Federal Court  Cour fédérale

Date: 20110211

Docket: IMM-1342-10

Citation: 2011 FC 164

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

HANI YOUSEF ABID
RAHIMA SHAIK
NAZMEYAH HANI ABID
SUMAYAH HANI ABID

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Principal Applicant, Mr. Hani Yousef Abid, a citizen of Jordan, came to Canada in 2003 after spending several years in the United States. He was granted refugee protection in 2005. In October 2005, the Principal Applicant and his family (collectively, the Applicants) applied for

permanent residence in Canada. As part of his application, the Principal Applicant disclosed that he had been charged and convicted of "wire fraud" in the United States, for which conviction he served a sentence from September 1992 to March 1993. In a decision dated February 12, 2010, the Applicants' application for permanent residence was rejected by an immigration officer (the Officer). The Officer's decision was based on a determination that the Principal Applicant's conviction in the United States was equivalent to a conviction in Canada, pursuant to s. 380(1)(a) of the *Criminal Code of Canada*, RSC 1985, c C-46 (the Criminal Code), for fraud in an amount exceeding CDN $5000, an offence punishable by a maximum term of imprisonment not exceeding 14 years. Accordingly, the Officer held that the Principal Applicant was inadmissible for "serious criminality" pursuant to s. 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). In addition, the Officer concluded that an exemption was not warranted on humanitarian and compassionate (H&C) grounds.

[2] The Applicants now seek to overturn the Officer's decision.

II. Issues

[3] The Application raises the following issues:

1. Did the Officer err in determining that 18 United States Code, section 1343 was equivalent to s. 380(1)(a) of the Criminal Code?

2. Did the Officer err in finding that the value of the offence committed by the Principal Applicant was greater than $5000?

3. Did the Officer err in his examination of whether the Applicants should be granted an exemption from s. 36(1)(b) of *IRPA* on the basis of H&C considerations?

[4] While I am not persuaded that the Officer erred in his assessment of serious criminality, I am prepared to allow this application for judicial review on the basis that the Officer erred in his analysis of a possible exemption on H&C grounds.

III. Background

[5] The Principal Applicant was arrested for wire fraud (18 United States Code section 1343) on September 12, 1992 and reached a plea agreement on January 15, 1993.

[6] The plea agreement states that:

> [B]eginning no later than sometime in 1992, the defendant and an individual named [AS] intentionally devised a scheme to defraud and obtain money and property from Southwestern Bell Telephone Company by operating a network of 'chipped up' cellular telephones utilizing cellular telephone numbers issued by Southwestern Bell.

[7] The Principal Applicant was convicted on March 31, 1993. The "Judgment in a Criminal Case" of the United States District Court, Northern District of Illinois, Eastern Division (the US Court) sets out that the Principal Applicant "pleaded guilty" to one count of the offence of 18 United States Code section 1343 and 2, described as "Wire Fraud, Aid & Abet". At the time of the

conviction, the relevant criminal provision, 18 United States Code section 1343 (referred to as the US Offence), read as follows:

> Fraud by wire, radio, or television
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1000 or imprisoned not more than 5 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

[8] The Principal Applicant was found to be inadmissible to Canada pursuant to s. 36(1)(b) of *IRPA*:

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
(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;	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;

[9] Under the provisions of s. 33 of *IRPA*, the facts underlying admissibility findings include facts "for which there are reasonable grounds to believe that they have occurred".

[10] For purposes of the s. 36(1)(b) determination of equivalency, the Officer used s. 380(1)(a) of the Criminal Code, which states as follows:

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,	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;	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

IV. **Analysis**

A. *Equivalency Determination*

[11] This Court has held that determinations of equivalency are factual determinations which attract deference (see, for example, *Lakhani v Canada (Minister of Citizenship and Immigration)*, 2007 FC 674, [2007] FCJ No 914 (QL) at para 20-23; *Magtibay v Canada (Minister of Citizenship and Immigration)*, 2005 FC 397, 271 FTR 153 at para 15). The standard of review is

reasonableness. As taught by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*] at paragraph 47:

> [R]easonableness 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.

[12] The parties acknowledge that the approach to equivalency is that set out by the Federal Court of Appeal in *Hill v Canada (Minister of Employment and Immigration)*(1987), 1 Imm LR (2d) 1, 73 NR 315 [*Hill*] at paragraph 16:

> … 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 there from 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; and three, by a combination of one and two.

(1) The language of the two offences

[13] In this case, the words of the statute are not identical. Thus, it seems to me that the first step of the analysis must be an examination of the wording of both provisions to determine whether there is an area of intersection between the two. Such an examination is implicit in the Officer's decision. After setting out the two provisions, the Officer concludes as follows:

> Fraud in Canada or Subsection 380(1) of the Criminal Code of Canada is broader than the Wire Fraud statute in the United States. Therefore, Wire Fraud (18 United States Code section 1343) in the

> United States is equivalent to Fraud in Canada or subsection 380(1) in the Criminal Code of Canada.

In other words, the Officer found that there was an area of intersection between the two provisions; wire fraud can, depending on the facts of the offence, fall within either the US offence or the Criminal Code offence.

[14] In some aspects the US offence is broader than the Criminal Code offence. As correctly noted by the Applicants, s. 380(1)(a) of the Criminal Code requires that there be actual fraud whereas the US provision does not require the completion of the fraudulent activity. Under US law, the intent to defraud is sufficient to establish guilt. On the other hand, as noted by the Officer, the Canadian provision is broader in that it covers all manners of fraud and not just fraud in the areas of "wire, radio or television communication in interstate or foreign commerce".

[15] Is there an area of intersection between the two offences such that we can conclude that there is equivalency? I believe that there is such an overlap. On its face, the US Offence applies to the intent to defraud. However, depending on the facts of the conviction, it may be that the offence that took place was one where the "devised" scheme was put into effect, thereby resulting in actual fraud. More specifically, for purposes of the case before me, an actual fraud with a value of over CDN $5000 involving "wire, radio or television communication in interstate or foreign commerce" would fall within the US provision.

[16] While his reasons could have been more expansive, the result of the Officer's analysis was not unreasonable.

(2) The elements of the US Offence

[17] Having concluded that there is an overlap between the two provisions, the next step is an examination of whether, on the facts of the Principal Applicant's conviction, his particular offence would fall within the area of intersection. The Officer's task was to examine the facts of the Principal Applicant's conviction in the United States to establish whether the act or offence for which he was convicted falls within the bounds of s. 380(1)(a)of the Criminal Code. Adapting the words of *Hill*, above, the Officer had to determine whether or not the evidence before the adjudicator in the United States was sufficient to establish that the essential ingredients of the Canadian offence had been proven in the foreign proceedings.

[18] Under the Criminal Code offence, the Principal Applicant would only have been convicted if: (a) there had been actual defrauding of the public; and (b) the value of the subject matter of the fraud exceeded CDN $5000.

[19] There is no question that the Principal Applicant was convicted of an offence under 18 United States Code section 1343. The plea agreement, the conviction and the reasons for the sentence are clear in that regard. What is not as clear is what the elements of the offence were. Whether the Principal Applicant's offence was one that could constitute an offence under s. 380(1)(a) of the Criminal Code can only be determined by an analyzing the evidence before the Officer.

[20] The first issue is whether there were reasonable grounds to believe that the Principal Applicant had committed actual fraud.

[21] The Applicants assert that the Officer had no evidence of actual fraud. They argue that "no fraud took place because the applicant was apprehended as soon as he purchased the phones for the purposes of engaging in the fraudulent activity".

[22] The critical question about the conviction is a factual one. As noted by Justice Heneghan in *Grinshpon v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1695, 306 FTR 27 at paragraph 11, "the plea was not entered in a vacuum". The issue for the Officer is whether the acts for which the person was convicted in the United States would also have made him or her guilty of an offence in Canada (see *Li v Canada (Minister of Citizenship and Immigration)*(1997), 138 DLR (4^{th}) 275, [1997]1 FC 235 (FCA) at para 12).

[23] If the only evidence before the Officer is that the Applicant only committed an intent to defraud, then the elements of s. 380(1)(a) of the Criminal Code are not met. However, if the evidence before the Officer establishes that there are reasonable grounds to believe that actual fraud was committed, then "equivalency" to the s. 380(1)(a) element of actual fraud is established.

[24] The US documentation related to the Principal Applicant's conviction consists of the following:

- the Criminal Complaint dated September 14, 1992, to which is attached the affidavit of the Special Agent, Secret Service (the Complaint);
- the Special October 1990-1 Grand Jury Charges filed October 7, 1992;
- the Plea Agreement dated January 15, 1993 (the Plea Agreement);
- the Judgment (referred to above); and
- the Statement of Reasons for Imposing Sentence under the Sentencing Guidelines of Judge James H. Alesia of the US Court, dated March 8, 1993 (the Sentencing Reasons).

[25] Within this documentation, there was, in my view, more than sufficient evidence upon which the Officer could conclude that there were reasonable grounds to believe that the conviction in the United States was for an actual fraud. A full description of the "scheme" is set out in several of the documents. It is evident from these documents that the scheme had been put into practice. The offence extended far beyond the planning stages and into actual implementation. For example, the affidavit of the Special Agent discloses that the Principal Applicant sold a "chipped up phone",

which was activated and used. All of this was acknowledged by the Principal Applicant in the Plea Agreement.

[26] The second issue relates to the value of the crime. An essential element of the Criminal Code provision is that the value of the fraud exceeds CDN $5000. Given the currency exchange rate at the time of the commission of the offence, the Officer concluded that he had to be satisfied that the "value" of the fraud was over US $4112 (see *Kent Douglas Davis v Canada (Minister of Employment and Immigration*), [1986] FCJ No 1053 (FCA)(QL)). As noted above, the US Offence does not specify any amount or value of the fraud. The Officer, however, was entitled to turn to the US documentary evidence. One obvious reference to the value of the offence was contained in the affidavit of the Secret Agent who swore that he had purchased one phone for US $1000. Turning to the Sentencing Reasons, Judge Alesia describes the offence as a "sophisticated scheme involving complex and highly technical alteration of microcomputer chips". Numerous references to the extent of the fraud are contained in the other documents before the Officer. Given the evidence, it was not unreasonable for the Officer to believe that the offence convicted of in the United States involved many, many sales of US $1000 phones. Therefore, it was not unreasonable for the Officer to conclude that there were sales in excess of CDN $5000.

[27] The Applicants object to the Officer's reliance on comments made by the Principal Applicant on his admission to Canada. In addition to the US documentation, the Officer had the Principal Applicant's responses to questions as recorded by an immigration officer on August 26, 2003. The notes to the file contain the following:

> Question 14: Has claimant ever been arrested/detained by the police/military in any country?

> Response: Chicago, USA – 12 Sep1992 – wire fraud – working for [GS] defrauding Sprint, At&T, Canada (Minister of Citizenship and Immigration) of 117 million worth of phone calls from Palestine and Arab countries. . . .

[28] In three separate letters (November 6, 2009, December 2, 2009 and January 8, 2010), the Principal Applicant was asked to provide information and evidence to show the value of the fraud that he plead guilty to in the US. In the final notification (January 8, 2010), the Officer referred to the statement made by the Principal Applicant that the fraud was "117 million worth of phone calls".

