Federal Court  Cour fédérale

Date: 20211028

Docket: IMM-1988-21

Citation: 2021 FC 1151

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 28, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

EYUP ATAY

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Eyup Atay, is seeking judicial review of an Immigration Appeal Division [IAD] decision rendered on March 8, 2021, dismissing his appeal of an exclusion order issued against him.

[2] The applicant is a citizen of Turkey. He has been a permanent resident of Canada since 1991, when he was 8 years old.

[3] The applicant has accumulated a significant number of criminal convictions since 2002. Most of the offences were committed while he was under the effect of alcohol. His last conviction was in 2018, when he pled guilty to two charges of assault causing bodily harm and two charges of assault. The applicant was sentenced to an intermittent term of 90 days of imprisonment with 2 years of probation, including 18 months of supervision and 240 hours of community work. The applicant is also subject to several conditions, including abstaining from alcohol.

[4] On February 27, 2019, a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], was drafted against the applicant. The officer was of the opinion that the applicant was inadmissible on grounds of serious criminality within the meaning of paragraph 36(1)(a) of the IRPA. The report was referred to the Immigration Division [ID] for an admissibility hearing under subsection 44(2) of the IRPA.

[5] On November 10, 2020, the ID found that the applicant was inadmissible under paragraph 36(1)(a) of the IRPA and issued a deportation order against him.

[6] The applicant appealed the ID decision before the IAD pursuant to subsection 63(3) of the IRPA. He did not challenge the validity of the deportation order, but raised humanitarian and

compassionate considerations to obtain special relief and keep his permanent resident status. The applicant sought a four-year stay of the removal order.

[7] The IAD concluded that there were insufficient humanitarian and compassionate considerations to allow the appeal. It found that (1) the offence in question was very serious and yielded four victims; (2) the applicant's criminal record showed several offences for which the applicant systematically downplayed his actions and shirked his responsibility; (3) the possibility of rehabilitation was quite low, considering the applicant's limited awareness and low implementation of any significant changes; (4) the applicant's establishment remained embryonic nearly 30 years after he arrived in Canada; (5) the significant role of the applicant in his niece's life had not been demonstrated; and (6) although a return to Turkey would cause him stress and there would be an adaptation period, the applicant had family in Turkey, spoke the language, and had no employment restrictions. The IAD also deemed that there was no reason to grant a stay of removal.

[8] The applicant submits that the IAD decision is unreasonable and that the IAD was biased.

II. Analysis

A. *Standard of review*

[9] The standard of review to apply in decisions rendered by the IAD pursuant to paragraph 67(1)(c) of the IRPA is reasonableness (*Canada (Minister of Citizenship and*

Immigration) v Vavilov, 2019 SCC 65 at paras 10, 16–17 [*Vavilov*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

[10] When the reasonableness standard applies, the Court will focus "on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). It must ask whether the decision "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). Moreover, the "burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100).

[11] With regard to the allegation of the IAD's bias, the right to an impartial hearing falls under procedural fairness. In such cases, the role of this Court is to determine whether the proceeding was fair considering all the circumstances (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54–56).

B. *Reasonableness of IAD decision*

[12] The applicant contests the IAD's statements that he [TRANSLATION] "joked," "laughed" and "smiled" during the hearing. He submits that on the contrary, he was very respectful to the IAD and that he answered the questions that were addressed to him to the best of his knowledge

and memory. He notes that the IAD should have taken his level of education into consideration when assessing his testimony.

[13] It is not the Court's duty to reassess the IAD's conclusions about how the applicant behaved during his testimony. The IAD saw and heard the applicant testify. The Court must show considerable deference to the IAD's assessment. Nevertheless, the Court listened to the excerpt on which the IAD based its finding that the applicant was joking around during his testimony. He did indeed joke when the IAD suggested to him that it was virtually impossible that the four pounds of cannabis found at his residence were for personal consumption. Laughing, the applicant responded, [TRANSLATION] "that didn't go over, but yes, usually I'm a consumer, but I'm not a dealer." The IAD could reasonably state that the applicant had joked during the hearing.

