Federal Court  Cour fédérale

Date: 20171123

Docket: IMM-1632-17

Citation: 2017 FC 1062

Ottawa, Ontario, November 23, 2017

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SKENDER HALILAJ

Applicant

And

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] In 2005, the Applicant, Mr. Skender Halilaj, was convicted of attempted intentional murder by a Kosovo court. He arrived in Canada in 2015 where, due to his foreign conviction, the Immigration Division [ID] found him inadmissible under section 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant applied to this Court for a judicial review of that decision, which means he must show the decision is unreasonable or his right to procedural fairness was breached. Because the ID decision is intelligible, justifiable, and transparent in its reasons, applied the correct law, and did not err in its equivalency analysis, I will dismiss this application for the reasons that follow.

II. Background

[3] The Applicant is a citizen of Kosovo who came to Canada on July 11, 2015. On August 21, 2015, the Applicant made a claim for refugee protection but he was found inadmissible on August 27, 2016, after it was determined he fell under section 36(1)(b) of the IRPA for serious criminality.

[4] The hearing took place before a member of the ID where the Applicant admitted he is a foreign national and that he had been convicted in Kosovo of attempted intentional murder on April 7, 2005. The conviction was related to an incident that occurred in 1998 when the Applicant was a member of the Kosovo Liberation Army. Namely, while the Applicant was on duty at a check stop, shots were fired at a Serbian soldier named Hamez Hajra. Mr. Hajra was unarmed in the attempt on his life, and the Applicant was not charged at the time.

[5] A second incident occurred, on August 20, 2001. Mr. Hajra was murdered along with most of his family, save one daughter. The Applicant was then charged with both the 1998 attempted murder, 2001 attempt on Mr. Hajra's daughter and the 2001 murder of Mr. Hajra and his family members (wife and three children).

[6] In 2006, a trial court in Kosovo convicted the Applicant of attempted murder for the 1998 incident and for the murders of Mr. Hajra and his family members and the attempted murder of Pranvera Hajra, the daughter that survived the 2001 incident. He was also convicted of participation in a group that commits a murder and agreement to commit a murder. He was sentenced to 30 years' incarceration for these convictions. The Applicant appealed these convictions.

[7] The appeal was heard on May 20, 2008, before the Supreme Court of Kosovo. Because Kosovo was under interim administration following the breakup of Yugoslavia, the Supreme Court of Kosovo panel was composed of five judges; three international judges and two Kosovo national judges. The appeal decision, issued on October 12, 2009, upheld the 1998 conviction but overturned the convictions in relation to the 2001 incident. The Applicant was sentenced to five years, of which he had already served the time.

[8] The Applicant was unable to obtain the 2008 Kosovo trial decision for the admissibility hearing and noted that there is a page missing from the 2009 appeal decision. The Applicant also submitted an expert opinion written by criminal lawyer Hersh Wolch about the differences between the Kosovo law and the Canadian law. Mr. Wolch based his opinion on information provided to him by the Applicant's counsel. In addition, through a translator, the Applicant gave oral testimony at the hearing.

[9] The ID member determined the question before him was whether "Mr. Halilaj [was] convicted in Kosovo for an offence that would equate to a paragraph 36(1)(b) offence in

Canada?" The ID released its decision on that question on March 20, 2017. The decision found the Applicant is inadmissible for serious criminality under section 36(1)(b) of the IRPA.

III. Issues

[10] The issues presented by the Applicant are:

A. Did the decision maker come to unreasonable findings of fact in determining that the elements of the underlying offence had been proven?

B. In finding the Applicant inadmissible to Canada, did the decision maker err in law in determining that the Kosovo conviction equated to a conviction in Canada?

IV. Standard of Review

[11] The standard of review for decisions made under section 36(1)(b) of the IRPA is reasonableness. The ID is afforded a high level of deference (*Moscicki v Canada (Minister of Citizenship and Immigration)*, 2015 FC 740 at paras 13-14 [*Moscicki*]; *Abid v Canada (Minister of Citizenship and Immigration)*, 2011 FC 164 at para 11).

[12] Errors of law made by the ID are reviewed for correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 50 [*Dunsmuir*]).

V. Analysis

[13] The relevant provisions of the IRPA are as follows:

Inadmissibility	**Interdictions de territoire**

Rules of interpretation

33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

Interprétation

33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

Serious criminality

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been 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; or

(c) committing an act outside Canada that is an offence in the place where it was committed and 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.

