Federal Court  Cour fédérale

Date: 20121220

Docket: IMM-3327-11

Citation: 2012 FC 1533

Ottawa, Ontario, December 20, 2012

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

SUKHCHAINPREET SINGH SIDHU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision made by a member of the Immigration Appeal Division [IAD] which granted the Minister's appeal of an Immigration Division [ID] decision. The IAD overturned an ID decision which had found that the Applicant was not inadmissible for organized criminality, specifically, transnational crime, pursuant to s. 37(1)(b) of the *Immigration and Refugee Protection Act* SC 2001, c 27 [*IRPA*].

Background

[2] The Applicant, Sukhchainpreet Singh Sidhu, is a citizen of India and became a permanent resident of Canada in 2000.

[3] On January 29, 2008, the Applicant entered the USA from Canada, arriving in Blaine, Washington. The Applicant rented a van and bought a cellular phone from a convenience store. He called a Mr. Kulwant Singh Brar and checked into a motel. He then received a call with instructions to drive to the border between the USA and Canada. The Applicant parked the van on the U.S. side of the border, and then met Mr. Brar and others, who were in a vehicle on the Canadian side of the border. In Mr. Brar's vehicle was 49kg of marijuana. Mr. Brar and the Applicant carried the marijuana across the border and placed them into the rental van. The Applicant intended to deliver the marijuana to another individual in the US for distribution.

[4] On August 8, 2008, the Applicant was convicted in the USA of importation of a controlled substance. His sentence was 12 months and 1 day incarceration, and 2 years of supervised release.

[5] As a result of this conviction, he was found inadmissible to Canada for serious criminality. Because of this, he became the subject of a s 44(1) *IRPA* Report on the basis that he was also inadmissible to Canada for organized criminality pursuant to s 37(1)(b) *IRPA*, specifically transnational crime.

Decisions Under Review

[6] The ID decided that the Applicant was not inadmissible under s 37(1)(b). The Minister appealed to the IAD, which allowed the appeal, holding that the decision of the ID was wrong in law. The IAD's decision is the subject of this application.

[7] The IAD set out s 37(1)(b). It stated that the question in this case was whether the Applicant engaged, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering – the three listed as examples of crimes coming under s 37(1)(b). The IAD noted that the ID found, essentially, that s 37(1)(b) does not include importation of drugs. The IAD disagreed and found that, in the circumstances of this case, s 37(1)(b) did include the offence of transnational importation of drugs.

[8] The IAD then set out five elements which it believed were required to be proven in order for s 37(1)(b) to apply:

> (a) the person must have engaged in something;
> (b) this engaging or engagement must have been in the context of transnational crime;
> (c) the engaging or engagement in must have been in an activity;
> (d) the activities must have been generated in the context of an organisation; and
> (e) the activity must have been something such as people smuggling, trafficking in persons or money laundering.

[9] The IAD held the crucial language of the section was, "…activities such as people smuggling, trafficking in persons or money laundering." The IAD noted it did not mention drugs, or importation of drugs, and therefore, the question was whether the phrase "activities such as"

allows the decision-maker to find that the section covers importation of drugs. The IAD held it did.

[10] The IAD noted that the list in s 37(1)(b) was not exclusive as the phrase "activities such as" indicated that the inclusion of other activities is contemplated. The IAD also noted the phrase "such as" indicated that, while there must be some similarity between the listed activities and the unlisted activities, they are not expected or required to be the same. The IAD held the task was to identify any common elements between the listed activities which would also be present in any proposed unlisted activities.

[11] The IAD held that the common elements of the three listed activities include attributes of organised criminality and movement across international borders. The IAD viewed the smuggling of drugs, an activity which could be carried out by criminal organizations and across international borders, is an obvious, although unlisted, activity to associate with the listed activities in s 37(1)(b). The IAD held that this was based on a plain reading of the section, put in its obvious context and purpose.

[12] The IAD noted that the words of a statute are to be read in context, and having regard to the purpose of the legislation and the intention of Parliament.

[13] The IAD stated that Canada intends to combat cross-border drug trade and cited statements and conventions Canada has made to eliminate the trafficking of drugs.

[14] The IAD discussed whether the elements to the section, which the IAD set out above, had been proven. The IAD held that the Applicant had been engaged in activities which took place in the context of transnational crime in that he was involved with moving large amounts of drugs across the border from Canada to the U.S. The IAD also held that these activities the Applicant was engaged in were generated in the context of an organisation. The IAD specifically noted that there were other individuals besides the Applicant involved in these activities and that each carried out specific roles and tasks. The IAD then found that the trafficking of drugs across the border was an activity such as people smuggling, trafficking in person, and money laundering.

[15] The IAD also discussed submissions made by the Applicant's counsel. The IAD stated that the Applicant's attorney in the U.S., as well as his counsel at the inadmissibility hearing, characterized his role in these events as minor, not so complicated, and of a stupid, minor character. The IAD made two comments regarding this point. First, the IAD noted that for the purposes of s 37(1)(b) it was irrelevant whether one was a minor or major player. Second, the IAD held that the Applicant was not a minor player, but one of the people at the center of the operation.

[16] The IAD then discussed what offence the Applicant might have been charged with in similar circumstances in Canada. The IAD noted that the Applicant could have been charged with an offence that would have made him liable for incarceration up to fourteen years. The IAD stated that this indicated that these activities were regarded very seriously by Parliament.

[17] Finally, the IAD noted there were attempts on the part of the Applicant's attorney in the U.S. and his counsel here in Canada, to portray him as a sympathetic character who was at heart honest and law-abiding, who had certain family problems and who would never get involved in this type of thing again. The IAD held that these types of considerations are not relevant to the determination under s 37(1)(b).

[18] The IAD concluded by finding that the ID erred and that s 37(1)(b) did apply in this case. The IAD allowed the appeal and made a Deportation Order against the Applicant.

Legislation

[19] *Immigration and Refugee Protection Act* SC 2001, c 27

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.
[…]	[…]
37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern	a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles

of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

(2) The following provisions govern subsection (1):

(a) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; and

(b) paragraph (1)(a) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

(2) Les dispositions suivantes régissent l'application du paragraphe (1) :

a) les faits visés n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national;

b) les faits visés à l'alinéa (1)a) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

Issue

[20] The issue arising in this case is whether the IAD erred in its interpretation of *IRPA* s 37(1)(b).

Standard of Review

[21] The IAD's interpretation of s 37(1)(b) attracts a correctness standard *Patel v Canada (Minister of Citizenship & Immigration)*, 2011 FCA 187, 98 Imm LR (3d) 175 at para 27.

[22] If the issue is answered in the negative, then this court will examine whether the IAD's decision was a reasonable one, in light of the facts and law. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at para 51

Analysis

[23] The Applicant argues that the IAD made several reviewable errors. First, by interpreting *IRPA* s 37(1)(b) as including "organized criminality." Second, by interpreting the section as including importing drugs. Third, the IAD engaged in an incorrect criminal equivalency assessment.

Did the IAD err in interpreting IRPA s 37(1)(b) as including "organized criminality"?

[24] The Applicant submits that the IAD misconstrued the test for determining inadmissibility under section 37(1)(b). Indeed, the Applicant correctly argued that the IAD set out its own unprecedented five-part test for s 37(1)(b). The Applicant argues that a plain reading of s 37(1)(b) requires *only* an assessment of whether (a) an individual engaged in an activity, (b) if so, whether the individual's engagement in the activity occurred in the context of transnational crime, and (c) whether the individual engaged in an activity such as people smuggling, trafficking in persons, or money laundering. The Applicant argues the requirement for a finding that "the activities must have been generated in the context of an organisation" is an incorrect interpretation of the *IRPA*, and thus is a reviewable error.

[25] The Respondent submits that s. 37(1)(b) renders a person inadmissible where a foreign national i) has engaged; ii) in transnational crime (i.e. crime crossing international borders; iii) that is serious enough to be comparable to people smuggling, human trafficking, or money laundering. The Respondent submits that these three basic elements were met.

[26] I agree with the Respondent. Further, I disagree with the Applicant that to conclude "the activities or crime must have been generated in the context of an organization" is an error. The reason for this is that s. 37(1) regards inadmissibility on grounds of organized criminality. While part (b) makes no specific mention of being a member of an organization as it does in part (a), the entirety of s. 37(1)(b) must be given effect. To not do so would lead to results that are not intended by Parliament in enacting s. 37(1).

[27] In order to determine the correct interpretation of s. 37(1)(b), it is helpful to set out the relevant provision.

37.(1) A permanent resident or foreign national is inadmissible on grounds of organized criminality for […] (b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering. [emphasis added]	37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants : b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité

[28] Although I consider the elements a) and c) set out by the IAD and repeated below to be redundant:

a. the person must have engaged in something;

b. the engaging or engagement in must have been in an activity;

I nonetheless find that the IAD interpreted s 37(1)(b) correctly. In my opinion the activities which make a person inadmissible under *IRPA* s 37(1)(b) must have been generated in the context of organized criminality, that is involving more than a single individual in an organized criminal activity.

Did the IAD err in interpreting IRPA s 37(1)(b) as including importing drugs?

[29] I begin with Justice Snider's words in *Dhillon v Canada (MCI)* 2012 FC 726 at para 66: "the words of s. 37(1)(b), when read in their entire context and in their grammatical and ordinary

sense harmoniously with the scheme of *IRPA*, the object of *IRPA*, and the intention of Parliament include the activity of transnational drug smuggling."

[30] The Applicant submits that the IAD failed to conduct an analysis of or explain how the activities in which the Applicant engaged were similar to people smuggling, trafficking in persons, or money laundering. In particular, the Applicant submits the IAD failed to engage in any comparison between the nature and substance of the Applicant's offence and the listed offences.

[31] The Applicant submits that Parliament specifically chose to include the list in section 37(1)(b) to indicate that the section is not meant to encompass all transnational crimes, but is instead meant to encompass only those transnational crimes that rise to the particularly egregious level of people smuggling, trafficking in persons, or money laundering.

[32] It is true that the importation or trafficking of drugs is not listed as one of the activities under s 37(1)(b) that leads to a finding of inadmissibility for organized criminality. However, the IAD, correctly in my view, noted that the words "activities such as" indicate that the list of activities found in s 37(1)(b), namely people smuggling, trafficking in persons and money laundering, is not exclusive and that Parliament intended that other crimes could also be included.

[33] Although the IAD's analysis on this point is abbreviated, it found that the common elements of the listed activities include attributes of organised criminality and movement across

international borders. The IAD also noted that Canada, through its international obligations, has committed to fight the illicit traffic in narcotic drugs and psychotropic drugs by agreeing to establish as criminal offences, among other things, the importation or exportation of any narcotic substance, including marijuana.

[34] The Respondent challenges the Applicant's proposed restricted definition of transnational crime as inconsistent with international law. The Respondent submits a restricted definition is inappropriate because it would exclude cross-border crimes such as weapons trafficking, illicit trade in nuclear materials, trade in biological weapons, proliferation of child pornography and others. I agree.

[35] *IRPA* s 37(1)(b) employs the phrase "such as". This indicates that the following list of activities is not a closed set. I find the IAD correctly determined that trafficking in drugs falls under s 37(1)(b). The importation of drugs, with which the Applicant was convicted of, meets the two elements the IAD found were shared by those crimes listed under s 37(1)(b). I am unable to agree with the Applicant that the illicit trafficking in drugs is not as egregious as money laundering. I agree with Justice Snyder in *Dhillon, supra* that the activities listed in s 37(1)(b) include the activity of transnational drug smuggling.

Criminal Equivalency Assessment

[36] The Applicant submits that where an equivalency assessment is done, and the wrong Canadian offence is put forward as being equivalent, the decision cannot stand. The Applicant

submits it is clear from the IAD's analysis that it informed itself of the wrong Canadian equivalent.

[37] The Applicant argues that the IAD based its decision on an incorrect assessment of the nature of the offence with which the Applicant was convicted. The Applicant argues that the IAD engaged in an incorrect equivalency assessment which should result in a review of the IAD's decision. I disagree.

[38] The Respondent submits that there is no criminal equivalency analysis required for an inadmissibility finding under s 37(1)(b). The Respondent argues that as such, the IAD's finding regarding equivalent Canadian offences is similarly superfluous and that if there are any errors therein, they would be immaterial and insufficient to disturb the IAD's decision.

[39] The Respondent is correct that no criminal equivalency analysis was required in this case. Contrary to the claims of the Applicant, I do not find that the IAD engaged in a criminal equivalency analysis. At paragraph 23, the IAD described what offence the Applicant might have been charged with in similar circumstances in Canada. In my view, this was not done in the context of a criminal equivalency analysis. Rather, it was done in order to demonstrate the seriousness of the offence committed by the Applicant for the purposes of explaining that importing drugs was a serious activity on par with those activities listed under s 37(1)(b); thus the IAD described what offence the Applicant might have been charged with in similar circumstances in Canada. The IAD made no error.

Was the IAD's decision reasonable?

[40] Having determined that the IAD correctly interpreted section 37(1)(b) of the *IRPA* as including drug smuggling, I must now turn to the question of whether the IAD reasonably applied the law to the facts of this case. "Questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness." *Dunsmuir*, *supra* at para 51

[41] The IAD considered that the Applicant had engaged in an activity (drug smuggling) in the context of transnational crime. At paragraph 21 of its decision, the IAD applied the test that it had set out to the facts of the case at bar. While I have noted at paragraph 28 of this decision that I would change the wording of the test, the interpretation and application of section 37(1)(b) are not in error in the Respondent's decision.

[42] The IAD considered that the Applicant had rented a vehicle, bought and used a cellular telephone, drove to the border, carried marijuana across the border, and placed the drugs into another vehicle, all with the intention of participating in drug smuggling. The IAD considered that these activities were carried out in the context of an organization. Indeed, other individuals who each had specific tasks for their involvement in the transnational criminal activity of drug smuggling.

[43] Judicial review "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" (*Dunsmuir supra* at para 47). I am satisfied that the IAD's decision fulfills these requirements.

Conclusion

[44] Since the IAD, in my opinion, correctly interpreted section 37(1)(b) of *IRPA* to include "drug smuggling" as one of the activities leading to a finding of inadmissibility, and since it reasonably considered the law as it applies to the facts in the case at bar, I find that the IAD made no reviewable error. The application is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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