Date: 20090611

Docket: IMM-2338-08

Citation: 2009 FC 597

Ottawa, Ontario, June 11, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

NGOC TRANH HO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board, dated February 28, 2006, which

cancelled the applicant's stay of removal, dismissed his appeal, and directed that the removal order be executed as soon as reasonably practicable.

[2] The applicant "respectfully prays" that this application for leave and judicial review be permitted to proceed. The applicant requests that the following question be certified:

> Should stays be always be considered to be priori less preferable than allowance of dismissal as stays always create a future operational burden on the Division that allowance and dismissal does not.

1. An order for a writ of *certiorari* setting aside the decision dated February 28, 2006;

2. An order to stay any attempt to remove the applicant from Canada pending the resolution of this matter before the Federal Court; and

3. Such further and other relief that counsel may suggest and this Honourable Court may deem appropriate.

Background

[3] The applicant, Ngoc Tranh Ho, became a permanent resident of Canada on September 25, 1984. He was born September 18, 1968 in Vietnam. The applicant was married in Canada and has a son, although he does not have an on-going relationship with him beyond financial child support payments.

[4] On October 19, 2000 the Immigration Division (ID) of the Immigration Refugee Board issued a deportation order against the applicant because he had been convicted of three counts of

trafficking in a narcotic and three counts of proceeds of crime and was sentenced to ten months in jail followed by two years of probation. In October 2000 a deportation order was issued. In October 2000, the applicant appealed the deportation order based on humanitarian and compassionate (H&C) grounds to the Immigration Appeal Division (IAD). The appeal did not contest the validity of the deportation order, but instead argued that pursuant to paragraph 70(1)(b) of IRPA, that having regard to all the circumstances of the case, the applicant should be granted special relief and not be removed from Canada.

[5] The IAD Board heard the appeal on August 20, 2001. A decision was rendered the same day. The IAD Board issued an order finding that the removal order of October 19, 2000 is in accordance with the law but ordered that the respondent's removal order be stayed for four years until a review by the IAD on or about August 20, 2005.

[6] The stay order was made with a number of conditions, most notably that the applicant:

- Report in writing to the Regional Manager, Immigration Appeals, Citizenship and Immigration, GTEC, Hearings and Appeals (Regional Manager) starting January 22, 2002 and for every two months thereafter including a reporting form that had details to inform the Department of Citizenship and Immigration of employment, living arrangements, and attendance at meetings of Alcoholics Anonymous, or any other drug or alcohol rehabilitation program with details such as date and location of meeting.
- Notify the Immigration Appeal Division in writing in advance of any change in Address.

- Keep the peace and be of good behaviour.
- Report in writing any criminal convictions FORTHWITH to the Regional Manager
- make reasonable efforts to seek and maintain full-time employment and immediately report any change in employment.
- Attend a drug or alcohol rehabilitation program such as Alcoholics Anonymous at least once per month. NOTE: IF YOU WITHDRAW YOUR CONSENT TO THE FOREGOING CONDITION, YOU MUST BRING AN APPLICATION TO THE IAD FORTHWITH TO HAVE THIS CONDITION REMOVED.
- Respect all parole conditions and any court orders.
- Not knowingly associate with individuals who have a criminal record or who are engaged in criminal activity.
- Not own or possess offensive weapons or imitations thereof.
- Refrain from the illegal use or sale of drugs.
- Keep the peace and be of good behaviour and not commit further criminal offences.

[7] On January 2006, the IAD conducted an oral review of the stay of the respondent's removal order. On February 28, 2006 the IAD cancelled the applicant's stay and dismissed his appeal of his deportation order. The applicant seeks judicial review of this decision.

IAD's Reasons

[8] The Board found that the onus was on the applicant to show that special relief "remains warranted" and "why he should not be removed from Canada". The Board member begins by outlining a number of factors that the IAD considers when exercising its discretionary jurisdiction in removal order appeals including the best interest of the child. The Board cites *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL) and *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 in this regard. Factors include:

(a) The seriousness of an offence or offences leading up to a removal order;

(b) The possibility of rehabilitation, or alternatively, the circumstances surrounding the failure to meet the conditions of admission;

(c) The length of the time spent, and the degree to which the appellant is established in Canada;

(d) The family in Canada and the dislocation to the family that removal would cause;

(e) The family and community support available to the appellant, and

(f) The degree of hardship that would be caused to the appellant by the appellant's return to his or her country of nationality.

[9] The Board found that after considering these factors, the Board agreed with the respondent that special relief was no longer warranted and that despite the four-year opportunity provided, the applicant was not fully rehabilitated and that there was still a risk of re-offending.

[10] The Board found that the "overall criminality in this case is serious" from the perspective of the offences prior to the deportation order and the subsequent criminal convictions for impaired driving and failure to provide a sample as well as offences for trespass and speeding. The Board

stated that the trespass and speeding offences breached the conditions of the IAD “to keep the peace, be of good behaviour, and not commit further criminal offences”.

[11] The Board then goes on to address the issue of drug and alcohol abuse and the IAD conditions to receive treatment at least once a month. The Board was not persuaded “that the appellant has attended or, if he has, that he has taken it seriously” because the applicant had not provided documentation that corroborates his attendance in any kind of rehabilitation program. The Board also finds it implausible that the applicant “attended and appreciated” the rehabilitation program because during the oral hearing the applicant had not heard of a link between alcohol and crack abuse. He finds on a balance of probabilities that the applicant breached his conditions regarding cocaine as well.

[12] The Board found that the applicant was not established culturally or financially in Canada despite being here for over 20 years. In particular, the Board noted that the applicant was unable to communicate in an official language of Canada during the hearing and also noted that the applicant’s work has been mainly low wage.

[13] The applicant’s return to Vietnam would not be a hardship according to the Board. Similar low wage work could be found in Vietnam.

[14] Insofar as family factors, the Board weighed the different familial responsibilities and relationships in the applicant’s life. He noted that the applicant has more family in Vietnam than in Canada, however, he does have a 15 year old child in Canada that he has been financially

supporting although he maintains no real on-going contact. The Board noted that another significant relationship was one that the applicant had developed with his common-law girlfriend and her children.

[15] Despite the familial ties, the Board found that nevertheless, the negative factors in this analysis substantially outnumbered the positive ones.

Issues

[16] The applicant submitted the following issues for consideration:

1. Did the Board member err on the face of the record and err in fact in dismissing this appeal on February 28, 2006?

2. Did the Board member exceed his jurisdiction and was he concerned with irrelevant considerations in dismissing his appeal on February 28, 2006?

[17] I would rephrase the issues as follows:

1. What is the standard of review?

2. Did the IAD Board err in fact when considering the evidence on breach of conditions on the stay of removal?

3. Did the IAD err in law when he stated that stays should always be considered to be *priori* less preferable than allowance or dismissal?

Applicant's Submissions

[18] The standard of review is that of reasonableness when considering decisions that require discretion and relief and they should be granted under paragraph 18(4)(d) of the *Federal Courts Act*. The applicant submits that questions of law such as the IAD's considerations of the *Ribic* above factors on the evidence are reviewed on a standard of correctness.

[19] The applicant raises two issues in this judicial review. One, that the IAD Board made "fundamental" errors in reviewing the evidence. Two, that the Board made the decision on the basis of an erroneous standard of the law that does not exist.

[20] First, the applicant takes particular issue with the conclusions that the Board drew from the oral hearing regarding the applicant's alleged use of crack and alcohol. The applicant notes the excerpt:

> Member:...when was the last time you used crack?
>
> Answer: 1997/1998.
>
> Member: Do you see any link between alcohol and crack?
>
> Answer: I do not understand your question – can you please explain more about that...
>
> Member: Well I am asking the questions...has anyone told you that cocaine abuse can be triggered by alcohol abuse?
>
> Answer: No I have not heard.

> Member: No one ever told you that?
>
> Answer: No.
>
> Member: I see.
>
> Cross examination by Mr. Consky: Since 2001 have you drank alcohol on a regular or occasional basis?
>
> Answer: Only New Year's day – 1 to 2 bottles.
>
> Mr. Consky: 1 to 2 bottles of what?
>
> Answer: bottles of beer.

[21] The applicant is particularly bothered by the conclusions drawn by the Board and states that it is a perverse, incorrect and unsubstantiated finding from this testimony. The applicant submits that the Board erred when it used this evidence to find that the applicant was using crack during his stay and appeal. The finding that the applicant had not attended rehabilitation for drug and alcohol abuse was the second error in the submissions. The applicant states that the one question and the one answer regarding the applicant's awareness of the link between alcohol and crack abuse do not make it implausible that the applicant did not attend drug rehabilitation and that the applicant provided documentation nonetheless.

[22] The applicant suggests that there were many other problems with the Board's analysis of the evidence as well as instances where factors were not considered altogether such as the offence leading to deportation.

[23] Finally, the applicant submits that the Board was wrong "to concern himself with the "burden" of stays" and exceeded his jurisdiction when he did so. The Board member's understanding of a purpose of a stay is erroneous in law, incorrect and not supported by legislation or policy.

Respondent's Submissions

[24] The respondent submits that findings of fact are reviewed with significant deference and as such a standard of review is that of reasonableness (see *Bielecki v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 442 and *Thach v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 834 and must meet the standard of paragraph 18.1(4)(d) of the *Federal Courts Act*. The respondent outlined the jurisprudence and legislation in the area of IAD decisions on stay of removal orders. The legislative scheme and principles with respect to IAD appeals was stated as in *Canada (Minister of Citizenship and Immigration) v. Stephenson*, 2008 FC 82. Jurisprudentially, *Chieu* above, was cited for the onus that exists on a permanent resident who is ordered deported to establish why he or she should be allowed to remain in Canada. The *Ribic* above factors are also noted in this analysis.

[25] The respondent submits that since the applicant's arrival into Canada he has engaged in "significant and serious" criminality both before the IAD decision to deport the applicant and after the IAD decision which stayed his removal with conditions and with a review in four years.

[26] The most relevant terms and conditions from the IAD decision are (i) attend a drug and rehabilitation program; and (ii) keep the peace and be of good behaviour and not commit further criminal offences.

[27] The respondent notes that Madam Justice Dawson, in *Stephenson* above, recently concluded that it was open to the IAD to consider whether offences under the *Highway Traffic Act* like speeding were " keeping the peace and be of good behaviour" issues.

[28] The respondent submits that contrary to the applicant's submissions, the IAD Board was aware that the applicant did not have any further criminal convictions beyond 2001 and stated it in the reasons and although the Board had erred in stating the trespass offence occurred when it did, it was not an error that was material.

[29] In respect of the decision regarding the applicant's efforts at rehabilitation, the respondent submits that the IAD ordered that he attend a drug or alcohol rehabilitation program because the applicant had admitted during the course of his appeal in August 2001 that he had abused crack cocaine. The respondent submitted that it was reasonable to conclude that the applicant did not attend a program, but even if this assumption was made, the applicant arguably did not take it seriously as the applicant stated he only went once a month for six months and could not provide documentary evidence to collaborate this claim.

[30] Familial factors and degree of hardship in returning to Vietnam were another area of analysis where the respondent submits that the Board's findings were based on the evidence and reasonable to make.

Analysis and Decision

[31] **Issue 1**

What is the standard of review?

Last year, the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, clarified the approach and standards to be applied to decisions in the review of administrative decisions.

[32] The approach involves determining whether jurisprudence has already found the standard of review to be applied in similar circumstances. The issues submitted by the applicant involved not only a review of the facts put forward in the documentation but also how those facts should be regarded in accordance with federal legislation under both the *Federal Courts Act* and IRPA as interpreted by relevant jurisprudence. Since *Dunsmuir* above, there have already been numerous decisions on what standard to apply to questions of mixed facts and law including *Ramanathan v. Canada (Minister of Citizenship and Immigration),* [2008] F.C.J. No. 546 and *Erdogu v. Canada (Minister of Citizenship and Immigration),* [2008] F.C.J. No. 546 which state a consensus towards the standard of reasonableness. Therefore, this issue put forward by the applicant is reviewed on the standard of reasonableness.

[33] At paragraph 47 of *Dunsmuir* above, reasonableness has been articulated as:

> …a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[34] The applicant also submits questions of law in this review, particularly the comment by the Board in the decision which suggests that dismissals or allowances are preferable to stays. I agree that this point is reviewable on the standard of correctness. It involves an evaluation of whether this principle exists in the law or not. The former question, however, is reviewable on a standard of reasonableness given that it intertwines the evidence with the law as in *Dunsmuir* above.

[35] **Issue 2**

Did the IAD Board err in fact when considering the evidence on breach of conditions on the stay of removal?

The Board in this case seemed primarily focused on the factors of drug and alcohol abuse and criminality in making its decision. The applicant submits that there were either errors of fact or errors in analyzing these facts.

[36] Serious criminality features prominently in this decision. The applicant submits that the traffic offences do not amount to serious criminality. Based on the facts of this case, I agree. The mere fact that a person has a speeding conviction does not alone lead to a finding of serious criminality. The other offence noted by the Board was a trespassing offence which occurred before the stay order came into effect.

[37] The Board then suggests that they are not convinced that the applicant has been rehabilitated from drug and alcohol problems. In my opinion, the documentation put forward by the applicant on his treatment following his stay conditions to obtain treatment once a month is sparse. As well, the applicant was to provide reports every two months regarding his rehabilitation as well as notifying immigration officials if he had discontinued his treatment; none of this was done. The Board, however, did not draw their conclusions there. The Board instead focused on the applicant's testimony in the oral hearing about whether he was aware of the link between alcohol and crack abuse. I cannot accept that this is reasonable. There is no indication that the applicant continues to have problems in this regard aside from a nebulous assessment of the applicant's understanding of abuse from a clinical perspective. While factual findings do require a high degree of deference, I am of the opinion that the judicial review application should be granted on this ground. The decision of the Board 's finding was not reasonable on this point and the Board's decision is based in part on this conclusion.

[38] Because of my finding on this issue, I will not deal with the other issue.

[39] The respondent did not propose a question for my consideration for certification. The applicant did propose a question as noted above. I am not prepared to certify the question as it is not determinative of the outcome of this case.

[40] The applicant requested costs, however, I am not prepared to order costs as I find no special reasons exist.

JUDGMENT

[41] **IT IS ORDERED that:**

1. The application for judicial review is allowed and the matter is referred to a different panel of the Appeal Division of the IAD for redetermination.

2. There shall be no order for costs.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Subsection 63(2), section 66, subsections 67(1), 68(1), (2) and (3) of the *Immigration and Refugee Protect Act*, S.C. 2001, c. 27 read as follows:

63. . . .	63. . . .
(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	(2) Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.
66. After considering the appeal of a decision, the Immigration Appeal Division shall	66. Il est statué sur l'appel comme il suit :
(a) allow the appeal in accordance with section 67;	a) il y fait droit conformément à l'article 67;
(b) stay the removal order in accordance with section 68; or	b) il est sursis à la mesure de renvoi conformément à l'article 68;
(c) dismiss the appeal in accordance with section 69.	c) il est rejeté conformément à l'article 69.
67.(1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67.(1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice	b) il y a eu manquement à un

has not been observed; or	principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
. . .	. . .
68.(1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	68.(1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
(2) Where the Immigration Appeal Division stays the removal order (a) it shall impose any condition that is prescribed and may impose any condition that it considers necessary; (b) all conditions imposed by the Immigration Division are cancelled; (c) it may vary or cancel any non-prescribed condition imposed under paragraph (a); and	(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

(d) it may cancel the stay, on application or on its own initiative.

(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.

(3) Par la suite, l’appel peut, sur demande ou d’office, être repris et il en est disposé au titre de la présente section.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2338-08
STYLE OF CAUSE:	NGOC TRANH HO - and - THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 5, 2009
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	June 11, 2009

APPEARANCES:

Mary Lam	FOR THE APPLICANT
Brad Gotkin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mary Lam Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT