Federal Court  Cour fédérale

Date: 20210622

Docket: IMM-6276-19

Citation: 2021 FC 653

Toronto, Ontario, June 22, 2021

PRESENT: Mr. Justice Diner

BETWEEN:

ANDREW NATHANAEL GRIFFITHS

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, selected under the Ontario Provincial Nominee Program ("PNP"), challenges an Immigration Officer's decision refusing his application for permanent residence on the basis the he is inadmissible to Canada for serious criminality pursuant to s. 36(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. I agree that the Officer failed to conduct a proper analysis as required under that provision, and therefore will allow this Application.

I. Background

[2] The Applicant is a citizen of Jamaica who, on January 19, 2016, applied for permanent residence in Canada through the Ontario PNP. The Applicant revealed that, while living in the United States in 2007, he had applied for an American passport using a falsified birth certificate. By signing his passport application, the Applicant declared under penalty of perjury that the information and documents contained therein were truthful and correct.

[3] He was subsequently charged with three federal offences under Title 18 of the US Penal Code: (i) making false statement in application and use of passport (18 USC § 1542 (1944)), (ii) making a false representation of US citizenship (18 USC § 911 (1996)), and (iii) perjury (18 USC § 1621 (2011)). The Applicant signed a plea deal for the lesser charge of "making a false statement in application and use of passport"; the disposition of the other charges was thus suspended. He was sentenced to time-served and two years' probation. Rather than serve his probation, he opted for deportation to Jamaica. It was during the next 14 years that the Applicant built a successful computer business and was selected on the basis of his experience by the Ontario PNP.

[4] A Canadian Immigration Officer ("Officer") stationed in Mexico City assessed the permanent residence application. On June 27, 2019, the Officer notified the Applicant via a procedural fairness letter ("PFL") of his potential inadmissibility to Canada in relation to the charge for perjury. The Officer indicated that the offence, had it been committed in Canada, could be punishable under ss. 131, 139, or 140 of the *Criminal Code of Canada*, RSC 1985, c C-

46 [*Criminal Code*]. He gave the Applicant 60 days to respond. A response was received on July 12, 2019.

II. Decision Under Review

[5] On September 23, 2019, the Officer found the Applicant inadmissible to Canada and rejected the application for permanent residence. He determined that the underlying circumstances of the US offence of perjury ("US Perjury") were consistent with the indictable offence of perjury found under s. 131 of the *Criminal Code* ("Canadian Perjury"), in that both offences required that the accused has intended to mislead by knowingly making a false statement by affidavit.

[6] The Officer found that the Applicant had made a false statement by affidavit with intent to mislead. Had those circumstances arisen in Canada, the Officer determined that they would have given rise to Canadian Perjury, punishable by a 14-year maximum term of imprisonment. He thus concluded that the Applicant was inadmissible under s. 36(1)(c) of *IRPA*. The Officer did not perform any analysis in relation to ss. 139 and 140 of the *Criminal Code*.

[7] Only the assessment of the Applicant's inadmissibility is at issue in this Application, which attracts a reasonableness review (*Garcia v Canada (Citizenship and Immigration)*, 2021 FC 141 at para 5 [*Garcia*]; *Clarke v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 128 at para 4 [*Clarke*]; *Randhawa v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 905 at para 19 [*Randhawa*]).

[8] The decision must be justified, transparent, and intelligible under its facts and the law, in both its rationale and outcome: *Vavilov v Canada (Citizenship and Immigration),* 2019 SCC 65 at paras 83, 99 [*Vavilov*]. In this context, matters of statutory interpretation are not treated uniquely, but are examined in light of the decision as a whole, the officer's reasons, and the outcome: *Clarke* at para 4; *Vavilov* at paras 115-116.

III. Analysis

[9] Pursuant to *IRPA* s. 36(1)(c), a foreign national is inadmissible for serious criminality if there are reasonable grounds to believe that they committed an act outside of Canada that is an offence where it was committed and, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of 10 years or more. The two key *IRPA* provisions are ss. 33 and 36(1) which read as follows:

Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
…	[…]
Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament	**a)** être déclaré coupable au Canada d'une infraction à une loi fédérale punissable

punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	**b)** être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	**c)** commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

[10] "Reasonable grounds to believe", set out in s. 33 represents "more than a mere suspicion", but less than a balance of probabilities; reasonable grounds exist "where there is an objective basis for the belief which is based on compelling and credible information": *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paras 111, 114 [*Mugesera*]; *Garcia* at para 11. The standard only applies to questions of fact, not questions of law. In other words, when applying the facts to s. 36(1)(c), the facts must show that they do, as opposed to could, constitute an offence (*Mugesera* at para 116; *Garcia* at para 11).

[11] Thus, two questions arise in this respect of this case. The first is a question of fact, namely whether there existed reasonable grounds for the Officer to believe that the Applicant supplied a falsified birth certificate, and knowingly and willingly made a false declaration in his passport application under penalty of perjury. This would establish that the Officer had reasonable grounds to believe that the Applicant had committed an act in the US that was an offence in the US (*i.e.*, US Perjury in these circumstances).

[12] The second question, one of application of the facts to the statute, is whether the essential elements of the criminal provision chosen by the Officer – Canadian Perjury – have been made out. As explained above, under this question of law, the Officer must determine whether the facts underlying the US offence, having been demonstrated on the reasonable grounds to believe standard, do indeed give rise to Canadian Perjury. This second question requires a thorough examination of the elements of the Canadian offence (*Ghahraman-Ebrahimi v Canada (Attorney General)*, 2020 FC 746 at para 47).

[13] Both parties agree that s. 36 admissibility has traditionally engaged an "equivalency analysis" comparing the foreign and the Canadian provision, as refined by the Federal Court of Appeal in *Hill v Canada (Minister of Employment & Immigration)* (1987), 73 NR 315, 1987 CarswellNat 15 (WL Can) (CA) [*Hill* cited to WL Can]. *Hill* provides for three methods to perform the analysis (at para 16):

1. Comparing 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;

2. 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; or
3. Using a combination of one and two.

[14] As will be explained in some detail below, while there is some debate about the requirement for an equivalency analysis when faced with a s. 36(1)(c) allegation, at a minimum the second *Hill* examination applies to this case, namely the need to ascertain whether "the essential ingredients of the offence in Canada have been proven".

[15] I note that *Hill* followed on a Federal Court of Appeal decision from some six years earlier in *Brannson v Canada (Minister of Employment & Immigration)* (1980), [1981] 2 FC 141, 34 NR 411 (CA) [*Brannson*], which had stressed the centrality of considering the offence's essential ingredients (at para 38):

> In this case, we have in evidence the judgment and probation commitment order and the definition of the relevant United States offence, and we know the definition of the Canadian offence. I would observe generally that in such a situation, in determining whether the offence committed abroad would be an offence in Canada under a particular Canadian statutory provision, it would be appropriate to proceed with this in mind: Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that these essential elements correspond. One must, of course, expect differences in the wording of statutory offences in different countries. I cannot, however, even with this in mind, escape the conclusion that the sending or transmission of "letters or circulars" is an essential element of the Canadian offence. One could not be

> convicted of the offence if the material transmitted or delivered were neither letters nor circulars.
>
> [Emphasis added.]

[16] Both parties also rely on the Federal Court of Appeal's decision in *Li v Canada (Minister of Citizenship & Immigration)* (1996), [1997] 1 FC 235, 1996 CarswellNat 1133 (WL Can) (CA) [*Li*] to explain the substance of an equivalency analysis. Expanding on *Brannson* and *Hill*, the Court in *Li* explained that it requires a comparison of the "factual and legal criteria for establishing the offence both abroad and in Canada". The Court of Appeal further explained that a "comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences".

[17] It is worth noting while that the Applicant was deemed inadmissible under s. 36(1)(c), s. 36(1)(c) employs very similar language to s. 36(1)(b). The difference is that s. 36(1)(b) deems inadmissible a foreign national who has been "convicted" of a foreign offence, while s. 36(1)(c) applies to those who have merely "committed" a foreign offence.

[18] In the PFL, the Officer originally informed the Applicant of his potential inadmissibility to Canada under *IRPA* s. 36(1) for having committed or having been convicted of an offence. However, the Officer's notes logged in the Global Case Management System ("GCMS Notes") make clear that the Applicant was deemed inadmissible under s. 36(1)(c) – for having committed a foreign offence, and not for a US conviction under s. 36(1)(b).

[19] I note, however, that certain judges of this Court have disagreed that a full equivalency analysis needs be done under s. 36(1)(c): *Garcia* at paras 49-50; *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at paras 208-210; *Victor v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 979 at paras 35-37. As Justice Nicholas McHaffie held in *Garcia*, at para 50:

> The analysis under paragraph 36(1)(*c*) of the *IRPA*, however, pertains not to a conviction outside Canada or even a charge, but to an act committed by the individual. The paragraph has two requirements. First, the act must be "an offence" where it was committed. Second, the act must constitute an offence punishable by a maximum term of imprisonment of at least 10 years, if it were committed in Canada. Unlike paragraph 36(1)(*b*), the paragraph does not on its face require that there be any equivalence between the offences in the two jurisdictions; simply that the act be "an offence" where it was committed, and constitute "an offence" with a particular punishment in Canada.
>
> [Emphasis added.]

[20] *Garcia* points out that other decisions have held that an equivalency analysis is required to establish inadmissibility under s. 36(1)(c). These cases include *Randhawa* at para 31; *Cruz v Canada (Citizenship and Immigration)*, 2020 FC 455 at paras 42-43; *Singh v Canada (Citizenship and Immigration)*, 2019 FC 946 at paras 16-17; and *Pardhan v Canada (Minister of Citizenship & Immigration)*, 2007 FC 756 at paras 9-10.

[21] During the hearing, this Court directed the Parties' attention to this issue. Given that the parties had not commented on *Garcia*, both were provided with the opportunity to make post-hearing submissions, and both parties did so. These Reasons take those post-hearing submissions into account.

[22] In brief, the Applicant submits that "whether an equivalency analysis is required for s. 36(1)(c) is not dispositive". Rather, the Applicant submits that the jurisprudence clearly demonstrates it is unreasonable for an officer to fail to turn their mind to the essential elements of the Canadian Offence. In this case, the Applicant argues that the Officer failed to do.

[23] The Respondent agrees that *Garcia* is not dispositive, stating that it is distinguishable on its facts. They also agree that s. 36(1)(c) requires an officer to analyze whether the underlying facts of the foreign offence satisfy the essential elements of the Canadian offence.

[24] I agree with the parties that the Court need not pronounce on the divergence raised in *Garcia*, as it is not dispositive in this case. In my view, the Officer's analysis was fundamentally flawed such that it cannot be considered reasonable under either approach.

[25] The traditional view favouring the equivalency analysis under s. 36(1)(c) requires the officer to complete two tasks: (i) identify and compare the constituent or essential elements of both the foreign and the Canadian offence; and (ii) establish whether the underlying circumstances of the foreign offence do in fact give rise to the Canadian offence.

[26] The view favoured in *Garcia* does not require a comparison of the offences in play, because the equivalency of the offences is not conclusive. However, this view imposes a requirement that the adjudicator adequately examine whether the underlying circumstances of the foreign offence do in fact give rise to the Canadian offence.

[27] Therefore, the lowest common denominator between those two approaches is to require – at a minimum – that an officer adequately demonstrate or justify how the underlying circumstances of the foreign offence give rise to the Canadian offence. While it may not be necessary for the officer to demonstrate that the two offences are properly equivalent under s. 36(1)(c), as highlighted out in *Garcia*, the officer must nevertheless engage with the essential elements of the Canadian offence that has been selected for the purposes of determining inadmissibility. It follows that the officer will commit a reviewable error if they fail to properly explain how the elements of the Canadian offence were met, or where their conclusion in relation to the Canadian offence is not reasonably justified in light of the facts and the law.

[28] In this vein, the Applicant argues that the Officer's s. 36(1)(c) analysis was grossly deficient, merely comparing the titles of the offences, noting a similarity between the US and Canadian legal systems and, from there, deciding that the two offences were equivalent. There was no engagement in addressing the essential elements of the Canadian offence.

[29] The Applicant further submits that Canadian Perjury is much narrower than US Perjury. Specifically, Canadian Perjury applies only to false statements made in court or in relation to a judicial proceeding, and thus cannot apply to false declarations made in relation to a passport application. Thus, the essential ingredients of the two offences are different. The other two *Criminal Code* offences cited by the Officer – s. 139 ("obstructing justice") and s. 140 ("public mischief") – are not applicable to these circumstances because they did not involve a judicial proceeding or the investigation of a peace officer.

[30] Instead, the Applicant indicates that the Officer should have selected “false statement in relation to passport” (s. 57(2) of the *Criminal Code*) as the Canadian offence, which is punishable on summary conviction for a term not exceeding two years’ imprisonment. Had that been the case, the analysis of which would have been conducted under *IRPA* s. 36(2) (which I will refer to as “ordinary criminality”) and not s. 36(1), the Applicant would not be inadmissible by virtue of deemed rehabilitation under *IRPA* s. 36(3)(c), and ss. 18(1)-(2). Together, these provisions deem that rehabilitation occurs 10 years after conviction for s. 36(2) ordinary criminality.

[31] The Respondent, on the other hand, submits that the Officer’s analysis was reasonable. Principally, the Minister argues that Canadian Perjury is not restricted in application to false declarations made in court or in relation to court proceedings. Accordingly, the essential ingredients of the two offences are the same, and the Officer’s conclusion on inadmissibility was reasonable.

[32] The Respondent also acknowledges that s. 57(2) of the *Criminal Code* might have served as a better comparator to US Perjury. However, *IRPA* does not require that an officer compare the foreign offence with a Canadian offence that would result in the most favourable immigration consequences for an applicant, nor with an offence that most exactly matches or is most similar to the foreign offence.

[33] As I noted above, the question of the equivalency analysis in relation to s. 36(1)(c) need not be answered in this case because the Officer’s analysis fell well below the minimum standard

common to both approaches highlighted in *Garcia* in two ways. First, while the Officer recited s. 131 of the *Criminal Code*, he failed to engage with its essential elements, and thus to explain how the underlying facts would give rise to the offence. Second, the Officer's conclusion that the underlying facts give rise to Canadian Perjury is erroneous.

[34] To demonstrate, I turn first to the words of the Canadian Perjury provision, reproduced verbatim in the in the GCMS Notes (in English):

Perjury	**Parjure**
131 (1) Subject to subsection (3), every one commits perjury who, with intent to mislead, makes before a person who is authorized by law to permit it to be made before him a false statement under oath or solemn affirmation, by affidavit, solemn declaration or deposition or orally, knowing that the statement is false.	**131 (1)** Sous réserve du paragraphe (3), commet un parjure quiconque fait, avec l'intention de tromper, une fausse déclaration après avoir prêté serment ou fait une affirmation solennelle, dans un affidavit, une déclaration solennelle, un témoignage écrit ou verbal devant une personne autorisée par la loi à permettre que cette déclaration soit faite devant elle, en sachant que sa déclaration est fausse.
Idem	**Idem**
(2) Subsection (1) applies, whether or not a statement referred to in that subsection is made in a judicial proceeding.	**(2)** Le paragraphe (1) s'applique que la déclaration qui y est mentionnée soit faite ou non au cours d'une procédure judiciaire.

[35] The text of the provision reveals three constituent elements for Canadian Perjury: (i) a false statement made under oath or solemn affirmation before a person authorized by law to permit it to be made before them; (ii) knowledge that the statement is false at the time it is made; and (iii) an intent to mislead (see *Calder v The Queen*, [1960] SCR 892 at 897; *R v Wilson*, 2011

ONSC 3385 at para 36). Thus, Canadian Perjury is a *mens rea* offence requiring the Crown to establish the accused's intent to mislead. The offence can occur outside the context of a judicial proceeding: *Criminal Code*, at s 131(2); *R c Vanier*, 2018 ONSC 2714 at para 11.

[36] The Officer dedicates a considerable portion of the GCMS Notes to the circumstances underlying the US Perjury charge, as well as to the Applicant's background. However, this commentary on the US is followed by the marked contrast of a dearth of discussion about how those facts would constitute Canadian Perjury. The Officer notes that the "US court system is similar to that of Canada", and proceeds to conclude that Canadian Perjury has been made out:

> Section 131 [of the *Criminal Code*] appears consistent with documents on file. [Applicant], with intent to mislead, made a false statement by affidavit knowing that the statement is false, when applying for a US passport. Max penalty of 14 years. I have also taken account [*Criminal Code*] 368 and IRPA 122. While I note that [Applicant] may also be inadmissible on these grounds and that an equivalency may be made, based on the information before me and that which was communicated to [Applicant], I have reasonable grounds to believe that [Applicant] is presently inadmissible to Canada under A36(1)(c) for committing an act, mainly perjury, that is an offence where it was committed (the US) and which would constitute an offence under an Act of Parliament (*Criminal Code* 131) punishable by a maximum term of imprisonment of at least 10 years.

