Federal Court  Cour fédérale

Date: 20140228

Docket: IMM-2825-13

Citation: 2014 FC 198

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 28, 2014

Present: The Honourable Mr. Justice Roy

BETWEEN:

Catalina Luminita DAIA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application for judicial review relates to a decision to issue a removal order against the applicant because she is inadmissible under section 37 of the *Immigration and Refugee Protection Act*, SC (2001), c 27 (the Act). It is important to note from the start that the applicant is also inadmissible under section 36 of the Act and that that decision is not the subject of this judicial review.

Facts

[2] The decision for which judicial review is requested was made on April 3, 2013. The applicant pleaded guilty on May 25, 2012, on three counts of attempted credit card theft and to two counts of credit card theft, all inadmissible under sections 463 and 342 of the *Criminal Code*, RSC (1985), c C-46. This was following her arrest, which occurred on October 4, 2011. A police officer of the Montréal Police Department testified as to the circumstances surrounding the commission of these offences. She was the primary investigator in a police investigation that apparently led to the arrest of the applicant and other people who were acting in concert to steal credit cards. This is how the member of the Immigration Division described the procedure:

> [TRANSLATION]
> The *modus operandi* of the group was described as follows by Ms. Tremblay: people work in groups of three or four. After locating a victim, often an older woman, at the terminal of the point of sale in a store, the members of the group place themselves behind her to be able to read the personal identification number (the PIN) of the card used, either debit or credit.
>
> When the victim goes to her automobile, she is followed by the members who located her, is approached by one other person who asks for information using a road map unfolded under her eyes. Once the victim is distracted by the new person, the accomplices steal the debit or credit cards. The group of people then goes to a bank branch to make a withdrawal using the stolen card.

The police officer testified that video and photographic surveillance and evidence showed the direct participation of the applicant whose role was to request information using the road map.

Arguments

[3] The applicant made three arguments:

a) the Immigration Division was wrong to designate the police officer as an expert witness. The applicant claimed that that was a breach of procedural fairness, which results in a standard of review of correctness;

b) in the applicant's view, the assessment of the testimony is unreasonable, which of course results in a standard of review of reasonableness;

c) the applicant argued that the Immigration Division had to consider her intention with respect to being part of a pattern of criminal activity planned and organized, which would result in a standard of review of correctness.

None of the three reasons put forward by the applicant resulted in the Court's approval.

Analysis

[4] The first grievance concerns the designation of the police officer as expert witness. The respondent argued that the conditions of section 32 of the *Immigration Division Rules*, SOR/2002-229, were met and that it was not appropriate to discuss the expert designation. The following are the relevant paragraphs:

32. (1) If a party wants to call a witness, the party must provide in writing to the other party and the Division the following witness information:	**32.** (1) Pour faire comparaître un témoin, la partie transmet par écrit à l'autre partie et à la Section les renseignements suivants :
(*a*) the purpose and substance of the witness's testimony or, in the case of an expert witness, a summary of the testimony to be given signed by the expert witness;	*a*) l'objet du témoignage ou, dans le cas du témoin expert, un résumé, signé par lui, de son témoignage;
(*b*) the time needed for the witness's testimony;	*b*) la durée du témoignage;
	c) le lien entre the witness et la partie;

(*c*) the party's relationship to the witness;	*d*) dans le cas du témoin expert, ses compétences;
(*d*) in the case of an expert witness, a description of their qualifications;	[…]
…	

I agree with the respondent that the conditions of rule 32 were met in this case. But, in my view, that is not the issue. However, the applicant claims that the expert designation was done *ex post facto*, without her being able to argue on the true expert qualifications of the police officer. She stated that she should have been allowed to be heard. In my view, the discussion surrounding the expert designation seems moot.

[5] Indeed, in reviewing the decision, we note that the police officer testified regarding what she saw and received during her investigation. The description of the *modus operandi* is nothing more than the description of facts observed. In *The Law of Evidence in Canada*, 3rd Ed., LexisNexis, 2009 (A.W. Bryant, S.N. Lederman and M.K. Fuerst), we read on page 771:

> §12.2 As a general rule, a witness may not give opinion evidence but may testify only to facts within her or his knowledge, observation and experience. It is the province of the trier of fact to draw inferences from the proven facts. A qualified expert witness, however, may provide the trier of fact with a "ready-made inference" which the jury is unable to draw due to the technical nature of the subject matter. Thus, expert opinion evidence is permitted to assist the fact-finder form a correct judgment on a matter in issue since ordinary persons are unlikely to do so without the assistance of persons with special knowledge, skill or expertise.

The description of a *modus operandi* and the participation of different people in criminal activity do not require any expertise proceeding from the technical nature of the subject. It is certainly possible for such a witness to submit hearsay evidence. However, as is well known, that is

allowed in administrative matters (*Judicial Review of Administrative Action in Canada* by Brown and Evans No. 10:5420).

[6] The mere designation of "expert" does not change anything by the fact that, contrary to what the applicant claims, the witness could have described the investigation that she was responsible for without being designated an "expert". The expert designation is not at all necessary. It was possible to attack the credibility or the probative value of this evidence but there would have been no doubt, in my view, as to its admissibility.

[7] The recent decision of the Supreme Court of Canada in *R v Sekhon*, 2014 SCC 15, (*Sekhon*) reinforces my conclusion that the expert designation made in the reasons for decision was not necessary and, in fact, would probably not have been appropriate. I note in paragraph 45 that "Mohan holds that '[i]f on the proven facts a judge or jury can form their own conclusions without help, then the opinion of [an] expert is unnecessary' (p. 23, quoting Lawton L.J. in *R v. Turner*, [1975] 1 Q.B. 834, at p. 841)."

[8] In this case of importing narcotics, a police officer who qualified as an expert testified that smugglers do not act involuntarily or are not unaware of what they are carrying. The Court found that such expertise was not necessary and appropriate and that the trial judge should not have relied on this part of the testimony (the minority would not have applied the remedial provision on appeal (subparagraph 686(1)(*b*)(iii) of the *Criminal Code*)).

[9] In our case, the Immigration Division did not rely on expertise in finding as it did. Further, the testimony given did not require any legally admissible expertise. Therefore, there was no breach of procedural fairness regarding the fact that the expert designation was allegedly made before the applicant could argue the appropriateness of this designation.

[10] Moreover, it was the responsibility of the Immigration Division to make a finding on the application to the facts of the case at paragraph 37(1)(*a*) of the Act. This paragraph reads as follows:

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 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	*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 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;

Therefore, it is up to the decision-maker to have reasonable grounds to believe required under paragraph 37(1)(*a*). He or she must be satisfied that the activities submitted as evidence are part of a pattern of criminal activity planned and organized by several people acting in concert.

[11] The applicant alleged that the expert designation made *ex post facto* ensured that the Immigration Division gave greater credibility to the police officer's testimony. Certainly, one

must be cautious, as the minority reminds us in *Sekhon*, above, of "the Crown's theory of the case cloaked with an aura of expertise" (paragraph 75). Therefore, I read the hearing transcripts with this caution in mind. I cannot find any error in this regard that would require the intervention of a reviewing court. Indeed, the decision seems reasonable and I could not detect that the decision-maker allegedly abandoned his adjudicative role. Of course, he noted that he believed the police officer, but nothing in her factual testimony was shaken. Moreover, is it necessary to repeat that the applicant pleaded guilty? Given the evidence before the Immigration Division, it is hard to see how this conclusion could be unreasonable.

[12] In this case, it was indeed the panel that found that a group of people were acting in concert. Further, the panel stated at page 7 of its decision that [TRANSLATION] "the group in question was not formed randomly for the immediate commission of a single offence. On the contrary, the formation and existence of such a group are necessary for this type of distraction robbery". The qualification of expert, in this case, changed nothing in the findings that had to be made by the panel.

[13] The applicant argued that the assessment of her testimony by the panel was unreasonable. With respect, I cannot see how this assessment could be characterized as such.

