Federal Court  Cour fédérale

Date: 20170516

Docket: IMM-4394-16

Citation: 2017 FC 505

Toronto, Ontario, May 16, 2017

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

PAUL SMITH
STEFANIA TUDOSA

Applicants

and

MINISTER OF IMMIGRATION REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] The present Application is a challenge to a decision of the Immigration Division (ID) of the Immigration and Refugee Board. By a decision dated September 26, 2016, the Applicants were found to be inadmissible to Canada pursuant to s. 36(1)(b) of the *IRPA*. The issue before the ID was whether the Applicants had been convicted in Romania of an offence that, if committed in Canada would constitute an offence in Canada punishable by a maximum term of

imprisonment for at least 10 years. To conclude on the issue the ID engaged in an equivalency analysis between a criminal statutory provision in Romania with respect to deceit punishable by imprisonment for 10 to 20 years, and s. 380(1)(a) of the *Criminal Code of Canada* pertaining to "deceit, falsehood or other fraudulent means" punishable by imprisonment for 14 years. In the result, the ID found equivalence between the two provisions.

[2] The ID made the following findings of law in reaching the decision under review:

> Equivalency seeks to identify a Canadian offence that is the equivalent of the foreign offence underlying a conviction outside Canada. The Federal Court of Appeal has established some principles for undertaking this exercise.
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> *Brannson v. Canada (Minister of Employment and Immigration),* [1981] 2 F.C. 141 (C.A.), at 152-153, 153-154, per Ryan J.A.:
>
> > 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.
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> *Hill, Errol Stanley v. M.E.I.* (F.C.A., no. A-514-86), Hugessen, Urie, MacGuigan, January 29, 1987. Reported: *Hill v. Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 1 (F.C.A.), at 9, per Uric J.A.:
>
> > …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 therefrom 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.
>
> [Emphasis in the original]
>
> (Decision, paras. 14 to 16)

[3] The findings at paragraphs 19 to 21 of the decision:

> Paragraph 1 of Art. 215 in the Romanian legislation refers to the act of deceiving a person by presenting a false fact as being true or a true fact as being false. This presentation must be in order to receive a material benefit for oneself or another and damage must be caused. The essential elements here are that a person is deceived by being provided erroneous facts in order for that deceiver or another person to receive a material benefit. As well, damage is caused, i.e. the person being deceived is deprived of something.
>
> The essential elements of fraud in the Canadian Criminal Code are that through a deceit, falsehood or other fraudulent means someone is defrauded of property, money or valuable security or any service. In Canadian criminal law, to defraud means 'to deprive a person of property or interest, estate or right by fraud, deceit or artifice'.
>
> Both the Romanian law on deceit and the Canadian law on fraud involve the use of deceit or fraud in order to deprive someone of money or property or something that they would have otherwise, save for the fraud, been entitled to. The eight suppliers of SC Autostop were deprived of their goods when they exchanged them for cheques issued by Mr. Tudosa. These cheques 'bounced' and the suppliers did not receive their monies. The B.C.R would not have extended a line of credit to SC Autostop were it aware of the true financials of the company. As such, I am satisfied that Mr. and Mrs. Tudosa's fraud convictions in Romania are equivalent to fraud pursuant to section 380 of the *Criminal Code of Canada*. As the monetary amounts involved were over 4.7 billion Romanian lei and Euro 1.2 million, I find that fraud over five thousand dollars pursuant to section 380(1)(a) *CCC* applies in this case.
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> (Decision, paras. 19 to 21)

[4] I am satisfied that the ID came to a reasonable conclusion that *mens rea* and *actus reus* are features both of the Romanian and Canadian provisions.

[5] However, Counsel for the Applicant argues that the ID failed to properly address the issue of the Applicants' *mens rea* because an equivalency analysis was not conducted with respect to convictions *in absentia* in Romania and Canada. The argument is that the Applicants had no opportunity to give their own evidence on the issue of *mens rea* because the trial in Romania was conducted *in absentia*. I find the argument has merit.

[6] On the *in absentia* issue, Counsel for the Applicant placed the following argument before the ID for consideration and determination:

> It is conceded that a Conviction *in Absentia*, is permissible under the Canadian Criminal Code, but in very limited circumstances. In Canada this only takes place where a defendant absconds after commencement of trial, and a Trial Judge makes a finding, after hearing evidence, that the accused has absconded. (Exhibit 7) In this case, no such conditions existed. It is submitted the authorities in Romania were quite happy to try this case without Mr. Smith and Ms Tudosa being present. It is submitted it is appropriate for a decision maker to compare legal systems (*Tomchin v MCI* Feb 28, 2011 2011 FC 231 par 15, casebook p. 113) and on that basis, quash a finding of equivalency.
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> In this case, we have already touched upon in our submissions, how painfully weak the evidence is to suggest that Mr. Smith and Ms Tudosa absconded, or even fled Romania. It is submitted these convictions were not genuinely obtained. The Minister's Representative has not presented any evidence to substantiate that when Mr. Smith and Ms Tudosa left Romania, there was any summons, trial notice, investigation certificate or even a warning not to leave town. There was no judicial process compelling or requiring them to remain in the country. The CBSA officer suggests they fled from bankruptcy. Bankruptcy is not a criminal process, and the evidence was that a creditor petitioned them into bankruptcy. While it is far from clear what exactly Mr. Smith and

> Ms Tudosa were charged with, bankruptcy is certainly not one of them.
>
> There was clear evidence that the Romanian authorities were well aware of the fact Mr. Smith had left the country in 2006. The extradition warrant states that the Romanian authorities are aware Mr. Smith was in Canada, and the Court proceedings from Romania clearly state this as well (p.81). And the only evidence of flight is that oft used but never explained phrase, "because he was heard on the cases" prior to his departure in 2006.
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> (Applicants' Reply Submission to the ID dated July 6, 2016 p. 9)

[7] The ID's treatment of the *in absentia* argument is found in paragraph 8 of the decision under review:

> Both Mr. and Mrs. Tudosa were convicted in absentia. They testified that they did not become aware of their convictions until the Canada Border Services Agency (CBSA) commenced its investigation in 2015. There is no evidence before me that these convictions have been appealed, pardoned, or otherwise disturbed. The Federal Court of Appeal has held that a conviction *in absentia* is a conviction: *Arnow. Leon Maurice v. MEI*. (F.C.A., no. A-599-80), Heald, Ryan, MacKay, September 28, 1981 (leave to appeal to the Supreme Court of Canada was refused, [1982] 2 S.C.R. 603). I am satisfied that Mr. and Mrs. Tudosa are permanent residents who have been convicted of an offence outside Canada, namely Deceit contrary to Art. 215 of the Romanian Criminal Code.

The passage from the Federal Court of Appeal decision relied upon reads as follows:

> Heald J: We are not persuaded that the Adjudicator erred in law or failed to exercise his jurisdiction in admitting into evidence inadmissible documents and reports. It is our further view that there was evidence before the Adjudicator of a foreign conviction within the meaning of Section 19(1)(c) of the *Immigration Act*, 1976.
>
> Insofar as the lack of equivalency of the foreign convictions to Canadian offences punishable under any Act of Parliament having a maximum term of imprisonment of 10 years or more is concerned, it is our opinion that in at least one of the foreign

> convictions, equivalency was established by the evidence before the Adjudicator. Accordingly, in our view he did not err in law or fail to exercise his jurisdiction. We would, therefore, dismiss the Section 28 application.

[8] In the present Application, in challenging the ID's decision, Counsel for the Applicants argues that the *in absentia* argument advanced for consideration and determination was disregarded:

> It is submitted that the Member's treatment of this issue is completely without merit. The Member cites the *Arnow* case for the proposition that a conviction in absentia is a conviction. It is submitted the *Arnow* case says no such thing. It is submitted the 2 paragraph FCA decision mentions absolutely nothing about convictions in absentia. *Arnow v MEI F.C.A.* no A-599-80
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> It is further submitted that the Member completely ignored evidence before him that clearly indicated that the Romanian authorities were well aware that the Applicants were in Canada prior to the commencement of these Criminal proceedings. Record pages 18-23, 253-260
>
> It is submitted that a conviction in absentia, is permissible under the Canadian Criminal Code, but in very limited circumstances. In Canada this only takes place where a defendant absconds after commencement of trial, and a Trial Judge makes a finding, after hearing evidence, that the accused has absconded. (Exhibit 7) In this case, no such conditions existed. It is submitted there is no evidence that the authorities in Romania went through a similar process. Record pages 308-316
>
> It is submitted it is appropriate for a decision maker to compare legal systems, and on that basis, quash a finding of equivalency. *Tomchin v MCI* 2011 FC 231 par 15.
>
> (Applicants' Memorandum of Argument, paras. 38 to 41)

[9] I find that the ID was required to render a decision upon consideration of Counsel for the Applicants' *in absentia* argument advanced. The failure of the ID to do so renders the decision unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for redetermination by a different decision-maker.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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