Federal Court  Cour fédérale

Date: 20220928

Docket: IMM-5031-21

Citation: 2022 FC 1356

Ottawa, Ontario, September 28, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

ASMEROM KIFLE TESFAZGI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act* , S.C. 2001, c 27 [*IRPA*]. The Applicant asks this Court to set aside the Immigration Division [ID] of the Immigration and Refugee Board's [IRB] decision dated July 16, 2021, which issued a deportation order against the Applicant after concluding he was inadmissible to Canada on grounds of serious criminality per paragraphs

36(1)(b) of *IRPA* and 229(1)(c) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*].

[2] The Board held it had reasonable grounds to believe the Applicant was convicted of an offence in the United States of America (USA) for applying for naturalization under another person's identity contrary to paragraph 1546(a) of Title 18 of the *United States Code* [*USC*], which the Board found was equivalent to paragraph 403(1)(a) of the *Criminal Code*, R.S.C., 1985, c. C-46 [*Code*], which prohibits identity fraud. The Board also considered and held the defence of necessity did not apply in the Applicant's circumstances.

II. Background Facts

[3] The Applicant is a 35-year-old male national of Eritrea. In 2005, he fled to Ethiopia, where he lived in a refugee camp until 2012. In 2012, a friend of the Applicant, referred to in these Reasons as W.Y.Y, offered the Applicant sponsorship documents to obtain refugee status in the USA in his place. On December 17, 2012, the Applicant arrived in the US under W.Y.Y.'s name, used his documents, and thereafter remained for about seven years as a Convention refugee and later as a permanent resident.

[4] On September 11, 2018, he applied for naturalization (i.e. citizenship) in the US. American authorities discovered his false identity and subsequently arrested and charged him under paragraph 1546(a) of Title 18 of the *USC*.

[5] On January 17, 2019, in San Antonio, Texas, the Applicant pled guilty to one count of making false material statements in connection with his immigration application. On April 24, 2019, he was convicted and sentenced to 167 days in jail and 3 years of non-reporting supervised release. On August 26, 2019, an American federal judge issued a removal order against the Applicant.

[6] On September 29, 2020, he entered Canada illegally between ports of entry and was subsequently apprehended. The following day an Officer with the Canada Border Services Agency (CBSA) issued a report pursuant to subsection 44(1) of *IRPA* opining he had reasonable grounds to believe that the Applicant was inadmissible for serious criminality pursuant to paragraph 36(1)(b) of the *IRPA*.

[7] On June 3, 2021, the Board held an admissibility hearing. The hearing resumed on July 16, 2021 where the Board released its decision orally that day, finding the Applicant inadmissible.

[8] On July 27, 2021, the Applicant initiated this application for judicial review.

III. Decision under review

[9] The Board member began her analysis by setting out two concessions the Applicant made through counsel. First, the Applicant conceded that he was a foreign national. Second, the Applicant conceded that he was convicted for making false material statements in connection

with his immigration application on January 17, 2019, contrary to paragraph 1546(a) of Title 18 of the *USC*.

[10] Based on these two concessions, the Board found it had reasonable grounds to believe the Applicant was the person convicted for making false material statements in connection with the immigration application in the US.

[11] Next, the Board turned to the question if that offence were committed in Canada, would it constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. The Minister's position was that the equivalent Canadian offence was paragraph 403(1)(a) of the *Code*, which forbids identity fraud.

[12] The Board noted the Applicant's position was that he had not committed an offence at all under Canadian law, or in the alternative, that his offences are captured by *IRPA* and not the *Code*.

