Federal Court  Cour fédérale

Date: 20090729

Docket: IMM-5654-08

Citation: 2009 FC 778

Ottawa, Ontario, July 29, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

RAJWANSH NIJJAR

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Immigration and Appeal Division (IAD) of the Refugee Division of the Immigration and Refugee IAD, dated December 9, 2008 (Decision) granting the Respondent's application for a stay of a removal order.

BACKGROUND

[2] The Respondent is a citizen of India and was born on June 26, 1980. She entered Canada illegally with a false passport at Vancouver International Airport on May 11, 2002. She was determined to be a Convention refugee in Canada on January 30, 2004.

[3] The Respondent applied for permanent resident status in Canada as a protected person, but no final determination of that application has been made to date.

[4] The Respondent married Kulwant Singh Bhathal on March 3, 2007. Her daughter, Kirat Bhathal, was born on November 13, 2007.

[5] The Respondent was convicted in BC Supreme Court in Vancouver, on June 22, 2007 of three charges: aggravated assault; assault with a weapon; and unlawful confinement. She was sentenced on September 17, 2007 to serve six months and 10 months concurrently in jail.

[6] On January 2, 2008, a CBSA Enforcement Officer reported the Respondent for inadmissibility due to serious criminality pursuant to subsection 36(1)(a) of the Act relating to her three convictions. On January 10, 2008, in a CIC Report to File, a CBSA enforcement officer recommended that “CBSA proceed, if necessary, after the appeal with getting a danger opinion issued against her.”

[7] A deportation order was made against the Respondent on April 7, 2008.

[8] The Respondent appealed the deportation order to the IAD solely on the basis that humanitarian and compassionate considerations warranted special relief in light of the circumstances.

[9] The IAD hearing was held on November 25, 2008, with the IAD rendering an oral decision and reasons staying the removal order for three years. The IAD issued its Decision on December 9, 2008.

[10] The IAD determined that the Respondent should receive a stay of the deportation order for three years on certain terms and conditions.

DECISION UNDER REVIEW

[11] The IAD examined the factors in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 and noted that the offences arose out of a three-on-one attack which involved planning and pre-meditation on the part of the Respondent and her co-accuseds (family members) towards a relative, a person who was in a trust relationship with them. The incident involved violence, with a weapon being used against a woman, and only by luck did it not result in any serious physical injuries to the victim, although there was emotional trauma. The

Respondent also refused to acknowledge any degree of involvement or culpability for the offences and alleges that there is a conspiracy in the criminal justice system against her. The Respondent had also not taken any therapy or rehabilitation programs. The IAD noted that these factors did not weigh in the favor of the Respondent.

[12] The IAD did note, however, that the Respondent's risk to society is low. She only has the three convictions and there was no evidence of any violent acts, either in India or in Canada, prior or subsequent to her convictions. She has also been fully compliant with all of the terms of her bail after her charge and with her release provisions on parole. The Respondent does not live with, or have any association with, the family members who were her co-conspirators. Based on the pre-sentence report, those family members were considered to have had a serious influence upon her.

[13] The IAD discussed how the Respondent currently lives with her baby and her husband and his extended family. The extended family members do not believe that the Respondent is guilty of the offences of which she is convicted and they support her appeal.

[14] The IAD noted that the Respondent, in her six years in Canada, has worked hard to establish herself. She has also married and has a child who is a Canadian citizen. She has been a full-time worker (with the exception of her time in jail) and her limited English has not inhibited her ability to interact in Canadian society.

[15] The IAD considered the effect on the Respondent's family members if she is removed from Canada. The Respondent has a partial dependence on her extended family financially. The IAD concluded that, if the Respondent were removed from Canada, "her husband and child…would both be affected both financially and emotionally if they were separated." It was assumed that the funding from the Respondent's contribution to the purchase of the family's truck would cease if she was deported.

[16] The IAD also noted the best interests of the Respondent's child, who was one years old at the time of the Decision. The IAD thought that it was best for a child to be raised by both parents and, if returned to India as a young child, the Respondent's daughter would require ongoing medical care and would need to access education, which are not fully available in India.

[17] There was also evidence before the IAD that the family would face financial hardship if returned to India as well as potential danger, since threats to the Respondent from her own family members had been the foundation of her claim for Convention refugee status.

[18] The IAD acknowledged that the Respondent had spent most of her life in India, was educated there, speaks the language and was fully integrated into that society. However, she was a Convention refugee from that country and it would not be easy for her to be removed to that country nor any other country where she might be removed. The Respondent's only country of removal would be "to the country where she has an acknowledged danger." Therefore, the IAD accepted that

the appellant “would incur a reasonably significant amount of difficulty if she were removed from Canada.”

[19] The IAD concluded as follows:

> After having considered all of those factors, I have to say, Ms. Nijjar, that yours would have been the type of appeal which I would have allowed had it not been for the fact that you were involved in a very serious set of circumstances and that you refused today to accept any responsibility whatsoever for any involvement in that crime for which you have been found guilty. Therefore, because of the seriousness of that factor, the offence you were involved with and your unwillingness to acknowledge any degree of responsibility for your own behaviour to whatever extent, I am not prepared to allow your appeal. However, I also came to the conclusion that a number of other positive factors in your appeal mitigate against a full dismissal. Therefore, I am going to order a stay of removal on terms and conditions. This will give you an opportunity, Ms. Nijjar, to demonstrate that you are not at risk to Canadian society and that your family support and the efforts that you have made to separate yourself from those negative influences in your life have been effective.
>
> I am going to order a stay of removal for three years because I believe that you need sufficient time to demonstrate that you will not be a further risk to Canadian society.

ISSUES

[20] The Applicant submits the following issue:

1) The IAD erred in law in considering hardship in a country of removal where the Respondent is protected from refoulement under subsection 115(1) of the Act.

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable to these proceedings:

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.	**115.** (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

STANDARD OF REVIEW

[22] The Applicant submits that the consideration of hardship of an applicant where the deportation order does not specify the country of removal, and where it is uncertain what that country might be, is a question of law, to be reviewed on a standard of correctness: *Balathavarajan v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1550 (F.C.A.) (*Balathavarajan*) at paragraph 5.

[23] The Respondent submits that the Federal Court's role in judicial review proceedings is not to substitute its assessment of the evidence for that of the IAD. Rather, its constitutional mandate is limited to assessing whether the IAD's decision observes the limits set out in the relevant

legislation. See: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labor),* [2003] 1 S.C.R. 539.

[24] The Respondent submits that the standard of review in this judicial review is that of reasonableness, as it is concerned primarily with the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the Decision falls within the range of possible acceptable outcomes which are defensible in respect of the facts and law. See: *Shah v. Canada (Minister of Citizenship and Immigration)* 2008 FC 708 and *Dunsmuir v. New Brunswick* 2008 SCC 9 at paragraph 47.

[25] The issue raised by the Applicant involves an error of law that I have reviewed under a standard of correctness. See *Balathavarajan.*

ARGUMENTS

The Applicant

IAD Erred in Considering Likely Country of Removal

[26] The Applicant submits that, since the Respondent was found to be a Convention refugee on January 29, 2004 by the Refugee Protection Division, the IAD member erred in law in concluding that the Respondent would face hardship upon removal to India. Pursuant to section 115 of the Act, a protected person who is recognized as a Convention refugee cannot be removed from Canada to a country where they would be at risk of persecution.

[27] The Applicant relies upon *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 at paragraphs 32, 33, 58 where the Supreme Court of Canada confirmed that potential foreign hardship can be taken into account by the IAD in deciding whether to uphold a deportation order. The Supreme Court of Canada also held that the IAD should be able to consider realistic possibilities, such as conditions in the likely country of removal, even where the ultimate country of removal is not known with absolute certainty at the time the appeal is heard. The Supreme Court of Canada also held, however, that the likely country of removal may not be ascertainable for Convention refugees because of section 53 of the former *Immigration Act* (now s.115 of the Act) which prohibits a Convention refugee's removal to a country where that person's life or freedom would be threatened. In such cases, there would be no likely country of removal at the time of the appeal; therefore, the IAD cannot consider foreign hardship.

[28] The Applicant says that if the IAD cannot ascertain a "likely country of removal" there is no need to consider this issue. When and if a destination country is decided upon, the hardship issue may then be addressed in the appropriate forum. The Applicant also relies upon *Balathavarajan* at paragraphs 5-10 and notes that the following certified question on this issue was answered in the negative:

> Is a deportation order, with respect to a permanent resident who has been declared to be a Convention refugee, which specifies as sole country of citizenship the country which he fled as a refugee, sufficient without more to establish that country as the likely country or removal so that *Chieu* applies and the IAD is required to consider hardship to the applicant in that country on an appeal from a deportation order?

[29] The Applicant submits that the IAD erred in concluding that the Respondent would face hardship upon removal to India. The IAD also acknowledged that there was no evidence before the tribunal of any other country of removal. The Respondent did not show, on a balance of probabilities, that she would be deported to India and, because she is a Convention refugee, she remains protected from refoulement under section 115 of the Act. Therefore, the IAD erred in law in considering foreign hardship in India when it is not a "likely" country of removal at the time of the appeal.

[30] The Applicant also submits that the Respondent has failed to address the sole issue raised by the Minister, particularly since the Minister is not arguing the reasonableness of the IAD's Decision, nor the weight of the factors considered by the IAD in finding that there were sufficient H&C grounds to warrant special relief. The sole ground is an error of law made by the IAD in considering hardship in a country of removal where the Respondent was protected from refoulement under subsection 115(1) of the Act.

[31] The Applicant notes that the Respondent suggests that the IAD's analysis of "hardship" with respect to removal from Canada should be distinguished from any analysis of hardship of return to India arising from a nexus to the Convention refugee definition. The Applicant suggests that this is "precisely the error made by the IAD" since the IAD concerned itself with hardship of removal to India, acknowledging that it may be difficult to remove her to a country where she has been accepted as a Convention refugee. Again the Applicant stresses that, because of *Balathavarajan* at paragraph 7, the IAD cannot ascertain a "likely country of removal" for Convention refugees

because of the non-refoulement provision in section 115 of the Act. Therefore, there was no need for the IAD to consider this issue.

The Respondent

[32] The Respondent submits that the IAD considered the major factors in the Respondent's favour to be the following:

1) The best interests of her Canadian-born child;
2) She has no criminal convictions either before or after the subject convictions;
3) She has been fully compliant with the terms of bail after her charge and release on parole subsequent to serving her time in jail;
4) She is no longer living, or having any association, with the family members who were her co-conspirators;
5) She lives with her baby, her husband and his extended family in a separate lifestyle from that which she previously led, namely one in which her co-conspirators were considered to be a serious influence upon her;
6) Her family is supportive of her and her stability in the community is likely to be a positive influence on her;
7) Her risk to society is low;
8) She has been hardworking during her life in Canada;
9) If she were removed from Canada without her husband and child, they would be affected both financially and emotionally if they were separated.

[33] The Respondent says that the Decision was based on a "fulsome analysis of all of the *Ribic* factors." The Respondent also contends that the Applicant has "failed to establish that this decision does not fall within a range of possible acceptable outcomes available to the IAD." She also says that "the Applicant has failed to establish that the application of the *Ribic* factors in this particular case amounts to a substantial legal error in the IAD Decision."

[34] The Respondent notes that this Court has cautioned that its role is "not to parse a tribunal's reasons but rather to seek to understand what fundamentally motivates the decision relying on the record as substantiation." The question is whether the IAD's reasons, taken as a whole, are tenable as support for the Decision. See: *Burianski v. Canada (Minster of Citizenship and Immigration)* 2002 FCT 826 at paragraph 40; *Law Society of New Brunswick v. Ryan* 2003 SCC 20 (*Ryan*) at paragraph 56 and *Diallo v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1450 at paragraphs 22-32.

[35] The Respondent contends that consideration of the *Ribic* factors led the IAD to its conclusion. If any of the reasons are sufficient to support the conclusion, then the Decision will not be unreasonable and the Court must not interfere: *Ryan.*

[36] The Respondent insists that the IAD gave numerous "tenable explanations for its Decision" and that the "IAD's analysis of Ms. Nijjar's 'hardship' with respect to removal from Canada should be distinguished from any analysis of hardship of return to India arising from a nexus to the

Convention refugee definition." The Respondent states that the IAD deals with the hardship the Respondent and her family would incur if she were removed from Canada, rather than if she were removed to India.

[37] The Respondent submits that by not proceeding with the application for a danger opinion prior to the hearing of the Respondent's appeal, the principles in *Chieu* (and relied upon by the Applicant) have been undermined.

ANALYSIS

[38] There is little doubt, in my view, that the IAD erred in considering hardship upon removal to India as one of the *Ribic* factors in this case. Pursuant to section 115 of IRPA, the Respondent cannot be removed to India because she has been recognized as a Convention refugee from that country.

[39] As the Applicant points out, the Supreme Court of Canada in *Chieu* made it clear that the likely country of removal may not be ascertainable for Convention refugees because of section 53 of the former *Immigration Act* (now, s. 115 of IRPA). In such cases there will be no likely country of removal at the time of the appeal and the IAD cannot, for that reason, consider foreign hardship. See *Chieu* at paragraphs 32, 33 and 58.

[40] More recently, the Federal Court of Appeal in *Balathavarajan* considered the issue and made it clear that *Chieu* applies in situations such as the present:

> **7** However, Iacobucci J. also stated, at para. 58, that the likely country of removal may not be ascertainable for Convention refugees because section 53 of the former *Immigration Act* (now, section 115 of the IRPA) prohibits a Convention refugee's removal "to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion", unless the individual falls within a particular enumerated class and the Minister is of the opinion that the individual constitutes a danger to the public in Canada, or a danger to the security of Canada. The Court said, "In such cases, there will be no likely country of removal at the time of the appeal and the IAD cannot therefore consider foreign hardship." Consequently, if the IAD cannot ascertain a "likely country of removal", there is no need to consider this issue. When and if a destination country is decided upon, the hardship issue may then be addressed in the appropriate forum.
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> **8** The appellant points to the decision in *Soriano v. Canada (Minister of Citizenship and Immigration)* (2003), 29 Imm. L.R. (3d) 71 (F.C.T.D.), to contend that the IAD has a duty to consider potential hardship in this case. In *Soriano*, a Convention refugee was the subject of an unexecutable deportation order to El Salvador, the country from which he fled. Campbell J. held, at para. 8, that the IAD erred when it failed to take potential hardship to the applicant into consideration given that the deportation order provided El Salvador was the country of deportation.
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> **9** *Soriano, supra,* can be distinguished from the case at bar. In *Soriano*, the country of deportation was known. Here, the Minister had not specified the country of deportation, and at the time of the IAD appeal had not taken the necessary steps under subsection 115(2) of the IRPA to remove the appellant. It was, at the time of the IAD appeal, not only unlikely but legally improper to remove the appellant to Sri Lanka. For the IAD to consider potential hardship the appellant might face if deported to Sri Lanka would have been a hypothetical and speculative exercise. This it need not do.

[41] The Respondent does not really take issue with this position or the fact that the Officer made a mistake in this regard. The Respondent argues, however, that the mistake should not require

reconsideration because the Decision was reasonable and can stand alone on the Officer's findings with regard to the other five *Ribic* factors.

[42] I agree with the Applicant that the Officer's error was an error of law and should be reviewed under a standard of correctness. See *Balathavarajan* at paragraph 5. However, irrespective of the standard of review, this Decision must be sent back for reconsideration. I have reviewed the Decision carefully and the hardship for the Respondent and her family upon removal to India was clearly a significant factor that the Officer took into account when weighing all of the *Ribic* factors. It is just not possible to say that the Decision would have been the same had the Officer not acted in error, or that it is otherwise reasonable.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application is allowed and the matter is returned for reconsideration by a different officer;

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-5654-08
STYLE OF CAUSE:	***THE MINISTER OF CITIZENSHIP AND MMIGRATION***
	v.
	RAJWANSH NIJJAR
PLACE OF HEARING:	Vancouver, B.C.
DATE OF HEARING:	June 18, 2009
REASONS FOR JUDGMENT:	RUSSELL J.
DATED:	July 29, 2009

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