

Federal Court



Cour fédérale

Date: 20140923

Docket: IMM-906-14

Citation: 2014 FC 912

Vancouver, British Columbia, September 23, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

KIN WAH TAO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] When Kin Wah Tao was 19-years-old and living in Hong Kong, he was convicted of claiming membership in a Triad Society and of possessing Triad Society materials, for which he was sentenced to two years probation. The uncontradicted evidence before the Court is that for a period of several months in the mid-1970s, Mr. Tao worked as a waiter and “booth guide” in an illegal sex club run by the Triad. According to Mr. Tao, in addition to waiting tables, he would

also escort prostitutes to meet with their clients at the club. Nothing in the record suggests that Mr. Tao himself was ever involved in any acts of violence during the time that he was associated with the Triad Society.

[2] Mr. Tao says that he left the Triad Society immediately after his arrest in 1976, and that he has lived a law-abiding life ever since. There is no evidence that Mr. Tao has had any brushes with the law in the nearly 40 years since his convictions.

[3] Mr. Tao has since married a Canadian citizen and applied for permanent residence in Canada as a member of the Spouse in Canada class. In his application, he also sought an exemption on humanitarian and compassionate [H&C] grounds from his inadmissibility for being a member of an organization that is believed on reasonable grounds to be, or have been engaged in organized crime.

[4] Karine Roy-Tremblay, a Director of Case Determination (“Minister’s Delegate”) at Citizenship and Immigration Canada rejected Mr. Tao’s request for humanitarian and compassionate relief. She found that Mr. Tao was inadmissible to Canada under paragraph 37(1)(a) of the *Immigration and Refugee Protection Act* and that it would be contrary to the objectives of the Act to allow him to stay in Canada.

[5] I have concluded that the Minister’s Delegate’s inadmissibility finding was reasonable, but that her decision to deny an exemption to Mr. Tao on humanitarian and compassionate grounds was not. Consequently, the application for judicial review will be allowed, in part.

II. The Inadmissibility Finding

[6] Paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

[*IRPA*] provides that:

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(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 ...

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

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 ...

[7] In making a finding under paragraph 37(1)(a) of the Act, an immigration officer is also guided by section 33 of *IRPA*, which provides that:

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

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

that they have occurred, are peuvent survenir.
occurring or may occur.

[8] The Supreme Court of Canada described the “reasonable grounds to believe” evidentiary standard in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100, as requiring “something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities”. The Court went on to hold that reasonable grounds will exist “where there is an objective basis for the belief which is based on compelling and credible information”: at para. 114.

[9] Mr. Tao argues that the Minister’s Delegate misunderstood the nature of his criminal convictions in Hong Kong, wrongly assuming that he had been convicted of being a member of a Triad Society. I do not accept this submission. The Minister’s Delegate’s reasons accurately describe Mr. Tao’s convictions. Her finding that Mr. Tao was a member of a Triad Society was based upon his own admissions and those of his family members, rather than the nature of Mr. Tao’s convictions.

[10] Mr. Tao insists that he was never formally initiated into a Triad Society. Be that as it may, the term “member”, as it is used in the inadmissibility provisions of *IRPA*, is to be given a broad and unrestricted interpretation, and does not require formal initiation into or membership in the organization in question: see *Gebreab v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1213 at para. 24, [2009] 359 F.T.R. 296, aff’d 2010 FCA 274. In light of this, Mr. Tao has not persuaded me that the Minister’s Delegate’s finding that he was a member of a Triad Society was unreasonable.

[11] Mr. Tao also notes that the Minister's Delegate did not specifically identify the Triad Society of which he was a member, arguing that not all Triad Societies in Hong Kong are engaged in illegal activities. Mr. Tao submits that the only evidence regarding the illegal activities of the Triad Society to which he belonged was his own evidence regarding its involvement in the keeping of a bawdy house – an activity that is no longer illegal in Canada in the wake of the Supreme Court of Canada's decision in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

[12] It is true that the Triad Society to which Mr. Tao belonged is not specifically identified in the Minister's Delegate's reasons. However, in determining whether a decision is reasonable, the reviewing Court must pay respectful attention to the reasons that were offered by the decision-maker, or which could have been offered in support of a decision. To the extent that a tribunal may not fully explain certain aspects of its decision, the reviewing Court may look to the record in assessing the reasonableness of the outcome: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras. 14-15, [2011] 3 S.C.R. 708.

[13] In his interview with an immigration officer in connection with his application, Mr. Tao was asked for the name of the Triad Society to which he belonged. The transcript of that interview records his answer phonetically as "Seen Ye Un" and includes the note "Possibly Sun Ye On?" The Minister's Delegate consulted a 2010 newspaper article entitled "Hong Kong Triads" which identifies Sun Yee On as the largest criminally active triad in Hong Kong, with some 25,000 members. From this it can reasonably be concluded that the Minister's Delegate was satisfied that Mr. Tao was a member of the Sun Yee On Triad Society.

[14] Mr. Tao has not taken issue in his affidavit with the interpretation of the answer he gave at his interview, nor has he denied that the Triad Society he worked for was in fact the Sun Yee On Triad Society.

[15] Mr. Tao submits that he was never provided with the newspaper article relied upon by the Minister's Delegate, arguing that he was denied procedural fairness as a result. However, the article was general country condition information that was publicly available on the internet, with the result that there was no obligation on the Minister's Delegate to disclose it to Mr. Tao: *Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461 at para. 22, 226 N.R. 134 (C.A.).

[16] Mr. Tao has also not taken issue with the newspaper article's contents in his affidavit, nor has he indicated what additional information he would have provided to the Minister's Delegate, had he been provided with a copy of the article for comment. In these circumstances, I am not persuaded that there has been any breach of procedural fairness here.

[17] The evidence before the officer was that in addition to involvement in prostitution, criminal Triads in Hong Kong such as the Sun Yee On Triad Society were engaged in drug trafficking, extortion, illegal gambling and racketeering - activities that are all illegal in Canada and meet the test for serious criminality in section 37 of *IRPA*.

[18] Given that Mr. Tao admitted to membership in the Sun Ye On Triad Society, a criminal organization that is involved in activities that are illegal in Canada, it follows that the Minister's Delegate's finding that Mr. Tao was inadmissible to Canada under paragraph 37(1)(a) of *IRPA* was one that was reasonably open to her.

III. The Prematurity Argument

[19] As I understand his argument, Mr. Tao says that it is premature to refuse his application for permanent residence on section 37 inadmissibility grounds at this stage, and that the application should not be refused unless and until the Immigration Division of the Immigration and Refugee Board confirms that Mr. Tao is inadmissible under section 37 of *IRPA*.

[20] This argument is itself premature: the jurisdiction of the Immigration Division is only engaged once a report has been prepared under section 44 of *IRPA* and that report has been referred to the Board for an inadmissibility hearing. There is no evidence before me that any such report has been prepared in this case, and Mr. Tao's argument is thus a hypothetical one.

IV. The Humanitarian and Compassionate Decision

[21] In support of his application for H&C relief, Mr. Tao relied upon the presence of his wife, son, daughter and step-child in Canada. Mr. Tao's mother, brother and two sisters also live in the Vancouver area, and he has no family members living anywhere outside of Canada.

[22] At the time of his application, Mr. Tao had been in Canada for some four years. He was not working, but was caring for his elderly mother.

[23] The Minister's Delegate's analysis commenced with the observation that Mr. Tao was seeking an exemption from his "serious inadmissibility on organized criminality grounds". While the Delegate appears to have been aware of the age of Mr. Tao's convictions, there is no mention in her analysis of the lack of violence associated with his Triad activities, or the fact that the Hong Kong courts did not deem Mr. Tao's conduct to have been serious enough to warrant a

custodial sentence. Nor does it appear that the Minister's Delegate gave any weight to Mr. Tao's apparently unblemished record for the *36 years* preceding his application for permanent residence.

[24] Instead, after reviewing Mr. Tao's establishment factors, the Minister's Delegate concludes with the observation that "Mr. Tao is inadmissible to Canada on serious grounds and it would be contrary to the objectives of *IRPA* and the Government of Canada commitments to allow him to stay in Canada".

[25] This statement is troubling as it suggests that the Minister's Delegate denied Mr. Tao H&C relief *because* he was inadmissible to Canada under paragraph 37(1)(a) of *IRPA*. This indicates a fundamental misunderstanding of the Minister's Delegate's H&C jurisdiction – a jurisdiction that is only engaged once inadmissibility has been established.

[26] At the time of Mr. Tao's application, section 25 of *IRPA* specifically contemplated that H&C relief could be afforded to those found to be inadmissible to Canada for organized criminality under section 37 of the Act. Thus Mr. Tao's membership in a criminal organization was not a bar to his receiving H&C relief, but was instead the reason why such relief was being sought in the first place.

[27] Once inadmissibility was established under paragraph 37(1)(a) of *IRPA*, the Minister's Delegate's task was to consider *all* of the relevant circumstances in determining whether H&C relief should be granted. For the Minister's Delegate's discretion to be properly exercised, factors favouring the granting of H&C relief had to be carefully weighed against those militating against it.

[28] That did not happen here. Rather than weighing the positive and negative factors relating to Mr. Tao's application, the Minister's Delegate employed circular reasoning to conclude that Mr. Tao should not be entitled to H&C relief because he is inadmissible to Canada under paragraph 37(1)(a) of *IRPA*. This renders this aspect of the Minister's Delegate's decision unreasonable, with the result that the application for judicial review will be granted, in part.

V. Conclusion

[29] While there is no basis for interfering with the Minister's Delegate's finding that Mr. Tao is inadmissible to Canada under paragraph 37(1)(a) of *IRPA*, the decision will be set aside insofar as it relates to the refusal of Mr. Tao's application for H&C relief. Mr. Tao's request for H&C relief will be remitted to a different Minister's Delegate for re-determination in accordance with these reasons.

VI. Certification

[30] Mr. Tao has proposed the following question for certification:

Is the refusal of the permanent residence application of a foreign national premature upon the determination of his inadmissibility under section 37(1) of the *Immigration and Refugee Protection Act*, given the fact that he may be referred under section 44 of the Act for an inadmissibility hearing before the Immigration Division, who has the power to grant the foreign national permanent resident status under section 45 of the Act at the conclusion of the hearing?

[31] Given my conclusion that there is no factual foundation for the question at this time, the issue does not arise in this case. Consequently, I decline to certify it.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, in part;
2. The finding that Mr. Tao is inadmissible to Canada under paragraph 37(1)(a) of *IRPA* shall stand, but the question of his entitlement to H&C relief is remitted to a different Minister's Delegate for re-determination in accordance with these reasons; and
3. On the consent of the parties, Mr. Tao's wife, Pui Yee Sham, is removed as an applicant in this proceeding.

"Anne L. Mactavish"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: KIN WAH TAO v THE MINISTER OF CITIZENSHIP
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APPEARANCES:

Ms. Angela Y.F. Chan FOR THE APPLICANT

Ms. Caroline Christiaens FOR THE RESPONDENT

SOLICITORS OF RECORD:

Angela Y.F. Chan FOR THE APPLICANT
Barrister and Solicitor
Vancouver, British Columbia

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Vancouver, British Columbia