Federal Court Cour fédérale

Date: 20150421

Docket: IMM-5137-13

Citation: 2015 FC 511

Toronto, Ontario, April 21, 2015

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

GYULA KOTAI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The present Application concerns an inadmissibility determination, dated July 22, 2013, made by a Member of the Immigration Division of the Immigration and Refugee Board (Member) pursuant to s. 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), in which the Applicant was found to be inadmissible for the reason that he was convicted of an offence outside Canada that, if committed in Canada, would constitute an

offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

[2] The uncontested fact scenario leading to the decision under review is stated in the Applicant's Memorandum of Fact and Law as follows:

> The Applicant, Mr. Gyula Kotai, was born on December 9, 1985, in Miskolc, Hungary. He left Hungary on November 2, 2012 and came to Canada after a short layover in Warsaw, Poland. Mr. Kotai was questioned at the port-of-entry and disclosed to the officer that he believed he had been convicted of assault with light bodily harm in 2007. His belief was based on a letter he received. While at the port-of-entry, the Applicant explained to the Officer that he had not been to court and that during the incident in question he was acting in self defense.
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> The incident leading to the "conviction" occurred in 2007. The Applicant was walking home from work when three skinheads confronted him. The Applicant identified them by the black uniforms and boots the individuals were wearing. The skinheads started verbally abusing Mr. Kotai, who did nothing to retaliate. One of the skinheads punched the Applicant in the mouth while a second skinhead pulled out a knife. In an attempt to defend himself, Mr. Kotai and the second skinhead ended up wrestling on the ground. The Applicant was able to acquire the knife and stabbed his assailant in the leg, allowing Mr. Kotai an opportunity to run home. A couple days later, police officers attended the home of the Applicant and took him to the station for questioning. At the police station, Mr. Kotai explained to the officer the details of the fight and that in stabbing the skinhead, he was acting in his self defense. The Applicant was then told that he would be contacted regarding a hearing date and was allowed to go home.
>
> Some time later, the Applicant received a letter in the mail that outlined his testimony, the testimony of the skinhead, and the doctor's report of the injuries sustained by the skinhead. The Applicant also believes that the letter notified him that he had been convicted of assault with light bodily harm and sentenced to two years probation. On July 22, 2013,

> Mr. Kotai attended an admissibility hearing. At the conclusion of the hearing, he was issued a removal order.

[3] In the decision under review, the Officer made the following preliminary statement with respect to the available evidence upon which to reach a decision:

> Pursuant to Section 173 of the Immigration and Refugee Protection Act the Immigration Division is not bound by any legal or technical rules of evidence and may receive and base a decision on evidence that it considers credible and trustworthy.
>
> (Certified Tribunal Record, p. 65)

[4] The Officer then proceeded to make the following determination:

> The primary evidence today relied on to establish that Mr. Kotai did receive a conviction in Hungary would be his statements made at the port of entry officials on the 23rd of November 2012, as well as his oral testimony today. Outside of these statements there is no objective, independent and credible evidence establishing that Mr. Kotai was indeed convicted and on what date. There is no certificate of conviction in the Minister's package; there is no record of the judgment of the sentencing body or court in the Minister's package. There are no police reports providing independent information about the occurrence that led to the conviction and as well the applicable foreign statute under which Mr. Kotai would have been convicted is not provided. And in that sense I'm referring to a country-issued document showing that applicable foreign statute.
>
> However the Minister, through his own research, and I say his, because the Minister is a male, zeroed in on the likely statute that was used to convict Mr. Kotai, which would be the Hungarian Criminal Code and has zeroed in on Section 170(1) of that Code as the applicable provision.
>
> There are some issues, for sure. The Minister encountered Mr. Kotai on the 21st of November 2012 and would have had eight months between then and now to collect the kind of information that is required to make a persuasive argument about Mr. Kotai's inadmissibility. However, what I find is that there is next to nothing in the disclosure package confirming the existence of a

> conviction for Mr. Kotai and there is also no information about efforts made by the Minister in that regard.
>
> The question therefore is, can the Tribunal rely solely on the statements made by Mr. Kotai at the port of entry and today?
>
> In spite of all that I have said my answer to this will be in the affirmative.
>
> […]
>
> Given what is before the Division today, I would find that the evidence from Mr. Kotai himself that he received a conviction for assault causing light bodily harm is credible and compelling information and that the Division can rely upon that information, in spite of the inability of the Minister to provide other corroboratory pieces of evidence.
>
> A point which should be made clear is that the threshold to establish the allegation relating to serious criminality outside Canada is reasonable grounds to believe, which is quite a low standard. It is a bona fide belief in a serious possibility based on credible evidence.
>
> The panel found that Mr. Kotai's evidence to be credible and based on what he stated to the port of entry officials and what he has stated today, this court can hold that he did receive a conviction.
>
> [Emphasis added] (Decision, Certified Tribunal Record, pp. 66 – 67)

[5] With respect to whether an application of s. 173 of the *IRPA* is reasonable, on judicial review each case must be determined on its own merits. The principle that speculation cannot be used as evidence to establish a fact cannot be over emphasized in the present case. Regardless of the latitude the Member has to make findings of fact, speculation is not capable of being "credible evidence" in determining a "bona fide belief in a serious possibility based on credible evidence," which was the evidentiary test applied by the Member.

