Federal Court  Cour fédérale

Date: 20160301

Docket: IMM-4101-15

Citation: 2016 FC 262

Toronto, Ontario, March 1, 2016

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

HUSSEIN MOHAMED AL-ABDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The present Application concerns the May 26, 2015 decision of the Immigration Appeal Division of the Immigration and Refugee Board (IAD) made pursuant to s. 68 of the *IRPA* dismissing an appeal brought by the Applicant against a deportation order made on November 7, 2001. On September 10, 2004, the IAD granted a stay of deportation for three years. Since that time to the date of the decision presently under review the stay has been extended on the imposition of conditions to be met by the Applicant.

[2] A critical feature of the case placed before the IAD was a joint submission made at the end of the hearing by Counsel for the Applicant and Counsel for the Respondent for a further stay of deportation for the period of one year. Counsel for the Applicant argues that the IAD's handling of the joint submission resulted in a breach of a duty of fairness owed to the Applicant. For the reasons which follow, I agree with his submission.

[3] There are two components to the decision-making under review which require examination. The first is the standard of fairness that the IAD was required to meet, and the second is, on the evidence of the process of decision-making on the record, whether the standard was met.

I. The Standard of Fairness

[4] By Justice Lemieux's decision in *Malfeo v Canada (M.C.I.)*, 2010 FC 193 (*Malfeo*) at paragraphs 12 to 16, this Court has set clear expectations of the IAD with respect to fair consideration of a joint submission as emphasized:

> The use of joint submissions is a concept well-known in criminal law where the Crown and the defence make joint submissions, for example, in sentencing. It is not unknown in administrative law cases and has been applied by this Court in the context of immigration law (see *Nguyen v. Canada (Minister of Citizenship and Immigration*), 196 F.T.R. 236), a case which bears similarity with the case at hand since it involved an application by Mr. Nguyen to the then Appeal Division for the exercise of its humanitarian and compassionate jurisdiction under a provision of the now repealed Immigration Act similar to paragraph 67(1)(c) of IRPA. That case involved the failure of the tribunal to explain why the joint submission of counsel proposing a five year stay was not endorsed. The purpose of staying the deportation is, in that case as it is in this case, to give the applicant an opportunity to

demonstrate, on the ground so to speak, becoming a decent law abiding resident of this country.

Borrowing upon criminal law jurisprudence, but appreciating the clear distinction between a deportation which is non criminal and the criminal context, this Court wrote at paragraph 11 as follows:

> Nevertheless, I am attracted to the underlying rationale behind joint submissions in a section 70(1)(b) case where the tribunal's jurisdiction is quite wide, the reasons for the deportation in this case are based on criminal offences and the factors outlined in *Chieu*, supra, (seriousness of the offence, possibility of rehabilitation, impact of the crime on the victim, remorsefulness of the applicant) are analogous to the matters which are taken into account in sentencing upon conviction.

I cited certain extracts from the Quebec Court of Appeal's judgment in *R. v. Dubuc*, 1998 CanLII 12524 (QC C.A.), (1998), 131 C.C.C. (3d) 250, written by Justice Fish, then of that Court, which set aside the sentence and substituted the sentence jointly suggested. Fish J.A. wrote:

> [...] I repeat, the trial judge was not bound by the shared submission of counsel. For appropriate reasons, explained even summarily, he was entitled to depart from the sentence jointly proposed. The judge could properly accept or reject the submission. But not disregard or ignore it. Still less, simply overlook it.

Justice Fish in *Dubuc* also stated "serious consideration" should be given to by the court to the submissions of Crown counsel and "it should not lightly be disregarded".

In *Nguyen*, reference was also made to the Manitoba Court of Appeal's judgment in *R. v. Chartrand*, (1998), 131 C.C.C. (3d) 122 where Kroft J.A. stated the following:

> A sentencing judge is not bound to accept the submission, but it should not be rejected unless there is good cause for so doing. This case does not fall into that category.

[Emphasis added]

II. Evidence of the Process

[5] To determine whether the expectations with respect to fair consideration of a joint submission were met by the IAD Member who delivered the decision, there are four necessary points of evaluation to be considered in context: the content of the submission; how it was delivered, how it was received, and how it was considered in reaching a conclusion. The official transcript of the hearing before the Member provides evidence on each of the four points. In the quotations from the transcript which follow, certain passages are emphasized as particularly relevant to the determination of the present Application.

A. *The Joint Submission: Content, Delivery, and Reception*

[6] After the Applicant gave his evidence in support of his extension request and upon questioning by the Member, his Counsel, and the Minister's Counsel, the following passage provides evidence of the first three points of evaluation:

> PRESIDING MEMBER: All right. Thank you, sir. Those are all my questions.
>
> APPELLANT: Thank you.
>
> PRESIDING MEMBER: I don't know if - did you have any redirect?
>
> COUNSEL: No, none, thank you.
>
> PRESIDING MEMBER: Okay, all right. So we'll go right to submissions.
>
> COUNSEL: I wonder if I might have a brief recess to speak with my friend ---
>
> PRESIDING MEMBER: (Inaudible).

COUNSEL: --- please.

PRESIDING MEMBER: Okay. I'll come back in ten minutes.

COUNSEL: Thank you.

PROCEEDINGS RECESSED -----

PROCEEDINGS RESUMED ---

PRESIDING MEMBER: Okay. We're back on the record, and we'll go ahead with submissions.

COUNSEL: Yes. Thank you for the opportunity to speak with my friend. In the course of our discussions, I think it's fair to say that we agree that an appropriate decision would be to stay the removal order for a further one-year period.

PRESIDING MEMBER: Mm-hmm.

COUNSEL: My – I know that my friend wishes to put his submissions on the record, and I know that you'll give him an opportunity to do that.

PRESIDING MEMBER: Mm-hmm.

COUNSEL: I don't want to be lengthy but I think it's agreed that an extension of the stay, I mean, is an appropriate one in this particular case. Mr. Al-Abdi has been in Canada now, I think, 27 years. He came here in 1988.

He's had- he had criminal convictions that led to his removal order being made a number of years ago.

He has no convictions for a period of years. He has, we know, had some charges in 2013, 2014, but they were either withdrawn or dismissed. There were no convictions.

He, as the member - as Member Chung stated in paragraph 13 of his reasons for the most recent extension of stay, Mr. Al-Abdi remains, to use the member's words, minimally established in Canada for the 23 years that he has lived here. It's more than 23 now, but I think that comment is still appropriate.

He is minimally established. He has a minimal amount of social assistance with which he pays his rent and has $250.00 left over. He works periodically. It's been a long time since he worked on a

fulltime basis. He has testified that he continues to look for employment but has so far been unsuccessful.

He isn't in a position, I think, reasonably to pay off his fines; that's for sure. And it would probably be difficult for him to pay something towards those fines, but he has indicated that he's prepared to do that to make an effort at least.

In terms of the passport application, his efforts at trying to get a passport were, I mean, doomed to failure. I think, to send a letter to the Ugandan High saying, send me a passport, is not appropriate.

The difficulty I've had is, representing him over the years, it's Legal Aid and, you know, when the hearing's over, then the certificate's finished, so you can't continue to help him as much as you might want to over a period of time until he's able to obtain another certificate. And then in this particular case, by the time he did that, it was too late to respond to the request for reconsideration and the appellant's statement. So you end up at a hearing.

He's- we now have a passport application and some assistance in accessing the information about the application and - because my friend has provided it and Mr. Al-Abdi has indicated that he's prepared to sit down with me and draft that application and provide a copy to the Minister and that he's prepared to make some efforts to obtain the fee that would be necessary to pay that-for that application. And I've undertaken to assist him in that regard.

He's been here a long time. He's, I wouldn't say incapable of complying with the conditions, but he's – he needs to be encouraged, and it's difficult for him to do some of these things. He's forgetful; he's confused. He needs some help and direction in attempting to comply with them. I don't think it's out of any bad intent. He's willing to comply. He's come here today.

And I think he, in my submission, deserves that opportunity given that he hasn't compounded his criminal convictions over the years. He's been conviction-free for a long time and it would be inappropriate, in my submission, to remove him from Canada at this point. Subject to any questions you have, those are my submissions.

PRESIDING MEMBER: Thank you.

MINISTER'S COUNSEL: The Minister was concerned about the appellant's testimony today. There is an overall lack of

understanding of the seriousness of what has brought us here today, no real explanation about why he didn't comply.

And we are here; we are almost 11 years further in the process, still without a passport, still without any efforts made toward paying the fines, other breach of the conditions, failure to report when directed, failure to report charges. All this lends itself to one questioning whether the appellant cares about this process. And certainly, the Minister has significant concerns about the ongoing repeated lack of compliance here.

However, on the other hand, it must be acknowledged that the conviction that has brought us here today occurred in 1998. It, although a serious offence - the sale of drugs is a very serious offence - it was a $20.00 sale of crack cocaine, and he has been conviction-free since 2003 according to my records.

We still have the issues that we had 11 years ago. And at this point, the Minister's not satisfied the appellant intends to comply with these conditions. It seems like he simply wants to wait it out and see until it goes away, and the Minister's not willing to allow that.

And I have spoken with my friend. He did advise that he would assist at this point with the completion of the travel document and make efforts to have that submitted or at least the application and a money order towards the application submitted to the agency.

The appellant has advised that as recently as January 2014, he was working cash jobs to pay for his crack cocaine. That type of work that he does can certainly be used to pay some token amount towards the fines.

There's an acknowledgement he's on a very fixed income. However, there's no physical barriers to him working. And there's an expectation that the fines were incurred; it's his responsibility to pay the fines. The Minister would expect that he begin payment commensurate with his levels of income.

But based on a weighing of different factors, the fact that the appellant does appear to be a relatively low risk in terms of public safety, at the same time lack of compliance with previous conditions, ongoing repeated lack of compliance, the one-year stay in the Minister's position is appropriate with the expectation that the efforts be put forward.

And the appellant has repeatedly stated over and over again, he made a mistake, he made a mistake. He comes to these hearings

> and says he'll do whatever he needs to do and then leaves the hearings and doesn't do them.
>
> So, ultimately, I've spoken with my friend and this needs to be done and the Minister expects that this will be a last chance for the appellant to show that he's serious about complying with the conditions. Those are my submissions. Thank you.

B. ***The Joint Submission: Consideration***

[7] Immediately following Counsel for the Minister's submission, the Member proceeded to deliver the decision presently under review:

> PRESIDING MEMBER: Okay. Okay, sir, I'm prepared to render an oral decision, and a copy of it will be sent to you and it will be edited for syntax and grammar. I just want to confirm with you before I start that your address is still 1037 Gerard Street East ---
>
> APPELLANT: Yeah.
>
> PRESIDING MEMBER: --- 2nd Floor---
>
> APPELLANT: Yeah.
>
> PRESIDING MEMBER: ---Toronto, Ontario M4M IZ6. This is the hearing of a reconsideration of a removal appeal brought by Hussein Mohamed Al-Abdi, the appellant, against a deportation order made November 7, 2001 pursuant to Section 27(1)(d) of the former Immigration Act.
>
> On September the 10th, 2004, the deportation order was stayed for three years with conditions by Member Wist (ph).
>
> A second review, a reconsideration took place. An extension of the stay was granted by Member Bohr (ph) on December 20, 2005.
>
> On July 30, 2009, Member Dolan (ph) again extended for one year followed by Member Lee (ph) who extended for six months on October 18, 2012.
>
> And then Member Chung (ph) gave the appellant one more year to comply with the condition 2 of Member Lee's decision, which was to provide a copy of his passport or travel document or to provide a

completed application for a passport or travel document or to provide evidence of ineligibility for such. The appellant was also to provide evidence of payment of his outstanding fines.

Minister's Counsel has provided a written statement entered as Exhibit R-1 today indicating that the appellant has failed to comply with his conditions. Counsel did not disagree with the contents of the written statement.

The appellant has not produced a passport or travel document. He has not provided evidence that he's not entitled to one.

The appellant has failed to appear for reporting. He's failed to notify CBSA of additional drug charges that occurred in 2013 and 2014, which have since been withdrawn. And he has not provided any evidence of repayment of fines. The updated information provided in Exhibit R-2 from the Minister shows outstanding fines in the amount of $1,327.00.

The appellant is represented today and he has provided a package entered at A-1 of a letter that was written to the Ugandan Embassy and a copy of- a partial copy of one of his Ontario Works stubs.

There's no challenge to the legal validity of the order. At the close of the hearing, Counsel and Minister's Counsel agreed that a one-year stay to enable the appellant to comply with conditions was appropriate.

In this reconsideration, the onus to demonstrate humanitarian and compassionate factors remains with the appellant. I'm guided today by the Ribic factors that were also confirmed in the Supreme Court cases of Chieu and Al Sagban and more recently in Kolsa (ph).

The Ribic factors include consideration of the seriousness of the offence that led to the removal order, the possibility of rehabilitation, length of time in Canada, establishment, family in Canada, dislocation to family by removal, the degree of hardship to the appellant, any best interest of any children that might be affected by the decision. These factors are not exhaustive and weight varies according to everyone's case.

The panel is also guided today by objectives of IRPA, which the panel views as very important. One is to protect the public safety and maintain security of Canadian society and to deny access to Canadian territory to persons who are criminals.

> The appellant was born in Uganda and became a permanent resident in 1965. He was landed during the refugee backlog process.
>
> […]
>
> [Emphasis added]
>
> (Certified Tribunal Record (CTR), pp. 407 – 410)

[8] At this point in the delivery of the decision, the Member conducted a review of the evidence against the factors identified. On the issue of drug addiction and the Member's concern for public safety, the following opinion was expressed:

> The appellant indicated at his last hearing before Member Chung that he had not used crack cocaine in over one and a half years and that he was not addicted.
>
> It is noted that the panel had new charges relating to possession of crack cocaine in 2013 and 2014. And while it's noted that those have been withdrawn, the panel does have some concerns given the appellant's history.
>
> The appellant today with respect to the use of crack cocaine candidly admitted to continued use in that once or twice a day he was using last January 2014 for a period of - excuse me- a few months. He indicated in testimony, when asked by Minister's Counsel how he overcame this recurring addiction, that he had stopped through prayer.
>
> It's noted by the panel that in fact the appellant had represented at past hearings that he had used crack cocaine and that he had stopped as well. He has not provided any evidence of engaging in any treatment plans or counselling [sic]. And actually, this was of concern at Member Chung's review where it was noted that he hadn't completed program that he had entered into in 2012 and 2013 for rehabi1itative purposes.
>
> With respect to the issue of the criminal offences relating to the crack cocaine, the panel does not find that the appellant has shown any strong possibility of rehabilitation. There's a continuing pattern of falling back into the use of the illegal drug and there is no evidence that the appellant appreciates the hard work and

> commitment to treatment that is associated with overcoming an addiction like that.
>
> […]
>
> [Emphasis added]
>
> (CTR), p. 411)

[9] Following the completion of the detailed examination of the Applicant's history, including the evidence produced at the hearing under consideration, the Member made the following emphasized key findings with respect to public safety and the joint submission:

> Upon questioning, the appellant reiterated he made a mistake and he'll make it right now. These are the same assertions that have been made at five previous IAD reconsiderations.
>
> I think at a certain point, while the appellant may be well-meaning with these assertions as Counsel points out, at a certain point he has to take responsibility for his failure to follow through. The panel has to be mindful of public safety issues and also of the public purse. Six chances to get it right with really very minimal expectations being set out, I think is adequate.
>
> I don't think that the appellant's previous chances were all premised on expressions of intentions. And they were also- his stays were also premised on his intentions of rehabilitation. And I think the continued use of crack cocaine and the continued efforts to work only minimally to obtain crack cocaine certainly show that the reliance placed on those intentions by previous members were not actually justified.
>
> As noted at the close of the hearing, Minister's Counsel and Counsel recommended a one-year stay, and I don't take those submissions lightly. However, I think that five chances to get this right is enough.
>
> Having considered all of the evidence before me, the appellant has not established on the balance of probabilities, taking into account the best interest of a child directly affected by the decision, that there are sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case.

> The panel is not satisfied that the appellant will ever comply with the conditions of the stay. And public policy considerations and public safety concerns now outweigh the humanitarian and compassionate factors in his favour.
>
> As a result, the appeal is dismissed. Thank you, Counsel, and --
>
> COUNSEL: Thank you, Madam Member.
>
> PRESIDING MEMBER: ---Minister's Counsel.
>
> MINISTER'S COUNSEL: Thank you, ma'am.
>
> ---- REASONS CONCLUDED-----
>
> [Emphasis added]
>
> (CTR, p. 413)

III. Conclusion

[10] There is a difference between an argument advanced by one of the parties to a litigation, and a joint submission presented by Counsel for both parties. An argument may be rejected by providing a supportable reason. A joint submission is not an argument; it is an agreement between the parties which goes directly to removing issues in the litigation from determination. This is why the law has established the principle that a joint submission must not be disregarded. A finding as to whether regard was paid to a joint submission is case dependent. That is, on judicial review an evaluation must be made of the nature of the impact of the joint submission on the person or persons directly affected, which in turn defines the quality of regard expected of the decision-maker to whom the joint submission is directed. The issue in each individual case is whether the joint submission was fairly regarded.

[11] In the present case Counsel for the Applicant argues that the joint submission was not fairly regarded because it was dismissed outright without meaningful consideration. The argument is advanced because Counsel had no way of knowing the Member's thoughts about the submission before the final decision was rendered because no dialogue occurred between the Member and Counsel during the course of the hearing. Counsel for the Respondent argues that there was no duty on the Member to so engage, and cautions about creating a precedent by imposing such an obligation. I find that I do not need to give an opinion on this discrete issue because the problem with the over-all process of decision-making in the present case is much more serious.

[12] Upon considering the evidence, it is clear that the Member came well prepared for the hearing. The 2000 word oral decision delivered immediately following the completion of the evidence and argument establishes that, before the hearing, careful research was undertaken with respect to the Applicant's experience before the IAD, and further, careful thought was given to the outcome of the proceeding.

[13] There is certainly nothing wrong with a decision-maker undertaking an effort before a hearing to research and to learn the contents of the available record upon which an application is based. There is also nothing wrong with a decision-maker seriously contemplating possible outcomes with respect to issues raised in the litigation upon application of the knowledge gained. But, whether and how the preparation can be applied in rendering a decision after the evidence and arguments are all in, depends on what transpires during the hearing itself, and the degree of

reflection given to what transpired. The point is that a decision-maker must come to the hearing with an open albeit questioning mind, but, nevertheless, a mind willing to learn.

[14] In the present case, I find that on the evidence the Member understood Justice Fish's statement in *Dubuc* that a joint submission should be given "serious consideration" and "it should not lightly be disregarded". This fact is established by the Member's twice given statement that "I don't take those submissions lightly". Nevertheless, I also find that, on the evidence, not only did the Member take the joint submission lightly, it was disregarded.

[15] There are two reasons for reaching this conclusion.

[16] First, the transcript establishes that the moment the argument on the joint submission ended, the delivery of the decision began. There is no evidence of a pause for reflection. While the joint submission was engaged by acknowledgment rather than being completely ignored, on the evidence it was treated as merely an extraneous consideration to the delivery of thoughts and conclusions that were prepared well in advance for delivery. In my opinion, the statement that "I don't take those submissions lightly" does not exonerate a closed mind being brought to the hearing.

[17] And second, the fact that the Minister's Counsel's position in the joint submission being that the Applicant "appears to be a relatively of low risk in terms of public safety" is contradicted by the public safety concerns expressed in the Member's reasons, establishes that the joint submission was disregarded.

[18] The content of the disregard is significant. Because the Minister is responsible for invoking and maintaining the deportation order under appeal by the Applicant, and is also responsible to consider the public's interest in acting on the order, to contradict the Minister's opinion on public safety in the joint submission is a serious conclusion to reach without full engagement of the joint submission, which certainly did not occur.

[19] Further evidence of the Member's disregard of the joint submission is the Member's failure to meaningfully acknowledge the Minister's "last chance" position. The Member's opinion that "I think that five chances to get this right is enough" is based on the Applicant's inability to meet the conditions imposed. The Minister's opinion that, nevertheless, the Applicant deserves a last chance was completely disregarded. I find that the Member's rush to judgment precluded a pause for reflection on this very important point.

[20] As a result, I find the decision was rendered in breach of a duty of fairness owed to the Applicant.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back for redetermination by a different IAD member.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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