Federal Court  Cour fédérale

Date: 20240829

Docket: IMM-10867-23

Citation: 2024 FC 1353

Toronto, Ontario, August 29, 2024

PRESENT: The Honourable Justice Battista

BETWEEN:

DAVIDAE SKELTON

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant seeks judicial review of an Immigration Division (ID) decision finding that there were reasonable grounds to believe that he was inadmissible to Canada due to membership in a criminal organization pursuant to paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicant submits that the ID unreasonably found that he was a member of a criminal organization, made several unreasonable credibility findings, and that the decision was tainted by anti-Black racism.

[2] For the reasons below, I find that the decision is unreasonable based on its unjustified findings that the Applicant was a member of a criminal organization, including the dismissal of his defence of duress. This application for judicial review is granted.

II. Background

[3] The Applicant is a citizen of Jamaica who was 18 years old at the time of the offences that led to his convictions and eventual deportation from Canada. He had been sponsored to Canada as a member of the family class and became a permanent resident of Canada in 2009.

[4] The Applicant was convicted of several offences resulting from robberies that took place on May 25 and May 28, 2015. He pled guilty to these offences and was sentenced by a judge of the Ontario Court of Justice to four months' imprisonment on all counts. At his sentencing hearing on February 22, 2018, the judge stated:

> … it seemed to me that given the way your performance on bail, your performance in the institution, it appears to me that you have potential for rehabilitation. If you get a chance, it would seem to me, in a structured environment, you can become productive member of society, because the signals are there…

[5] The Applicant was first found inadmissible pursuant to paragraph 37(1)(a) of the *IRPA* on June 16, 2020. Paragraph 37(1)(a) of the *IRPA* results in inadmissibility for a permanent resident who is believed on reasonable grounds to be involved in organized criminality. This inadmissibility finding was quashed on December 8, 2021, by Madam Justice Elizabeth Heneghan, who remitted the matter for redetermination (*Skelton v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1373).

[6] The redetermination resulted in another finding of inadmissibility pursuant to paragraph 37(1)(a) in a decision dated August 10, 2023. This is the judicial review of that decision.

[7] The Applicant commenced an Application for Leave and Judicial Review of the inadmissibility decision on August 28, 2023. On February 12, 2024, Justice John Norris issued a production order in this matter. The *Federal Court Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (Guidelines) provide the following: "In cases in which the Court is inclined to grant leave, a production Order will be issued by the Court before the Application for Leave is formally adjudicated" (Guidelines at para 40, page 14). Production orders are an indication that the Court is likely to grant leave: *Rao v Canada (Citizenship and Immigration)*, 2024 FC 95 para 8.

[8] Despite the production order indicating a likelihood that leave would be granted in this matter, the Applicant was removed from Canada on April 8, 2024. His counsel attempted to file a motion to stay his deportation but the Court declined to hear the motion due to its late arrival. Justice Norris granted leave to commence this application for judicial review on May 29, 2024.

III. Decision

[9] The ID found that the issues for determining inadmissibility were whether there was a criminal organization for the purposes of paragraph 37(1)(a) of the *IRPA*, whether the Applicant belonged to a criminal organization or engaged in a pattern of criminality, and whether the Applicant was under duress when he participated in the criminal activity.

[10] Based on the evidence, the ID found that a criminal organization existed between March and May 2015, which carried out several robberies in Toronto.

[11] The ID also found that the Applicant was a member of this criminal organization. The ID found that the robberies in which the Applicant participated followed a similar pattern as previous robberies, that the Applicant "hung out" with the other members (thus forming a relationship with them), and that the Applicant had an integral role in the crimes through brandishing a weapon, as well as stealing money and property. The Member noted that the Applicant did not deny his involvement with the group.

[12] The Applicant raised a defence of duress to explain his actions, but the ID dismissed the defence on the basis that the Applicant's behaviour was implausible. The ID acknowledged the Applicant's testimony that he had received death threats by the criminal organization, that he was fearful owing to his experience of his mother's shooting and father's murder in Jamaica, and that he had no means of escaping the commission of the crimes. However, the ID found the Applicant's conduct to be inconsistent with the behaviour of a "reasonable" 18-to-21 year old in his position.

IV. Issue and standard of review

[13] The issue is whether the ID's decision is reasonable, and the standard of review for the merits of the ID's decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], affirmed in *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21).

[14] Reasonableness review requires that decisions are justified, intelligible, and transparent (*Vavilov* at para 15). Reasonable decisions are justified in respect of their legal and factual constraints and must have rational and logical reasoning (*Vavilov* at paras 101–102).

V. Analysis

[15] While the ID reasonably found that an organization existed for the purpose of applying paragraph 37(1)(a) of the *IRPA*, it made unreasonable findings regarding the Applicant's membership in that organization, including the unjustified dismissal of his defense of duress.

A. *The existence of an organization within the meaning of paragraph 37(1)(a)*

[16] The Applicant argues that the ID failed to reasonably apply the jurisprudence regarding the definition of an organization for the purposes of paragraph 37(1)(a). The Applicant states that the jurisprudence requires that organizations be defined by structure and continuity, and that the ID improperly used its own subjective indicators, such as the group's criminal methods, to find that an organization existed.

[17] However, in my view the ID's determination that a criminal organization existed is reasonable given the clarity and intelligibility of its reasons, the evidence before it, and the governing jurisprudence.

[18] The ID reasonably stated that there was no evidence of hierarchy, leadership, or group symbols in the proposed organization. The ID also conceded that there was no evidence of detailed advance planning of locations targeted by the organization.

[19] However, the ID clearly identified a number of unifying factors in the evidence that reasonably supported its determination that an organization existed. Those factors included the similar nature and proximity of the locations targeted for crimes, the similar clothing and statements used by the perpetrators of the crimes, and the same vehicle used by the perpetrators. The ID stated that while there was not a lot of detailed advance planning of the crimes, specific

roles were assigned to the perpetrators, and they shared a common motive of material benefit and financial gain. The ID identified a continuity of similar criminal activity over a period of months.

[20] The Federal Court of Appeal has held that it is "necessary to adopt a rather flexible approach in assessing whether the attributes of a particular group meet the requirements of the IRPA given their varied, changing and clandestine character," including the recognition that such organizations do not "usually have formal structures" (*Sittampalam v Canada (Citizenship and Immigration)*, 2006 FCA 326 [*Sittampalam*] at para 39; see also para 38).

[21] The jurisprudence relied upon by the Applicant recognizes the Federal Court of Appeal's determination from *Sittampalam* that organizations need only a "loose" or "informal" structure to meet the definitional elements of an organization (*Pascal v Canada (Citizenship and Immigration)*, 2020 FC 751 [*Pascal*] at para 12; *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at para 188; *Saif v Canada (Citizenship and Immigration)*, 2016 FC 437 at para 9; *Pajazitalj v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 540 at para 32).

[22] The ID correctly cited the principles from the jurisprudence related to the definition of an organization under paragraph 37(1)(a) and applied those principles to the evidence in a manner which demonstrated an understanding of the jurisprudence. The ID's determination that an organization existed was reasonable.

B. *The Applicant's membership and the allegation of duress*

[23] After finding that an organization existed for the purpose of paragraph 37(1)(a), the ID was required to determine whether the Applicant was a member of that organization. The ID's determination that the Applicant was a member is unreasonable because it was not sufficiently

rooted in the evidence before it. Moreover, the ID dismissed the Applicant's defence of duress based on an unreasonable approach to the issue as well as unjustified implausibility findings.

(1) Involvement in the organization as an indication of membership

[24] The Applicant challenges the ID's finding of membership on the basis that there was not a sufficient connection between him and the organization to establish his membership.

[25] The ID correctly referred to jurisprudence indicating that "member" should be afforded a broad interpretation (*Chiau v Canada (Minister of Citizenship and Immigration)* (TD), [1998] 2 FC 642; *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 [*Poshteh*]).

[26] However, there is also a wealth of jurisprudence providing that the definition of "membership" is more defined, including consideration of "the nature of the person's involvement in the organization, the length of time involved, and the degree of the person's commitment to the organization's goals and objectives" (*B074 v Canada (Citizenship and Immigration)*, 2013 FC 1146 at para 29 [citations omitted]). Admittedly, this jurisprudence deals with membership under paragraph 34(1)(f) of the *IRPA* (*i.e.*, being a member of an organization committing security-related crimes). However, in light of the fact that these decisions often refer to *Poshteh*, which has been imported into the paragraph 37(1)(a) analysis (see *Pascal* at para 13), it is reasonable to find these principles relevant to determining membership under paragraph 37(1)(a), notwithstanding the differences in statutory context between sections 34 and 37 of the *IRPA*.

[27] The ID acknowledged that evidence of the Applicant's criminal activity with the organization was confined to the dates of May 25 and May 28, 2015. However the ID found that he was a member of the organization for four reasons:

- he was involved in the same pattern of criminal activity,
- he “hung out” with the organization’s other members,
- he played an integral role in the criminal activities, and
- he did not deny his involvement in the crimes or with the group.

[28] The ID’s first finding is reasonable: it was based on the criminal convictions resulting from the activity. However, the remaining three findings are not reasonable.

[29] The evidence of the Applicant “hanging out” with the other organization members was contradictory to the ID’s conclusion, or at least insufficient for that conclusion. At the November 1, 2019 ID hearing, the Applicant was questioned in relation to his written submissions: “which friends are you referring to here?” (CTR at p 500). The Applicant responded: “the guy I met, like my boyfriend” (CTR at p 500). Furthermore, the Applicant explicitly stated he had only met the other members once: “the day of the commission of the series of the crimes” (CTR at pp 499–500). Thus, the ID unreasonably characterized the Applicant’s evidence regarding the formation of a relationship with the other members.

[30] Further, the ID does not explain how the Applicant played an “integral role” through brandishing a weapon and stealing money and property; this characterization is neither obvious nor supported by the evidence (see for example: CTR at p 552).

[31] Finally, while the Applicant did not deny his involvement with the group, he did characterize it as involuntary through his defence of duress, which was unreasonably dismissed by the ID as explained below.

[32] For these reasons, the ID's finding that the Applicant was a member of the organization based on his connections was unjustified and unreasonable.

(2) Unreasonable dismissal of the defence of duress

[33] The Applicant claimed that he was not a member of the organization because his participation in the crimes was under duress.

[34] As stated by Justice Michael Manson with respect to duress and membership in paragraph 37(1)(b) claims: "An individual who is forced into membership in a criminal organization under duress is not acting voluntarily... As an excuse, the defence of duress goes to voluntariness of the act in question, whether that be membership in an organization or otherwise" (*Canada (Public Safety and Emergency Preparedness) v Lopez Gaytan*, 2019 FC 1152 at paras 27, 31, aff'd on appeal in 2021 FCA 163 at para 5; see also paras 76–80).

[35] In affirming Justice Manson's decision, the Federal Court of Appeal stated:

> Just as the defence of duress serves to excuse a defendant of moral culpability and to protect them against a finding of guilt and punishment for morally involuntary conduct (see e.g. *Hibbert*, at paragraphs 48 and 52–55; *R. v. Ryan*, 2013 SCC 3, [2013] 1 S.C.R. 14, at paragraph 23),, the importation of this defence into the immigration context provides a robust framework for determining actual membership for the purposes of admissibility.
>
> [para 80]

[36] At previous ID hearings, the Applicant provided extensive sworn testimony regarding the threats and coercion he experienced in being forced to participate in the organization's crimes. The ID acknowledged that these threats of death and bodily harm were made to him and his mother. He testified that the threats were successful because of the trauma he experienced in witnessing his mother's shooting and his father's murder in Jamaica when he was a young boy.

[37] The ID acknowledged the legitimacy of the defence of duress "at first blush," and acknowledged that the Applicant received no financial benefit from the robberies. The ID then dismissed the defence on the basis of several implausibility findings. These findings were meant to cast doubt on whether the Applicant did actually face threats.

[38] The ID's approach to this issue was flawed. It did not, unfortunately, apply the jurisprudence on the defence of duress. Instead, it set up a highly subjective standard of behaviour, measured the Applicant against that standard, and when the Applicant inevitably failed to meet that standard, the ID extinguished his defence of duress.

[39] The ID's implausibility findings extended to:

(a) the Applicant's return to his cousin's home on May 28, 2015;

(b) why the Applicant did not raise the issue of duress until 2019;

(c) why he did not tell the police or his mother about the threats to his and his mother's life; and

(d) why he did not tell the Canada Border Services Agency (CBSA) about committing the crimes under duress given that he "would have realized that the threats of harm had faded away three and a half years later" and that the CBSA would not have made any connection to the organization.

[40] With respect to finding (a), the ID found that the Applicant could have returned to his boyfriend or mother's house, instead of his cousin's home, on May 28, 2015. The Applicant stated was that he was not living at his mother's house and the ID overlooked evidence that the Applicant had animosity with his stepfather in finding that he could return there. While the Applicant had indicated that he had also been living with his boyfriend at the time, the testimony revealed that

he was living there or with his cousin after having “run away” from home. The ID ignored the Applicant’s evidence with respect to this finding and speculated about what would have been the reasonable course of action for the Applicant.

[41] The ID found it implausible that the Applicant would not have raised duress earlier than 2019 and would not have told his criminal lawyer, his mother, or the police/CBSA about the threats. These are highly subjective implausibility findings which are not reasonable.

[42] With respect to finding (c), the Applicant did not talk about the threats to his mother’s life owing to her previous experience with gun violence (CTR at pp 689–690), a fact the ID characterized as her having “first hand experience with serious criminal matters in Jamaica.” In my view, it was unreasonable for the ID to find that “a reasonable 18 to 20 year old with Mr. Skelton’s family background would have told the police and/or his mother about the threats to his and his mother’s life well before meeting his immigration lawyer,” given the testimonial evidence, the nature of the Applicant’s circumstances, and the opaque nature of the descriptor of “a reasonable 18 to 20 year old with Mr. Skelton’s family background.”

[43] The Applicant testified that he did not tell his criminal lawyer because he stated that the people threatening him said “make sure nobody finds out or you are dying” (CTR at p 567). Moreover, it is clear that the strategy pursued in the criminal proceedings was to accept responsibility and plead guilty—a strategy that resulted in favourable findings from the criminal judge. The assertion of the defence of duress in the criminal proceedings would have undermined the strategy undertaken given that it would have been equivalent to a plea of not guilty. The ID’s finding regarding the implausibility of the Applicant not advising his criminal lawyer of duress was not based in evidence and is unreasonable.

[44] The ID found that the Applicant should have told the police and CBSA about the threats and duress. However, the Applicant testified that he thought he was being followed (CTR at pp 679–683) and that he was attempting to "do what [the people who threatened him] said. They said make sure the police doesn't [*sic*] hear about it" (CTR at p 680; see also CTR at p 568).

[45] The ID found that it would have been "obvious" for a reasonable person to disclose duress to a criminal lawyer given that it would have been beneficial to do so. This finding is made without regard to the evidence from the Applicant accounting for his explanation as to why he did not disclose it to anyone, including his lawyer. It also assumes what the Applicant would or would not know about the CBSA connecting him to the group, as well as whether the Applicant still feared this group despite not having been threatened by them in the years after the conviction.

[46] Implausibility findings should only be made in the clearest of cases. As stated by Justice Richard Southcott in *Flayyih v Canada (Citizenship and Immigration)*, 2024 FC 1000 at paragraph 28:

> It is trite law that implausibility findings should be made only in the clearest of cases, i.e., only if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant (see, e.g., *Gebreslasie v Canada (Citizenship and Immigration)*, 2021 FC 566 at paragraph 12, relying on *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 9, and *Zaiter v Canada (Citizenship and Immigration)*, 2019 FC 908 at para 9).

[47] The ID had an unreasonable level of confidence in the predictability of a "reasonable" 18-to-21 year old in light of the Applicant's complicated circumstances and history. Its treatment of the Applicant's defence lacked the justification required to be reasonable due to its highly subjective and speculative nature (*Vavilov* at para 15).

C. *Anti-Black racism*

[48] In his written argument, the Applicant encourages the Court to infer anti-Black racism based on the low evidence of organized criminality and the removal of the Applicant when it was clear that his challenge to the deportation order would be heard by this Court. In oral argument counsel for the Applicant did not advance submissions on the issue and was equivocal regarding whether it remained a proposed basis for review.

[49] I find insufficient evidence of racism to justify such a finding.

[50] However, it is troubling that the Applicant was deported from Canada given the clear indication from Justice Norris's production order that this Court was interested in assuming jurisdiction over the Applicant's challenge to the decision and deportation order, which led to his removal. The Respondent's actions in these circumstances, while not illegal, were certainly of highly dubious propriety.

VI. Conclusion

[51] The ID's decision finding the Applicant to be inadmissible based on paragraph 37(1)(a) of the *IRPA* is unreasonable based on its unjustified findings regarding the Applicant's membership in an organization, including the dismissal of the Applicant's defence of duress based upon highly subjective and unreasonable implausibility findings.

[52] The application for judicial review will be granted, the decision of the Immigration Division will be quashed, and the consequences of that decision, specifically the deportation order dated August 10, 2023, and the Applicant's loss of status based on that deportation order, will be declared legal nullities.

JUDGMENT in IMM-10867-23

THIS COURT'S JUDGMENT is that:

1. The application is granted, and the decision of the Immigration Division dated August 10, 2023, is quashed;

2. The matter is remitted for redetermination by a differently constituted panel;

3. For clarity, the Court declares the decision of the Immigration Division dated August 10, 2023, to be a legal nullity. As such the consequences of the decision—specifically the deportation order dated August 10, 2023, based on the decision, and the Applicant's loss of permanent resident status pursuant to section 46 of the *IRPA* based on that deportation order—are declared legal nullities.

4. There is no question for certification.

"Michael Battista"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10867-23
STYLE OF CAUSE:	DAVIDAE SKELTON v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 21, 2024
JUDGMENT AND REASONS:	BATTISTA J.
DATED:	AUGUST 29, 2024

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