[29] The only response of the Principal Applicant, made through his immigration consultant, was the following letter dated January 26, 2010:

> I am very surprised of your referral to his declaration to Canadian immigration officials at Windsor and the money of 177 million of phone calls fraud. Does it make sense to a child let alone an adult that some one defraud phone companies in United States for this amount of money be sentenced to 5 months in prison and 50 dollar special assessment that was waived? If my client has defrauded this amount of money he will be in jail for at least 10 years if not more but the judge understood he cannot pinpoint the exact amount of fraud. It was very minor to him.

[30] This response is most unhelpful. The Principal Applicant's consultant may question the accuracy of the amount, but the Principal Applicant has not denied or explained the admission to the immigration officer.

[31] The Applicant asserts that the mention of the $117 million figure is “absurd”. I disagree. Nowhere in the decision does the Officer conclude that the value of the fraud was $117 million. The Officer merely used the admission of the Applicant to support his conclusion that there were reasonable grounds to believe that the value of the crime exceeded CDN $5000. The Applicant was provided with three opportunities to explain the value of the offence he committed and the meaning of his admission that the fraud consisted of “$117 million worth of phone calls”. The Officer did not place any undue emphasis on this statement, and the Applicant failed to provide any alternative evidence. In the result and based on the totality of the evidence, it was not unreasonable for the Officer to conclude that the value of the subject matter of the offence was greater than CDN $5000. Indeed, on this record, it would have been absurd to conclude otherwise.

[32] The Applicants argue that the sentence given to the Principal Applicant provides evidence that the offence was not serious. I agree that the sentence of five months imprisonment and a $50 fine is not an overly harsh punishment. However, absent expert evidence on sentencing in Illinois on matters such as these, it is impossible to draw any inferences from the length of the sentence. From the remarks of Judge Alesia in the Sentencing Reasons, it appears that the Judge took into accout that the Principal Applicant was unable and unlikely to pay a fine. Moreover, the record discloses that the Principal Applicant was prepared to be an informer; this factor may have been a reason or a reduced sentence. On these facts, the Officer could not reasonably infer that the offence was of a trivial nature and of a value of less than CDN $5000.

(3) Conclusion on Equivalency

[33] The Applicants do not dispute that s. 380(1)(a) of the Criminal Code is an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. Accordingly, I am satisfied that, based on the words of the two statutory provisions and on the U.S. documentation, it was reasonable for the Officer to conclude that the Principal Applicant had 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. Thus, the Principle Applicant is inadmissible to Canada pursuant to s.36(1)(b) of *IRPA*.

B. *H&C Determination*

[34] In addition to the criminal inadmissibility finding, the Officer also considered whether there were sufficient factors to warrant an exemption on H&C grounds. The Officer noted that the Principal Applicant had requested that the permanent residence application be kept open to allow him to seek criminal rehabilitation. However, beyond this request, the Officer stated that no request for an exemption on H&C grounds was made. Nevertheless, the Officer carried out an assessment of the possible H&C grounds, concluding that neither the request for rehabilitation nor H&C considerations warranted an exemption. The Officer's analysis was very brief:

> The applicant has not satisfied me that either consideration is warranted. The applicant has lived in Canada for less than seven years and he has not satisfied me that he is sufficiently established to warrant either an exemption on H&C grounds or that the application be kept open pending criminal rehabilitation. The applicant has not provided information about the best interests of his children in his submissions. However, when the best interests of the applicant's children are considered based on file information I am still not

> satisfied that the best interests of his children warrant an exemption on H&C grounds or that the application be kept open pending criminal rehabilitation. His children are both under ten years of age and thus I am satisfied that his children could be integrated elsewhere.
>
> While the applicant has not satisfied me that his case contains sufficient factors to justify an exemption on H&C grounds or that his application be held in abeyance pending criminal rehabilitation, both his time in Canada and the interests of his minor age children are positive factors. However, when those positive factors are considered in conjunction with the applicant's serious criminality pursuant to subsection A36(1) of IRPA I am still not satisfied that either an H&C exemption is warranted or that the application should be kept open longer pending a criminal rehabilitation application.

[35] The first error made by the Officer, in my view, is that he incorrectly found that no submissions on H&C grounds were made. While the submissions of the Applicants' consultant leave much to be desired, there are a number of references to H&C grounds (albeit without use of the term "humanitarian and compassionate grounds"). The consultant refers to the status of the Principal Applicant as a Convention refugee. Moreover, the letter of January 26, 2010 from the consultant contains the following:

> It is also important to understand my client is a very decent, honest and credible person. . . . It is true that he made a mistake 17 years ago and he paid for that mistake and he is now a family man and a licensed technician in Canada. He has no criminal records in Canada or anywhere in the world after 1993.

In my view, these were clear H&C submissions.

[36] The Respondent correctly points out that Officers considering H&C requests are only obliged to consider factors commensurate with the submissions presented to them (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635 at para 8).

However, the question in this case is whether the Officer, faced with representations, had due regard for the submissions that were made. In my view, he did not.

[37] The first error in the analysis is a factual one. Although the Officer purported to consider the interests of the Principal Applicant's children, he incorrectly stated that there were only two children. As clearly set out in the "file information" upon which the Officer relied, the Principal Applicant has four children.

[38] The remaining problem with the Officer's analysis is that he failed to consider the factors highlighted by the Applicants' consultant and set out in the relevant Ministerial Guidelines: Inland Processing Policy Manual, Chapter 5, Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds, Appendix B (the H&C Guidelines). The Officer makes no reference to the fact that the Principal Applicant was found to be a Convention refugee or that his criminal conviction was 17 years ago.

[39] The H&C Guidelines provide that, when assessing criminal inadmissibility and an exemption for it, an officer is required to take into account a series of factors. One of the key factors is the likelihood of re-offending.

11.4. Criminal inadmissibilities	**11.4 Interdiction de territoire pour criminalité**
When considering the H&C factors, officers should assess whether the known inadmissibility, for example, a criminal conviction, outweighs the H&C grounds. They may consider	Quand il examine les circonstances d'ordre humanitaire, l'agent doit évaluer si l'interdiction de territoire connue, par

factors such as the applicant's actions, including those that led to and followed the conviction. Officers should consider: • the type of criminal conviction; • what sentence was received; • the length of time since the conviction; • whether the conviction is an isolated incident or part of a pattern of recidivist criminality; and • any other pertinent information about the circumstances of the crime	exemple, une déclaration de culpabilité, l'emporte sur celles-ci. Il peut tenir compte de facteurs comme les actes du demandeur, y compris ceux ayant conduit à la déclaration de culpabilité et l'ayant suivie. L'agent doit examiner : • le type de déclaration de culpabilité; • la peine infligée; • le temps écoulé depuis la déclaration de culpabilité; • si la déclaration de culpabilité est un incident isolé ou si elle fait partie d'un profil de comportement récidiviste; • tout autre renseignement pertinent sur les circonstances du crime.

[40] In this case, the Officer failed to have regard to many of the relevant factors surrounding the particular situation of the Principal Applicant.

V. Conclusion

[41] In sum, the Officer's determination of criminal equivalency is reasonable; no intervention from this Court is warranted on that basis. However, the decision refusing an H&C exemption is not reasonable. On this basis, the application for judicial review will be allowed and the matter sent

back for re-consideration. The re-consideration will be limited to the determination of whether the Principal Applicant should be granted an exemption on H&C grounds. On the re-consideration, the Applicants should be given the opportunity to make further written submissions.

[42] Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed with respect to the Officer's section 36(1)(b) of *IRPA* finding;

2. The application for judicial review is allowed with respect to the Officer's decision that there were insufficient H&C grounds to warrant an exemption; that portion of the Officer's decision is quashed; and the matter referred back to Citizenship and Immigration Canada for reconsideration by a different immigration officer; and

3. No question of general importance is certified

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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