Federal Court  Cour fédérale

Date: 20140107

Docket: IMM-9844-12

Citation: 2014 FC 16

Ottawa, Ontario, January 7, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ALEJANDRO MARIANO CHUNG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [Act] for judicial review of the decision of the Immigration Division [ID] of the Immigration and Refugee Board, dated 6 September 2012 [Decision], which found that the Applicant was a person described under subsection 37(1)(a) of the Act and was therefore inadmissible to Canada.

BACKGROUND

[2] The Applicant is a 47-year-old citizen of Chile and a permanent resident of Canada. He arrived in Canada in 1979, when he was 13 years old and, at the time of the Decision, had not been back to Chile since.

[3] The Applicant has an extensive criminal record spanning approximately 30 years. He joined the Hells Angels in 2010, and quit in 2011, though he had been associated with the group for years. There is no dispute that the Hells Angels is a criminal organization. The Applicant admits to being a past member of the Hells Angels with "prospect" status, which is the final rank before becoming a full-patch member.

[4] Detective Wes Law of the Winnipeg Police Service provided an opinion on the Applicant's involvement with the Hells Angels (Applicant's Record, page 14). The Applicant was observed at the Hells Angels Halloween Social on 27 October 2000 associating with Hells Angels members. On 28 January 2002, the Applicant was arrested for assault with another man who was wearing a Hells Angels baseball cap and T-shirt at the time. The victim of that assault was hesitant to cooperate with the police as he was aware that his attackers were members of the Hells Angels, and the charges were eventually stayed. The Applicant was also seen associating with Hells Angels members and in attendance at other Hells Angels social events between 2003 and 2011. In 2011, the Applicant verbally confirmed to Detective Law that he was a prospect member of the Hells Angels. Later in 2011, he confirmed that he had been demoted to the rank of "hangaround," but he did not explain the reason for the demotion. Based on the above, Detective Law's opinion was that the Applicant is "an individual deeply entrenched in the Hells Angels Motorcycle Club, and has

actively involved himself in the Outlaw Motorcycle Gang lifestyle over the course of the past two decades."

[5] On 6 September 2012, the ID found the Applicant inadmissible to Canada under subsection 37(1)(a) of the Act on the grounds of organized criminality and ordered him deported.

PRELIMINARY MATTER

[6] The Respondent requests that the Court amend the style of cause to replace "The Minister of Public Safety and Emergency Preparedness" as the Respondent with "The Minister of Citizenship and Immigration" pursuant to subsection 4(1) of the Act.

DECISION UNDER REVIEW

[7] The ID noted that the standard of proof with respect to the facts alleged is "reasonable grounds to believe," which is a lower standard than a "balance of probabilities" but requires more than a mere suspicion. The ID also noted that this was not a criminal trial and it did not need to be established that the Applicant was guilty of a criminal offence.

[8] At the ID hearing, the Applicant testified that he joined the Hells Angels in 2010 and later became a prospect, but then quit in October, 2011. When asked why he wanted to join, the Applicant said that he just wanted to ride a motorcycle with them, and that his close friend, Shane Kirton, had been a member of the Hells Angels for 10 years, and that he was always around Mr. Kirton. The Applicant admitted to being demoted from prospect to hangaround status, and said

that it was because he had missed some events and a shift at the clubhouse. He said that he quit the Hells Angels because he had no time for it, it was causing him to spend less time with his daughter, and because there was too much police harassment. He claimed that he did not know why the police would be harassing the Hells Angels.

[9] Evidence was introduced that described the designation of a "hangaround" as requiring that "full patch members must be certain that the individual is systematically involved in crime before approving his promotion to this rank. He also has to receive majority approval in a vote." A "prospect" is "an individual who is gaining the confidence of all colour-wearing members. He is demonstrating his loyalty and ability to carry out and obey orders. He has been actively involved in criminal activities." This evidence was not challenged by the Applicant.

[10] The Applicant did not admit to any knowledge of Hells Angels' criminal activity. As a hangaround, he said that his shifts at the clubhouse consisted of cleaning and serving drinks. He testified that he never heard any of the members talk about criminal offences, and that he never saw a member of the Hells Angels commit a criminal offence. Counsel submitted that just because the Applicant progressed to the level of prospect does not mean that he had knowledge of the criminal nature of the activities of the organization, and that the Hells Angels are secretive by nature.

[11] The ID noted that the Applicant was observed by police as being involved with Hells Angels as early as 2000, and that the Applicant's own evidence was that his life-long friend, Mr. Kirton, had been a member of the Hells Angels for 10 years. Another friend of the Applicant, Dale Paggett, testified that he knew some people involved in the Hells Angels but did not view the

Hells Angels as being a criminal organization. The ID did not find this testimony helpful, as Mr. Paggett, unlike the Applicant, was not a hangaround or prospect.

[12] The ID stated that the Hells Angels are a notorious criminal organization. The Applicant's explanation that he wanted to become a full patch member simply to ride motorcycles with the group was not credible because the Applicant was pulled over by police while riding his motorcycle with the Hells Angels both when he was a hangaround and a prospect. Thus, he must have been able to ride his motorcycle with the group without being a full patch member.

[13] Detective Law testified that the business of the Hells Angels is crime, and primarily drug trafficking. He said there is no misconception that they are just a group who likes to get together and ride motorcycles. For someone to make it to the rank of prospect he or she would need to have demonstrated a commitment to the organization and would be heavily involved and entrenched. Even to become an "official friend" of the Hells Angels, which is the rank below a hangaround, a person would have to have been actively involved in criminal activities.

[14] The ID noted that the case of *Amaya v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 549 [*Amaya*] established at para 30 that "In sum, even if the Applicant himself did not engage in the criminal activities, if he had knowledge of the activities, he would meet the requirements of membership. Knowledge of the gang's activities is sufficient to satisfy any mens rea requirement."

[15] The ID specifically referred to the Applicant's contention that his testimony that he was not aware of the criminal activity of other Hells Angels was not seriously challenged in cross-examination. However, the ID stated that it did not have to accept the Applicant's evidence as credible merely because of this and that it was entitled to consider the reasonable probabilities of the surrounding conditions. The ID thought that the Applicant's testimony was "entirely inconsistent with the preponderance of the probabilities which rationally emerge out of all the evidence in the case and I do not believe his evidence." The ID also noted that, by virtue of subsection 173(c) of the Act, it was not bound by any legal or technical rules of evidence.

[16] The ID noted it is sufficient to show that the Applicant was wilfully blind to the criminal nature of the Hells Angels. To establish wilful blindness it must be demonstrated that the Applicant knew of the need to make inquiries but chose to remain ignorant. The ID noted that on 29 July 2010 the Winnipeg Hells Angels clubhouse was raided, and the Applicant was inside at the time. The Applicant was convinced to leave the clubhouse peacefully by negotiators. This incident specifically, as well as many other encounters with police, should have alerted the Applicant that something illegal was going on to attract so much police attention.

[17] The ID found that the Applicant had knowledge of the Hells Angels criminal activity, and if he did not then he was wilfully blind to it. Thus, the Applicant was found to be inadmissible under subsection 37(1)(a) of the Act.

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in this proceeding:

Rules of interpretation

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.

[…]

Organized criminality

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;

[…]

Interprétation

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.

[…]

Activités de criminalité organisée

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;

[…]

ISSUES

[19] The Applicant raised the following issues in his written submissions but modified his position somewhat at the review hearing:

a. Is the standard of proof for rebuttal of sworn testimony under sections 34 through 37 of the Act "reasonable grounds to believe" or "a balance of probabilities"?

b. If the answer to the first question is "reasonable grounds to believe," is the answer different under the Canadian *Charter of Rights and Freedoms*?

c. Does the principle established in *Browne v Dunn*, (1893) 6 R 67 (HL) [*Browne v Dunn*] apply to the ID's proceedings?

d. Was there a breach of procedural fairness when the ID found that parts of the Applicant's testimony were not credible despite the fact that the Applicant was not cross-examined on this testimony?

[20] The Applicant withdrew his *Charter*-based argument (issue b.) at the hearing of the application, and asked the Court to focus upon the following issues:

a. Did the ID breach a duty of procedural fairness by concluding that the Applicant's testimony was not credible on material points on which he had not been cross-examined, contrary to the rule stated in *Browne v Dunn*?

b. Did the ID err by failing to give proper effect to the presumption of credibility of sworn testimony, or by applying the wrong standard of proof to the rebuttal of that presumption?

STANDARD OF REVIEW

[21] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[22] Past jurisprudence has firmly established that the Board's determination of inadmissibility on grounds of membership in a criminal organization "is largely an assessment of facts, and is thus to be reviewed on the standard of reasonableness": *Lennon v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1122 at para 13; see also *M'Bosso v Canada (Minister of Citizenship and Immigration)*, 2011 FC 302 at para 53 [*M'Bosso*]; *Castelly v Canada (Minister of Citizenship and Immigration)*, 2008 FC 788 at paras 10-12; *He v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 391 at paras 24-25 [*He*]; *Tang v Canada (Minister of Citizenship and Immigration)*, 2009 FC 292 at para 17. This includes the ID's evaluation of the evidence, including the credibility of witnesses and the weight to be assigned to their testimony: see *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paras 38-42.

[23] As others have noted, the application of the reasonableness standard of review in cases relating to inadmissibility under sections 34 to 37 of the Act is affected by the statutory standard of

proof that applies to the constituent facts of inadmissibility, namely "reasonable grounds to believe": see s. 33 of the Act. For clarity, then, the ID had to come to a reasonable conclusion that there are reasonable grounds to believe that: a) Hells Angels is a criminal organization (which is not in dispute here); and b) the Applicant was a "member" of that organization as that term has been defined by the jurisprudence: see *Tjiueza v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1260 at paras 22-24; *Rizwan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 781 at para 29; *M'Bosso*, above, at paras 4, 24.

[24] The Applicant's attempts to separate out subsidiary legal issues regarding the ID's treatment of the evidence, such as the "standard of proof" applicable to the rebuttal of evidentiary presumptions about credibility, does not affect the standard of review. The ID is entitled to deference in its evaluation of the evidence, including the judgments about witness credibility that this necessarily entails: *Mugesera*, above.

[25] The question of the proper application of the rule from *Browne v Dunn* raises an issue of procedural fairness. Specifically, where the rule is applicable and is not properly applied, it could compromise a party's right to know and fully answer the case to be met, often referred to as the principle of *audi alteram partem*. Questions of procedural fairness are reviewable on a standard of correctness: *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29 at para 100. As the Federal Court of Appeal stated in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at para 53, "[t]he decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." This is a question on which no deference is due.

[26] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

[27] The Hells Angels make concerted efforts to hide the criminality of their organization, and the Applicant submits that one cannot assume that a person who hangs around the group will automatically know of its criminal activities. Section 37 of the Act is specifically designed so that members of criminal organizations who do not know about criminal activities are not deemed inadmissible (*Stables v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1319 [*Stables*]). In *Stables*, the applicant was found to be a member of the Hells Angels, but he was a full patch member of high rank and not a peripheral member like the Applicant.

[28] The Applicant says there is no evidence that he had any knowledge of the Hells Angels' criminal activity. Detective Law also acknowledged that the Hells Angels try to give the impression that they are just a motorcycle club. Only full patch members attend all the meetings of the

organization, and hangarounds and prospects do not have the organization's full trust. The Applicant submits that this type of membership does not, by its very nature, import knowledge of the criminality of the organization.

[29] The Minister's own materials say that a prospect "cannot vote or attend meetings." A prospect must be actively involved in criminal activities, but he can be involved in these activities on his own. The Applicant's status in the club was not in and of itself enough to demonstrate knowledge, and there are no other facts establishing knowledge in this case.

[30] The Applicant testified before the ID that he did not know anything about any of the Hells Angels' criminal activities, and this testimony was not cross-examined. Nor did the Minister suggest in his submissions that the Applicant knew of the criminality of the Hells Angels. The case of *Browne v Dunn*, above, says that in order to impeach the credibility of the Applicant he must have been cross-examined, and the Supreme Court of Canada said in *R. v Lyttle*, 2004 SCC 5 at para 65 [*Lyttle*] that this remains a sound principle of law.

[31] The Applicant says that it is clear from cases such as *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 and *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 103 that a person who is ignorant of the criminal activities of the organization with which they are associated should not be considered a member of that organization for inadmissibility purposes. If this were not the case, then subsection 37(1)(a) would be contrary to the *Charter*.

[32] The ID found at para 41 that there were reasonable grounds to conclude that the Applicant had the requisite knowledge for membership, but the Applicant submits that reasonable grounds is the wrong standard of proof and that the legally correct standard of proof is balance of probabilities. The Applicant says that if this is not the case then the presumption of credibility of testimony would have no operational effect, and it would not matter whether or not an applicant has testified. In order to give meaning to the presumption of credibility, the standard of proof for rebuttal of the presumption must be different from the standard of proof for establishing the underlying facts, absent contrary testimony.

[33] The Applicant also points out that the ID found that he was wilfully blind to the criminal activities of the Hells Angels; however, the Applicant was never asked whether he made any inquiries or not. The ID reasons that if the Applicant had made inquiries then he would have found out about the criminal nature of the organization, but this reasoning is inconsistent with other parts of the evidence that show that the Hells Angels are secretive in nature and have an elaborate recruiting process involving many stages whereby only full patch members know the full details of the organization's activities.

[34] Had the Applicant been cross-examined at the hearing on whether he made inquiries, he may have replied that he had. The Applicant submits that although the ID may not be bound by formal rules of evidence, it is bound by the rule from *Browne v Dunn* as a component of the duty of fairness. The Court said that the rule was applicable to an ID proceeding in *T.H.S.B. v Canada (Minister of Citizenship and Immigration)*, 2011 FC 354. Furthermore, in *Lyttle*, above, the

Supreme Court said that the principle from *Browne v Dunn* is a sound principle of general application, not a technical rule of evidence.

[35] The ID said that the principle from *Browne v Dunn* is not applicable when it is "perfectly clear" that the person concerned "has had full notice beforehand that there is an intention to impeach the credibility of the story he is telling." The Applicant submits that there was no such notice in this case. Submissions were made on the law and on knowledge, but this is different from an argument that the testimony the Applicant gave on his own knowledge was not credible. The only time the Applicant told his story was at the hearing, so there could be no prior impeachment of the credibility of that story. Thus, the exception to the *Browne v Dunn* principle relied on by the ID was not applicable.

[36] Further, the Minister knew that the Applicant was planning on testifying that he had no knowledge of the Hells Angels' criminal activities because it was raised in pre-hearing submissions. The Applicant then testified to this effect and it was unfair to him for the Minister to decline to cross-examine him on this issue, and then afterwards impeach his credibility when he might have been able to address the concerns at the hearing. It is precisely this situation that the rule in *Browne v Dunn* was designed to avoid.

The Respondent

[37] The Respondent points out that in *R. v Palmer*, [1980] 1 SCR 759, the Supreme Court held that the rule in *Browne v Dunn* is not absolute. If the issue is "foreseen" then it is not necessary to put the witness on notice of every detail. The Respondent submits that this is such a case. As the

Applicant's contention that he did not have knowledge of the Hells Angels' criminal activity was the basis of his case, it cannot be said that he did not have notice that knowledge was at issue.

[38] In addition, while the Applicant was not cross-examined on every detail on his testimony, he was cross-examined at length about his involvement with the Hells Angels. This included questions about his duties within the organization, his rise in the ranks, his length of involvement, incidents with the police, why he wanted to become a member, why he wanted to become a full patch member and his friendships with certain members. Thus, the Respondent submits that in the circumstances of this case the duty of fairness was met.

[39] The Respondent further submits that the ID's finding that the Applicant had knowledge of the Hells Angels' criminal activities was reasonable. There was extensive evidence before the ID about the group's criminal activities, and based on this evidence the ID found that there were reasonable grounds to believe that the Applicant knew about the criminal activities of the Hells Angels with whom he was an active member.

[40] As to the wilful blindness finding, the Respondent points out that the Applicant was arrested or stopped by the police on numerous occasions while in the company of Hells Angels members. In fact, one of the Applicant's reasons for leaving the organization was "too much police harassment." He was also in attendance during a police seizure at a clubhouse and continued his membership for more than a year after that. After all this, the ID concluded that if he did not know about the group's criminal activities it was because he declined to inquire and chose to be wilfully blind. The Respondent submits that this is a reasonable finding on the facts.

[41] The Applicant relies on the testimony of Detective Law to argue that the Hells Angels organization attempts to disguise its criminal nature and its members would not have answered the Applicant truthfully had he asked about its criminal activities. However, Detective Law's testimony does not support this argument. He testified that Hells Angels members will attempt to mislead the public and law enforcement, but that it has "been proven that the Hells Angels are a criminal organization and I found in my experience members involved with the Hells Angels don't even try to mislead the police any more." If members do not even bother to mislead the police anymore, it is reasonable to find that they would not mislead a prospect member who has been associated with the organization for 20 years.

[42] The Applicant has challenged the standard of proof relied on by the ID, but this argument is without merit because the standard of proof is legislated. Section 33 of the Act provides that in the case of inadmissibility under section 34 to 37 the standard is "reasonable grounds." Further, the Applicant's *Charter* argument is not relevant on these facts because the ID found that the Applicant did have knowledge.

The Applicant's Reply

[43] The Applicant points out that if the ID's findings of knowledge and wilful blindness were made in a legally erroneous way then the requirements for membership have not been met.

[44] As to the standard of proof set out in section 33 of the Act, the Applicant replies that this standard refers to the facts that constitute inadmissibility and not to the presumption of credibility.

The ID is entitled to make a finding of fact on membership using the standard of reasonable probability, but that statutory provision says nothing about the standard of proof required to rebut the presumption of credibility. The standard of proof for rebutting the presumption of credibility must be higher than the standard of reasonable probability or the presumption would have no meaning. Furthermore, the ID did not even acknowledge that there is a presumption of credibility of the Applicant's sworn testimony.

[45] The Applicant also says that the ID never directly addressed the standard of proof it used in making its finding that the Applicant was wilfully blind. This being so, the Applicant submits that if the ID made the error he suggests on the standard of proof for knowledge, then that same error was committed when addressing wilful blindness. The ID also said that wilful blindness is equivalent to knowledge, which implies it used the same standard of proof for both.

[46] Furthermore, the Applicant does not have to persuade the Court that the wrong standard of proof was used; it is sufficient for the Applicant to establish that it was unclear what standard was being used (*Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 at para 9). At the very least the ID was unclear about what standard it was using in arriving at the conclusion that the Applicant was wilfully blind. At para 53 of the Decision the ID says that the Applicant's evidence is "entirely inconsistent with the preponderance of probabilities which rationally emerge out of all the evidence and I do not believe his evidence." Thus, it would appear the ID used two different standards of proof: preponderance of probabilities and reasonable grounds for believing.

[47] As to the rule in *Browne v Dunn*, the Applicant states that his concern is not that he did not have notice that knowledge would be an issue, but that there was a detailed attack on his testimony on knowledge in the submissions of the Minister without an opportunity to answer that attack in cross-examination. The Respondent says that the Applicant was extensively cross-examined, but that cross-examination focused on other matters and not on the Applicant's knowledge of the criminality of the Hells Angels. The Applicant says that the rule in *Brown v Dunn* and the duty of fairness both require a good deal more than just notice of relevant subject matter, and that in this case they required "cross-examination on the substance of the challenge to the credibility of the testimony of the applicant in order to give the applicant an opportunity to answer the concerns raised" (Applicant's Reply at para 47).

[48] The Applicant submits that he was not cross-examined on those matters which went directly to the ID's adverse credibility finding. In support of that credibility finding the ID found that the Hells Angels are notorious for being a criminal organization, but the Applicant was asked no questions about this notoriety. The ID also found that there must be some other benefit to being a full-patch member besides being able to ride motorcycles with the club, but the Applicant was never asked about what that benefit might be. The Applicant was also not asked about what his friend Shane Kirton told him about the organization.

[49] Furthermore, the reasons the Respondent gives for the rule in *Browne v Dunn* not being applicable in this case are not the same reasons given by the ID. The ID did not reason that the rule does not require notice of every detail, and the Applicant says that it was apparent to the ID that the Applicant was not given notice of "more than mere detail." The ID also did not reason that the

Applicant was subject to extensive cross-examination which amounted to effective compliance with the rule from *Browne v Dunn*. The ID said that the rule from *Browne v Dunn* did not apply because the ID is not bound by formal rules of evidence. That is not the reasoning of the Respondent and the Respondent does not try to defend that position. The Respondent says there was cross-examination, but the ID has already admitted there was not.

[50] The Applicant also submits that the findings of knowledge and wilful blindness were not reasonable. Detective Law testified that the Hells Angels do not even try to mislead the police anymore, but that is a reference only to the police. The Applicant is not a member of the police. The Respondent assumes that if the organization does not try to mislead the police then it would not try to mislead others. However, the organization may not try to mislead the police on the assumption that the police already know the nature of the organization, and this does not necessarily mean that the group would not attempt to mislead others who do not know the nature of the organization. In fact, Detective Law testified that "I think it would be fair to say some of the individuals involved with Hell's Angels criminal organization might try and mislead you by saying that they simply enjoy riding motorcycles and are not a criminal organization."

[51] The Applicant submits that the ID's reasoning is internally inconsistent and therefore unreasonable.

The Respondent's Further Submissions

[52] The Respondent points out that there was both documentary and oral evidence before the ID demonstrating the Applicant's membership in the Hells Angels and his knowledge that it is a

criminal organization. The Applicant conceded both the criminal nature of the Hells Angels and Detective Law's expertise on the subject at the hearing. Detective Law testified that:

> In the case of the Hell's Angels, over the course of time a friend may be promoted to the rank of hang around and eventually promoted to the rank of prospect or full patch. I can say that all those individuals, if you're wearing the vest, you are a member of the criminal organization and you are involved in criminal activities for that organization.

[53] The Respondent argues that the "reasonable grounds to believe" standard of proof is applicable to questions of fact in relation to subsection 37(1)*(a)*: *Mugesera*, above, at para 116. The Respondent acknowledges that knowledge of, or wilful blindness regarding, the organization's pattern of criminal activity is a requirement for inadmissibility under subsection 37(1)*(a)* (*Amaya*, above, at para 30), but argues that whether a person has the requisite knowledge is a question of fact to which the "reasonable grounds to believe" standard of proof is applicable. On review, the ID's determination that the Applicant did know about the Hells Angels' criminal activities is entitled to significant deference: *He*, above, at para 25.

[54] The Respondent also argues that the Applicant's submissions conflate the standard of proof with the weighing of evidence. The standard of proof applicable to each of the factual components of inadmissibility under subsection 37(1)*(a)* is reasonable grounds to believe, and this does not change simply because there is sworn testimony denying one or more of the disputed factual components. With respect to the weight to be given to the Applicant's sworn testimony, the standard of proof is not a relevant consideration.

[55] While sworn testimony is presumed to be true in the absence of contradiction, the presumption is rebuttable: such testimony can be reasonably rejected if found to be implausible. Such a finding must be rational and clearly expressed, and the basis for the finding must be apparent in the tribunal's reasons: *Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 at para 44. The Respondent argues that the ID member properly stated the determination he was required to make – that is, whether the Applicant was credible when he said he did not know that the Hells Angels is a criminal organization – and stated that he did not believe this evidence. Rather, he found it to be "entirely inconsistent with the preponderance of the probabilities that rationally emerge out of all the evidence in the case." The reasons for this conclusion were "apparent, rational and clearly expressed" and there is no basis upon which this Court should re-weigh this evidence. The ID member explicitly asked himself whether he was required to accept the Applicant's testimony as credible, since it was given under affirmation and not seriously challenged on cross-examination, and applied the well-accepted test from *Faryna v Chorny*, [1951] BCJ No 152 (QL) to make a finding about the Applicant's credibility. There is thus no confusion as to the basis upon which this finding was made and no reason the Court should interfere.

[56] With respect to the Applicant's argument concerning procedural fairness and the rule in *Browne v Dunn*, the Respondent states that it was clear from the outset of the hearing that "knowledge was *the issue* that would be determinative." The Minister presented his case first, and the Applicant was present during Detective Law's testimony. He was thus aware of the case to be met. The Applicant has not provided any evidence as to what additional evidence he may have given if explicitly challenged on his claimed lack of knowledge.

[57] In addition to its previous argument with respect to the Applicant's *Charter* argument, the Respondent notes that the Court has previously found subsection 37(1)*(a)* to be constitutional: *Stables*, above.

ANALYSIS

[58] At the judicial review hearing before me on August 29, 2013, Applicant's counsel informed the Court that the Applicant was withdrawing the *Charter*-related arguments referred to in written submissions. Counsel asked the Court to direct its attention to those aspects of the Decision dealing with the Applicant's knowledge of the criminal nature of the Manitoba Chapter of Hells Angels and the ID's failure to consider and deal with the presumption of credibility that arises from the Applicant's sworn testimony that he did not know that Hells Angels is a criminal organization.

[59] As regards the Applicant's alleged lack of knowledge of the criminal nature of the organization, the ID acknowledged that a form of *mens rea* was required, but found that the requirement was satisfied in this case because the Applicant's evidence that he was unaware of the criminal activity of the Manitoba Chapter was not credible. This evidence was found to be "entirely inconsistent with the preponderance of the probabilities which rationally emerge out of all the evidence in the case and I do not believe his evidence." Either the Applicant had actual knowledge or he was wilfully blind to the criminal activity of the Manitoba Chapter, and "[s]ince wilful blindness is equivalent to knowledge, [the Applicant] had knowledge of the illegal activities of the Manitoba Chapter." The ID concluded that this meant the *mens rea* ingredient of membership in a criminal organization had been established by the Minister.

[60] The Applicant has raised two principal issues with regard to the *mens rea* or knowledge findings of the ID and, in my view, they are the only arguable issues that he brings before the Court in this application.

[61] First of all, the Applicant raises a procedural fairness argument based upon *Browne v Dunn*, above. Applicant's counsel raised this issue in written submissions to the ID, and the ID dealt with it in the following way:

> [63] In written submissions, counsel pointed out that in direct examination Mr. Chung said that he did not know about any criminal activities committed by the Hells Angels members and that on cross-examination, the Minister did not confront Mr. Chung regarding what knowledge he had of the criminal activities of the Manitoba Chapter. He argues that having failed to put it to Mr. Chung that his evidence on this point was not believable, now the Minister cannot say that Mr. Chung's evidence on the issue of knowledge of the activities of the Manitoba Chapter is not credible. He relies on *Browne v. Dunn* (1893), 6 r. 67 (H.L.), at 70-71 in support of his argument.
>
> [64] I reject this submission. In the first place by virtue of paragraph 173(c) of the Act, the Immigration Division is not bound by any legal or technical rules of evidence.
>
> [65] Secondly, I agree with Minister's counsel that the last part of the quotation from *Browne v. Dunn* is applicable to this case "… it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling." (my emphasis)
>
> [66] Mr. Chung and his counsel had notice that the Minister would be submitting that Mr. Chung would have known that the Hells Angels and the Manitoba Chapter are criminal organizations. The issue of knowledge as an element of membership in a criminal organization was raised before the hearing and both counsel made submissions on the issue. Mr. Chung's counsel wrote in his Reply

> "… the submissions of the Minister at paragraph 15 appear to suggest that the Minister agrees, and that there is only a factual issue whether the applicant knew or was wilfully blind to the pattern of criminal activity of the Hells Angels."
>
> [67] Mr. Chung and his counsel would have known that if he said he had no knowledge of the Manitoba Chapter's criminal activities that the Minister would submit that this is not believable. The Minister put in his case before Mr. Chung testified. Therefore *Brown v. Dunn* does not apply.

[62] Essentially, the Applicant's argument is that he testified that he had no knowledge of the criminal activities of the Manitoba Chapter and the Minister failed to cross-examine him on this aspect of his sworn testimony. It was thus, he argues, procedurally unfair for the ID to make findings based upon the preponderance of the probabilities which rationally emerge out of all of the evidence in the case to conclude that the Applicant was either lying or was wilfully blind.

[63] *Browne v Dunn*, above, deals with a point of procedural fairness and reads in relevant part as follows:

> Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses. Sometimes reflections have been made upon excessive cross-examination of witnesses, and it has

> been complained of as undue; but it seems to me that a cross-examination of a witness which errs in the direction of excess may be far more fair to him than to leave him without cross-examination, and afterwards to suggest that he is not a witness of truth, I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, and the point upon which he is impeached, and is to be impeached, is so manifest, that it is not necessary to waste time in putting questions to him upon it. All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted.
>
> [Emphasis added]

[64] The Supreme Court of Canada in *Lyttle*, above, at para 65 confirmed that the "rule in *Browne v Dunn* remains a sound principle of general application …".

[65] In the present case, the Applicant was well aware that the principal issue at the hearing before the ID would be his knowledge of, or wilful blindness to, the criminal nature of the Manitoba Chapter of Hells Angels. The Minister had, before the Applicant testified, entered his case, including clear and compelling evidence concerning the Applicant's long involvement with the Manitoba Chapter and his efforts to work his way up the hierarchy to "full-patch" status. The Applicant never did achieve full-patch, but he did become a "prospect," the status that immediately precedes full-patch. The evidence shows that it was more than clear that the Minister's case was that – given the nature of Hells Angels, its notoriety as a criminal organization, its long and arduous recruiting system, the criminal involvement of recruits at different stages in the hierarchy (friend, hang-around, prospect, full-patch), the Applicant's own involvement and aspirations within the

system, and his interaction with police in that context – the Applicant had full knowledge of the criminal nature of the Manitoba Chapter and, if he did not, then he was being wilfully blind. This meant that there were reasonable grounds to believe that he was, or had been, a member of a criminal organization in accordance with the governing jurisprudence.

[66] The Applicant not only had full notice that there was an intention to impeach anything he might say about being unaware of the criminal nature of the Manitoba Chapter, he also knew, given the case entered against him, that a mere denial of knowledge of criminal activity and an assertion that he just wanted to ride motor bikes would not explain his long involvement with the Manitoba Chapter, his aspirations to achieve full-patch status, his success in achieving prospect status, and his knowledge of the police interaction with the Manitoba Chapter. In other words, before the Applicant gave evidence, he had notice, and had to be fully aware, that the issue he had to answer was not just "Did you know about the criminal activities of the Manitoba Chapter?" but also "Given your long history of involvement with the Manitoba Chapter, how is it possible that you did not know about the criminal activities of the Chapter?" Some explanation on this point was clearly required.

[67] Knowing what was at stake, examination in chief by Applicant's counsel was very brief. On the issue of *mens rea*, the extent of the evidence offered by the Applicant is as follows:

> Q. Were you aware of criminal activity of other Hell's Angels – people who were members of Hell's Angels?
>
> A. No, I don't.
>
> Q. Did they talk to you about it?
>
> A. No.

[68] Counsel for the Applicant says that it was not his job to cross-examine his own client on this answer. I agree, but I do not think that is the issue before me. When these brief questions were asked, the Applicant and his counsel were fully aware of the evidence on *mens rea* entered by the Minister. They also knew that these were not criminal proceedings and that the ID would have to weigh all of the evidence from both sides in order to determine whether there were reasonable grounds to believe that the Applicant had the requisite *mens rea* to render him a member of a criminal organization. Knowing this, they decided not to enter evidence that would explain how, in the full context of the evidence already entered, the Applicant was not aware of the obvious. No real explanation was forthcoming on an issue for which the Applicant had full notice by the time he stood up to testify. He simply denied having any knowledge.

[69] The Court cannot speculate as to why no further explanation was offered and, if there were reasons why the Applicant was not aware that the Manitoba Chapter was a criminal organization, the Applicant has chosen not to reveal them to the Court. In any event, the Applicant chose to meet the whole case entered against him on *mens rea* with a simple denial of any knowledge. As counsel's submissions to the ID and before this Court reveal, the Applicant chose to enter a simple denial and rely upon the presumption of credibility to persuade the ID that he was not a member of a criminal organization.

[70] What I cannot say, however, is that, when the whole sequence of the hearing is examined, there was any procedural unfairness of the kind that the rule in *Browne v Dunn* is meant to alleviate. The Applicant had full notice of the case he had to meet – including *mens rea* and wilful blindness – and he chose not to enter evidence in chief that would explain how he was not aware of the obvious.

[71] As the Supreme Court of Canada has made clear, even in criminal proceedings, the rule in *Browne v Dunn* does not automatically apply on a failure to cross-examine on a particular point. The effect to be given to the absence or brevity of cross-examination depends upon the circumstances of each case. See *R v Palmer*, [1980] 1 SCR 759, pp 780-782.

[72] In the present case, the Applicant was also cross-examined by the Minister. Given the extreme brevity of the examination in chief, it is not surprising that cross-examination was not extensive. In my view, however, the questions of Minister's counsel are directly related to the *mens rea* issue and the Applicant's denial of knowledge of criminal activities. The following sequence, for example, obviously goes to the credibility of the Applicant's assertion of lack of knowledge.

> Q. So what was your ultimate goal in the organization?
>
> A. I just wanted to ride a motorcycle, you know.
>
> Q. But you started as a friend and then went to hang around and then became a prospect.
>
> A. Mm-hmm.
>
> Q. Obviously you're moving through the ranks, is that correct?
>
> A. Yes.
>
> Q. In an upwards direction?
>
> A. Yes, I am.
>
> Q. We heard some testimony earlier that explained the rank structure of the Hell's Angels. The next step from prospect would be full patch member. Was that your intention?

A. At one time.

Q. Why would you want to be a full patch member?

A. I just wanted to ride motorcycles with them, that's about it.

Q. Why the Hell's Angels in particular?

A. Because I have a friend that's a member.

Q. And that's Shane Kirton?

A. Yes.

Q. Were you ever investigated for any offences by the Winnipeg Police along with Mr. Kirton?

A. Not that I recall.

[73] The evidence is clear that the Applicant was investigated for offences along with Mr. Kirton. And the other questions about why the Applicant was involved with Hells Angels are obviously related to the *mens rea* issue. This is because there was direct evidence introduced by the Minister that members could not become a "prospect" without becoming involved in criminal activity. This evidence is referred to in para 26 of the Decision. Detective Law had testified that "if you are wearing a vest, you are a member of the criminal organization and you are involved in criminal activities for that organization." The fact of the Applicant's status and long association goes directly to the *mens rea* and knowledge issue.

[74] For the reasons given, I cannot accept the Applicant's submissions on this point. In my view, there was no procedural fairness error.

[75] The other principal point raised by the Applicant is that, given his sworn testimony that he had no knowledge of criminal activities, the ID committed a reviewable error by not acknowledging and applying in his favour the presumption of credibility.

[76] In my view, however, a reading of the Decision reveals that, although the ID does not use the words "presumption of credibility," it provides substance and reasons as to why any such presumption cannot prevail in this case:

> [50] Counsel points out that Mr Chung's evidence was not seriously challenged in cross-examination. As a result do I have to accept Mr. Chung's testimony as being credible? No, I do not have to accept his evidence as credible merely because it was given under affirmation and it was not seriously challenged on cross-examination.
>
> [51] In *Faryna v. Chorny* [1951] B.C.J. No. 152, the British Columbia Court of Appeal in considering the trial judge's assessment that a witness was not credible wrote:
>
> > **11** The credibility of interested witness, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration

> of only half the problem. In truth it may easily be self-direction of a dangerous kind.
>
> **12** The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can he tested in the particular case.
>
> **13** Mr. Justice Stephen put it another way: He said (General View of the Criminal Law, 2nd ed., p. 191) "that the utmost result that can in any case be produced by judicial evidence is a very high degree of probability ... The highest probability at which a court of justice can, under ordinary circumstances arrive is the probability that a witness or a set of witnesses tell the truth when they affirm the existence of a fact".

> [52] Ultimately the Court of Appeal concluded that the evidence of the witness "is entirely inconsistent with the preponderance of the probabilities that rationally emerge out of all the evidence in the case, and therefore the conclusion reached by the learned trial Judge cannot be disturbed."
>
> [53] Such is the case here, although Mr. Chung affirms that he was unaware of criminal activity on the part of the Manitoba Chapter, his evidence is entirely inconsistent with the preponderance of the probabilities which rationally emerge out of all of the evidence in the case and I do not believe his evidence.

[77] In other words, the ID makes it clear that, whatever value the Applicant's sworn testimony may attract, it cannot be accepted when balanced against the other evidence adduced. In my view, there is no reviewable error with this approach. The ID gave proper effect to the presumption of credibility and applied the right standard of proof to the rebuttal of that presumption.

[78] These are the points emphasized by the Applicant at the judicial review hearing of this application. In effect, they go to the substance of the Decision and I can find nothing unreasonable or procedurally unfair about the way the issues were addressed by the ID. In written submissions, the Applicant raised a number of other points such as standard of proof and clarity issues. I have examined each in turn against the Decision and the governing jurisprudence and find the Applicant's arguments unconvincing. Hence, I appreciate the fact that Applicant's counsel chose not to address these issues at the hearing and directed the Court to the *Browne v Dunn* and presumption of credibility issues.

Certification

[79] In post-hearing written submissions allowed by the Court, the Applicant has suggested that, in assessing the knowledge requirement under subsection 37(1)(a) of the Act the ID should have considered and applied the principles enunciated by the Supreme Court of Canada in *Ezokola v Canada (Minister of Citizenship and Immigration)*, 2013 SCC 40, and has submitted the following question for certification:

> What is the degree of knowledge required for membership in a criminal organization under the *Immigration and Refugee Protection Act* subsection 37(1)(a), in light of the *Ezokola* decision in the Supreme Court of Canada [*Ezokola v Canada (Citizenship and Immigration)*, 2013 SCC 40]

[80] The issues now raised by the Applicant concerning the relevance of *Ezokola* to the Decision were not raised before the ID and were not raised in the Applicant's leave application. Hence, the

Applicant is, in effect, asking the Court to assess a new issue and return the matter for reconsideration on the basis of new law and new arguments.

[81] As the Applicant points out, the Supreme Court in *Ezokola*, above, was considering Article 1F(a) of the *Refugee Convention*, while the present case involved the applications of section 33 and subsection 37(1)(a) of the Act. He argues, however, that the question addressed by the Supreme Court in *Ezokola* is concerned with the "degree of knowledge...in a criminal activity [which] justifies excluding secondary actors from refugee protection" and this should be relevant to the question of the degree of knowledge of a criminal organization which justifies a finding of inadmissibility under subsection 37(1)(a) of the Act.

[82] The Applicant's counsel has submitted detailed and able argument on why *Ezokola* should apply to the present case and, if it is applied, the Decision is unreasonable. After considering these arguments carefully, however, I am not convinced that *Ezokola* can be applied in the suggested way. I also feel that the Applicant seriously misstates the evidentiary record before the ID in his suggestions regarding the result of any such application.

[83] Essentially, I agree with the Respondent that complicity in the crimes of an organization (1F(a)) is very different from membership in an organization (37(1)(a)). Knowledge or *mens reas* is important under both provisions but, as the Supreme Court points out in *Ezokola* itself at para 89, complicity under 1F(a) requires that the individual "be aware of the government's crime or criminal purpose and aware that his or her conduct will assist in the furtherance of the crime of criminal purpose."

[84] Under subsection 37(1)(a), the person concerned, as well as being a member in the criminal organization, only needs to have knowledge of the criminal nature of the organization. See *Stables*, above, at para 37. I see nothing in *Ezokola*, above, to suggest that the Supreme Court also intended its remarks to apply to subsection 37(1)(a) of the Act or to change the law that was identified and applied in this case. The Applicant is arguing that, in his view, *Ezokola* should be applied to the present situation, but I cannot accept that IF(a) of the *Refugee Convention* can be equated with 37(1)(a) of the Act, because the two provisions use different language and it seems plain that the knowledge requirements are different.

[85] The ID in the present case applied the jurisprudence applicable to subsection 37(1)(a) and there is nothing in *Ezokola*, in my view, to render that approach either incorrect or unreasonable.

[86] I also feel that, in his application of the *Ezokola* factors to the present case, the Applicant seriously misstates the evidence before the ID in several important instances. For example, the evidence was not that Hells Angels is a multifaceted organization so that criminality is only one of several principal purposes. Detective Law made it clear that the organization is not "a group of individuals that just likes to get together to ride motorcycles…Anybody involving themselves…are aware that what the Hells Angels do is crime and what they're involved with is criminal." The Applicant also suggests that the fact that he has been a "prospect" does not mean he was involved in crime or knew that other members were. As the ID pointed out in its reasons, however, Detective Sergeant Isnor's evidence was that a "prospect" is someone who "is demonstrating his loyalty and ability to carry out and obey orders. He has been actively involved in criminal activities." Detective Law also said that "if you're wearing the vest, you are a member of the criminal organization and you are involved in criminal activities for that organization." The Applicant also

persists in saying that the period of his involvement with the Manitoba Chapter was "relatively brief," while the evidence before the ID was that the Applicant was "deeply entrenched in the Hell's Angels Motorcycle Club, and has actively involved himself in the Outlaw Motorcycle Gang lifestyle over the course of past two decades."

[87] Even if the ID was obliged to consider the *Ezokola* factors, it is my view that, given the evidence before the ID, those factors in dispute were reasonably considered by the ID.

[88] Consequently, I do not think the Applicant's proposed question for certification is a serious question of general importance. This is because I do not think that *Ezokola*, above, even by way of analogy, can be said to affect the jurisprudence application to subsection 37(1)(a) of the Act as reasonably applied by the ID and that, even if it did, on the evidence before the ID, the relevant aspects of the *Ezokola* factors were reasonably addressed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question for certification.

3. The style of cause is amended to remove "The Minister of Public Safety and Emergency Preparedness" as the Respondent and substitute "The Minister of Citizenship and Immigration" as the Respondent.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9844-12
STYLE OF CAUSE:	ALEJANDRO MARIANO CHUNG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Winnipeg, Manitoba
DATE OF HEARING:	August 29, 2013
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APPEARANCES:

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