Federal Court  Cour fédérale

**Date: 20121003**

**Docket: IMM-2440-12**

**Citation: 2012 FC 1166**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, October 3, 2012**

**PRESENT: The Honourable Madam Justice Gagné**

**BETWEEN:**

**DOMINIQUE LINISE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Division of the Immigration and Refugee Board [ID], dated February 24, 2012, by which the applicant was determined to be inadmissible to Canada pursuant to paragraph 36(2)(*d*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for committing an offence under section 159 of the *Customs Act*, RSC, 1985, c 1 (2nd Supp) [CA].

***Background***

[2] The applicant, Dominique Linise, is a French citizen of Martinican origin. Since 2006, he has been living in Canada as a temporary resident with a renewable study permit.

[3] On August 23, 2011, when the applicant was returning to Canada after a trip to Martinique, a customs officer at Montréal–Pierre Elliot Trudeau International Airport found a pipe containing 0.001 grams of cannabis residue in his luggage, along with a small bag containing 0.5 grams of cannabis, essentially in the form of seeds (the evidence in the record does not indicate whether or not the seeds were sterile). These quantities are stated in the assessment report made by the Canada Border Services Agency that same day.

[4] Although police authorities were notified, no criminal charges were laid against the applicant. However, a report on inadmissibility was made, and the applicant's file was referred to the ID in accordance with section 44 of the IRPA.

[5] A hearing was held before the ID on February 24, 2012. At the conclusion of that hearing, the applicant was determined to be inadmissible, and a removal order was made against him.

[6] Before considering the reasons for the impugned decision, a review of the relevant statutory provisions is required.

***Relevant statutory provisions***

[7] One of the grounds for inadmissibility for criminality is set out at paragraph 36(2)(*d*) of the IRPA:

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| 36. (2) A foreign national is inadmissible on grounds of criminality for | 36. (2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants : |
| . . . | […] |
| (*d*) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations. | *d*) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement. |

(emphasis added)

[8] An offence such as this one, among others, may trigger the removal process provided for at section 44 of the IRPA on the basis of a determination of inadmissibility:

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| 44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister. | 44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre. |
| (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order. | (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi. |
| . . . | […] |

[9] For the purposes of paragraph 36(2)(*d*) of the IRPA, the *Customs Act*, RSC, 1985, c 1 (2nd Supp) [CA], and the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA], are listed or *prescribed* in the *Immigration and Refugee Protection Regulations* (SOR/2002-227).

[10] However, the ID bases its decision on the CA. Section 159 of the CA creates the offence that the applicant allegedly committed, which offence may lead to criminal proceedings and is punishable by the penalties provided for at section 160:

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| 159. Every person commits an offence who smuggles or attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament. | 159. Constitue une infraction le fait d'introduire ou de tenter d'introduire en fraude au Canada, par contrebande ou non clandestinement, des marchandises passibles de droits ou dont l'importation est prohibée, contrôlée ou réglementée en vertu de la présente loi ou de toute autre loi fédérale. |
| . . . | […] |
| 160. (1) Every person who contravenes section 11, 12, 13, 15 or 16, subsection 20(1), section 31 or 40, subsection 43(2), 95(1) or (3), 103(3) or 107(2) or section 153, 155, 156 or 159.1 or commits an offence under section 159 or knowingly contravenes an order referred to in subsection 107(11) | 160. (1) Quiconque contrevient aux articles 11, 12, 13, 15 ou 16, au paragraphe 20(1), aux articles 31 ou 40, aux paragraphes 43(2), 95(1) ou (3), 103(3) ou 107(2) ou aux articles 153, 155, 156 ou 159.1, commet l'infraction prévue à l'article 159 ou contrevient sciemment à une ordonnance visée au paragraphe 107(11) encourt, sur déclaration de culpabilité : |
| (*a*) is guilty of an offence punishable on summary conviction and liable to a fine of not more than fifty thousand dollars or to imprisonment for a term not exceeding six months or to both that fine and that imprisonment; or | a) par procédure sommaire, une amende maximale de cinquante mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines; |
| (*b*) is guilty of an indictable offence and liable to a fine of not | b) par mise en accusation, une amende maximale de cinq cent |

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| more than five hundred thousand dollars or to imprisonment for a term not exceeding five years or to both that fine and that imprisonment. | mille dollars et un emprisonnement maximal de cinq ans, ou l'une de ces peines. |

(emphasis added)

[11] However, the importation of cannabis is prohibited under the CDSA. Sections 4 and 6 of the CDSA make it a criminal offence to possess, import or export certain substances listed in the schedules to that act:

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| 4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III. | 4. (1) Sauf dans les cas autorisés aux termes des règlements, la possession de toute substance inscrite aux annexes I, II ou III est interdite. |
| . . . | […] |
| (4) Subject to subsection (5), every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II | (4) Quiconque contrevient au paragraphe (1) commet, dans le cas de substances inscrites à l'annexe II mais sous réserve du paragraphe (5) : |
| (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day; or | a) soit un acte criminel passible d'un emprisonnement maximal de cinq ans moins un jour; |
| (*b*) is guilty of an offence punishable on summary conviction and liable | b) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible: |
| (i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and | (i) s'il s'agit d'une première infraction, d'une amende maximale de mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines, |
| (ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both. | (ii) en cas de récidive, d'une amende maximale de deux mille dollars et d'un emprisonnement maximal d'un an, ou de l'une de ces peines. |

(5) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VIII is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both.

(5) Quiconque contrevient au paragraphe (1) commet, dans le cas de substances inscrites à la fois à l'annexe II et à l'annexe VIII, et ce pourvu que la quantité en cause n'excède pas celle mentionnée à cette dernière annexe, une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'une amende maximale de mille dollars et d'un emprisonnement maximal de six mois, ou de l'une de ces peines.

. . .

[…]

6. (1) Except as authorized under the regulations, no person shall import into Canada or export from Canada a substance included in Schedule I, II, III, IV, V or VI.

6. (1) Sauf dans les cas autorisés aux termes des règlements, l'importation et l'exportation de toute substance inscrite à l'une ou l'autre des annexes I à VI sont interdites.

(2) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, III, IV, V or VI for the purpose of exporting it from Canada.

(2) Sauf dans les cas autorisés aux termes des règlements, il est interdit d'avoir en sa possession, en vue de son exportation, toute substance inscrite à l'une ou l'autre des annexes I à VI.

(3) Every person who contravenes subsection (1) or (2)

(3) Quiconque contrevient aux paragraphes (1) ou (2) commet:

(*a*) where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;

a) dans le cas de substances inscrites aux annexes I ou II, un acte criminel passible de l'emprisonnement à perpétuité;

(*b*) where the subject-matter of the offence is a substance included in Schedule III or VI,

b) dans le cas de substances inscrites aux annexes III ou VI :

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or

(i) soit un acte criminel passible d'un emprisonnement maximal de dix ans,

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a

(ii) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible

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| term not exceeding eighteen months; and | d'un emprisonnement maximal de dix-huit mois; |
| (*c*) where the subject-matter of the offence is a substance included in Schedule IV or V, | c) dans le cas de substances inscrites aux annexes IV ou V : |
| (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or | (i) soit un acte criminel passible d'un emprisonnement maximal de trois ans, |
| (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year. | (ii) soit une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal d'un an. |

(emphasis added)

[12] Cannabis resin and cannabis (marihuana) are substances included in Schedule II to the CDSA. Sterile cannabis seeds are excluded, but the derivatives of such seeds are not.

***Decision under review***

[13] Before the ID, the Minister of Public Safety and Emergency Preparedness [MPSEP] argued that the applicant had committed a criminal offence under section 159 of the CA, the prohibited good being cannabis, the importation of which is prohibited under section 6 of the CDSA. It should be noted that unlike section 4, which prohibits possession, section 6 of the CDSA does not set out any minimum amounts of illegal substances for the purposes of importing.

[14] According to the evidence, the applicant regularly uses cannabis for medical reasons, to treat his epilepsy. He filed a certificate from his doctor, who has been treating him since 2007 and prescribed him cannabis for this purpose. The applicant is a member of the Centre compassion de Montréal, which describes itself as a medical cannabis dispensary. The applicant states that he made

sure to empty out the contents of his pipe and his small bag before leaving Martinique because he had previously been advised by a customs officer that he was not allowed to travel in Canada with cannabis.

[15] The ID found that the applicant's testimony was credible.

[16] However, for the purposes of section 159 of the CA, the ID held that the applicant was responsible for the materials he was carrying in his luggage even though the cannabis was left in there out of negligence or carelessness.

[17] The ID noted that cannabis, even in the form of viable seeds, is a drug included in Schedule II to the CDSA, such that its importation is prohibited.

[18] The ID rejected the applicant's argument to the effect that he could raise the defence of *de minimis non curat lex* because the amount of cannabis found in his suitcase upon his arrival in Montréal was minimal. In the opinion of the ID, Parliament did not temper the offence of importing drugs or other illicit substances, as neither section 6 of the CDSA nor section 159 of the CA sets out minimum amounts. Moreover, this is a criminal law defence that is not recognized in administrative law, where the burden of proof and the penalties are very different.

[19] The ID found that there were reasonable grounds to believe that an offence had been committed under section 159 of the CA and therefore ordered that the applicant be deported.

***Issues***

[20] In light of the parties' written and oral submissions, this application for judicial review raises the following issues:

1) The standard(s) of review applicable to the ID's decision.

2) Whether the impugned decision is correct or reasonable, as the case may be.

***Applicable standard of review***

[21] The applicant submits that the ID's interpretation of section 159 of the CA must be reviewed on a standard of correctness, since the CA is not a statute of which the ID has specialized knowledge or which is [TRANSLATION] "closely connected" to the ID's function. Relying on the judgments of this Court in *Mohammad c Canada (Minister of Citizenship and Immigration)*, 2010 FC 51 at paras 48-51, [2010] FCJ 50 [*Mohammad*] and *Rizwan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 781 at para 31, [2010] FCJ 957 [*Rizwan*], he submits that this is essentially a question of law. He adds that the question of whether there are *reasonable grounds to believe* (within the meaning of section 33 of the IRPA) that an offence under an Act of Parliament prescribed by regulations has been committed is a question of mixed fact and law, which is reviewable on a standard of reasonableness.

[22] Before we can address the first issue raised in this application for judicial review, a clarification is in order. Since the ID found that the applicant's testimony was credible, there was no need to emphasize the burden of proof required under section 33 of the IRPA when analyzing the facts, acts or omissions set out in section 34 to 37. The real issue before the ID was whether or not the applicant had committed the cross-border offence provided for in section 159 of the CA. In other

words, the ID had to determine whether the facts, as adduced and without dispute, proved the elements of this offence.

[23] As Justice O'Keefe notes in *Mohammad*, what constitutes an act of terrorism within the meaning of paragraph 34(1)(*c*) of the IRPA is a question of law reviewable on the correctness standard, but the reasonableness standard applies to the factual component of the decision:

> It bears noting that applying the standard of reasonableness in these cases involves an added wrinkle, for the legislation itself contains the qualification that there need only be "reasonable grounds to believe". Therefore, to require on review that those reasonable grounds to believe did in fact exist, would be to apply a correctness standard. Applying the reasonableness standard means the Court does not need to satisfy itself that reasonable ground to believe existed, only that the officer's conclusion that there were reasonable grounds to believe, was a reasonable conclusion on his or her part.
>
> The "reasonable grounds to believe" standard mandated by section 33 of the Act has been held to require more than mere suspicision [*sic*], but less than the civil standard of or proof on a balance of probabilities. It is a *bona fide* belief in a serious possibility based on credible evidence (see *Jalil* 2006 at paragraph 27).
>
> The "reasonable grounds to believe" standard however does not apply to an officer's determination of law (see *Mugesera v. Canada (Minister of Citizenship and Immigration*), [2005] 2 S.C.R. 100, [2005] S.C.J. No. 39 (QL) at paragraph 116). What constitutes an act of terrorism is a matter of law. While the officer need only to have had reasonable grounds to believe that an act occurred, and may make findings of fact regarding the purposes behind the act, his determination that the act was an act of terrorism must be correct.

[24] Similarly, in *Rizwan*, Justice Mosley held that the immigration officer had to use the correct interpretation of "terrorism", as defined by the Supreme Court in *Suresh v Canada (Minister of*

*Citizenship and Immigration)*, 2002 SCC 1 at para 98, [2002] 1 SCR 3, when applying paragraph 34(1)*f*) of the IRPA.

[25] The respondent supports the ID's decision as a whole, which in his view is reviewable on the reasonableness standard. He submits that the MPSEP is responsible for applying both the IRPA and the CA, which suggests that they have some authority over the application of these two statutes. The respondent also argues that because the ID has jurisdiction to apply section 159 of the CA in accordance with the burden of proof set out in section 33 of the IRPA, it has a sufficiently specialized knowledge of the matter.

[26] Finally, the respondent notes that the inadmissibility provisions of the IRPA, namely, sections 34 to 37, generally require knowledge of other laws to determine whether a person is inadmissible. On this point, the respondent relies on *Sayer v Canada (Minister of Citizenship and Immigration)*, 2011 FC 144 at paras 4-5, [2011] FCJ 352, in which it was held that, for the purposes of applying paragraph 36(2)(*b*) of the IRPA, the standard of review applicable to the question of the equivalence of an offence under Turkish law to the offence of assault set out in section 266 of our *Criminal Code* is reasonableness.

[27] Having considered all of the arguments submitted by each side, the Court is of the opinion that in the present case, the interpretation of the legislative provision in question—whose application is not closely connected to the administrative board's function—is a question of law and therefore reviewable on a correctness standard.

