Federal Court  Cour fédérale

Date: 20110722

Docket: IMM-6802-10

Citation: 2011 FC 921

Ottawa, Ontario, July 22, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

ARTEM MKRTCHYTAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Respondent (the Minister) submits that the Applicant, a citizen of Armenia who would like to claim refugee status in Canada, is inadmissible to Canada on grounds of organized criminality. The problem for the Applicant is that he came to Canada with a criminal record acquired in the United States, as a result of a crime that may have been a part of organized criminal activities.

[2] In a decision dated October 26, 2010, a panel of the Immigration Division of the Immigration and Refugee Board [the ID] found that there were reasonable grounds to establish that the Applicant "is described in both paragraph 37(1)(a) and paragraph 37(1)(b) of the [*Immigration and Refugee Protection Act*, S.C. 2001, c.27] *Act*" and was, therefore, inadmissible to Canada. The Applicant seeks to overturn the ID's decision, raising the following issues:

1. Did the ID err by failing to give adequate notice to the Applicant that it would consider the admissibility of the Applicant pursuant to: (a) that portion of s. 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 [the Act] that provides that a foreign national is inadmissible on grounds of organized criminality for engaging in activity that is part of a pattern of criminal activity commonly described as organized criminality (rather than being a member of an organization that engages in such activity); or (b) s. 37(1)(b) that provides for inadmissibility for engaging in transnational crime; and

2. Was the ID's decision that the Applicant was inadmissible unreasonable?

[3] For the reasons that follow, I conclude that, while the Applicant had adequate notice of the alleged grounds of inadmissibility, the decision should be quashed on the basis that it is unreasonable.

Issue #1: Adequacy of Notice

[4] The issue of adequacy of notice raises a question that is reviewable on a standard of correctness.

[5] I begin with the report [the s. 44 Report] under s. 44(1) of the Act. In the s. 44 Report, an immigration officer stated that he was of the opinion that the Applicant was inadmissible to Canada pursuant to s. 37(1)(a) and s. 37(1)(b) of the Act. Those provisions of the Act are as follows:

37.(1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for (a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or (b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.	37.(1) Emportent interdiction de territoire pour criminalité organisée les faits suivants : a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan; b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité

[6] In the context of this application it is important to note the two aspects of s. 37(1)(a). A foreign national may be found to be inadmissible for being a member of an organization that is engaged in organized crime or for engaging in activities related to organized crime. On the bifurcation of s. 37(1)(a), Justice Evans in *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 122, [2006] 1 FCR 474, at paragraph 30, stated as follows:

> The structure of paragraph 37(1)(a) makes it clear that "membership" of a gang and engaging in gang-related activities are discrete, but overlapping grounds on which a person may be inadmissible for "organized criminality". The "engaging in gang-related activities" ground of "organized criminality" was added by the *IRPA* and did not appear in its predecessor, paragraph 19(1)(c.2) of the *Immigration Act*, R.S.C. 1985, c. I-2. In order to give meaning to the amendment to the previous provision made by the *IRPA*, Parliament should be taken to have intended it to extend to types of involvement with gangs that are not included (or not clearly included) within "membership".

[7] The s. 44 Report refers to all of s. 37(1)(a) and s. 37(1)(b). The narrative portion of the s. 44 Report appears to focus on the Applicant as someone who “has been the member of a criminal organizational group”. There is no reference in the narrative portion of the s. 44 Report to “engaging in gang-related activities” or to transnational crimes. However, the s. 44 Report is clear that all three grounds were “on the table” for consideration by the ID.

[8] As provided for in s. 44(2) of the Act, the Minister referred the s. 44 Report to the ID for an admissibility hearing to determine if the Applicant “is a person described in paragraph(s) 37(1)(a)(b)”. In other words, the referral did not limit the grounds.

[9] A hearing was held before the ID. At the beginning of the hearing, the ID referred to the allegations of the s. 44 Report as being that the Applicant was inadmissible (a) pursuant to

s. 37(1)(a) for being a member of an organization engaged in organized criminality; and (b) for being inadmissible under s. 37(1)(b) of the Act. At this point, the ID did not explicitly refer to any allegation of "engaging in gang-related activities". Throughout the entirety of the transcript, there is no further reference to the alleged grounds for inadmissibility.

[10] At the conclusion of the hearing, the ID gave counsel time to submit written submissions. The ID did not specify the issues to be addressed. In final written submissions of the Minister, reference is made to all three grounds – the two set out in s. 37(1)(a) and that of s. 37(1)(b). In conclusion, "the Minister submits that he has not met the burden of establishing that Mr. Mkrtchyan is inadmissible pursuant to 37(1)(a) and 37(1)(b)".

[11] The Applicant relies on the decision in *Butt v. Canada (Minister of Citizenship and Immigration)* (1998), 145 F.T.R. 122, [1998] FCJ No 325 (QL) (FCTD) to support its allegation that there was a denial of natural justice. In that case, the decision of the Convention Refugee Determination Division of the Immigration and Refugee Board was overturned because the Board failed to indicate that credibility was an issue, resulting in a denial of natural justice. However, in *Butt*, unlike the case before me, the Board had not, when asked by counsel, explicitly listed credibility as an issue. In the case before me in this application, the ID never stated that any of the grounds were not under consideration; in fact, the only explicit statements made were to the opposite at the commencement of the hearing. Moreover, the Minister's written submissions made explicit reference to all three grounds.

[12] In my view, while the ID could have been more explicit with respect to the fact that it would consider all three grounds of inadmissibility, the record discloses that there was adequate notice to the Applicant that it would do so. There was no denial of natural justice.

Issue #2: Reasonableness of the Decision

[13] The second issue raised by this application is whether the decision was reasonable. The parties accept that the standard of review of the decision is that of reasonableness. As taught by the Supreme Court of Canada, on a standard of reasonableness, the Court should not intervene where the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para 47).

[14] The first point to make is that the ID is under no obligation to defer to the opinion of the Minister (see *Alwan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 807, [2004] FCJ No 982 (QL) at para 7). Parliament has vested the ID with the sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction (the Act, s. 162(1)). It was the ID's mandated function to assess the inadmissibility of the Applicant and the well-foundedness of the s. 44 Report (the Act, s. 44(2)). It is open to the ID to choose not to accept the submission of the Minister, provided that it does so with clear reasons and based on the evidence before it.

[15] In this case, I acknowledge the high degree of deference to be accorded to the ID and the fact that the ID may reach a conclusion that does not agree with the Minister's conclusion. However, on the facts of this case, I cannot conclude that the conclusion was reasonably supported by the evidence.

[16] The essence of the allegations against the Applicant is that he was engaged in activities involving a criminal organization known as Global Human Services (GHS). As reflected in a press release of the Los Angeles Police Department (LAPD), the Applicant was one of six individuals arrested by the LAPD on warrants connected with an investigation into the activities of GHS. According to the press release, the GHS was a registered non-profit charity which regularly sent humanitarian relief overseas in large shipping containers while actually using this 'charity' as a front for international car theft and fraud activities. The Applicant pleaded guilty to and was convicted and sentenced in the State of California for "grand theft auto".

[17] The Applicant submits that the ID erred in finding that he had engaged in activities associated with GHS's pattern of criminal activity. I agree. The only evidence linking the Applicant to the GHS was the LAPD press release, which press release did not specify the Applicant's connection to GHS. The press release merely stated that the Applicant had been arrested in connection with the police investigation of GHS. The Applicant testified before the ID that he had never heard of GHS and did not know what it did nor whether it existed, except insofar as it was mentioned to him during his criminal proceedings in the United States. The ID found that the Applicant was not a member of GHS, and accepted his evidence that he had not heard of it until he

was charged. However, the ID concluded that the Applicant was engaged in activities of the GHS, as contemplated by the second ground of s. 37(1)(a).

[18] The key problem with the ID's conclusion is that, beyond the LAPD press release, there is nothing before the ID to support its conclusion in this regard. The Minister was unsuccessful in obtaining any notes or details of the charges made against the Applicant or of his plea agreements. Indeed, beyond the bare assertions in the press release, there is nothing that supports a conclusion that the GHS is a criminal organization. There is no documentary evidence in the Certified Tribunal Record that describes the activities of the GHS. There was no evidence regarding anyone who was a member of GHS, nor whether any of the people arrested in connection with the investigation had been found to be members of that organization.

[19] It is very clear that the Applicant was guilty of a crime; he did not deny that. However, the ID's conclusion is unsustainable unless there was evidence that: (a) the GHS was a criminal organization within the contemplation of s. 37(1)(a); and (b) the Applicant was engaged in activities linked to the GHS. The evidence is that the Applicant pleaded guilty to insurance fraud and car theft. While it is true that, as stated by the ID, those are the same activities in which the press release stated the GHS engaged, there is no objective evidence establishing that link. In the absence of such evidence, it was unreasonable for the ID to find that the applicant was engaged in activities for GHS and, therefore, had engaged in organized criminal activity.

[20] I have a similar concern with the ID's conclusions on the Applicant's role in transnational crime (s. 37(1)(b)).

[21] In sum, the LAPD press release is woefully inadequate to support the ID's findings on either s. 37(1)(a) or 37(1)(b).

[22] In concluding that the ID's decision is unreasonable, I am well aware of the low standard of proof involved in a s. 37 inadmissibility decision. Section 33 of the Act states that the facts that constitute inadmissibility include facts arising from omissions and include facts that there are reasonable grounds to believe:

33. The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33. Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir

[23] In light of s. 33, and the decisions of this Court affirming the reasonable grounds standard for the proof of facts underlying section 37(1) in general, I conclude that the ID correctly interpreted the standard of proof required for demonstrating the existence of a criminal organization under section 37(1). However, this does not excuse the ID from the obligation to find some grounds to believe beyond a press release.

Conclusion

[24] In its decision, the ID carried out a careful and correct analysis of the law related to its mandate. Moreover, the ID did not err by failing to give adequate notice to the Applicant of the grounds upon which it was relying to determine inadmissibility. However, the real problem – and

the reviewable error – arises due to the lack of an evidentiary record to support the ID's conclusions. As a result, the decision does not fall within a range of possible, acceptable outcomes; it is not defensible in light of the facts before the ID. It will be set aside.

[25] The Applicant proposes a question for certification as to whether it is an error for the ID to make a finding under both grounds of s. 37(1)(a) and 37(1)(b), where the Minister has only alleged inadmissibility under one ground of s. 37(1)(a). The problem with such a question is that the Minister in his submissions to the ID did refer to all three grounds, even though the primary focus was on the grounds of membership in the GHS. The question does not arise on the facts of this case. Moreover, even if the question does arise, the answer is not necessarily determinative of the judicial review, since I have also concluded that the decision was unreasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is allowed, the decision of the ID is quashed and the matter is sent back to the ID for re-determination by a newly-constituted panel of the ID; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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