Federal Court  Cour fédérale

Date: 20180919

Docket: IMM-672-18

Citation: 2018 FC 926

[ENGLISH TRANSLATION]

Ottawa, Ontario, September 19, 2018

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

SCHILLOT BELLEVUE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision rendered by a member of the Immigration Division [ID] of the Immigration and Refugee Board [IRB], who found Schillot Bellevue, the applicant, inadmissible pursuant to paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] For the reasons set out below, the application for judicial review will be allowed.

I. Background

[3] On October 28, 2017, Mr. Bellevue, a citizen of Haiti, entered Canada without going through a Canadian port of entry and, once in Canada, claimed refugee protection.

[4] However, it appears that on April 13, 2010, in the United States, Mr. Bellevue was convicted of misuse of passport under section 1544 of Title 18 of the *United States Code* [Section 1544] for attempting to enter the United States using a fake Canadian passport.

[5] On November 8, 2017, considering this conviction in the United States, a Canada Border Services Agency officer [the Officer] signed a "report under subsection 44(1) of the *Immigration and Refugee Protection Act*" for the Minister of Citizenship and Immigration and declared Mr. Bellevue inadmissible in Canada pursuant to paragraph 36(1)(b) of the Act, reproduced in the appendix.

[6] On the same day, a Minister's delegate referred the file to the ID for investigation to determine whether Mr. Bellevue was subject to paragraph 36(1)(b) of the Act.

[7] On December 15, 2017, the ID found that Mr. Bellevue was, in fact, subject to paragraph 36(1)(b) of the Act, and issued a deportation order against him.

II. Disputed decision

[8] The ID had to determine whether the delegate's conclusion regarding Mr. Bellevue's inadmissibility was justified.

[9] Because Mr. Bellevue was convicted of an offence outside Canada, the ID needed to determine whether Section 1544 is equivalent to the section presented as its Canadian counterpart, namely, paragraph 122(1)(b) of the Act.

[10] The ID reiterated the principle set out by the Federal Court of Appeal in *Hill v Canada (Minister of Employment and Immigration)* (1987), 73 NR 315 [*Hill*], whereby, in short, equivalency can be established in three ways. In this regard, it noted that, in this case, simply comparing the statutes was not sufficient and that it was necessary to analyze the evidence presented at the hearing to determine whether the essential elements of the offence referred to in paragraph 122(1)(b) had been proven in the foreign proceedings.

[11] The ID believed that it could reasonably find that Mr. Bellevue had not demonstrated his right to enter Canada pursuant to sections 18 to 20 of the Act, and that his acts in the United States, had they been committed in Canada, would have fallen under paragraph 122(1)(b) of the Act. The ID found that Section 1544 is equivalent to paragraph 122(1)(b) of the Act.

[12] The ID then considered the argument put forward by Mr. Bellevue that the offence committed in the United States and the one committed in Canada cannot be equivalent, because

the Canadian statute provides for a defence with respect to the offence referred to in section 122 of the Act, whereas the American statute makes no such provision with respect to Section 1544.

[13] This defence, or immunity, is provided for under section 133 of the Act, which reads as follows:

> "133 A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the *Criminal Code*, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred." (Emphasis added.)

[14] Before the ID, Mr. Bellevue essentially claimed that, had he entered Canada under circumstances identical to those under which he entered the United States, he could have used a defence because he attempted to claim refugee protection in the United States. Mr. Bellevue therefore relied on *Uppal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 338 [*Uppal*], which addressed the scope of the immunity granted by section 133 of the Act.

[15] Before rendering its decision, the ID referred the parties to another decision of this Court, *Kathirgamathamby v Canada (Citizenship and Immigration)*, 2013 FC 811 [*Kathirgamathamby*], citing paragraph 17, in particular, and gave the parties the opportunity to make additional submissions.

[16] The ID reviewed this Court's decisions in *Uppal* and *Kathirgamathamby* and, feeling that it was bound by the latter, determined that section 133 of the Act could not apply in

Mr. Bellevue's case, because he had not "entered Canada". It indicated that its finding would not change even if it accepted that Mr. Bellevue had gone to the United States to claim refugee protection. The ID also rejected Mr. Bellevue's argument, finding that section 133 of the Act constituted only a deferral rather than a defence and that it had not been established that Mr. Bellevue would not have been prosecuted had he committed the same offence in Canada.

III. Positions of the parties

A. *Applicant's position*

[17] Mr. Bellevue submits that the standard of review applicable to a question of equivalency pursuant to paragraph 36(1)(b) of the Act is that of reasonableness (*Abid v Canada (Citizenship and Immigration)*, 2011 FC 164 at paragraph 11 [*Abid*]).

[18] Mr. Bellevue argues that (1) the ID erred in finding that section 133 of the Act should not be considered in the test for equivalency and that it was only a deferral, and (2) the Immigration Division's decision can be unreasonable even if it complies with the rule of *stare decisis* based on a Federal Court decision.

[19] First, the applicant maintains that Section 1544 and section 122 of the Act are not equivalent. The ID apparently erred in its interpretation of *Uppal* and *Kathirgamathamby*.

[20] The applicant argues the following points in support of his position. First, the equivalency test must take defences into account (*Li v Canada (Minister of Citizenship and*

Immigration), [1997] 1 FC 235 at paragraph 19, (FCA) [*Li*]). To do so, Canadian provisions must be adapted to events that occurred in a foreign jurisdiction. Second, in this case, section 133 provides a defence for refugee claimants, because Parliament's intent is to not prosecute individuals who attempt to flee their country of origin and claim refugee protection in their destination country. Third, if an individual meets the criteria in section 133 in a foreign country, there should be no equivalency. Moreover, *Uppal* and *Kathirgamathamby* support this position. In *Uppal*, section 133 did not apply to the fake driver's licence, because it was not used to flee the country of origin and arrive in the destination country. In *Kathirgamathamby*, the Court referred only to *Uppal*. Fourth, neither *Uppal* nor *Kathirgamathamby* indicated that section 133 must be automatically excluded from the equivalency test when a fake document is used to enter a country other than Canada. Instead, it must be excluded based on the purpose for which the documents were used. Fifth, the applicant obtained the fake passport specifically to flee Haiti and claim refugee protection in the United States. Had he committed the same acts in Canada, he would have been able to avail himself of the immunity granted by section 133. As this is not possible in the United States, Section 1544 and section 122 of the Act are not equivalent. Sixth, in response to the ID's claim that section 133 is only a deferral, the applicant maintains that this is irrelevant and that the real question is whether the applicant could have availed himself of section 133 if he had committed the same acts in Canada.

[21] In response to the Court's concerns in relation to the rule of *stare decisis*, because the ID relied on a decision of this Court in rendering its own, Mr. Bellevue maintains that (1) the Federal Court can set aside its previous case law (*Khan v Canada (Citizenship and Immigration)*, 2010 FC 983 at paragraph 16; *Viel v Canada (Employment Insurance Commission)*, 2001 FCA 9

at paragraph 7); (2) if the decision of an administrative tribunal was automatically reasonable because it relied on a Federal Court decision and was therefore not reversible through judicial review, it would be impossible for the Court to set aside its previous jurisprudence and change the law; (3) the Federal Court must ensure that the precedent is correct; and (4) to find otherwise would lead to inappropriate results.

B. *Respondent's position*

[22] The Minister also argues that the reasonableness standard of review is applicable to a court's findings with respect to the test of equivalency regarding a provision of a foreign country and a provision taken from Canadian law (*Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paragraph 21 [*Nshogoza*]).

[23] The Minister submits that the issue is to examine whether it was reasonable for the ID to determine that paragraph 122(1)(b) of the Act is the equivalent of Section 1544 for the purpose of finding the applicant inadmissible to Canada.

[24] In his memorandum, the Minister states that the ID's finding in relation to equivalency is reasonable. Relying initially on *Uppal* and *Kathirgamathamby*, he argues that section 133 of the Act cannot be used in relation to equivalencies. Indeed, it would only apply when an offence is committed "in relation to the coming into Canada", whereas the applicant used a fake passport for entry *into the United States*. Also, the Minister points out that section 133 does not provide absolute immunity and is not a defence against a charge, but rather postpones or prevents a charge from being laid.

