Federal Court  Cour fédérale

Date: 20151218

Docket: IMM-4413-14

Citation: 2015 FC 1397

Toronto, Ontario, December 18, 2015

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

AKIN OLULOPE AKINSUYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Akin Olulope Akinsuyi (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Division (the "Board"), dated May 15, 2014. In its decision, the Board determined that the Applicant is inadmissible to Canada on grounds of organized criminality and participation in transnational crime, pursuant to paragraph 37(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Applicant is a citizen of Nigeria. He became a permanent resident in Canada on May 9, 2006.

[3] On July 4, 2013, the Applicant attended the Downsview Postal Outlet. In the hearing of an undercover RCMP officer, he said that he was waiting for a package that he had been tracking. The Postal Outlet employee advised the RCMP officer, who was posing as an employee and waiting in the rear room, that the Applicant was known to the Postal Outlet as Jordan Soyar, the renter of mailbox 30033. The employee showed the Applicant the package. The Applicant said "yeah, that's it", signed for the package, and left.

[4] The package contained heroin and unbeknownst to the Applicant, it had been intercepted by the United Kingdom-International Crime Team (Border Agency) at London Heathrow Airport on June 27, 2013. The package had been seized by the RCMP on July 2, 2013 upon its arrival in Canada. On July 4, 2013, the RCMP obtained a warrant to facilitate a controlled delivery of the package and executed the controlled delivery the same day.

[5] The Applicant was arrested 10 minutes after leaving the Postal Outlet. He was carrying two cell phones, one of which contained sent text messages with the name "Jordan Soyar".

[6] After his arrest, the Applicant told RCMP Constable Hung that he was paid $950.00 to receive the package. He was arrested by the Canada Border Services Agency (the "CBSA") on August 7, 2013.

[7] The Applicant was charged with four offences, specifically:

> i. Importing Heroin to Canada, contrary to subsection 6(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "CDSA");
>
> ii. Conspiracy to import heroin contrary to subsection 6(1) of the CDSA, and contrary to paragraph 465(1)(c) of the *Criminal Code*, R.S.C., 1985, c. C-46 (the "Code");
>
> iii. Possession of heroin for the purpose of trafficking, contrary to subsection 5(2) of the CDSA; and
>
> iv. Conspiracy to possess heroin for the purposes of trafficking, contrary to subsection 5(2) of the CDSA and paragraph 465(1)(c) of the Code.

[8] By a Report dated July 31, 2013, the Applicant was found inadmissible to Canada. A Report pursuant to subsection 44(1) of the Act, dated September 20, 2013, was reviewed by an Enforcement Officer on September 23, 2013. On September 23, 2013 pursuant to subsection 44(2) of the Act, the Applicant was referred for an admissibility hearing.

[9] On February 3, 2014, the Applicant sought a stay of the admissibility hearing pending the result of his criminal trial.

[10] Following a hearing held on February 17, 2014, the Board found the Applicant to be inadmissible pursuant to paragraph 37(1)(b) of the Act. Although the Applicant did not testify at the hearing, written arguments were file on his behalf.

[11] In its decision, dated May 15, 2014, the Board rejected the Applicant's submissions that he was not inadmissible because there was no evidence to show that he was aware that the

package contained heroin. It considered that the Applicant hid his name from the Postal Outlet and that he was paid $950.00 for taking delivery of the package. It concluded that he must have known that an illegal act was involved since he was paid so much for doing so little.

[12] The Board determined that the evidence showed a serious possibility that the Applicant had knowingly engaged in a transnational crime and that it was reasonable to believe he is inadmissible to Canada on the grounds of organized criminality, that is the unauthorized importation of heroin into Canada.

[13] The Applicant now argues that the Board breached procedural fairness by refusing to stay the admissibility hearing pending the adjudication of the criminal charges, in a criminal trial. He submits that denial of an adjournment impacted upon his ability to present a full answer and defence in the admissibility hearing, without prejudice to his right not to testify in the criminal proceedings. Although the Board sealed the record of the admissibility hearing, the Applicant argues this protection did not adequately respect the degree of procedural fairness to which he was entitled.

[14] The Applicant next submits that the Board erred in its conclusion that lack of personal testimony from the Applicant means that there was no evidentiary basis to support the theory that it found to be most likely. He pleads that this perverse finding because the Board's decision to deny him an adjournment of the admissibility hearing prevented him from presenting evidence, by personal testimony, to support an alternative theory.

[15] Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 at paragraph 43.

[16] The Board's findings of fact are reviewable on the standard of reasonableness; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 53.

[17] On judicial review, in order to meet the reasonableness standard, the reasons offered must be justifiable, transparent, intelligible and fall within a range of possible, acceptable outcomes; see the decision in *Dunsmuir, supra* at paragraph 47.

[18] The Board committed no breach of procedural fairness in denying the Applicant's Motion for a stay. The Applicant sought a stay of the admissibility hearing in cause number IMM-620-14, an application for leave and judicial review of the delegate's decision to refer the matter to an admissibility hearing. The stay motion was heard on February 3, 2013. By Order dated February 4, 2013, that motion was dismissed by Justice Phelan.

[19] The Board is master of its own proceedings; see section 161(1) of the Act and section 49 of the *Immigration Division Rules*, SOR/2002-229. I refer to pages 189 to 199 of the Certified Tribunal Record where the Board dealt with the Applicant's further motion for an adjournment, at the commencement of the admissibility hearing on February 17, 2014.

[20] I see nothing here to suggest the Board erred in its disposition of that motion. The Applicant's arguments were presented and considered. There was no breach of procedural fairness, an issue to be assessed relative to the proceedings at hand, that is the admissibility hearing. The requirements of procedural fairness are to be assessed in context; see the decision in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at page 654, as recently discussed in *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326 at paragraph 91, where Chief Justice Hinkson said:

> The Supreme Court of Canada has long recognized that both the process and the outcome of an administrative decision must conform to the rationale of the statutory regime set up by the legislature. As Mr. Justice Le Dain wrote for the unanimous Court in *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643 at 653 [*Cardinal*], "there is, a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interests of an individual"

[21] The Board was to concern itself with respect for the procedural fairness rights of the Applicant in the admissibility hearing. It had no role or responsibility for the procedural protections afforded by the law in criminal prosecutions.

[22] Criminal proceedings are characterized by two key principles, that is the presumption of innocence and the requirement of proof beyond a reasonable doubt that the alleged offence has been committed; see the decision in *R. v. Lifchus*, [1997] 3 S.C.R. 320.

[23] As noted above, the requirements of the content of procedural fairness are to be assessed against the "rationale of the statutory regime" established by the legislation.

[24] The purpose of an admissibility hearing is to determine if a person is inadmissible. An admissibility hearing proceeds before the Immigration Division.

[25] Such a hearing is an administrative proceeding, not a trial of charges that are subject to the Code and the legal principles that apply in criminal prosecution.

[26] The Applicant had a choice, to testify or not, before the Immigration Division.

[27] The Act makes it clear that anyone seeking admission into Canada, including the Applicant, carries the burden of showing that they are not inadmissible and meet the requirements of the Act; see subsection 11(1) of the Act. The Applicant knew, or can be deemed to have known, that he had to make his case to show that he was admissible to Canada. He cannot plead that his ability to do so was hamstrung by his right to present a full defence to outstanding criminal charges.

[28] The Applicant's arguments about a breach of procedural fairness flow over into his challenge to the factual findings of the Board, that is its conclusion that he was part of a scheme to import heroin. He submits that his ability to present evidence to support an alternative factual picture was compromised by the Board's denial of an adjournment, to allow the criminal charges to be tried.

[29] In effect, the Applicant's challenge to the Board's factual findings rests upon his choice not to testify and to present evidence to challenge that submitted by the Respondent.

[30] The evidence before the Board included the RCMP arrest report, the testimony of Constable Hung and the testimony of CBSA Officer Clare who arrested the Applicant on August 7, 2013.

[31] Pursuant to section 33 of the Act, the standard of proof under section 37 is "reasonable grounds to believe". This is more than mere suspicion, but less than proof on a balance of probabilities. Reasonable grounds exist where there is an objective basis for the belief based on compelling and credible evidence; see the decision in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100 at paragraph 114.

[32] In my opinion, the evidence of the police officers and the arrest report, referred to above, constitutes an objective basis for the Board's belief. Paragraph 37(1)(b) of the Act includes international drug trafficking; see the decisions in *Canada (Minister of Citizenship and Immigration) v. Dhillon (2012)*, 413 F.T.R. 21 at paragraph 66 and *Sidhu v. Canada (Minister of Citizenship and Immigration)* (2012), 424 F.T.R. 110 at paragraph 35. There was sufficient evidence to support the Board's conclusion that there was a serious possibility that the Applicant knowingly engaged in transnational crime, that is the importation of heroin.

[33] I am satisfied that the Board's ultimate findings, about the Applicant's inadmissibility to Canada, are reasonable and meet the test for reasonableness set out in *Dunsmuir*, *supra*. There is no basis for judicial intervention.

[34] In the result, this Application for judicial review is dismissed. There is no question for certification arising.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, there is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4413-14
STYLE OF CAUSE:	AKIN OLULOPE AKINSUYI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

LAURENCE COHEN	FOR THE APPLICANT
JUDY MICHAELY	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Laurence Cohen Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT