Federal Court  Cour fédérale

Date: 20180108

Docket: IMM-1247-17

Citation: 2018 FC 6

Ottawa, Ontario, January 8, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

KAM TIM TONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, Kam Tim Tong, seeks judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, dated February 24, 2017, which, pursuant to subsection 68(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], reconsidered Mr. Tong's appeal of a deportation order made against him in 2007 and dismissed the appeal.

[2] The Applicant was born in Hong Kong and is a citizen of New Zealand. He was granted permanent residence status in Canada in November 1993. His former wife and three (3) children chose not to follow him to Canada and remain in New Zealand.

[3] In 2005, the Applicant was convicted of possession of narcotics for the purposes of trafficking under subsection 5(2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19. He was sentenced to two (2) years probation and was fined $50,000, of which $15,000 was payable immediately and the remainder payable over the next two (2) years.

[4] As a result of the Applicant's conviction, he was deemed inadmissible for serious criminality under paragraph 36(1)(*a*) of the IRPA and a deportation order was made against him in February 2007.

[5] The Applicant appealed the deportation order to the IAD. On September 11, 2009, the IAD ordered a stay of the Applicant's deportation for a period of four (4) years on consent of the Respondent. The stay carried terms and conditions, including that the Applicant report in person to the Canada Border Services Agency every six (6) months on specified dates, that his written report contain specific details, that he make reasonable efforts to seek employment, and that he respect all probation/parole conditions and any court orders.

[6] At the expiry of the stay in 2013, the Respondent submitted a written statement to the IAD indicating that he did not consent to the Applicant's appeal being allowed. It was the Respondent's position that the Applicant had failed to comply with some of the conditions of his

stay of removal as he had not served the Respondent with his written statement of compliance, had not applied for an extension of the validity of his passport or travel document before it expired, and had made no reasonable efforts to seek and maintain full-time employment.

[7] The IAD reconsidered the Applicant's appeal in 2014. Upon considering the joint recommendation of the parties, the IAD extended the stay for an additional period of two (2) years with amended conditions. One of the conditions required the Applicant to enter into a payment plan for the repayment of his outstanding criminal conviction fines.

[8] Three (3) months before the expiry of the stay in 2016, the Respondent sought a reconsideration of the Applicant's stay of removal on the grounds that the Applicant was not compliant with the conditions of his stay. The Respondent then filed a written statement informing the IAD that the Applicant had failed to: 1) provide his written statement to the Respondent; 2) make reasonable efforts to seek and maintain full-time employment (condition 10); 3) respect the court order with respect to the repayment of his outstanding criminal conviction fines (condition 13); and 4) keep the peace and be of good behaviour, because he had been fined $375.00 under the *Highway Traffic Act* (condition 15).

[9] In reconsidering the Applicant's appeal, the IAD heard from the Applicant, who appeared without counsel and gave evidence on his personal circumstances and the reasons why he had not complied with the IAD's previous stay conditions. The IAD dismissed the Applicant's appeal on February 24, 2017 on the basis that the Applicant had not established sufficient humanitarian

and compassionate [H&C] considerations to warrant granting another stay and because of the Applicant's incapability of abiding by the conditions of a stay.

[10] The Applicant claims that the IAD denied him procedural fairness by conducting the hearing without an interpreter and by making biased comments during the hearing. He also submits that the IAD's assessment of the relevant H&C factors and treatment of the Applicant's evidence was unreasonable.

II. Analysis

A. *Preliminary Matter*

[11] In support of his application for judicial review, the Applicant filed two (2) affidavits and supporting documents. The affidavits were sworn on April 18, 2017 and August 14, 2017. The Respondent submits that portions of the affidavits and attached exhibits are inadmissible because they advance arguments and rely upon evidence not before the IAD, and that the Applicant is thereby improperly attempting to address on judicial review the concerns raised by the IAD in its reasons.

[12] It is well-established that judicial review of a tribunal decision is to be considered on the basis of the material that was before the tribunal when it made its decision (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22; *Castillo Afable v Canada (Citizenship and Immigration)*, 2010 FC 1317 at paras 20-22).

[13] While there are a few recognized exceptions to this general rule, the Applicant has not demonstrated that any of those exceptions apply in this case. Accordingly, paragraph 9 of the affidavit sworn April 18, 2017 and its exhibits A, B, and D, as well as paragraphs 4 to 7 and 9 of the affidavit sworn August 14, 2017 and its exhibits A, B, C, and D will not be considered for the purposes of this application for judicial review.

B. *No Breach of Procedural Fairness*

[14] The Courts have consistently held that the applicable standard of review to issues of procedural fairness is correctness. When reviewing a decision on the basis of correctness, the question that arises is not whether the decision was "correct", but rather whether, in the end, the process followed by the decision-maker was fair (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]; *Majdalani v Canada (Citizenship and Immigration)*, 2015 FC 294 at para 15; *Hashi v Canada (Citizenship and Immigration)*, 2014 FC 154 at para 14).

[15] The Applicant submits that the IAD member should not have conducted the hearing without an interpreter as he is not fluent in English and did not have counsel to assist him. The Applicant also argues that certain comments made by the IAD member during the hearing evidence a bias against him.

[16] I am not persuaded by the Applicant's arguments.

[17] While the Applicant might have preferred to have an interpreter assist him, he agreed to proceed without one, and at no point during the hearing did he give any indication that he did not understand the questions nor that he needed interpretation. At the outset of the hearing, the IAD member asked the Applicant whether he needed an interpreter. The Applicant responded: "[y]eah, if you got it yeah". The Respondent's counsel then informed the IAD member that the Applicant had not required an interpreter at the previous hearings. At this point, the IAD member asked the Applicant: "[y]ou do not understand…?", reminding him that he had not needed an interpreter four (4) months before, when he was last at the IAD. The Applicant then responded, "I can hear you but you have speak slowly." The IAD member then stated to the Applicant: "[a]ll right, let us try that first. So far do you understand…" and the Applicant replied, "So far, I understand." During the hearing, the Applicant agreed that if there was something he did not understand he would tell the IAD member. The Applicant also confirmed at the end of the hearing that he had understood everything that had been said and asked, and was given the opportunity to raise any issues with his ability to communicate, which he did not do.

[18] The onus was on the Applicant to object to the language of the hearing at the first opportunity possible and his failure to do so implies that he accepted to proceed in English (*Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 742 at paras 18-19; *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191 at para 19, cited in *Abegaz v Canada (Citizenship and Immigration)*, 2017 FC 306 at para 14).

[19] Moreover, I am satisfied upon a review of the transcript that the Applicant understood the questions that were asked of him and that he was able to express himself well in English. The

IAD member's questions were often open-ended questions which required more than a "yes" or "no" answer and the Applicant's answers were responsive to the questions. There is no indication that the Applicant did not understand or that he had difficulty expressing himself.

[20] In addition, there is nothing in the record which suggests that the Applicant received the assistance of an interpreter when he testified at the reconsideration hearing conducted in 2014.

[21] I conclude that the Applicant's complaints arise from his lack of counsel and not from interpretation issues. Although unrepresented litigants are owed a heightened duty of fairness, I am satisfied that the Applicant was provided with sufficient opportunity to present his story (*Lee v Canada (Citizenship and Immigration)*, 2012 FC 705 at para 12).

[22] With respect to the Applicant's argument regarding bias on the part of the IAD member, there is nothing in the record or in the transcript that supports the Applicant's allegation.

[23] Accordingly, the Applicant's argument that he was denied procedural fairness must fail.

C. *The IAD's Decision is Reasonable*

[24] The Applicant submits that the IAD's decision is unreasonable because it did not properly assess and give due weight to all the relevant factors in considering whether there were sufficient H&C grounds to order another stay of the deportation order, including the best interest of the Applicant's Canadian-born son.

[25] The issues raised by the Applicant involve questions of fact and of mixed fact and law and are reviewable on a standard of reasonableness (*Santiago v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 91 at paras 25-26 [*Santiago*]).

[26] When the standard of reasonableness applies, the role of the Court is to determine "whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and the law"; if there is "justification, transparency, and intelligibility within the decision-making process", it is not up to this Court to substitute its own view of the appropriate solution (*Khosa* at para 59; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[27] In order to allow an appeal or to stay a deportation order pursuant to paragraph 67(1)(*c*) and subsection 68(1) of the IRPA, the IAD must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient H&C considerations warrant the special relief sought in light of all the circumstances of the case. This is a highly discretionary exercise that attracts significant deference by this Court (*Santiago* at para 28).

[28] In conducting its analysis, the IAD is required to specifically consider the factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 [*Ribic*] and approved by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, which are: (i) the seriousness of the offence that led to the deportation order; (ii) the possibility of rehabilitation; (iii) the length of time spent in Canada and the degree of establishment; (iv) family in Canada and the dislocation to that family if the

appellant were to be deported; (v) the family and community support available to the appellant; and (vi) the degree of hardship that would be caused to the appellant by his return to his country of nationality (see *Santiago* at para 30).

[29] The Applicant submits that the IAD's assessment of the *Ribic* factors is unreasonable. He argues that the IAD did not consider his advanced age, his time spent in Canada, his family ties in Canada, the difficulties he would experience in re-establishing himself in New Zealand, his full-time employment, his rehabilitation and the relative degree of seriousness of the Applicant's criminal conviction. Relying upon *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, the Applicant further submits that the IAD did not sufficiently consider the best interests of his sixteen (16) year old son in Canada and the economic and emotional hardship that his Canadian common law wife and son would experience upon his deportation. Finally, the Applicant contends that he was unfairly penalized by the IAD for failing to provide his tax returns in addition to his pay stubs as evidence of employment and that he ought to have been able to submit his tax returns after the hearing.

[30] Again, the Applicant has not persuaded me of the merits of his arguments.

[31] Contrary to the Applicant's submissions, the IAD expressly considered the Applicant's age and health concerns, the length of time he has been in Canada, his estrangement from his family in New Zealand, his family connections in Canada, including his common-law spouse and son with whom he resides, as well as the absence of any further convictions since being granted the stay order. The IAD also noted that the Applicant had been working for two (2) years and the

reasons why he had not been employed for a period of approximately five (5) years before that. Finally, the IAD considered the hardship the Applicant's son and common-law spouse would suffer if the Applicant were to return to New Zealand and found that they could rely upon family in Canada or attempt to unite with the Applicant abroad.

[32] The Applicant argues that the IAD did not properly assess the best interests of his child and that, if it had, the IAD would have allowed the Applicant to stay in Canada at least until his son graduated from high school and no longer needed the presence of his father. I am satisfied that the IAD reasonably addressed the best interests of the Applicant's son given the minimal evidence adduced by the Applicant as to how his son would be affected. The IAD's hardship analysis is reasonably commensurate with the lack of evidence furnished by the Applicant at the hearing.

[33] The IAD gave "considerable weight" to all of these positive factors but ultimately found that they did not overcome the Applicant's failure to comply with the terms of his judicial and stay orders or his poor prospects in complying with future stay orders. Noting that the Applicant was assisted by counsel both at the inadmissibility hearing and during his subsequent two (2) stay hearings, the IAD rejected the Applicant's explanation that he did not have knowledge of his stay conditions and of the importance of complying with such conditions.

[34] The IAD found that the Applicant failed to provide sufficient evidence of his full-time employment. As noted earlier, one of the Applicant's stay conditions was to make reasonable efforts to seek and maintain full-time employment. The IAD noted that the Applicant only

provided pay stubs going back four (4) months. It is in that context that the IAD noted that there was no credible reason why the Applicant had not provided, not only at his last stay order hearing, but also in the current reconsideration hearing, notices of assessments to support the income he claimed to be earning. On the basis of the record before it, it was reasonably open to the IAD to find that the Applicant did not appear to take seriously his obligation to provide proof of full-time employment and to make reasonable efforts to look for such employment.

[35] The IAD also considered the Applicant's failure to make any payments towards his criminal convictions fines or to enter into a payment plan as he had been required to do at the last stay hearing. While the IAD appreciated that the Applicant was of modest means and that he was now offering to enter into a plan and have his future pension set off his debt, the IAD ultimately found that the Applicant had had ample time to begin making payments toward the repayment of his fines and that he had not demonstrated that he had made any efforts to do so. The IAD concluded it was not remotely persuaded that the Applicant would begin to do so despite the Applicant's assurances that he would.

[36] I do not accept the Applicant's argument that it was unreasonable for the IAD to place significant weight on the Applicant's nonpayment. The 2014 reconsideration decision specifically made it a condition that the Applicant takes steps towards paying his outstanding criminal conviction fines. At paragraph 12 of its decision, the IAD had stated:

> A condition for the continued stay of removal is that the appellant enter into an installment plan and make every effort to satisfy the fine imposed by the criminal courts. The above fees were not imposed for mere miscellaneous infractions -rather, they represent the criminal court's opinion of the seriousness of the appellant's criminal offence . . . ignoring these fees demeans the criminal

> court's objective of restoring justice for a public that was harmed by the appellant's criminal activities. In this context, the importance of these fines cannot be overstated.

[37] The Applicant testified that he was not made aware of this condition by his counsel as they had a falling out over the payment of his legal fees. However, I note from the 2014 stay decision that the Applicant was questioned at the last hearing regarding his outstanding debt. He testified that he had satisfied the $15,000 portion of the fine in one lump-sum payment nearly fifteen (15) years ago, but that he had not entered into any type of payment plan to pay the remainder. Given that the Applicant was granted a stay of his deportation in 2009, subject to conditions, and that his stay was extended in 2014, it would have been reasonable for him to ensure that he knew what conditions had been imposed upon him as the failure to do so could lead to the stay being cancelled. Moreover, even if the Applicant did have a falling out with his previous counsel, it is highly unlikely that counsel would withhold information about the Applicant's stay conditions.

[38] It also appears from the record that the Applicant was on notice that the IAD would address the issue of his compliance with the stay conditions. At a conference in April 2016 that preceded the reconsideration now under review, the Applicant was informed of the Respondent's concerns regarding his employment and failure to repay the criminal conviction fines.

[39] The Applicant's 2005 criminal conviction fine is significant and, to this day, remains largely outstanding. The relief he sought from the IAD is exceptional and highly discretionary. In these circumstances, it was reasonable for the IAD to place significant weight on the Applicant's non-compliance with his stay conditions. Such a finding is consistent with this Court's recent

decision holding that a breach of one or more conditions of a stay is a "violation of the very basis for a stay" as well as an important "circumstance of the case" as contemplated by sections 68(1) and 67(1)(c) of the IRPA (*Santiago* at para 52). The Applicant's failure to take any steps towards payment of his outstanding fines was a cogent reason for the IAD to depart from its last stay order.

[40] Overall, I am satisfied that the IAD weighed all the relevant factors and that its analysis was reasonably responsive to the evidence furnished by the Applicant. I see no basis to interfere with the IAD's decision as it falls within the range of possible, acceptable outcomes which are defensible in light of the facts and the law (*Khosa* at para 59; *Dunsmuir* at para 47).

III. Conclusion

[41] For all of these reasons, the application for judicial review is dismissed. No questions were proposed for certification and I agree that none arise.

JUDGMENT in IMM-1247-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship Canada" with the "Minister of Citizenship and Immigration";

3. No question is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1247-17
STYLE OF CAUSE:	KAM TIM TONG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	DECEMBER 14, 2017
JUDGMENT AND REASONS:	ROUSSEL J.
DATED:	JANUARY 8, 2018

APPEARANCES:

Dov Maierovitz	FOR THE APPLICANT
Amy King	FOR THE RESPONDENT

SOLICITORS OF RECORD:

EME Professional Corporation Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT