A-47-95

CORAM: MARCEAU J.A.
MacGUIGAN J.A.
DESJARDINS J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

- and -

ALEXANDER HENRI LEGAULT

Respondent

REASONS FOR JUDGMENT

MacGUIGAN J.A.

An adjudicator issued a conditional deportation order against the respondent, an American citizen with no residence status in Canada and a fugitive from justice in the United States, on the basis, inter alia, that he had reasonable grounds to believe that the respondent came within the proscription of subparagraph 19(1)(c.1)(ii) of the *Immigration Act* (the Act).

The Motions Judge quashed the adjudicator's decision and certified the following question to this Court (*Appeal Book*, I, 280):

> Whether the adjudicator erred in finding, on the basis of the warrant for arrest and indictment from the United States of America, that he had reasonable grounds to believe that the applicant [respondent] had committed outside Canada certain acts or omissions which constituted offences under the laws of

> the United States of America within the meaning of subparagraph 19(1)(c.1)(ii) of the *Immigration Act*, R.S.C. 1985, c.I-2 as amended.

Extradition of the respondent was sought by the United States Department of State, but was refused by Riopel J. of the Quebec Superior Court on 10 March 1983 because almost all of the affidavit evidence submitted was deficient either in form or in content. Riopel J. stated (*Appeal Book*, I, 118):

> In reaching the present decision, I was mindful of my obligations to give effect to the extradition treaty between the U.S. and Canada and not to dismiss an application for what might otherwise appear to have been a mere procedural technicality. It is, nonetheless, my view that it was incumbent upon the requesting state to prove its case, even prima facie, at least in the observance of our laws as a minimal standard if not in accordance with the proven requirements of its own legislation.
>
> The objection raised on behalf of Respondent having been sustained in most of its important aspects, and assuming for the purpose of the present, but without deciding that three of the prerequisite conditions for the granting of the application would have been met in that: we are dealing with an extradition crime; that is a crime both in Canada and in the U.S.A. and the identity of the fugitive as the accused in the extradition proceedings has been proven, it necessarily follows that the fourth condition having regard to the prima facie evidence with respect to the commission of the crime cannot be met since there is no evidence that Legault, a k a William Barr, had anything to do with the transaction even if we could find that Barr had set up the material facilities, which the Court is not prepared to do at this time; there is no evidence of the presentation by Barr of any false documents; nor is there any proof of forgery of the said documents by Barr; in short, no evidence of any activity, criminal or otherwise on the part of Barr after February 26, 1981.
>
> FOR THESE REASONS, the application is dismissed and the fugitive accordingly discharged.

On 14 March 1986 a U.S. federal grand jury returned a true bill of indictment against the respondent on a variety of offences including conspiracy to commit wire and mail fraud, fraud, falsely making a bill of lading and use of fictitious names. On the basis of the indictment, a warrant for the respondent's arrest was issued the same day by the U.S. District Court.

It was ultimately as a result of this indictment and warrant that the inquiry by an adjudicator was held and a decision rendered on 10 December 1993 leading to the deportation order. The respondent testified at the inquiry, but was asked

no questions concerning the detailed allegations in the indictment. (Of course, he could have volunteered evidence on his own).

The analysis by the Motions Judge of the adjudicator's action was as follows (*Appeal Book*, I, 287-288):

> The Canadian and American systems of law pertaining to the issuance of an indictment differ significantly, principally due to the abolition in Canada of the grand jury system. It is unnecessary for the purposes of the decision in this case for me to conduct a detailed analysis of Canadian and American criminal procedure concerning the issuance of indictments. Suffice it to say that, despite differences in the criminal procedure in the two countries, an indictment performs the same function in both legal systems in that it is the formal legal document containing the alleged indicatable criminal offences upon which the accused will be tried by a judge or jury, as the case may be. It does not constitute evidence and may not be used as evidence by the trier of fact in the criminal proceedings. Indeed, in the Canadian legal system, judges routinely instruct juries in criminal cases that the indictment is not evidence of anything alleged in it.
>
> In the present case, the adjudicator concluded that the warrant for arrest and the indictment "represented" reasonable grounds to believe that the applicant committed various offences under American law. In arriving at this conclusion, the adjudicator based his decision solely on the allegations in the indictment which had been returned by a grand jury in the United States of America. He examined no evidence pertaining to the alleged offences. In my opinion, the contents of the warrant for arrest and the indictment did not constitute evidence of the commission of alleged criminal offences by the applicant. The adjudicator therefore erred in law in concluding, on the basis of these documents, that he had reasonable grounds to believe that the applicant had committed outside Canada acts or omissions which constituted offences under the laws of the United States of America. Furthermore, in relying on the allegations made in the indictment, the adjudicator erred in law by failing to make an independent determination on the basis of evidence adduced before him.

In my respectful opinion the Motions Judge was mistaken in proceeding on the basis of the criminal law analogy, in the context of which her conclusion certainly was correct, as it would also have been in the case of extradition proceedings. For one thing, in such proceedings the indictment would be excluded as constituting hearsay evidence.

