Federal Court  Cour fédérale

Date: 20130611

Docket: IMM-5431-12

Citation: 2013 FC 629

Ottawa, Ontario, June 11, 2013

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

KONSTANTIN ULYBIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] Mr. Ulybin, the Applicant, is a citizen of Russia who is presently a permanent resident of Spain. He wishes to come to Canada as a permanent resident as an Investor under the Business Category. In a decision dated May 21, 2012, an Immigration Officer (the Officer), at the Embassy of Canada in Paris, France, refused his application on the basis that he was criminally inadmissible to Canada pursuant to s. 36(1)(b) of the *Immigration and Refugee Protection Act*,

(*IRPA*). The factual underpinning of the decision was the Applicant's conviction in Spain of offences related to a construction incident which had resulted in the death of a worker. The Officer concluded that, if committed in Canada, these offences would be punishable under s. 217.1, 219 and 220 of the *Canadian Criminal Code*, RSC 1985, c C-46 [*Criminal Code*] by a maximum term of imprisonment of at least ten years.

[2] The Applicant seeks to overturn the Officer's decision.

II. Issues

[3] The issues raised by this application are as follows:

1. Did the Officer violate the duty of procedural fairness by failing to disclose an internal legal opinion to the Applicant and to provide him with an opportunity to respond?

2. Did the Officer err in his conclusion that the offences for which the Applicant was found guilty and sentenced to prison were equivalent to s. 217.1, 219 and 220 of the *Criminal Code*?

[4] For the reasons that follow, I have concluded that the Officer did not err as alleged and that the decision should stand.

III. Background

[5] Since the issue of equivalency is so fact-driven, I am including a rather lengthy summary of the background to the Applicant's offence in Spain.

[6] The Applicant served as a director of companies in Russia and in Spain. In 2009, the Applicant was convicted in Spain of gross negligence manslaughter and of an offence related to the rights of workers because of his responsibility for a workplace accident that occurred in 2005. The facts as found by the Criminal Court No. 6 of Málaga are the following:

- The Applicant was the sole director of Boat Care SL (Boat Care), which owned Las Palomas Hotel.

- In January 2005, during the renovation of Las Palomas Hotel, the Applicant ordered part of the construction to begin without the appropriate construction permits. The Applicant signed a contract with Eugueni Chebotura, the sole director of Tombela Costa SL (Tombela Costa), to carry out brick laying work, and also engaged other companies to do other work.

- The Applicant and Mr. Chebotura started the work, even though they were both aware of the following workplace safety problems:

    - Boat Care had not drafted the compulsory safety plan;

- No one was appointed to take responsibility of the management and coordination of safety issues; and

- In the absence of a health and safety plan, workers received no training about risks and precautions in the workplace.

- On April 28, 2005, Mr. Chebotura verbally employed Grygoriy Uzun as a labourer. Mr. Chebotura did not provide Mr. Uzun with adequate training for his position, the operation of a service lift.

- Mr. Uzun started work that morning under the supervision of Site Manager, Jesús Fajardo Ruiz. Mr. Ruiz was aware that Mr. Uzun had no experience or training in the operation of the service lift.

- On his first day at work, Mr. Uzun fell to his death while operating the service lift because the service lift was not properly secured.

[7] The Applicant, Mr. Chebotura and Mr. Ruiz were convicted of offences related to this workplace accident. The Applicant was convicted of an offence relating to the rights of employees under s. 316 of the *Spanish Penal Code*. For this offence, the Applicant received a sentence of six months imprisonment and a six month fine at a daily rate of three euros per day. The Applicant was also convicted of gross negligence manslaughter under s. 142.1 of the

Spanish Penal Code, for which he received a sentence of one year of imprisonment. Both imprisonment sentences were suspended.

IV. Decision and Reasons under Review

[8] The reasons for the Officer's decision are set out in the letter dated May 21, 2012. The Officer's reasons also include his Computer-Assisted Immigration Processing System (CAIPS) notes.

[9] The Officer conducted an equivalency analysis, concluding that the essential ingredients of the offence of criminal negligence causing death were established by the facts found by the Spanish court. In the Officer's view, if the Applicant committed the relevant acts in Canada, he could be convicted of criminal negligence causing death, with reference to s. 217.1, 219 and 220 of the *Criminal Code*. This offence carries a maximum penalty of life imprisonment.

[10] Section 217.1 states that an individual who undertakes, or has the authority, to direct how another person does work or performs a task has a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

[11] The Officer made the following findings:

- The Applicant directed the task to be completed by Mr. Uzun, the employee who died, and s. 217.1 is applicable. Although the Applicant did not directly supervise

Mr. Uzun, the Officer did not believe that this was a requirement of s. 217.1. In his capacity as director of Boat Care, the Applicant had the authority to decide whether the work could commence before the safety plan was in place.

- Failure to perform the duty outlined in s. 217.1 may support a conviction of criminal negligence under s. 219(1), where an accused shows wanton or reckless disregard for the lives or safety of persons. The omission must be a marked and substantial departure from the conduct of a reasonably prudent person in the circumstances, where an accused either recognized a serious risk to the employee's life or gave no thought to it and proceeded anyway (citing *R v JF*, 2008 SCC 60, [2008] 3 SCR 215 [*JF*]).

- Facts proven during the Spanish trial demonstrated such disregard for Mr. Uzun's safety. The Applicant and Mr. Chebotura started the work, knowing that Boat Care had not drafted a compulsory safety plan, nobody was appointed to coordinate safety issues and workers did not receive any training about risks or precautions. Further, on April 28, 2005, Mr. Chebotura employed Mr. Uzun as a labourer, failing to provide him with adequate training about the operation of a service lift. The Site Manager assigned Mr. Uzun to this task, knowing that he did not have any relevant experience or training.

[12] Since the Applicant was inadmissible to Canada under s. 36(1)(b) of *IRPA*, his application for permanent residence was refused under s. 11(1).

V. Statutory Framework

[13] The Officer concluded that the Applicant was inadmissible to Canada on the basis of criminality under s. 36(1)(b) of *IRPA*:

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;

[14] The Applicant was convicted under two provisions of the *Spanish Penal Code*. The first is an offence against employees' rights under s. 316:

> Those who contravene the Health and Safety rules, being obliged under the laws in force to abide by them, and who do not provide adequate means for the employees to work using adequate health and safety measures, in such a way that their lives, health and personal safety are put at risk, will be punished with imprisonment sentences ranging from six months to three years and fines going from six to twelve months.

[15] The more serious offence was gross negligence manslaughter under s. 142.1 of the Code:

> Those who by serious negligence cause the death to another, shall be punished as involuntary manslaughter by imprisonment of 1 to 4 years.

[16] The Officer concluded that the factual findings of the Spanish Court satisfied the essential elements of criminal negligence causing death in Canada. The relevant provision of the *Criminal Code* is s. 220 which, in turn, is informed by s. 219:

220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable	220. Quiconque, par négligence criminelle, cause la mort d'une autre personne est coupable d'un acte criminel passible :
(a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and	a) s'il y a usage d'une arme à feu lors de la perpétration de l'infraction, de l'emprisonnement à perpétuité, la peine minimale étant de quatre ans;
(b) in any other case, to imprisonment for life.	b) dans les autres cas, de l'emprisonnement à perpétuité.
219. (1) Every one is criminally negligent who	219. (1) Est coupable de négligence criminelle quiconque :
(a) in doing anything, or	a) soit en faisant quelque chose;
(b) in omitting to do anything that it is his duty to do,	b) soit en omettant de faire quelque chose qu'il est de son devoir d'accomplir,
shows wanton or reckless disregard for the lives or safety of other persons.	montre une insouciance déréglée ou téméraire à l'égard de la vie ou de la sécurité d'autrui.
(2) For the purposes of this section, "duty" means a duty imposed by law.	(2) Pour l'application du présent article, « devoir » désigne une obligation imposée par la loi.

[17] Section 219 refers to the omission to perform a legal duty. The Officer found that the Applicant failed to satisfy the duty of those who direct work under s. 217.1:

217.1 Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.	217.1 Il incombe à quiconque dirige l'accomplissement d'un travail ou l'exécution d'une tâche ou est habilité à le faire de prendre les mesures voulues pour éviter qu'il n'en résulte de blessure corporelle pour autrui

VI. Standard of Review

[18] The parties are agreed that the standard of review with respect to the alleged breach of procedural fairness is correctness. They disagree on the standard of review with respect to the Officer's decision itself; the Applicant argues that a standard of review of correctness should be applied and the Respondent submits that a standard of reasonableness is appropriate.

[19] In my view, the standard of review for findings of equivalency such as this is reasonableness (*Abid v Canada (Minister of Citizenship and Immigration)*, 2011 FC 164 at para 11, 384 FTR 74; *Sayer v Canada (Minister of Citizenship and Immigration)*, 2011 FC 144 at para 4, [2011] FCJ No 352; *Edmond v Canada (Minister of Citizenship and Immigration)*, 2012 FC 674 at para 7, [2012] FCJ No 688). The nature of foreign law and the determination of the circumstances underlying the foreign conviction are questions of fact. Comparison of Canadian law to foreign law and the offence committed by the Applicant engages questions of mixed fact and law.

[20] As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*], "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process". A court must also consider "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above at para 47).

[21] How does the reasonableness standard apply to the analysis in issue? It is important that the Officer carrying out the equivalency analysis understand the elements of the comparable offence. A failure to address one of the elements would make the analysis unreasonable. However, the Officer's application of the facts to the *Criminal Code* elements is a matter for which the Officer is owed deference by the Court. This exercise may lead to more than one reasonable outcome, particularly when taking into account the highly factual determination of equivalency.

VII. Issue #1: Breach of Procedural Fairness

[22] When making his application, the Applicant, assisted by counsel, provided extensive submissions with respect to his criminal conviction in Spain. When considering the application, the Officer sought assistance and advice from a legal officer at National Headquarters in Ottawa (the NHQ opinion). The Officer did not provide a copy of the NHQ opinion to the Applicant before he rendered his decision. The Applicant argues that this was a breach of procedural fairness.

[23] Failure to provide disclosure of a key document upon which the decision-maker intends to rely may constitute a breach of procedural fairness under certain circumstances (*Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para 22, [2001] 3 FC 3). The question, however, is not whether the actual document was disclosed to the Applicant but whether the Applicant had the opportunity to meaningfully participate in the decision-making process (see *Mekonen v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1133 at para 27, 66 Imm LR (3d) 222).

[24] In my view, the submissions provided by the Applicant in the context of this case demonstrate that meaningful participation occurred without the disclosure of the NHQ opinion. Therefore, there is no breach of procedural fairness.

[25] As noted, the Applicant provided extensive submissions addressing the particular issue of inadmissibility under s. 36(1)(b). In his application documentation, the Applicant reviewed the circumstances of the workplace accident and the Spanish court proceedings, enclosing the court records and information from the Applicant's Spanish lawyer. Most importantly, these submissions directly addressed equivalency of the Applicant's convictions under s. 316 and s. 142.1 of the *Spanish Penal Code* to an offence under s. 217.1, 219 and 220 of the *Criminal Code*.

[26] Although the NHQ opinion may have played a significant role in the Officer's decision, the Officer did not breach procedural fairness by failing to disclose it. The duty of fairness is at the low end of the spectrum in the context of visa applications (*Khan v Canada (Minister of*

Citizenship and Immigration), 2001 FCA 345 at paras 30-32, [2002] 2 FC 413). Further, the NHQ opinion was based on documentary evidence and legal submissions that the Applicant provided. Although fairness may require disclosure where the Officer draws certain conclusions based on extrinsic information, the Officer's duty does not extend to providing a "running score" based on information submitted by the Applicant (*Ronner v Canada (Minister of Citizenship and Immigration*), 2009 FC 817 at paras 43-45, [2009] FCJ No 923).

[27] Certainly, if the Applicant had not addressed the issue of his criminal conviction in his application documents and it was raised, for the first time, by the Officer, the Officer would have a duty to advise the Applicant of the issue (*Bhagwandass*, above). Even in that event, I do not see any absolute requirement for the Officer to provide a copy of the NHQ opinion. The duty can be fulfilled by providing the information in the opinion that is necessary for the Applicant to know and meaningfully respond to the case against him (*Nadarasa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1112 at paras 25-28, [2009] FCJ No 1350). In the circumstances of the Applicant's case, there was no need to go that far since, as amply demonstrated by the detailed submissions of the Applicant, he was aware of the relevant allegations and had already provided submissions relating to them. This demonstrates that the Applicant could and did participate meaningfully in the decision-making process.

[28] In sum, there was no breach of procedural fairness.

VIII. Issue #2: Equivalency Analysis

[29] A foreign national is inadmissible to Canada under s. 36(1)(b) where he or she was convicted of an offence outside Canada that, if committed in Canada, would constitute an offence punishable by a maximum of at least ten years imprisonment.

[30] To establish inadmissibility under s. 36(1)(b), the standard of proof is "reasonable grounds to believe", as noted in s. 33 of *IRPA* (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 at paras 114-115, [2005] 2 SCR 100). This standard requires more than "mere suspicion" but less than proof on the civil standard of a balance of probabilities. Parliament has determined that a criminal standard of proof of "beyond a reasonable doubt" is not required.

[31] As acknowledged by the parties, the seminal case on equivalency is *Hill v Canada (Minister of Employment and Immigration)* (1987), 73 NR 315 at para 15, 1 Imm LR (2d) 1 (FCA) [*Hill*]. In *Hill*, above at para 15, the Federal Court of Appeal described three methods for determining equivalency. In this case, the Officer applied the second of those methods:

> 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.

[32] The Officer considered the three provisions of the *Criminal Code* as a whole in determining the essential elements of the offence. The Officer's analysis relies on the assumption

that the requirements of s. 217.1 and 219, and the sentence imposed by s. 220, are all relevant. The provisions are never considered in the alternative. Further, the Officer cites the text of s. 217.1, which refers to a duty, and s. 219, which refers to the omission of something that it is one's duty to do. Reading the provisions together demonstrates how they are interconnected. It was not necessary for the Officer to explicitly recognize this fact.

[33] The key to the decision – and to the Applicant's arguments – is the "duty" established by s. 217.1. To give rise to the duty in that provision, the accused must undertake, or have the authority, to direct how another person does work or performs a task. To determine equivalency, the Officer had to evaluate whether the Applicant, as the Director of Boat Care, the entity that hired Tombela Costa which, in turn employed the person killed, had the authority to direct how the accident victim did his work.

[34] In his reasons, the Officer clearly turned his mind to this element of the offence. The Officer found that the Applicant's ability to direct that the work to begin without the required safety precautions was sufficient to place the Applicant within the ambit of s. 217.1. This decision led to the failure to appropriately train the worker in question and to his death on his first day at work.

[35] The Applicant submits that he was never in a position to direct how the work was done. Rather, asserts the Applicant, only the subcontractor was in a position to dictate how the victim did the work.

[36] The Applicant has not demonstrated a reviewable error in this regard.

[37] The Applicant takes an overly narrow view of the words "has the authority, to direct how another person does work or performs a task". How work is performed reasonably includes such matters as whether the work is performed safely and in accordance with required permits. At that level, the Applicant certainly had the authority to ensure that the subcontractor, and hence the employee, only commenced work on the project with the necessary safety measures in place. As found by the Spanish Court, the Applicant was aware that the necessary safety plan was not in place.

[38] The case law cited by the Applicant does not narrow the scope of s. 217.1. The accused persons in *R v Gagné*, 2010 QCCQ 12364, [2010] QJ No 30893 [*Gagné*] were acquitted since the prosecution did not prove beyond a reasonable doubt that a reasonable person would have been aware of the risk in question, as required by s. 219. This case does not discuss the requirements of s. 217.1 and is irrelevant to that inquiry. Further, the short discussion of s. 217.1 in *R v Scrocca*, 2010 QCCQ 8218, [2010] QJ No 9605 [*Scrocca*] is consistent with the Officer's interpretation of this section:

> 106 This provision results from an amendment made to the *Criminal Code* by the *Act to amend the Criminal Code (criminal liability of organizations)*.The objective of this legislation is to ensure the safety of employees within the workplace and to change the rules governing corporate liability. More specifically, it is a response to the 1992 deaths of numerous miners as a result of a mine explosion in Nova Scotia.
>
> 107 Section 217.1 creates no offence but confirms the duty imposed on every one who is responsible for any work to take the necessary steps to ensure the safety of others. It facilitates proof of charges of criminal negligence against corporations and

> organizations, although the meaning of "every one" extends the scope of this provision to any person.
>
> [Emphasis added, footnotes omitted.]

[39] These paragraphs of *Scrocca* recognize the important rationale for the general language used in s. 217.1. Section 217.1 was meant to attribute responsibility to corporations and organizations, and not just individuals who directly supervise the worker in question. As well, arrangements to contract work to other companies are commonplace; it may defeat the objective of this legislation to restrict it to traditional employer-employee relationships in situations where one company is directing the work of another. In my view, the Applicant has not cited any case law that establishes his restrictive interpretation of a provision meant to protect vulnerable employees.

[40] The references to Mr. Uzun as an "employee" are of no moment. The CAIPS notes begin by acknowledging that Mr. Uzun was an employee of Tombela Costa, and not Boat Care. The word "employee" used in other places appears to serve merely as a label and is not relevant to the Officer's reasoning. What was significant for the Officer was the Applicant's ability to direct whether the work could commence before the appropriate safety precautions were taken. In my opinion, this reasoning is consistent with s. 217.1 and the case law cited by the parties.

[41] Although not entirely on point, *R c Transpavé*, 2008 QCCQ 1598, [2008] JQ No 1857 [*Transpavé*] and *R v Metron Construction Corporation*, 2012 ONCJ 506, 1 CCEL (4th) 266 [*Metron*] are consistent with the Officer's decision. The accused persons and companies in these cases pled guilty, and s. 217.1 was not directly at issue. However, the willingness of the courts to

impose penalties on a company as a whole or its directors in the context of workplace accidents may support a wider scope for s. 217.1 in view of the "overwhelming importance of ensuring the safety of workers whom they employ" (*Metron*, above at para 33).

[42] The Applicant also argues that the Officer failed to have regard to a defence of due diligence, a defence available to an accused under the *Criminal Code* but not under Spanish law. I do not agree.

[43] First, the Officer explicitly recognized the standard of care inherent in s. 219, when he stated in the CAIPS notes:

> As established in R v. J.F., [2008] 3 S.C.R. 215, criminal negligence requires proof that the omission to do something that it is the person's duty to do is a marked and substantial departure from the conduct of a reasonably prudent person in circumstances where the accused either recognized and ran an obvious and serious risk to the employee's life or, alternatively, gave no thought to it.

[44] The Officer considered the requirement to take reasonable steps in his analysis of the relevant case law. Contrary to the Applicant's submission, this element of the law of criminal negligence was not ignored.

[45] Second, the mitigating factors cited by the Applicant are not significant facts which necessarily contradict the Officer's finding of inadmissibility. The Officer correctly acknowledged that the significant question with respect to criminal negligence is what a reasonably prudent person would have done under the circumstances. The Applicant's personal intentions and actions are not necessarily relevant, much less determinative, of this analysis (see,

for example, *Lu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1476 at paras 20-22, 404 FTR 1). Despite these "mitigating factors", it was open to the Officer to conclude that the Applicant ran an unreasonable risk through his failure to ensure a health and safety plan was in place, to appoint a person to manage safety issues and to provide training for workers in health and safety matters.

[46] In sum, the Applicant has not established that the Officer erred in finding that his conduct satisfied the essential ingredients of an equivalent *Criminal Code* offence.

IX. Conclusion

[47] I conclude that the Officer did not breach of rules of procedural fairness and that his decision that the Applicant was inadmissible was reasonable.

[48] Neither party proposes a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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