Federal Court of Appeal  Cour d'appel fédérale

Date: 20150127

Docket: A-208-14

Citation: 2015 FCA 21

CORAM: **NOËL C.J.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

TONG SANG LAI

Appellant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard at Vancouver, British Columbia, on January 27, 2015.
Judgment delivered from the Bench at Vancouver, British Columbia, on January 27, 2015.

REASONS FOR JUDGMENT OF THE COURT BY: DAWSON J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Vancouver, British Columbia, on January 27, 2015).

DAWSON J.A.

[1] A member of the Immigration Division of the Immigration and Refugee Board of Canada found the appellant to be inadmissible to Canada pursuant to paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). In the member's view, there were reasonable grounds to believe:

a) the appellant was a member of the Shui Fong triad in Macau; and

b) it was believed on reasonable grounds that the Shui Fong triad 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 outside Canada that, if committed in Canada, would constitute an offence punishable under an Act of Parliament by way of indictment.

[2] For reasons cited as 2014 FC 258, a judge of the Federal Court dismissed an application for judicial review of that decision. The Judge certified the following question:

> In section 37(1)(*a*) of the *Immigration and Refugee Protection Act*, does the phrase "in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence" require evidence of the elements of a specific foreign offence and an equivalency analysis and finding of dual criminality between the foreign offence and an offence punishable under an Act of Parliament by way of indictment.

[3] In our view, the determinative issue on this appeal is whether the Judge properly exercised his discretion to certify the question. By direction dated January 8, 2015, the Chief Justice directed that counsel for the parties be ready to address the propriety of the certified question at the outset of the hearing of this appeal.

[4] It is well-settled law that a question should be certified only if it is a serious question of general importance which would be dispositive of an appeal. A certified question must have been raised and dealt with in the Federal Court; a certified question is not to be a reference of a question to this Court (*Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 318 N.R. 365; and *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129).

[5] In *Brannson v. Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 141, 34 N.R. 411 (F.C.A.D.), this Court considered how an adjudicator should go about equating an offence committed abroad with an offence under the laws of Canada when considering inadmissibility on grounds of criminality.

[6] Justice Urie began his analysis by noting that an adjudicator must be satisfied on the evidence that the constituent elements of a foreign offence would constitute an indictable offence in Canada (as more specifically described in the then applicable legislation). Justice Urie went on to note that some offences by their very nature would require only limited proof of this.

[7] To similar effect, in *Hill v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 47, 1 Imm. L.R. (2d) (F.C.A.D.), Justice Urie observed that in *Brannson* the Court "did not limit the determination of so-called 'equivalency' of the paragraph of the Code, there in issue, to the essential ingredients of any offence specifically spelled out in the statute being compared therewith."

[8] In the present case, the Judge concluded that there was a requirement that the Immigration Division "consider equivalency between the law of the foreign jurisdiction in which the alleged offence was committed, and the appropriate laws of Canada". That said, the Judge went on to note that "[h]owever, where the alleged offences are such that, regardless of the jurisdiction, most civilized countries would have laws condemning such an offence, it would be ludicrous to expect that expert evidence would have to be led in such a case" (reasons, at paragraph 20).

[9] With respect to the case before him, the Judge concluded that the record before the Immigration Division "shows abundant evidence that Triads in Macau were engaged in a number of activities that any civilized country would find to be illegal and indictable; including cold-blooded murder in public, extortion, assault, and more. A discrete analysis was unnecessary" (reasons, at paragraph 25). We agree, and find the Judge's conclusion to be consistent with the prior jurisprudence of this Court.

[10] In this circumstance, the question certified by the Judge was not dispositive of the appeal. An issue that need not be decided, in this case a discrete comparative analysis of the specific elements of foreign and domestic offences, can never be an issue that grounds a properly certified question.

[11] Subsection 74(*d*) of the Act provides that an appeal lies to this Court from the Federal Court only where a serious question of general importance has been stated. In consequence, where there is no serious question of general importance, the condition precedent to a right of appeal has not been met and the appeal should be dismissed on that ground (*Varela*, at paragraph 43).

[12] It follows that the appeal will be dismissed.

"Eleanor R. Dawson"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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