But s. 80.1(5) of the Act clearly establishes a different standard for immigration adjudicators. It reads as follows:

> An adjudicator is not bound by any legal or technical rules of evidence and, in any proceedings, may receive and base a decision on evidence adduced in the proceedings and *considered credible or trustworthy in the circumstances of the case*. [Emphasis added].

As this Court put it in *Attorney General v. Jolly*, [1975] F.C. 216, 223 (per Thurlow J., as he then was), in dealing with the same language, "the Board was entitled to found its judgment on the material in the exhibit if it considered what was in it to be credible and trustworthy in the circumstances." Indeed, in *M.E.I. v. Gray*, A-334-77, decided 14 January 1984 (per Heald J.A.) this Court decided that the Immigration Appeal Board was in error when it rejected evidence because the documents in question were not proven pursuant to the rules of evidence in civil actions. *Dan-Ash v. M.E.I* (1988), 93 N.R. 33 (per Hugessen J.A.) went further in holding that the Board was no more bound by the best evidence rule than by the hearsay rule. I do not see *Nakkuda Ali v. Jayaratne*, [1951] A.C. 66, on which the respondent relied heavily to support a limitation of administrative discretion, as governing, given the precise statutory authority under the *Immigration Act*.

The Motions Judge also concluded that "in relying on the allegations made in the indictment, the adjudicator erred in law by failing to make an independent determination on the basis of the evidence adduced before him." But this conclusion fails to take account of the adjudicator's own description of what he was doing (*Appeal Book*, I, 44):

> One of the elements of subparagraph 19(1)(c.1)(ii) is the expression (reasonable grounds) which requires that the level of evidence be less than the balance of probabilities.
>
> I must determine if the acts allegedly committed by Mr. Legault constitute offenses under the law of the United States. The warrant for the arrest of Mr. Legault and the indictment represent in my opinion reasonable grounds to believe that Mr. Legault committed a number of acts punishable by the law of the United States. These two documents identify in detail the infractions and provide a detailed description of the procedure followed for the commission of the different infractions....
>
> Secondly, I must determine if the acts committed by Mr. Legault in the United States constitute offenses under an act of Parliament.

There is nothing here to indicate that the adjudicator is not making an independent determination of the facts. Quite the contrary! As the adjudicator stated, the indictment and the warrant "identify in detail the infractions and provide a detailed description of the procedure followed for the commission of the different infractions." He considered this evidence credible or trustworthy in the circumstances of the case, and in my opinion such a decision is entirely within his discretion. Given the evidence before the adjudicator, he could reasonably arrive at the conclusion he did.

His apparent *bona fides* is strengthened by the fact that he reached the conclusion that there was no reason to believe that the respondent had violated s. 121 of Title 49 of the U.S. *Code* in spite of the grand jury conclusion that he had done so.

The respondent laid a good deal of emphasis on the fact that the adjudicator had before him the extradition judgment as well as the grand jury indictment, and went on to argue that the extradition judge had concluded that there was no evidence linking the respondent with any criminal activity. I believe this is a considerable over-interpretation of Riopel J.'s concluding comments.

He found no evidence of the presentation of false documents, no proof of forgery, "no evidence of any activity, criminal or otherwise on the part of [the respondent] after February 26, 1981." But this conclusion is based on the deficient affidavits before him, and has no generalizable quality. Moreover, it was uttered three years before the grand jury indictment was brought down.

In any event, in my view the weighing of the evidence was within the discretion of the adjudicator.

Therefore, the certified question should be answered in the negative, and the judgment should be rendered accordingly.

(Mark R. MacGuigan)
J.A.

I agree
Louis Marceau J.A.

I agree
Alice Desjardins J.A.

A-47-95

CORAM: MARCEAU J.A.
MacGUIGAN J.A.
DESJARDINS J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Appellant

- and -

ALEXANDER HENRI LEGAULT

Respondent

Heard at Montreal, Quebec, on Friday, September 19, 1997.

Judgment rendered at Ottawa, Ontario, on Wednesday, October 1, 1997..

REASONS FOR JUDGMENT BY: MacGUIGAN J.A.

CONCURRED IN BY: MARCEAU J.A.
DESJARDINS J.A.

A-47-95

CORAM: LE JUGE MARCEAU
LE JUGE MacGUIGAN
LE JUGE DESJARDINS

ENTRE:

LE MINISTRE DE LA CITOYENNETÉ
ET DE L'IMMIGRATION

Appelant

- et -

ALEXANDER HENRI LEGAULT

Intimé

Audience tenue à Montréal, Québec, le vendredi 19 septembre 1997.

Jugement rendu à Ottawa, Ontario, le mercredi 1 octobre 1997.

MOTIFS DU JUGEMENT PAR: MacGUIGAN J.A.

Y ONT SOUSCRIT: MARCEAU J.A
DESJARDINS J.A.

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