a homicide investigator being permitted to testify that in all of the cases she or he has worked on, the accused [page291] intended the death of his or her victim. Nor do I see a difference between the Impugned Testimony and a stolen goods investigator testifying that he or she has never seen a case of innocent possession of stolen property, or an experienced fraud investigator testifying that he or she has never seen a case where a senior manager was not aware of fraudulent conduct occurring*

> *within the company (A.F., at para. 60). The inherent danger of admitting such evidence is obvious - as Newbury J.A. pointed out:*
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> *Anecdotal evidence of this kind is just that - anecdotal. It does not speak to the particular facts before the Court, but has the superficial attractiveness of seeming to show that the probabilities are very much in the Crown's favour, and of coming from the mouth of an "expert". If it can be said to be relevant to the case of a particular accused, it is also highly prejudicial. [para. 27]*
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> *This type of anecdotal evidence would appear to require the accused to somehow prove that, regardless of a particular expert's past experience, the accused's situation is different. Such a result is contrary to another fundamental tenet of our criminal justice system - that it is the Crown that bears the burden of proving the mens rea of an offence beyond a reasonable doubt. As the appellant points out, "such evidence would logically trigger a defence need to call evidence to refute such opinions, such as a retired investigator who did experience an innocent person in similar circumstances, or a witness who could testify that he or she was in the same circumstances of the accused and was innocent" (A.F., at para. 61). At that point, the trial would become a battle of experts - and a completely irrelevant battle at that.*

[9] The Applicant's Counsel argued before me that the evidence of Detective Oliver is irrelevant and inadmissible.

[10] Respondent's Counsel differentiates the criminal hearing in *Sekhon* from the administrative hearing in the present case in which the rules of evidence are relaxed and the test is not the criminal test of beyond a reasonable doubt, rather it is "believed on reasonable grounds".

[11] Justice Roy of this Court recently distinguished the criminal proceedings in *Sekhon* from proceedings under IRPA in *Daia v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 198 where he wrote (translation) at paragraphs 5 to 7:

[5] Indeed, in reviewing the decision, we note that the police officer testified regarding what she saw and received during her investigation. The description of the modus operandi is nothing more than the description of facts observed. In The Law of Evidence in Canada, 3rd Ed., LexisNexis, 2009 (A.W. Bryant, S.N. Lederman and M.K. Fuerst), we read on page 771:

> *§12.2 As a general rule, a witness may not give opinion evidence but may testify only to facts within her or his knowledge, observation and experience. It is the province of the trier of fact to draw inferences from the proven facts. A qualified expert witness, however, may provide the trier of fact with a "ready-made inference" which the jury is unable to draw due to the technical nature of the subject matter. Thus, expert opinion evidence is permitted to assist the fact-finder form a correct judgment on a matter in issue since ordinary persons are unlikely to do so without the assistance of persons with special knowledge, skill or expertise.*

The description of a modus operandi and the participation of different people in criminal activity do not require any expertise proceeding from the technical nature of the subject. It is certainly possible for such a witness to submit hearsay evidence. However, as is well known, that is allowed in administrative matters (Judicial Review of Administrative Action in Canada by Brown and Evans No. 10:5420).

[6] The mere designation of "expert" does not change anything by the fact that, contrary to what the applicant claims, the witness could have described the investigation that she was responsible for without being designated an "expert". The expert designation is not at all necessary. It was possible to attack the credibility or the probative value of this evidence but there would have been no doubt, in my view, as to its admissibility.

[7] The recent decision of the Supreme Court of Canada in R v Sekhon, 2014 SCC 15, (Sekhon) reinforces my conclusion that the expert designation made in the reasons for decision was not necessary and, in fact, would probably not have been appropriate. I note in paragraph 45 that "Mohan holds that '[i]f on the proven facts a judge or jury can form their own conclusions without help, then the opinion of [an] expert is unnecessary' (p. 23, quoting Lawton L.J. in R v. Turner, [1975] 1 Q.B. 834, at p. 841)."

[12] I find that the evidence of Detective Oliver was relevant and admissible.

II. MR. CLARKE

[13] On May 2, 2013, the law firm of Mamann, Sandaluk and Kingwell LLP wrote to the Immigration Division saying that they had been recently retained by the Applicant. They requested that the hearing be postponed for a number of reasons, until September 2013. A Use of Representative form dated May 2, 2013 naming a lawyer in that law firm was filed. The Use of Representative was never revoked; the law firm never advised the Immigration Division that they no longer represented the Applicant.

[14] Two days before the hearing, the Mamann firm submitted a letter to the Immigration Division naming four persons who they would call in support of the Applicant's case and attaching a number of documents. That letter dated September 13, 2013 said in respect of Mr. Clarke who was one of the named persons:

> *Mr. Clarke will give evidence related to his personal knowledge of (the Applicant) as well as evidence related to his experience as a Counsellor with troubled youth in the Jane-Finch area.*

[15] Attached among the documents provided was a letter dated April 29, 2013 addressed "To whom it may concern" from Mr. Clarke. It addressed the character of the Applicant in a positive manner and the impact on the community should he be ordered to be removed from Canada.

[16] The Member asked Applicant's Counsel why an application for summons for Mr. Clarke was made out of time. The answer was that there had been a "financial breakdown in the relationship" between the Applicant and the law firm.

[17] The Member asked what Mr. Clarke might testify to; Counsel answered that, among other things, it would markers of gang membership and whether the Applicant is somebody who would be a member of a gang.

[18] The Member rejected the request for a summons for Mr. Clarke. The Member noted that the Applicant himself would be giving evidence. The Member noted that the request came at the 11th hour, that the law firm had carriage of the file since May and had Mr. Clarke's letter dated April 25th. The Member was satisfied that there was nothing sufficient to justify an exception so as to allow a late application.

[19] I am satisfied that the Applicant, including his Counsel were afforded a reasonable opportunity to make submissions as to whether an exception could be made to allow a late summons to be issued to Mr. Clarke. I am satisfied that Mr. Clark's evidence would have added little of relevance to the record; it was largely character evidence. No written material from the law firm or Mr. Clarke indicates that he would address gang membership. The lateness of the application was explained only by a so-called financial breakdown between the Applicant and the law firm.

[20] The law firm had in its possession for several months Mr. Clarke's letter. The law firm took no steps to advise the Immigration Division that its relationship with the Applicant had broken down. It did not withdraw from the record. Had Mr. Clarke's evidence been important, notice in good time should have been given to the Immigration Division.

[21] I find that there was no lack of procedural fairness or denial of natural justice in the refusal to issue a summons to Mr. Clarke.

III. REASONABLENESS OF DECISION

[22] The Member found that, while there was insufficient evidence to find that the Applicant was a member of the Blood gang, there was sufficient evidence to find that it is believed on reasonable grounds to have been engaged in activity that is part of a pattern as set out in subsection 37(1)(a) of IRPA.

[23] As the Federal Court of Appeal in *Thanaratnam v Canada (Minister of Citizenship and Immigration)*, [2006] 1 F.C.R. 474, 2005 F.C.A. 122 pointed out, a person does not have to be found to be an actual member of a gang in order to fall within the provisions of subsection 37(1)(a) of IRPA. Evans J.A. for the Court wrote at paragraphs 7 and 29 and 30:

> *7 I would allow the Minister's appeal. In my respectful view, the Judge erred in law by considering only whether Mr. Thanaratnam was a "member" of a gang. Having found that he was not, the Judge ought to have asked whether Mr. Thanratnam was nonetheless inadmissible by virtue of the last phrase of paragraph 37(1)(a), for "engaging in activity that is part of ... a pattern" of organized criminal activity.*
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> *...*

> *29 Having concluded that the Board had erred in finding that Mr. Thanaratnam was a "member" of the VVT, the applications Judge did not go on to consider whether the evidence that he was "involved in gang-related events" (the first criterion used by the police in identifying gang members) was sufficient to support a finding that he was inadmissible for engaging in activities that were part of the VVT's pattern of criminal activities, even if he did not "belong" to the gang.*
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> *30 In my opinion, this was an error of law. The structure of paragraph 37(1)(a) makes it clear that "membership" in a gang and engaging in gang-related activities are discrete, but overlapping grounds on which a person may be inadmissible for "organized criminality". The "engaging in gang-related activities" ground of "organized criminality" was added by the IRPA and did not appear in its predecessor, paragraph 19(1)(c.2) of the Immigration Act. In order to give [page487] meaning to the amendment to the previous provision made by the IRPA, Parliament should be taken to have intended it to extend to types of involvement with gangs that are not included (or not clearly included) within "membership".*

[24] I find that the Member's determination was reasonable.

IV. CERTIFIED QUESTION

[25] Applicant's Counsel asked for a Certified Question on the issue of the admissibility of Detective Oliver's evidence and the decision of the Supreme Court of Canada in *Sekhon*. Respondent's Counsel said that no question be certified as the matter was fact specific.

[26] Given the remonstration of the Federal Court of Appeal in *Lai v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 21, I find no basis for a certified question here.

JUDGMENT

THE COURT THEREFORE ORDERS AND ADJUDGES that:

1. The application is dismissed;

2. No question is certified;

3. No Order as to costs.

"Roger T. Hughes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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