Federal Court  Cour fédérale

Date: 20160509

Docket: IMM-4587-15

Citation: 2016 FC 518

Ottawa, Ontario, May 9, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

FRED DOE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The applicant, Fred Doe, seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the decision of the Immigration Appeal Division [IAD] which dismissed his appeal of a removal order made against him on January 28, 2015. The applicant had asked the IAD to exercise its discretionary jurisdiction to grant special relief and to stay his removal order on humanitarian and compassionate [H&C] grounds.

[2] At the IAD hearing, the parties jointly submitted that there should be a stay of the removal order for a period of four years on conditions; however, the IAD did not agree with the joint submission and dismissed the appeal.

[3] The applicant submits that: the decision of the IAD is not reasonable because the IAD misstated and relied on erroneous facts, which influenced their consideration of the relevant criteria; and, the IAD breached procedural fairness because the IAD did not advise him that it was considering not accepting the joint submission and did not provide him with an opportunity to make submissions in response.

[4] For the reasons that follow, the application is allowed. The IAD did not breach its duty of procedural fairness. However, the IAD misstated or misunderstood the facts and, as a result, the decision is not reasonable.

I. Background

[5] The applicant is a citizen of Liberia who left Liberia at the age of three. He arrived in Canada in November 2001 at the age of 15.

[6] He was convicted of possession for the purposes of trafficking (cocaine and heroin) on May 15, 2014 and sentenced to five months in jail. A removal order was issued against him based on this conviction pursuant to paragraph 36(1)(a) of the Act.

[7] In November 2014, he was subsequently convicted of assault, theft and breach of a recognizance and served eight months in jail.

[8] The applicant appealed his removal order to the IAD, but did not challenge its validity. He asked the IAD to exercise its discretion to grant special relief and to stay the removal order on H&C grounds.

II. The Decision Under Review

[9] The IAD noted that the factors to be considered when exercising its discretion to grant relief are those set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) [*Ribic*] (endorsed by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84 [*Chieu*]): the seriousness of the offence, the possibility of rehabilitation, the length of time the applicant has spent in Canada and the degree to which he is established here, the family and community support available to him, the dislocation to his family in Canada that deportation would cause and, the hardship by reason of his removal to his country of origin. The IAD noted that the list is illustrative, not exhaustive, and the weight afforded to each factor will vary according to the circumstances of the case. The IAD also noted the need to consider the best interests of any child affected by the decision and the objectives of the legislation. The IAD considered each of the factors.

[10] With respect to the seriousness of the offence, the IAD stated:

> […] the appellant was convicted of multiple drug trafficking offences, offences which occurred in January 2013. Since the offence gives rise to the removal order, the appellant was subsequently convicted of assault, contrary to section 266 of the *Criminal Code of Canada* on November 21, 2014. He was also convicted the same date of robbery contrary to section 344 of the *Criminal Code of Canada*, as well as breach of curfew contrary to subsection 145(3) of the *Criminal Code of Canada*. I find the seriousness of the offence is a negative factor in this appeal, and the appellant's subsequent convictions to weigh heavily against the granting of the relief.

[11] The IAD found that there was no credible or reliable evidence that there is a pathway to rehabilitation for the applicant, apart from the applicant's own word that he was no longer using drugs and had taken a course in drug and alcohol awareness. The IAD also noted that the applicant had not expressed any remorse.

[12] With respect to the applicant's length of time in Canada and establishment, the IAD noted that although he has lived in Canada since 2001, there was little evidence of establishment.

[13] As a positive factor, the IAD found that the applicant's father and one of his sisters are available to support him.

[14] The IAD gave no weight to the impact on the applicant's family of his removal. The IAD noted that the applicant has a father, two sisters and nieces in Canada. His sister provided a letter of support. However, the IAD noted that there was no documentary evidence that the applicant financially contributes to his family. The IAD found that his criminal choices have likely caused significant disruption to his family.

[15] The IAD found that there would "certainly be hardship" arising from the applicant's removal. The IAD noted that Liberia is a very poor country; the applicant has no roots or family there; and, the applicant has not lived there since he was three years old. However, the IAD stated that: "given the recidivist and serious nature of his crimes, the Panel is hard pressed to find that this hardship is sufficient to warrant the appellant's non-removal from the country or to allow for a stay of the removal order."

[16] With respect to the best interests of any children affected, the IAD noted the applicant's testimony that he occasional babysits his nieces, but found no credible or corroborating evidence of this and concluded, on a balance of probabilities, that there will likely be no impact on the applicant's nieces by his removal from Canada, adding that his removal would likely have a positive impact on his nieces.

[17] In weighing the positive and negative factors and concluding that relief would not be granted, the IAD stated:

> […] the negative features of the case substantially outweigh the positive factors. The crimes he committed that resulted in the removal order are serious -- trafficking in hard drugs -- and represent a threat to the Canadian public. While the appellant has been in Canada for nearly as many years as he lived outside the country, the majority of this period has been involved in committing crimes and not contributing in a peaceful or productive way towards Canadian society.

[18] The IAD also noted the applicant's breaches of prior undertakings and the lack of evidence that he was on the path to rehabilitation.

[19] The IAD stated that it had considered the joint submission for a stay, but noted that in accordance with *Fong v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1134, [2010] FCJ No 1407 (QL) [*Fong*], it was entitled to reject such a submission as long as it provided transparent and intelligible reasons.

III. The Issues

[20] The applicant argues that the decision is not reasonable; the IAD relied on inaccurate information about his criminal history and misstated the facts, which, in turn, influenced its consideration of the other *Ribic* factors; and, the IAD ignored relevant and credible evidence from his sister about his relationship with his nieces in considering the best interests of any affected children.

[21] The applicant also argues that the IAD breached the duty of procedural fairness by rejecting the joint submission without providing any indication that it might do so and without providing an opportunity for him to make submissions about why the joint submission should not be rejected.

IV. Standard of Review

[22] Issues of procedural fairness are reviewable on a correctness standard*: Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43, [2009] 1 SCR 339 [*Khosa*].

[23] The standard of review applicable to the IAD's determination of whether H&C considerations warrant special relief is reasonableness: *Khosa* at para 59; *Nguyen-Tran v Canada (Minister of Citizenship and Immigration)*, 2010 FC 93 at paras 7-8, [2010] FCJ No 106 (QL); *Palmer v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1277 at paras 18-19, [2012] FCJ No 1375.

[24] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). The Court will not re-weigh the evidence or re-make the decision.

V. Is the decision reasonable: Did the IAD misstate and rely on inaccurate facts, which in turn influenced its consideration of the other relevant factors?

[25] The applicant argues that the IAD erred by misstating the facts and relying on evidence that was not credible or trustworthy.

[26] The IAD found that the applicant's criminal history included seven convictions, 45 charges and 170 encounters with the police. The applicant acknowledges that there were seven convictions, but notes that an "encounter" with the police includes any contact with the police, including being a witness or victim of a crime and simply being questioned, which does not reflect any criminal wrongdoing. The applicant adds that the IAD erred by relying on charges that did not result in any conviction in making its decision.

[27] The applicant also argues that the IAD erred in referring to the conviction that underlies his removal order as "multiple drug trafficking offences", noting that he was convicted of two counts of possession for the purpose of trafficking.

[28] In addition, the IAD erroneously stated that the applicant was convicted of robbery. Rather, he was charged with robbery with respect to one incident, but pleaded and was found guilty of theft, which is a lesser offence.

[29] The applicant also argues that the IAD's finding that he had been involved in crime for the majority of his time in Canada is inaccurate and an exaggeration. The applicant notes that his prior convictions were in relation to provincial offences under the *Motor Vehicle Act*, RSBC 1996, c 318. His first criminal conviction occurred in 2012. The applicant submits that this does not represent the majority of his time in Canada, given that he arrived in 2001.

[30] The applicant submits that the errors made by the IAD in assessing his criminal history influenced its consideration of other factors, including his prospects of rehabilitation, and its overall weighing of factors to determine whether relief should be granted.

[31] The respondent submits that it was not the applicant's overall background which the IAD found determinative, but the serious nature of his conviction for drug trafficking, which was the basis for the removal order. The respondent points to the specific wording in the IAD's reasons under the heading of "Seriousness of the Offence" where the IAD found that the "seriousness of

the offence is a negative factor" [emphasis added] and "the appellant's subsequent convictions … weigh heavily" against the granting of special relief.

[32] The respondent also notes that the occurrence reports regarding the drug-related charges, which resulted in the conviction, constitute credible and reliable evidence of the circumstances of those serious offences.

[33] The respondent acknowledges that the IAD erred in finding that the applicant was convicted of robbery rather than theft.

[34] The respondent submits that IAD's consideration of other factors was not influenced by the applicant's criminal background. The applicant's own evidence reflected his lack of serious efforts to pursue or complete rehabilitation programs. The IAD did not misstate anything by referring to the applicant as a "recidivist criminal and convicted drug trafficker" in assessing the best interests of the applicant's nieces. The applicant's testimony about his relationship with his nieces was relied on.

The decision is not reasonable

[35] I find that the IAD misstated the relevant criminal convictions and the applicant's overall criminal background and this had an influence on the consideration of some of the other *Ribic* factors. As such, the decision is not justified by the facts and is not reasonable.

[36] The applicant clearly has a criminal history. The underlying offence of possession of drugs for the purpose of trafficking is not disputed. The issue is whether the consideration of the "seriousness of the offence" in the context of the *Ribic* factors is reasonable.

[37] Although the applicant takes issue with the characterisation as "multiple counts" of drug trafficking, two counts would be "multiple" on a strict interpretation of the term. In addition, possession for the purpose of trafficking is a serious offence. However, the IAD's reasons convey that it was not only the underlying offence that was considered as a negative factor, but the applicant's subsequent convictions and his overall history. The IAD erroneously found the subsequent convictions to include robbery and cited the robbery provision of the *Criminal Code*, RSC, 1985, c C-46. This reference cannot be attributed to the confusion of a layman between robbery and theft. Robbery is a much more serious offence and, in this case, the IAD should have been alive to the distinction between the two offences, given that it referred to the relevant *Code* provision, and to the distinction between charges and convictions.

[38] The IAD referred to the "serious and recidivist nature of his crimes" in considering both the degree of hardship and the best interests of his nieces. The applicant did have more than one conviction for breach of conditions, including a curfew, and this appears to be the basis for the characterisation as a "recidivist". Some of his other convictions were more serious, but the IAD's characterisation should be based on accurate facts and on the offences for which the applicant was, in fact, convicted.

[39] Reading the reasons as a whole, the IAD's misstatement or misunderstanding of the applicant's criminal past influenced its determination on some of the *Ribic* factors. It cannot be determined if the overall weighing of the factors would have been different had the IAD acknowledged that the applicant was not convicted of robbery, that the offences charged are not part of his criminal record, that the encounters with the police are simply encounters of various nature, and that, although the applicant has a criminal record and a troubling past, he was not engaged in criminal activity for the majority of his time in Canada.

VI. Did the IAD breach procedural fairness by not advising the applicant that it was considering rejecting the joint submission?

[40] The applicant acknowledges that the IAD is permitted to reject a joint submission, in accordance with *Fong*. The applicant argues that the IAD must, however, advise the parties that it is considering not following the joint submission and provide an opportunity for the parties to make submissions in response.

[41] The applicant submits that, although *Fong* has been cited in other cases, including *Saroya v Canada (Minister of Citizenship and Immigration)* 2015 FC 428, [2015] FCJ No 407 (QL) [*Saroya*], for the proposition that as long as reasons are provided, the IAD may reject a joint submission, the proposition in *Fong* was based on the facts of that case. In *Fong*, the IAD noted that it would consider a joint submission, but would have to think seriously about it, and invited submissions.

[42] The applicant argues that in the present case, the hearing proceeded with his testimony and questioning by counsel and the IAD Member. The parties then took a break and, before making final submissions on the H&C factors, reached a joint submission. The hearing resumed and the focus was only on the conditions proposed in the joint submission. The IAD did not suggest that it might reject the submission nor did it provide an opportunity for him to make submissions on whether the relief should be granted on the H&C grounds.

[43] The respondent submits that there was no breach of procedural fairness noting that in *Saroya* at para 20, Justice Mosley set out the prevailing law:

> [20] As a matter of law, the IAD is entitled to reject a joint submission if it provides reasons for doing so: *Fong v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1134 at para 31. The fact that counsel for the Minister favoured granting the appeal at the conclusion of the hearing had no binding force on the IAD.

There was no breach of fairness in the circumstances of this case

[44] In my view, the issue is whether there was a breach of procedural fairness in the circumstances of this case, not whether there is a general duty on the IAD to invite submissions on whether to accept or reject a joint submission. There is no disagreement that the IAD may reject a joint submission. When it does so, it must explain why. In the present case, the IAD explained why it rejected the joint submission, finding that positive H&C factors did not outweigh the negative, in particular because of the serious nature of the applicant's crimes and, more generally, his criminal past. As noted above, the IAD's decision was based on misstatements and/or a misunderstanding of the facts.

[45] In *Fong*, Justice Zinn noted:

> [31] I agree with the submission of the respondent that the IAD is entitled to reject a joint submission so long as it provides reasons for so doing: *Hussain v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 334, *Malfeo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 193, *Akkawi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 21, and *Nguyen v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1843 (T.D.). The IAD Member did not reject the joint submission out of hand. She provided reasons that transparently and intelligibly explained why the joint submission was rejected.
>
> [32] The IAD Member was not obliged to invite the parties to provide further evidence after indicating that it would not automatically accept the joint submission. It was incumbent on the applicant to call further evidence if he wished to bolster the joint submission. The applicant decided not to call any further evidence and there was no unfairness or impropriety in the manner the IAD dealt with the joint submission.

[46] The principle enunciated in *Fong* is not novel; as noted by Justice Zinn at para 31, it is well established that the IAD may reject a joint submission. The IAD must consider the submission and explain why it is rejected.

[47] In *Saroya*, the decision does not reveal whether the applicant was specifically notified that the joint submission might be rejected. However, Justice Mosley notes that there were submissions at the hearing and post-hearing submissions regarding the joint submission.

[48] In the present case, the transcript of the hearing reflects that the IAD heard the applicant's testimony. The applicant was questioned extensively by the Minister's counsel, his own counsel and the Member about each of the *Ribic* factors. The Member specifically asked the applicant why the IAD should allow his appeal. The applicant was then re-examined by his counsel.

Following a short break to permit the parties to prepare to make their submissions, the Minister's counsel and the applicant's counsel reached an agreement on a joint submission. The joint submission proposed that the applicant's removal order be stayed for a period of four years on conditions. Following presentation of the joint submission, the questioning continued about: the need for specific conditions; whether any conditions should be modified to reflect the applicant's circumstances; and, whether other conditions should be added. The IAD Member asked the parties if they wished to add anything further. The Member then stated: "So I'm going to consider this matter and I will provide you my reasons and in due course in writing; okay?"

[49] In my view, this statement does not suggest that the Member would consider only the joint submission, rather "this matter" – i.e. the application for relief on H&C grounds. The IAD hearing was thorough and the Member provided an opportunity for submissions, not only with respect to the joint submission, but with respect to the overall application. The jurisprudence had previously and clearly established that the IAD could reject a joint submission. In addition, the applicant could have requested to submit post-hearing submissions to highlight the evidence he relied upon in support of his application and the joint submission.

[50] I cannot find that in these circumstances, the applicant was denied procedural fairness.

[51] As a result, the question proposed for certification by the respondent which asks whether there is a duty on the IAD to notify the parties that it is considering rejecting a joint submission need not be certified as it will not be dispositive of this judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The applicant's request for a stay of his removal order based on H&C grounds shall be considered by a different member of the Immigration Appeal Division.

3. The proposed question is not certified for the reasons set out at paragraph 51 above.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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