Federal Court  Cour fédérale

Date: 20111222

Docket: IMM-4226-11

Citation: 2011 FC 1510

Ottawa, Ontario, December 22, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

RU WANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ru Wang's Canadian wife's application to sponsor him was put on hold pending the determination of whether there were reasonable grounds to believe that he was inadmissible to Canada under paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*]. The Immigration Appeal Division found that Mr. Wang was inadmissible as he had 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.

[2] Mr. Wang now seeks judicial review of the Board's decision, asserting that the Board erred in its equivalency analysis. For the reasons that follow, I have concluded that the Board did not err as alleged. As a consequence, the application for judicial review will be dismissed.

Background

[3] Mr. Wang is a citizen of China, although he lived for some time in the United States. He married a Canadian citizen on December 19, 2006, and the couple has one American-born son.

[4] On August 30, 2000, Mr. Wang was arrested in New York City and was charged with gang assault in the first degree and assault in the first degree. He subsequently pled guilty to assault in the second degree pursuant to Article 120.5 of the *New York Penal Code* [*NYPC*]. He was sentenced by the Supreme Court of New York to 10 months imprisonment. This sentence was subsequently reduced to eight months.

[5] Mr. Wang came to Canada on August 26, 2009, and filed a claim for refugee protection. He has since withdrawn his refugee claim and applied for permanent residence as a member of the family class.

[6] On May 14, 2010, a report was issued under subsection 44(1) of *IRPA* alleging that Mr. Wang was inadmissible under paragraph 36(1)(b) of *IRPA* for having committed an offence in the United States that, if committed in Canada, would be equivalent to an offence under subsection 267(b) of the *Criminal Code of Canada*, R.S.C., 1985, c. C-46 [Criminal Code], namely assault causing bodily harm.

[7] The question of Mr. Wang's admissibility was initially referred to the Immigration Division for determination. In a decision dated September 15, 2010, the Immigration Division declared that Mr. Wang was not a person described in paragraph 36(1)(b) of *IRPA*. The Immigration Division determined that article 120.5(1) of the *NYPC* was not equivalent to section 267 of the *Criminal Code*, and that section 265 of the Code was the equivalent Canadian offence. Section 265 creates the offence of simple assault.

[8] On appeal, the Immigration Appeal Division found Mr. Wang to be inadmissible to Canada pursuant to paragraph 36(1)(b) of *IRPA*. Applying, amongst other things, the test for aiding and abetting set out in section 21 of the *Criminal Code*, the Board found that a conviction under article 120.5(1) of the *NYPC* was equivalent to offences described under sections 267, 268 and 269 of the *Criminal Code of Canada*.

Standard of Review

[9] Although Mr. Wang raised an issue of procedural fairness in his memorandum of fact and law, that issue was not pursued at the hearing. Consequently, the only matter in issue is the Board's equivalency finding.

[10] Findings of equivalency are factual determinations which attract deference and are to be reviewed on the reasonableness standard: *Abid v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 164, 384 F.T.R. 74 at para. 11.

[11] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible acceptable outcomes which are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47, and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59.

Statutory Framework

[12] Mr. Wang was found to be inadmissible to Canada under paragraph 36(1)(b) of *IRPA* which provides that:

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
[…]	[…]
(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;	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;

[13] In accordance with section 33 of *IRPA*, the facts underlying admissibility findings include facts “for which there are reasonable grounds to believe that they have occurred”.

[14] The Supreme Court of Canada described the “reasonable grounds to believe” evidentiary standard as requiring “something more than mere suspicion, but less than the standard applicable in

civil matters of proof on the balance of probabilities". Reasonable grounds will exist "where there is an objective basis for the belief which is based on compelling and credible information": *Mugesera v. Canada (Minister of Citizenship and Immigration),* 2005 SCC 40, [2005] 2 S.C.R. 100 at para. 114.

Information Regarding the Offence

[15] The evidentiary record with respect to the events giving rise to Mr. Wang's conviction is sparse. We do not have a copy of the indictment, and thus do not know what acts he was charged with having committed. Nor do we have Mr. Wang's plea agreement, the judgment convicting him or the reasons for imposing sentence.

[16] According to a police report in the file, Mr. Wang and four of his friends were sitting on a bench when a stranger came by. The five individuals approached the victim from behind, punched him in the head and face and shot him in the left thigh. I do not understand there to be any claim by the Minister that Mr. Wang actually fired the shots. In considering police report it must be recognized that it only contains allegations, and does not necessarily reflect the facts that actually formed the basis of Mr. Wang's conviction.

[17] However, Mr. Wang's own rehabilitation application states that while walking around in a park with his friends, one of Mr. Wang's friends got into an argument with a stranger. When the argument became worse, Mr. Wang says that his friend "forced him" to go and get a gun at the friend's home. Mr. Wang says that he "reluctantly" followed his friend's order, and brought the gun back to him. The friend then "lost control" and fired twice, hitting the victim and Mr. Wang himself.

It is noteworthy that in discussing the events giving rise to his criminal conviction, Mr. Wang makes no mention of having struck the victim in the head, leading to the clear inference that it was his role in the shooting that formed the basis of the conviction.

Analysis

[18] Mr. Wang's first argument is that although it had been established that he had been convicted of assault in the second degree contrary to Article 120.5 of the *NYPC*, it was not established under which of the nine subsections of Article 120.5 he had been convicted.

[19] The Board's finding that Mr. Wang had been convicted of an offence under Article 120.5(1) of the *NYPC* was reasonable. The Certificate of Disposition Indictment issued by the Supreme Court of the State of New York makes it quite clear that Mr. Wang's conviction of assault was entered under Article 120.5(1) of the *NYPC*. This subsection provides that a person is guilty of assault when the person "with intent to cause serious physical injury to another person … causes injury to such person or to a third person".

[20] The parties agree that in *Hill v. Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 1, 73 N.R. 315 [*Hill*], the Federal Court of Appeal determined that equivalency can be determined in one of three ways.

[21] The first is "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".

[22] The second way that equivalency can be established is “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”. Finally, equivalency can be established by a combination of the first two tests: all quotes from *Hill*, above at para. 16.

[23] In this case, the Board appears to have applied a combination of the first two *Hill* tests, concluding that both the New York and the Canadian statutes require intent or knowledge, that the accused be a party to the offence, and that injury be caused to the victim.

[24] The Board weighed the evidence before it and was satisfied that the Minister had established reasonable grounds to believe that Mr. Wang had committed acts amounting to aiding and abetting an assault causing bodily harm. In my view, this was a conclusion that was reasonably open to the Board on the record before it and does not fall outside the range of reasonable defensible outcomes on the facts and the law.

[25] Based upon Mr. Wang’s own admissions, the Board found that while involved in a five-on-one altercation, Mr. Wang had retrieved a firearm at the behest of a co-participant, who then used the gun to shoot the victim causing injury. The Board considered Mr. Wang’s role in the offence, and whether he could have been deemed to be a party to the offence under Canadian law.

[26] After examining the evidence, including Mr. Wang's admissions as to his role in the shooting incident, the Board concluded that there were reasonable grounds to believe that Mr. Wang had the requisite knowledge of the shooter's intent to bring him within the definition of an aider or abettor under section 21 of the *Criminal Code*. This was a reasonable conclusion. If Mr. Wang did not intend to assist in the commission of the offence, why did he go and get the gun?

[27] While Mr. Wang now claims that he was acting under duress, the *mens rea* or mental element required under section 21 of the *Criminal Code* to deem a person to be a party to an offence in which he or she was not directly involved is not negated by duress: see *R. v. Hibbert*, [1995] 2 S.C.R. 973, [1995] S.C.J. No. 63 (Q.L.), at para. 39.

[28] The Board concluded that, based upon Mr. Wang's own admissions, there were reasonable grounds to believe that he had pled guilty for his active involvement (bringing a gun to the principal actor) which he knew was to be used in the shooting of the victim. While the events surrounding Mr. Wang's plea are not entirely clear, I am satisfied that there was sufficient evidence before the Board to support its findings, having regard to the "reasonable grounds to believe" standard applicable to factual matters under section 36 of *IRPA*.

[29] Finally, the Board's conclusion that Article 120.5(1) of the *NYPC* was equivalent to assault causing bodily harm under section 267 of the *Criminal Code* was also reasonable, having regard to the essential elements of each offence.

[30] Both offences require the commission of an assault, as well as a mental element or intention. As previously discussed, the Board reasonably concluded that Mr. Wang's conviction for assault in New York, and his admitted involvement in the shooting, were sufficient to make him party to the offence under Canadian law, and to satisfy the requisite mental element of the offence.

[31] Both the Canadian and the American offences also require the infliction of a significant injury.

[32] The New York offence requires a "serious physical injury", which is defined in Article 10 of the *NYPC* as "physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ".

[33] The Canadian offence requires "bodily harm", which is defined at section 2 of the *Criminal Code* as "any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature".

[34] The law does not require that offences be identical in every respect. As the Federal Court of Appeal observed in *Li v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1060 at para. 18, what is required is "essentially the similarity of definitions of offences". In my view, the definition of the degree of injury required in the two offences is sufficiently similar as to render the offences equivalent for the purposes of a section 36 analysis. If anything, the "serious physical injury" element of the *NYPC* offence is more onerous that the "bodily harm" of the Canadian

offence. That is, harm that qualifies as the “serious physical injury” for the purposes of the *NYPC* offence would necessarily qualify as “bodily harm” for the purposes of section 267 of the *Criminal Code*.

Conclusion

[35] For these reasons, the application for judicial review is dismissed.

Certification

[36] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. No serious question of general importance is certified.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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