Federal Court  Cour fédérale

Date: 20091001

Docket: IMM-3418-08

Citation: 2009 FC 992

Ottawa, Ontario, October 1, 2009

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

DE BING LI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by De Bing Li challenging a decision of the Immigration Appeal Division of the Immigration and Refugee Board (IAD) which declined to stay his removal to China.

I. Background

[2] Mr. Li became a permanent resident of Canada on May 1, 2000. He is 38 years old. He is married to a Canadian citizen and they are the parents of two young Canadian children ages four years and one year.

[3] In 2003 Mr. Li quit his job and became involved in a marijuana grow operation. This led to a charge under ss. 7(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, to which Mr. Li pleaded guilty on August 25, 2005. He was sentenced on February 3, 2006 to 16 months of community detention and conditions.

[4] On November 30, 2006, Mr. Li was declared inadmissible to Canada because of serious criminality. He appealed that decision to the IAD. Notwithstanding a recommendation from counsel for the Minister that a conditional stay of deportation be ordered, the IAD, in a decision issued on July 2, 2008, confirmed Mr. Li's deportation. It is from that decision that this application for judicial review arises.

II. Decision Under Review

[5] The IAD was not impressed by Mr. Li's evidence and it found him not to be credible. This negative assessment was based on Mr. Li's attempts to minimize the significance of his criminal conduct including some testimony that he did not know at the time that stealing power and growing marijuana were illegal. This, in turn, led the IAD to conclude that Mr. Li's expression of remorse and his claim to be rehabilitated were not genuine.

[6] The IAD apparently felt that Mr. Li had been treated rather leniently in the criminal court and that the principle of general deterrence had not been satisfied. At the same time, the IAD did acknowledge that this was a consideration which had not been previously recognized among the so-called *Ribic*[1] factors. All of this is evident from the following passages from the IAD decision:

> [27] This reaction on the appellant's part and his performance in the appeal hearing bring to mind how important it is to have a result which will discourage foreign nationals and permanent residents from getting involved in these types of criminal activities in the first place.
>
> [28] Appellant's testimony was quite eloquent on this point. Mr. Wang basically seeks out people such as himself, the appellant, and very easily convinces them that there is money to be made with grow-ops and that he need not to worry about the sanctions. One can only imagine how Mr. Wang described the leniency of the Canadian legal system to the appellant while he was selling him on the idea of getting involved in the narcotics business. I find that this is a very serious matter and I also find that granting a stay as an automatic reaction to the fact that this appellant has young children in Canada, would only go a step further in confirming to permanent residents that they need not be overly concerned about getting involved in such operations. Even should they eventually get caught, they will serve time in the community and will not be deported from Canada.

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[1] See *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL).

[…]

> [35] This panel finds that the appellant's attitude and his claim of blissful ignorance, in the presence of direct evidence of the contrary, simply cannot merit special relief from the deportation order made against him. Further, I find that allowing special relief in circumstances where, such as this one, the appellant, is not rehabilitated and has not shown remorse, would only reinforce the hand of individuals such as Mr. Wang, who prey upon newly-arrived people in Canada, and make them easy marks when these predators can, in fact, show them that illegal operations of the magnitude of grow-ops do not merit any other form of retribution than time served, or restriction of movement to an individual's home and business or place of work, and no deportation order inasmuch as you can establish that you have young children who financially depend on you. This is one of the circumstances which was not enumerated in *Ribic*, but which needs to be considered when allowing special relief.

[7] The IAD also linked the issues of remorse and rehabilitation to its assessment of the best interests of Mr. Li's children in the following way:

> [30] The fact that the appellant would accept to be part of such an organization speaks volumes about his value system. This value system is important because of his claim that his presence in Canada is required in the best interest of his two children. His counsel asked the panel to conclude that this would be the case as the best interest of the children would, of necessity, be well-served by this individual's presence in Canada. I do not agree.
>
> [31] The panel cannot presume as to the nature of the education that this individual would give to these two young children in the future years, and this presumption cannot exist in either direction, except with regards to the previous conclusion of this panel, as to this appellant's lack of remorse in rehabilitation. When there is remorse and rehabilitation, then a fairly strong argument can be presented that the appellant, having learned the errors of his ways, will transmit this knowledge to his own children. The contrary argument is just as convincing. In a case where there is no rehabilitation, and no remorse, then it is fairly clear that this individual may well, impart his values on his children as he is charged with their education. As things now stand with the appellant, the only objective finding in his

> favour is that he is bringing in a revenue to this household. Again, on that ground the panel cannot help but notice that he failed to do so apparently from 2003 until 2006. So again, the argument that he is recently employed does not carry much weight, given his past inaction from 2003 until 2006.

III. Issues

[8] (a) Did the IAD err in law in the exercise of its discretion under ss. 67 and 68 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) by taking into account the principle of general deterrence?

(b) Did the IAD err in its assessment of the evidence concerning the best interests of the children affected by the Applicant's deportation?

IV. Analysis

[9] The scope of the IAD's humanitarian and compassionate discretion in this case is defined by ss. 67 and 68 of the IRPA, above. Those provisions state:

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 has not been observed; or	b) il y a eu manquement à un 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.

Effect

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

Effet

(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

Removal order stayed

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.

Sursis

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.

In *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the Court dealt at length with the standard of review pertaining to the IAD's discretion under these provisions. The issue of whether the discretion includes the consideration of the principle of general deterrence is one of law which must be assessed on the standard of correctness. The issue of whether the IAD erred in its assessment of the best interests of the children is one of mixed fact and law which dictates a review on the deferential standard of reasonableness.

[10] It is not for the Court to reweigh the evidence or to revisit the IAD's credibility findings: see *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. Even if I had such a discretion, I would not be disposed to exercise it because Mr. Li's attempts to minimize the significance of his conduct justified the IAD's negative views about the prospects for his rehabilitation.

[11] Having regard to the *Ribic* factors, it was entirely appropriate for the IAD to examine Mr. Li's apparent lack of remorse and the absence of a serious commitment to rehabilitation and, on the evidence before it, to come to a conclusion different from that reached in the criminal proceeding. These are matters which are obviously relevant to the risk of re-offending. The question before me is whether, in denying relief to Mr. Li, it was correct in law for the IAD to take into consideration general deterrence, which is a criminal law principle of sentencing.

[12] I would note that the *Ribic* factors focus on the individual seeking relief and not on broad public interest concerns. The public interest may, of course, be served by a deportation especially

where there is a perceived recidivism risk, but the emphasis is clearly placed on the personal circumstances of the offender in the context of affording possible relief from deportation. The IAD is required to consider whether the individual before it should be allowed to remain in Canada on humanitarian and compassionate grounds.

[13] Given the frequency with which the *Ribic* factors have been applied since 1985 one might well have expected to see an earlier recognition of general deterrence if it was a relevant and meritorious consideration in the exercise of the IAD's mandate. Instead, what authority there is indicates that it is not appropriate for the IAD to act as some sort of an adjunct to the criminal courts.

[14] The recognition that the IAD's function is not to mete out punishment or to serve the principle of general deterrence goes back at least as far as the decision of the Court of Appeal in *Hurd v. Canada (Minister of Employment and Immigration)* (1988), [1989] 2 F.C. 594, 12 A.C.W.S. (3d) 328 (F.C.A.). There the Court was concerned with a challenge brought under ss. 11(h) of the *Canadian Charter of Rights and Freedoms* based on the argument that deportation as a consequence of a criminal conviction constituted impermissible double punishment. The Court rejected that argument on the following basis:

> The implication of all this case law is that a deportation proceeding should not be considered to be within subsection 11(h) of the Charter. Besides authority, there is, moreover, good reason to come to the same conclusion. The necessary redressing of the wrong done to society, and the goal of deterrence of others, has already been accomplished through the criminal conviction. The purpose of the deportation proceedings is not any larger-than-personal social purpose, but merely to remove from Canada an undesirable person. It

> is individual deterrence, as it were, not social deterrence. Deportation under the *Immigration Act*, 1976 is thus to be distinguished from the older criminal sanctions of banishment or transportation to a penal colony, in which a citizen was deported from his country of birth as part of his punishment, and so was just another penal consequence. It cannot be supposed that deportation to a deportee's country of birth is a true penal consequence. It may, in particular circumstances, amount to a grave personal disadvantage, but not to the kind of larger-than-merely-personal disadvantage to which subsection 11(h) of the Charter is directed. Deportation is analogous, rather, to a loss of a licence or to dismissal from a police force, or to the forfeiture of a right to practice a profession.

[15] Although the majority decision in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 noted that the *Ribic* factors were not exhaustive of the scope of the IAD's humanitarian and compassionate discretion, the need for it to maintain a clear separation from the criminal process was noted at paragraphs 65 and 66:

> 65 In terms of transparent and intelligible reasons, the majority considered each of the *Ribic* factors. It rightly observed that the factors are not exhaustive and that the weight to be attributed to them will vary from case to case (para. 12). The majority reviewed the evidence and decided that, in the circumstances of this case, most of the factors did not militate strongly for or against relief. Acknowledging the findings of the criminal courts on the seriousness of the offence and possibility of rehabilitation (the first and second of the *Ribic* factors), it found that the offence of which the respondent was convicted was serious and that the prospects of rehabilitation were difficult to assess (para. 23).
>
> 66 The weight to be given to the respondent's evidence of remorse and his prospects for rehabilitation depended on an assessment of his evidence in light of all the circumstances of the case. The IAD has a mandate different from that of the criminal courts. *Khosa* did not testify at his criminal trial, but he did before the IAD. The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal

> order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence. It did so.
>
> [Emphasis added]

[16] Even, in its own decisions, the IAD has respected this distinction. The IAD's decision in *Khosa v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1268 (QL), offers an example of this where the majority held as follows:

> 23 Counsel for the appellant made lengthy submissions contending that it is not the function of the Division to mete out further punishment to this appellant for his offence. Counsel is entirely correct that it would be inappropriate for the panel to take that role upon itself. The criminal justice system has spoken with respect to the appellant's guilt and handed down a sentence consistent with principles of sentencing in Canada. The role of the Division is distinct and separate from the criminal courts. This is an application for discretionary relief. Domestic immigration legislation provides that a removal order may be made as against permanent residents who are inadmissible on the grounds of serious criminality. When an appeal is taken from a removal order, the Division must look at all the circumstances in any given case, weigh the various factors both supportive and non-supportive of special relief and reach a determination. […]

In the dissenting opinion, the same point was made:

> 31 [5] It is not for the IAD to exercise its discretion for punishment or deterrence, as it is prohibited by law from doing so. It goes without saying that the actions of the Appellant are not condoned. However, the IAD must apply the proper legal test and therefore must consider all the circumstances.

[17] The rationale for the principle of general deterrence in criminal sentencing is to send a message into the community. The imposition of a criminal sanction for the purpose of setting an

example is clearly an aspect of punishment which has no place in the process of immigration deportation. One of the other dangers associated with the blurring of the IAD's humanitarian and compassionate discretion into the criminal sphere is that the resulting decision may look, as in this case, like an attempt to redress a perceived sentencing inadequacy. That point and the risk of turning the IAD hearing into a quasi-criminal proceeding were noted by Justice Robert Décary in *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 24, [2007] 4 F.C.R. 332 at paragraph 18.

[18] Although it is not strictly necessary to deal with the IAD's assessment of the best interests of the children, this is a sufficiently important consideration that it bears some scrutiny. The IAD's comments about the interplay between Mr. Li's lack of insight into his conduct and his role as a parent appear somewhat overstated and speculative. But in any event, the IAD's reduction of the best interests consideration to a balancing between Mr. Li's financial contribution and the potential for inculcating his children with the wrong set of values is an oversimplification. There was far more evidence of Mr. Li's positive contributions to the welfare of his children than is fairly captured by his acknowledged role as a financial contributor to the household. Mr. Li's wife testified that he was directly involved in a caregiving role and that she could not handle those responsibilities on her own. She also noted in her 2007 statement to the IAD that Mr. Li had formed a healthy and meaningful bond with their eldest son and that Mr. Li was a good father. The failure by the IAD to acknowledge this evidence and to focus instead on its contrary perception of him as a poor role model to his children constitutes a capricious finding made without regard to the evidence and the decision must also be set aside on that basis.

V. Conclusion

[19] I am satisfied that the IAD erred in law by applying the principle of general deterrence in the exercise of its humanitarian and compassionate discretion. I am also satisfied that the IAD erred in its treatment of the evidence concerning the best interests of the children. In the result, this matter must be returned to a differently-constituted panel of the IAD for reconsideration on the merits.

[20] Because the Respondent had expressed an interest in proposing a certified question with respect to the issue of general deterrence, I will allow 10 days to make that submission. The Applicant will have 7 days to respond.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is allowed with the matter to be returned to a differently-constituted panel of the IAD for reconsideration on the merits.

" R. L. Barnes "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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