Federal Court  Cour fédérale

Date: 20170609

Docket: IMM-4621-16

Citation: 2017 FC 568

Vancouver, British Columbia, June 9, 2017

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

BABAK AGHEVLI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] On this application, Babak Aghevli challenges a decision of the Immigration Division of the Immigration and Refugee Board [Board] by which he was declared inadmissible on the grounds of organized criminality and ordered deported. Mr. Aghevli contends that the Board erred by misapplying section 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001 c27 [*IRPA*] to the evidence.

[2] The underlying facts of Mr. Aghevli's immigration problems are not materially in dispute. The Board's inadmissibility finding was based on Mr. Aghevli's undisputed involvement in a narcotics trafficking enterprise described by the Board as a "dial-a-dope operation on the North Shore of Vancouver". Mr. Aghevli's role was that of a weekend street-level seller working under the direction of Waheed Kara. Mr. Aghevli was one of a number of "runners" working for Mr. Kara. Although Mr. Aghevli was never criminally charged, his trafficking activity was established by way of a police undercover operation. Mr. Kara was, on the other hand, convicted for his role and sentenced to three years in custody.

[3] Mr. Aghevli's principal argument is that the Board had no evidence that he was aware of the scope of Mr. Kara's trafficking operation. Without proof that Mr. Aghevli knew that the operation consisted of more members than solely Mr. Kara and himself, the Board could not reasonably find that he was a knowing participant in a criminal organization. This, he says, flows from my finding in *Saif v Canada (MCI)*, 2016 FC 437, [2016] FCJ No 412 (QL) [*Saif*], that, for the purposes of applying section 37(1)(a), a criminal organization requires the concerted activity of three or more participants. Mr. Aghevli also takes from the decision in *Saif*, above, that the involvement of independent parties in the narcotics supply chain do not count as participants in the organizational structure required by section 37(1)(a).

[4] According to Mr. Aghevli, the Board erred by concluding that he must have known the cocaine he was selling came from someone above Mr. Kara in the supply chain and he was thus part of a criminal organization. In the absence of evidence of some recognized organizational

structure (e.g. identity, leadership, territory), Mr. Aghevli says there was nothing to support a finding that the supplier was a member of the operation.

[5] Indeed, the only evidence on point, he contends, was to the effect that the "kilo level" supplier to Mr. Kara was operating independently of Mr. Kara's operation (see the testimony of Sgt. Koberly at pp 205-206 of the Applicant's Record). The argument is summarized in the Applicant's Memorandum of Argument in the following way.

> 21. It is submitted that the above-noted analysis does not fall within the range of acceptable outcomes because there is no indication that the Member considered the legal necessity for the existence of common organizational characteristics that was mandated by the Court of Appeal in *Sittampalam*. It is submitted that, had the Member properly considered these factors, she would have been obliged to find that there was no reason to suspect that Waheed KARA had any organizational ties to his drug supplier(s) and that it was therefore unreasonable to find that his relationship with his drug supplier(s) could be characterized as an organization. The Member's failure to consider the presence of any common organizational characteristics resulted in her to apply [*sic*] an interpretation of the definition of a criminal organization that was unreasonably broad and far too flexible. Since it was unreasonable to find that Waheed KARA's cocaine supplier(s) were members of an organization with Waheed KARA, there was no reason for the Member to find that the applicant was a member of a criminal group containing more than two people. It was therefore unreasonable to find that he was a member of a criminal organization as described in section 36(1)(a) [*sic*] and this decision should be overturned on this basis.

[6] There are two fundamental problems with Mr. Aghevli's argument.

[7] Mr. Aghevli draws comfort from a point I made by analogy in *Saif*, above, that bare street level purchasers of drugs cannot be seen as falling within the organizational structure contemplated by section 37(1)(a). I described that type of involvement as "peripheral" to the

existence "of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of a commission of an offence . . .".

[8] In this case, the Board found at para 37 that "Kara was buying large amounts of cocaine from another person and then re-selling street level amounts of cocaine himself with the assistance of Mr. Aghevli". Mr. Aghevli had knowledge that the operation consisted of "at least three people" and he was therefore a knowing participant in the criminal organization.

[9] The Board is, of course, entitled to considerable deference in the area of fact finding. It is also entitled some latitude in the interpretation of the *IRPA*. A helpful discussion about the applicable standard of review can be found in the following passage from *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR. 708 [*Newfoundland Nurses*]:

> [11] It is worth repeating the key passages in Dunsmuir that frame this analysis:
>
> > Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable

> outcomes which are defensible in respect of the facts and law.
>
> . . . What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in respect for governmental decisions to create administrative bodies with delegated powers" . . . . We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision" . . . . [Emphasis added; citations omitted; paras. 47-48.]

[12] It is important to emphasize the Court's endorsement of Professor Dyzenhaus's observation that the notion of deference to administrative tribunal decision-making requires "a respectful attention to the reasons offered or which could be offered in support of a decision". In his cited article, Professor Dyzenhaus explains how reasonableness applies to reasons as follows:

> "Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added.]
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> (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in Michael

> Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304)
>
> See also David Mullan, "*Dunsmuir v. New Brunswick*, Standard of Review and Procedural Fairness for Public Servants: Let's Try Again!" (2008), 21 *C.J.A.L.P.* 117, at p. 136; David Phillip Jones, Q.C., and Anne S. de Villars, Q.C., *Principles of Administrative Law* (5th ed. 2009), at p. 380; and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 63.

[10] The Board's interpretation in this case of what constitutes a criminal organization is accordingly deserving of judicial respect. It does not seem unreasonable to me that the analogy used in *Saif*, above, was not applied by the Board to the relationships that existed in this case. Although there may well be varying degrees of organizational structure, leadership, and hierarchy in the distribution of drugs, everyone involved is presumably working in furtherance of a common goal – that is, to get the product into the hands of the users. Although Mr. Kara may have enjoyed a degree of independence from his own supplier or suppliers, the activity still required some planning within a network of participants acting together in the furtherance of the commission of an offence. The Board, by implication, found it sufficient that Mr. Kara had to have had an ongoing business relationship with a wholesale supplier and Mr. Aghevli must have known about it. I also do not accept that it was unreasonable for the Board to find a criminal organization in the face of Sgt. Koberly's testimony. Although Sgt. Koberly did speak to a level of independence commonly existing within narcotics distribution networks, he did not say that ongoing supply relationships did not exist among the participants.

[11] I am also not convinced that the Board was unmindful of Mr. Aghevli's awareness of other street-level runners operating within Mr. Kara's group. The Board did note that there was

no direct evidence of that knowledge but it also observed that Mr. Kara was moving large amounts of cocaine over an extended period of time. Mr. Aghevli was only working on weekends. Common sense suggests that he was aware of others working at his level. This inference is consistent with the Board's statement that Mr. Aghevli knew "that at least three people were involved with Kara's operation at any given time".

[12] This inference is also consistent with evidence in the record that Mr. Aghevli shared a cell phone with another street-level seller working for Mr. Kara, and had disclosed to an undercover officer that he was the "new guy" working the phone on weekends. Although the Board did not refer to this evidence, it is open to the Court to consider the entirety of the record to assess the reasonableness of the decision: see, *Newfoundland Nurses*, above.

[13] For the foregoing reasons, the application is dismissed. Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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