Date: 20070626

Docket: IMM-3224-06

Citation: 2007 FC 674

Ottawa, Ontario, June 26, 2007

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

RAFIQ REHMAT LAKHANI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of an unfavourable decision by Marie-Louise Côté, Member, Immigration Division (the Tribunal), dated May 31, 2006, following the inadmissibility hearing conducted pursuant to subsection 44(2) of the Act.

ISSUES

[2] Did the Tribunal err in fact or in law in its assessment of the offence the applicant allegedly committed in the United States of America (U.S.A.) and in its identification of the Canadian equivalent offence under the *Criminal Code*, R.S.C. 1985, c. C-46 (CCC)?

[3] For the reasons that follow, the answer to this two-part question is negative. Consequently, the application for judicial review shall be dismissed.

BACKGROUND

[4] The applicant was born in Pakistan on July 23, 1965. He entered the U.S.A. on a visitor's visa on October 10, 1992. He claimed refugee status but was unsuccessful. He lived in the United States until February 22, 2004, when he fled to Canada and claimed refugee status.

[5] The applicant is not a citizen of the U.S.A. However, in November 1999, the applicant agreed after prompting from a friend, to put his name on a Small Business Administration loan application in order to purchase a convenience store in Forth Worth, Texas. He alleges that he did not read the loan application documents before signing them on May 26, 2000. These documents stated that he was a citizen of the U.S.A., which enabled him to receive approval of a loan in the amount of $1,190,000.

[6] On September 25, 2003, the applicant was arrested and accused of having falsely and wilfully represented himself to be a citizen of the U.S.A. in the Small Business Administration loan application, in violation of section 911 of Title 18 of the United States Code (U.S.C.) and of

paragraph 645(a) of Title 15 of the U.S.C. It is alleged that if committed in Canada, this act would constitute an indictable offence of fraud under section 380 of the CCC.

[7] On December 3, 2003, the applicant entered a guilty plea for the offence of impersonating a citizen of the United States and the judge ordered a sentencing hearing, scheduled for March 22, 2004. On February 6, 2004, the applicant filed a motion to withdraw the plea of guilty which motion was granted on February 10, 2004. He did not attend his sentencing hearing, as he had fled the country on February 22, 2004. Therefore on March 31, 2004, an arrest warrant was issued charging the applicant with Failure to Appear for sentencing.

[8] On November 29, 2005, an immigration officer made a subsection 44(1) report alleging that the applicant was inadmissible on the basis of serious criminality, pursuant to paragraphs 36(1)(c) and 36(2)(c) of the Act. The Tribunal held an admissibility hearing on November 29, 2005 pursuant to paragraph 44(2), in order to determine if the applicant is a person described in paragraph 36(1)(c). The respondent did not proceed under paragraph 36(2)(c) against the applicant. The Tribunal concluded that he was inadmissible on the basis of serious criminality, as a result of which, the applicant filed the present application for judicial review.

DECISION UNDER REVIEW

[9] Having considered the applicant's testimony and the documentary evidence regarding the criminal charges against him, and the warrant of arrest for his failure to appear at his sentencing hearing, the Tribunal concluded that the applicant was not credible on the following three grounds:

a) the applicant agreed to make a false statement about his status in the U.S.A. in order to obtain a Small Business Administration loan;
b) the applicant did not provide a reasonable explanation to justify his failure to appear for sentencing on March 22, 2004, before the criminal Court in Dallas, Texas; and
c) the applicant claimed that he did not receive the proceeds of the loan, which is contrary to the documentary evidence.

[10] The Tribunal was satisfied that the applicant was willing to make a false statement to the Bank United stating that he was a U.S. citizen. Moreover, the applicant fully agreed to declare that he was going to receive a green card very soon when he applied for the loan, whereas this was not the case. His application for permanent residence in the U.S.A. had not even been submitted at the time of the loan application. This demonstrated to the Tribunal that the applicant had the intention to obtain money fraudulently, which adversely affected his credibility on a crucial element.

[11] The Tribunal was not satisfied with the explanation provided by the applicant for his failure to appear before the criminal court for sentencing. The immigration judge had given the applicant and his wife up to March 23, 2004, to leave the country. His sentence hearing was to be heard on March 22, 2004. Instead of remaining for his sentencing hearing, the applicant fled to Canada on February 22, 2004, a full month before sentencing, which undermines his credibility and supports the inference that he is a fugitive from justice. In the Tribunal’s opinion, the applicant could have contested the charges in the U.S.A. but he did not.

[12] Moreover, the applicant's claim that he did not receive the loan is contradicted by the evidence, which shows that the applicant was able to purchase a Chevron store following the approval of the loan. He became the owner of the store and later defaulted on the loan. The Tribunal was satisfied that the applicant did receive the proceeds from the loan since the evidence adduced outweighed the applicant's argument that it is logical that he would have been charged with some count of fraud were he to have received money illegally.

