Federal Court of Appeal

Cour d'appel fédérale

Date: 20180801

Docket: A-466-16

Citation: 2018 FCA 145

[ENGLISH TRANSLATION]

CORAM: **PELLETIER J.A.**
GAUTHIER J.A.
DE MONTIGNY J.A.

BETWEEN:

WILFRID NGUESSO

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Montreal, Quebec, on February 13, 2018.

Judgment delivered at Ottawa, Ontario, on August 1, 2018.

REASONS FOR JUDGMENT BY: DE MONTIGNY J.A.

CONCURRED IN BY: PELLETIER J.A.
GAUTHIER J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] Wilfrid Nguesso (the appellant or Mr. Nguesso) is appealing from a decision rendered by the Honourable Justice Gagné (the judge) of the Federal Court (*Nguesso v. Canada (Citizenship and Immigration)*, 2016 FC 1295) on November 24, 2016. Following her analysis, the judge dismissed the application for judicial review of the decision of an immigration officer with the immigration service of the Canadian Embassy in Paris (the officer) dated February 18, 2016,

which concluded that the appellant was inadmissible to Canada because of his membership in a criminal organization, pursuant to paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

[2] The judge certified, relying on paragraph 74(d) of the IRPA, the following serious question of general importance:

> For the purposes of paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, does the phrase “or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence” require that there also be evidence that the actions at issue constitute a criminal offence in the country where they occurred?

[3] For the reasons that follow, I am of the opinion that the question should not have been certified because neither the officer nor the judge addressed it in their respective reasons for the simple reason that the question had already been definitively decided during a first application for judicial review involving the same parties.

I. <u>Facts</u>

[4] The facts which give rise to the present appeal were comprehensively summarized by the officer (in her first and second decision), Justice Bédard (during the first application for judicial review, indexed as *Nguesso v. Canada (Citizenship and Immigration)*, 2015 FC 879) and Justice Gagné. Therefore, I need not revisit the intricacies of this case or the abundant evidence that the two parties filed to try to shed light on the appellant’s activities, his personal and business relationships with senior officials in his country and business people with questionable

reputations, and his involvement in certain activities and operations that are not above suspicion and that were denounced by a number of non-governmental organizations.

[5] Mr. Nguesso is the adopted son of Denis Sassou Nguesso (DSN), the president of the Republic of the Congo. He did not complete his high school studies, which he had begun in the Congo, but did subsequently obtain a licence from an international aircraft piloting school in France. From 1986 to 1992, he worked as a pilot in the Congo. He then lived in Gabon with his sister, the wife of the Gabonese president.

[6] On December 27, 2006, the appellant applied to immigrate to Canada under the family class. His spouse and their seven children are Canadian citizens. The officer rendered a first decision on December 20, 2013, in which she found the appellant inadmissible on grounds of organized criminality. Justice Bédard, then of the Federal Court, allowed the appellant's application for judicial review of that decision because the officer had failed to identify the criminal organization to which the appellant supposedly belonged as well as the Canadian criminal offences at issue and their essential elements. Consequently, Justice Bédard referred the appellant's permanent residence application back to the officer so that the officer could reconsider the matter by identifying the Canadian offences at issue and their essential elements and so that the officer could assess the evidence in light of those elements to determine whether she had reasonable grounds to believe that the applicant should be inadmissible on grounds of organized criminality. The officer thus reconsidered the matter taking Justice Bédard's concerns into account.

[7] It is important to note that during the first application for judicial review, Justice Bédard explicitly responded to the question certified by the judge. The appellant had argued, *inter alia*, that the officer had erred by failing to identify the Congolese criminal provisions corresponding to the offences she alleged he had committed and by failing to identify the corresponding offences in Canadian law. Following her analysis of the relevant case law, Justice Bédard unequivocally rejected the appellant's argument:

> [208] However, in a context where there is no finding of guilt in the foreign country and the inadmissibility is merely founded on acts committed abroad, I am of the view that it is unnecessary to identify the potential foreign-law offences and compare them with the Canadian law. Paragraph 37(1)(*a*) of the IRPA simply states that the organized activities must be in furtherance of the commission of "an offence outside Canada that, if committed in Canada, would constitute such an offence". In my view, this paragraph does not require a determination of whether the acts at issue are prohibited by foreign law. The important thing is to assess whether the acts committed would be punishable by indictment in accordance with a Canadian Act of Parliament. The foreign law is only relevant to the extent that it enables one to assess the probative value of a conviction by a foreign jurisdiction as evidence that the acts committed correspond to an offence under Canadian law. Otherwise, it suffices to assess directly whether the evidence establishes reasonable grounds to believe that the person committed acts that, if committed in Canada, would be punishable by indictment in accordance with federal legislation. This exercise requires that the offences under Canadian law and their essential elements be identified.

[8] The officer's decisions were made further to an investigation that spanned several years. First, she considered the social and political context in the Congo, and she described the Congolese government as autocratic and corrupt; she described DSN's presidency as a period where [TRANSLATION] "his family members and those close to him benefited from positions, monopolies and privileges, which led to impunity and corruption" (Decision, page 2). She explained that the appellant controls an organization that engages in criminal activities and is composed of two entities, one in the Congo and the other in Luxembourg. The appellant is the CEO of Société Congolaise de Transports Maritimes (Socotram), a company the Congolese

government created in 1990 with the objective of developing a national marine fleet. He has been its principal shareholder since 1998 and has maintained control of it through a succession of corporations, themselves controlled by a complex system of trusts and dummy companies overseen by a manager in Luxembourg who specializes in concealing the true beneficiaries. Since Socotram's board of directors consists of people within DSN's or the appellant's circles or people connected to companies in which the appellant holds shares, the appellant had no difficulty obtaining excessive remuneration, benefits and allowances, which the officer considered to be fraud against Socotram.

[9] Section 37 of the IRPA states that there needs to be a pattern of criminal activity in order for there to be a finding of inadmissibility on grounds of organized criminality. The officer noted that the appointment of the appellant as CEO of Socotram, the Congolese government's transfer of 40% of maritime rights to Socotram and the tax exemptions the company benefited from were all part of a well-thought-out plan, the main objective of which was the personal enrichment of the appellant. Although Socotram received many subsidies and tax exemptions totalling hundreds of millions of dollars per year, the evidence shows that the company nevertheless faced a number of financial challenges and had still not succeeded in achieving its corporate purpose after more than 20 years. The officer concluded that the company was used only to enrich the appellant, to the detriment of the Congolese government.

[10] The appellant is in possession of a very advantageous contract of employment but refused to provide a copy of it to the officer; the officer drew a negative inference from this refusal. The contract apparently provides for a salary of 3.5 million Canadian dollars per year, a number of

living units for his work, including a residence in Montreal and an apartment in France (the appellant is the owner of the apartment, but the company pays him 15,000 euros per month for his rent), luxury vehicles, fuel, first-class and business-class plane tickets for him and his family, entertainment allowances, household staff and various other allowances. The officer considered the remuneration and the benefits set out in his employment contract to be excessive considering the company's results, the appellant's qualifications and the fact that 70% of the Congolese population lives off less than one dollar per day. The officer found that the excessive benefits and the complacency of the board of directors demonstrate a misappropriation of Socotram's funds for the benefit of the appellant.

[11] The officer was of the opinion that Socotram's funds were misappropriated on a large scale in order to enrich Mr. Nguesso. They were fraudulent operations carried out to the detriment of the Congolese government and society. The officer also found, drawing a negative inference from the appellant's refusal to produce any documents relating to taxes he paid between 2009 and 2012, that there were reasonable grounds to believe that none of the appellant's income was reported to the Congolese tax authorities and that he had therefore wilfully evaded taxation in the Congo. Lastly, since the money misappropriated from the Congo had been used to purchase real and personal property and had been transferred to his account, the officer found that there had been laundering of proceeds of crime.

[12] As for the appellant's participation, the officer found that as he was the CEO of Socotram, he was highly and centrally involved in the organization. He was an instigating

member of the organization and participated in it in a personal and essential way. His participation was direct, knowing and repeated.

[13] The officer therefore concluded that she had reasonable grounds to believe that the appellant had committed the following offences under Canadian law: (i) fraud (section 380 of the *Criminal Code*, R.S.C. 1985, c. C-46); (ii) tax evasion (subsection 239(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.)); and (iii) laundering proceeds of crime (subsection 462.31(1) of the *Criminal Code*). As a result, she declared the appellant inadmissible pursuant to subsection 37(1) of the IRPA on grounds of organized criminality.

II. The Federal Court decision

[14] Justice Gagné had to answer the following three questions: (1) Was the appellant deprived of his right to be heard? (2) Did the officer raise a reasonable apprehension of bias? (3) Did the officer err in her interpretation of the essential elements of section 37 of the IRPA?

[15] With regard to the first question, the judge found that the applicant was sufficiently aware of the composition of the criminal organization to which he was suspected of belonging and that he knew the allegations to which he was required to respond. The report on the officer's interview with the appellant describes her concerns about Socotram and its board of directors as well as her concerns about the appellant's other companies. The criminal organization was identified in several documents made available to the appellant, including the respondent's memorandum, and it was extensively discussed in his first application for judicial review before Justice Bédard. The officer was not obligated to provide Mr. Nguesso with a "running score" or

advise him of her future findings. The appellant was given a reasonable opportunity to respond to the officer's concerns.

[16] The judge summarily dismissed the appellant's allegations that there was a reasonable apprehension of bias on the part of the officer. The appellant alleged that the officer had relied on a prejudiced view of the Congo and its administration and that she had ignored several pieces of evidence that contradicted that view. The judge found that the appellant had not elaborated on the facts that would have given rise to a suspicion of bias or raised any arguments that would lead her to conclude that he was successful in rebutting the presumption of impartiality.

[17] Lastly, with regard to the interpretation and application to the facts at issue of section 37 of the IRPA, the judge first noted, with respect to the existence of a criminal organization, that the case law favours a flexible interpretation of the term "organization", that the fact that "the group have been somewhat organized and have been coordinating its activities for some time" (Reasons, at paragraph 61) is sufficient to conclude that an organization exists, and that the fact that the organization also has legitimate purposes or activities does not prevent it from being characterized as "criminal". The judge concluded that it was open to the officer to find that the organization was criminal given the appellant's refusal to answer her questions and provide her with the necessary documentation and given the fact that after 22 years of operation and substantial revenues, Socotram had still not succeeded in achieving its legitimate objective of developing a national marine fleet.

[18] With regard to the existence of criminal activities, which was the main issue the officer had to address following Justice Bédard's decision, the judge noted that a single offence punishable under an Act of Parliament by way of indictment is sufficient and that the officer had identified three such offences (Reasons, at paragraph 68). The judge dismissed the appellant's claim that the officer had erred by interfering in the affairs of Socotram or the Congolese government. In the judge's opinion, the issue was "whether the applicant is inadmissible to Canada for actions that Canadian society does not tolerate and characterizes as criminal" (Reasons, at paragraph 69). Lastly, with respect to the existence of constituent elements of offences under a Canadian law, the judge understood the appellant's arguments as him asking her to reconsider the evidence, which is not her role. The judge concluded that it was reasonable for the officer to make the finding she did (Reasons, at paragraphs 70, 73, 75, 76 and 77). For all of these reasons, the judge dismissed the application for judicial review and certified the question mentioned above.

III. Issue

[19] The appellant's appeal raises the following three substantive issues:

(a) Should the question certified by the judge be answered in the positive or in the negative?
(b) Did the judge err in finding that the officer's decision was reasonable?
(c) Did the judge err in finding that the appellant was not deprived of his right to be heard?

[20] The respondent argues that this Court should dismiss the appeal solely on the basis that the question certified in this case should not have been certified because it was not argued before Justice Gagné and had nevertheless been definitively determined by Justice Bédard during the first application for judicial review in 2015. It is therefore appropriate to deal with this

preliminary issue before addressing the appellant's arguments against the judge's decision confirming that he is inadmissible.

IV. Analysis

[21] Pursuant to paragraph 74(d) of the IRPA, Federal Court decisions rendered in the context of an application for judicial review under the authority of that Act may be appealed to the Federal Court of Appeal only if "a serious question of general importance is involved". This Court has consistently held that a question cannot be certified unless it is determinative of the appeal and transcends the interests of the immediate parties to the litigation such that it has general application: *Canada (Citizenship and Immigration) v. Liyanagamage* (1994), 176 N.R. 4 at paragraph 4, [1994] F.C.J. No. 1637 (QL) (F.C.A.); *Varela v. Canada (Citizenship and Immigration)*, 2009 FCA 145 at paragraph 28, [2010] 1 F.C.R. 129 [*Varela*]; *Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at paragraph 3, 419 D.L.R. (4th) 566; *Sran v. Canada (Citizenship and Immigration)*, 2018 FCA 16 at paragraph 3. Consequently, the question must have at the very least been raised and examined by the trial judge. It would be difficult to claim that a question is determinative or important if it was not argued in Federal Court or if the trial judge did not consider it necessary to examine the question: *Canada (Minister of Citizenship and Immigration) v. Zazai*, 2004 FCA 89 at paragraphs 11–12, 318 N.R. 365 [*Zazai*]; *Lai v. Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21 at paragraph 4, 467 N.R. 198 [*Lai*]. When a question certified by a trial judge whose judgment is being appealed does not meet the requirements of paragraph 74(d), this Court has no choice but to dismiss the appeal. To conclude otherwise "would be to allow the Federal Court of Appeal to create a right of appeal where the Act has not provided one" *Varela*

at paragraph 43; see also: *Zhang v. Canada (Citizenship and Immigration)*, 2013 FCA 168 at paragraph 16, 446 N.R. 382; *Kunkel v. Canada (Citizenship and Immigration)*, 2009 FCA 347 at paragraphs 12–14, 398 N.R. 271; *Lai FCA* at paragraph 11; *Mudrak v. Canada (Citizenship and Immigration)*, 2016 FCA 178 at paragraphs 18–19, 485 N.R. 186; *O'Brien v. Canada (Citizenship and Immigration)*, 2016 FCA 159 at paragraph 8, 484 N.R. 73; *Rrotaj v. Canada (Citizenship and Immigration)*, 2016 FCA 292 at paragraphs 3 and 10.

[22] In this case, it is not disputed that the question the judge certified was not argued before her and consequently was not analyzed in detail in her reasons. It was only by the judge's invitation at the end of the hearing to submit questions for certification that counsel for the appellant submitted a number of questions that were supposedly important and of general application. Several of those questions were deemed to not be determinative and were thus rejected by Justice Gagné. Being of the opinion that four of the questions submitted could be combined into one, the judge acknowledged that the reformulated question was equivalent to the question certified by Justice Hughes in *Lai v. Canada (Public Safety and Emergency Preparedness)*, 2014 FC 258, 450 F.T.R. 254 [*Lai FC*], and that this Court had refused to address it because Justice Hughes had not dealt with it. In the judge's view, the question she was proposing to certify in this case did not suffer from the same failing because she addressed it at paragraphs 69 and 70 of her reasons.

> [69] I repeat, Socotram's corporate objective was to acquire vessels of its own or in partnership to create a national marine fleet. In the early 2000s, Socotram's revenues from maritime rights were estimated to be between US$23 million and US$29 million per year, in addition to US$5.5 million in 2003 and US$9.3 million in 2004 paid by the Congolese government. At the September 25, 2012 interview, the applicant stated that a national marine charter fleet had not yet been established after 22 years of operation since the cost of purchasing vessels was too high. At the time, Socotram was paying him an estimated annual salary of

> CAD$3.5 million, not including the other benefits supposedly stipulated in his employment contract. The officer did not have to require evidence that the applicant was found guilty of misappropriation of funds in the Congo, or even that these acts constituted fraud, tax evasion or misappropriation of funds in the Congo, but that if committed in Canada, they would constitute such offences. Contrary to what the applicant claims, this is not a question of interfering in the affairs of Socotram or the Congolese government, but rather determining whether the applicant is inadmissible to Canada for actions that Canadian society does not tolerate and characterizes as criminal.
>
> [70] I am therefore of the view that it was open to the officer to conclude that she had reasonable grounds to believe that the applicant was appointed CEO of Socotram to lend the appearance of legitimacy to the misappropriation of this company's funds for his own personal benefit, in concert with several other persons. It was also open to her to find that the applicant used sophisticated corporate structures and a maze of dummy companies headquartered in a tax haven to mask his criminal activities, in concert with other individuals.

[23] However, my close reading of the judge's reasons does not allow me to conclude that she did indeed deal with the question she certified. It is clear to me that her decision (as well as the officer's decision) was based on the premise that demonstrating the criminal nature of the appellant's and Socotram's activities under Canadian law is sufficient for the second part of paragraph 37(1)(a) (*that is*, 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) to apply. In fact, the judge concluded at paragraph 75 of her reasons that it was reasonable for the officer to find that if the actions of the applicant and the other members of the organization identified had been committed in Canada they would constitute offences punishable under an Act of Parliament by way of indictment.

[24] It is true that at paragraph 69 of her reasons, the judge wrote that "[t]he officer did not have to require evidence that the applicant was found guilty of misappropriation of funds in the Congo, or even that these acts constituted fraud, tax evasion or misappropriation of funds in the

Congo, but that if committed in Canada, they would constitute such offences”. I find that in doing so the judge did not really deal with or decide the question she certified but merely reiterated Justice Bédard’s conclusions in the first application for judicial review.

[25] Regardless, I find that the judge, even if she had wanted to, could not determine the question she certified. It should be remembered that Justice Bédard referred the matter back to the officer with the sole objective of having it reanalyzed after the Canadian offences at issue and their constituent elements had been clearly identified. That is precisely what the officer did in her second decision. Therefore, the judge could not deal with a question that Justice Bédard had definitively decided and that the officer therefore did not revisit in her second decision.

[26] The appellant could have relied on the two questions Justice Bédard certified (regarding the need to identify the criminal organization at issue and the provisions of a federal law that are related to an offence punishable by way of indictment) to attack her conclusion that paragraph 37(1)(a) of the Act does not require evidence of a foreign offence. During the hearing before this Court, counsel for the appellant tried to explain why she had not appealed Justice Bédard’s decision. If I understand the argument by counsel for the appellant correctly, it would have been premature to attack Justice Bédard’s decision before knowing whether the officer in charge of re-examining the case would find the appellant inadmissible on the basis of (1) his membership in an organization that engaged in activity that was part of a pattern of criminal activity in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or (2) the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence. If the officer adopted the first approach,

Justice Bédard's judgment would be unassailable; but if the officer adopted the second approach, Justice Bédard's opinion would pose a problem for the appellant.

[27] I find this argument to be specious, to say the least. Justice Bédard failed to distinguish between these two situations, and I find it difficult to understand how the officer could have concluded that the organization to which the appellant belonged engaged in concerted activities with the objective of committing one or more offences under Canadian federal law. It was clearly Congolese law the organization was attempting to evade. Therefore, I consider it fallacious to claim that the officer changed her position in her second decision by basing the inadmissibility of the appellant on offences under Congolese law. There was never any doubt that the only issue to be addressed was whether the acts the appellant and the organization to which he belonged committed outside Canada were offences under Canadian law, independent of the fact that those same acts may not constitute offences outside Canada. That is also the only reason the application for permanent residence was referred back to the officer: the only thing asked of her was that she identify the Canadian law offences and their essential elements to determine whether there were reasonable grounds to believe that the organization to which the appellant belonged had committed such offences based on the evidence submitted. If the appellant wanted to argue, as he is doing now, that he could not have committed the *actus reus* of fraud under Canadian law because he committed no offence under Congolese law, he would have to have attempted to have Justice Bédard's judgment overturned on this point, which he did not do.

[28] It is true that the Minister argued before Justice Bédard that the question as to whether paragraph 37(1)(a) of the Act requires evidence of constituent elements of an offence committed

outside Canada and its equivalence to an offence punishable under an Act of Parliament by way of indictment could be considered since the question had already been the subject of an application for leave (dismissed) before the Supreme Court in *Lai*. Since Justice Bédard refused to certify such a question on the grounds that it would not necessarily be determinative of the appeal, it can be assumed that she would have arrived at the same conclusion if the appellant had proposed the certified question. The fact remains that the appellant could have gained clarification on this question if he had appealed Justice Bédard's decision. It has been well established, since the Supreme Court's decision in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193, that the Federal Court of Appeal is not limited to answering the certified question, but may also address all the arguments raised in the appeal: see also *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 12, 174 D.L.R. (4th) 193; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at paragraph 44, [2015] 3 S.C.R. 909. Therefore, it was open to the appellant to have the error that he felt Justice Bédard committed, that is, the error of failing to require that the alleged acts correspond to an offence in foreign law, corrected.

[29] Consequently, I find that the question the judge certified should not have been certified. In addition to failing to address the question in her reasons, such that it cannot be determinative in the context of this case, she could not consider it since the decision under judicial review did not raise that issue and was therefore not being called into question on that basis.

V. Conclusion

[30] The above reasons are sufficient to dispose of the appeal and there is no need to address the other questions raised by the appellant. In the absence of a validly certified question, the appeal must be dismissed.

"Yves de Montigny"
J.A.

"I agree.
J.D. Denis Pelletier J.A."

"I agree.
Johanne Gauthier J.A."

Certified true translation
Janine Anderson, Revisor

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

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