Federal Court Cour fédérale

Date: 20200130

Docket: IMM-3857-19

Citation: 2020 FC 168

Ottawa, Ontario, January 30, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

EMMET DENHA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Emmet Denha is a citizen of the United States of America. On August 17, 1993, he pleaded guilty in Michigan to an offence under the *Racketeer Influenced and Corrupt Organizations Act* [RICO], 18 USC §§ 1962(c), 1963(a), and 2.

[2] Mr. Denha was initially charged with multiple offences arising from a large-scale illegal gambling operation conducted by a criminal organization in Michigan. He pleaded guilty to a single count of racketeering that involved 23 separate instances of laundering money over a period of one and a half years. The total amount laundered exceeded USD $4.5 Million.

[3] On January 31, 2017, Mr. Denha applied to the Immigration Section of the Consulate General of Canada in New York for criminal rehabilitation under s 36(3)(c) the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. A migration officer [Officer] refused Mr. Denha's application on the ground that he was inadmissible to Canada for serious criminality and for organized criminality, pursuant to ss 36(1)(b) and 37(1)(a) of the IRPA. While a finding of rehabilitation can overcome inadmissibility for serious criminality, it cannot overcome inadmissibility for organized criminality.

[4] Mr. Denha says that his sole contact with the criminal organization in Michigan was a bookie named Henry Allen Hilf, who also pleaded guilty to numerous counts related to the operation of an illegal gambling business, laundering money and racketeering. Mr. Denha claims to have had no knowledge of the nature or extent of the illegal gambling operation. He says the Officer's finding that he was inadmissible for organized criminality was therefore unreasonable.

[5] The Minister concedes that the Officer's assessment of Mr. Denha's rehabilitation was unreasonable because the Officer failed to consider the likelihood of recidivism. However, the Minister maintains that the Officer's finding that Mr. Denha was inadmissible to Canada for organized criminality was reasonable, and this is sufficient to sustain the decision.

[6] The Officer found Mr. Denha's denial of any knowledge that the criminal organization or activity involved anyone other than Mr. Hilf to be implausible. Given the frequency of the financial transactions, the large denominations of the cheques, and Mr. Denha's admission that he knew he was laundering the proceeds of an illegal gambling operation, it was open to the Officer to conclude that Mr. Denha was a member of a criminal organization or had participated in a pattern of organized criminal activity.

[7] The Officer's decision was reasonable. The application for judicial review is therefore dismissed.

II. Background

[8] Mr. Denha was born in Baghdad, Iraq in 1949. In 1974, he acquired the Shopper's Market grocery store in Warren, Michigan.

[9] Mr. Denha says that in 1981 he was asked by Mr. Hilf to cash cheques for him through Shopper's Market. He says he consulted a Certified Public Accountant [CPA], who assured him this was legal. Mr. Denha would receive the cheques from Mr. Hilf, wait ten days for them to clear, and then pay Mr. Hilf the amounts of the cheques. The large monetary transactions enabled him to obtain favourable rates at his bank.

[10] The RICO was enacted on October 27, 1986, rendering Mr. Denha's conduct illegal. Mr. Denha says he received bad advice from his CPA and lawyer, both of whom continued to assure him that his conduct was lawful.

[11] U.S. authorities began investigating Mr. Hilf and his associates in 1988. On May 21, 1991, a grand jury issued an indictment against 18 individuals, including Mr. Hilf and Mr. Denha. Mr. Denha says he was facing fines of USD $20 Million and a possible 20-year jail sentence. On April 5, 1992, he pleaded guilty to a single count of racketeering in exchange for lower fines and the termination of the remaining charges against him. He was sentenced to six months in a community treatment centre and required to pay a fine of USD $62,000.00, and to forfeit USD $275,000.00.

[12] Mr. Denha applied for criminal rehabilitation on January 31, 2017. On August 9, 2017, the Officer requested complete court records and transcripts related to Mr. Denha's conviction, which Mr. Denha provided on September 15, 2017.