[14] The applicant pleaded ignorance as to what was happening and to the scheme that she agrees that she participated in several times. The evidence shows the applicant's participation in the repeated activities of a group of people over a period of a few weeks. Further, the activities were such that the applicant could not be unaware of them: while she very clearly distracted

victim, her accomplices would steal the victim's wallet. She could only have been involved and essential to the scheme that was used repeatedly.

[15] She pleaded guilty to five offences relating to her activities with this same group of people, which is the best proof possible. She acknowledged that she committed these offences, including having the required *mens rea*. These admissions cannot be reversed. Other charges weigh on her for similar activities in Ontario. The applicant asks for leniency in the sentence that would have been imposed on her and claims that [TRANSLATION] "the panel did not review the applicant's testimony in its context and in light of all the evidence". These allegations had nothing to do with the standard of reasonableness that was described in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, (*Dunsmuir*) at paragraph 47.

[16] Finally, the applicant states in her factum that she did not consciously take part in the activities that fall within paragraph 37(2)(*a*). This argument is particularly vague since it is based on the discretion conferred on the Minister not to make inadmissible someone who the Minister is satisfied would not be detrimental to the national interest. The text reads as follows:

37. (2) The following provisions govern subsection (1):	**37.** (2) Les dispositions suivantes régissent l'application du paragraphe (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	*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;

[17] If, in fact, the applicant wanted to refer to paragraph 37(1)(*a*), the argument presented seems to be that the evidence that the applicant intentionally participated in the activities described must be provided.

[18] The applicant's argument is not clear. She seems to rely on *Talavera Morales v Canada (Public Safety and Emergency Preparedness),* 2010 FC 768, (*Talavera*) but this decision deals with what is necessary to be a member of an organization within the meaning of section 37. Ultimately, one would have to consciously participate in activities that are part of a pattern of criminal activity planned and organized.

[19] In my view, the guilty pleas considered as part of the *modus operandi* submitted in evidence were the required basis to satisfy the elements of paragraph 37(1)(*a*) of the Act. The description made in the manner used to steal the credit cards does not leave room for doubt on how this group operates. The applicant's participation was repeated. The activities were criminal, they were organized; indeed, they were done in concert. The Immigration Division was not wrong to disagree; the applicant was not an innocent victim. The guilty pleas made all doubt disappear in this regard.

[20] As in *Talavera*, I note that the standard of review is that of reasonableness as regards the concept of "member". The applicant did not meet her burden that the Immigration Division's finding does not fall within the "range of possible acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at paragraph 47). The argument that the applicant is short in relation to the applicable standard of review that requires deference for the

decision made. It is useful to recall that "it is not necessary to prove that someone belongs to a criminal organization described in section 37 of the Act; it is sufficient to have reasonable grounds to believe that he or she is or was a member of such an organization" (*Castelly v Canada (Minister of Citizenship and Immigration)*, 2008 FC 788, [2009] 2 FCR 327, at paragraph 40).

[21] Clearly, the Immigration Division would have no jurisdiction under paragraph 37(2)(*a*) of the Act and there can be no judicial review of a decision that was not made. Therefore, this argument has no relevance with respect to the dispute before this Court and it can only be dismissed. As to the dispute relevant to subject of paragraph 37(1)(*a*), it must also be dismissed, as I attempted to explain.

[22] Therefore, the application for judicial review is dismissed. There is no question of importance that must be certified.

JUDGMENT

The application for judicial review of the decision made on April 3, 2013, by the Immigration Division of the Immigration and Refugee Board of Canada is dismissed. There is no question to certify.

"Yvan Roy"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2825-13
STYLE OF CAUSE:	Catalina Luminita DAIA and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 20, 2014
REASONS FOR JUDGMENT AND JUDGMENT BY:	Roy J.
DATED:	February 28, 2014

APPEARANCES:

Zofia Przybytkowski	FOR THE APPLICANT
Jocelyne Murphy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Zofia Przybytkowski Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT