Federal Court  Cour fédérale

Date: 20220613

Docket: IMM-6022-21

Citation: 2022 FC 862

Ottawa, Ontario, June 13, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

WAHAB SELIMANKHYL ABDULQAYUM

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by the Immigration Division of the Immigration, Refugees and Citizenship Canada (the "ID"), dated August 16, 2021, refusing the Applicant's application for permanent residence as a member of the Spouse and Common-Law in Canada class (the "Decision").

[2] The ID found that the Applicant was inadmissible on grounds of serious criminality under paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*Act*") and therefore did not meet the requirements under subparagraph 72(1)(e)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "*Regulations*").

I. Background

[3] The Applicant, Wahab Selimankhyl Abdulqayum, is a 32-year-old male citizen of Afghanistan. In June 2015, the Applicant fled to the United States on a K-1 visa that he obtained in connection with his fiancé at the time who resided in the United States, and sought refugee status.

[4] On or about June 30, 2015, while in the United States, the Applicant was charged with aggravated harassment in the second degree pursuant to *New York Penal Law* § 240.26(3) arising out of an incident with his former fiancé wherein he placed approximately sixty seven calls to her in an approximately nine hour period. On October 3, 2018, the Applicant pled guilty and received a one-year conditional discharge and a two-year protection order in respect of his former fiancé.

[5] Fearing that his criminal charge would affect his refugee claim in the United States, the Applicant fled to Canada on September 16, 2015 and filed a refugee claim in Canada on October 29, 2015. On October 6, 2016, the Applicant was granted refugee status, however the decision was substituted and the Refugee Appeal Division of the Immigration and Refugee Board of Canada dismissed the Applicant's appeal on July 5, 2017.

[6] In September 2017, the Applicant met his spouse (a Canadian citizen) and they married on March 2, 2019. On August 6, 2019, the Applicant and his spouse submitted a Spousal Sponsorship application. They had a son born on July 12, 2020.

[7] In the Decision, dated August 16, 2021, the ID refused the Applicant's Spousal Sponsorship application finding that the Applicant was inadmissible on grounds of serious criminality under paragraph 36(1)(b) of the *Act* as a result of the Applicant's conviction of harassment in the second degree pursuant to *New York Penal Law* § 240.26(3).

[8] On September 3, 2021, the Applicant filed this application for leave and judicial review seeking an Order setting aside the Decision and declaring that the Applicant is not inadmissible to Canada.

II. Decision Under Review

[9] As stated above, the Applicant was convicted of harassment in the second degree under *New York Penal Law* § 240.26(3). The ID found that, if committed in Canada, the offence would equate to criminal harassment as described in subparagraph 264(1)(2)(b) of the *Criminal Code*, RSC 1985, c C-46, rendering the Applicant inadmissible on the grounds of serious criminality pursuant to paragraph 36(1)(b) of the *Act*.

[10] On March 30, 2021, the ID sent the Applicant a procedural fairness letter informing him that, based on his conviction in New York, USA, he was inadmissible to Canada pursuant to paragraph 36(1)(b) of the *Act*. The Applicant submitted a response explaining the circumstances

leading to the charge, as well as an analysis of the relevant US and Canadian charges. More specifically, the Applicant stated that *New York Penal Law* § 240.26(3) was a violation – not a crime – and its *actus reus* is to "alarm or seriously annoy", as opposed to subparagraph 264(1)(2)(b) of the Canadian *Criminal Code*, which apples to conduct that "causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them."

[11] Despite the Applicant's response, the ID refused the Applicant's Spousal Sponsorship application in the Decision, providing the following reasons:

A. According to the complaint/charging document issued by the New York Court, the Applicant "…with intent to harass and threaten another person, made a telephone call…" which "… caused [the complainant] to feel harassed, threatened, annoyed and alarmed", thus meeting the elements of subparagraph 264(1)(2)(b) of the *Criminal Code*;

B. The New York Consulate office was consulted on two occasions to assess criminality, at which time it verified that the Applicant's conviction would equate to section 264 of the *Criminal Code*;

C. In New York, a conditional discharge results in a verdict of guilty but the subject does not usually have to complete any of the associated punishments – the charges are not dropped nor is the conviction overturned or expunged; and

