

Federal Court



Cour fédérale

**Date: 20180125**

**Dockets: IMM-1075-17  
IMM-1076-17**

**Citation: 2018 FC 31**

**Ottawa, Ontario, January 25, 2018**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**RASHAD AMAL JOLLY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**AMENDED JUDGMENT AND REASONS**

[1] The Applicant has applied for judicial review of two decisions. The lead file is IMM-1075-17. Therein the Applicant challenges a decision given orally by the Immigration and Refugee Board, Immigration Division, dated February 28, 2017, in which a member of the Division [the Member] found the Applicant to be inadmissible to Canada pursuant to section 36(1)(b) of the *Immigration, Refugee and Protection Act*, SC 2001, c 27 [IRPA] on the grounds of serious criminality [the Inadmissibility Decision]. The second file is IMM-1076-17.

Therein the Applicant challenges a decision of an immigration officer, dated March 1, 2017, finding the Applicant's claim for protection ineligible for referral to the Refugee Protection Division [RPD] pursuant to section 101(1)(f) of the IRPA [the Ineligibility Decision]. The Respondent has agreed that both applications should be considered and dealt with together. A related PRRA application is being held in abeyance. The applications are brought pursuant to subsection 72(1) of the IRPA.

I. Orders Sought

[2] The Applicant seeks an order setting the Inadmissibility Decision aside and remitting the matter back for redetermination by a different Member of the Immigration Division. The Applicant submits and I agree that if the Inadmissibility Decision is set aside, it follows that the Ineligibility Decision will also be set aside.

[3] The Respondent seeks amendments to the style of cause to show the Minister of Citizenship and Immigration as the sole respondent on each file.

II. Background

[4] The Applicant is a 31 year-old citizen of the Bahamas. In 2007, while in the Bahamas, he was involved in a car accident in which he hit and killed an oncoming motorcyclist. The Applicant pled guilty and was convicted of 'Killing in the course of dangerous driving' [the Conviction] under section 44(1) of the Bahamian *Road Traffic Act*, LRO 1/2006, Chapter 220 [the RTA]. The Applicant was initially sentenced to pay \$2,500.00 (Bahamian dollars) yearly to the college the victim had attended, for the rest of his working life. However, on appeal, the Applicant received a final sentence of twelve days of community service.

[5] On December 13, 2016, the Applicant entered Canada and at the Port of Entry stated his intention to make a claim for refugee protection based on his sexual orientation. The Applicant disclosed the Conviction. Canada Border Services Agency [CBSA] contacted the High Commission of the Bahamas and was advised that offences under the RTA are not criminal. The High Commission produced a copy of the Applicant's Bahamian criminal record which confirmed that the Applicant "has not been convicted of a criminal offence in the Commonwealth of the Bahamas."

### III. Relevant Legislation

#### A. *Canada*

[6] The *Criminal Code*, R.S.C., 1985, c. C-46 [the Criminal Code] :

249 (1) Every one commits an offence who operates

(a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place;

[...]

(4) Everyone who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

249 (1) Commet une infraction quiconque conduit, selon le cas :

a) un véhicule à moteur d'une façon dangereuse pour le public, eu égard aux circonstances, y compris la nature et l'état du lieu, l'utilisation qui en est faite ainsi que l'intensité de la circulation à ce moment ou raisonnablement prévisible dans ce lieu;

[...]

(4) Quiconque commet une infraction mentionnée au paragraphe (1) et cause ainsi la mort d'une autre personne est coupable d'un acte criminel et passible d'un emprisonnement maximal de quatorze ans.

B. *The Bahamas*

[7] The *Road Traffic Act*, LRO 1/2006, Chapter 220, assent September 18, 1958:

44.(1) Any person who causes the death of another person by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be guilty of an offence and shall be liable on conviction therefor on information in the Supreme Court to a fine not less than five thousand dollars but not exceeding ten thousand dollars or to imprisonment for a term of four years, or to both the fine and imprisonment.

(2) Section 18 of the Coroners Act shall apply to an offence under this section as it applies to murder, manslaughter or infanticide.

45.(1) If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be on the highway, he shall be liable on summary conviction therefor to a fine of five thousand dollars or to imprisonment for a term of one year, or to both the fine and imprisonment.

(2) Where a person is convicted of aiding, abetting, counselling or procuring, or inciting the commission of an offence under this section, and it is proved that he was present in the vehicle at the time of the commission of the offence, the offence of which he is convicted shall, for the purpose of the provisions of this Act relating to disqualification for holding or obtaining licences, be deemed to be an offence in connection with the driving of a motor vehicle.

46. If any person drives a vehicle on a road without due care and attention or without reasonable consideration for other persons using the road, he shall be guilty of an offence and liable on summary conviction therefor to a fine of two hundred dollars.

C. *Mens Rea*

[8] The Supreme Court of Canada has held that the requirement for *mens rea* in section 249(4) of the Criminal Code is elevated in the sense that the section only applies in situations where there is a marked departure from the standard of care which a reasonable person would have exercised in the same circumstances; see *R v Roy*, 2012 SCC 26 at para 36.

[9] In Canada, the fact that section 249(4) of the Criminal Code has an elevated requirement for *mens rea* is not apparent from the wording of the section. It is necessary to look at the Supreme Court of Canada's decisions to discover the nature of the *mens rea* element of the offence. Regarding the Bahamas, the Minister did not offer the Member any case law or expert testimony about the *mens rea* required for a conviction under s 44 of the RTA. All the Member was given was the text of sections 44 – 47 of the RTA.

IV. The Inadmissibility Decision

[10] The issue before the Member was whether the Conviction was equivalent to “Dangerous operation causing death” under section 249(4) of the Criminal Code.

[11] The Member noted that in *Hill v Canada (Minister of Employment and Immigration)* (1987), 73 NR 315, [1987] FCJ No 47, the Federal Court of Appeal explained there are three ways to assess the equivalence of an offence:

[...] first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences. Two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory

provisions in the same words or not. Third, by a combination of one and two. [my emphasis]

[12] The Member compared the wording of the offence in section 44(1) of the RTA with the wording of section 249(4) of the Criminal Code. The Member found that the wording is almost identical, and then concluded:

I find that if comparing statute to statute that these are indeed equal and all of the same elements or ingredients are in both, that none is broader than another and that therefore the two are equal for the purpose of this case.

[13] Later the Member repeated this conclusion in the following terms:

In this case, given that the wording is almost identical, both statutes cover the same areas, elements, or ingredients.

Neither is broader than the other and I do not read the case law in such a way to show that if there are tests required beyond the statutes in a different level of court or different grounds to be met based on the court system or previous case law that these need all be taken into consideration, otherwise simple statute to statute which is number one would not be one of the standard methods of equivalency.

[14] Finally the Member concluded that:

There was an option for the authorities [in the Bahamas] to downgrade the charge but they proceeded with section 44.

Therefore, I must find that deducing equivalency from the wording of the statute from country to country is the most suitable and adequate method.

[15] The Member appears to have understood that the case law in Canada establishes an elevated standard for *mens rea* in cases of dangerous driving causing death under the Criminal Code section 249(4). However she seems to indicate that the case law is not relevant to her analysis because it can be based solely on the wording of the statutes.

[16] In spite of concluding the elevated *mens rea* requirement established by the Supreme Court of Canada was not relevant, the Member appears to have inferred that a comparable requirement existed under section 44 of the RTA because a lesser charge was available and was not laid. In my view, this inference is not reasonable and the Member should have been provided with case law or expert evidence to show how *mens rea* is treated under section 44 of the RTA.

V. Conclusion

[17] The Member's failure to identify the essential elements of the offences, the inference she drew about the degree of *mens rea* required under the RTA and her rejection of the relevance of Canadian case law make the Inadmissibility Decision unreasonable.

[18] For these reasons the application will be allowed.

VI. Certified Question

[19] Neither party posed a question for certification for appeal.

**JUDGMENT in IMM-1075-17**

**THIS COURT'S JUDGMENT is that:**

1. The style of cause is amended to show the Minister of Citizenship and Immigration as the sole Respondent; and
2. The application is allowed and the Applicant's Inadmissibility is to be reconsidered by another Member of the Immigration Division.

**JUDGMENT in IMM-1076-17**

**THIS COURT'S JUDGMENT is that:**

1. The style of cause is amended to show the Minister of Citizenship and Immigration as the sole Respondent; and
2. The Ineligibility Decision is hereby set aside for the reasons given in file IMM-1075-17.

"Sandra J. Simpson"

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Judge



**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKETS:** IMM-1075-17 AND IMM-1076-17

**STYLE OF CAUSE:** RASHAD AMAL JOLLY v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** DECEMBER 7, 2017

**JUDGMENT AND REASONS:** SIMPSON J.

**DATED:** JANUARY 17, 2018

**AMENDED:** JANUARY 25, 2018

**APPEARANCES:**

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