Federal Court  Cour fédérale

Date: 20130425

Docket: IMM-7028-12

Citation: 2013 FC 425

Ottawa, Ontario, April 25, 2013

PRESENT: THE CHIEF JUSTICE

BETWEEN:

CARLOS ARMAND CASIMIRO SANTOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This judicial review concerns a decision by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada that the Applicant, Mr. Casimiro Santos [Casimiro], is inadmissible to Canada based on his conviction in the United States for having failed to remain at the scene of an accident in which he was involved.

[2] Mr. Casimiro alleges that the IAD erred in finding that there is equivalency between the foreign law under which he was convicted and section 252 of the *Criminal Code of Canada*, RSC 1985, c C-46 [*Criminal Code*].

[3] I disagree. For the reasons that follow, this application is dismissed.

I. Background

[4] Mr. Casimiro is a citizen of Guatemala who applied for refugee protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] after his arrival in Canada.

[5] Prior to arriving in Canada in March 2011, Mr. Casimiro lived in the United States.

[6] In 2007, he was involved in a collision on a Florida highway. According to the Offense-Incident Report and the Narrative filed by the arresting officer, Mr. Casimiro's car struck the rear of the victim's car with the front of his truck. He then left the scene while driving in an erratic manner. The victim of the collision followed Mr. Casimiro and contacted the police, who charged him with several offences. At the time of his arrest, the officer observed the odor of alcoholic beverage on his breath and two half empty beer bottles in the center consol of his truck. The officer also noted that Mr. Casimiro seemed to comprehend verbal directions slowly, and used the body of his truck several times as a support. The officer also determined that Mr. Casimiro had been driving with a suspended driver's licence. In addition, he noted that Mr. Casimiro had refused to submit to any of the requested tests, including "the breath tests and standardized field sobriety."

[7] Later in 2007, Mr. Casimiro pled guilty to failing to remain at the scene of a crash in which he was involved and that resulted in damage to another vehicle. He was sentenced to six months of

probation, 30 hours of community service and a $265 fine. The other charges that had been filed against him were dropped.

[8] Several weeks after he arrived in Canada in 2011, he was stopped while driving. When he was unable to produce a valid driver's licence, he was referred to Citizenship and Immigration Canada [CIC]. CIC then prepared and transmitted to the Minister an inadmissibility report under subsection 44(1) of the IRPA. In turn, the Minister referred the report to the Immigration Division [ID] of the Board for a hearing, pursuant to subsection 44(2) of the IRPA.

II. Relevant Legislation

[9] Pursuant to paragraph 36(2)(b) of the IRPA, a foreign national is inadmissible on grounds of criminality for:

> (b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament.

[10] In making a determination as to whether a person is inadmissible to Canada under sections 34-37 of the IRPA, the following rule of interpretation set forth in section 33 applies:

> **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.

[11] Mr. Casimiro pled guilty under § 316.061 of the Florida State Uniform Traffic Control Statute [Florida Statute], the relevant portion of which provides as follows:

> **316.061 Crashes involving damage to vehicle or property.**
> (1) The driver of any vehicle involved in a crash resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop such vehicle at the scene of such crash or as close thereto as possible, and shall forthwith return to, and in every event shall remain at, the scene of the crash until he or she has fulfilled the requirements of s. 316.062. A person who violates this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Notwithstanding any other provision of this section, $5 shall be added to a fine imposed pursuant to this section, which $5 shall be deposited in the Emergency Medical Services Trust Fund.

[12] The Respondent asserts that the Canadian statute which is equivalent to § 316.061 is section 252 of the *Criminal Code*, the relevant portions of which state:

> **252.** (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with
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> (*a*) another person,
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> (*b*) a vehicle, vessel or aircraft, or
>
> (*c*) in the case of a vehicle, cattle in the charge of another person,
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> and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.
>
> (1.1) Every person who commits an offence under subsection (1) in a case not referred to in subsection (1.2) or (1.3) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.
>
> …..
> (2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, vessel or, where possible, his aircraft, as the case may be, offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

[13] The complete text of the above-mentioned provisions is set forth in Appendix 1 hereto.

III. The ID's Decision

[14] After the initial admissibility hearing, the ID concluded that § 316.061 of the Florida Statute and section 252 of the *Criminal Code* are not equivalent because intent is not a required element under the former statute, whereas it is under subsection 252(1) of the *Criminal Code*.

[15] Although the ID took note of subsection 252(2), it concluded that intent to leave the scene of an accident to escape civil or criminal liability had not been established on the available facts and could not be presumed based on the application of what it characterized as being the "the rule of evidence" set forth in that provision.

IV. The IAD's Decision

[16] On appeal, the IAD initially focused on an argument that was not raised before this Court, namely, that it had not been established that the accident in question involved "either another person, a vehicle, vessel or aircraft, or cattle in the charge of another person."

[17] The IAD then turned to the alleged equivalency between section 252 of the *Criminal Code* and § 316.061 of the Florida Statute. It ultimately concluded that such equivalency existed, based on a purposive interpretation of the former provision and the available evidence that had been adduced in the record with respect to intent. It also observed that no other explanation for leaving the scene of the accident had been offered by Mr. Casimiro during the course of his immigration proceedings.

[18] Given the foregoing, the IAD determined that there were reasonable grounds to believe that Mr. Casimiro was inadmissible to Canada on grounds of criminality for having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, i.e., section 252 of the *Criminal Code*.

V. Issue

[19] The only issue that has been raised in this proceeding is whether the IAD erred in reaching its above-mentioned conclusion.

VI. The Standard of Review

[20] The issue raised in this proceeding has two components. The first component is whether there are reasonable grounds to believe that Mr. Casimiro is inadmissible to Canada on the ground of criminality set forth in paragraph 36(2)(b) of the IRPA. That is a question of mixed fact and law in respect of which the standard of review is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-53 [*Dunsmuir*]).

[21] The second component is whether the foreign offence for which Mr. Casimiro was convicted would, if committed in Canada, constitute an indictable offence under an Act of Parliament. This is a question of equivalency in respect of which the standard of review appears to remain unsettled.

[22] Relying on *Park v Canada (Minister of Citizenship and Immigration)*, 2010 FC 782 at paras 12-13 [*Park*], where the issue was characterized as a question of law, the Respondent submits that

the standard of review is correctness. However, there is other jurisprudence of this Court in which the issue of equivalency has been characterized as a question of fact, in respect of which the standard of review is reasonableness (see, for example, *Lakhani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 674 at paras 20-23; and *Abid v Canada (Minister of Citizenship and Immigration)*, 2011 FC 164, at para 11).

[23] In the case at bar, nothing turns on this issue, as I find that the determination made by the IAD with respect to the issue of the equivalency between the offence for which Mr. Casimiro was convicted under § 316.061 of the Florida Statute and section 252 of the *Criminal Code* was correct. For this reason, and given that Mr. Casimiro made no submission regarding the applicable standard of review, I will refrain from further addressing this issue.

VII. Analysis

Did the IAD err in finding that there was equivalency between the offence for which Mr. Casimiro was convicted in the United States and subsection 252(1) of the Criminal Code?

[24] Mr. Casimiro submits that the fact that an accused can "rebut" the presumption of intent set forth in subsection 252 (2) of the *Criminal Code* is sufficient to distinguish section 252 from § 316.061 of the Florida Statute, which is a strict liability offence that contains no such rebuttable presumption. Stated alternatively, he contends that the fact that he could have provided evidence that may have rebutted the presumption of intent in a criminal proceeding under the *Criminal Code* is a sufficient basis upon which to find that section 252 of the *Criminal Code* and § 316.061 of the Florida Statute are not equivalent.

[25] On the particular facts of this case, I disagree.

[26] At paragraph 7 of its decision, the IAD made the requisite finding with respect to Mr. Casimiro having been convicted of an offence outside Canada. It then turned to the equivalency between the offence for which he was convicted and the offence in section 252 of the *Criminal Code*.

[27] In this regard, the IAD embraced, at paragraph 8 of its decision, the approach established in *Hill v Canada (Minister of Employment and Immigration)* [1987] FCJ No 47, 73 NR 315 (CA), [*Hill*]. There, Justice Urie, with whom Justice MacGuigan agreed, stated in the following passage that equivalency between a Canadian criminal statute and a foreign law can be determined in three ways:

> It seems to me that because of the presence of the words "would constitute an offence … in Canada", the equivalency can be determined in three ways: - first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences. Two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not. Third, by a combination of one and two.

[28] The IAD then proceeded to find equivalency to exist between section 252 of the *Criminal Code* and § 316.061 of the Florida Statute based not only on the first of the above-mentioned tests, but also on the second of those tests.