Grande criminalité

36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Application

36 (3) The following provisions govern subsections (1) and (2):

(…)

(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that

Application

36 (3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :

(…)

c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa

they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;	réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

A. *Did the decision maker come to unreasonable findings of fact in determining that the elements of the underlying offence had been proven?*

[14] The Applicant argued the ID's decision is unreasonable for three reasons. The first being that the ID unreasonably found he committed the essential ingredients of the equivalent Canadian offence. The Applicant argued this is an unreasonable finding because instead of evidence, the ID used the Kosovo appeal decision to conduct an equivalency analysis. Because there was no trial decision available, the ID had to review the evidence, not the appeal decision. He submits the evidence available at the ID does not prove attempted murder beyond a reasonable doubt because there is no evidence of specific intent, a required element of attempted murder.

[15] Secondly, the Applicant submits this is an unreasonable decision because the ID overlooked relevant evidence. Specifically, the Applicant argues the ID overlooked the fact that the Kosovo court system did not meet international standards of due process, especially in cases of inter-ethnicity.

[16] Third, the Applicant's final argument regarding the decision's reasonableness is that the Kosovo crime allows for constructive murder which is unconstitutional in Canada. The Applicant says the decision is therefore unreasonable because he could not be convicted of an unconstitutional offence in Canada.

[17] I do not agree with the Applicant's arguments. For the reasons below, I find that the decision maker's equivalency analysis and decision was reasonable.

(1) Court of Appeal decision not evidence

[18] The Applicant submitted that the Appeal Court decision is not "evidence" which is called for in the legislation. The Applicant argued that the equivalency test is not met because the ID did not have actual evidence or the Kosovo trial transcript.

[19] I find that this argument calls for an interpretation that is too literal a reading of the section. An international appeal court decision that sat in appeal of a trial decision is acceptable to use in an equivalency analysis under section 36(1)(b) of the IRPA.

[20] The test is not for the ID to do a mock trial as if in Canada to determine if the Applicant would be convicted by a Canadian court using the beyond a reasonable doubt standard of proof. I looked to a decision of mine, *Moscicki,* which explains at paragraph 28: "[t]he key point is that it is not necessary for the Board to determine whether there was sufficient evidence for an *actual conviction in Canada*. It is whether there are *reasonable grounds to believe* that the Applicant would be convicted if the same act were committed in Canada" [emphasis in original].

[21] It went undisputed that the Applicant had been convicted of this crime, and that this crime met the section 36(1)(b) punishment requirement of at least 10 years imprisonment. It is not unreasonable that, after a review of the appeal decision as well as the Applicant's own

evidence, the ID found reasonable grounds that the Applicant would have been convicted of the equivalent Canadian offence.

B. *In finding the Applicant inadmissible to Canada, did the decision maker err in law in determining that the Kosovo conviction equated to a conviction in Canada?*

[22] At the hearing the Applicant argued the ID should not recognize the conviction because the Kosovo procedure could not ever take place under Canadian law. For example, joinder of the cases would not have occurred in Canada. The Applicant's position is that an examination of the Kosovo legal process is a necessary part of an equivalency analysis.

[23] Although the FCA in *Li v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ 1060 (FCA) at paragraph 25 [*Li*] was clear that "[t]he Act does not contemplate a retrial of the case applying Canadian rules of evidence. Nor does it contemplate an examination of the validity of the conviction abroad," the Applicant urged me (as he argued before the ID) to disregard *Li* which is the leading case on this issue.

[24] The Applicant says this Court should not apply *Li* because of the low procedural standards in Kosovo. Instead, the Applicant argued (both at the ID and to me) that this Court should apply *Biro v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1428 [*Biro*] which deals with procedural fairness issues.

[25] Justice Gascon summarized the applicable law in *Nshogoza v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1211:

> **27** The only question to determine is whether the Officer's equivalency findings and her resulting inadmissibility conclusions are reasonable. In *Lu*, the Court explained the methods of the equivalency analysis to be undertaken by an immigration officer (at para 14). Citing *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 (FCA) at page 320, Mr. Justice Pinard stated that equivalency between offences can be determined in three ways: (i) "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"; (ii) "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"; or (iii) by a combination of one these two approaches.
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> **28** The Court must further look at the similarity of definition of the two offences being compared and the criteria involved for establishing the offences (*Li v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1060 (FCA) [*Li*] at para 18). As explained by Mr. Justice Strayer, "[a] comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences" (*Li* at para 19). In *Brannson v Canada (Minister of Employment and Immigration)*, [1981] 2 FC 141 (FCA) at para 38, the Federal Court of Appeal further stated that the essential elements of the relevant offences must be compared, no matter what are the names given to the offences or the words used in defining them.

[26] I do not agree that the ID erred by following the FCA in *Li* as it is the law.

[27] On our facts the ID's equivalency analysis started with the test in *Hill v Canada (Minister of Employment and Immigration)*, [1987] FCJ No 47 (FCA) [*Hill*]. Using the second *Hill*

method, the ID found the Canadian provision for attempt murder requires the elements of 1) specific intent of killing the victim; and 2) some steps taken toward that objective beyond mere preparation.

[28] Referring to the Kosovo decisions, the ID found the essential elements of the Canadian offence in the Kosovo conviction. Namely, that the Applicant waited in ambush, fired at the victim's car, and had the intent to kill the victim.

[29] Despite this conclusion, out of an "abundance of caution", the ID conducted a *Biro* analysis to see if procedural fairness issues had impacted the conviction. The ID found the issues concerning the Applicant were already brought up and sufficiently addressed by the Kosovo courts whose decisions were "thorough, thoughtful and reasonable." Therefore, even under the *Biro* analysis, the ID found there were no fairness issues.

[30] I find that the ID used the correct test and was reasonable in the assessment of the evidence before it. In support of my finding that *Biro* is not the appropriate test regarding fairness of other judicial systems, I rely on *Li* where the FCA followed what the SCC already had determined and quoted Justice La Forest who said "[t]he judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country." This confirms that it is not the role of the ID to examine another country's judicial system and apply our Charter or our rules of procedural fairness.

[31] The ID, as shown above, was clear and transparent during the equivalency analysis. The ID went even further and looked at the process as instructed in *Biro* and yet found that the Kosovo system was fair. Even the Applicant's own expert stated that the equivalency is the Canadian offence of attempted murder. The FCA in *Li* is specific in this regard, and holds the ID is not to retry the case as if it was in Canada with all the Charter rights as that is not the law passed by parliament. For that reason this argument too must fail.

[32] Reasonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision making process and the decision must also be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir*; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12). I find that this decision is reasonable and I will dismiss the application.

VI. Certified Question

[33] The Applicant submitted these as certified questions:

> "What is the threshold for a foreign conviction to be recognized by Canadian Immigration Authorities under Section 36(1) (b) of the *Immigration and Refugee Protection Act*;" or
>
> "What is the legal test to determine whether a foreign conviction should be recognized by Canadian Immigration Authorities under Section 36(1)(b) of the *Immigration and Refugee Protection Act*?"

[34] A certified question must be a question of general importance. This means the question "transcends the interests of the immediate parties to the litigation and contemplates issues of broad significance or general application" (*Liyanagamage v Canada (Minister of Citizenship and*

Immigration) (1994), 176 NR 4 at para 4 (FCA)). The question must also be dispositive of the appeal (*Zazai v Canada (Minister of Citizenship and Immigration*), 2004 FCA 89 at para 11).

[35] The Applicant argued that since section 36(1)(b) of the IRPA was created with Canadian values in mind, any analysis of section 36(1)(b) of the IRPA should consider procedural fairness if the relevant conviction occurs in a country without Canada's level of human rights and procedural fairness protections in its judicial system.

[36] The Respondent did not submit a question and argued the Applicant's questions should not be certified as this matter had already been determined so was not of general importance.

[37] I will not certify these questions because the question of threshold was already answered by the FCA and found not to be part of the legal test. The FCA jurisprudence holds "the validity or the merits of the conviction is not an issue" (*Brannson v Canada (Minister of Employment and Immigration)* (1980), [1981] 2 FC 141 (CA) at 145 [*Brannson*].

[38] Despite *Li* and *Brannson*, the Applicant has argued that section 36(1)(b) of the IRPA was created with Canadian values in mind, and when the level of procedural unfairness is especially high there should be a threshold for foreign convictions. Yet creating different thresholds would imply that procedural unfairness in other courts—including American courts (such as the issues faced by Mr. Brannson)—are somehow less important (see also the procedural unfairness issue in *Park v Canada (Minister of Citizenship and Immigration*) (1998), 146 FTR 42 (FC)). The

FCA in *Li* and *Brannson* has already made a determination in this regard; the merits of the conviction outside of Canada are not part of the equivalency test.

[39] In this case the question would also not be dispositive. The ID performed a *Biro* analysis out of an abundance of caution, and examined whether the Applicant's right to procedural fairness was breached. The ID found it was not. Therefore, even if the question was certified and answered in the positive, it would not affect the Applicant's appeal.

[40] The certified questions do not meet the test. They are not questions of general importance as they do not transcend the interests of the parties, they are not issues of broad significance or general application, and they are not dispositive of this case.

JUDGMENT in IMM-1632-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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