[13] On October 2, 2017, the Officer gave notice to Mr. Denha that he may be inadmissible to Canada for organized criminality under s 37(1) of the IRPA, and offered him an opportunity to respond. Mr. Denha made submissions on November 28, 2017, denying membership in or knowledge of the criminal organization responsible for the illegal gambling operation. He insisted that his role was limited to laundering money, and his sole contact in the criminal organization was Mr. Hilf.

III. Decision under Review

[14] The following is a summary of the relevant portions of the Officer's notes of his decision:

- The equivalent section of the *Criminal Code*, RSC, 1985, c C-46 to the applicant's conviction in Michigan is s 462.31: "Laundering proceeds of crime".

- Counsel for Mr. Denha argues that s 37 of the IRPA requires reasonable grounds to believe, which is more than mere suspicion but less than a balance of probabilities. The evidence provided meets this threshold.

- There are two parts to the s 37 analysis: being a member of a criminal organization; or engaging in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert.

- Counsel for Mr. Denha argues that to establish membership in a criminal organization there must be evidence of knowing participation in the group's activities. Mr. Denha only cashed cheques for Mr. Hilf. While Mr. Denha engaged in a criminal transaction in common with Mr. Hilf, he had no further involvement with the organization that would lead to the conclusion that Mr. Denha was a member of it.

- Counsel for Mr. Denha states that a criminal organization requires the involvement of three or more persons – here, there was only Mr. Denha and Mr. Hilf. Two persons do not constitute a criminal organization.

- However the court record states that: "At all times relevant herein, EMMET DENHA, Defendant herein, knowing that the aforedescribed Rosenbalm checks

represented the proceeds of illegal gambling activity, and acting directly and indirectly through employees under his immediate supervision, negotiated such checks for HENRY ALLEN HILF …". The court record shows that at least three if not more people were involved.

- The sums transacted were considerable, demonstrating Mr. Denha's degree of involvement and span of time in laundering illegal funds through his business account. The court record lists the cheques cashed and a consistent pattern. This took place over approximately 1.5 years, and involved the laundering of dozens of cheques with a total combined value of approximately USD $4.6 million.

- The applicant was engaged in an activity that was part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an indictable offence. Mr. Denha is described under s 37(1) as part of a criminal organization involving three or more persons.

- There is evidence of Mr. Denha's knowing participation in the group's activities, and he was thus a member of a criminal organization. Mr. Denha engaged in activity that was part of a pattern of criminal activity planned and organized by a number of persons acting in concert.

- The finding that Mr. Denha is described under s 37(1) of the IRPA makes him ineligible for rehabilitation.

IV. Issue

[15] The sole issue raised by this application for judicial review is whether the Officer's finding that Mr. Denha was inadmissible for organized criminality was reasonable.

V. Analysis

[16] Reasonableness is presumed to be the standard of review in all cases (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The parties agree that this is the applicable standard here.

[17] The Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[18] The IRPA provides in s 37(1)(a):

37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	**37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(a) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part	**a)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie

of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern;	d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

[19] As the Officer noted, a person may be found inadmissible for organized criminality if that person (a) is a member of a criminal organization; or (b) engages in activity that is part of a pattern of organized criminal activity. The Officer found Mr. Denha to be inadmissible on both grounds.

[20] "Member" of a criminal organization is not defined in the IRPA. The Federal Court of Appeal has held that the term must be given an unrestricted and broad interpretation (*Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 27).

[21] Mr. Denha argues that a criminal organization must comprise at least three people (citing *Saif v Canada (Citizenship and Immigration)*, 2016 FC 437 [*Saif*] at para 15). Because the single count of racketeering to which Mr. Denha pleaded guilty implicated only Mr. Hilf and himself, he says he could not reasonably be found to have been a member of a criminal organization, nor to have participated in a pattern of organized criminal activity.

[22] The Minister disagrees that a criminal organization must comprise at least three people. In *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 at paragraphs 41 to 46, the Supreme Court of Canada held only that "s 37(1)(b) should be interpreted harmoniously with the *Criminal Code* definition of 'criminal organization'", and did not strictly incorporate the *Criminal Code* definition into the IRPA. In *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 [*Sittampalam*] at paragraphs 38 to 39, the Federal Court of Appeal confirmed that the *Criminal Code* definition does not apply in an immigration setting, and should be relied upon only as an interpretive aid. Justice Robert Barnes acknowledged in *Saif* that "organization" should be given a broad interpretation (at paras 9 and 17). According to the Minister, to the extent that *Saif* departs from the authority of higher courts, it should not be followed.

[23] It is unnecessary to decide in this case whether a criminal organization for the purposes of s 37(1)(a) of the IRPA must comprise at least three people. For the reasons given by the Officer, I am satisfied that Mr. Denha admitted through his guilty plea to being a member of a criminal organization, or to engaging in activity that is part of a pattern of organized criminal activity.

[24] Mr. Denha pleaded guilty to an offence under the RICO, which is explicitly concerned with corrupt organizations. The single count of the indictment to which he pleaded guilty confirms that:

(a) he knowingly laundered the proceeds of crime on 23 separate occasions;

(b) the proceeds of crime that he laundered totalled more than USD $4.5 Million over a period of a year and a half; and

(c) he knew the proceeds of crime were derived from an illegal gambling operation.

[25] Mr. Hilf pleaded guilty to and was convicted of several counts of the same indictment, many of which disclosed the existence of a large-scale illegal gambling operation involving numerous participants.

[26] The Officer found Mr. Denha’s denial of any knowledge that the criminal organization or activity involved anyone other than Mr. Hilf to be implausible. Given the frequency of the financial transactions, the large denominations of the cheques, and Mr. Denha’s admission that he knew he was laundering the proceeds of an illegal gambling operation, it was open to the Officer to conclude that Mr. Denha was a member of a criminal organization, or had engaged in activity that was part of a pattern of organized criminal activity. Despite some ambiguity in the Officer’s notes, there can be little doubt that he applied the correct legal test of “reasonable grounds to believe”, *i.e.*, more than mere suspicion but less than a balance of probabilities. This is not the most onerous standard of proof.

[27] The Officer was entitled to rely upon the count of the indictment to which Mr. Denha pleaded guilty (*Chen v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 13 at para 63). It was reasonable for the Officer to also consider the charges of which Mr. Hilf was convicted. According to the indictment, Mr. Hilf directed, supervised, and conducted an illegal

gambling operation, including "by supervising other bookmakers". He was said to have worked in combination, conspiracy, confederation and agreement with "persons known and unknown to the Grand Jury".

[28] The Officer's reasons provide a transparent and intelligible justification for his decision. His finding that Mr. Denha was inadmissible to Canada under s 37(1)(a) of the IRPA was reasonable.

VI. Conclusion

[29] Counsel for Mr. Denha acknowledged that, if this Court upholds the finding of inadmissibility under s 37(1)(a) of the IRPA, no useful purpose will be served by remitting the question of rehabilitation to another migration officer for redetermination. The application for judicial review is therefore dismissed.

[30] Given the Minister's position that *Saif* may be inconsistent with binding authority, it was suggested during the hearing that this case may give rise to a certified question for appeal. Following the hearing, counsel for the Minister informally requested an opportunity to propose particular questions for certification. The informal request was denied.

[31] This case ultimately turns on its facts, and not on any novel or disputed question of law. Nor would the issue raised by *Saif* be dispositive of an appeal in this case (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 36). I therefore decline to certify any question for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3857-19
STYLE OF CAUSE:	EMMET DENHA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 20, 2020
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	JANUARY 30, 2020

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