Federal Court  Cour fédérale

Date: 20160615

Docket: IMM-4796-15

Citation: 2016 FC 670

Ottawa, Ontario, June 15, 2016

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

PARTHIPAN RASARATNAM

Respondent

JUDGMENT AND REASONS

[1] The Applicant, the Minister of Public Safety and Emergency Preparedness [Minister], has applied pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*Act*], for judicial review of a decision by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board [IRB], whereby the IAD determined that the Minister's notice for cancellation of the Respondent's stay of deportation and termination of the appeal would not be allowed.

I. Background

[2] The Respondent, Parthipan Rasaratnam, is a 39 year old Sri Lankan Tamil who has been a permanent resident of Canada for nearly 23 years. He attended high school in Canada after he and his family arrived here when he was 16 years old, but he dropped out of school in 1995 when he was in grade 11. In March 1995, he was charged with attempted fraud under $5,000 in the first of what would become several criminal charges and convictions between then and November 22, 2012. The Respondent's conviction on November 22, 2012 for unauthorized use of credit card data stemmed from an offence he had been charged with on December 31, 2009.

[3] Suffice it to say by way of background that the Respondent's criminality was such that he became the subject of an inadmissibility report under subsection 44(1) of the *Act* on January 23, 2008, following a criminal conviction in October 2007 for an offence punishable "by a maximum term of imprisonment of at least 10 years" (paragraph 36(1)(a) of the *Act*). The inadmissibility report against the Respondent precipitated an admissibility hearing under subsection 44(2) of the *Act*. The hearing before the Immigration Division of the IRB resulted in a deportation order dated August 28, 2008, being issued against the Respondent who, on September 3, 2008, appealed that order to the IAD. In amended reasons dated August 26, 2010, the IAD stayed enforcement of the deportation order until August 11, 2015, subject to numerous conditions which included that the Respondent not commit any criminal offences, that if charged with a criminal offence to report it in writing to the Canada Border Services Agency [CBSA], and that "if convicted of a criminal offence, immediately report that fact in writing" to the IAD and CBSA.

[4] In late April 2015, the IAD sent a notice of reconsideration for the Respondent's appeal and stay under subsection 68(3) of the *Act*. This notice enclosed a form which requested the Respondent to advise whether he had or had not complied with the conditions of the stay, and if not to provide an explanation. The record suggests that the Respondent may not have received this notice and, in any event, there is no completed form in the record.

[5] By letter dated June 5, 2015, CBSA informed the Respondent that his stay of removal was cancelled and his appeal before the IAD terminated because of his conviction on November 22, 2012, for unauthorized use of credit card data. The CBSA letter (which was copied to the IAD) referred to various provisions of the *Act*, including subsection 68(4) which states:

Termination and cancellation	Classement et annulation
68 (4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.	**68 (4)** Le sursis de la mesure de renvoi pour interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé.

[6] Subsequent to the CBSA letter, the IAD sent a letter to the Respondent dated June 9, 2015, advising that if he believed his appeal should not be terminated he should provide written information and arguments. The Respondent replied to the IAD's letter with submissions dated September 22, 2015, and informed the IAD that the November 2012 conviction was being

appealed. Shortly thereafter, in a terse decision dated October 2, 2015 (the full text of which is quoted below), the IAD determined that:

> This stay reconsideration will be scheduled for a full hearing. The Minister's notice for cancellation of stay- termination of the appeal pursuant to 68(4) will not be allowed. The appellant's charges of December 31, 2009 predates the stay order even though the conviction is registered after the stay order. No new charges and convictions since stay order.

[7] After this decision, which is the decision under review, the IAD proceeded to issue a notice for the Respondent to appear at a hearing before a panel of the IAD to reconsider the stay and the appeal. This hearing has been postponed, however, by an interlocutory decision of the IAD dated February 1, 2016, pending a final disposition of this application for judicial review. This interlocutory decision notes that the Minister has challenged the IAD's jurisdiction to reconsider the stay of the removal order despite the IAD's decision in *Oswald v Canada (Public Safety and Emergency Preparedness)*, 2015 CanLII 92491, 2015 CarswellNat 8396 (CA IRB), where the IAD determined that there is ample support in the common law and this Court that under subsection 68(4) of the *Act* a determination must be made by the IAD rather than the Minister.

II. Issues

[8] The Applicant raises only one issue; that is, was the IAD incorrect in determining that it had the discretion to not apply subsection 68(4) of the *Act* and terminate the Respondent's stay of deportation upon him being convicted on November 22, 2012, for unauthorized use of credit card data?

[9] Aside from this issue though, there is also an issue as to the appropriate standard of review by which the IAD's decision should be reviewed by the Court; and it is to that issue which I now turn.

III. Standard of Review

[10] The Applicant submits that the IAD's decision should be reviewed on a standard of correctness since it deals with the IAD's jurisdiction and the legal effect of provisions of the *Act*.

[11] However, the Supreme Court of Canada has stated in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 [*Alberta Teachers*], that cases dealing with true issues of jurisdiction are exceptional. The majority decision of the Supreme Court in *Alberta Teachers* (per Rothstein, J.) offers the following guidance:

> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[12] More recently, the Supreme Court has reiterated the exceptional nature of truly jurisdictional questions in *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 SCR 219 [*ATCO Gas*], a ratemaking case where Mr. Justice Rothstein, speaking for the Court, stated as follows:

> [27] …This Court's recent jurisprudence has emphasized that true questions of jurisdiction, if they exist as a category at all, an issue yet unresolved by the Court, are rare and exceptional: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34. …
>
> [28] To the extent that an appeal also turns on the Commission's interpretation of its home statutes, a standard of reasonableness also presumptively applies: *Alberta Teachers' Association*, at para. 30. The presumption is not rebutted in this case.

[13] In this case, the IAD is concerned with a provision of its home statute. The IAD is presumed to be familiar with its home statute. The IAD has expertise in the matter and, accordingly, is entitled to due deference (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 68 and 124 [*Dunsmuir*]; *Alberta Teachers* at para 39). The decision is not one outside the specialized expertise of the IAD, nor does it involve a question of law central to the legal system (*Dunsmuir* at para 70). There is no compelling reason to displace the presumption that a standard of reasonableness applies. In view of *Alberta Teachers* and *ATCO Gas*, a deferential reasonableness standard of review, rather than a correctness standard of review, should be adopted in reviewing the IAD's decision in this case. This standard of review also applies to the IAD's application of subsection 68(4) of the *Act* because that involves questions of mixed fact and law (see: *Caraan v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 360, [2014] 4 FCR 243, at paras 20 and 21 [*Caraan*]).

[14] Before leaving this issue, I note that my conclusion that the IAD's decision in this case should be reviewed on a standard of deferential reasonableness conflicts with the Court's decisions in cases such as *Canada (Minister of Citizenship and Immigration) v Bui*, 2012 FC 457, [2013] 4 FCR 520 at para 36 [*Bui*] and *Canada (Minister of Citizenship and Immigration) v Smith*, 2012 FC 582, 411 FTR 187 at para 25 [*Smith*], where the Court adopted a correctness standard of review in respect of the IAD's interpretation of subsection 68(4) of the *Act*. The decisions in *Bui* and *Smith*, however, predate the Supreme Court's more recent statements in *ATCO Gas* as to the appropriate standard of review where questions of jurisdiction are raised by a tribunal's interpretation of its home statute.

IV. Analysis

[15] The Minister asserts that the IAD has no jurisdiction and no discretion to determine that subsection 68(4) does not apply to the Respondent because that subsection automatically cancels the stay of deportation and terminates the appeal where, as in this case, the Respondent has been convicted of an offence under subsection 36(1). According to the Applicant, under subsection 68(4) the IAD's jurisdiction consists only of verifying whether the factual requirements of the subsection are met; in this regard, the Applicant relies upon *Ferri v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1580, [2006] 3 FCR 53 [*Ferri*], where the Court stated as follows:

> [40] [Under subsection 68(4)]…the IAD's jurisdiction is limited to answering the following questions:
>
> 1. Is the individual in question a foreign national or permanent resident?

> 2. Has the individual previously been found to be inadmissible on grounds of serious criminality or criminality?
>
> 3. Has the IAD previously stayed a removal order made in relation to that individual?
>
> 4. Has the individual been convicted of another offence referred to in subsection 36(1)?
>
> [41] If the answer to each of these questions is in the affirmative, as is admittedly the case here, then the section is clear: the IAD loses jurisdiction over the individual, with the stay being cancelled and the appeal being terminated by operation of law.

[16] The Minister further argues that this Court has previously held that the provisions of subsection 68(4) are met by a post-stay conviction in respect of a pre-stay charge, and in this regard relies upon *Canada (Citizenship and Immigration) v Malarski*, 2006 FC 1007, 294 FTR 319, at paras 3, 11 and 17 [*Malarski*], *Caraan* at para 48, and *Bui* at para 45.

[17] As was the case in *Malarski*, this application in essence involves a dispute between the Minister and the IAD about the IAD's jurisdiction to make the determination as to whether the Respondent's stay of removal has been cancelled and his appeal to the IAD terminated by the operation of subsection 68(4). In *Malarski*, the IAD had dismissed the Minister's notice advising of the cancellation of the stay of deportation. The Court in *Malarski* set aside the IAD's decision on the basis that the IAD had no jurisdiction to treat the Minister's cancellation notice as a motion for reconsideration and issue a decision rejecting the notice. The Court in *Malarski* further determined that the Minister's cancellation notice was of no force and effect because subsection 68(4) of the *Act* did not, in fact, cancel the stay by operation of law based on a breach of the stay conditions. Although the post-stay conviction in *Malarski* related to a pre-stay charge,

there was no breach of the stay conditions because Mr. Malarski's stay conditions explicitly excluded certain specific pre-stay charges from the "no criminal acts" condition attached to the stay.

[18] This case can be distinguished from *Malarski*. The IAD in that case considered the Minister's cancellation notice as a motion for reconsideration of the stay and its decision was set aside on that basis. In this case, however, the IAD's decision cannot be faulted on this basis because it, on its own initiative, had already commenced the process for reconsideration of the stay and the appeal more than a month before it received the Minister's cancellation letter dated June 5, 2015; this letter was not treated by the IAD as a motion for reconsideration but, rather, as part of the reconsideration process already commenced by the IAD. This case is also unlike *Malarski* because the stay conditions in that case expressly contemplated that certain specific pre-stay charges were excluded from the "no criminal acts" condition; whereas in this case there is no such specific exception for the pre-stay charges.

[19] This case can also be distinguished from *Bui*, a case where the IAD had refused to cancel the stay after advising the parties it would reconsider the stay and the appeal without a hearing after considering the parties' written submissions (see paras 7 to 9). In this case, unlike *Bui*, the IAD has ordered a full hearing in the decision under review to consider whether the stay is cancelled by operation of law and the appeal is terminated. It may or may not do so after such hearing. The IAD's statement in the decision under review that the Minister's notice will not be allowed is one that simply confirms that it is the IAD, and not the Minister, which is the entity that should, as stated in *Ferri*, be the one which ultimately determines whether the factual

preconditions for application of subsection 68(4) of the *Act* apply. It would be incongruous, in my view, that the entity which granted the stay in the first place was subsequently deprived of jurisdiction to determine at a later date whether the conditions pertaining to such stay had been cancelled by operation of law.

[20] Lastly, this case is also unlike that in *Caraan* since the IAD had cancelled Mr. Caraan's stay *after* the Minister's application to the IAD to cancel the stay under subsection 68(4) of the *Act*. In this case, not only has the Minister made no such application, but the IAD has yet to hear and determine whether the stay of removal afforded to the Respondent should be cancelled by operation of law and the appeal terminated.

[21] The Minister argues that once the IAD has verified the factual requirements to trigger application of subsection 68(4), the IAD does not have jurisdiction to dismiss his notice cancelling a stay and is obligated to terminate the stay. Implicit, though, in this argument is the Minister's acknowledgement that the IAD does have jurisdiction at least to review a cancellation notice, and consider and determine whether the factual requirements of subsection 68(4) have been met as stated in *Ferri* (at paras 40-41). This is something the IAD has yet to do by ordering that the matter should be scheduled for a full reconsideration hearing. In the circumstances of this case it was reasonable for the IAD to schedule a full reconsideration hearing in order to determine for itself whether the requirements of subsection 68(4) were present. It may well be the case that following its reconsideration hearing the IAD, like the Minister, concludes that the requirements of subsection 68(4) have been satisfied and the Respondent's stay cancelled and his

appeal terminated. That decision, however, should be made by the IAD because it, not the Minister, issued the stay and it has not terminated the appeal proceeding still before it.

[22] It should be noted, as the Applicant does, that some decisions of this Court since *Malarski* have determined that a pre-stay offence for which there is post-stay conviction is a conviction for purposes of subsection 68(4). However, this case law is unresolved in view of the certified questions which have been stated in *Caraan* and *Bui*, but which, unfortunately, did not proceed to the Federal Court of Appeal for answers. In *Caraan*, Justice Scott certified this question:

> During a stay of removal order, does subsection 68(4) of the IRPA only apply to convictions for subsection 36(1) offences committed after the beginning of the stay?

[23] Similarly, in *Bui* Justice Martineau certified this question:

> Does subsection 68(4) of the IRPA apply to a permanent resident convicted of, during his or her stay, an offence of serious criminality when the acts alleged to constitute the offence were committed before the beginning of the stay?

[24] Moreover, it is not altogether clear precisely what the words "convicted of *another* offence" mean for purposes of subsection 68(4) [emphasis added]. Does this mean a conviction for some offence other than that for which a foreign national or permanent resident has been only charged when a stay of removal is granted by the IAD? Or, does it mean only an offence for which the foreign national or permanent resident has been both charged and convicted after the stay order was issued? In any event, it is unnecessary to answer these questions in this case because the IAD in this case has yet to determine whether the factual requirements of

subsection 68(4) are present and, presumably, it will do so at the postponed reconsideration hearing.

V. Conclusion

[25] The Applicant's application for judicial review is dismissed. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed, and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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