[28] It is true that the fact that the same minister is responsible for applying both statutes shows a certain closeness in their purposes. However, I cannot conclude from this that the CA is a statute that is "closely connected to [the] function" of the ID or with which it has a "particular familiarity" within the meaning of *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190. The CA is a penal statute that applies to everyone regardless of their status in Canada and that covers many different matters. Although the various divisions of the Immigration and Refugee Board do have jurisdiction to apply it in relation to provisions of the IRPA (just as they may be called upon to apply certain provisions of the *Criminal Code*), this does not mean that they have specialized knowledge of it.

[29] Even if such were the case, I agree with the decisions of this Court in *Mohammad* and *Rizwan*, above, which establish that a question of law, even if it concerns a tribunal's home statute, could be reviewed on a standard of correctness if it is not inextricably intertwined with the facts (see *Smith v Alliance Pipeline Ltd*, 2011 SCC 7, [2011] 1 SCR 160, and *Nor-Man Regional Health Authority Inc v Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para 36, [2011] 3 SCR 616, which were rendered after the abovementioned decisions). Moreover, the respondent did not submit any compelling arguments for distinguishing this case law on the basis of the facts in this application.

***Offence under section 159 of the CA***

[30] Before addressing the second issue raised by this application for judicial review, I would like to make a second clarification. The ID found that the respondent's version, namely that the

cannabis seeds in his small bag (0.5 g) were left there inadvertently, was credible. Since the respondent did not challenge this finding of fact, the Court is obliged to accept it.

[31] That said, the applicant submits that the ID erred in interpreting and applying section 159 of the CA and that, consequently, its decision is necessarily unreasonable.

[32] The applicant submits that the case law on the notion of "*fraude*" indicates that it involves an element of dishonesty. Regarding the element of "*fraude*" set out in section 159 of the CA, the applicant refers to the decision of the Court of Queen's Bench of Saskatchewan in *R v Leugner*, 2011 SKQB 469 at para 34, in which that Court states that one of the essential elements of this offence is that the accused knew that the goods were prohibited at the time he or she entered Canada.

[33] The respondent reads section 159 of the CA differently. He submits that simply bringing a prohibited good into Canada, on the one hand, or attempting to bring it in, on the other, is in either case an offence within the meaning of this provision. Thus, the respondent argues that the mere fact that the applicant had in his possession a certain amount of cannabis upon his entry into Canada and did not declare it is enough to establish that he committed the offence.

[34] With respect, the Court does not agree with this interpretation. On a plain reading of section 159, it is clear that the act of smuggling or attempting to smuggle must be fraudulent, whether this is done clandestinely or not. The English version confirms this interpretation.

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| 159. Every person commits an offence who smuggles or | 159. Constitue une infraction le fait d'introduire ou de tenter |

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| attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament. | d'introduire en fraude au Canada, par contrebande ou non clandestinement, des marchandises passibles de droits ou dont l'importation est prohibée, contrôlée ou réglementée en vertu de la présente loi ou de toute autre loi fédérale. |

[emphasis added]

[35] The use of the word "*fraude*" in the phrasing of section 159 cannot be inconsequential. It is well known that Parliament does not speak in vain. Moreover, the CA is a criminal law statute, so the crimes set out in it must have a *mens rea* component.

[36] From this, I conclude that the ID erred in its interpretation of section 159 when it decided that even though it was out of negligence or carelessness that the applicant travelled to Canada with cannabis in his luggage, he was still liable for the materials he was carrying.

[37] Given the reasons set out in this decision, the application for judicial review will be allowed, and the case will be referred back to a differently constituted panel of the Immigration Division of the Immigration and Refugee Board for reassessment of the respondent's credibility on the basis of all of the evidence, particularly the fact that he was in possession of (possibly viable) cannabis seeds and not cannabis. No questions were proposed to me for certification, and none will be certified.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that:**

1. The application for judicial review of the decision of the Immigration Division of the Immigration and Refugee Board, dated February 24, 2012, is allowed.
2. The matter is hereby referred back to a differently constituted panel of the Immigration Division for reconsideration in accordance with these reasons for judgment.
3. No question is certified.

"Jocelyne Gagné"
Judge

Certified true translation
Michael Palles

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2440-12 |
| **STYLE OF CAUSE:** | Dominique Linise v MCI |
| **PLACE OF HEARING:** | Montréal, Québec |
| **DATE OF HEARING:** | August 30, 2012 |
| **REASONS FOR JUDGMENT & JUDGMENT:** | GAGNÉ J. |
| **DATED:** | October 3, 2012 |

**APPEARANCES:**

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| Ornella Saravalli | **FOR THE APPLICANT** |
| Diane Lemery | **FOR THE RESPONDENT** |

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