Federal Court  Cour fédérale

Date: 20181113

Docket: IMM-2012-18

Citation: 2018 FC 1140

Ottawa, Ontario, November 13, 2018

PRESENT: The Honourable Madame Justice Simpson

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

KAMEL ALY

Respondent

JUDGMENT AND REASONS

[1] The Minister of Public Safety and Emergency Preparedness [the Minister] has applied for judicial review of a decision of a member [the Member] of the Immigration Appeal Division [the IAD] dated April 19, 2018 [the Decision], in which he concluded that Kamel Aly is not inadmissible to Canada. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Kamel Aly [the Respondent] is a citizen of Egypt. There he practiced as a criminal lawyer. His wife and two young children still live in Egypt.

[3] In 2012, the Respondent worked for Mohamed Morsi during his successful election campaign. However, President Morsi's government was subsequently removed from power and was eventually replaced by the government of President Al-Sissi.

[4] The Respondent alleges that in 2015 he was told that he was on a list of individuals who were about to be charged with anti-government activity. As a result of this warning, he left the country and went to Malaysia. There he was admitted as a tourist, but his three month tourist visa did not entitle him to work.

[5] Shortly after his arrival in Malaysia, the Respondent visited an office of the United Nations High Commissioner for Refugees [UNHCR] to apply for refugee protection. He was informed that a decision on his application would take twelve to eighteen months. His evidence was that he feared losing his status as a visitor and being removed to Egypt before he received the UNHCR's decision.

[6] The Respondent, who speaks only Arabic, looked for work in Malaysia and found a job as a bookkeeper at Shawky Travel [the Agency]. It was an Arabic speaking travel agency, owned by an Egyptian. When he was hired, the Respondent was not asked for a work authorization (which he did not possess). After working at the Agency for about one month, the Respondent began to notice irregularities in the Agency's financial transactions, which he identified as large

scale credit card fraud [the Fraud]. He brought it to the attention of the owner of the Agency [the Owner] but was told to ignore it. The Owner also said that, if the Respondent left the Agency and worked elsewhere, he would report him to immigration authorities [the Threat].

[7] The Respondent says that he did not report the Fraud because he feared that the authorities would detain him for working without authorization and deport him to Egypt. He also feared that the Owner would carry out the Threat if he sought other employment. The Respondent continued to work at the Agency for approximately 3 months after he learned that it was a criminal operation. At the end of that time, the combination of savings from his salary and loans from the Owner and his brother meant that the Respondent could afford to purchase a false passport and an airline ticket. The Respondent left Malaysia and travelling via South Africa, he arrived in Canada on August 11, 2015. He subsequently made a refugee claim and became the subject of three reports under section 44(1) of the IRPA.

I. Proceedings to date

[8] Further to the section 44 reports, the Minister asked the Immigration Division [ID] for a ruling that the Respondent is inadmissible under sections 36(1)(c) (serious criminality) and sections 37(1)(a) and 37(1)(b) (organized criminality) of the IRPA.

[9] The ID heard testimony from the Respondent and found him to be credible. The ID issued two separate decisions. In the first decision, the ID found that the Respondent was not inadmissible under s. 37(1)(a). The Minister missed the deadline to appeal this decision to the IAD.

[10] In its second decision, the ID found that the Respondent was also not inadmissible under s. 36(1)(c) and s. 37(1)(b) of the IRPA. The Minister filed an appeal of this ID decision and a *de novo* hearing was held before the IAD. The Respondent testified and was again found to be credible and not inadmissible under section 37(1)(b). Although, as indicated above, section 36(1)(c) was also before the IAD, the relevant facts which involved the Respondent's activities in South Africa were not mentioned in the Decision and no conclusion was reached about whether section 36(1)(c) applied.

[11] It appears that the Member overlooked this aspect of the Minister's appeal. For this reason, an order will be made sending this matter back to the IAD for a determination about whether the Respondent is a person described under section 36(1)(c). I now turn to the Decision as it relates to section 37(1)(b).

II. The IAD Decision

[12] Before the IAD, the Respondent conceded that 90% of the business of the Agency involved transnational credit card fraud. He therefore took the position that the only issue for determination was whether his work for the Agency was excused by the defence of necessity.

[13] There is no issue that the defence of necessity requires proof that:

i. there exists a clear and imminent peril;

ii. there is no reasonable legal alternative available to disobeying the law;

iii. there is proportionality between the harm inflicted and the harm avoided.

[14] The Member found that, in Malaysia, the Respondent faced clear and imminent peril of being returned to Egypt, where he feared detention, arrest and torture. He held that the Respondent's fear of the government of President Al-Sissi was corroborated by the objective evidence.

[15] The Member also found that the Respondent had no reasonable alternative to disobeying the law. He found that the Respondent raised his concerns with the Owner and was told to ignore the Fraud. The Respondent did not approach the authorities or look for other work because of his precarious situation in Malaysia. The IAD found that given that he only spoke Arabic, had no work authorization and faced the Owner's Threat, his only viable option was to continue to work for the Agency until he had sufficient funds to leave Malaysia.

[16] Finally, the IAD found that the Respondent's actions were proportional in light of the harm he faced in Egypt. Accordingly, since the defence of necessity had been made out, the IAD found that the Minister had not established that the Respondent was inadmissible by reason of section 37(1)(b) of the IRPA.

III. Issues

The Issues on which leave was granted

i. Did the IAD fail to adequately address the Minister's argument that the defence of necessity is only to be raised in an application for Ministerial Relief and not at an admissibility hearing?

ii. Did the IAD make an unreasonable finding with respect to the defence of necessity?

New Issue Raised on Judicial Review

iii. Did the IAD err when it considered the defence of necessity?

Issue i

[17] This issue presupposes that the Minister actually made submissions on this issue and took the position that the defence of necessity could not, as a matter of law, be argued in an admissibility hearing. For the reasons given below, I have concluded that no such submissions were made.

[18] At paragraphs 25 and 26 of the Decision, the Member made the following remarks:

> Having found the respondent [Mr. Aly] to be credible, the issue for the panel to consider is whether the defence of necessity is open to the respondent given the circumstances of his situation.
>
> The Panel finds that the defence of necessity raised by the respondent is an available defence to the allegation made against him under section 37(1)(b).

[19] In my view, in these comments the Member was not considering whether the defence of necessity could be raised. Rather he was considering whether, on the facts, the defence had been made out. In other words, the issue was whether the Respondent had satisfied the three requirements of the defence.

[20] My interpretation of the Member's comments is supported by the remarks made by counsel for both parties during their closing submissions.

[21] In his closing submissions before the IAD, counsel for the Respondent pointed out that the Minister did not take issue with the availability of the defence of necessity. Counsel for the Respondent said:

> So, first, with respect to the availability of the necessity argument, and I think my—the Minister's counsel is not taking issue with the suggestion that the necessity argument is available—or that the necessity defence is available, and that was conceded in *B10* by the Minister at paragraph 73 of *B10*.
>
> [my emphasis]

[22] In reply, the Minister acknowledged that the defence of necessity was properly raised. He said:

> Also, what — I will agree . . . The onus is not on the Minister to disprove Mr. Aly's defence. The onus — this is the Minister's case to make and it is the Minister's case to make to establish that the elements of 37(1)(b) and 36(1)(c) are met. There is no onus on the Minister to disprove his defence. He can raise a defence if he wants to. That is his onus. That is his case to make.
>
> [my emphasis]

[23] In my view, counsel for the Respondent made it clear in his closing that the Minister had not taken the position that the defence of necessity was not available in law. Thereafter, when the Minister's counsel made his closing remarks, his focus was on whether the defence had been made out. At no time before the IAD did he suggest that necessity could not be considered.

[24] Since the issue was not before the IAD, the IAD did not need to consider whether necessity could be raised.

Issue ii

(1) The Parties' Positions

[25] The parties agree that the first two elements of the defence of necessity are evaluated using the modified objective standard. It means that the Respondent must believe he faces imminent peril and that he has no legal alternative to his illegal employment. Further, his belief must be reasonable given his personal and situational circumstances.

[26] The Minister notes that the British Columbia Court of Appeal in *Nwanebu*, 2014 BCCA 387 [*Nwanebu*] at paragraph 63 emphasized that the defence of necessity must "be strictly controlled and scrupulously limited to situations that … are truly 'involuntary'". The Minister stresses that the Respondent voluntarily decided to stay with the Agency, even after he was aware of its participation in the Fraud.

[27] The Minister argues that the IAD's Decision is unreasonable because it fails to properly apply the modified objective standard for the first two elements of the test. For a description of the standard, the Minister relies on the following passage from *R v Ruzic*, 2001 SCC 24 at paragraph 61, as cited in *Nwanebu* at paragraph 66:

> The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by

> the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse.

The Minister also relies on paragraph 67 in *Nwanebu*, where the Court states:

> In sum, the accused must subjectively believe he or she faces an imminent peril and has no legal alternative available, however, that belief must be reasonable taking into account his or her personal and situational circumstances. Those circumstances may affect the accused's rational decision-making capacity and his or her ability to clearly evaluate the situation, and thus may affect the reasonableness of his or her belief.
>
> [my emphasis]

[28] The Minister distinguishes *Nwanebu* from the present case by noting that in *Nwanebu* there was evidence before the Court about Mr. Nwanebu's reduced decision-making capacity due to his torture and his related PTSD. The Minister argues that no such evidence was adduced in this case.

[29] The Minister further submits that the finding that the Respondent was in clear and imminent peril was not supported by the facts. The Minister quotes from the Supreme Court's decision in *R v Ryan*, 2013 SCC 3, where it states, at paragraph 74, that "the temporality requirement for necessity is one of imminence."

[30] As well, the Minister says that there was no evidence to suggest that the Respondent was at risk of removal to Egypt. The evidence was that immigration authorities never attempted to interview him and never attended at his place of residence. Further, when they visited the Agency, he was not questioned. The Minister argues that while the Respondent may have

subjectively feared removal to Egypt, there was no imminence to the threat from an objective viewpoint.

[31] The Minister is concerned that the Member did not conduct an objective assessment of the Respondent's circumstances. Given that he is a resourceful criminal lawyer, the Minister says he should have taken steps and made inquiries about a lawful alternative job when he learned of the Fraud. He should not have assumed that without a work authorization, he had no legitimate way to make money.

[32] Finally, the Minister submits that the IAD erred in its proportionality analysis. He argues that the IAD made an unsupported inference when it found that the harm avoided is actual removal as the evidence did not support that the Respondent was in danger of removal. Rather, the Minister argues that the harm avoided was the Respondent's inability to support himself in Malaysia.

[33] The Respondent, on the other hand, emphasizes that both the ID and the IAD found him to be credible. He notes that his reasons for leaving Egypt were consistent with the country condition documents regarding the false convictions, imprisonment and execution of perceived supporters of President Morsi. The Respondent notes that the Minister did not question his fear of returning to Egypt.

[34] The Respondent disagrees with the Minister's argument that there was no objective evidence that he was at risk of removal to Egypt. He notes that the evidence described below was before the IAD in a document from the European Resettlement Network, which reads as follows:

> Malaysia is not a signatory to the 1951 Convention or its 1967 Protocol and has no national asylum legal framework or system (RSD is instead conducted by UNHCR). Urban environments can in some cases offer more opportunities for self-reliance and better prospects for integration. However, the 1963 Malaysian Immigration Act does not distinguish between refugees and undocumented migrants, and without a protected legal status refugees are at constant risk of arrest, detention and deportation.
>
> Refugees are unable to work legally, send their children to school, or access health care or social services.
>
> [my emphasis]

(2) Discussion

[35] *R v Latimer*, 2001 SCC 1 is a decision about the defence of necessity. *Latimer*, at paragraph 29, describes the requirement for "clear and imminent peril" as follows:

> [D]isaster must be imminent, or harm unavoidable and near. It is not enough that the peril is foreseeable or likely; it must be on the verge of transpiring and virtually certain to occur. In *Perka*, Dickson J. expressed the requirement of imminent peril at p. 251: "At a minimum the situation must be so emergent and the peril must be so pressing that normal human instincts cry out for action and make a counsel of patience unreasonable". The *Perka* case, at p. 251, also offers the rationale for this requirement of immediate peril: "The requirement . . . tests whether it was indeed unavoidable for the actor to act at all". Where the situation of peril clearly should have been foreseen and avoided, an accused person cannot reasonably claim any immediate peril.

[36] In my view, the IAD followed *Latimer* and set out the correct test when it said:

> The harm faced by the person must be imminent and the harm unavoidable or near. The peril faced by the person must be more

> than simply foreseeable or likely. It must be on the verge of transpiring and it is virtually certain to occur.

[37] The Respondent's evidence was that he had been threatened with exposure by the Owner, had little money, limited language skills, no work permit, a short tourist visa and no UNHCR recognition. There was also objective evidence showing that he was at "constant" risk of deportation. In these circumstances, I have concluded that the IAD reasonably found that he was in imminent peril. The Minister suggests that since the Malaysian authorities had not found him, he was not in imminent peril. In my view, this submission misses the point. Once he was found, it would have been too late. He was in constant peril of discovery and it would have led to detention and deportation.

[38] It is also my view that the defence of necessity does not require, as the Minister suggested, evidence of diminished decision-making capacity. The Minister did not refer to any case law on the point. Nowhere in *Nwanebu* does the Court suggest that psychological evidence of impaired reasoning is required in every case.

[39] It is also my view that the IAD's conclusions about the last two elements of the test were reasonable. Lacking work authorization and speaking only Arabic the Applicant was unlikely to find lawful employment. The harm he faced in Egypt (which was in my view the relevant harm) outweighed a short period of employment with a firm engaging in white collar crime.

Issue iii

[40] The Court has discretion about whether to hear issues raised after leave is granted (*Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22). In this case, when the Minister filed his Further Memorandum of Argument, he argued for the first time in this application for judicial review that it is an error in law to consider the defence of necessity at an inadmissibility hearing before the ID or IAD.

[41] The new issue, while not argued before the IAD, was fully argued before the ID so there is no prejudice to the Respondent arising from the fact that it was not raised until after leave was granted. Having also considered the other factors described in *Al Mansuri*, I am prepared to exercise my discretion in favour of considering and deciding this issue.

(1) The Parties' Positions

[42] The Minister submits that the defence of necessity is not available at an admissibility hearing because it is more appropriately raised when the Minister is considering an application for ministerial relief under section 42.1 of the IRPA. It is argued that to conclude otherwise would make the Minister's role redundant and would mean that government resources would be wasted considering the same issue twice.

[43] The Respondent submits that there are no decisions which support the Minister's position. He notes that in *B006 v Canada (Citizenship and Immigration)*, 2013 FC 1033, Madam Justice Kane determined that the Federal Court of Appeal in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 103 did not rule out that coercion or duress could be

raised in determining inadmissibility. At paragraphs 104-107 of her decision, Kane J. reviewed examples of cases in which the Federal Court has considered how the defence of duress was treated during admissibility hearings. In the Respondent's submission, necessity should be given the same treatment. However, the Minister submits that *B006 v Canada* should be distinguished and not accepted as a precedent because it dealt with the defence of duress, not the defence of necessity, and because it was a case of people smuggling not a case involving white collar crime.

(2) Discussion

[44] In my view, there is no basis for distinguishing *B006*. Although not as serious as people smuggling, the conduct at issue in this case is nevertheless criminal. The Agency's unauthorized use of credit card data was a crime and I see no reason why a defence at criminal law should not be raised. Further, the fact that this case deals with necessity rather than duress is a difference without meaning. Both defences excuse criminal conduct by treating it as morally involuntary.

[45] Lastly, I see no reason to exclude consideration of the defence of necessity before the ID and IAD simply because it may also be one of a number of relevant matters before the Minister on an application for relief.

[46] To summarize, I have concluded that the defence of necessity can be raised before the IAD. Accordingly, it did not err in reaching its Decision based on the defence.

[47] For all these reasons, I find the Decision to be reasonable and the application for judicial review will be dismissed as it relates to section 37(1)(b) of the IRPA.

IV. Certification

[48] Neither party posed a question for certification for appeal.

JUDGMENT IN IMM-2012-18

THIS APPLICATION for Judicial Review is allowed in part so that the IAD may determine an issue that was overlooked in the Decision. It is whether the Respondent is inadmissible by reason of section 36(1)(c) of the IRPA.

THE APPLICATION for Judicial Review of the Decision to the effect that the Respondent is not inadmissible under section 37(1)(b) of the IRPA is hereby dismissed.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2012-18
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v KAMEL ALY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	OCTOBER 11, 2018
JUDGMENT AND REASONS:	SIMPSON J.
DATED:	NOVEMBER 13, 2018

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