[13] Finally, the Tribunal was satisfied that there were reasonable grounds to believe that the applicant had indeed made a false statement for the purposes of obtaining the loan and that he had acted contrary to Title 15 U.S.C. paragraph 645(a). It further was satisfied that the same offence being committed in Canada would make the applicant liable to a maximum term of imprisonment of 14 years pursuant to section 380 of the CCC. The Tribunal also held that the criminal charges in the U.S.A. were equivalent to the Canadian offences under subsection 361(1) of the CCC. As a result, the applicant was deemed to be a foreign national who is inadmissible to Canada on grounds of serious criminality as described in paragraph 36(1)(c) of the Act.

RELEVANT LEGISLATION

[14] Section 44 of the Act provides the authority to determine the inadmissibility and removal of foreign nationals in Canada who are deemed to be inadmissible to remain in this country. The provision states:

LOSS OF STATUS AND REMOVAL **Report on Inadmissibility** **Preparation of report**	**PERTE DE STATUT ET RENVOI** **Constat de l'interdiction de territoire Rapport d'interdiction de territoire**
44. (1) An officer who is of the	**44.** (1) S'il estime que le

opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
Referral or removal order (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	**Suivi** (2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.
Conditions (3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.	**Conditions** (3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

[15] The applicant was found to be inadmissible on the grounds of serious criminality based on paragraph 36(1)(c) of the Act, which provides as follows:

INADMISSIBILITY **Serious criminality**	**INTERDICTIONS DE TERRITOIRE** **Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for [. . .] (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.	**36. (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants : [. . .] 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.

[16] The U.S.C. offences under which the applicant was charged outside of Canada are set out below as follows:

Section 911 of Title 18, U.S.C.
Whoever falsely and wilfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years or both."

Paragraph 645(a) of Title 15, U.S.C.
(a) False statements; overvaluation of securities
Whoever makes any statement knowing it to be false, or whoever wilfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment of action, or otherwise, or the acceptance, release, or substitution of security

> therefore, or for the purpose of influencing in any way the action of the Administration, or for the purpose of obtaining money, property, or anything of value, under this chapter, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

[17] The Canadian equivalent of these U.S.C. offences is found in section 380 of the CCC, which provides as follows:

Criminal Code	**Code criminel**
PART X: FRAUDULENT TRANSACTIONS RELATING TO CONTRACTS AND TRADE	**PARTIE X : OPÉRATIONS FRAUDULEUSES EN MATIÈRE DE CONTRATS ET DE COMMERCE**
Fraud	**Fraude**
380. (1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,	380. (1) Quiconque, par supercherie, mensonge ou autre moyen dolosif, constituant ou non un faux semblant au sens de la présente loi, frustre le public ou toute personne, déterminée ou non, de quelque bien, service, argent ou valeur :
(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars; or	a) est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans, si l'objet de l'infraction est un titre testamentaire ou si la valeur de l'objet de l'infraction dépasse cinq mille dollars;
(b) is guilty	b) est coupable :
(i) of an indictable offence and is liable to imprisonment for a term not exceeding two years, or	(i) soit d’un acte criminel et passible d’un emprisonnement maximal de deux ans,
(ii) of an offence punishable on	(ii) soit d’une infraction

summary conviction, where the value of the subject-matter of the offence does not exceed five thousand dollars.	punissable sur déclaration de culpabilité par procédure sommaire, si la valeur de l'objet de l'infraction ne dépasse pas cinq mille dollars.

[18] The applicant's offence in the U.S.A. is also equivalent to the offence of false pretence prescribed in subsection 361(1) of the CCC, which states:

Criminal Code **PART IX: OFFENCES AGAINST RIGHTS OF PROPERTY** **False pretence**	**Code criminel** **PARTIE IX : INFRACTIONS CONTRE LES DROITS DE PROPRIÉTÉ** **Escroquerie** **Définition de « faux semblant » ou « faux prétexte »**
361. (1) A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.	361. (1) L'expression « faux semblant » ou « faux prétexte » désigne une représentation d'un fait présent ou passé, par des mots ou autrement, que celui qui la fait sait être fausse, et qui est faite avec l'intention frauduleuse d'induire la personne à qui on l'adresse à agir d'après cette représentation.

[19] The applicant was ordered deported pursuant to paragraph 229(1)(c) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations). This procedure is as follows:

Specified Removal Order **229**. **(1)** For the purposes of paragraph 45(d) of the Act, the applicable removal order to be made by the Immigration Division against a person is [. . .]	**Mesures de renvoi à prendre** **229. (1)** Pour l'application de l'alinéa 45d) de la Loi, la Section de l'immigration prend contre la personne la mesure de renvoi indiquée en regard du motif en cause : [. . .]

(c) a deportation order, in the case of a permanent resident inadmissible under subsection 36(1) of the Act on grounds of serious criminality or a foreign national inadmissible under paragraph 36(1)(b) or (c) of the Act on grounds of serious criminality;	**c)** en cas d'interdiction de territoire pour grande criminalité du résident permanent au titre du paragraphe 36(1) de la Loi ou de l'étranger au titre des alinéas 36(1)b) ou c) de la Loi, l'expulsion;

ANALYSIS

Standard of Review

[20] The applicable standard of review in this matter, which deals with questions of fact, is that of patent unreasonableness. Indeed inadmissibility to Canada on the basis of "serious criminality" under subsection 36(1)(c) of the Act, requires an assessment of the facts of an offence outside of Canada, which is the equivalent to an offence in Canada. This Court has held that a finding of equivalency should be reviewed against the most deferential standard of patent unreasonableness.

[21] In *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1742, [2005] F.C.J. No. 2161 (F.C.), Justice Judith Snider held as follows at paragraphs 10 and 11:

> The issue before me relates to findings of fact made by the Board. In assessing equivalency, the Board was required to determine the underlying facts of a foreign criminal conviction. The only point of difference between the parties is whether the Board properly found that the Applicant had "uttered" the forged vehicle permit, giving rise to his conviction in New York.
>
> The Federal Court of Appeal suggested in *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 587, 2005 FCA 122 (see also *Dhanani v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 183, 2005 FC 169 (F.C.) at para. 22), that a standard of patent unreasonableness should apply to a decision of the Board regarding equivalency. A Board's findings of fact should not be disturbed unless patently unreasonable. Accordingly, this Court should only intervene if the Board's

> conclusion that there were "reasonable grounds to believe" the Applicant had uttered the forged permit was patently unreasonable.

[22] Moreover, I rely on the decision of the Federal Court of Appeal, which has established that foreign law is a question of fact. In *Canada (Minister of Citizenship and Immigration) v. Saini*, [2002] 1 F.C. 200 (C.A.), the Court held at paragraph 26, as follows:

> […] Foreign law is a question of fact, which must be proved to the satisfaction of the Court. Judicial findings about foreign law, therefore, have always been considered on appeal as questions of fact (see J.-G. Castel, Canadian Conflict of Laws, 4th ed. (Toronto: Butterworths, 1997), at page 155). Moreover, it is well settled that this Court will only interfere with a finding of fact, including a finding of fact with regard to expert evidence, if there has been a palpable and overriding error (see for example *N.V. Bocimar S.A. v. Century Insurance Co. of Canada*, [1987] 1 S.C.R. 1247; *Stein et al. v. "Kathy K" et al. (The Ship)*, [1976] 2 S.C.R. 802).

[23] I adopt the reasoning of my colleague in *Ferguson*, above. To succeed, the applicant must show that the Tribunal's decision was so obviously wrong based on the evidence before it, that it was patently unreasonable for it to arrive at the conclusions it did.

Did the Tribunal err in its assessment of the evidence with respect to the American offences?

[24] The applicant argues that the Tribunal erred in its assessment of the charges against him in that it mixed up the fraudulent scheme to deceive Bank United, of which he was a victim, with the false statements the applicant did make to the Bank. The applicant swears that he did not intend to declare in his loan application that he was a U.S. citizen but rather that he was an alien on the verge of obtaining his green card. The applicant argues that if he intended to say that he was a U.S. citizen, he would not have submitted his work permit, which U.S. citizens and green card holders do not

need to work in the U.S.A. He also contends that the Bank must have known that he was not a U.S. citizen due to the fact that he was waiting for his green card.

[25] The respondent is adamant in its support of the Tribunal's decision. The Tribunal was correct in holding that the statement held against the applicant was a fraudulent statement under Title 15 U.S.C., paragraph 645(a). The Tribunal did not mix up the false statements of the applicant with the fraudulent scheme to defraud the United Bank.

[26] Moreover, the evidence contradicts the applicant's contention that he had no intention of declaring he was a U.S. citizen and therefore did not commit an offence under Title 15. In support of this contention, the respondent draws the Court's attention to the applicant's Personal Information Form (PIF), which was also considered by the Tribunal. In his PIF, the applicant admits that the loan application form identified him as a U.S. citizen. In addition, the applicant made other false statements in his loan application in violation of the broad provisions of Title 15. At the time he signed the blank loan application form, not only had his permanent resident application not been granted, but it had not even been submitted. Thus the applicant wilfully made a false statement for the purposes of obtaining a loan contrary to Title 15, paragraph 645(a).

[27] After a careful review of the Tribunal's decision and an examination of the documentary evidence, as well as the transcripts of the hearings, I am of the view that the applicant's arguments that the Tribunal erred in law and in fact must fail. The decision of the Tribunal was reasonably open to it in light of the totality of the evidence.

[28] The sworn statement of complainant Ronald Joe Brookshire, Bureau of Immigration and Customs Enforcement, September 24, 2003 (C-3), affirms that the loan application form clearly states that the applicant was a U.S. citizen and the applicant's signature is affixed to the document. Ignorance is no defence for breaking the law. And more importantly, one is expected to have read a document before signing it. The Tribunal's assessment of the elements of the case points to the same conclusion that both offences under Titles 15 and 18 were applicable to the applicant. Consequently, I find no reviewable error and I am satisfied that the unfavourable decision confirming the inadmissibility of the applicant was not patently unreasonable.

Did the Tribunal err in its identification of the equivalent Canadian offence?

[29] The applicant argues that the Tribunal erred in both fact and law when it identified the equivalent criminal offences under paragraph 380(1)(a) and subsection 361(1) of the CCC. The applicant argues that the Tribunal fell into error here as well for since it confused the offences in the U.S.A, it cannot logically make out an equivalent offence under Canadian law. Similarly, the applicant argues that there could be no equivalent offence in Canada to impersonating a U.S. citizen. Neither the CCC nor the Act criminalizes the misrepresentation of declaring oneself a Canadian citizen *per se*, he argues.

[30] The respondent rejects outright this reasoning and draws the Court's attention to the discussion on equivalency as set out by the Federal Court of Appeal in *Li v. Canada (Minister of Citizenship and Immigration)* (C.A.), [1997] 1 F.C. 235. Writing for the Court of Appeal, Justice Barry Strayer carved out the parameters for measuring equivalences between foreign and Canadian offences. He held as follows at paragraph 12:

In considering this question it will be useful to refer again to the actual language of subparagraph 19(2) (a.1) (i) which requires that, for a person to be rendered inadmissible under this subparagraph he or she must:

> 19. (2) . . . .
> (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence [punishable by indictment under Canadian federal law]. [Emphasis added.]

It is common to speak of this provision as requiring the "equivalence" of the foreign and Canadian offences and the Motions Judge correctly adopted this language in the certified questions. The reference in those questions to "essential elements" as the test of equivalency comes from earlier decisions of this Court. The jurisprudence of this Court has not yet, as far as I can ascertain, dealt expressly with the particular issue being addressed here: namely whether the "essential elements" to be compared include defences. One can, however, derive certain guiding principles from those decisions. In *Brannson v. Minister of Employment and Immigration*, this Court was dealing with a similar provision of the Immigration Act. Ryan J.A. writing for the majority made the following comments concerning the comparison of the offence for which a person has been convicted under foreign law and an offence under an Act of Parliament.

> 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. [Emphasis added.]

The Court found in that case that the offence under which the person had been convicted in the United States was broader than the allegedly similar provision of the Criminal Code of Canada. Ryan J.A. said that in such a case it would be open to lead evidence before the adjudicator of the particulars as charged of the actual offence committed, to enable the adjudicator to determine whether the offence actually committed would fit within the Canadian offence definition. He seemed to indicate that evidence as to what the person in question had actually done would also be admissible in determining whether his or her acts would have constituted an offence in Canada. Urie J.A. in concurring expressed the matter somewhat differently. He said [at page 144] that there should be a

> comparison of the "essential ingredients" (he did not use the term "essential elements" as did Ryan J.A.) and he said there should also be evidence as to the circumstances of the offence, which evidence could be either documentary (e.g. the particulars as charged in the U.S.) or *viva voce* as to how the offence had actually been committed. By this means it would be possible to determine whether, although the offence might be more broadly defined in the United States, the acts for which the person was convicted would also have made him or her guilty of an offence in Canada.

[31] Applying this case to the facts before the Tribunal, I am satisfied that the Tribunal was correct in its assessment of the equivalence between the essential elements of the American offences on the one hand, and the identified offences under the CCC on the other hand. The essential elements of the offences in both USC Titles are based on the notions of the knowing declaration of falsehoods.

[32] In the same manner, the Canadian equivalent offences require the *mens rea* of the U.S. offences of knowingly making misrepresentations or statements that are known to be false in order to obtain a benefit which would not be available save for the deception. Where, as in the offence of Title 15, money is involved, fraud is a necessary corollary, which also underpins the offence under section 380 of the CCC. Based on the facts, it was reasonably open to the Tribunal to settle on the Canadian equivalence of section 380. This assessment was not patently unreasonable, based on the evidence before the Tribunal. Its analysis of the competing statutes is coherent and clear, demonstrating a thoughtful assessment of the corresponding elements of the American law. The same analysis is evident with respect to subsection 361(1) of the CCC.

[33] The parties did not submit questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed;

2. No question is certified.

« Michel Beaudry »
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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