Federal Court  Cour fédérale

Date: 20110603

Docket: IMM-5706-10

Citation: 2011 FC 643

Ottawa, Ontario, June 3, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

MASOUD BOROUMAND

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of the decision of a Citizenship and Immigration Canada (CIC) Pre-Removal Risk Assessment Coordinator (the Coordinator), dated September 16, 2010 whereby the Coordinator determined that the applicant was not entitled to refugee protection under paragraph 114(1)(*a*) of the *IRPA*.

I. Background

[2] The applicant is a citizen of Iran. He came to Canada in 1988 using a false Spanish passport and without a visa.

[3] In September of 1992, he was convicted of three drug trafficking offences and sentenced to four years in prison. In February of 1993, a deportation order was issued on the basis of that conviction.

[4] In April of 1993, the applicant claimed refugee protection. By a decision dated February 22, 1994, the Immigration and Refugee Board (IRB) decided that the applicant was excluded from refugee protection as a result of the drug convictions pursuant to Article 1F(*c*) of the *United Nations Convention Relating to the Status of Refugees* (the Convention). Application for leave and judicial review of this determination was denied on September 8, 1994.

[5] Although the applicant was scheduled for removal on August 23, 1995, he fled the province of Ontario for British Columbia where he assumed his brother's identity. In December of 2002, the applicant was arrested and held in immigration detention until October of 2004 at which point he was released on bond.

[6] In 2004, the applicant applied for protection pursuant to subsection 112(1) of the *IRPA*. A Pre-Removal Risk Assessment (PRRA) officer interviewed the applicant and on October 4, 2004 found that the applicant would "likely face a risk of torture, risk to life and risk of cruel and unusual treatment or punishment upon return to Iran due to his drug trafficking conviction".

[7] However, processing of the applicant's application for protection required more than just a risk assessment. Since the applicant was a person described in subsection 112(3) of the *IRPA* - he was inadmissible on grounds of serious criminality as a result of the 1992 convictions (s 112(3)(*b*)) and he had made a claim for refugee protection that was rejected on the basis of Article 1F of the Convention on February 22, 1994 (s 112(3)(*c*)) - paragraph 113(*d*)(*i*) of the *IRPA* required that the applicant's case be considered both on the basis of the risk factors set out in section 97, and also on the basis of whether or not he posed a danger to the public in Canada. The matter was referred to the Minister's delegate to perform the requisite balancing.

[8] On March 29, 2007, the Minister's delegate denied the applicant's application for protection. The applicant applied for judicial review and on November 21, 2007, Justice Frederick Gibson of this Court allowed the application, set aside the decision, and ordered that a re-determination be carried out by a different Minister's delegate (*Boroumand v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1219, [2007] FCJ No 1576).

[9] On December 21, 2009, prior to any re-determination, the National Parole Board awarded the applicant a pardon under the *Criminal Records Act*, RSC 1985, c C-47 in relation to the 1992 convictions.

[10] By letter dated January 18, 2010, applicant's counsel wrote to immigration officials indicating that the applicant had received a pardon and, as a result, was no longer inadmissible due to serious criminality and was no longer a person described in subsection 112(3) of the *IRPA*. Counsel sought confirmation of the fact that, because of the positive risk opinion issued in 2004, and because the applicant was no longer a person described in subsection 112(3), the applicant was automatically entitled to protected person status and, thus, could apply for permanent residence on that basis. Counsel indicated that the applicant would proceed to make a formal application for permanent residence as a protected person.

II. The decision under review

[11] By letter dated September 16, 2010, a PRRA Coordinator with CIC responded to counsel's January 18, 2010 letter. He indicated that pardons are to be given prospective effect and, as such, the granting of the pardon in the applicant's case did not quash the exclusion decision made pursuant to Article 1F(*c*) of the Convention on February 22, 1994.

[12] In any event, as a result of the pardon, the removal order made against the applicant in 1993 was no longer enforceable and, as such, the Federal Court order for re-determination had effectively been rendered moot. The Coordinator pointed out that the applicant would become eligible to apply for protection again under subsection 112(1) of the *IRPA* should he become subject to another enforceable removal order.

[13] In essence, the Coordinator determined that the applicant had not received status as a protected person by virtue of his 2004 application for protection and that any re-determination of his application was now moot.

III. Legislative background

[14] Subsection 112(1) of the *IRPA* allows a person who is subject to an enforceable removal order to apply to the Minister of Citizenship and Immigration for protection.

Application for protection	**Demande de protection**
112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	**112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

[15] Subsection 112(3) indicates that certain groups of applicants are not eligible to receive refugee protection. These groups include persons who are determined to be inadmissible on grounds of serious criminality with respect to certain convictions, and persons who claimed refugee protection and who were rejected on the basis of Article 1F the Convention:

Restriction	**Restriction**
112. (3) Refugee protection may not result from an	**112.** (3) L'asile ne peut être conféré au demandeur dans les

application for protection if the person	cas suivants :
…	…
(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;	*b*) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or	*c*) il a été débouté de sa demande d'asile au titre de la section F de l'article premier de la Convention sur les réfugiés;
…	…

[16] Although a positive determination will not result in the conferral of refugee protection for the people described in subsection 112(3), paragraph 114(1)(*b*) of the *IRPA* indicates that a positive determination will nonetheless result in a stay of removal for these people. For all other applicants, a positive determination does result in the conferral of refugee protection:

Effect of decision	**Effet de la décision**
114. (1) A decision to allow the application for protection has	**114.** (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de
(*a*) in the case of an applicant not described in subsection	

112(3), the effect of conferring refugee protection; and	surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.
(*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.	

[17] Not only will a positive determination have a different result for people described in subsection 112(3), but their applications will also be considered in a different way. Paragraphs 113(*c*) and 113(*d*) of the *IRPA* recognize that there are essentially two streams for processing applications under subsection 112(1): one for applicants who are not described in subsection 112(3) and one for applicants who are described in subsection 112(3). While the focus for the former group are considerations under sections 96 to 98 of the *IRPA* (the Convention refugee and persons in need of protection provisions), the latter group will have risk factors under section 97 balanced against countervailing considerations such as the safety and security of the Canadian public.

Consideration of application	**Examen de la demande**
113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
…	…
(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	*c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(*d*) in the case of an applicant described in subsection 112(3),	*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la

consideration shall be on the basis of the factors set out in section 97 and	base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

IV. Issue

Did the Coordinator err in concluding that the applicant was not entitled to refugee protection under paragraph 114(1)(*a*) of the *IRPA* as a result of the pardon?

V. Standard of review

[18] Determining the effect of a pardon on an outstanding application for protection under subsection 112(1) of the *IRPA* is largely a question of statutory interpretation. The Supreme Court of Canada in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at para 44, [*Khosa*] indicated that, "Errors of law are generally governed by a correctness standard".

However, deference will often result where an expert tribunal is interpreting its own statute (*Khosa*, above at para 44; *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] SCJ No 9 at para 54).

[19] Although I accept that a PRRA officer – and in this case a PRRA Coordinator – has significant experience interpreting and applying sections 112-114 of the *IRPA*, that experience does not extend to the interpretation and application of the pardon provisions found in the *Criminal Records Act*. As such, the appropriate standard of review to apply in this case is correctness.

VI. Analysis

[20] The applicant argues that the Coordinator erred by finding that he was still a person described in subsection 112(3) of the *IRPA* – and, thus, would still be subject to the second, more restrictive, stream of processing and would be ineligible for refugee protection on any outstanding or future application for protection under subsection 112(1).

[21] The applicant submits that, in fact, the pardon that he received in 2009 effectively removed him from the group of people described in subsection 112(3). Paragraph 112(3)(*b*) no longer applies, he says, because he is no longer inadmissible on grounds of serious criminality. He also contends that paragraph 112(3)(*c*) no longer applies. In this regard, while he admits that a claim for refugee protection was rejected on the basis of Article 1F(*c*) in his case, he contends that rejection can no longer be counted against him because the jurisprudence of this Court in *Smith v Canada (Minister of Citizenship and Immigration),* [1998] 3 FC 144 [*Smith*] establishes that a pardon eliminates any future sanction that arises as a result of the pardoned conviction.

[22] The respondent does not take issue with the applicant's contention that paragraph 112(3)(*b*) of the *IRPA* no longer applies in his case. However, the respondent does take issue with the applicant's submissions regarding paragraph 112(3)(*c*) of the *IRPA*. The respondent argues that the Coordinator was correct in stating that paragraph 112(3)(*c*) continued to describe the applicant: he had made a claim for refugee protection and that claim was rejected on the basis of Article 1F(*c*) of the Convention in February of 1994.

[23] The respondent relies on *Nazifpour v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35, [2007] FCJ No 179 [*Nazifpour*] for the proposition that such an exclusion finding cannot be revisited on the basis of new evidence, such as the pardon. In any event, pardons are to be given prospective effect and that the grant of a pardon does not have the effect of quashing any decisions previously made (*Therrien (Re)*, 2001 SCC 35, [2001] 2 SCR 3 [*Therrien*] and *Canada (Minister of Citizenship and Immigration) v Saini*, 2001 FCA 311, [2002] 1 FC 200 [*Saini*]).

[24] Although the decision of the Federal Court of Appeal in *Nazifpour*, above, arises out of a similar set out facts, I nonetheless agree with the applicant that it is not responsive to the issue raised here. The sole issue before the Court of Appeal in *Nazifpour* was whether section 71 of the *IRPA* extinguished the jurisdiction of the Immigration Appeal Division (IAD) to reopen an appeal of a deportation order on the basis of new evidence. The Court found that it did and that, despite the fact that there had been a pardon in the applicant's case, the IAD did not have jurisdiction to reconsider his appeal.

[25] The applicant in the current case does not seek to have the IAD reopen an appeal, nor does he seek to have the Refugee Protection Division reopen the February 1994 exclusion decision. Instead, the applicant argues that the sanctions flowing from the exclusion decision - i.e. ineligibility for refugee protection and different processing under a subsection 112(1) protection application - cannot be applied subsequent to the pardon.

[26] Section 5 of the *Criminal Records Act* sets out the intended effect of a pardon issued pursuant to that Act. Of particular interest is paragraph 5(*b*) which indicates, in part, that a pardon "removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament".

Effect of pardon	**Effacement de la condamnation**
5. The pardon	**5.** La réhabilitation a les effets suivants :
…	…
(*b*) unless the pardon is subsequently revoked or ceases to have effect, requires the judicial record of the conviction to be kept separate and apart from other criminal records and removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of Parliament — other than section 109, 110, 161, 259, 490.012, 490.019 or 490.02901 of the *Criminal Code*, subsection 147.1(1) or	*b*) d'autre part, sauf cas de révocation ultérieure ou de nullité, elle entraîne le classement du dossier ou du relevé de la condamnation à part des autres dossiers judiciaires et fait cesser toute incapacité ou obligation — autre que celles imposées au titre des articles 109, 110, 161, 259, 490.012, 490.019 ou 490.02901 du *Code criminel*, du paragraphe 147.1(1) ou des articles 227.01 ou 227.06 de la *Loi sur la défense nationale* ou de l'article 36.1 de la *Loi sur le transfèrement international*

section 227.01 or 227.06 of the *Nationa Defence Act* or section 36.1 of the *International Transfer of Offenders Act* — or of a regulation made under an Act of Parliament.	*des délinquants* — que la condamnation pouvait entraîner aux termes d'une loi fédérale ou de ses règlements.

[27] Justice Andrew MacKay in *Smith*, above at paras 16-20, conducted a review of the relevant case law and found that a pardon under the *Criminal Records Act* had the effect of, "cleansing the individual of the stain caused by the conviction and limiting the uses to which the fact of the conviction [could] be put". It is not that the conviction did not ever exist – it did – it is just that, going forward, any disqualifications resulting from the conviction are to be removed.

[28] In *Smith*, above, Justice MacKay was considering an application for judicial review of a deportation order and an exclusion order. The deportation order had been issued based on a conviction for which the applicant had subsequently received a pardon, while the exclusion order had been issued based on the deportation order. Justice MacKay considered: 1) whether or not the orders at issue amounted to "disqualifications" within the meaning of paragraph 5(*b*) of the *Criminal Records Act*, and 2) whether those disqualifications arose "by reason of the conviction" within the meaning of paragraph 5(*b*). He concluded that both the exclusion order and the deportation order amounted to "disqualifications" against remaining in Canada and that both were sufficiently linked to the conviction that they amounted to disqualifications "by reason of the conviction".

[29] In the current case, I am of the view that the IRB's decision that the applicant was excluded pursuant to Article 1F(*c*) of the Convention amounts to a "disqualification" on a prospective basis.

For one thing, this finding prevents him from obtaining refugee protection on any future application for protection under subsection 112(1) of the *IRPA*. Upon reviewing the record, it is also clear that the IRB's decision in this regard was based exclusively on the convictions for which the applicant has now been pardoned. The IRB indicated:

> This panel believes that the trafficking of heroin, an elicit drug, by the claimant… is contrary to the purposes and principles of the United Nations. Therefore the panel, after considering all the evidence, is of the view that the claimant Masoud Boroumand, is not a Convention refugee because he is specifically excluded from the definition, as indicated in Article 1FC of the United Nations Convention relating to the status of refugees, because he has been guilty of acts contrary to the purposes and principles of the United Nations.

I am satisfied that the IRB's February 22, 1994 exclusion decision amounts to a disqualification that the applicant is now subject to by reason of the pardoned convictions. As such, by virtue of the pardon and paragraph 5(*b*) of the *Criminal Records Act*, the applicant should no longer be subject to the disqualifications set out in paragraph 112(3)(*c*) of the *IRPA*.

[30] This conclusion is not at odds with *Therrien* and *Saini*, above, as cited by the respondent. Those cases stand for the proposition that the grant of a pardon does not retroactively erase the conviction itself; it only removes the resulting disqualifications on a prospective basis. In *Therrien*, the Supreme Court of Canada determined, along the same lines as Justice MacKay in *Smith*, that "while a pardon does not make the past go away, it expunges consequences for the future" (*Therrien*, above at para 127). There is no doubt that the IRB's exclusion decision was valid at the time that it was made. However, by virtue of the pardon, that exclusion decision cannot operate to disqualify the applicant for refugee protection under subsection 112(3) of the *IRPA* any longer.

[31] Although the applicant is no longer a person described in subsection 112(3) of the *IRPA*, it does not mean, in my opinion, that he is automatically entitled to refugee protection.

[32] The applicant suggests that the favourable risk assessment completed in October of 2004 should now be treated as a decision to allow the applicant's original application under subsection 112(1) and to confer refugee protection pursuant to paragraph 114(1)(*a*). Any other approach, the applicant submits, would be tantamount to a continuing disqualification and would be contrary to section 5 of the *Criminal Records Act*. I disagree.

[33] Although it is true that a PRRA officer did determine that the applicant would be at risk if he returned to Iran in 2004, no "decision to allow" the applicant's application for protection was ever made within the meaning of subsection 114(1) of the *IRPA*. As such, paragraph 114(1)(*a*) is not engaged. It is important to remember that the 2004 risk assessment was rendered in the context of an enforceable removal order which was issued as a direct result of the 1992 criminal convictions. Had there been no enforceable removal order, the applicant would not have had access to the PRRA application process. The applicant cannot now argue that the pardon should operate in such a way as to leave his original application for protection intact – reliant as it was on the existence of the removal order which, in turn, was based on his criminal convictions – while at the same time removing the negative consequences of being considered under subsection 112(3), thus paving the way for automatic refugee protection. This does not logically flow from section 5 of the *Criminal Records Act*.

[34] Instead, the Coordinator was correct that any further determination of the applicant's 2004 application for protection has effectively been rendered moot by virtue of the pardon. The removal order issued in 1993, underpinning the 2004 application, is no longer enforceable.

[35] Should the applicant become subject to an enforceable removal order in the future, he will be entitled to apply under subsection 112(1) of the *IRPA* again. On a subsequent application, assuming his circumstances do not change, the applicant will not be treated as a person described by either paragraph 112(3)(*b*) or 112(3)(*c*) of the *IRPA*.

[36] For the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review be dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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