Federal Court  Cour fédérale

Date: 20161124

Docket: IMM-1431-16

Citation: 2016 FC 1295

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 24, 2016

PRESENT: The Honourable Madame Justice Gagné

BETWEEN:

WILFRID NGUESSO

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

AMENDED JUDGMENT AND REASONS

I. Overview

[1] Wilfrid Nguesso is challenging the decision of an immigration officer with the Immigration Division of the Canadian Embassy in Paris, in which she found that he was inadmissible to Canada because he was a member of a criminal organization, within the meaning of paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] This is a second decision by the immigration officer. The first was successfully challenged by the applicant before this Court. For the reasons outlined in Court File 2015 FC 879, Madam Justice Bédard allowed the applicant's application for judicial review and found that the officer's first decision was unreasonable. According to the judge, the officer failed to identify the criminal organization to which the applicant belonged and to associate the alleged activities with criminal offences recognized in Canadian law. She therefore set aside the officer's first decision and referred the matter back to her to identify "the Canadian offences at issue and their essential elements and an assessment of the evidence in light of these elements to determine whether she has reasonable grounds to believe that the applicant should be declared inadmissible on grounds of organized criminality."

[3] Bédard J. certified the following two questions:

> (a) In the context of a declaration of inadmissibility under paragraph 37(1)(a) of the IRPA, is it necessary to identify the applicable criminal organization?
>
> (b) At paragraph 37(1)(a) of the IRPA, does the expression "or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence" require the identification of the provisions of a federal law that are related to an offence punishable by indictment, the identification of the constituent elements of the offence under Canadian law and the proof of the constituent elements of the offence?

[4] The respondent did not appeal this judgment and the officer therefore rendered a new decision. That decision is the subject of this application.

[5] Since I am of the view that the immigration officer did not repeat the errors identified by Bédard J. and that she made a reasonable decision defensible in respect of the facts and law, the application for judicial review will be rejected.

II. Facts

A. *History*

[6] The applicant is a citizen of the Republic of the Congo (Congo), commonly known as Congo-Brazzaville, and is the son of President Denis Sassou-Nguesso (DSN).

[7] He studied in the Congo but did not obtain a high school diploma. He subsequently studied in France at an international aircraft piloting school, where he obtained a licence. From 1986 to 1992, he worked as a pilot in the Congo and, from 1992, he lived in Gabon with his sister, the wife of the Gabonese president.

[8] In 1989, the Congolese government created the Société Congolaise de Transports Maritimes (Socotram), a national shipping company whose main objective is to develop a national shipping fleet. The Congolese government then held 45% of Socotram's capital stock. The balance was held by two private companies; SAGA, which held 49% of the shares and ELF Congo, which held 6%. In 1998, shortly after DSN had returned to power, the Congolese government granted Socotram the right to appropriate at least 40% of the marine traffic rights generated by foreign trade to and from the Congo.

[9] The applicant then incorporated WGN Trading and Shipping Négoce-International SA (TS) and registered it in Liechtenstein. TS purchased all of the Socotram shares held by SAGA and ELF Congo, and the applicant, through his private company, became the majority private shareholder. He was appointed Director of Transportation.

[10] In 2004, TS sold all of its Socotram shares to the Guinéa Gulf Shipping Company SA, and the applicant was appointed Chief Executive Officer (CEO) of the company. He has held this position since June 2005.

[11] The applicant has been married to a Canadian citizen since 1999, with whom he has seven children, all Canadian citizens. The applicant's wife and her seven children have lived in Montréal since 2006. On December 27, 2006, the applicant filed a family class application for permanent residence.

[12] In reviewing this application, the Immigration Division conducted routine checks with the war crimes and organized crime sections of the Canada Border Services Agency (CBSA) regarding the applicant's activities or associations. In April 2008, a representative of the CBSA's Organized Crime Section informed the Immigration Division that he had major concerns about the origin of the applicant's income and his property assets.

[13] The applicant was therefore required to provide a number of documents and information, which he did in August 2008.

[14] In January 2009, the Financial Transactions and Reports Analysis Centre of Canada issued a report on several electronic fund transfers involving the applicant.

[15] Despite the information obtained, concerns expressed and the relationship between the applicant and DSN, a representative of the CBSA's Organized Crime Section expressed the view that there was insufficient evidence that the applicant had committed one or more criminal offences abroad, or was a member of a criminal organization. The applicant's case was still being studied by the CBSA's Organized Crime Section, although it was inactive from October 2009 to March 2011.

[16] On September 5, 2012, the Immigration Division sent the applicant a "fairness letter" to advise him of the concerns about him. The letter mentioned that he might not be admissible due to organized criminality under paragraph 37(1)(a) of the IRPA. The Division's concerns involved: (i) the applicant's education and professional experience in relation to his career progression; and (ii) alleged appropriation of proceeds from the sale of petroleum products by the Congo.

[17] The applicant was summoned to an interview to answer the Immigration Division's questions regarding these matters. The interview lasted approximately 4 hours and the applicant answered about 170 questions.

[18] Following this interview, the Immigration Division sent the applicant another letter informing him of concerns about: (i) his income; (ii) the companies in which he previously or

still held shares; (iii) the nature of his contract of employment; and (iv) generally, the success of his businesses. The Division again requested that he provide a number of documents and information.

[19] In a report issued on November 1, 2012, the CBSA found that, despite the applicant's suspected embezzlement and money laundering activities, there was not enough evidence to conclude that there were "reasonable grounds to believe" that the applicant would be inadmissible on grounds of organized criminality within the meaning of paragraph 37(1)(a) of the IRPA.

[20] On December 20, 2013, the applicant's application for permanent residence was rejected and he was declared inadmissible on grounds of organized criminality.

B. *The immigration officer's first decision*

[21] In her first decision, the officer concluded that she had reasonable grounds to believe that the applicant had been involved in criminal activities (embezzlement, misappropriation of company property and money laundering) that were supported by a structured and deliberate plan. She was of the view that the applicant had participated directly, knowingly and repeatedly in these activities and financial arrangements, such that he was inadmissible, and his application for permanent residence had to be rejected.

C. *Judgment of the Federal Court*

[22] Because it found that the officer had erred in law by: (i) failing to identify the criminal organization at issue; and (ii) failing to identify the offences under Canadian federal law at issue along with their essential elements, the applicant's application for judicial review was allowed, and the matter was returned for a new determination. The applicant's other arguments, including those alleging a breach of procedural fairness, were all dismissed.

III. Impugned decision

[23] The immigration officer's second decision, rendered on February 18, 2016, identified the criminal organization at issue, as well as the related criminal offences under Canadian law, including their constituent elements. After having reviewed the case, she again found that the applicant did not meet the requirements of the IRPA and was inadmissible to Canada under paragraph 37(1)(a).

[24] The officer listed a number of factors in support of her refusal: (i) the existence of an organization; (ii) whose activities are described in section 37 of the IRPA; (iii) the commission of offences under a Canadian federal law; and (iv) the applicant's involvement and participation as a member in that organization.

A. *Existence of an organization*

[25] The officer found that she had reasonable grounds to believe that the applicant was at the centre of an organization consisting of two groups over which he exercised control. The first group was located in the Congo and was composed of DSN, the applicant and Socotram, or

rather its board of directors. A second group operated in Luxembourg. It was composed of companies and complex legal structures, for the benefit of the applicant, which were supervised by Alain Sereyjol-Garros (Garros). She also found that the members of the organization were bound by friendly or family relationships.

B. *Whose activities are described in section 37 of the IRPA*

[26] Regarding the existence of criminal activities as described in section 37 of the IRPA, the officer noted that this criterion required the existence of a pattern of criminal activity planned and implemented by persons acting in concert. According to the officer, the context in which the applicant was appointed Director of Transportation and then CEO of Socotram, the Congolese government's transfer of 40% of maritime rights to Socotram and the tax exemptions granted to Socotram were all part of a deliberate plan whose main objective was the personal enrichment of the applicant.

[27] The officer found that she had reasonable grounds to believe that by holding 55% of Socotram's shares, the applicant was able to pay himself excessive compensation and perks in violation of Socotram's rights.

[28] Also, although it had received hundreds of millions of dollars of funding from the Congolese government over the last 20 years, through subsidies and tax exemptions, Socotram had still not succeeded in achieving its primary corporate objective, the creation of a national maritime fleet. The officer found that she had reasonable grounds to believe that Socotram was

being used only to provide the applicant with a very substantial source of income to the detriment of the government.

[29] The officer found that the excessive wages and benefits granted by Socotram to the applicant, Socotram's payment of rent for an apartment owned by the applicant in Paris, the purchase of a house in Montréal for the benefit of another company whose shareholder was the applicant and the purchase of luxury vehicles in Canada were all indicative of misappropriation of Socotram funds for the benefit of the applicant.

[30] She noted that there was a pattern of criminal activity by persons acting in concert and who, according to her, were the directors of Socotram, DSN and Garros. She noted that the members of the Socotram Board of Directors were all close relatives of the applicant and DSN and that they made decisions that ran counter to the interests of the corporation and its economic development.

C. *Commission of offences under a Canadian federal law*

[31] The immigration officer stated that she had reasonable grounds to believe that several of the expenses incurred by Socotram for applicant's benefit were fraudulent and ran counter to Socotram's interests and the achievement of its corporate purpose. She therefore had reasonable grounds to believe that the applicant had committed offences under Canadian law, pursuant to section 380 of the *Criminal Code*, R.S.C. 1985, c. C-46; (ii) tax evasion under subsection 239(1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.); and (iii) laundering proceeds of crime, under subsection 462.31(1) of the *Criminal Code*.

[32] Not only was the applicant unable to explain his successive appointments as Socotram's CEO, but also, other than his family ties, there was absolutely no basis for his level of income and the excessive benefits he enjoys, given that the applicant refused to provide his employment contract.

[33] Section 380 of the *Criminal Code* provides that "[e]very one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service … is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars." Since the immigration officer found that she had reasonable grounds to believe that the applicant [TRANSLATION] "acted dishonestly" to embezzle "funds, property and services of the legal entity Socotram," whose value exceeded five thousand Canadian dollars, he committed fraud within the meaning of section 380 of the *Criminal Code*.

[34] With respect to tax evasion, the officer noted that it is generally defined as a violation of the law to avoid taxation or reduce the amount of tax otherwise payable. Subsection 239(1) of the *Income Tax Act* states that "every person who (a) has made, or participated in, assented to or acquiesced in the making of, false or deceptive statements in a return, certificate, statement or answer filed or made as required by or under this Act or a regulation... (e) conspired with any person to commit an offence described in paragraphs 239(1)(a) to 239(1)(d), is guilty of an offence." The officer drew a negative inference from the lack of evidence that the applicant had

reported his income or paid taxes in the Congo or elsewhere. She therefore found that she had reasonable grounds to believe that the applicant had not reported all of his income and had therefore committed the equivalent of tax evasion under Canadian law.

[35] Finally, the officer added that she had reasonable grounds to believe that the corporate amounts and shares invested in civil societies and real estate companies or trust companies located in Luxembourg were obtained through the commission of indictable offences—namely misappropriation of funds, which is the equivalent of laundering proceeds of crime within the meaning of subsection 462.31 (1) of the *Criminal Code*.

D. *Applicant's membership and participation*

[36] The officer found that she had reasonable grounds to believe that the applicant was [TRANSLATION] "the instigating and active member of that organization" and that he "participated in the pattern of criminal activity that characterized the organization."

[37] Since the applicant directed and controlled operations as the CEO, the officer found that he was [TRANSLATION] "highly and centrally involved in the organization."

[38] She said she had reasonable grounds to believe not only that the applicant was a member of the organization, but that he was participating in his criminal activities personally and for his own benefit. Whereas the applicant enjoyed excessively favourable working conditions as the CEO of Socotram, he operated through dummy corporations that were part of complex structures located in Luxembourg in order to remain anonymous. The officer found that the applicant was

[TRANSLATION] "more than just a member of an organization," he was "an active participant in the scheme" and had "contributed and participated in an essential manner in implementing the pattern and the criminal activities."

[39] Under these circumstances, the officer found that the applicant was inadmissible within the meaning of paragraph 37(1)(a) of the IRPA, given his position within an organization engaged in criminal activities (fraud, embezzlement, tax evasion, and laundering proceeds of crime), and his direct, [TRANSLATION] "knowing and repeated" participation in these activities, in order to enrich himself personally.

IV. Issues and standard of review

[40] This application for judicial review raises the following issues:

A. *Did the officer deprive the applicant of his right to be heard?*

B. *Did the officer raise a reasonable apprehension of bias?*

C. *Did the officer err in her interpretation of the essential elements of section 37 of the IRPA?*

[41] The standard of review applicable in matters of procedural fairness is correctness. More to the point, the only issue that arises is whether the principles of procedural fairness were followed (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 43; *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79).

[42] The issue of whether the evidence before the officer was sufficient to find that there were reasonable grounds to believe that the applicant was a member of a criminal organization referred to in paragraph 37(1)(a) of the IRPA is, for its part, a question of mixed fact and law subject to the standard of reasonableness (*Athie v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 425 at paragraph 36; *Nguesso v Canada (Citizenship and Immigration)*, 2015 FC 879 at paragraph 61).

V. Analysis

A. *Did the officer deprive the applicant of his right to be heard?*

[43] The applicant argued that between her first and second decisions, the officer substantially altered the identity of the criminal organization at issue without notifying him and giving him an opportunity to counter the new allegations. In doing so, the officer breached the principles of procedural fairness. The applicant relied on the principle illustrated in *Canada (Minister of Citizenship and Immigration) v Khan*, 2001 FCA 345, at paragraph 18, according to which "the duty of fairness requires that visa applicants be given a reasonable opportunity to respond to visa officers' concerns before their application is denied." He contended that the criminal organization, as described by the officer, originally consisted of the applicant and members of his family, whereas it now included Socotram, the members of its Board of Directors, Garros, as well as the trusts under his control. The applicant maintained that this breach of the principles of procedural fairness alone warranted the Court's intervention.

[44] With respect, instead, I am of the view that the applicant was sufficiently aware of the composition of the organization characterized as criminal by the officer, that he knew the allegations to which he was required to respond, and consequently, that he was not deprived of his right to be heard. The applicant was interviewed for four hours, and the officer's interview report was sent to counsel for the applicant. It provided a detailed description of the officer's concerns regarding Socotram and its Board of Directors and the applicant's other companies.

[45] The criminal organization at issue was also identified in certain documents made available to the applicant, including the respondent's factum in file IMM-1144-14, and it was extensively discussed in his first application for judicial review. If this issue were then of real concern to the applicant, he had ample time to raise it in the seven months that elapsed between this Court's decision and the officer's second decision.

[46] Case law confirms that the principles of fairness require that visa applicants be given a reasonable opportunity to respond to the immigration officer's concerns before their application is denied (*Khan*, above, at paragraph 18). This principle does not stretch to the point of requiring that an immigration officer has an obligation to provide an applicant with a "running score" of the weaknesses during the review of the evidence (*Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at paragraph 23). Nor did the officer's obligation to provide information require her to advise the applicant of her future findings as to the exact composition of the criminal organization to which he was suspected of belonging.

[47] The Certified Tribunal Record contained extensive documentation, in the form of repartees or questions and answers between the officer and the applicant, where the involvement and role of the various stakeholders was discussed. The list of documents that the applicant was required to provide on September 25, 2012 was also extensive. As we will see, the applicant chose not to provide most of the documents requested. He chose not to address the officer's concerns on the various topics discussed.

[48] I therefore find that the applicant was sufficiently aware of the facts that gave rise to the officer's suspicions to have the opportunity to respond and that he was in fact offered several opportunities to do so.

B. *Did the officer raise a reasonable apprehension of bias?*

[49] The applicant maintained that the officer's findings were based on a biased and prejudiced view of the Congo and its administration, which raised a reasonable apprehension of bias. He contended that the whole review was based on the premise that the Congolese government was [TRANSLATION] "autocratic, corrupt, favouring the emergence of a group of individuals who considered public offices to be sources of personal enrichment and where institutions were subverted to maintain the power of an elite." He added that by ignoring a part of the evidence that contradicted this premise, the officer had demonstrated bias, and her decision was therefore invalid.

[50] Two tests must be satisfied to confirm that a decision-maker is impartial: (i) there must not be any conflict of interest; and (ii) the decision-maker must be open to persuasion

(*Ayyalasomayajula v Canada (Citizenship and Immigration)*, 2007 FC 248 at paragraph 13). An applicant alleging that a decision-maker is biased must first rebut this presumption of impartiality (*Asl v Canada (Citizenship and Immigration)*, 2009 FC 505 at paragraph 11). He must demonstrate a real likelihood of bias. Mere suspicion is insufficient (*Guo v Canada (Citizenship and Immigration)*, 2015 FC 161 at paragraph 19).

[51] In this case, the applicant alleged a suspicion of bias, but did not elaborate on the facts that would have given rise to such suspicion. He did not raise any arguments that would lead me to conclude that he was successful in rebutting the presumption of impartiality. In *Committee for Justice and Liberty et al. v National Energy Board et al.*, [1978] 1 SCR 369, the Supreme Court of Canada clearly stated that:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude." (page 394)

[52] The issue then is whether, in all likelihood, the officer, knowingly or unknowingly, rendered a biased and unfair decision. The applicant did not raise any arguments that would lead me to this conclusion, and the officer's review of all of the evidence—including negative inferences arising from the absence of certain evidence—lead me to the opposite conclusion.

C. *Did the officer err in her interpretation of the essential elements of section 37 of the IRPA?*

[53] I agree with the respondent that the role of this Court is not to decide whether, on the evidence before the officer, there were "reasonable grounds to believe" that the essential elements of section 37 were satisfied, but only whether it was reasonable for her to conclude that there were (*Canada (Minister of Citizenship and Immigration) v Thanaratnam*, 2005 FCA 122 at paragraphs 32-33).

[54] The issue of whether there are "reasonable grounds to believe" that an event occurred within the meaning of section 33 of the IRPA requires more than mere suspicion, but the standard of proof is less onerous than that of the preponderance of the evidence. There must be an objective basis for the belief which is based on compelling and credible information (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCR 40, at paragraph 114).

[55] The applicant maintained that the officer's decision was vitiated by several errors of law regarding the essential elements required for section 37 of the IRPA to apply. He argued that the decision was unreasonable due to several errors of fact and law, including: (i) the existence of a criminal organization as described under paragraph 37(1)(a), whose main objective is to engage in criminal activities; (ii) the incorrect characterization of legal activities authorized by Congolese law as criminal activities forming part of a pattern; and (iii) the finding that there were elements constituting criminal offences, when they were actually legal and authorized practices.

(a) *Existence of a criminal organization*

[56] With respect to the existence of a criminal organization, the applicant maintained that the officer erred in reaching this conclusion in the absence of evidence of criminal activity on the part of the organization, an essential element of section 37 of the IRPA. The applicant relied on the wording of the English version of *Thanaratnam*, above, at paragraph 23, where the term "pursuing" is used to signify that the organization must pursue criminal activities to be an organization within the meaning of section 37. He submitted that the purpose of the organization must be to commit organized criminal activities (*Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 at paragraphs 37-38).

[57] He added that even repeated criminal activities, with several persons acting in concert in the absence of evidence of a criminal organization with a purpose and plan, are not sufficient to meet the elements of the test of paragraph 37(1)(a) (*Thanaratnam*, above, at paragraph 30).

[58] According to him, section 37 should be interpreted harmoniously with the *Criminal Code*'s definition of "criminal organization," which requires that one of the main purposes of the organization be to commit serious offences (*B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at paragraphs 37, 41-42, 46) or that a criminal organization requires "an organizational structure that promotes the commission of offences" (*R v Way*, 2015 ONSC 3080 at paragraph 121).

[59] He concluded that the officer erred in disregarding the evidence provided by the applicant demonstrating the legality and legitimacy of his activities and those of Socotram, a legally constituted corporation that has shareholders, a decision-making process consistent with its

bylaws, that is managed by directors and operates in accordance with the laws of the Congo. He argued that the criminal organization identified by the officer, as well as its members (including DSN, Socotram and its directors, an entity constituted in Luxembourg consisting of accounts, companies and legal, financial and tax structures for the applicant's benefit, supervised by Garros) did not satisfy the definition of criminal organization as recognized by the courts and that they did not engage in activities that were part of such a pattern.

[60] I am of the opinion that when considering all the evidence on the record, it was not unreasonable for the officer to find that the applicant was a member of the organization described in her second decision.

[61] First, case law favours a flexible interpretation of the term "organization" found in paragraph 37(1)(a) of the IRPA to include a wide variety of organizations (*Sittampalam*, above at paragraphs 36-40; *B010*, above at paragraphs 37, 42 and 46). It is therefore sufficient that the group have been somewhat organized and have been coordinating its activities for some time. An organization can be characterized as criminal, regardless of whether the group also has legitimate purposes or activities (*R v Kwok*, 2015 BCCA 34 at paragraph 84; *R v Beauchamp*, 2015 ONCA 260 at paragraphs 171-172).

[62] The evidence amply showed that Socotram's primary, if not sole, "legitimate" objective was to develop a national marine fleet. It was also granted the right to collect maritime rights, which would otherwise have benefited the Congolese government, with the specific aim of achieving this objective. After 22 years of operation and a substantial increase in the company's

income, this legitimate objective has still not been achieved. And although the company's income has increased, its profit margin remains very low and, according to the applicant, it pays virtually no dividends to its shareholders, including the Congolese government. When questioned by the officer, the applicant, who is the CEO of Socotram, remained very vague regarding his role and commercial activities.

[63] Nor was he able to provide any details regarding the transactions by which his management company acquired the majority of Socotram's capital stock and subsequently resold it.

[64] It was in this context that the officer examined the applicant's excessive enrichment, his disproportionate revenues and the substantial transfers of funds between Socotram and the applicant. She found that the organization's criminal activities, essentially misappropriation of funds, took precedence over Socotram's legitimate objective and that the applicant acted in concert with several persons in order to do so. The only explanation provided by the applicant was that he had a very attractive employment contract. However, he refused to provide a copy of the contract and instead produced the affidavit of a local lawyer who claimed to have read it and that this document was confidential. The lawyer did not explain why she was hired, nor did she explain why the document would be confidential. The applicant also refused to provide most of the other documents required by the officer. She could very well draw a negative inference from this insufficient evidence.

[65] I do not believe that the fact that the organization in question does not respond to what is commonly understood as organized criminality, i.e. controlling territories for the purpose of drug trafficking, etc., prevented the officer from concluding as she did.

[66] In my view, it was open to her to find that the organization in question met all the requirements of a criminal organization. As a result it falls within the meaning of paragraph 37(1)(a) of the IRPA.

(b) *Existence of criminal activities*

[67] The applicant submitted that a personal enrichment project cannot constitute a criminal act if the actions taken are individually legitimate. He added that even behaviour that is unauthorized, negligent, unethical or noncompliant with recognized business practices is not an indictable offence. He maintained that his indirect ownership of the majority of Socotram's shares, his involvement in managing the company's affairs, the government's financial allocation from which the company benefits (public funds and tax exemptions), the quest for personal enrichment, Garros's (an individual suspected of tax evasion) role and know-how in managing his affairs, Socotram's internal complacency (decisions that run counter to Socotram's development and interests) and the interconnection of all these persons acting in concert are not illegal acts. Consequently, he argued that the officer erred in finding that the whole was part of a "pattern of criminal activity" within the meaning of the Act and/or case law.

[68] The officer concluded that the organization had committed misappropriation of funds, tax evasion and money laundering. However, in order for paragraph 37(1)(a) of the IRPA to apply to

that organization and to the applicant, a single federal indictable offence committed as part of a "pattern of criminal activity" is sufficient.

[69] I repeat, Socotram's corporate objective was to acquire vessels of its own or in partnership to create a national marine fleet. In the early 2000s, Socotram's revenues from maritime rights were estimated to be between US$23 million and US$29 million per year, in addition to US$5.5 million in 2003 and US$9.3 million in 2004 paid by the Congolese government. At the September 25, 2012 interview, the applicant stated that a national marine charter fleet had not yet been established after 22 years of operation since the cost of purchasing vessels was too high. At the time, Socotram was paying him an estimated annual salary of CAD$3.5 million, not including the other benefits supposedly stipulated in his employment contract. The officer did not have to require evidence that the applicant was found guilty of misappropriation of funds in the Congo, or even that these acts constituted fraud, tax evasion or misappropriation of funds in the Congo, but that if committed in Canada, they would constitute such offences. Contrary to what the applicant claims, this is not a question of interfering in the affairs of Socotram or the Congolese government, but rather determining whether the applicant is inadmissible to Canada for actions that Canadian society does not tolerate and characterizes as criminal.

[70] I am therefore of the view that it was open to the officer to conclude that she had reasonable grounds to believe that the applicant was appointed CEO of Socotram to lend the appearance of legitimacy to the misappropriation of this company's funds for his own personal benefit, in concert with several other persons. It was also open to her to find that the applicant

used sophisticated corporate structures and a maze of dummy companies headquartered in a tax haven to mask his criminal activities, in concert with other individuals.

[71] Contrary to what the applicant believes, she did not find that creating sophisticated structures or incorporating companies in tax havens was illegal per se. However, after having reviewed all the evidence, she did have reasonable grounds to believe that the applicant had done this for criminal purposes.

[72] The applicant refused to provide his tax returns and proof of payment of his taxes in the Congo or elsewhere. Instead, he filed two affidavits from the same lawyer who commented on his employment contract, stating that: (i) the applicant is a tax resident of the Congo and that three of his tax certificates (for 2008, 2011 and 2012) are confidential; and (ii) the applicant's taxes are collected at source by Socotram. Again, his lawyer, who practises law in Laval, Québec, did not explain how she could have personal knowledge of the alleged facts or how the records at issue would be confidential. At best, this is hearsay evidence; at worst, it is a convenient statement.

[73] It was therefore rational for the officer to find that she had reasonable grounds to believe that the applicant had used his dummy corporations located in a tax haven, mainly to avoid paying his taxes.

(c) *Existence of constituent elements of offences under a Canadian law*

[74] Finally, the applicant pleaded that the officer erred in finding that all the facts entered into evidence enabled her to conclude that she had reasonable grounds to believe that the applicant, in concert with other persons, had committed offences outside Canada, that if committed in Canada, would constitute indictable offences, i.e. fraud, tax evasion and money laundering. He maintained that his high or excessive salary, the payment of personal bills by Socotram, the payment of per diem amounts, the management of a dwelling in the Paris area and the purchase of a house in Montréal did not constitute fraud, but rather business decisions authorized by the company's board pursuant to his employment contract. He claimed that the use of corporate and financial structures in Luxembourg did not constitute evidence of tax evasion and that the officer could not find that he had laundered proceeds of crime without demonstrating the existence of proceeds of crime or indictable offences.

[75] With respect, I believe that it was reasonable for the officer to find that if the actions of the applicant and the other members of the organization identified had been performed in Canada they would constitute federal indictable offences.

[76] It is true that the applicant attempted to demonstrate the legality and legitimacy of some Socotram activities, taken individually, but I do not believe that this evidence precluded any finding regarding the criminal nature of the pattern or primary objective of the organization.

[77] Pursuant to Bédard J.'s request, the officer listed the offences under Canadian law at issue: (i) fraud (*Criminal Code*, section 380); (ii) tax evasion (*Income Tax Act*, subsection 239(1)); and (iii) laundering proceeds of crime (*Criminal Code*,

subsection 462.31(1)), and each of their constituent elements. She carefully weighed and reviewed each of these constituent elements in light of the laconic evidence provided by the applicant. In this regard, the applicant appeared to be essentially asking the Court to reconsider the evidence, which is not its role. I agree with the respondent that a single indictable Canadian offence was sufficient to support the officer's findings, and in my view her assessments concerning fraud and tax evasion were reasonable.

[78] In sum, the applicant failed to convince me that the Court needed to intervene.

VI. Certification

[79] Following the hearing of this application, the applicant sent me a letter in which he asked me to certify a number of questions which he described as general and important:

A. *In a determination of inadmissibility under paragraph 37(1)(a) of the IRPA, is the visa officer required to provide the litigant with the identity of the criminal organization and inform him of the specific allegations made against him before initiating the interview and information gathering process, and is he required to include this information in the fairness letter?*

B. *In paragraph 37(1)(a) of the IRPA, does the phrase "or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence" require constituent elements of the alleged offence to have been committed abroad, in accordance with the law in force abroad? And an equivalence analysis and a finding of dual criminality between the foreign offence and the offence under a federal law?*

C. *Can commercial practices provide the basis for RGB (reasonable grounds to believe) regarding dishonest acts (within the meaning of the Criminal Code of Canada) or criminal offences under section 37 of the IRPA: (a) in the absence of evidence that such practices are illegal in the country where the offences at issue were committed? (b) in the absence of evidence that such practices are illegal in Canada?*

D. *In the absence of evidence that they are illegal in the countries at issue, can foreign governmental or legislative choices and/or corporate choices abroad constitute dishonest acts or a pattern of criminal activity within the meaning of paragraph 37(1)(a)?*

E. *In the absence of evidence that they are illegal in Canada, can foreign governmental or legislative and/or corporate choices made abroad constitute dishonest acts or a pattern of criminal activity within the meaning of paragraph 37(1)(a)?*

F. *When the Federal Court remits a matter back to the same officer specifically to correct errors of law and render a new decision in accordance with the order, can the same officer legally consult with other persons to render the new decision?*

G. *Does invoking adjudicative privilege with respect to a communication from the decision-making officer's supervisor (with persons other than the decision-maker) confirm the unlawful interference in the decision-making officer's decision-making process?*

H. *Does this interference or involvement of other persons violate the appearance of impartiality?*

[80] I am of the view that Question A is not determinative since the applicant was in fact informed, early in the process, of the allegations against him and that he had ample opportunity to be heard on them.

[81] Questions F, G and H are related to an argument which the applicant raised for the first time at the hearing and was not considered by the Court. They are therefore not determinative.

[82] Finally, Questions B, C, D and E are all related and have to do with my finding that it was not necessary for the officer to conclude that the applicant had been found guilty or charged with an indictable offence in the Congo, or that the alleged actions constituted indictable

offences in that country. They can be combined into a single question which, in my view, would be more of general interest and would transcend the facts of this case:

> For the purposes of paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, does the phrase "or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence" require that there also be evidence that the actions at issue constitute a criminal offence in the country where they occurred?

[83] I am aware that the same question was certified by Mr. Justice Hughes in *Lai v Canada (Public Safety and Emergency Preparedness), 2014 FC 258*, and that the Federal Court of Appeal criticized him for having done so it because it dealt with an issue that Hughes J. did not have to rule on.

[84] Because I have ruled on this issue in paragraphs 69 and 70 of these reasons and find that (i) it is determinative; (ii) it could be determinative in an appeal; (iii) it transcends the interests of the parties in this case; and (iv) it is of a general nature, it will be certified.

VII. Conclusion

[85] For all these reasons, the applicant's application for judicial review will be dismissed and the question stated in paragraph 82 of these reasons will be certified.

JUDGMENT

THE COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The following question is certified:

> For the purposes of paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, does the phrase "or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence" require that there also be evidence that the actions at issue constitute a criminal offence in the country where they occurred?

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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