Date: 20060929

Docket: IMM-7239-05

Citation: 2006 FC 1160

OTTAWA, Ontario, the 29th day of September 2006

Present: The Honourable Paul U.C. Rouleau

BETWEEN:

FADILA KHARCHI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), of a decision dated September 20, 2005, of an immigration officer of the Canadian Embassy in Paris, France, in which the applicant was refused a permanent resident visa because her husband is a person described in section 36 of the IRPA and therefore inadmissible to Canada on grounds of serious criminality.

[2] The applicant, Fadila Karchi, is the principal claimant in the immigration proceeding in Canada. Included in the same application are her husband, Abdelfettah Sayoud; their two sons, Medhi Amine Sayoud and Amir Sayoud; and their daughter, Meroua Melissa Sayoud.

[3] On November 5, 2004, Ms. Karchi and her family members obtained their Quebec selection certificate.

[4] On March 14, 2005, Ms. Karchi sent her application for permanent residence to the Canadian Embassy in Paris. In her application, she stated that her spouse had been given a suspended sentence of three months' imprisonment and a fine of 2,000 Algerian dinars, or approximately CAN$44 (Affidavit of Carmelina Paci, Exhibit K, Applicant's Record, at page 54), after being convicted of involuntary manslaughter.

[5] In a letter dated June 15, 2005, the Canadian Embassy in Paris asked Ms. Karchi to supply additional details about the automobile accident which had led to her husband's conviction.

[6] In a letter dated August 12, 2005, Ms. Karchi forwarded the police report of the accident to the Canadian Embassy in Paris.

[7] In a letter dated September 20, 2005, the immigration officer advised Ms. Karchi of her decision to refuse her application for permanent residence.

[8] On August 19, 1999, while he was in Algeria, Mr. Sayoud was driving an automobile in the wedding procession of a friend. Ms. Karchi, their three children and Ms. Karchi's niece were inside the automobile.

[9] When he arrived at a bridge, at the request of the driver ahead of him, Mr. Sayoud drove into the left lane to have a photograph taken. The wedding photographer was in the automobile ahead of Mr. Sayoud, taking pictures of all the cars in the procession as they drove by.

[10] Mr. Sayoud's automobile was the last one to be photographed.

[11] When he changed lanes, Mr. Sayoud failed to notice a vehicle approaching from the opposite direction in that same lane. He was surprised by a oncoming truck and tried unsuccessfully to avoid it.

[12] The passengers in the automobile were injured in the crash, and Ms. Karchi's niece, Hanane Bensouad, died shortly thereafter.

[13] The police detachment in Ouled Rahmoune charged Mr. Sayoud with the offence of manslaughter by carelessness, as appears from the police report.

[14] The court in Constantine found Mr. M. Sayoud guilty of involuntary manslaughter and bodily harm, which are offences punishable under articles 288 and 442 of the Algerian criminal code (Affidavit of Carmelina Paci, Exhibit I, Applicant's Record, at page 47).

[15] On January 31, 2000, Mr. Sayoud was given a suspended sentence of three months' imprisonment and fined 2,000 Algerian dinars.

[16] The immigration officer's letter dated September 20, 2005, as well as entries in the Computer Assisted Immigration Processing System (CAIPS) were included in the reasons of the contested decision.

[17] The immigration officer refused the application for permanent residence of Ms. Karchi and her family because her husband, Mr. Sayoud, was inadmissible to Canada on grounds of serious criminality under paragraph 36(1)(*b*) of the IRPA.

[18] The immigration officer noted that under paragraph 36(2)(*b*) of the IRPA, a foreign national is inadmissible to Canada for having been convicted of an offence outside Canada that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament.

[19] In addition, the immigration officer noted that Mr. Sayoud had been convicted in Algeria on January 31, 2000, of the offence of involuntary manslaughter and bodily harm following an automobile accident. Had Mr. Sayoud committed this offence in Canada, he would have been guilty of an offence under subsection 249(4) of the *Criminal Code*, R.S.C. 1985, c. C-46, and liable to

imprisonment for a term not exceeding fourteen years. Accordingly, the immigration officer concluded that Mr. Sayoud was inadmissible.

[20] The immigration officer rejected Ms. Karchi's application under subsection 11(1) of the IRPA, which provides that a foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of the IRPA.

[21] The immigration officer added that the inadmissibility extended to any stay in Canada as a visitor, and that Ms. Karchi's husband should not even try to enter Canada.

[22] The immigration officer noted that the accident did not happen under the influence of alcohol, and nothing in the judgment shows that there was any negligence on the driver's part. According to the judgment, the accused's automobile swerved to the left side of the road at the entrance to a bridge, where the accused was surprised by an oncoming truck which he unsuccessfully tried to avoid.

[23] In this case, the following issues are raised in the submissions made by the parties:

a. Did the immigration officer err in determining that Ms. Karchi's spouse was inadmissible on grounds of serious criminality under paragraph 36(1)(*b*) of the IRPA?

b. Did the immigration officer breach her duty of diligence and fairness by failing to require Ms. Karchi and her husband to appear at an interview to clarify the matter of the automobile accident?

c. Do the facts in this case warrant the award of costs on a solicitor–client basis?

[24] Subsection 11(1) of the IRPA states the conditions which must be met before a foreign national may enter Canada, namely, obtaining the required documents, which are issued if the foreign national shows that he or she is not inadmissible:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of the Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

[25] Paragraph 36(1)(*b*) of the IRPA mentions inadmissibility on grounds of serious criminality, more specifically, where a foreign national has been convicted of an offence outside Canada that would constitute an offence in Canada:

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;
…	[…]

[26] Section 249 of the *Criminal Code* describes the offence of dangerous operation of motor vehicles:

249. (1) Every one commits an offence who operates	**249**. (1) Commet une infraction quiconque conduit, selon le cas :
(*a*) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place.	*a*) un véhicule à moteur d'une façon dangereuse pour le public, eu égard aux circonstances, y compris la nature et l'état du lieu, l'utilisation qui en est faite ainsi que l'intensité de la circulation à ce moment ou raisonnablement prévisible dans ce lieu;
…	[…]
(3) Every one who commits an offence under subsection (1) and thereby causes bodily harm to any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.	(3) Quiconque commet une infraction mentionnée au paragraphe (1) et cause ainsi des lésions corporelles à une autre personne est coupable d'un acte criminel et passible d'un emprisonnement maximal

	de dix ans.
(4) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.	(4) Quiconque commet une infraction mentionnée au paragraphe (1) et cause ainsi la mort d'une autre personne est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans.

[27] Article 288 of the Algerian criminal code (Affidavit of Carmelina Paci, Exhibit J, Applicant's Record, at page 52) concerns the offence of involuntary manslaughter and states the following

> [TRANSLATION]
> Everyone who by clumsiness, carelessness, inattention, negligence or breach of a regulation involuntarily commits manslaughter, or is an involuntary cause thereof, is liable to imprisonment for a term from six months to three years and to a fine of DA1,000 to 2,000.

[28] Article 442 of the Algerian criminal code (Affidavit of Carmelina Paci, Exhibit J, Applicant's Record, at page 53) concerns penalties for offences against persons:

> [TRANSLATION]
> The following persons are liable to imprisonment for a term of at least ten days and of no more than two months and to a fine from DA100 to DA1,000, or to only one of these penalties:
>
> . . .
>
> (2) Those persons who by clumsiness, carelessness, inattention, negligence or breach of a regulation involuntarily cause injuries, trauma or illness not resulting in a total inability to work for more than three months;
>
> . . .

[29] The issue of determining whether or not an offence committed abroad of which a foreign national has been convicted is equivalent to an offence under an Act of the Parliament of Canada is an question of law. The foreign and Canadian laws in question must be interpreted to determine whether or not the two offences are equivalent, based on how the respective offences are constructed. In this context, an immigration officer does not have any special expertise. His or her interpretation of foreign and Canadian law must be correct (*Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at paragraph 37 and 59). Failure to properly conduct an equivalency assessment is a fatal error which is reviewable by this Court (*Ngo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 609, at paragraph 23).

[30] With regard to breaches of procedural fairness or principles of natural justice, this Court must study the specific circumstances to determine whether the decision-maker complied with those rules. If the Court decides that there has been a breach of procedural fairness or natural justice, it must remit the decision back to the decision-maker in question (*Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 16, [2006] F.C.J. No. 8 (QL), at paragraph 15; *Demirovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284, [2005] F.C.J. No. 1560 (QL), at paragraph 5; *Trujillo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 414, [2006] F.C.J. No. 595 (QL), at paragraph 11; *Bankole v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1581, [2005] F.C.J. No. 1942 (QL), at paragraph 7).

[31] To determine that an offence committed abroad would be an offence under an Act of Parliament if it had been committed in Canada, it must be established that the essential elements of both offences are equivalent.

[32] According to *Hill v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 47 (F.C.A.) (QL), a judgment of the Federal Court of Appeal, the essential elements of an offence are the determining factors of equivalency. Equivalence may be verified 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]

[33] This equivalence test was subsequently applied in several decisions, for example, in *Steward v. Canada (Minister of Employment and Immigration)*, [1988] 3 F.C. 487, [1988] F.C.J. No. 321 (QL), at paragraph 11; *Lo v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1155, at paragraph 36; and *Ngo v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 609, at paragraph 16.

[34] In *Brannson v. Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 141 (F.C.A.), the Federal Court of Appeal stated that the essential elements of the relevant offences must be compared to determine whether or not they are equivalent:

> 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.

[35] According to the Federal Court of Appeal in *Li v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235 (F.C.A.), the offences must be compared to determine whether or

not they are sufficiently similar, that is, if they involve the same criteria, regardless of how these criteria are characterized in each offence:

> I believe that it would be most consistent with the purposes of the statute, and not inconsistent with the jurisprudence of this Court, to conclude that what equivalency of offences requires is essentially the similarity of definitions of offences. A definition is similar if it involves similar criteria for establishing that an offence has occurred, whether those criteria are manifested in "elements" (in the narrow sense) or "defences" in the two sets of laws. In my view the definition of an offence involves the elements and defences particular to that offence, or perhaps to that class of offences. For the purpose of subparagraph 19(2)(a.1)(*i*) of the *Immigration Act* it is not necessary to compare all the general principles of criminal responsibility in the two systems: what is being examined is the comparability of offences, not the comparability of possible convictions in the two countries.

[36] Article 288 of the Algerian criminal code is very broad in scope and goes beyond the context of the offence of dangerous operation of motor vehicles under subsection 249(4) of the *Criminal Code* of Canada. In fact, article 288 of the Algerian criminal code applies where someone causes the death of another person by <u>clumsiness, carelessness, inattention, negligence or breach of a regulation</u>.

[37] *R. v. Hundal*, [1993] 1 S.C.R. 867, a key judgment which expanded the *mens rea* requirement in the context of dangerous operation of motor vehicles to make convictions easier under subsection 248(4) of the *Criminal Code*, defined dangerous driving as follows:

> Thus, it is clear that the basis of liability for dangerous driving is negligence. The question to be asked is not what the accused subjectively intended but rather whether, viewed objectively, the accused exercised the appropriate standard of care. It is not overly difficult to determine when a driver has fallen markedly below the acceptable standard of care. There can be no doubt that the concept of negligence is well understood and readily recognized by most Canadians. Negligent driving can be thought of as a continuum that progresses, or regresses, from momentary lack of attention giving rise to civil responsibility through careless driving under a provincial Highway Traffic Act to dangerous driving under the *Criminal Code*.

[38] Accordingly, not all negligence in the operation of a motor vehicle is punishable under Canadian criminal law, more specifically, under subsection 249(4) of the *Criminal Code*. For an accused to be convicted under subsection 249(4) of the *Criminal Code*, ". . . the trier of fact should be satisfied that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's situation." (*R. v. Hundal, supra*).

[39] In contrast, article 288 of the Algerian criminal code does not require a marked departure from the standard of care expected of a reasonable person, because it specifically mentions clumsiness as being punishable, although such a state is similar to the lack of attention which entails civil liability, as noted in *R v. Hundal, supra*.

[40] The evidence submitted to the immigration officer was insufficient to show that the essential elements of the offence under subsection 249(4) of the *Criminal Code* of Canada had been established in the foreign proceeding.

[41] No evidence leads to the conclusion that Mr. Sayoud was convicted of negligent involuntary manslaughter. On the contrary, the Algerian police charged him with manslaughter by carelessness (Affidavit of Carmelina Paci, Exhibit G, Applicant's Record at page 29), an offence which is not punishable under an Act of Parliament.

[42] Moreover, the term of imprisonment to which Mr. Sayoud was sentenced, that is, a suspended three-month sentence of imprisonment, is well below the six-month minimum specified in article 288 of the Algerian criminal code. Likewise, the fine of 2,000 Algerian dinars imposed on

Mr. Sayoud is at the bottom of the scale set out under article 288 of the Algerian criminal code, which provides for a fine of 1,000 to 2,000 Algerian dinars.

[43] The light sentence given to Mr. Sayoud leads to the conclusion that his blameworthiness was considered to be relatively low under article 288 of the criminal code of Algeria.

[44] It should also be noted that this was Mr. Sayoud's first offence (Affidavit of Carmelina Paci, Exhibit L, Applicant's Record, at page 55), which is an additional fact supporting the notion that Mr. Sayoud's crime is not very serious.

[45] Carelessness is not punishable under Canadian criminal law. Carelessness in the operation of a motor vehicle would instead be liable to prosecution under provincial highway codes.

[46] In her CAIPS notes, the immigration officer referred to the fact that [TRANSLATION] "carelessness seems to be established" and that [TRANSLATION] "dangerous driving causing the death of a person is a criminal offence punishable by a maximum term of 14 years' imprisonment" as reasons for her decision that Mr. Sayoud was inadmissible on grounds of serious criminality. The immigration officer referred to dangerous driving and careless driving as if they were one and the same under the law.

[47] However, dangerous driving and careless driving are distinct principles in law, as the former entails criminal liability under the *Criminal Code*, while the latter entails civil liability under provincial highway codes.

[48] Therefore, the immigration officer erred in her interpretation of the essential elements of the offence of dangerous operation within the meaning of section 249 of the *Criminal Code*.

[49] Nothing in the evidence shows that Mr. Sayoud committed an offence which has the same essential elements as that of dangerous operation under subsection 249(4) of the *Criminal Code*.

[50] Nothing in the evidence shows that the immigration officer analyzed the essential elements of the two offences. Nothing in the evidence shows that the immigration officer even consulted the Algerian criminal code.

[51] Accordingly, the immigration officer committed an error in determining that the two offences (article 288 of the Algerian criminal code and section 249 of the Canadian *Criminal Code*) were equivalent.

[52] Ms. Karchi alleges that the immigration officer breached her duty of diligence and fairness by failing to require her and her husband to appear at an interview to clarify the matter of the automobile accident.

[53] First of all, it is important to note that, in a letter dated June 15, 2005, the immigration officer requested additional information for the analysis of the application for a permanent resident visa. The immigration officer asked for a copy of the complete police report to better assess the circumstances of the automobile accident in question.

[54] Accordingly, the complete accident report was filed in the record along with the criminal judgment. It appears that the immigration officer was of the opinion that this evidence was sufficient to allow the analysis of the application to proceed.

[55] It is clear that the immigration officer was not required to conduct an interview out of fairness. The Court wrote the following in *Lo, supra*, at paragraph 35:

> In my opinion, the visa officer was not required to give Mr. Lo the chance to make submissions with respect to criminal equivalency, nor were the subsequent visa officers functus Visa Officer Menard's decision to issue a visa.

[56] Given that the requirements related to procedural fairness are minimal, in these circumstances, Ms. Karchi's argument to the effect that the immigration officer breached her duty of fairness because she did not require them to appear at an interview is unfounded.

[57] In *Silion v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1390 (F.C.) (QL), at paragraph 11, Mackay J. wrote the following:

> The decision is essentially an administrative one, made in the exercise of discretion by the visa officer. There is no requirement in the circumstances of this or any other case that he personally interview a visa applicant. There may be circumstances where failure to do so could constitute unfairness, but I am not persuaded that is the case here . . . .

[58] Ms. Karchi seeks costs on a solicitor–client basis, alleging the lack of initiative of the immigration officer, who neglected to apply the equivalency tests.

[59] In general, Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules* prohibits the award of costs in cases such as the one at bar, except for special reasons.

[60] In this case, there is no evidence of special reasons warranting the award of costs to Ms. Karchi.

[61] The decision rendered in this case does not warrant the award of costs. There was no indication of bad faith on the part of the Minister of Citizenship and Immigration, who did in fact study and analyze the evidence before rendering a decision.

[62] The immigration officer did not follow the procedure set out in *Hill, supra*, to determine whether or not the offence committed abroad was equivalent to an offence under an Act of Parliament. Therefore, she erred in determining that the offences were equivalent and in relying on this determination to decide that Mr. Sayoud was inadmissible.

JUDGMENT

The application for judicial review is allowed, and the decision is remitted to a different immigration officer for redetermination.

"Paul U.C. Rouleau"
Deputy Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Rosalie Brunel	FOR THE APPLICANT
Daniel Latulippe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Brunet Avocats Montréal, Qc	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT