Date: 20081017

Docket: IMM-1472-08

Citation: 2008 FC 1178

OTTAWA, ONTARIO, OCTOBER 17, 2008

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

TARLOK SINGH BAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review brought pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, of a decision by the Immigration Appeal Division of the Immigration and Refugee Board (the IAD), dated March 4, 2008. The Tribunal confirmed the Deportation Order made against the Applicant by a member of the Immigration Division, and refused his application for a stay of removal on humanitarian and compassionate grounds.

[2] Despite counsel for the Applicant's very able submissions, I cannot conclude that the Tribunal made any reviewable errors that stand to be corrected by this Court. Having carefully read the Tribunal's reasons and the record that was before it, I have come to the conclusion that the Tribunal did take into consideration the best interests of the Applicant's child, that the interpretation was adequate, and that Tribunal was entitled to consider the jurisprudence tendered and to reach its own conclusion. For these reasons, this application for judicial review shall be dismissed.

BACKGROUND

[3] The Applicant is a 40 year-old permanent resident, originally from India. He has a Grade 7 education from his local village school, was a farmer until he came to Canada, and does not understand English.

[4] Most of his family – excluding the Applicant – were sponsored by one of his sisters and immigrated to Canada in the early 1990s. It was not until December 1998 that the Applicant immigrated to Canada. He was sponsored by his wife, whom he had married through an arranged marriage. The Applicant and his wife shared a house with his parents, his sister and his family in Surrey.

[5] The Applicant and his wife have two sons. The Applicant's wife also has a daughter from a previous marriage, but according to the Applicant that child stayed with them for three years and then went to live with her biological father.

[6] From 1999 to 2004, the Applicant was criminally convicted four times for assault, and four times for breach of probation. Each time, he pled guilty. The assault victim in each instance was his wife. Following these assault charges, the Applicant and his wife have separated and reconciled from time to time. Between 1999 and 2005, they lived apart for three or four years.

[7] The last assault occurred on May 10, 2005. The Applicant and his family claimed that his wife had had a "kitchen mishap" while putting away dishes. The Court did not find the Applicant or his explanation to be credible. The judge made reference to the Pre-sentence report in his decision, noting the Applicant's alcohol abuse of the Applicant, his failure to attend counselling, and his relapse. He also noted the Applicant's son's evidence that he had been the victim of abuse from his father, particularly when his father had been drinking. Despite the Applicant's withdrawal of his guilty plea, the Court eventually convicted him for assault causing bodily harm on April 13, 2006. Having regard to the nine months he had served in pre-trial custody, the judge sentenced the Applicant to one day plus two years of probation.

[8] Since the incident on May 10, 2005, the Applicant's wife moved out from the Applicant's parents' family home. Before the Tribunal, the Applicant testified that he and his wife had retained legal counsel to negotiate the terms of their divorce, and that the divorce process had begun in 2000. On December 11, 2007, based on his application and with the consent of the Applicant's wife, the Applicant was granted a Consent Order by the Supreme Court of British Columbia to have supervised access to his children. The Applicant was present at the hearing with his wife, and his counsel told the Court that they were "in the process of reconciliation".

[9] On November 8, 2006, the Applicant was given an opportunity to make submissions as to why he should not be found inadmissible for serious criminality in light of his April 13, 2006 conviction for assault causing bodily harm.

[10] On December 4, 2006 and again on December 5, 2006, the Applicant's counsel made written submissions. By his counsel, he denied he assaulted his wife and claimed he pled guilty to criminal charges at his lawyers' insistence and so that he could get out of jail sooner. He accused his wife of being a liar and of various wrongdoings. He claimed not to have consumed alcohol for over four years and to have attended some counselling.

[11] On June 22, 2007, the Immigration Division held an admissibility hearing. The Applicant was represented by legal counsel and admitted to the facts. The Applicant, who had been criminally convicted under s. 267(b) of the *Criminal Code*, carrying a potential maximum term of imprisonment of 10 years, was found inadmissible for serious criminality as a person described in s. 36(1)(a) of the *Immigration and Refugee Protection Act*. Following the hearing, the Immigration Division issued the Removal Order.

[12] As previously mentioned, the Applicant did not appeal the validity of the Removal Order to the IAD. Rather, he sought a stay of removal on humanitarian and compassionate grounds.

THE IMPUGNED DECISION

[13] On February 8, 2008, the IAD held a hearing *de novo* to determine whether or not to stay the Removal Order, pursuant to s. 68(1) of the *IRPA*. In a detailed decision released on March 4, 2008, the IAD declined to grant a stay.

[14] Applying the factors to be considered when exercising its discretionary jurisdiction as set out by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 84 (the so-called *Ribic* factors, named after the decision of the IAD confirmed by the Supreme Court), the IAD found that the negative factors outweighed the positive ones. These factors included: 1) the seriousness of the Applicant's offence leading to the Removal Order; 2) the Applicant's previous criminal record and pattern of repeated violent offences; 3) the Applicant's establishment in Canada was not significant and his ties were not exceptional; 4) given the length of time the Applicant had been in Canada, the IAD was not satisfied with the evidence of support from family, friends and community. There was no credible evidence that the Applicant's family or community support could help him stay out of trouble in future, especially as they had been unable to do so in the past; 5) there was no reliable evidence that his family was financially or emotionally dependent upon him or that they would suffer significant dislocation as a result of his removal; 6) there was no credible evidence of significant hardship to the Applicant if he were to return to India; and 7) the Applicant had not demonstrated a sufficient degree of rehabilitation and remained at risk to re-offend. In this last respect, the IAD wrote:

> The evidence of the appellant's pattern of assaults against his wife indicates a lack of remorse, his failure to accept full responsibility and culpability for his criminal and unacceptable behaviour since his

> first conviction, his failure to take meaningful and timely corrective steps toward becoming rehabilitated, his numerous lapses and breaches of probation, his tendency to minimize his new charges in 2005, absence of evidence of further counselling to deal with his alcohol addiction problems besides unreliable evidence of participating in the AA meetings, outweighs his evidence to support his claim of a changed lifestyle. Based on the evidence before me I am not satisfied that the appellant's demonstrated sufficient degree of rehabilitation and I find that a risk remains that the appellant may re-offend in the future.

[15] The IAD also found that the Applicant's answers were not straightforward and sometimes contradictory, and therefore concluded that he was not a credible witness.

[16] The IAD took into account the best interests of the child affected by the decision, not only vis-à-vis the Applicant's children but also vis-à-vis his nieces and nephews. With respect to his sons, the Member found the Applicant's evidence of his relationship before the last assault of their mother indicative of the lack of meaningful involvement in their life. When the Applicant and his wife separated, she took the children with her and he did not make child support payments. Moreover, the Applicant admitted that, given his drinking problem, his children were mostly cared for by his parents and siblings. The IAD Member summed up his conclusions in the following paragraph:

> [39] I find that in the best interest of any children is to be cared by both parents, however, based on the evidence in this case and on a balance of probabilities I find in the best interests of the appellant's children is to remain under the care of their mother. Given the history of assault perpetrated by the appellant on the mother of his children and the effect it had on them I

> find the evidence of the appellant's supervised visits, which began two months before the Consent Order was issued, inconsistent with the conclusion that the appellant will be granted joint custody as a result of the divorce settlement, as claimed. While the appellant testified that he loves his children and he enjoys their company, I find no sufficient evidence to support the appellant's claim that he has dealt sufficiently with the extent of his problem of alcohol abuse, that he is not likely to re-offend and that his continuous stay in Canada is in the best interest of his children. No reliable evidence was adduced at the hearing to suggest that if the appellant is removed his parents and siblings can not re-establish their relationship with his two children, subject to their mother's approval.

ISSUES

[17] The Applicant raised several issues in his written memorandum and in his oral submissions. I will deal with each of them in the following reasons. That being said, there are two questions that deserve to be addressed more extensively. The first is whether the IAD made a reviewable error in not properly considering the best interests of the Applicant's children. The second is an issue of procedural fairness: has the Applicant been denied the right to a fair hearing by being denied a competent interpreter?

STANDARD OF REVIEW

[18] There is agreement between the parties as to the applicable standard of review. The assessment of the weight placed on the evidence by the IAD and how it interpreted that evidence at the hearing is a question of fact, and it should accordingly be reviewed on a standard of reasonableness in the wake of *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190. Provided the

decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", this Court will not intervene.

[19] As for issues of procedural fairness, it is well established that the standard of review analysis does not apply. Procedural fairness raises questions of law, to be reviewed on a standard of correctness. Where a breach of procedural fairness is found, the decision must be set aside: *Sketchley* v. *Canada (Attorney General)*, 2005 FCA 404; *Canadian Union of Public Employees* v. *Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539.

ANALYSIS

[20] The Applicant argues that the IAD did not take sufficient account of the Consent Order and failed to understand its import. Counsel for the Applicant went as far as saying that the IAD decision gives rise to a conflict of laws insofar as the competent Court in the area of family law has found that regular weekly contact between father and sons is in the children's best interests, whereas the IAD has found that the best interests of the Applicant's two sons are served by his permanent removal.

[21] Counsel for the Applicant also contended that the IAD failed to have any regard for the provisions in international instruments ratified by Canada that are directly relevant to the rights of children, and in particular to the Convention on the Rights of the Child. As evidence of this oversight, it was noted that the IAD nowhere refers to paragraph 3(3)(f) of the *IRPA*, which provides that it must be construed and applied in a manner that complies with international human

rights instruments to which Canada is a signatory. The IAD did, however, refer to other objectives of the Act, namely to paragraphs 3(1)(e), (h) and (i).

[22] Having carefully read the reasons given by the IAD for refusing to grant a stay of removal, I am unable to conclude that it was not "alive, alert and sensitive" to the best interests of the Applicant's child. With respect to the Consent Order, in particular, I agree with the respondent that it is now too late for the Applicant to argue that it bars his removal. He neither raised this point at his admissibility hearing as a ground not to make a removal order, nor did he appeal the removal order.

[23] Perhaps more importantly, I fail to see how the Consent Order could be interpreted as preventing the removal of the Applicant from Canada. A court order for access simply sets out the parameters for a parent to see his or her child, if that parent is otherwise able to exercise that access. It does not override or supersede everything else. If the parent to whom access has been provided is unable to access his or her children due to medical conditions, absence from Canada, or a jail sentence, for example, it does not necessarily follow that the Court Order has been disobeyed.

[24] This is not to say that the Court Order, though not determinative, did not have to be considered. Indeed, the IAD expressly took account of the Consent Order. However, it also had an independent statutory duty to consider the best interests of the Applicant's children in the context of assessing whether or not to grant a stay of removal. The IAD fulfilled that mandate. To say that the

IAD did not place adequate emphasis on the Consent Order is an argument directed at the weight given to the evidence, and this beyond the scope of judicial review.

[25] As for the Applicant's argument based on the use of international law, it is fully answered by the recent decision of the Federal Court of Appeal in *Thiara* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FCA 151. In that case, the Court held that it is not necessary for a tribunal to mention expressly the relevant international instruments concerning children, as long as the tribunal takes in substance those considerations into account. This is precisely what the IAD did in the present case. While *Thiara* was decided in the context of s. 25 of the *IRPA*, I believe the same reasoning applies with equal force, by analogy, to a discretionary decision made by the IAD pursuant to s. 68(1).

[26] Turning to the Applicant's second argument, it is contended that lengthy portions of the recording of the hearing were inaudible, therefore preventing a meaningful review of what was said by the Applicant at the hearing. This is apparently further compounded by the poor quality of the interpretation provided to the Applicant. Relying on the affidavit of an articling student in the law firm of Applicant's counsel, who describes himself as being fluent in the Punjabi and English languages, numerous problems with the interpretation were pointed out to this Court. This, in turn, would have prevented the Applicant from fully participating in the hearing of his application before the IAD.

[27] This argument cannot prevail for several reasons. First of all, it is fair to say that the interpretation is not required to be perfect, as long as it is "continuous, precise, impartial and contemporaneous": *Lawal* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 861. Indeed, as Chief Justice Lamer wrote in *R.* v. *Tran*, [1994] 2 S.C.R. 951, at p. 978: "…the principle of linguistic understanding which underpins the right to interpreter assistance should not be elevated to the point where those with difficulty communicating in or comprehending the language of the proceedings, be it in English or French, are given or seen to be given unfair advantages over those who are fluent in the court's language".

[28] If this holds true in the context of criminal law, it is all the more so in immigration hearings, where it is surely in the interests of the individual and of the public that various claims and applications be processed as soon as practicable. While it is important that acceptable safeguards be adhered to, it is equally crucial that the huge caseload of the Immigration and Refugee Board of Canada not be inordinately delayed by imposing too high a standard.

[29] Here, the Applicant's complaint is based solely on his personal view as supported by that of the articling student. There is no evidence that this articling student is a qualified interpreter. Moreover, the respondent asked a qualified and experienced interpreter, Mr. Singh, to review the tape of the hearing. In his affidavit, this interpreter acknowledged that some errors were made at the hearing. For example, the interpreter used the word "struck" instead of "hit", and did not use the proper word to translate "alcoholic" in Punjabi. Mr. Singh also noted that at one time, the interpreter failed to simultaneously interpret the whole discussion between the Hearing Officer and

the legal counsel involved in the hearing. But in the end, Mr. Singh was of the view that the few technical errors in the translation "were not so serious as to affect the outcome of the hearing". He also wrote in his affidavit that he had "no concern with the overall quality of the Recording".

[30] Mr. Singh has been an interpreter in the English, Punjabi, Hindi and Urdu languages for seven years and is an Immigration and Refugee Board-qualified interpreter who has conducted interpretation and translations for the IRB. He candidly admitted that, in his view, the interpreter at the hearing made some technical errors. Not only is he a more credible witness than the articling student, but the Applicant has been unable to demonstrate how the errors made could have been material and prejudicial.

[31] There is another reason to reject the competence of the interpreter as a ground for judicial review. The Applicant had the benefit of a Punjabi-speaking counsel, Ms. Ajeet Kang, at the IAD hearing. It is apparent from the transcript that Ms. Kang was fluent in both English and Punjabi. Further, she credited the interpreter at the hearing with being "quite a seasoned interpreter". Ms. Kang generally took no issue with the calibre of the interpretation. When she saw fit to object to the interpretation, corrective measures were taken to her apparent satisfaction. The Applicant must therefore be taken to have waived his right to object to the quality of the interpretation.

[32] Faced with a similar situation in *Mohammadian* v. *Canada (Minister of Citizenship and Immigration)* [2000] 3 F.C. 371, Mr. Justice Pelletier had this to say (at para. 29):

> In this case, I find that the question of the quality of the interpretation should have been raised before the

> CRDD because it is obvious to the Applicant that there were problems between him and the interpreter. His affidavit refers to the difficulty he had in understanding the interpreter and says that at times he did not understand what was being said. This is sufficient to require him to speak out at the time. His failure to do so then is fatal to his claim now. The Applicant's assertion that he did not know he could object to the interpreter is not credible given that the first hearing was adjourned because he and the interpreter could not communicate. Clearly, the CRDD has shown it was alive to the issue of interpretation. As a result, I do not have to engage in an analysis of whether all the elements of Tran have been met since, even if they have, the Applicant's failure to make a timely complaint in the circumstances where it was reasonable to expect him to do so means that relief is not available to him.

[33] The Federal Court of Appeal not only confirmed that decision (2001 FCA 191), but went out of its way to stress that the burden is on the Applicant to complain about the interpretation at the first reasonable opportunity. For a unanimous Court, Justice Stone wrote (at para. 18):

> As Pelletier J. observed, if the appellant's argument is correct a claimant experiencing difficulty with the quality of the interpretation at a hearing could do nothing throughout the entire hearing and yet be able to successfully attack the determination at some later date. Indeed, where a claimant chooses to do nothing despite his or her concern with the quality of the interpretation, the Refugee Division would itself have no way of knowing that the interpretation was in any respect deficient. The claimant is always in the best position to know whether the interpretation is accurate and to make any concern with respect to accuracy known to the Refugee Division during the course of the hearing, unless there are exceptional circumstances for not doing so.

[34] In reply, counsel for the Applicant argued that once a problem with the interpretation has been raised, the onus shifts to the tribunal to ensure the adequacy of the interpretation. It was his submission that counsel for the Applicant before the IAD could not be expected to object every time there is a problem with the interpretation, as this process would not be practical and may not even be tolerated. I cannot accept that argument. Not only would this be contrary to the jurisprudence that has developed around the concept of waiver, but it would put an impossible burden on the shoulders of IAD and RPD members who are generally not in a position to assess by themselves the quality of the interpretation. It may be that in exceptional circumstances, such as when repeated objections are made to the interpretation, exceptional measures will have to be taken by the presiding member. However, the evidence before me does not disclose such a state of affairs.

[35] A few arguments remain, which I shall now discuss briefly. First, the Applicant is of the view that the Removal Order is disproportionate to the assault to which he pleaded guilty nearly two years ago, and to the underlying and relatively minor previous criminality. The Applicant also submitted that the IAD fettered its discretion by failing to consider previous decisions where a stay was granted despite what he would characterize as much more serious offences. By simply stating, "I find the cases cited not helpful as they differ on facts" without any further analysis, it is contended that the IAD offended the principle of *stare decisis*.

[36] This line of argument is without merit. A stay is an extraordinary and discretionary relief, and each case turns on its own facts. The IAD applied the *Ribic* test; that the outcome is not what the Applicant had hoped for does not amount to reviewable error. Seriousness of the offence is not

limited to the nature of the charges, but also includes other features of the case. Moreover, it is only one of the factors to be taken into account and weighed in all of the circumstances of the case. Finally, the IAD did not have to proceed with a detailed analysis of the cases submitted by the Applicant; the Member considered these cases and provided brief but entirely adequate reasons to explain why it was not granting a stay despite that jurisprudence.

[37] The Applicant also asserts that the IAD did not make a credibility finding with regard to the witness Zoe Henderson, whose *viva voce* evidence allegedly corroborated the Applicant's testimony as to his remorse and low risk of re-offending. As the Applicant's sister-in-law, Ms. Henderson was not an objective witness. The IAD expressly considered the evidence of Zoe Henderson and other family members and accepted some of it. Nevertheless, in the end it was not satisfied, on the totality of the evidence that the Applicant was truly remorseful, sufficiently rehabilitated, or unlikely to re-offend. I agree with the respondent that simply re-weighing the evidence is beyond the scope of judicial review.

[38] The Applicant then submits that the IAD erred in dismissing the expert evidence of the psychiatrist, Dr. Harrad, for the mere reason that his report was not dated. This is mistaken. The IAD squarely addressed that evidence at paragraphs 23, 24, and 29 of its reasons. The IAD notes that Dr. Harrad was not identified as an expert witness pursuant to the *Immigration and Refugee Protection Regulations*, and that it was not clear what evidence was presented to Dr. Harrad by the Applicant's counsel with respect to the Applicant's criminal history in Canada to assist in the assessment of the Applicant's risk to re-offend as a result of his alcohol addiction. The IAD also

took into account other evidence as to alleged alcohol treatment and rehabilitation, such as AA meetings, but was not satisfied that the evidence was sufficiently credible and/or reliable and/or otherwise adequate. Again, simply re-weighing the evidence is beyond the scope of judicial review.

[39] For all of the foregoing reasons, this application for judicial review must be dismissed. Of course, if ever the Applicant's wife wants to sponsor him back to Canada, she will be entitled to do so in the future.

[40] Counsel did not propose questions for certification, and none need be certified.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed. No serious question of general importance is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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