[29] As to the first of the tests, the IAD concluded, at paragraph 20 of its decision, that the "apparent distinction between the foreign and Canadian law does not amount to a material difference when the presumption [set forth in subsection 252(2)] is factored into the comparison because the foreign jurisdiction always presumes the intent and in Canada it is generally presumed but can be rebutted." This analysis has a certain initial appeal where, as in the case at bar, there is some evidence on the foreign record with respect to intent and such evidence falls short of rebutting the presumption in subsection 252(2). However, it would be problematic where the foreign national in question may well have been able to adduce evidence to rebut the presumption set forth subsection 252(2), but did not do so, either because such evidence was not considered to be relevant to the foreign proceeding or because no opportunity was provided to adduce such evidence. Given the conclusion reached below with respect to the IAD's approach to the second of the tests for equivalency, it is not necessary for me to reach a conclusion regarding the correctness or reasonableness of the conclusion reached by the IAD regarding this first test.

[30] Turning to the second test, the IAD began to venture down this path at paragraph 20 of its decision, when it embraced a purposive interpretation of paragraph 36(2)(b) of the IRPA to find that it is sufficiently broad to bring within its scope conduct in a foreign jurisdiction that "might, if occurring in Canada, generate a criminal conviction of concern to immigration officials." Then, at paragraph 22, the IAD effectively reached a conclusion under Urie J's second test when it observed that there were "reasonable grounds to believe that the actions giving rise to the conviction in the foreign jurisdiction would also constitute an indictable offence under an Act of Parliament, the *Criminal Code*, subsection 252(1)." In the ensuing sentence, at the beginning of paragraph 23, it stated: "There are reasonable grounds to believe that [Mr. Casimiro] is inadmissible to Canada on

grounds of criminality for having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament."

[31] In support of its conclusion on this second test, the IAD made the required evidentiary findings with respect to each of what Justice Urie characterized as being "the essential ingredients of the offence in Canada," in *Hill*, above. Specifically, it noted the following:

- Mr. Casimiro was convicted in Circuit Court in Florida for leaving the scene of an accident with property damage (paragraph 9);

- Mr. Casimiro acknowledged having "a little crash", and indicated to the officer that he did not know why he did not stop (paragraph 21);

- Another vehicle was involved, as corroborated by the victim who followed Mr. Casimiro's vehicle and by the damage to the victim's car (paragraph 18);

- The documentary record did not disclose evidence to rebut the presumption established in subsection 252(2) of the *Criminal Code*, and no explanation for leaving the scene of the accident was offered by Mr. Casimiro during the course of the admissibility hearing (paragraphs 10 and 21);

[32] Based on the foregoing, I am satisfied that the IAD reasonably and correctly concluded that the second test for equivalency established by Justice Urie in *Hill*, above, had been met (*Lo v*

Canada (Minister of Citizenship and Immigration) 2002 FCT 1155 at paras 36 to 43). The evidence in the record pertaining to Mr. Casimiro's conviction pursuant to § 316.061 of the Florida Statute established the *actus reus* of the offence prescribed in section 252 of the *Criminal Code* and did not rebut the presumption of intent set forth subsection 252(2).

[33] Mr. Casimiro also appears to maintain that § 316.061 of the Florida Statute and section 252 of the *Criminal Code* are not equivalent because the former is a non-criminal "traffic offence" whereas the latter is a criminal offence. He adds that the equivalent traffic offence in Canada is section 68 of the *Motor Vehicle Act*, RSBC 1996, c 18 [MVA].

[34] I disagree.

[35] In my view, the objective underlying paragraph 36(2)(b) of the IRPA is the protection of the Canadian public from foreign nationals who have been convicted outside Canada of an offence that, if committed in Canada would constitute an indictable offence under an act of Parliament (see also *Park*, above, at para 21). This objective may explain why there is nothing in paragraph 36(2)(b) that in any way limits or modifies the nature of the offences outside Canada for which a foreign national may have been convicted.

[36] It is not difficult to conceive a conduct that is prohibited as an indictable offence in Canada and that may simply be treated as an administrative offence or a misdemeanour in certain parts of the world. Foreign nationals may not escape the purview of paragraph 36(2)(b) just because the foreign offence for which they were convicted cannot be characterized as being criminal in nature in

that jurisdiction. Permitting them scope to do so would undermine the important objective of protecting the Canadian public.

[37] The fact that § 316.061 of the Florida Statute may also be equivalent to section 68 of the MVA is not particularly relevant.

Conclusion

[38] The IAD did not err in finding equivalency between § 316.061 of the Florida Statute and section 252 of the *Criminal Code* based on the second of the three tests established in *Hill*, above, or in reaching its ultimate conclusion that there are reasonable grounds to believe that Mr. Casimiro is inadmissible to Canada on grounds of criminality for having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament.

[39] This application is dismissed.

[40] The parties did not propose a question for certification and I find that no such question arises on the facts of this case.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT this application is dismissed. There is no question for certification.

"Paul S. Crampton"
Chief Justice

APPENDIX 1

§ 316.061 of the Florida State Uniform Traffic Control Statute

316.061 Crashes involving damage to vehicle or property.

(1)The driver of any vehicle involved in a crash resulting only in damage to a vehicle or other property which is driven or attended by any person shall immediately stop such vehicle at the scene of such crash or as close thereto as possible, and shall forthwith return to, and in every event shall remain at, the scene of the crash until he or she has fulfilled the requirements of s. 316.062. A person who violates this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Notwithstanding any other provision of this section, $5 shall be added to a fine imposed pursuant to this section, which $5 shall be deposited in the Emergency Medical Services Trust Fund.

(2)Every stop must be made without obstructing traffic more than is necessary, and, if a damaged vehicle is obstructing traffic, the driver of such vehicle must make every reasonable effort to move the vehicle or have it moved so as not to block the regular flow of traffic. Any person failing to comply with this subsection shall be cited for a nonmoving violation, punishable as provided in chapter 318.

(3) Employees or authorized agents of the Department of Transportation, law enforcement with proper jurisdiction, or an expressway authority created pursuant to chapter 348, in the exercise, management, control, and maintenance of its highway system, may undertake the removal from the main traveled way of roads on its highway system of all vehicles incapacitated as a result of a motor vehicle crash and of debris caused thereby. Such removal is applicable when such a motor vehicle crash results only in damage to a vehicle or other property, and when such removal can be accomplished safely and will result in the improved safety or convenience of travel upon the road. The driver or any other person who has removed a motor vehicle from the main traveled way of the road as provided in this section shall not be considered liable or at fault regarding the cause of the accident solely by reason of moving the vehicle.
History.—s. 1, ch. 71-135; s. 3, ch. 74-377; s. 2, ch. 75-72; s. 9, ch. 76-31; s. 22, ch. 85-167; s. 3, ch. 85-337; s. 30, ch. 92-78; s. 296, ch. 95-148; s. 6, ch. 96-350; s. 83, ch. 99-248; s. 3, ch. 2002-235.

Section 252 of the Criminal Code, RSC, 1985, c C-46.

Failure to stop at scene of accident
252. (1) Every person commits an offence who has the care, charge or control of a vehicle, vessel or aircraft that is involved in an accident with
(a) another person,
(b) a vehicle, vessel or aircraft, or

(c) in the case of a vehicle, cattle in the charge of another person, and with intent to escape civil or criminal liability fails to stop the vehicle, vessel or, if possible, the aircraft, give his or her name and address and, where any person has been injured or appears to require assistance, offer assistance.

Marginal note: Punishment

(1.1) Every person who commits an offence under subsection (1) in a case not referred to in subsection (1.2) or (1.3) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction.

Marginal note: Offence involving bodily harm

(1.2) Every person who commits an offence under subsection (1) knowing that bodily harm has been caused to another person involved in the accident is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

Marginal note: Offence involving bodily harm or death

(1.3) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for life if

(a) the person knows that another person involved in the accident is dead; or

(b) the person knows that bodily harm has been caused to another person involved in the accident and is reckless as to whether the death of the other person results from that bodily harm, and the death of that other person so results.

Marginal note: Evidence

(2) In proceedings under subsection (1), evidence that an accused failed to stop his vehicle, vessel or, where possible, his aircraft, as the case may be, offer assistance where any person has been injured or appears to require assistance and give his name and address is, in the absence of evidence to the contrary, proof of an intent to escape civil or criminal liability.

R.S., 1985, c. C-46, s. 252; R.S., 1985, c. 27 (1st Supp.), s. 36; 1994, c. 44, s. 12; 1999, c. 32, s. 1(Preamble).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7028-12
STYLE OF CAUSE:	CARLOS ARMAND CASIMIRO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	February 18, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	CRAMPTON C.J.
DATED:	April 25, 2013

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