[14] Additionally, the Court cannot agree with the argument that the IAD did not consider the applicant's level of education in its assessment. On the contrary, it specifically made reference to it in its reasons. It indicated that the applicant responded to the questions well, and it did not have the impression that his level of education prevented him from expressing himself.

[15] The applicant also submits that the IAD erred when it wrote, in reference to the search of his home, that [TRANSLATION] "a judge had been satisfied that there were reasonable grounds to authorize one". Specifically, the applicant alleges that there is no evidence on record that a search warrant had been issued and notes that the IAD does not have specialized criminal law knowledge.

[16] The Court disagrees.

[17] In his testimony about the circumstances surrounding his conviction for possession of narcotics for the purpose of trafficking, the applicant explained that a friend who lived above him had been under police surveillance. The applicant affirmed, in reference to the police, that [TRANSLATION] “they had a warrant for the three storeys”. He then repeated that the police [TRANSLATION] “had a warrant for everywhere”. The applicant himself referred to a warrant being issued. Moreover, even if it recognized, as the applicant submits, that the IAD does not have specialized criminal law knowledge, the Court does not believe that it was unreasonable for the IAD to believe that the judge who issued the warrant was satisfied that there were reasonable grounds to authorize it.

[18] The applicant also criticizes the IAD’s finding that there were breaches of condition when the convictions were from several years earlier. He submits that the IAD could not conclude that he had been convicted for breach of condition when there were no charges for such breaches.

[19] In reviewing the applicant’s lack of seriousness about respecting the conditions he had to comply with in the past, the IAD recognized that the charges for breach of condition were from several years earlier. It noted, however, that the offences that led to the removal order were committed while the applicant was on probation for the offence of drug possession for the purpose of trafficking and he was not only required to abide by the law, but also to keep the peace and be of good behaviour. It added that even if he was not charged with breaching his

probation, there was nonetheless a fairly recent *de facto* breach of condition. The Court is of the opinion that it was not unreasonable for the IAD to make this finding, despite the absence of a formal charge for breach of probation. This finding was based on the facts on the record and is relevant to the assessment the IAD had to make of the applicant's ability to respect his conditions should it stay the removal order.

[20] The Court also disagrees with the applicant when he states that the IAD erred in making a speculative finding about his ability to stop drinking without therapy and without relapsing. The applicant submits that this statement is not based on any evidence in the record.

[21] The applicant is interpreting the IAD's statements out of context. The IAD explained that the applicant did not do anything about his alcohol problems and deemed that his explanations were not persuasive. In light of the evidence on the record showing that the applicant's alcohol problems have existed for a long time, it was reasonable for the IAD to have doubts about his testimony that he had decided to completely stop drinking without therapy and without relapsing.

[22] The Court agrees with the applicant that the IAD's comment about the sale of drugs was not supported by the evidence on the record. The IAD stated in its reasons that it could be concluded that the applicant sold drugs considering his conviction for drug possession for the purpose of trafficking. The record does not indicate that the applicant has ever been accused of drug trafficking. Without condoning the comment, the Court nonetheless feels that it has to be put into context. The IAD was examining the degree of the applicant's establishment, and more specifically, his employment and income situation. At the hearing, the applicant was questioned

about his jobs, his sources of income and his expenses. The evidence shows that he had very little money to support his alleged expenses. He also testified that the police found four pounds of cannabis at his home, which had resulted in his conviction for drug possession for the purpose of trafficking. Although the conclusion that the applicant was selling drugs while he was receiving social assistance benefits is not justified or based on the evidence, the Court does not believe that it was so unreasonable as to invalidate the IAD decision. The decision must be read holistically and contextually.

[23] The same can be said for the IAD finding regarding the applicant's financial contribution to his parents. The IAD actually seems to be saying that the amount the applicant mentioned in his testimony was not supported by his father's letter.

[24] The applicant is also contesting the IAD findings that he has not taken responsibility for his crimes and the fact that it questions his self-awareness and possibility of rehabilitation. Relying on the probation officer's report, he submits that the documentary evidence shows the opposite.

[25] The Court cannot agree with the applicant's arguments.

[26] The IAD considered the probation officer's report but disregarded it. It explained why it had doubts about its validity and the opinion expressed therein. The IAD also mentioned the elements of the applicant's testimony on which it relied to make its assessment. The Court finds these explanations coherent and reasonable.

[27] Moreover, it is relevant to note that the role of the probation officer is different from that of the IAD. The IAD's jurisdiction on appeal is broad. Under subsection 68(1) of the IRPA, the IAD can stay a removal order if it is satisfied that "sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case." When exercising this power, the IAD considers several non-exhaustive factors established in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) at paragraph 14, approved by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paragraph 40, and *Al Sagban v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4 at paragraph 11. These factors include the seriousness of the offence and the possibility of rehabilitation. It is up to the IAD, as a specialized tribunal, to determine the applicant's possibility of rehabilitation (*Kacprzak v Canada (Citizenship and Immigration)*, 2011 FC 53 at para 58). The applicant has not established that there is a basis for intervention in this case.

C. *Bias or appearance of bias of the IAD*

[28] Lastly, the applicant states that certain comments in the IAD's decision suggest a lack of neutrality and create an apprehension of bias. For example, the applicant criticizes the IAD for stating "[o]nce again, the appellant walked away with fines and probation." Using the phrases "[o]nce again" and "walked away with" shows bias, or at least creates the appearance of bias. The applicant also alleges that the IAD was looking for negative elements to justify refusing a stay of the removal order and accuses it of turning positive factors into negative factors.

[29] The test for determining whether there is an apprehension of bias was set out in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 [*Committee for Justice and Liberty*]. The apprehension must be reasonable, and the Court must ask "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude" (*Committee for Justice and Liberty* at p 394; see also *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*, 2015 SCC 25 at para 20 [*Yukon*]).

[30] The grounds must be substantial and not simply based on conjecture or personal impressions. Allegations of this kind are serious and must be clearly supported by the evidence (*Mulla v Canada (Citizenship and Immigration)*, 2017 FC 445 at para 18). The party alleging the bias or appearance of bias has the burden of proving it. This burden is high because the decision-maker is presumed to be impartial (*Yukon* at paras 25–26; *Arthur v Canada (Attorney General)*, 2001 FCA 223; *Senat v Canada (Public Safety and Emergency Protection)*, 2020 FC 353 at paras 40–41; *Lostin v Canada (Citizenship and Immigration)*, 2013 FC 1098 at para 26).

[31] First, it is important to note that the applicant stated before this Court that the allegation of bias did not involve the IAD's conduct at the hearing or its interventions. If this were the case, it should have been raised at the earliest opportunity (*AB v Canada (Citizenship and Immigration)*, 2016 FC 1385 at para 139 [*AB*]; *Shahein v Canada (Citizenship and Immigration)*, 2015 FC 987 at para 24).

[32] In this case, the words for which the IAD is being criticized cannot be examined in isolation. They were pronounced when the IAD was reviewing the applicant's numerous convictions over the years. When the criticized words are read in their entirety and in context, the Court cannot conclude that an informed person, viewing the matter realistically and practically, and having thought the matter through, would be of the opinion that the IAD was biased (*AB* at para 151).

[33] Regarding the allegation that the IAD was looking for negative factors or that it turned positive factors into negative factors, the Court considers this to be unfounded and based solely on personal impressions. A reading of the reasons shows that the IAD considered all the evidence. It noted the positive and negative factors. However, after weighing all the factors, it found that special relief was not warranted in light of the record.

[34] Thus, the applicant did not persuade the Court that the IAD's reasons reflect a reasonable apprehension of bias according to the high threshold established by the case law. It is relevant to note that a judicial review is not a "line-by-line treasure hunt for error" (*Vavilov* at para 102).

[35] To conclude, the Court is of the opinion that when the IAD's reasons are read holistically and contextually, they have the hallmarks of reasonableness—justification, transparency and intelligibility (*Vavilov* at paras 97, 99). Moreover, the applicant did not establish a breach of procedural fairness. The Court therefore has no reason to intervene in this case.

[36] For these reasons, the application for judicial review is dismissed. No question of general importance has been submitted for certification, and the Court feels that this case does not give rise to one.

JUDGMENT in docket IMM-1988-21

THE COURT'S JUDGMENT IS that:

1. The application for judicial review is dismissed; and

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

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