Federal Court  Cour fédérale

Date: 20190529

Docket: IMM-4917-18

Citation: 2019 FC 752

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 29, 2019

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MOUSTAFE TOURÉ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The applicant is challenging a decision by the Immigration Division [ID], which found him to be inadmissible on grounds of serious criminality under paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. In fact, the ID deemed that the applicant was inadmissible because he had pleaded guilty, in the United States, to an offence

equivalent to the offence of fraud under paragraph 380(1)(a) of the *Criminal Code*, RSC 1985, c C-46, which is punishable by a maximum term of imprisonment of at least 10 years where the value of the subject-matter of the offence exceeds CAN$5,000.00. This decision rendered the applicant ineligible to file a claim for refugee protection, which he had wanted to do when he came to Canada after spending the last 27 years of his life in the United States.

[2] According to the applicant, the ID engaged in an erroneous equivalency analysis by factoring in the restitution order that accompanied his sentence of imprisonment of 14 months, since the value of the subject-matter of the only fraud-related crime for which he was convicted did not exceed the monetary threshold established in paragraph 380(1)(a) of the *Criminal Code*, and which is required to expose the offender to the effects of paragraph 36(1)(b) of the Act.

[3] He clarified that he was in fact convicted of fraud for an amount ranging between US$500.00 and US$1,000.00. For its part, the restitution order, which he could not explain, sought the restitution to the American government of the amount of US$81,892.30.

II. BACKGROUND

[4] The relevant context in this case can be summarized as follows. The applicant is a national of Mali. He lived in the United States for 27 years under a work permit before travelling to Canada in April 2018 to claim refugee protection. In 2009, while he was living in Cincinnati, Ohio, he opened the equivalent of what we call a corner store here. That same year, he obtained authorization to participate in the US government’s food assistance program [the Program] in his capacity as a business person. The Program, intended for people in need, allows beneficiaries to

buy food at authorized places of business using debit cards to which the government allocates a certain amount of money every month.

[5] Under the Program rules, these cards cannot be used to purchase alcoholic drinks, tobacco or firearms; funds allocated under the Program may also not be redeemed for cash.

[6] In May 2014, the applicant was charged with committing several offences under U.S. federal laws in connection with his participation in the Program. He had to answer to 43 charges in that regard. He was also charged with possession of a firearm, as a foreigner, while in the United States illegally. This charge, for which the applicant also pleaded guilty and for which, in any case, the ID considered there was no Canadian equivalent, is not relevant for the purposes of this case.

[7] On December 4, 2017, the applicant, under an agreement reached between his counsel and the prosecutor, pleaded guilty to one of the forty-three charges related to the Program. He was therefore convicted of defrauding the Program, on October 2, 2013, of an amount of less than one thousand dollars (US). Further to this guilty plea, he received a sentence of imprisonment of 14 months, to be served concurrently with the sentence imposed for the offence of illegal possession of a firearm, and the abovementioned restitution order was issued against him.

[8] When he arrived in Canada in April 2018, an inadmissibility report under subsection 44(1) of the Act was made against him. The matter was then referred to the ID for an

admissibility hearing. Before the ID, the applicant acknowledged that he had been convicted of defrauding the Program of an amount that had earned him US$250.00 but expressed his incomprehension of the restitution order. He submitted that he had only defrauded the Program once and added that the amount that was being claimed from him under the restitution order represented the total amount of the Program-related transactions lawfully carried out at his store.

[9] The ID undertook the task of conducting a comparative analysis of the essential elements of the American and Canadian offences on the basis of the test developed by the Federal Court of Appeal in *Hill v Canada (Minister of Employment and Immigration)* (1987), 73 NR 315 (FCA) [*Hill*]. With respect to the value of the subject-matter of the offence, the ID, as I have already had an opportunity to point out, relied on the restitution order to conclude that it exceeded the threshold of CAN$5,000.00, which, under paragraph 380(1)(a) of the *Criminal Code*, gives rise to a term of imprisonment not exceeding 14 years thereby triggering paragraph 36(1)(b) of the Act. The ID expressed the view that this order was part of the sentence imposed and that it was therefore directly related to the subject-matter and the value of the fraud.

III. ISSUE AND STANDARD OF REVIEW

[10] The issue here is to determine whether, in reaching its conclusion regarding the issue of the value of the subject-matter of the fraud the applicant was charged with in the United States, the ID made an error that would justify the intervention of the Court.

[11] The equivalency of the essential elements of the American offence for which the applicant pleaded guilty and those set out in paragraph 380(1)(a) of the *Criminal Code* is not

really at issue in this case. In other words, it is not disputed that fraud occurred within the meaning of this provision. What is in dispute is the issue of the "value of the subject-matter of the offence". More specifically, at issue is whether the ID could rely on the restitution order to establish this value or whether it should have considered only the value of the subject-matter of the offence for which the applicant pleaded guilty. It goes without saying that if the ID could rely on this order, its decision is unassailable. Otherwise, the decision cannot stand.

[12] It is well-established that the standard of review for decisions of the ID concerning inadmissibility on grounds of serious criminality is that of reasonableness (*Bellevue v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 926 at para 26 [*Bellevue*]; *Halilaj v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1062 at para 11; *Liberal v Canada (Citizenship and Immigration)*, 2017 FC 173 at para 12). It is also recognized that in such matters, determinations of equivalency are essentially factual determinations requiring deference on the part of the reviewing judge (*Abid v Canada (Citizenship and Immigration)*, 2011 FC 164 at para 11 [*Abid*]).

IV. ANALYSIS

[13] Under paragraph 36(1)(b) of the Act, a permanent resident or a foreign national is inadmissible for "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".

[14] In this case, no one is contesting the fact that, under the terms of this provision, the review of the equivalency of the Canadian and foreign offence can be based on any of the three methods set out in *Hill*. According to this judgment, this review can be conducted:

a. 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";

b. 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

c. three, "by a combination of one and two".

[15] The applicant is urging me to apply a narrow interpretation of this test—and therefore, of paragraph 36(1)(b) of the Act—since his right to refugee protection and, consequently, his safety are being jeopardized by the ID's decision. According to him, this means that the equivalency of the offences must be assessed solely on the basis of the guilty plea that he entered, which concerns only one of the numerous charges of fraud filed against him and only one offence involving a subject matter with a value well below the threshold of CAN$5,000.00, which, under Canadian law, would expose the offender to a term of imprisonment of at least 10 years.

[16] Alternatively, the applicant contends that the ID erred by relying on the Immigration Appeal Division's decision in *Edri v Canada (Public Safety and Emergency Preparedness)*, 2016 CanLII 35057 (CA IRB) [*Edri*], in order to infer the value of the fraud committed from the restitution order issued against him by the American justice system, since, according to him, the facts of the two cases differ considerably. He added that when determining equivalency, referring to all of the evidence that was before the foreign decision-maker is only possible when the foreign offence does not define the value of the subject-matter of the offence, which is not the case here.

[17] With due respect, I cannot support these arguments.

[18] On the one hand, as I noted earlier, according to the case law of this Court, equivalency determinations are essentially factual determinations. I note again that, in this case, the only issue is the value of the subject-matter of the offence committed by the applicant: if it exceeds CAN$5,000.00, equivalency is established and full effect must be given to paragraph 36(1)(b) of the Act; otherwise, the ID's decision must be reversed.

[19] The test set out by the Federal Court of Appeal in *Hill* permits a certain flexibility when determining whether or not a Canadian and a foreign offence are equivalent, meaning that relevant evidence of a contextual nature may be relied on. As the Court reiterated in *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879, at para 206, such an exercise "ensures that a person's acts are always evaluated in accordance with Canada's standard for criminal law, in

particular to protect those coming from countries where the criminal law is harsher". In my view, this test does not align with the inflexible model proposed by the applicant.

[20] In this case, I find it difficult to disregard the restitution order when assessing the value of the subject-matter of the offence at issue. This is not a case where the ID sought to deliver the sentence which, in its opinion, should have been imposed by the American court. It also did not attempt to try or retry the applicant's case, which it would not have been permitted to do (*Bellevue* at para 30). It simply factored in one element which, in my opinion, is intertwined with the context in which the applicant's guilty plea was made, that is, in the context of a negotiated agreement. This type of agreement, which is commonplace in Canada, and I have no reason to believe that the same is not true for our neighbour to the South, involves some form of "win-win" situation and generally benefits all participants in the justice system (*R v Wong*, 2018 SCC 25 at para 61).

[21] In my view, it was therefore not unreasonable for the ID to consider this contextual element when assessing the actual severity, in a manner of speaking, of the offence for which the applicant was convicted under a negotiated agreement. Before the ID, the applicant attempted to have this contextual element disregarded by arguing that the American justice system appeared to have made a mistake regarding the nature of the amount for which restitution was ordered; according to him, it appeared to comprise the total amount of all lawful transactions related to his store's participation in the Program.

[22] The ID deemed this explanation to be improbable and not credible. In light of the evidence on record, I cannot say that that is an unreasonable inference. I recall that the applicant claimed before the ID that he had only defrauded the Program on a single occasion in connection with the debit card of one single beneficiary. However, as noted by counsel for the respondent at the hearing for this case, the card number he mentioned during his testimony is not the same as the one mentioned in the charge for which he pled guilty. In my view, this adds weight to the negative inference drawn by the ID regarding the testimony given by the applicant to somehow discredit the restitution order. I also note that the applicant did not contest the order as failing to reflect the agreement under which he entered a guilty plea.

[23] On the other hand, I do not believe that reliance on the decision rendered by the Immigration Appeal Division in *Edri* is problematic. Even though, as the applicant claims, the context of that case differs somewhat from the one before us—it involved a case of conspiracy to commit fraud—that is not enough, in my view, to overturn the ID's decision. Moreover, it is my impression that the ID cited *Edri* simply to illustrate the fact that the value of the subject-matter of the fraud can be inferred from a restitution order. In inadmissibility matters, each case stands on its own merits and should be assessed on the basis of its own specific circumstances (*De Dieu Ikuzwe v Canada (Citizenship and Immigration)*, 2017 FC 941 at para 38). Equivalency in matters involving inadmissibility on grounds of serious criminality is no exception: an equivalency determination is a factual determination that also depends largely on the specific circumstances of each case. As I have just mentioned, relying on the restitution order issued against the applicant was, from the perspective of the standard of reasonableness, justified in the

circumstances of this case to establish the value of the subject-matter of the offence for which the applicant was found guilty in a way that was reflective of what the record as a whole reveals.

[24] Lastly, the same considerations must come into play in response to the applicant's argument that when determining equivalency, referring to all of the evidence that was before the foreign decision-maker is only possible when the foreign offence does not define the value of the subject-matter of the offence. Once again, I do not see any such restriction in the case law, as each case should be considered on its own set of facts.

[25] The applicant's application for judicial review will therefore be dismissed. Neither of the parties found that this case raises a question of general importance that would justify an appeal. I subscribe to that view.

JUDGMENT in IMM-4917-18

THIS COURT'S JUDGMENT IS that:

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

Certified true translation
This 10th day of June 2019.

Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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