Federal Court  Cour fédérale

Date: 20160706

Docket: IMM-4841-15

Citation: 2016 FC 760

Ottawa, Ontario, July 6, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ANH LE TRAN

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (IAD), dated October 8, 2015, which dismissed the Minister's appeal of the Immigration Division's (ID) finding that the Respondent is not inadmissible on the ground of membership in organized crime pursuant to paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

II. Background

[2] The Respondent is a 36 year old citizen of Vietnam. He became a permanent resident of Canada in 1994 when he was 15 years old.

[3] Since 1999, the Respondent has been charged and convicted of several offences including possession of an unregistered restricted weapon in January 1999 and failure to comply with recognizance in June 1999, May 2003 and July 2003.

[4] Notably, in September 1999, the Respondent was arrested after a long-term investigation into the "Trang Gang" led by the Royal Canadian Mounted Police (RCMP) and called "Project Kachou". Charges laid against the Respondent in relation to this arrest were eventually stayed.

[5] On August 19, 2011, the Respondent was convicted of production and possession of a controlled substance for the purpose of trafficking contrary to subsections 5(2) and 7(1) of the *Controlled Drugs and Substances Act,* SC 1996, c 19 because of his involvement in a marijuana grow operation. As a result of this conviction, the Respondent was sentenced to a 12 month conditional sentence.

[6] On November 16, 2012, a Canada Border Services Agency (CBSA) Officer reported the Respondent inadmissible on the ground of serious criminality pursuant to paragraph 36(1)(a) of the Act due to the 2011 conviction of production and possession of a controlled substance.

[7] The CBSA also reported the Respondent for inadmissibility based on membership in organized crime pursuant to paragraph 37(1)(a) of the Act. In this respect, the CBSA alleged that

the Respondent was a member of the Trang Gang in Edmonton. The CBSA alleged that this gang was engaged in criminal activity, namely, the traffic of narcotics.

[8] On February 5, 2014, the ID found the Respondent inadmissible pursuant to paragraph 36(1)(a) of the Act and issued a deportation order. However, the ID found that the Respondent was not a person described in paragraph 37(1)(a) of the Act.

[9] On appeal, the IAD upheld the ID's finding that the Respondent was not a person described in paragraph 37(1)(a) of the Act.

[10] The IAD found that on the whole of the evidence before it, there was insufficient credible and trustworthy evidence to provide reasonable grounds to believe that the Respondent was a member of the Trang Gang or that he engaged in activities part of such a pattern. The IAD found that while the Respondent was one of the persons arrested in Project Kachou, the charge laid against the Respondent in this regard was stayed.

[11] Moreover, since much of the police information about the gang had been purged or is no longer available, the Applicant's evidence was mostly based on the testimony of Inspector Brezinski from the Edmonton Police. Mr. Brezinski testified that much of his knowledge of the Respondent's activities in relation to his alleged involvement with the Trang Gang came largely through conversations with Corporal Willisko, the RCMP's Project Kachou coordinator, from reading intelligence reports and from speaking to police officers who had obtained information from confidential sources.

[12] The IAD gave little weight to the testimony provided by Mr. Brezinski for the following reasons:

a. Mr. Brezinski was unable to explain on what facts he concluded that the Respondent was a mid-level drug distributor for the Trang Gang;
b. Mr. Brezinski's testimony regarding an intercepted conversation between the Respondent and another person where the Respondent discussed AK47 and 357 firearms is non-determinative since there is no transcript or summary of the intercepted conversation. This prevented the IAD from determining whether the conversation provided evidence that the Respondent was a member of an organized gang;
c. Mr. Brezinski's testimony that the Respondent was in phone contact with Binh Trang, a second-tier leader of the Trang Gang, was given little weight since the IAD was not provided with evidence of the calls, their frequency and what was discussed;
d. Mr. Brezinski's testimony that an apartment associated with the Respondent was searched during the Project Kachou arrests was given little weight since no incriminating evidence was found at the apartment; and
e. Mr. Brezinski's testimony to the effect that the Respondent was a hit-man for the Trang Gang was given little weight since this information was not included in his "will-say" and only came out in cross-examination. Moreover, no credible information was put forward to demonstrate that the Respondent was a hit-man.

[13] The IAD also gave little weight to the Respondent's conviction for possession of an unregistered restricted weapon in 1999. Since no information was provided on the particulars of

the Respondent's conviction, the IAD was unable to determine whether the Respondent was carrying the unregistered firearm as a member of a criminal organization or not. The IAD also gave little weight to six other convictions against the Respondent for offences having occurred between 1999 and 2003**.** Since no particulars were provided**,** the IAD could not discern if these convictions were evidence of the Respondent's membership in a criminal organization. The IAD also gave little weight to the Respondent's arrest in July 2003. In this instance, the Respondent was arrested while in a vehicle with someone who had been a member of the Trang Gang. While he was charged with possession of a restricted weapon and other related offences, the charges were eventually dismissed. The IAD gave this evidence limited weight since the charges were dismissed and since the events post-dated the demise of the Trang Gang by four years.

[14] The IAD also found that the Applicant provided little evidence that the Respondent's dragon tattoo bears the distinctive hallmarks of the tattoos worn by some members of the Trang Gang.

[15] Regarding the allegation that the Respondent is inadmissible for organizing a marijuana grow operation with his wife and cousin, the IAD found that if paragraph 37(1)(a) of the Act were to be interpreted in this way it "would cover virtually any indictable offence committed by two or more parties". The IAD found that section 36 of the Act provides for the removal of people who have committed indictable offences and that section 37 of the Act is intended to raise the bar even further for those who are members of a criminal organization.

[16] The Applicant submits that "reasonable grounds to believe" is a low threshold and that the IAD failed to make any findings that Mr. Brezinski's evidence was not credible. Instead, the

IAD applied too high an evidentiary burden and threshold in expecting direct evidence in support of each of the allegations and statements made by Mr. Brezinski and evidence relating to Mr. Tran's criminal activities. In this regard, the Applicant argues that the IAD erred by failing to take into consideration the cumulative aspect of all of the evidence to demonstrate a pattern of behaviour and indicia of membership in a criminal organization.

[17] The Respondent also appealed the ID's paragraph 36(1)(a) inadmissibility finding and deportation order. However, that appeal was held in abeyance by the IAD pending the outcome of the organized criminality appeal.

III. Issue and Standard of Review

[18] The issue to be determined in this case is whether the IAD committed a reviewable error as contemplated by subsection 18.1(4) of the *Federal Courts Act*, RSC, 1985 c F-7.

[19] Since the question of whether there is sufficient evidence to constitute "reasonable grounds to believe" that a permanent resident is "a member" of a criminal organization or engages "in activity that is a part of such a pattern" is a question of mixed fact and law, the applicable standard of review is that of reasonableness (*Thanaratnam v Canada (Minister of Citizenship and Immigration*), 2005 FCA 122, at paras 26-27; *Castelly v Canada (Minister of Citizenship and Immigration)*, 2008 FC 788, at paras 10-12, 329 FTR 311[*Castelly*]; *Toussaint v Canada (Public Safety and Emergency Preparedness),* 2009 FC 688, at paras 21-22 [*Toussaint*]).

[20] Findings made by the IAD in this respect are therefore given a high level of deference and the Court will not intervene so long as the decision falls within a "range of possible,

acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2009 SCC 9, at para 47, [2008] 1 SCR 190).

IV. Analysis

[21] As is well-established, it is not necessary under sections 33 and 37 of the Act to show that the person concerned is a member of a criminal organization but rather that there are reasonable grounds to believe that he or she is a member of such an organization or has engaged in activity that is a part of such a pattern of criminal activity (*Castelly*, at para 26; *He v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 391, at paras 28-29, 367 FTR 28; *Toussaint*, at para 38).

[22] As noted by the Applicant, the "reasonable grounds to believe" standard of proof is a low threshold to meet. It requires something more than mere suspicion, but less than the standard applicable in civil matters of proof (*Sivakumar v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 433 (CA), at p 445, 44 ACWS (3d) 563; *Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297 (CA), at para 60; *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at para 114, [2005] 2 SCR 100 [*Mugasera*]; *Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298 (CA), at p 311, 107 DLR (4th) 424). In *Mugasera*, the Supreme Court of Canada stated 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; see also *Sabour v Canada (Minister of Citizenship and Immigration)*, 195 FTR 69, 100 ACWS (3d) 642).

[23] However, as I indicated previously, my role in these proceedings is not to determine whether there are reasonable grounds to believe that the Respondent was a member of a criminal organization within the meaning of paragraph 37(1)(a) of the Act. It is rather to decide whether the IAD's finding that no such grounds exist in this case falls within a range of possible acceptable outcomes.

[24] It is not contested that most of the Applicant's evidence both before the ID and the IAD consisted of Mr. Brezinski's testimony. In my view, it was entirely open for the IAD to give this testimony little weight. As indicated by the Respondent, Mr. Brezinski's involvement with Project Kachou was peripheral and brief. During the 3 week period between August 30, 1999 when he commenced with the Gang Activity Suppression Team, and September 25, 1999 when Mr. Tran was arrested and subsequently detained, Mr. Brezinski had no contact or knowledge of Mr. Tran. He did not even participate in the Project Kachou investigation, which ended on September 25, 1999, and had no particular expertise on the Trang Gang.

[25] Moreover, it was entirely open for the IAD to find that Mr. Brezinski's testimony was vague in that he could not provide any particulars for most of the paragraph 37(1)(a) allegations against the Respondent. Mr. Brezinski's testimony itself was in large part based on hearsay evidence. He was unable to explain on what facts he concluded that the Respondent was a mid-level distributor for the Trang Gang. He was unable to provide any particulars on the wiretapped conversation or any particulars regarding the phone calls shared between the Respondent and Binh Trang, an alleged member of the Trang Gang. Mr. Brezinski was also unable to provide any credible evidence demonstrating that the Respondent was a hit-man for the Trang Gang.

[26] Mr. Brezinski's evidence was given in a context where much of the police information about the Trang Gang had been purged and is no longer available. In other words, there was not much to support Mr. Brezinski's testimony and some caution regarding its probative value could reasonably be expected.

[27] In sum, I find that the IAD completed a thorough assessment of the evidence before it and reasonably found that the Applicant did not establish reasonable grounds to believe that the Respondent was a member of the Trang Gang or was engaged in activities that are part of such a pattern. In my view, while the Applicant frames the issue in terms of a misapplication of the evidentiary standard on the part of the IAD, the Applicant is actually requesting the Court to reweigh the evidence and substitute its own findings to those of the IAD. However, as is well-established, this is not the function of this Court (*Kuar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1491, at para 20; *Thavarathinam v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1469, at para 10, 127 ACWS (3d) 967).

[28] With respect to the IAD's finding regarding the Respondent's marijuana grow operation, I am also of the opinion that the IAD reasonably found that the commission of this offence does not constitute membership in a criminal organization within the meaning of paragraph 37(1)(a) of the Act. The persons involved in the grow operation were the Respondent, his wife and his wife's cousin.

[29] The IAD found in this respect that if the Respondent were to fall under the ambit of paragraph 37(1)(a) of the Act for the marijuana grow operation offences, this provision would

cover "virtually any indictable offence committed by two or more parties" and that this interpretation of paragraph 37(1)(a) would be inconsistent with the object of the Act and intention of Parliament, which already provides for the removal of persons who have committed indictable offences at section 36 of the Act.

[30] This interpretation of paragraph 37(1)(a), a provision in the IAD's home statute, seems entirely reasonable in that it falls within a arrange of acceptable outcomes (see *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, at para 34, [2011] 3 SCR 654; *Public Service Alliance of Canada v Canadian Federal Pilots Association and Attorney General of Canada*, 2009 FCA 223, at para 36, 50).

[31] I see no reason to interfere with the IAD's decision. As a result, the Applicant's judicial review application is dismissed. No question of general importance has been proposed by the parties. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed;

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4841-15
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v ANH LE TRAN
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MAY 18, 2016
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	JULY 6, 2016

APPEARANCES:

Kim Sutcliffe	FOR THE APPLICANT
Gordon Maynard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Vancouver, British Colombia	FOR THE APPLICANT
Gordon Maynard Maynard Kischer Stojicevic Barristers and Solicitors Vancouver, British Colombia	FOR THE RESPONDENT