Federal Court  Cour fédérale

Date: 20100104

Docket: IMM-2212-09

Citation: 2010 FC 6

Ottawa, Ontario, January 4, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

SOHIEL HAGE ABDALLAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Protection Board dated April 15, 2009 which reconsidered its 2005 direction staying the execution of the applicant's removal order and dismissed his appeal pursuant to subsection 68(3) of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27. The applicant has been a permanent resident of Canada for the past 17 years and is now facing removal to Lebanon, his country of origin and nationality.

FACTS

Background

[2] The thirty (30) year old applicant, a citizen of Lebanon, became a permanent resident of Canada on December 19, 1992 at the age of thirteen as a dependent of his mother. Since then the applicant has been convicted of six offences as a youth, which include theft under $5000, mischief, robbery, possession of an unregistered and restricted weapon, and failure to appear. As an adult, the applicant has been convicted of approximately 23 criminal offences including mischief, obstruction of a peace officer, cheating at play, trespass at night, robbery, possession of property obtained by crime, failure to appear or comply with court orders. The applicant also has numerous convictions under provincial highway law.

[3] The Immigration division of the Immigration and Refugee Protection Board ordered the removal of the applicant on March 20, 2003 pursuant to paragraph 36(1)(a) of IRPA as a result of his conviction for breaking and entering a dwelling house in 1998, an offence that is punishable by a maximum term of imprisonment of ten years which renders the applicant inadmissible to Canada.

Stay of removal

[4] The applicant appealed this removal order to the IAD on humanitarian and compassionate (H&C) grounds pursuant to subsection 63(3) of IRPA. The validity of the removal order was not challenged. The applicant and his mother testified at the hearing.

[5] On August 29, 2005 the IAD allowed the applicant's appeal and stayed the execution of his removal order for three years conditional upon the applicant's compliance with 15 terms and conditions. The IAD found the applicant to be of "poor character as is evidenced by his deceitful conduct under oath": 2005 IAD decision, at para. 13. Despite the lack of compelling H&C factors, the IAD allowed the applicant's appeal and imposed a stay of execution upon the applicant's removal order for three years: 2005 IAD decision, at para. 21. The panel emphasized that the stay of execution is conditional on the applicant refrain from further offending:

> ¶21 …It will also be a term of his stay that he ***refrain completely from criminal activity and that he incur no further criminal convictions on account of any criminal activity committed after this stay has been granted***. I consider this to be an extremely important term of the stay.
>
> [Emphasis in original]

The IAD concluded by warning the applicant that a "stay is warranted in this case by only the slimmest of margins": 2005 IAD decision, at para. 21. The IAD also advised that a final reconsideration the applicant's case will occur on or about August 29, 2008.

First review

[6] On November 15, 2006 the IAD conducted an oral review of the applicant's appeal and stay. The parties submitted a joint recommendation that the stay be continued. The IAD agreed and ordered that the stay be continued with the added condition that the applicant report to his legal counsel concurrently with his departmental and tribunal reporting requirements. No *viva voce* evidence was adduced at the hearing. The IAD reiterated the previous panel's warning to the

applicant that further criminality may serve to convince the IAD to dismiss his appeal and cancel the stay.

Second review and IAD Decision subject to this judicial review

[7] On March 17, 2009 the IAD conducted the second and final review of the applicant's appeal and stay. The IAD panel defined the issue as whether or not the applicant should be allowed to remain in Canada despite his criminal record.

[8] The applicant testified with respect to his criminal convictions, pending criminal charges, the consequences of being deported to Lebanon, and his efforts at rehabilitation. The IAD took no issue with the applicant's testimony. The applicant's counsel submitted that the applicant was making progress, albeit uneven, in rehabilitating himself and complying with the stay order conditions.

[9] The respondent submitted that the applicant's appeal should be dismissed. The respondent submitted that the applicant never ceased his criminal activities even after his conviction for the original offence that led to the removal order. Further more, the applicant failed to report his criminal charges and convictions to the Minister as they materialized, particularly a conviction dated May 23, 2008 for obstruction of a peace officer and a charge of possession of narcotics for the purposes of trafficking dated November 2, 2008. The applicant testified at the hearing that the conviction for obstruction of a peace officer was a result of giving a false name in traffic stop.

[10] The IAD considered the following factors, set out in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 at paragraph 14 (*Ribic*), and confirmed by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3: the seriousness of the offences leading to the deportation order; the possibility of rehabilitation; the length of time spent in Canada and the degree to which the appellant is established here; the family in Canada and the dislocation to the family that deportation would cause; support available to the appellant, within the family and within the community; and potential foreign hardship the appellant would face in the likely country of removal.

[11] The IAD found that the applicant is a habitual criminal who "has gone on to flagrantly continue his criminal behaviour" despite the previous panels' warnings. The IAD acknowledged that the applicant is entitled to the presumption of innocence with respect to the narcotics charge but held that the applicant has been non-compliant with the terms and conditions of his stay by failing to report to the respondent and tribunal new criminal convictions and charges in a timely manner.

[12] The IAD acknowledged that the applicant has been in Canada for a significant period of time, is emotionally close to his family, has been trying to maintain full time employment, and will experience hardship if removed to Lebanon. Despite these factors, the IAD found that the applicant was only able to obtain casual work, does not financially support his family in a verifiable manner, and is not able to show that his minor sibling would suffer hardship as a result of his removal. These factors led the IAD to hold that the applicant is minimally established in Canada.

[13] The IAD concluded that the applicant's positive H&C factors were not sufficient to override the applicant's inability to rehabilitate. The appeal was therefore dismissed.

LEGISLATION

[14] Subsection 18.1(4)(d) of the *Federal Courts Act*, R.S.C. 1985, c F-7 designates the making of findings of fact that are made in a capricious manner or without regard for the material before it as a ground of review:

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

[15] Paragraph 36(1)(a) of IRPA renders a permanent residence inadmissible to Canada on the grounds of serious criminality if convicted of an offence punishable by a maximum term of imprisonment of at least ten years:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale

years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed; …	pour laquelle un emprisonnement de plus de six mois est infligé; …

[16] Subsection 63(3) of IRPA grants a right of appeal to a permanent resident who has a removal order made against them:

63(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	63) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

[17] Section 66 of IRPA sets out the powers of disposition of the IAD on appeal:

66. After considering the appeal of a decision, the Immigration Appeal Division shall (*a*) allow the appeal in accordance with section 67; (*b*) stay the removal order in accordance with section 68; or (*c*) dismiss the appeal in accordance with section 69.	66. Il est statué sur l'appel comme il suit : *a*) il y fait droit conformément à l'article 67; *b*) il est sursis à la mesure de renvoi conformément à l'article 68; *c*) il est rejeté conformément à l'article 69.

[18] Subsection 67(1) of IRPA sets out the general grounds for allowing an appeal:

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*) la décision attaquée est erronée en droit, en fait ou en

(*a*) the decision appealed is wrong in law or fact or mixed law and fact; (*b*) a principle of natural justice has not been observed; or (*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. …	droit et en fait; *b*) il y a eu manquement à un principe de justice naturelle; *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. …

[19] Section 68 of IRPA sets out the grounds to allow an appeal and impose a stay on a removal order:

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. (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	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) 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.

the Immigration Division are cancelled; (*c*) it may vary or cancel any non-prescribed condition imposed under paragraph (*a*); and (*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. …

[20] Section 69 of IRPA sets out the consequences of not allowing an appeal of a removal order:

69. (1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.	69. (1) L'appel est rejeté s'il n'y est pas fait droit ou si le sursis n'est pas prononcé.

ISSUES

[21] The applicant raises the following issue:

1. Did the panel err in law by making key findings of fact in a perverse or capricious manner or without regard to the evidence before it?

STANDARD OF REVIEW

[22] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question (see *also Khosa v. Canada (MCI),* 2009 SCC 12, per Justice Binnie at paragraph 53)."

[23] It is clear that as a result of *Dunsmuir*, *supra* and *Khosa*, *supra*, at para. 58, that questions the IAD's factual determinations are to be reviewed on a standard of reasonableness: see also *Ho v. Canada (MCI)*, 2009 FC 597, per Justice O'Keefe at para. 32; *Canada (MCI) v. Aweleh*, 2009 FC 1154, per Justice Martineau at para. 24; and my decision in *Canada (MCI) v. Abdul*, 2009 FC 967, at para. 21.

[24] In reviewing the IAD's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir*, *supra* at paragraph 47, *Khosa*, *supra*, at paragraph 59).

ANALYSIS

Issue: Did the officer make an erroneous finding of fact in a perverse or capricious manner without regard to the evidence?

[25] The applicant challenges several factual determinations made by the IAD which formed the basis of the decision to dismiss the applicant's appeal. The applicant contends that these factual determinations were erroneous, and made in a manner that was capricious or without regard to the evidence. Accordingly, these findings were not reasonably open to the IAD.

[26] The respondent submits that the applicant merely disagrees with the IAD's findings of fact. The respondent submits that the applicant cannot show that the IAD's findings of facts were truly erroneous, made capriciously, and form the basis of the decision: *Rohn and Hass Canada Ltd. v. Canada (Anti-Dumping Tribunal)*, [1978] F.C.J. No (QL), 522, 22 N.R. 175 (F.C.A.), per C.J. Jacket at para. 5.

[27] The jurisdiction of the IAD on appeal is broad. Pursuant to subsection 67(1)(c) and 68(1), the IAD may allow an appeal or stay a removal order where they are 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." The IAD retains the same discretion when it reconsiders an appeal.

[28] Mr. Justice Martineau recently outlined in *Awele*, *supra*, at paragraphs 21-22, the role of the IAD when it reconsiders an appeal:

> ¶21 As noted by the Supreme Court in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 57 (*Khosa*), the IAD is left with the discretion to determine, not only what constitutes "humanitarian and compassionate considerations", but the "sufficiency" of those considerations as well.
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> ¶22 While the decision under review is not the original grant of the stay, the IAD must consider the same factors upon reconsideration of the stay, as they consider in granting it. According to *Canada (Minister of Citizenship and Immigration) v. Stephenson*, 2008 FC 82 at paragraph 25 (*Stephenson*), "the *Ribic* factors continue to be the factors that the IAD is required to consider when reconsidering a decision pursuant to subsection 68(3) of the Act."

[29] The first impugned finding of fact concerns the characterization of the applicant as a "habitual criminal" who "flagrantly" continued his criminal behaviour since the imposition of the stay. The applicant further challenges the IAD's finding where it states that there is no "evidence of change of behaviour since the deportation order and stay of removal". The IAD stated that despite being warned multiple times, the applicant has gone on to commit and "be convicted of 6 additional crimes".

[30] The applicant places great emphasis on the fact that there is no evidence of any criminal activity after the July 24, 2006 review hearing. Accordingly, it was not reasonably open to the IAD to dismiss the applicant's appeal on the basis of minor offences or based on convictions for which the underlying act occurred before the stay: *Ho, supra*, at para. 36.

[31] The IAD's impugned fact findings were largely based upon a criminal conviction for obstruction of a police officer dated May 23, 2008, a conviction under the Alberta Traffic and

Safety Act for “stunting” dated August 20, 2008, a criminal conviction for mischief under $5000 dated August 19, 2005, and an outstanding criminal charge for possession of narcotics for the purposes of trafficking which was laid in October 2008.

[32] The applicant in the case at bar stands convicted of the criminal offence of obstructing a peace officer on March 10, 2006, which is after the stay period came into effect. The fact that this serious offence was committed before the first review of the applicant’s stay is irrelevant. The IAD at the time mentioned, but did not discuss the effect of the charge upon the applicant’s appeal. The implication that the IAD already considered this charge and factored it into the decision to extend the stay is untenable. Accordingly, it does not lie in the mouth of the applicant to waive its success on an oral review hearing decided on the basis of a joint recommendation as a bar against the final review decision which had the benefit of *viva voce* evidence.

[33] Regardless, in my view, the IAD’s discretion to reconsider an appeal and a stay necessarily includes all matters and evidence that were considered by previous IAD review panels.

[34] The applicant was warned throughout the appeal process that he must refrain completely from any criminal activity and incur no further criminal convictions. The IAD warned the applicant that his appeal was allowed on the slimmest of margins.

[35] Serious criminality under subsection 36(1)(a) of IRPA means that a permanent resident such as the applicant has been convicted of an offence under an Act of Parliament punishable by a

maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed. In the case at bar, the only criminal offence for which the applicant was convicted subsequent to the 2005 IAD first review which granted the stay is the conviction under section 129(a) of the Criminal Code of Canada for obstructing a peace officer on March 10, 2006. The applicant was convicted on May 23, 2008 and placed on probation and incarceration for a term of 30 days to be served intermittently. The circumstances of this offence are that the applicant gave a false name to a police officer who stopped the applicant for a traffic offence. The maximum term for this offence is a term not exceeding two years so that this criminal offence is not a "serious criminal offence" under subsection 36(1)(a) of IRPA.

[36] With this background, the Court has reviewed 7 material findings of fact upon which the IAD decision was based, and the Court must conclude that these findings of fact are clearly wrong, made without regard to the evidence and were not reasonably open to the IAD. These findings of fact are at paragraphs 9 and 10 of the IAD decision:

1. ¶9 "… The offences which led to the removal order are serious …"

   There was only one old conviction which was a "serious criminal offence", and that was for break and enter. The circumstance of the offence showed that it was not actually a serious offence in that the applicant was only given probation and no time in jail.

2. ¶9 "… The appellant has gone on to flagrantly continue his criminal behaviour. …"

   This is patently unreasonable. Since the 2005 review which granted the stay, the applicant has only committed one criminal offence and that was obstruction of justice. Obstruction of justice is not considered "serious criminality" and the circumstances of the case are not such that would warrant deporting the applicant from Canada.

3. ¶9 "… Clearly the appellant's criminal activity is not a thing of the past or an isolated incident."

For the same reasons as stated above, the applicant has not continued criminal activity since the 2005 IAD hearing and decision.

4. ¶10 "…By his ongoing criminal activity he appears to me to be habitual criminal. The length of his criminal record, spanning his entire life in Canada, is not an indicator of rehabilitation….

This is clearly wrong, and in fact, absurd. Since the 2005 IAD review, there has been no ongoing criminal activity except for the obstruction of justice charge. Giving a false name to a police officer is the act of a person who is afraid, not really ongoing criminal activity or evidence of a habitual criminal.

5. ¶10 "….since the removal order was issued are convictions for failure to attend Court and obstructing a police officer…"

This is patently unreasonable. The conviction for failing to attend Court took place before the 2005 IAD stay.

6. ¶15 "…Despite two such warnings he has gone on to commit and be convicted of subsequent offences…."

Since the IAD warning in 2005, the applicant has committed one criminal offence and that is "obstruction of justice". The IAD warning related to criminal activity, not to breaching provincial offences.

7. ¶16 "…Despite the strong warning by this Tribunal against further criminal actions and the removal order itself, the appellant has gone on to commit such offences and has been convicted of 6 additional crimes."

Again this is patently unreasonable, clearly wrong, perverse and capricious and made without regard to the evidence. The applicant has been convicted of one criminal offence and that was obstruction of justice, not 6 additional crimes.

[37] For these reasons, this application for judicial review of the IAD decision dated April 15, 2009 must be allowed on the grounds that it is based on several material findings of fact which were not reasonably open to the decision-maker.

CERTIFIED QUESTION

[38] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is allowed; and

2. the decision of the Immigration Appeal Division of the Immigration and Refugee Protection Board dated April 15, 2009 is set aside, and this matter is referred back to the IAD for a new hearing and re-determination by a different member of the IAD.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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