D. The following humanitarian and compassionate considerations were highlighted:

i. Other methods of staying in Canada are available to the Applicant, such as applying for a temporary resident permit or applying for permanent residence from within Canada under humanitarian and compassionate grounds;

ii. Positive weight was given to the Applicant's maintenance of temporary resident status valid until September 25, 2021. However, a removal order had been issued since the failure of his refugee claim and was pending the outcome of the sponsorship application;

iii. The Applicant had not sought to have his conviction expunged nor had he expressed remorse; and

iv. The ID was alert and sensitive to the best interests of the Applicant's newborn child. However, the ID was "not satisfied it is in the child's best interest to be under the care of an individual who has the potential to commit harassment."

III. Issues

[12] The issue is whether the ID's Decision was reasonable.

IV. Standard of Review

[13] The standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 25).

V. Analysis

A. *Preliminary issue – amendment of the style of case*

[14] The proper Respondent in this matter is the Minister of Citizenship and Immigration; the style of cause is hereby amended.

B. *Was the Decision reasonable?*

[15] Paragraph 36(1)(b) of the *Act* states that a foreign national is inadmissible on grounds of serious criminality if they have been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years.

[16] In addition, paragraph 36(3)(a) provides that an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily.

[17] The ID must conduct an equivalency exercise to determine whether someone falls within the ambit of paragraph 36(1)(b) (*Bellevue v. Canada (MPSEP)*, 2018 FC 926 [*Bellevue*] at paragraph 30). The Federal Court of Appeal has recognized three methods of approaching this analysis (*Bellevue* at paragraph 31, citing *Hill v. Canada (MEI)*, [1987] FCJ No 47 (FCA) [*Hill*]):

i. 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. An examination of 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 has been proven in the foreign proceedings, whether precisely described in the initiating documents or in the same words or not.

iii. A combination of (a) and (b).

[18] The following principles apply to an equivalency analysis:

i. The three methods are alternatives and there is no hierarchy between them (*Bellevue* at paragraph 30, citing *Moscicki v. Canada*, 2015 FC 740 [*Moscicki*] at paragraph 18);

ii. The words must be similar or involve the same criteria. However, there is no requirement that the words be identical in order to find equivalence and the essential ingredients of the offences need not correspond perfectly; there is both a legal determination, in assessing the content of the two offences, and factual determinations, in assessing whether the circumstances of the applicant's charges of aggravated harassment in the second degree and his guilty plea fall within the ambit of subparagraph 264(1)(2)(b) of the *Criminal Code* (*Victor v. Canada (MPSEP)*, 2013 FC 979 at paragraph 38);

iii. The analysis exercise ensures that a person's acts are always evaluated in accordance with Canada's standard for criminal law (*Nguesso v. Canada (MCI)*, 2015 FC 879 at paragraphs 205 to 206);

iv. It is not the role of the ID to look behind the conviction and to question it (*Wang v. Canada (MPSEP)*, 2021 FC 1196 at paragraph 18);

v. The expression "maximum term of at least ten years" under subsection 36(1) of the IRPA means "ten years or more" (*Ortiz v. Canada (MCI)*, 2015 FC 1090 [*Ortiz*] at paragraph 15); and

vi. The ID must have reasonable grounds to believe that certain facts have occurred and may use witness statements to found this belief (section 33 of the *Act*; *Moscicki* at paragraph 20, citing *Mugesera v. Canada (MCI)*, 2005 SCC 40 at paragraph 114; *Ali v. Canada (MCI)*, 2021 FC 1419 at paragraph 39).

[19] The *Criminal Code of Canada* criminalizes harassment in the following terms:

> **Criminal Harassment**
>
> **264 (1)** No person shall, without lawful authority and knowing that another person is harassed or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably, in all the circumstances, to fear for their safety or the safety of anyone known to them.
>
> **Prohibited conduct**
>
> **(2)** The conduct mentioned in subsection (1) consists of…
>
> **(b)** repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;…

Punishment

(3) Every person who contravenes this section is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction.

[20] The jurisprudence provides the following guidance for interpreting paragraph 264(2)(b):

i. To be subject to harassment as defined for the purposes of section 264 means to be something more than "vexed, disquieted or annoyed"; one must be "tormented, troubled, worried continually or chronically, plagued, bedeviled and badgered" (*R v. Sheppard*, 2022 ABCA 89 [*Sheppard*] at paragraph 14, citing *R v. Sillipp*, 1997 ABCA 346 at paragraph 16, leave to appeal ref'd [1998] SCCA No 3 (SCC) and *R v. Kosikar*, [1999] OJ No 3569 (ONCA) at paragraph 25);

ii. Safety includes physical, emotional, and psychological safety (*Sheppard* at paragraph 16);

iii. In terms of paragraph 264(2)(b), the definition of "repeatedly" means behavior done more than once but not necessarily more than twice – there is no minimum number to trigger this subsection (*R v. Ohenhen*, [2005] OJ No 4072 (ONCA) [*Ohenhen*] at paragraphs 31 and 32);

iv. The approach to determining the *actus reus* is done objectively and is a contextual one. The trier will consider the conduct that is the subject of the charge against the background of the relationship and/or history between the complainant and accused (*Ohenhen* at paragraph 32).

[21] *New York Penal Law* § 240.26 defines harassment in the second degree as:

> A person is guilty of harassment in the second degree when, with intent to harass, annoy or alarm another person:
>
> 1. He or she strikes, shoves, kicks or otherwise subjects such other person to physical contact, or attempts or threatens to do the same; or
>
> 2. He or she follows a person in or about a public place or places; or
>
> 3. He or she engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.
>
> Subdivisions two and three of this section shall not apply to activities regulated by the national labor relations act, as amended, the railway labor act, as amended, or the federal employment labor management act, as amended.
>
> Harassment in the second degree is a violation.

[22] "Violation" means an offense, other than a "traffic infraction," for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.

[23] The Applicant argues that *New York Penal Law* § 240.26 requires that the defendant's conduct "alarm or seriously annoy"; causing the complainant to fear for her safety (as required under section 264 of the *Criminal Code*) is not a necessary element of the offence. Therefore, the definitions of the offences (which include the elements of the offence) are not equivalent (*Li v. Canada (MCI)*, [1997] 1 FC 235 (FCA)).

[24] The Respondent argues that the ID's analysis was complete and in line with the jurisprudence of this Court, as outlined above, and that the Decision is reasonable.

[25] The ID came to the Decision using the method proposed in *Hill*, above, i.e., a comparison of the precise wording in each statute both through documents and an examination of the evidence adduced before the adjudicator to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada has been proven in the foreign proceedings.

[26] It noted that:

i. The Applicant pleaded guilty to harassment in the second degree;

ii. The charging document, which explains that the victim was called approximately sixty seven times by the Applicant and caused her to feel "harassed, threatened, annoyed, and alarmed;"

iii. That criminal harassment under the *Criminal Code* may bring a sentence of 10 years;

iv. That *New York Penal Law* § 240.26(3) describes an act that alarms or seriously annoys another person; and

v. That a literal reading of the offence under § 240.26(3) is essentially equivalent to paragraph 264(2)(b).

[27] It is the equivalence of the offence that is to be assessed, not the equivalence of law (*Moscicki* at paragraph 18, citing *Steward v. Canada (Minister of Employment and Immigration)*,

[1988] 3 FC 452 (FCA) and *Ngo v. Canada (Minister of Citizenship and Immigration*, 2005 FC 609 at paragraph 22).

[28] The ID considered the language of both Canadian and New York State law and found that they were both equivalent in light of their similar language. In addition, the ID consulted with the New York Consulate, which advised that the two provisions were equivalent. Furthermore, the ID noted that the victim felt "harassed, threatened, annoyed, and alarmed," which equates to the necessary elements for a finding of harassment under subparagraph 264(1)(2)(b) of the *Criminal Code*.

[29] It matters not that *New York Penal Law* § 240.26(3) is a "violation" which may equate to a summary conviction under section 264 of the *Criminal Code* – as stated above, paragraph 36(3)(a) of the *Act* provides that a hybrid offence is deemed to be an indictable offence (*Ortiz* at paragraph 14).

[30] In light of the foregoing, the Decision is reasonable.

JUDGMENT in IMM-6022-21

THIS COURT'S JUDGMENT is that

1. The style of cause is hereby amended to name the Respondent as The Minister of Citizenship and Immigration.
2. The Application is dismissed.
3. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6022-21
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