[37] As mentioned above, the Respondent relies on a decision from the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board for the proposition that an Immigration Officer need not select, for the purposes of inadmissibility, the Canadian offence which would lead to the best immigration consequences for the Applicant (*Canada (Minister of Public Safety and Emergency Preparedness) and Adekunle, Re*, 2017 CarswellNat 4435 (WL Can) (Imm App Div), citing, *Canada (Minister of Citizenship & Immigration) v Canada (Immigration & Refugee*

Board - Appeal Division) (1999), 178 FTR 110, 1999 CarswellNat 2486 (WL Can) (TD)).While that may be, it is nevertheless incumbent on the Officer to (i) demonstrate why the selected Canadian offence is applicable, and (ii) how it is made out on the underlying facts. Here, the Officer skipped this crucial step. Furthermore, in my view, the Officer wrongly concluded that Canadian Perjury was made out.

[38] I agree with the Respondent that Canadian Perjury can occur outside of the court process: s. 131(2) of the *Criminal Code* makes this explicitly clear. However, Canadian Perjury requires that the false declaration was made under oath, before a person authorized by law to receive such oath. The Officer's GCMS Notes indicate that the Applicant made false statements "by affidavit", yet nothing on the record indicates that the Applicant was under oath or affirmation at the time he signed the declaration. Nor does the record reveal that the Applicant made the declaration "before a person who is authorized by law to permit it to be made before him".

[39] For contrast, US Perjury explicitly distinguishes between false statements made under oath to an authorized representative and those made under "penalty of perjury", the second category being most comparable to the Applicant's situation. The language of Canadian Perjury, in my view, is not broad enough to capture these circumstances (see, for example, *United States of America v Quintin*, [2000] OTC 170, [2000] OJ No 791 at para 109 (Sup Ct J), in which the Ontario Superior Court of Justice held that Canadian Perjury did not apply to false statements in a tax return).

[40] The Respondent argues that lying in a passport application can meet the definition of Canadian Perjury, and, in support of the proposition, cites *United States of America v Sosa*, 2011 ABQB 534 at paras 11, 26-27, 34 [*Sosa*], leave to appeal to the ABCA ref'd, 2012 ABCA 242, leave to appeal to the SCC ref'd, [2012] SCCA No 433.

[41] I do not agree. To the contrary, *Sosa* reinforces my conclusions above. There, the Court determined that a Guatemalan national, sought for extradition and prosecution by the United States Government for making false declarations while attempting to become a naturalized American citizen, had committed an offence equivalent to Canadian Perjury. The individual knowingly made false statements in his application documents and during various interviews with immigration officials under penalty of perjury. Importantly, during an interview with a naturalization examiner, the individual swore under oath that the information contained in his application and shared during his interviews remained true and correct.

[42] *Sosa* is thus distinguishable on the key fact that the individual in question (i) had made false statements, and had done so (ii) while under oath, (iii) before a person authorized by law to receive sworn statements. The same cannot be said for Mr. Griffiths in this case. Thus, the Respondent's argument on this point cannot succeed.

[43] As a result, I am not satisfied the Applicant would have committed Canadian Perjury had the underlying circumstances of his US charge arisen in Canada. The Officer's conclusion was thus unreasonable in light of the facts on the record, and his failure to apply them to the Canadian provision properly.

IV. Conclusion

[44] In sum, the Officer's decision is unreasonable regardless of whether an equivalency analysis is required under s. 36(1)(c) by reason of two fatal flaws. The Officer erroneously concluded that the underlying circumstances of the acts committed by the Applicant would have given rise to Canadian Perjury, had they arisen in Canada. Combined with his failure to engage with the essential elements of Canadian Perjury, the Officer failed to satisfy the "minimum standard" required under s. 36(1)(c). It follows that the decision does not meet the hallmarks of justification, transparency, and intelligibility, and is thus unreasonable. For these reasons, this Application for judicial review is allowed.

JUDGMENT in IMM-6276-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.

2. The matter will be remitted for redetermination by another Officer.

3. The parties proposed no question of general importance for certification, and I agree that none arises.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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