Federal Court  Cour fédérale

Date: 20230809

Docket: IMM-9244-22

Citation: 2023 FC 1088

Ottawa, Ontario, August 9, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

ENOCK OKWENA MAKORI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of a Member of the Immigration Appeal Division [IAD], dated September 8, 2022 [the Decision]. In the Decision, the IAD cancelled, pursuant to subsection 68(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], a five-year stay of removal that had previously been granted to the Applicant.

[2] For the reasons explained in greater detail below, this application is dismissed. The Applicant seeks to challenge the Decision on both reasonableness and procedural fairness grounds. However, the Applicant's challenge to the reasonableness of the Decision is based on a statutory interpretation argument that was not raised before the IAD, and the procedural fairness arguments are either unsupported by the record or were not raised before the IAD, in the Notice of Application, or in the Applicant's Memorandum of Argument in the within proceeding.

II. Background

[3] The Applicant is a citizen of Kenya and a permanent resident of Canada. He landed in Canada in 2016 when he was 18 years old.

[4] In November 2019, the Applicant was convicted under section 348(1)(b) of the *Criminal Code*, RSC 1985, c C-46 for breaking and entering with intent. This is an indictable offence that is subject to imprisonment for a term not exceeding ten years. Because he was convicted of an offence that carried a maximum term of imprisonment of at least ten years, the Applicant became inadmissible to Canada on grounds of serious criminality. As a result, a deportation order was issued against him.

[5] The Applicant appealed the deportation order under subsection 63(3) of the IRPA. The IAD allowed the appeal on February 13, 2022, and entered a five-year stay of removal with terms and conditions.

[6] On June 17, 2022, the Applicant was convicted of two more offences: (a) break and enter with intent, which carries a maximum sentence not exceeding ten years, and (b) operation of a vehicle while under prohibition, which also carries a sentence of more than ten years. These offences were committed before the Applicant's appeal that had resulted in the IAD's February 13, 2022 stay of removal.

[7] As a result of these two new convictions, the Canada Border Services Agency notified the Applicant, by letter dated August 9, 2022, that his stay of removal was cancelled by operation of law. This letter explained that these convictions fall under the serious criminality provisions of paragraph 36(1)(a) of the IRPA and that the Applicant's stay would therefore be cancelled under subsection 68(4) of the IRPA. As noted in the letter, subsection 68(4) of the IRPA provides that, if the IAD has stayed a removal order against a permanent resident or foreign national who was found inadmissible on grounds of serious criminality, and the permanent resident or foreign national is convicted of another offence referred to in subsection 36(1) of the IRPA, the stay is cancelled by operation of law.

[8] The Applicant did not contest the facts of these convictions. However, by letter from his counsel to the IAD dated August 22, 2022, the Applicant raised humanitarian and compassionate [H&C] considerations, highlighting in particular hardship that he would face if returned to Kenya, in support of a request that his stay be allowed to continue.

III. Decision under Review

[9] The Decision under review in this application reads as follows:

> The Appellant was placed on a five year stay of removal on February 13, 2022. According to the Minister's submissions, the Appellant was convicted, on June 17, 2022 of Break and Enter with Intent which carries a maximum sentence not exceeding 10 years and Operation of a Vehicle while under a Prohibition which carrying [*sic*] a sentence of more than 10 years. These offences fall under the serious criminality provisions in the *Immigration and Refugee Protection Act*. The Appellant's counsel does not contest the facts of these convictions but rather raises humanitarian and compassionate considerations. Humanitarian and compassionate considerations are not applicable in this situation. By Section 68(4) of the *Act* the stay is cancelled by operation of law and the appeal is terminated.

IV. Issues and Standard of Review

[10] With the benefit of the Applicant's counsel's oral submissions at the hearing of this application, the Court understands that the Applicant is challenging both the reasonableness and procedural fairness of the Decision. I would articulate the issues raised by the Applicant's arguments as follows:

A. Did the IAD err in interpreting subsection 68(4) of the IRPA to apply to a permanent resident or foreign national convicted of, during his or her stay of removal, an offence of serious criminality where the acts alleged to constitute the offence were committed before the beginning of the stay?

B. Did the IAD deprive the Applicant of procedural fairness, including by failing to hold an oral hearing before making the Decision?

[11] The first issue, involving interpretation of the IAD's home statute, is governed by the standard of reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65). The procedural fairness argument is subject to the standard of correctness (see

Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship), 2020 FCA 196 at para 35).

V. Analysis

A. *Did the IAD err in interpreting subsection 68(4) of the IRPA to apply to a permanent resident or foreign national convicted of, during his or her stay of removal, an offence of serious criminality where the acts alleged to constitute the offence were committed before the beginning of the stay?*

[12] The Applicant submits that, at the time of the Applicant's successful appeal that resulted in his stay of removal, both the Minister and the IAD knew about the pending charges that subsequently resulted in the Decision. He argues that it is highly prejudicial to the Applicant to have those pre-stay charges result in the cancellation of his stay once the charges have matured into convictions. The Applicant takes the position that applying subsection 68(4) of the IRPA in this manner represents an unreasonable interpretation of the subsection.

[13] This Court has previously addressed this issue in decisions that are not favourable to the Applicant's position (see *Canada (Citizenship and Immigration) v Bui*, 2012 FC 457 [*Bui*]; *Caraan v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 360). However, the Applicant notes that in *Bui*, Justice Martineau certified for appeal a question raising this issue of statutory interpretation. The Applicant argues that, in the case at hand, the Court should depart from the existing jurisprudence and certify for appeal effectively the same question.

[14] In addition to arguing that the Court should follow the existing jurisprudence, the Respondent submits that the Court should reject the Applicant's argument because he did not

raise this argument before the IAD. Rather, he asked the IAD to continue his appeal based on H&C considerations.

[15] I agree with the Respondent. Before the IAD made the Decision impugned in this application, his then counsel provided written submissions by letter dated August 22, 2022, which raised H&C considerations including the Applicant's history and family circumstances, his remorse and willingness to take responsibility for his criminal activity in Canada, and hardship he would face if he returned to Kenya. The Applicant's counsel argued that he is not a danger to the public, noted that the Applicant had made the IAD aware at the time of his appeal hearing that he was awaiting decision on criminal charges, and advised that the Applicant was hopeful that his stay would be allowed. However, counsel's letter does not raise the issue that he is now arguing on this application, to the effect that subsection 68(4) of the IRPA does not apply to convictions resulting from pre-stay acts.

[16] Judicial review requires the Court to rule on the questions put before the administrative decision-maker, based on the reasons given by the decision-maker in support of the decision rendered (see, e.g., *Kaur v Canada (Citizenship and Immigration)*, 2006 FC 1066 at para 17). The jurisprudence is clear that arguments that were not before the decision-maker below cannot properly be raised for the first time on judicial review before a Court (see, e.g., *Goodman v Canada (Public Safety and Emergency Preparedness)*, 2022 FCA 21 at para 4, citing *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61).

[17] Based on these principles, the Applicant necessarily fails on the first issue raised in this application.

B. *Did the IAD deprive the Applicant of procedural fairness, including by failing to hold an oral hearing before making the Decision?*

[18] At the hearing of this application for judicial review, I understood the Applicant's counsel first to argue that the Applicant was deprived of procedural fairness because he did not have an opportunity to make submissions to the IAD before it made the Decision. However, as the Respondent argues and as was canvassed earlier in these Reasons, the Applicant clearly did have such an opportunity, as his previous counsel made written submissions to the IAD before the Decision was made.

[19] The Applicant also argues that he was deprived of procedural fairness because the IAD did not hold an oral hearing. He has cited no authority for the proposition that an oral hearing is required before a decision is made under subsection 68(4) of the IRPA.

[20] In response to this argument, the Respondent notes that there is no evidence that the Applicant asked for an oral hearing. His counsel's August 22, 2022 letter does not contain such a request. Moreover, the Respondent notes that the Applicant's Application for Leave and for Judicial Review, dated September 23, 2022, does not raise the absence of an oral hearing before the IAD as a ground for review. Nor does the Applicant's Memorandum of Law and Argument raise this argument.

[21] The jurisprudence of this Court is clear that, unless the situation is exceptional, new arguments not presented in a party's Memorandum of Fact and Law should not be entertained, as to do so would prejudice the opposing party and could leave the Court unable to fully assess the merits of the new argument (see, e.g., *Altiparmak v Canada (Citizenship and Immigration)*, 2018 FC 776 at para 11). I find nothing exceptional about the present situation that would merit departure from this principle. I therefore decline to consider the Applicant's argument as to the need for an oral hearing.

VI. Certified Question

[22] As a result of the foregoing analysis, this application for judicial review must be dismissed. However, as previously noted, the Applicant submits that the Court should certify for appeal the following question, which is substantially the same as the question certified in *Bui*:

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

[23] This Court can certify a question for appeal only if the question is one which was dealt with in the Court's reasons and which would be dispositive of an appeal (see, e.g., *Zaghbib v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 182 at para 55). In the case at hand, the Applicant's argument surrounding the interpretation of subsection 68(4) of the IRPA was rejected because it had not been raised before the IAD. As such, the Court has not analyzed that argument in these Reasons, and the proposed certified question would not be dispositive of an appeal. I therefore decline to certify the proposed question.

JUDGMENT IN IMM-9244-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9244-22
STYLE OF CAUSE:	ENOCK OKWENA MAKORI v. MCI
PLACE OF HEARING:	TORONTO,ON
DATE OF HEARING:	JULY 19, 2023
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