[25] However, the respondent qualifies his position with respect to the impact of *Kathirgamathamby*. He maintains that the rule of *stare decisis* is rigorously applied only for the *ratio decidendi* of a decision. However, he argues that comments in *Kathirgamathamby* on the applicability of section 133 were only *obiter dictum* and therefore not binding (*R c Henry*, 2005 SCC 76 at paragraph 57). Moreover, based on Sarah Blake's work, *Administrative Law in Canada* (5th ed, Markham, LexisNexis, 2011, at pages 140–141), the Minister submits that an administrative tribunal is not bound by a decision that rules that a provision is "reasonable" rather than "correct".

IV. Standard of review

[26] The Court concurs with the parties' position and will therefore apply the reasonableness standard to the ID's decision rendered under the terms of section 36 of the Act and to its finding of an equivalent offence under Canadian law (*Lu v Canada (Citizenship and Immigration)*, 2011 FC 1476 at paragraph 12 [*Lu*]; *Abid* at paragraph 11; *Sayer v Canada (Citizenship and Immigration)*, 2011 FC 144 at paragraph 4).

V. Issue

[27] According to the parties, the Court must determine whether it was reasonable for the ID to exclude from the equivalency exercise the immunity granted by section 133 of the Act on the grounds that this section (1) only applies if the offence involved a person who has actually "entered Canada", and (2) constitutes a deferral rather than a defence.

[28] The Court must therefore determine whether the impugned decision is justified, transparent and intelligible, and whether it "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47).

VI. Discussion

[29] According to paragraph 36(1)(b), a foreign national is inadmissible if he or she has been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years.

[30] The ID must conduct an equivalency exercise to determine whether there are reasonable grounds to believe that a conviction would have been handed down in Canada for the same type of act as was committed outside Canada (*Moscicki v Canada (Citizenship and Immigration)*, 2015 FC 740 at paragraph 38 [*Moscicki*]). It is then a question of assessing the equivalency of offences and not the equivalency of the law (*Steward v Canada (Minister of Employment and Immigration)*, [1988] 3 FC 487 (CA)). It is not necessary to "compare all the general principles of criminal responsibility" (*Moscicki* at paragraph 18), because the test of equivalence only involves the comparison of the two offences, not the analysis of the comparability of possible convictions. Nor does the test of equivalency involve conducting another trial (*Moscicki* at paragraph 38; *Halilaj v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1062 at paragraph 20).

[31] To test for equivalency between a Canadian offence and a "foreign" offence, one of the three methods established by the Federal Court of Appeal in *Hill* must be used. This test involves "[looking] at the similarity of definition of the two offences being compared and the criteria involved for establishing the offences" (*Nshogoza* at paragraph 28).

[32] Therefore, "a comparison of the 'essential elements' of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences" (emphasis added) (*Li* at paragraph 19). In *Li*, the Court of Appeal found that it was unreasonable that the motions judge did not take into account the defences.

[33] Section 133 of the Act is presented as an "immunity" rather than a "defence" because the refugee claimant cannot, pending disposition of their claim for refugee protection or if refugee protection is conferred, be charged with an offence under section 122. Thus, when the above conditions are met, a refugee claimant does not even have to defend himself or herself, because no charges can be laid. Obviously, if the person entering Canada with a fake passport does not claim refugee protection in Canada, he or she can be charged under section 122 of the Act, in the same way as a person whose refugee protection claim was denied.

[34] According to case law, it seems clear that Section 1544 and section 122 would not be equivalent in the case of a refugee claimant, at least until the outcome of the claim is known, because immunity is attached to one and not the other. However, the ID strayed from this case law by relying on this Court's decision in *Kathirgamathamby*, which interpreted *Uppal*.

[35] It is appropriate to examine those two decisions.

[36] In *Uppal*, Mr. Uppal came to Canada and claimed refugee protection. However, when he arrived, he had in his possession a fake passport and driver's licence. The ID had to determine whether section 133 of the Act granted immunity to both a refugee claimant who used a fake passport to enter Canada and one who used a fake driver's licence. The ID did not need to conduct an equivalency exercise, because the offences Mr. Uppal was accused of were not committed outside Canada.

[37] The ID found that Mr. Uppal was not inadmissible because of the offence involving use of the fake passport, because of the immunity granted by section 133 of the Act, as the passport was, in fact, used *in relation to his coming into Canada*. However, the ID declared Mr. Uppal inadmissible because of the offence involving use of the fake driver's licence and found that he could not take advantage of the immunity granted by section 133 of the Act, because the driver's licence was not used *in relation to his coming into Canada*, as stipulated in section 133 of the Act. The Court confirmed the ID's decision.

[38] In *Uppal*, the Court addressed the scope of the immunity granted by section 133 in the context of offences committed in Canada as opposed to in a foreign jurisdiction, and in the situation where one of the offences involved a fake document used in relation to coming into Canada and another offence involved a fake document not used in relation to coming into Canada. In *Uppal*, no equivalency exercise was involved.

[39] The situation was different in the subsequent decision. Mr. Kathirgamathamby was initially recognized as a refugee in Canada, but an immigration officer then refused his application for permanent residence, considering Mr. Kathirgamathamby inadmissible because of a conviction in the United States. A few years earlier, Mr. Kathirgamathamby had arrived in the United States with a fake passport and pleaded guilty to a fraud offence under paragraph 1028(a)(4) of Title 18 of the *United States Code.*

[40] According to the facts set out in the decision, the immigration officer determined that the American offence was equivalent to the offence referred to in section 403 of the *Criminal Code* of Canada, RSC, 1985, c C-46, and that Mr. Kathirgamathamby was therefore inadmissible pursuant to paragraph 36(1)(b) of the Act. But since the immigration officer did not provide any details about the test of equivalency he conducted, the Court allowed the application for judicial review and vacated the immigration officer's decision.

[41] However, in passing, the Court also addressed the immunity granted by section 133 of the Act at paragraph 17 of its decision, on which the ID relied to reject the application of section 133 in Mr. Bellevue's case.

[42] Thus, in this regard, I concur with the respondent with respect to the rule of *stare decisis* and find that this is a case of *obiter dictum*, and that it cannot be imposed, even on a lower court (*Dumont Vins & Spiritueux Inc. v Canadian Wine Institute*, 2001 FCT 695 at paragraph 26), because only the *ratio decidendi* of a decision is binding.

[43] Also, with all due respect, in my opinion, *Uppal* does not address the exclusion of section 133 of the Act from an equivalency exercise.

[44] In this case, it was unreasonable for the ID to exclude section 133 of the Act from its test of equivalency. The jurisprudence of this Court indicates that a test of equivalency must include defences (*Li* at paragraph 19), even more so an immunity.

VII. Conclusion

[45] The Court will allow the application for judicial review and refer the matter back for reconsideration in light of these reasons.

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is referred back to the ID for reconsideration in light of these reasons.

3. No question is certified.

4. Without costs.

"Martine St-Louis"

Judge

APPENDIX

***Immigration and Refugee Protection Act* (SC 2001, c 27)**	***Loi sur l'immigration et la protection des réfugiés* (LC 2001, ch 27)**
Rules of interpretation	**Interprétation**
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 that they have occurred, are occurring or may occur.	**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 peuvent survenir.
Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	**a)** être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	**b)** être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(c) committing an act outside Canada that is an offence in the place where it was committed	**c)** commettre, à l'extérieur du Canada, une infraction qui, commise au Canada,

and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.
Offences Related to Documents	**Infractions relatives aux documents**
Documents	**Possession, utilisation ou commerce**
122 (1) No person shall, in order to contravene this Act,	**122 (1)** Commet une infraction quiconque, en vue de contrevenir à la présente loi et s'agissant de tout document — passeport, visa ou autre, qu'il soit canadien ou étranger — pouvant ou censé établir l'identité d'une personne :
(a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;	**a)** l'a en sa possession;
(b) use such a document, including for the purpose of entering or remaining in Canada; or	**b)** l'utilise, notamment pour entrer au Canada ou y séjourner;
(c) import, export or deal in such a document.	**c)** l'importe ou l'exporte, ou en fait le commerce.
Penalty	**Peine**
123 (1) Every person who contravenes	**123 (1)** L'auteur de l'infraction visée :
(a) paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up	**a)** à l'alinéa 122(1)a) est passible, sur déclaration de culpabilité par mise en accusation, d'un emprisonnement maximal de

to five years; and	cinq ans;
(b) paragraph 122(1)(b) or (c) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to 14 years.	**b)** aux alinéas 122(1)b) ou c) est passible, sur déclaration de culpabilité par mise en accusation, d'un emprisonnement maximal de quatorze ans.
Aggravating factors	**Circonstances aggravantes**
(2) The court, in determining the penalty to be imposed, shall take into account whether	**(2)** Le tribunal tient compte dans l'infliction de la peine des circonstances suivantes :
(a) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization as defined in subsection 121.1(1); and	**a)** l'infraction a été commise au profit ou sous la direction d'une organisation criminelle — au sens du paragraphe 121.1(1) — ou en association avec elle;
(b) the commission of the offence was for profit, whether or not any profit was realized.	**b)** l'infraction a été commise en vue de tirer un profit, que celui-ci ait été ou non réalisé.
Deferral	**Immunité**
133 A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(a) or section 127 of this Act or under section 57, paragraph 340(c) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.	**133** L'auteur d'une demande d'asile ne peut, tant qu'il n'est statué sur sa demande, ni une fois que l'asile lui est conféré, être accusé d'une infraction visée à l'article 122, à l'alinéa 124(1)a) ou à l'article 127 de la présente loi et à l'article 57, à l'alinéa 340c) ou aux articles 354, 366, 368, 374 ou 403 du Code criminel, dès lors qu'il est arrivé directement ou indirectement au Canada du pays duquel il cherche à être protégé et à la condition que l'infraction ait été commise à l'égard de son arrivée au

	Canada.
18 U.S. Code § 1544	**§ 1544 du titre 18 du code des États-Unis**
Misuse of passport	**Utilisation abusive d'un passeport**
Whoever willfully and knowingly uses, or attempts to use, any passport issued or designed for the use of another; or	Quiconque utilise ou tente d'utiliser volontairement et sciemment un passeport délivré à une autre personne ou conçu pour être utilisé par une autre personne;
Whoever willfully and knowingly uses or attempts to use any passport in violation of the conditions or restrictions therein contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports; or	Quiconque utilise ou tente d'utiliser volontairement et sciemment un passeport en contravention des conditions ou des restrictions énoncées dans les présentes dispositions, ou en contravention des règles prescrites en application des lois régissant la délivrance des passeports;
Whoever willfully and knowingly furnishes, disposes of, or delivers a passport to any person, for use by another than the person for whose use it was originally issued and designed—	Quiconque fournit, transmet ou délivre volontairement et sciemment à une autre personne un passeport qui sera utilisé par une personne autre que celle à laquelle il a initialement été délivré et pour laquelle il a été initialement conçu —
Shall be fined under this title, imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the offense was committed to facilitate a drug trafficking crime (as defined in section 929(a) of this title)), 10 years (in the case	Est passible d'une amende suivant le présent titre, d'un emprisonnement maximal de vingt-cinq ans [si l'infraction a été commise dans le but de faciliter un acte terroriste international (au sens de la section 2331 du présent titre)], de vingt ans [si l'infraction a été commise dans le but de faciliter le trafic de stupéfiants

of the first or second such offense, if the offense was not committed to facilitate such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.	(au sens de la section 929(a) du présent titre)], de dix ans (dans le cas d'une première ou d'une deuxième infraction de cette nature, si l'infraction n'a été commise ni pour faciliter un acte terroriste international, ni pour faciliter le trafic de stupéfiants), ou de quinze ans (dans le cas de toute autre infraction), ou des deux. [traduction non officielle]

FEDERAL COURT

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