Date: 20070919

Docket: IMM-1160-07

Citation: 2007 FC 934

Ottawa, Ontario, September 19th 2007

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ROBERTO ERNESTO CONTRERAS MENDOZA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Defendant

REASONS FOR ORDER AND ORDER

[1] The applicant, Mr. Mendoza, claimed refugee status but was opposed by the Minister as inadmissible on the basis that he was a member of a criminal organization, pursuant to paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the *IRPA*). This is an application to judicially review the February 8, 2007 decision of the Immigration Appeal Division (the IAD) which set aside the decision of a member of the Immigration Division (the ID) who had found Mr. Mendoza was not inadmissible (and thereby admissible). For the reasons that follow, I would dismiss this application for judicial review.

FACTS

[2] Mr. Mendoza was born on December 15, 1974. He claims that he had a difficult life in El Salvador. At the age of 16, he was arrested and imprisoned for illegal possession of a weapon. While in prison, his brother was killed by police officers and his sister was raped. After two years in prison, he was released free of charges.

[3] He then met Mara Salvatrucha members and joined the gang. It is not entirely clear whether Mr. Mendoza joined voluntarily or under coercion. He described how he had been beaten by several group members for his initiation. He admits that while as a member of the gang he got tattoos, painted graffiti, carried a slingshot, taxed people on the bus, and attended meetings of the organization. He denied having personally used violence or any direct involvement in any serious crimes.

[4] There is also some confusion as to when he left the gang. In his testimony before the ID member, he said that he became uneasy when he realized that people who did not pay the taxes on the buses might be subject to harm. He also indicated that he limited his contacts with the gang after the birth of his daughter, in 1996, but that he could not break completely from the gang and simply walk away. Mr. Mendoza finally left El Salvador on May 10, 2000 for the United States where he lived and worked for about two years. He then came to Canada and applied for refugee status.

[5] Mr. Mendoza alleges that he fears returning to his country because the Mara Salvatrucha would be after him for his lack of fidelity to the organization. He is also afraid of persecution by a sub-group of police officers for his past involvement with the organization.

[6] By decision dated April 11, 2006, a member of the ID determined that Mr. Mendoza was not a member of a criminal organization as described in section 37(1)(a) of *IRPA*. The ID member was persuaded that a favourable finding regarding the respondent would not be contrary to any objectives of the *IRPA*, that the respondent was coerced into engaging in certain activities and that those activities were not of such a gravity to bring him within this inadmissibility section. The Minister of Citizenship and Immigration appealed the ID decision to the IAD pursuant to subsection 63(5) of the *IRPA*.

THE IMPUGNED DECISION

[7] The IAD allowed the appeal by the Minister and substituted the decision of the ID with its own decision. Relying on the phrase “at the time the appeal is disposed of” in paragraph 67(1) of the *IRPA*, the IAD considered its jurisdiction as a hearing *de novo*. As a result, both parties could adduce fresh evidence they wished the IAD to consider. However, Mr. Mendoza chose not to introduce any additional evidence. As for the Minister, he was allowed to provide further evidence only pertaining to Mara Salvatrucha.

[8] To determine whether Mr. Mendoza was inadmissible under section 37(1)(a) of the *IRPA*, the IAD had to investigate whether Mara Salvatrucha can be considered a criminal organization and

whether Mr. Mendoza was a member of it. As to the nature of the organization, the IAD had no difficulty finding that Mara Salvatrucha meets the definition of a criminal organization during the time period Mr. Mendoza was alleged to have been a member. Not only had the ID member so found and the respondent conceded that it was a criminal organization, but the documentary evidence satisfied the IAD that it had a single brutal purpose, that of carrying out criminal activity by whatever means it chose.

[9] More problematic was the membership of Mr. Mendoza into that organization. Relying on the Federal Court decision in *Chiau v. Canada (Minister of Citizenship and Immigration)*, [1998] 2 F.C. 642 [*Chiau*] (affirmed at [2001] 2 F.C. 297), the IAD determined that being qualified a "member" of a criminal organization simply means belonging to it. In addition, the IAD found that mere membership is sufficient to find inadmissibility when a criminal organization is found to have a single brutal purpose. In any event, the respondent's admission of his participation in certain activities of the organization as well as his awareness that people who did not pay the taxes on the buses might be hurt supported the finding that he was a member of the Mara Salvatrucha. As a consequence, the IAD concluded that the ID member erred by focusing on factors like the objectives of the *IRPA*, the degree of gravity of the activities Mr. Mendoza was involved in, and the coercion he might have been subjected to.

[10] Finally, the IAD rejected allegations of intimidation by immigration officials and of interpretation problems. After reviewing the transcripts, the panel came to the conclusion that, despite the directiveness of the immigration officers, the respondent was given the opportunity to

provide explanations and did provide detailed information in response to questions. Similarly, it could find no evidence showing irregularities in the interpretation nor any indication that the respondent or his counsel raised any problem in this respect at the appropriate time.

ISSUES

[11] This application for judicial review essentially raises three issues:

- What is the applicable standard of review?
- Did the IAD err in finding that it had a *de novo* appeal jurisdiction?
- Did the IAD err in finding there was "reasonable ground to believe" that Mr. Mendoza was a 'member' of a criminal organization?

ANALYSIS

A) The applicable standard of review

[12] The first issue brought forward by this application for judicial review squarely raises a jurisdictional question and has to do with the proper interpretation of a legislative provision. To determine whether the IAD could properly hear the appeal on a *de novo* basis, this Court must interpret section 67(1) of the *IRPA*, in isolation or in combination with other provisions of the *IRPA*, most notably section 63. This is certainly not a matter on which the IAD has more expertise than this Court, nor does it engage a delicate balancing of competing policy objectives or interests of various constituencies. Moreover, it is clearly an issue of law, the resolution of which is susceptible of having a precedential value. Accordingly, the decision of the IAD on this issue calls for the standard of correctness.

[13] On the other hand, the second issue can be split in two discrete inquiries. It involves an issue of law, i.e. what is the test for membership in an organized criminal group for the purposes of section 37(1) of the *IRPA*, and an issue of mixed fact and law, i.e. whether the IAD erred in concluding that there was sufficient evidence of Mr. Mendoza membership and participation in the Mara Salvatrucha. For the reasons already spelled out in the previous paragraph with respect to jurisdiction, I am of the view that the first question does not attract any deference and must be reviewed on a standard of correctness. The second one is a mixed question of fact and law; I am inclined, however, to assess it on a standard of patent unreasonableness, as the factual underpinning is of primary importance.

[14] The Federal Court of Appeal came to a similar conclusion when it recently faced a comparable fact situation. Speaking for the Court, Justice Evans wrote in *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 122 [*Thanaratnam*]:

> [26] On questions of fact and factual inferences, the Board's decisions are reviewable on a standard of patent unreasonableness, pursuant to the *Federal Courts Act*, R.S.C 1985, c. F-7, paragraph 18.1(4)(d). In contrast, deference may not be afforded to the Board's interpretation of particular provisions of its enabling statute: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3.
>
> [27] There are two questions to be decided in this appeal. First, did the Applications Judge err in law by failing to consider whether Mr. Thanaratnam was "engaging in activity that is part of" a pattern of criminal activity within the meaning of paragraph 37(1)(a)? Second, did the Board err in concluding that the evidence before it was sufficient to constitute "reasonable grounds to believe". This is a question of mixed fact and law. However, in this case, it is so largely factual that the Board's finding should be set aside only if patently unreasonable.

B) The nature of the appeal jurisdiction of the IAD pursuant to s. 63(5) of the IRPA

[15] Counsel for the respondent contended that Ministerial appeals under section 63(5) of the *IRPA* are very different in nature and scope from the appeals authorized under paragraphs 63(1) to (4). He relied for that proposition on the fact that Ministerial appeals do not contemplate hearing new evidence on a humanitarian and compassionate issue which could not have been considered by the ID member. And in any event, the IAD in the present instance did not act as a court presiding a *de novo* hearing since it limited itself to a review of the record of the ID proceedings (except for the new evidence adduced by the applicant with respect to the nature of Mara Salvatrucha, which played no significant role in the appeal).

[16] That being the case, the respondent argues that the determination of the appropriate standard of review to be applied by the IAD when sitting on appeal of an ID decision pursuant to section 63(5) of the *IRPA* must be assessed through a pragmatic and functional analysis. This would translate into a patent unreasonableness standard on questions of fact, since ID members possess specialized expertise within their field and have the sole opportunity to assess an applicant's credibility through hearing *viva voce* evidence.

[17] After having carefully reviewed the relevant provisions of the *IRPA*, I find this argument without merit and contrary to the clear language used by Parliament in defining the IAD's jurisdiction on appeal. Section 63 deals exhaustively with the right to appeal, and sets out five grounds of appeal, one of which being that the Minister may appeal a decision of the ID in an admissibility hearing. After considering the appeal, the IAD is given three options by section 66,

one of which is to allow the appeal in accordance with section 67. It is worth quoting this section in full, as it is key to the resolution of this application for judicial review:

> **67.** (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
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> (*a*) the decision appealed is wrong in law or fact or mixed law and fact;
>
> (*b*) a principle of natural justice has not been observed; or
>
> (*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.
>
> (2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.
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> **67.** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
>
> *a*) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
>
> *b*) il y a eu manquement à un principe de justice naturelle;
>
> *c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
>
> (2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

[18] Nowhere in this section is there any distinction to be found, in terms of the nature of the appeal, between an appeal made by the Minister pursuant to section 63(5) and other appeals authorized under paragraphs 63(1) to (4). It is true that humanitarian and compassionate considerations cannot be taken into account by the IAD in the case of an appeal by the Minister, but Parliament has not seen fit to correspondingly limit the *de novo* jurisdiction of the IAD as a consequence of its restricted ability to consider fresh evidence. Not only are the opening words of paragraph 67(1) explicitly applicable to all three subparagraphs, but paragraph 67(2) confirms the *de novo* jurisdiction of the IAD, irrespective of the reasons for which the appeal is allowed, by stating that it can substitute its own decision for that which should have been made. Where Parliament has explicitly spelled out in the legislation the grounds for appeal to be applied by the IAD and the remedy it may grant if it allows the appeal, a pragmatic and functional analysis to determine the standard of review is unnecessary.

[19] I am therefore in full agreement with the reasoning of the IAD on that issue, and I wholeheartedly concur with the following two paragraphs of its reasons:

> [14] Section 67 of the *Act* includes the phrase "at the time that the appeal is disposed of" which provides a clear indication of Parliament's intentions. There was no such language under the former legislation and the Appeal Division relied on the jurisprudence, most notably *Kahlon* [*Kahlon v. Canada (Minister of Employment and Immigration)* (1989), 97 N.R. 349 (FCA); [1989] F.C.J. No. 104 (QL) [*Kahlon*]]. In the new legislation Parliament has specifically clarified the scope of the Appeal Division's jurisdiction in the language of section 67 of the *Act*. There is no ambiguity in the language. A plain reading of the relevant legislation requires the Appeal Division, pursuant to subsection 67(1) of the *Act*, to consider appeals on a *de novo* basis.

> [15] Moreover, Parliament has clearly indicated in which types of appeals the Appeal Division cannot consider humanitarian and compassionate considerations, i.e., section 65 and paragraph 67(1)(c) of the *Act*. Parliament clearly turned its mind to the specific circumstances of appeals by the Minister pursuant to subsection 63(5) of the *Act* by including the phrase "other than in the case of an appeal by the Minister" by which it prevented the Appeal Division the scope to consider humanitarian and compassionate considerations in Minister's appeals. These limitations are the prerogative of Parliament and though they may appear unfair to the respondent, they do not in any way detract from the *de novo* jurisdiction granted to the Appeal Division.

[20] I need only add to this that the *Kahlon* decision has been followed repeatedly by this Court after the adoption of the *IRPA*, and it is often noted in these cases that the *de novo* jurisdiction issue is accepted and not a point of contention between the parties: see, for example, *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1673, at para. 8; *Ni v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 241, at para. 9; *Canada (Minister of Citizenship and Immigration) v. Savard*, 2006 FC 109, at para. 16; *Canada (Minister of Citizenship and Immigration) v. Venegas*, 2006 FC 929, at para. 18; *Froment v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1002, at para. 19.

[21] I would also note that in the circumstances of this case, Mr. Mendoza has chosen not to introduce any additional evidence and instead relied on the Record and provided additional submissions. This was his choice. The Minister, on the other hand, was directed by the IAD not to introduce new evidence from the immigration officers regarding the interview with Mr. Mendoza but was allowed to file additional evidence and submissions on the Mara Salvatrucha. Mr. Mendoza

was not prejudiced in any way in having the appeal heard *de novo* and the IAD had authority under the *IRPA* to do so.

C) The membership of Mr. Mendoza in a criminal organization

[22] Subsection 37(1) of the *IRPA* renders a permanent resident or foreign national inadmissible on the grounds of organized criminality. Paragraph 37(1)(a) provides:

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 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; or	*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 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;
(*b*) engaging, in the context of transnational crime, in activities such as people	*b*) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des

smuggling, trafficking in persons or money laundering.	produits de la criminalité.

[23] The meaning of the term “criminal organization” is also mirrored in subsection 121(2) of the *IRPA*:

121. (2) For the purposes of paragraph (1)(*b*), "criminal organization" means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is 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 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.	**121.** (2) On entend par organisation criminelle l’organisation dont il y a des motifs raisonnables de croire qu’elle se livre ou s’est livrée à des activités faisant partie 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.

[24] The inadmissibility provisions contained in sections 34 through 37 of the *IRPA* are subject to the rules of interpretation in section 33. That section mandates that the facts giving rise to inadmissibility pursuant to sections 34 through 37 include past, present and future facts:

[25] The burden of proof for a finding of reasonable grounds is lower than the civil standard. It has been defined as one that, while falling short of a balance of probabilities, nonetheless connotes a *bona fide* belief in a serious possibility based on credible evidence: *Chiau*. That being said, the function of the Federal Court on judicial review is not to come to its own assessment of the

evidence, but to determine whether it was patently unreasonable for the IAD to rule as it did. As Justice Evans wrote in *Thanaratnam*:

> [33] It is important to reiterate that the Court is not sitting in the same place as the Board. Our function is not to decide whether, on the evidence before the Board, there were "reasonable grounds to believe", but only whether it was obviously irrational for the Board to conclude that there were. In the absence of an allegation that the Board erred in law, or that its procedure was unfair, it is difficult to establish that the Board's conclusion that “reasonable grounds to believe” existed was patently unreasonable.

[26] There is no issue in this case as to the criminal nature of the Mara Salvatrucha organization. It has been admitted by the respondent, and there is ample evidence to support that conclusion. The only issue, therefore, is whether the IAD erred in finding that the respondent was a member of that organization and engaged in criminal activity.

[27] Counsel for the respondent argued that mere membership is insufficient, except where the organization’s criminal nature is notorious. But there is no authority in support of that proposition, which is at odds with the language of section 37(1)(a) of the *IRPA*. The wording of that provision clearly refers both to membership in a gang or having been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert. A person can therefore be found inadmissible either on the basis of his membership in a criminal organization or on the basis of his involvement in organization-related activities. As stated by the Federal Court of Appeal in *Thanaratnam* (at para. 30), membership in a gang and participation in gang-related activities are “discrete, but overlapping grounds” on which a person may be inadmissible under paragraph 37(1)(a) of the *IRPA*. Moreover, the fact that Mr. Mendoza has ceased

to be a member of the Mara Salvatrucha does not exempt him from the application of section 37(1)(a) of the *IRPA*, which applies to former members of criminal organizations: *Sittampalam* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, at paras. 18-29).

[28] The IAD had ample evidence before it, from Mr. Mendoza himself, of his admitted membership and participation in the Mara Salvatrucha. His membership in that organization is the basis of his refugee claim. He attested in his Personal Information Form that he was a member of that organization from the time he was released from prison until the birth of his first child. The tattoos on his body reflect his involvement. Mr. Mendoza was interviewed by three Enforcement Officers from the Canada Border Services Agency in which he admitted membership and participation in gang activities. I pause here to say that, after having carefully read the transcript of these interviews, I am unable to find that Mr. Mendoza was intimidated and coerced into making false statements. The IAD relied on all this evidence to determine that there were reasonable grounds to believe Mr. Mendoza was a member of the Mara Salvatrucha, and that his subsequent denial of his participation with that organization in his testimony before the ID member was not plausible. Bearing in mind the case law to the effect that "membership" is a concept that should be broadly understood and includes mere "belonging to" a criminal organization (*Chiau*, at para. 57), I am unable to conclude that the IAD's finding is patently unreasonable.

[29] At paragraph 41 of its reasons, the IAD concluded:

> [41] The ID hearing was conducted after the respondent acquired legal counsel and the respondent was made aware that his membership with the Mara Salvatrucha could be grounds for inadmissibility to Canada. While the panel accepts that the

> respondent has likely suffered many injustices over the years and some of his participation with the Mara Salvatrucha may have been under coercion, the panel finds it is not plausible that the respondent would be able to provide such details of the Mara Salvatrucha and his involvement with the organization at earlier interviews with immigration officials even though he was allegedly intimidated but was unable to provide such details of either his involvement with or the activities of the Mara Salvatrucha at the ID hearing. Therefore, the panel prefers to place more weight on the respondent's statements to the immigration officers as credible and trustworthy evidence than his testimony at the ID hearing.

[30] In light of the *de novo* jurisdiction of the IAD and of the limited jurisdiction of this Court when reviewing questions of fact and credibility, this conclusion does not warrant my intervention. Even if Mr. Mendoza did not himself participate in any serious violent crimes, he had knowledge of the criminal activities of the group. The record shows he was aware that people who did not pay taxes on the buses might be subject to harm, that members were using homemade weapons, that gang rival fights resulted in injuries or deaths, that violence was used against persons who were pretending to be gang members, that other members would try to kill him if he ceased his own membership, and that the group used to beat members who did not attend meetings. To that extent, this case is on all four with a recent decision of my colleague Justice Tremblay-Lamer where she held that similar knowledge of criminal activities was held sufficient to establish membership in the same organization: *Amaya v. Canada (Minister of Public Safety and Emergency)*, 2007 FC 549.

[31] At the end of the hearing, I allowed the parties to make submissions with respect to proposed questions for certification. Counsel for the applicant submitted the following question:

> In an appeal of an Immigration Division Decision by the Minister under Section 63(5) of *IRPA* is the Immigration Appeal Division standard of review determined by the pragmatic and functional test

> laid down in *Pushpanathan* or does the wording of Section 67 of the *IRPA* create a correctness standard for the Immigration Appeal Division in the context of its power to conduct a *de novo* review?

[32] This proposed question has been opposed by counsel for the Minister essentially because, in her view, the grounds for allowing an appeal are clearly set out in section 67 of the *IRPA*. I agree with the applicant that the question proposed by the respondent does not raise a serious issue. Even if there is no previous case which directly rules on the correct standard of review to be employed by the IAD in an appeal under section 63(5) of the *IRPA*, I believe (for the reasons already given) that there is simply no basis for the respondent's argument. Accordingly, there will be no certified question.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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