[6] The only fact established by the Applicant's evidence in the present case is that he believed he had been convicted of a crime; his statement of his belief is sheer speculation and has no evidentiary value going to prove that he was, in fact, convicted of a crime. Neither the Member, Counsel for the Minister, or the Applicant had any evidence upon which it could be established that the Applicant was "convicted"; the word has a meaning that depends on the context in which it is used. To make a comparison to a conviction in Canada, surely there must be some verifiable evidence advanced that a foreign state's action can be considered to be a "conviction" as that word is understood in Canada. In the present case, as carefully set out by the Member, there was none. The Applicant was interviewed by the police; was told that he would receive a notice to appear in Court; did not receive a notice; did not appear in Court; but did receive documentation in the mail that he believed to be evidence that he was convicted of a crime. The evidence goes to establish that the Applicant did not know the meaning of the documents he received, but, nevertheless, he felt able to offer a speculation.

[7] Having received the Applicant's speculation, the Member then engaged in a further speculation as to the law in Hungary under which the "conviction" was entered. Making a finding with respect to foreign law on the basis that a certain statute is "likely" to be relevant certainly constitutes speculation. As a result, I find that there was no basis on which the Member could proceed to make a finding that the Applicant was "convicted" of an offence that could be compared to a "conviction" under Canadian law.

[8] In addition, for the following reasons, I find that the comparison of the alleged conviction in Hungary to the law of assault causing bodily harm in Canada was made in error of law

because the Member applied an outdated self-defence provision of the Canadian *Criminal Code* (the *Code*).

[9] The Member made the following findings on the issue of self-defence:

> To avail himself of the defence, Mr. Kotai would have to repel the force in a manner not intended to cause death or grievous bodily harm and without the application of more force than was necessary. My assessment is that once Mr. Kotai retrieved the knife, which he feared would be used to attack him, he could have run away with the knife and thereby made it unavailable to the victim, whom he feared. However, he stabbed the victim, threw the knife on the ground and then run [sic] away. He did not even take the knife with him to ensure that he would not be followed with the knife.
>
> I find that Mr. Kotai may have used more force than was necessary or required and the extent of the aggression to defend himself. Let's not forget that this victim only insulted Mr. Kotai. And then he pulled out a knife. So Mr. Kotai could have left the situation or retreated or disengaged from the conflict.
>
> All in all this Division or this panel is hesitant that he would be absolved of liability for his conduct under Sections 34 to 37 of the Criminal Code of Canada. Accordingly the panel's assessment of equivalency still stands.
>
> [Emphasis Added]
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> (Decision, Certified Tribunal Record, pp. 72-73)

[10] Counsel for the Applicant argues that this analysis is problematic because in finding that the Applicant "may have used more force than was necessary or required," the Member appears to have relied on the previous incarnation of s. 34(1) of the *Code*, which read as follows:

> 34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

[11] However, on March 11, 2013, the *Citizen's Arrest and Self Defense Act*, SC 2012, c 9, amended the self-defence provisions of the *Code*, and, as a result, s. 34 now reads as follows:

> 34. (1) A person is not guilty of an offence if
>
> > (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
> >
> > (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
> >
> > (c) the act committed is reasonable in the circumstances.
>
> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> > (a) the nature of the force or threat;
> >
> > (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
> >
> > (c) the person's role in the incident;
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> > (d) whether any party to the incident used or threatened to use a weapon;
> >
> > (e) the size, age, gender and physical capabilities of the parties to the incident;
> >
> > (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
> >
> > (f□□□. 1) any history of interaction or communication between the parties to the incident;
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> > (g) the nature and proportionality of the person's response to the use or threat of force; and

> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[12] I agree with Counsel for the Applicant's argument that the error in law caused the Member to completely disregard the factors cited in s. 34(2), which must be balanced in the decision making process in order to determine whether the alleged act was committed in self-defence.

[13] For the reasons provided, I find that the decision under review is made in reviewable error.

ORDER

THIS COURT ORDERS that:

1. The decision under review is set aside.

2. There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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