[13] The Board correctly recognized there are three ways to determine equivalency pursuant to the Federal Court of Appeal's reasons in *Hill v Canada (Minister of Employment & Immigration)*, [1987] F.C.J. No. 47 [*Hill*]. The Board concluded that the first method of determining equivalency did not apply:

> In reviewing the American statute found at page 19 of Exhibit C-1 and the Canadian statute found at page 22 of Exhibit C-1, it is clear on their face that a comparison of precise wording of the two is highly impractical. The American statue is an omnibus provision which provides many ways in which a person can commit the

> offence of fraud and misuse of visas, permits, and other documents.
>
> […] As this is a lengthy provision in comparison to the Canadian statute and there are far more precise words than that of the Canadian statute, the first way to conduct an equivalency analysis would not be an effective one.

[14] Moving to the second method of determining equivalency sanctioned by *Hill*, the Board held it was required to ascertain whether that evidence was sufficient to establish the essential elements of the offence in Canada. The Board referred to the following undisputed facts found in the Applicant's factual basis for the plea to indictment wherein the Applicant admitted to in his guilty plea:

> A. He applied for naturalization in the US under the name of W.Y.Y., which are actually the initials of his friend;
>
> B. The Applicant fraudulently posed as W.Y.Y. and the W.Y.Y. identity on his application for naturalization was not his own;
>
> C. The Applicant possessed and used a US permanent resident card that was assigned to W.Y.Y.;
>
> D. The Applicant provided false testimony to an immigration services officer for the purpose of obtaining an immigration benefit;
>
> E. The Applicant used W.Y.Y.'s identity to fraudulently submit an application for naturalization;
>
> F. The Application for naturalization was signed under penalty of perjury; and
>
> G. The Applicant knowingly made a false material statement on an application for naturalization because he was not actually W.Y.Y.

[15] The Board found these facts sufficient to establish the two essential elements of paragraph 403(1)(a) of the *Code*.

[16] According to the Board, the first element of paragraph 403(1)(a) is to "fraudulently personate another person, living or dead". The second element is to have "intent to gain advantage for themselves or another person."

[17] The Board held the Applicant fraudulently signed his naturalization form under the penalty of perjury with the intent to gain advantage namely becoming naturalized as a citizen of the US . The Board concluded it therefore had reasonable grounds to believe that if convicted in Canada, the Applicant's actions would constitute identity fraud under paragraph 403(1)(a) of the *Code*.

[18] Next, the Board rejected the Applicant's argument it is required to find an equivalent Canadian provision that is most similar to that of the American statute. The Board relied on *Canada v Brar,* 1999 CanLII 8984, [2000] 1 FC D-34 a decision of Justice Campbell of this Court, to conclude the Board did not need to find an equivalence with a more "appropriate Canadian legislative provision."

[19] Finally, the Board considered the Applicant's argument that he should not be found inadmissible based on his having the defence of necessity under Canadian jurisprudence. The Board considered this argument, and having applied the test set out by the Supreme Court of Canada in *R v Latimer,* 2001 SCC 1 at para 28, the Board found that it was not logical or

believable that the Applicant faced a clear and imminent peril in the USA for 7 years under a false identity. The Board found that making his own asylum claim under his actual identity was a reasonable legal alternative to disobeying the law. In determining that the defence of necessity did not apply, the Board noted it did not consider the third element of the *Latimer* test i.e. if the alleged harm inflicted was proportional to the harm avoided.

[20] The Board did not need to consider the third factor.

[21] Accordingly, the Board found the Applicant was inadmissible and issued a deportation order.

IV. Issues

[22] In my view, the issues are:

A. What is the appropriate standard of review?

B. Is the Board's decision reasonable?

V. Standard of Review

[23] The Applicant asserts the criminal law provisions and their interpretation by the Board are subject to review on a correctness standard. The Minister submits the proper standard of review is reasonableness pursuant to *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[24] In *Vavilov*, the Supreme Court of Canada established a revised analysis framework for determining the standard of review applicable to administrative decisions. The starting point for this analysis is the presumption that the reasonableness standard applies (*Vavilov* at para 23). This presumption may be rebutted in at least two types of situations: where there is a statutory appeal mechanism or where the rule of law requires that the standard of correctness be applied (*Vavilov* at para 17). With respect, this is not one of them.

[25] Although the Applicant argues the correctness standard applies to the Board's equivalency analysis, he did not point to jurisprudence supporting this proposition. To the contrary, he referred to a copy of this Court's decision in *Wang v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1510 at para 10 where Justice Mactavish [as she then was] confirmed established jurisprudence that: "Findings of equivalency are factual determinations which attract deference and are to be reviewed on the reasonableness standard." I find no merit in the Applicant's submissions. The presumption has not been rebutted and it is contrary to settled law.

[26] The issues on this application will be reviewed on the basis of reasonableness. The Supreme Court in *Vavilov* at para 126 provides pivotal guidance on reasonableness:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable

> apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
>
> [Emphasis added]

VI. Relevant sections of the law

[27] Paragraph 36(1)(b) of the *IRPA* states:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
…	…
(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	**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;
...	…

[28] Section 403 of the *Criminal Code* provides:

Identity fraud	**Fraude à l'identité**
403 (1) Everyone commits an offence who fraudulently personates another person, living or dead,	**403 (1)** Commet une infraction quiconque, frauduleusement, se fait passer pour une autre personne, vivante ou morte:

(a) with intent to gain advantage for themselves or another person;

(a) soit avec l'intention d'obtenir un avantage pour lui-même ou pour une autre personne;

(b) with intent to obtain any property or an interest in any property;

(b) soit avec l'intention d'obtenir un bien ou un intérêt sur un bien;

(c) with intent to cause disadvantage to the person being personated or another person; or

(c) soit avec l'intention de causer un désavantage à la personne pour laquelle il se fait passer, ou à une autre personne;

(d) with intent to avoid arrest or prosecution or to obstruct, pervert or defeat the course of justice.

(d) soit avec l'intention d'éviter une arrestation ou une poursuite, ou d'entraver, de détourner ou de contrecarrer le cours de la justice.

Clarification

(2) For the purposes of subsection (1), personating a person includes pretending to be the person or using the person's identity information — whether by itself or in combination with identity information pertaining to any person — as if it pertains to the person using it.

Clarification

(2) Pour l'application du paragraphe (1), se fait passer pour une autre personne quiconque prétend être celle-ci ou utilise comme s'il se rapportait à lui tout renseignement identificateur ayant trait à elle, que ce renseignement soit utilisé seul ou en conjonction avec d'autres renseignements identificateurs relatifs à toute personne.

Punishment

(3) Everyone who commits an offence under subsection (1)

(a) is guilty of an indictable offence and liable to imprisonment for

Peine

(3) Quiconque commet une infraction prévue au paragraphe (1) est coupable:

a) soit d'un acte criminel passible d'un

a term of not more than 10 years; or	emprisonnement maximal de dix ans;
(b) is guilty of an offence punishable on summary conviction.	**b)** soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

A. *Provisions of the Foreign Legislation*

[29] Section 1546 of Title 18 under the *USC* states:

> **§1546. Fraud and misuse of visas, permits, and other documents**
>
> (a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or non immigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives any such visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or
>
> Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United States, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or non immigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or
>
> Whoever, when applying for an immigrant or non immigrant visa, permit, or other document required for entry into the United States,

or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact-

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses-

> (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,
>
> (2) an identification document knowing (or having reason to know) that the document is false, or
>
> (3) a false attestation,

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481).1 For purposes of this

> section, the term "State" means a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

VII. Analysis

A. *Was the Board's decision reasonable?*

[30] Under *IRPA* paragraph 36(1)(b), a foreign national is inadmissible for serious criminality if there are reasonable grounds to believe he or she was convicted of an offence outside of Canada, that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of 10 years or more.

[31] The Applicant disputes the US offence of knowingly making a false material statement on his application for naturalization (18 USC §1546) is equivalent to identity fraud under subsection 403(1) of the *Code*. The Applicant argues his actions would not be a criminal offence in Canada at all. In the alternative, the Applicant claims his actions gave rise to offences under *IRPA*.

[32] The law is well settled on how to approach these issues.

[33] The key determination for this Court is whether the Board followed the framework set out by the Federal Court of Appeal in *Hill*. In *Hill,* the Federal Court of Appeal set out three ways to determine equivalency:

> [15] This Court in the *Brannson* case did not limit the determination of so-called "equivalency" of the paragraph of the Code, there in issue, to the essential ingredients of any offence

> specifically spelled out in the statute being compared therewith. Nor is it necessary in this case. It seems to me that because of the presence of the words "would constitute an offence ... in Canada", the 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. Third, by a combination of one and two.
>
> [Emphasis added]

[34] *Hill* followed the earlier Federal Court of Appeal decision in *Brannson v Canada (Minister of Employment & Immigration)*, (1980), [1981] 2 FC 141 [*Brannson*]. *Brannson* stressed the centrality of considering the essential ingredients of each law, that of the foreign state and that of Canada:

> [38] In this case, we have in evidence the judgment and probation commitment order and the definition of the relevant United States offence, and we know the definition of the Canadian offence. I would observe generally that in such a situation, in determining whether the offence committed abroad would be an offence in Canada under a particular Canadian statutory provision, it would be appropriate to proceed with this in mind: 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. I cannot, however, even with this in mind, escape the conclusion that the sending or transmission of "letters or circulars" is an essential element of the Canadian offence. One could not be convicted of the offence if the material transmitted or delivered were neither letters nor circulars.
>
> [Emphasis added]

[35] In the case at bar, the Board agreed with the Minister that paragraph 403(1)(a) (identity fraud) is the equivalent Canadian offence to that in respect of which the Applicant pled guilty and was convicted in the US. The Board noted "a number of Canadian provisions could be equivalent in this case [..] However, the [Federal, ed.] Court in *Brar* instructs that there is no legal requirement to find the equivalent that is the most similar and make the equivalency decision with respect to that provision only."

[36] With respect, I am not persuaded the Board acted unreasonably in finding equivalency between the offence to which the Applicant pled guilty and was convicted in the US, and paragraph 403(1)(a) of the *Code*.

[37] The Board instructed itself correctly in stating and following *Hill* as constraining law in its assessment, as it was required to do. The Board reviewed the factual components of the US offence charged and the Applicant's guilty plea. In my view, the Board reasonably concluded that the two 'essential elements' of the Canadian offence were met:

> [30] You fraudulently personated another person, specifically W.Y.Y., who was alive before you arrived in America. Therefore the first essential element of the Canadian statute is satisfied.
>
> […]
>
> [35] The second essential element of the Canadian statute is satisfied as well. You signed form N-400 under penalty of perjury, fraudulently using the full W.Y.Y name in order to gain the advantage of naturalization in America.

[38] While the Board was required to demonstrate why the selected Canadian offence is equivalent, it was not required to select the Canadian offence that would lead to the best

immigration consequences for the Applicant (see *Griffiths v. Canada (Citizenship and Immigration)*, 2021 FC 653 at para 37 citing to *Brar*). Nor was the Board required to ascertain for itself what if any other provision(s) of Canadian criminal law was equivalent to the charge to which the Applicant pled guilty and of which he was convicted. With respect, *Brar* was properly relied upon by the Board in this connection.

[39] The Board reasonably chose to apply the second method of conducting an equivalency analysis in *Hill*, by comparing the Applicant's admitted conduct in the US to the essential ingredients of the Canadian index offence, and reasonably concluded that the two offences are equivalent. As the Board pointed out, the precise wording of the US and Canadian offences is not the same. As such, the Board examined the evidence to ascertain whether or not the applicant's conduct for which he was convicted in the USA was sufficient to establish the essential elements of the offence in Canada.

[40] In addition, and in my respectful view, the Board reasonably concluded the Applicant's actions in the US were guided with "an intent to gain advantage" amounting to identity fraud. Notably, the Applicant also admitted to providing false testimony to an Immigration Services Officer for the purpose of obtaining an immigration benefit.

[41] The Applicant argued there was no advantage. I am not persuaded there was no advantage to the Applicant in seeking to become a naturalized citizen of the US. This with respect is a very difficult point to establish. Certainly, the Applicant himself saw an advantage or he would not have applied. There is no merit in this submission.

[42] The Applicant also argues the Board failed to consider all the circumstances of the guilty plea and conviction in the USA, submitting for example that equivalency should not be found where there is a conviction for assault but circumstances in which self-defence applied. In particular, he submits the Board should have considered defences available to the Applicant in Canada.

[43] There are several objections to these submissions.

[44] First, in *Grillo v Canada (Minister of Public Safety & Emergency Preparedness)*, 2021 FC 343 at para 3 [*Grillo*], Justice Grammond held an applicant may not rely on criminal law defences after having pleaded guilty to a foreign criminal offence: "[3]…I note that the ID was not required to retry the American case or speculate on the chance of success of certain defences, given that Mr. Grillo in fact pleaded guilty. Mr. Grillo has therefore failed to establish that the ID's decision is unreasonable." On this basis, the Applicant's argument fails.

[45] The second barrier to the Applicant's submissions in this regard is that the Board did in fact consider, and at some length, the defence of necessity which was raised before it by counsel for the Applicant. This is a complete answer to the Applicant's submissions. In this connection I also find the Board reasonably analyzed and relied on the Supreme Court's decision in *R v Latimer*, 2001 SCC 1 at paras 29-31, in which the Supreme Court outlined the following three essential requirements for the defence of necessity: a clear and imminent peril, no reasonable legal alternative to disobeying the law, and a proportionality between the harm inflicted and the harm avoided.

[46] With respect to the first element of this defence, the Board reasonably in my view concluded that it is neither logical nor believable that the applicant faced a clear and imminent peril, because he lived in the US for 7 years under a false identity, and was only caught when he applied for naturalization. With respect to the second element of the defence of necessity, the Board concluded that there was a reasonable legal alternative to disobeying the law – that being making an asylum claim or refugee claim in the US under the applicant's actual identity. The Board's finding in this regard is reasonable. I agree there was no need to go on to the third point.

VIII. Conclusion

[47] In my view, the Decision of the Board is justified, transparent and intelligible for the reasons set out above. It complies with constraining law and the record in this case. Therefore this application for judicial review will be dismissed.

IX. Certified question

[48] The Applicant as I understood him, proposed the following two questions for certification:

> 1. Should an immigration officer be tasked with applying a legal equivalence test where he or she must consider and apply criminal and statutory law defences?
>
> 2. Can a legal equivalent analysis still occur for crimes that have no history of being prosecuted in Canada?
>
> 3. Does the language in paragraph 36(1)(b) of *IRPA* which uses the words "would be prosecuted" require that a person has to be prosecuted in Canada in order for it to be legally equivalent, or may one substitute the word "could" where as long as there is a hypothetical possibility of prosecution, a legal equivalence analysis may be undertaken?

[49] While these questions reflect aspects of the Applicant's many submissions in this matter, I decline to certify them.

[50] The first overlooks the fact the Board did in fact assess the defence proposed by Applicant's counsel namely necessity, and found it irrelevant. It is not a proper question to certify in this case because it is a purely academic point.

[51] The second two are based on the unsound proposition that immigration officials must determine the frequency of prosecution under the Canadian reference *Criminal Code* provision. With respect, doing so would offend the approach mandated by the Federal Court of Appeal in *Hill*, and would also offend the principle enunciated by this Court in *Brar* noted above, both to the effect no such inquiry is required.

JUDGMENT in IMM-5031-21

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified, and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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