Date: 20080320

Docket: IMM-1705-07

Citation: 2008 FC 370

Ottawa, Ontario, March 20, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

AYODEJI AKANMU ALABI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The Applicant is a citizen of Nigeria. In 1993, he was convicted in the United States (U.S.) of conspiracy to distribute heroin. A section 44 report, of the *Immigration and Refugee Protection* Act, S.C. 2001, c. 27 (IRPA), was prepared, alleging that the Applicant is criminally inadmissible to Canada under paragraph 36(1)(*b*) of the IRPA, and referred to the Immigration Division.

[2] Although the Applicant stated, before the Immigration Division, that he applied for rehabilitation, under paragraph 36(3)(*c*) of the IRPA, he admitted that he had no documents demonstrating that he was deemed to be rehabilitated and received no answer on his request for

deemed rehabilitation. While the Applicant may have suggested, in his July 2006 submissions, on his Humanitarian and Compassionate (H&C) application, that he may be eligible to be deemed rehabilitated, the Applicant only filed his application for rehabilitation, in August 2007.

[3] The Immigration Division found that the Applicant was a person described in paragraph 36(1)(*b*) of the IRPA. The Applicant admitted that he was convicted, in the U.S., of conspiracy to distribute heroin. The offence would be equivalent to paragraph 465(1)(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46, conspiracy offence, which, in the circumstances, could be punishable by imprisonment for life. There was no evidence that the Applicant was deemed to be rehabilitated. The Applicant was inadmissible under paragraph 36(1)(*b*) of the IRPA, and a deportation order was issued, pursuant to paragraph 229(1)(*c*) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (Regulations).

II. Judicial Procedure

[4] This is an application pursuant to section 72(1) of the IRPA for judicial review of the Immigration Division decision, dated April 17, 2007, wherein, the Applicant was found to be a inadmissible, pursuant to paragraphs 36(1)(*b*) and 40(1)(*a*) of the IRPA.

III. Background

Criminal History in the United States

[5] On September 3, 1980, the Applicant, Mr. Ayodeji Akanmu Alabi, entered the U.S., as a student. He entered, using the name Timothy Kayode Alabi, with the date of birth of January 29,

1958. (Application Record, U.S. Immigration Review, pp. 47-49; Tribunal Record, Transcript of IRB Hearing, dated January 23, 2007, p. 122.)

[6] On June 27, 1989, the Applicant's status was adjusted to that of a lawful permanent resident. (U.S. Immigration Review, above.)

[7] On August 10, 1993, the Applicant was convicted in the U.S. District Court, District of Rhode Island, of the offense of conspiracy to distribute heroin, pursuant to section 841.A-1 of the US Code. (U.S. Immigration Review, above.)

[8] The Applicant, known in the U.S., as Timothy K. Alabi, did plead guilty to two counts of distributing heroin, in violation of 18 USC, 8, which is Section 841.A-1, and was sentenced to serve 24 months in prison. (Tribunal Record, Transcript of IRB hearing, dated January 23, 2007, p. 123.)

[9] On April 1 1994, the Immigration and Naturalization Service issued a Show Cause Order charging the Applicant as deportable, pursuant to the *Immigration and Nationality Act* of 1990 section 241(*a*)(2)(A)(iii) – Convicted of an aggravated felony. (U.S. Immigration Review, above.)

[10] On February 13, 1997, after appealing to the Board of Immigration Appeals, it was ordered that the Applicant be deported from the U.S. to Nigeria. (U.S. Immigration Review, above; <u>it is to be noted</u> that the Transcript of IRB hearing, dated January 23, 2007, above, p. 126, indicates that the Applicant was deported on February 20, 1997.)

Political Activist

[11] The Applicant, Mr. Akanmu Alabi, a citizen of Nigeria, was born on May 20, 1958.

[12] Mr. Akanmu Alabi was actively involved in pro-democratic activism, in Nigeria, before his problems with the Security Agents began, forcing him to flee Nigeria in order to save his life.

[13] Mr. Akanmu Alabi alleges to be a political activist and claims to have belonged to the National Democratic Coalition (NADECO), the United Action for Democracy (UAD) and the Committee for the Defense of Human Rights (CDHR). He was also a member of the Social Democratic Party (SDP) during the third republic in Nigeria and campaigned vigorously for Chief Moshood Abiola, the presidential candidate for the party.

[14] As a result of his political activities, to install democracy in Nigeria and his stand against the military government, Mr. Akanmu Alabi was arrested on several occasions, beaten, tortured and sustained severe injuries while in detention.

[15] Mr. Akanmu Alabi alleges to have been warned, subsequent to his release, by officials with the State Security Service (SSS), loyal to his cause, that his name had been forwarded to the office of the head of state, in Abuja, as a prime trouble-maker. It is they who advised him to leave the country.

[16] With the help of a good friend at the Security Agency, he purchased a British Passport with which he traveled to Canada.

[17] Mr. Akanmu Alabi arrived at the Pearson International Airport, in Toronto, on January 17, 1998. Shortly after his arrival, on January 20, 1998, he made a refugee claim on the basis of his fear of persecution, due to his political opinion, perceived political opinion and membership in a particular social group. Mr. Akanmu Alabi did not disclose in his refugee claim that he had previous convictions in the U.S. or that he had used an alias and a different date of birth.

[18] On April 13, 1999, the Convention Refugee Determination Division, of the Immigration and Refugee Board, determined that Mr. Akanmu Alabi was not a Convention Refugee due to a political change of circumstances, in Nigeria.

[19] On July 7, 1999, Mr. Akanmu Alabi applied to Citizenship and Immigration Canada (CIC) to be considered a Post-Determination Refugee Claimant, in Canada. Mr. Akanmu Alabi, again, neglected to indicate his prior convictions and alias to the Canadian authorities.

[20] On January 29, 2000, Mr. Akanmu Alabi received a Post Claim Determination Refugee decision, wherein, his application was dismissed as it was not received in time.

[21] Mr. Akanmu Alabi sought judicial review of the decision to dismiss his application. Justice Francis C. Muldoon, in an Order, dated March 2, 2001, allowed the judicial review, quashed and set aside the decision and returned the matter for redetermination. (*Alabi v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 294 (QL).)

[22] Subsequently, Mr. Akanmu Alabi was approved to enter Canada on H&C grounds. (Transcript of IRB hearing, dated January 23, 2007, above, p. 120.)

[23] On January 16, 2003, Mr. Akanmu Alabi was granted exemption, pursuant to section 25 of the IRPA, to allow for processing of his application for permanent residence from within Canada. Mr. Akanmu Alabi did not disclose, for a third time, his previous conviction or his alias. (Application Record, Applicant's Affidavit, sworn July 3, 2007, para. 3.)

[24] In April 2006, CIC discovered that Mr. Akanmu Alabi had previously been convicted and sentenced to jail in the U.S. CIC also learned that Mr. Akanmu Alabi was deported from the U.S. to Nigeria upon completion of his sentence, which was for two years. When CIC confronted Mr. Akanmu Alabi, he admitted that he had not been forthcoming and explained that he had neglected to previously disclose that he had fled persecution in Nigeria. At this time, Mr. Akanmu Alabi asked that he be considered rehabilitated. (Applicant's Affidavit, above, paras. 4 & 5.)

[25] On April 17, 2007, the Immigration Division, deemed Mr. Akanmu Alabi to be a person, described in paragraphs 36(1)(*b*) and 40(1)(*a*) of the IRPA and, therefore, found him inadmissible to Canada. (Transcript of IRB Hearing, dated April 17, 2007, above, pp. 112-114.)

[26] On April 25, 2007, Mr. Akanmu Alabi commenced an application for judicial review.

IV. Decision under Review

[27] The Immigration Division was satisfied that Mr. Akanmu Alabi is a foreign national as described in paragraph 36(1)(*b*) of the IRPA, inadmissible to Canada on grounds of serious criminality, 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 ten years. In accordance with paragraph 229(1)(*c*) of the Regulations, a deportation order was issued against him. (Transcript of IRB Hearing, dated April 17, 2007, above, p. 114).

[28] Furthermore, the Immigration Division also determined Mr. Akanmu Alabi to be a person described in paragraph 40(1)(*a*) of the IRPA. A foreign national, inadmissible for misrepresentation for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of the Act; therefore, in accordance with paragraph 229(1)(*h*) of the Regulations, Mr. Akanmu Alabi was excluded from Canada (Transcript of IRB Hearing dated, April 17, 2007, above, p.112.)

V. Relevant Legislation

[29] The applicable statutory provisions of section 36 of the IRPA, are:

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 :
…	[…]
(*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;
…	[…]
(3) The following provisions govern subsections (1) and (2):	(3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
…	[…]
(*c*) the matters referred to in paragraphs (1)(*b*) and (*c*) and (2)(*b*) and (*c*) do not constitute inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;	*c*) les faits visés aux alinéas (1)*b*) ou *c*) et (2)*b*) ou *c*) n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

The Immigration Division determined the U.S. offence to be equivalent to paragraph 465(1)(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46:

465. (1) Except where otherwise expressly provided by law, the following provisions apply in respect of conspiracy:	**465.** (1) Sauf disposition expressément contraire de la loi, les dispositions suivantes s'appliquent à l'égard des complots :
…	[…]
(*c*) every one who conspires with any one to commit an indictable offence not provided for in paragraph (*a*) or (*b*) is guilty of an indictable offence and liable to the same punishment as that to which an accused who is guilty of that offence would, on conviction, be liable; and	*c*) quiconque complote avec quelqu'un de commettre un acte criminel que ne vise pas l'alinéa *a*) ou *b*) est coupable d'un acte criminel et passible de la même peine que celle dont serait passible, sur déclaration de culpabilité, un prévenu coupable de cette infraction;

VI. Issue

[30] Did the Immigration Division err in law by finding the Applicant to be a person described under paragraph 36(1)(*b*) of the IRPA?

VII. Standard of Review

[31] Justice Max M. Teitelbaum of the Federal Court determined that the appropriate standard of review, wherein, a foreign national is inadmissible under the *Immigration Act* due to a criminal conviction, was that of reasonableness *simpliciter*. (*Wynter v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1107 (QL), paras. 20-22.)

VIII. Analysis

Preliminary Comments

[32] Mr. Akanmu Alabi also challenged the Immigration Division's determination that he is inadmissible under paragraph 40(1)(*a*) of the IRPA. The challenge was dismissed by the Federal Court. Mr. Akanmu Alabi cannot now challenge paragraph 40(1)(*a*) determination in this proceeding.

Paragraph 36(1)(*b*) - Criminal inadmissibility finding properly made

(a) Treatment of potential admission of deemed rehabilitation

[33] Mr. Akanmu Alabi asserts that the Immigration Division failed to recognize that the Minister's Representative did not dispute that he was rehabilitated and that he had requested that the Minister deem him rehabilitated.

[34] The Minister's Representative did not admit that Mr. Akanmu Alabi was rehabilitated. Rather, in regard to the status of his request for rehabilitation, Mr. Akanmu Alabi, admitted to the Minister's Representative that he had no documentation proving that he was deemed rehabilitated and had not received a decision on his rehabilitation application. (Transcript of IRB Hearing dated, April 17, 2007, above, pp. 135-136.)

(b) Requirement to adduce evidence of deemed rehabilitation

[35] Mr. Akanmu Alabi asserts that the Immigration Division erred in requiring him to adduce evidence of his deemed rehabilitation when paragraph 36(3)(*c)* only requires one to satisfy the Minister of his rehabilitation.

[36] Mr. Akanmu Alabi's assertion must fail for a number of reasons. The onus is on Mr. Akanmu Alabi to establish that the Minister has deemed him to be rehabilitated. This would necessarily involve adducing evidence before the Immigration Division to establish that fact.

[37] Secondly, the Immigration Division may only assess the evidence that is put before it. Unless evidence of the Minister's positive finding of rehabilitation is adduced, the Immigration Division cannot assess whether paragraph 36(3)(*c*) of the IRPA applies. If he was indeed determined to be rehabilitated by the Minister, it was incumbent on Mr. Akanmu Alabi to adduce that evidence before the Immigration Division Member.

[38] Mr. Akanmu Alabi cannot be considered rehabilitated without adducing evidence that such a finding was made. The Immigration Division cannot be faulted for expecting the he adduce such evidence.

(c) Application for rehabilitation does not prohibit decision on criminal inadmissibility allegation

[39] Mr. Akanmu Alabi specified that, as his request for rehabilitation pre-dated the hearing on paragraph 36(1)(*b*) of the IRPA allegation, the Immigration Division was without jurisdiction to consider the paragraph 36(1)(*b*) of the IRPA allegation until his application for rehabilitation was decided.

[40] Mr. Akanmu Alabi's assertion fails in both fact and law. Factually, while Mr. Akanmu Alabi may have referred to the possibility of his deemed rehabilitation in submissions on his H&C application, he did not make a formal application for rehabilitation, until August 2007, well after the Immigration Division determined the inadmissibility allegation. There could be no basis for the Immigration Division to defer a decision in light of a pending rehabilitation application when no such application existed. (Affidavit of Heather Cumming, para. 5.)

[41] Mr. Akanmu Alabi's argument, in law, that a pending rehabilitation application prevents the Immigration Division from assessing the paragraph 36(1)(*b*) allegation is inconsistent with the IRPA and the jurisprudence.

[42] As the Supreme Court of Canada explained in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, a foreign national has no right to continue to remain in Canada, particularly where he has been convicted of a serious offence. This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. A person falling within the class of foreign nationals

described in paragraph 36(1)(*b*), who have deliberately violated an essential condition under which they were permitted to remain in Canada and are subject to removal from Canada on that basis.

[43] In *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] S.C.R. 539, the Supreme Court of Canada also recognized that the objectives as expressed in the IRPA indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records, from Canada. Viewed collectively, these objectives of the IRPA and its provisions concerning foreign nationals, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

(i) Provisions of the IRPA

[44] Section 45 of the IRPA requires that the Immigration Division expediently assess inadmissibility allegations put before it. No provision is made for the Immigration Division to forestall the assessment of a criminal inadmissibility allegation when a rehabilitation application is pending. Had Parliament intended this, it could have specifically provided for it, but it did not do so.

[45] Paragraph 36(3)(*c*) is remedial in nature. It can apply to absolve a person from the consequences of a criminal inadmissibility finding either before or after the finding is made. Given that paragraph 36(3)(*c*) relief is available, after a paragraph 36(3)(*c*) finding is made, there is no basis to postpone assessing the paragraph 36(1)(*b*) allegation until the rehabilitation application is assessed.

[46] An application for rehabilitation requires that it be submitted, assessed and that a determination of rehabilitation be made. The threshold for demonstrating rehabilitation is an onerous one. It would be inconsistent with the language used in paragraph 36(3)(*c*) if a finding of criminal inadmissibility – is the normal course – be postponed pending a potential favourable finding on rehabilitation made on the basis of onerous criteria which may not be met.

[47] It is necessary, under paragraph 36(3)(*c*), that a rehabilitation application be made even after the prescribed period has expired. If, before that period expires, a decision is made to proceed with a criminal inadmissibility allegation, to which paragraph 36(3)(*c*) could potentially apply, and the person concerned applies for rehabilitation before the period has expired, this could produce a stalemate where the Immigration Division cannot assess the allegation pending a determination on a rehabilitation application that cannot be determined until the prescribed period expires. Furthermore, paragraph 36(3)(*c*) is similar to the provisions in subsections 34(2) and 35(2) of the IRPA. If filing subsections 34(2), 35(2) or paragraph 36(3)(*c*) application could forestall an assessment of the inadmissibility allegation, this could frustrate the government's ability to deal with security and criminal risks to Canada. Clearly, Parliament did not intend such a result. A policy course was chosen by Parliament in this respect, wherein, an application for rehabilitation requires that it be submitted, assessed and that an actual determination of rehabilitation be made. It is for this reason that no question will be certified in this regard as it was a policy choice.

(d) <u>Governing jurisprudence determines that Immigration Division has continuing jurisdiction in light of rehabilitation application</u>

[48] In *Kalicharan v. Canada (Minister of Manpower and Immigration)*, [1976] 2 F.C. 123 (T.D.), Justice Patrick M. Mahoney explained that a Special Inquiry Officer did not need to await the decision of an appeal from a criminal conviction before assessing whether a deportation order should be issued in the circumstances. Justice Mahoney explained that the inadmissibility assessment should proceed on the basis of the current situation, and not on what it may be in the future.

[49] In *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 2, [2008] F.C.J. No. 10 (QL), Justice Eleanor R. Dawson relied on *Kalicharan*, above, to hold that an H&C Officer did not have to await the results of an appeal before deciding whether the applying foreign national's conviction rendered him criminally inadmissible to Canada.

[50] By analogy, if an immigration decision-maker does not need to await the results of an appeal making an inadmissibility assessment on the current circumstances of the person concerned, the Immigration Division need also not await a decision of the rehabilitation application when deciding a criminal inadmissibility allegation.

VIX. <u>Conclusion</u>

[51] Mr. Akanmu Alabi has not established that the Immigration Division erred in finding him inadmissible under paragraph 36(1)(*b*) of the IRPA. As such, there is no basis to disturb the Immigration Division's finding.

[52] For all the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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