Federal Court  Cour fédérale

Date: 20120515

Docket: IMM-6927-11

Citation: 2012 FC 575

Ottawa, Ontario, May 15, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DAVID MATUSICKY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is the judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (IAD) that dismissed Mr. Matusicky's appeal of a deportation order issued by the Immigration Division. The IAD determined that there were insufficient humanitarian and compassionate (H&C) grounds to warrant special relief. For the reasons that follow this application to set aside that decision is dismissed.

BACKGROUND

[2] Mr. Matusicky was born on June 4, 1951 and is a citizen of the United States. He is also a permanent resident of Canada. He came to Canada in 1991 to join a woman he met when working in Los Angeles. Shortly after arriving, he started working as a truck driver and construction worker.

[3] In May 2006, Mr. Matusicky was arrested by the United States Department of Homeland Security for conspiracy to smuggle/transport and harbour illegal aliens. He was apprehended after five women, one of whom was believed by authorities to have been seventeen years old, were smuggled from Canada into the United States. According to the evidence, the applicant travelled to Seattle by plane, rented a vehicle, met with the women who had just walked across the Canadian border into the United States, and drove them to a motel about 5 hours away where they were held by the group of conspirators. The plea agreement Mr. Matusicky entered into with the U.S. authorities suggests that he did this "[d]uring at least 2006 and continuing through on or about May 27, 2006." At the hearing before the IAD, he admitted doing it on three occasions. It was on the third occasion that he was apprehended.

[4] In October 2006, the applicant pled guilty to one count of "Conspiracy to Smuggle and Transport Aliens" contrary to Title 8 of the *United States Code* sections 1324(a)(1)(A)(i), 1324(a)(1)(A)(ii), 1324(a)(1)(A)(v)(I) and 1324(a)(1)(B)(i). On August 27, 2008, the Immigration Division held that this conviction equated to a violation of subsection 117(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[5] On April 14, 2010, Mr. Matusicky was convicted of trafficking a controlled substance. This conviction was the result of a police operation lasting from December 2005 to January 2006 in which he sold cocaine to an undercover police officer on two occasions.

[6] The validity of the deportation order issued by the Immigration Division was not challenged before the IAD. Mr. Matusicky asked the IAD to use its discretionary jurisdiction to grant him special relief. Accordingly, the IAD considered the factors set forth in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 [*Ribic*] and approved by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.

Seriousness of the Offence

[7] The IAD stated that Mr. Matusicky's offences, especially that involving human trafficking, were "extremely serious." It found that he was involved in a significant and well-organized illegal operation which carried substantial risks to the safety of the women concerned. It noted that the operation was discovered by authorities because one of the conspirators attempted to sexually assault one of the women. The IAD stated that Mr. Matusicky was well aware of the seriousness of this offence. It cited a report that said "Matusicky would not identify the targets of the investigation for fear that his life would be in danger…"

[8] The IAD held that the potentially dangerous consequences of the organization's actions made the offence extremely serious in the context of the *Ribic* factors and that this weighed heavily against Mr. Matusicky.

Prospects of Rehabilitation

[9] The IAD noted that several friends and supporters of Mr. Matusicky had submitted letters in evidence characterizing his deeds as "poor decisions," "indiscretions," and "questionable behaviour." It also noted that several of the letters alluded to the offences having been motivated to some degree by difficulties arising from a failed marriage and a difficult medical condition. On that point, the IAD wrote: "I do not agree that his offences can be relegated either to the category of mere impropriety, or to the vicissitudes of life's challenges as these comments imply. By [their] inherent nature the offences have the likelihood of grave consequences for others who are directly affected and for society in general. That is undoubtedly why Parliament established the severe penalties that it did."

[10] The IAD stated that since the offences were the result of more than an isolated impulse and were practiced with purpose and deliberation, the prospects of rehabilitation were weak. The IAD further noted Mr. Matusicky's deceitful practices when he was being detained in the United States. He had provided multiple and different addresses that were inconsistent, he had submitted a false California driver's license when he applied for a British Columbia license, and he had two social security cards. At the time of the charges, his former wife and current spouse also indicated to a Pre-Trial Officer that they did not know of his passport status in the United States, his immigration status in Canada, or his travels into the United States. The IAD held that these accounts cast further doubt on Mr. Matusicky's commitment of rehabilitation.

[11] The IAD summarized the submissions made in the letters of support as containing three broad elements: (1) that he committed a single indiscretion due to poor judgment; (2) that he is

otherwise an honest person; and (3) that he is upset over the consequences for himself and for those around him. The IAD rejected each of these elements. It found that: (1) Mr. Matusicky was not merely involved in a single act arising from impulse or from a rare congruence of circumstances given that in each case he was engaged for a period of time; (2) his conduct throughout the period when the offences occurred was the antithesis of honesty; and (3) his concerns for his actions only went so far as they suggest that he is repentant for himself and for his family and friends with no mention of the victims of his offences or his community.

Establishment in Canada

[12] The IAD then considered Mr. Matusicky's establishment in Canada. It noted that he has been here since 1991, that he is involved in a spousal relationship, that he appears to be close to certain members of his spouse's family, and that he has a number of supportive friends. The Board considered these to be favourable features.

Family in Canada and best interests of a child directly affected by the decision

[13] The IAD said that there is no evidence that Mr. Matusicky is employed on a permanent basis in Canada and there would be no related deprivation if he was removed. It also noted that he has no children and that there was no evidence that a child would be directly affected by his removal.

Hardship on the Applicant and Family Members

[14] The IAD said it was cognisant of Mr. Matusicky's medical condition but found no evidence to show that he would face hardship if removed to the United States. It stated that there are social

and economical links between British Columbia and the Northwest area of the United States which render the geographical impediment minimal. Lastly, the IAD found that Mr. Matusicky and his family would have reasonable avenues to maintain their ties.

Conclusion

[15] In conclusion, the IAD stated that on the balance of probabilities there were insufficient H&C considerations to warrant special relief.

ISSUES

[16] Mr. Matusicky raises two issues in this application:

1. Whether the Member erred in law and unlawfully fettered his discretion by allowing his fixation on the seriousness of the offences to unduly influence his opinion of the other *Ribic* factors; and

2. Whether, if the Member did not fetter his discretion, his decision was unreasonable because he failed to consider relevant evidence supporting the applicant's rehabilitation.

ANALYSIS

1. Fettering of Discretion

[17] I agree with the applicant that the IAD cannot conclude that one's prospects of rehabilitation are insufficient simply because the offence(s) committed were serious. That would be the

equivalent of the decision-maker fettering his discretion as in *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533.

[18] The IAD can, however, look at the circumstances surrounding an offence to establish the prospects of rehabilitation. In my view, that is what the IAD did in the present matter.

[19] The IAD did not accept the evidence that the applicant committed a single act due to impulse or a rare congruence of circumstances. At paragraph 14 it wrote:

> From the evidence the appellant's actions in these two offences were the result of more than an isolated impulse. As the plea agreement states, he had been engaged in the smuggling activity before having been arrested. Also, his trafficking conviction resulted from a lengthy undercover operation by the police. The evidence surrounding both offences indicates that the appellant participated in them with both purpose and deliberation. As such I do not consider that the prospects for rehabilitation are strong.

[20] The fact that one participates in an offence for a length of time and with both purpose and deliberation are valid factors to consider when it is submitted that one acted out of impulse or a rare congruence of circumstances and will not offend again.

[21] Also in evidence were letters saying that Mr. Matusicky was an honest person. It was entirely open to the IAD to consider the circumstances of the applicant's crimes and those that followed his arrest as it did at paragraph 15:

> There is also evidence that [the applicant] appears to have engaged in other deceitful practices as indicated in the proceedings of his detention hearing in the United States. According to the proceedings, he provided multiple and different addresses that were inconsistent; he submitted a false California driver's license when he

> applied for a British Columbia license; and he had two Social Security cards. The proceedings also state that the appellant's former wife and his girl friend indicated to the Pre-trial Officer that they did not know of either his passport status in the United States or his immigration status in Canada. Further, according to the proceedings, they said that they were unaware of his travels to the United States.

Deceitful practices such as these validly cast doubt on the applicant's honesty.

[22] In sum, the IAD is not barred from considering the circumstances surrounding an offence when assessing prospects of rehabilitation; that is what it did in this instance. As such, I do not find that the IAD fettered its discretion.

2. Unreasonable Decision

[23] It is submitted that the IAD failed to analyze the evidence of Mr. Matusicky's rehabilitation since his criminal offences. The following is a list of what the applicant says are the critical factors that were not considered by the IAD:

> - [T]he Applicant had an exemplary civil record, including honourable service in the U.S. Military from 1971 - 1973, for the first 54 years of his life in the USA and Canada;
>
> - [T]he Member paid no regard to the Applicant's exemplary civil record since May, 2006, when he was released from custody in the USA;
>
> - [T]he Member ignored the Applicant's evidence that he had successfully quit using narcotics during his 120 days of custody in the USA in 2006 and that he has abstained from using narcotics since then; and
>
> - [T]he Member ignored the fact that the Applicant has contributed to his community by sharing with young people the dangers of using drugs by holding himself and his current tenuous situation out as an example to them of the dangerous ramifications of using drugs.

[24] It is submitted that Mr. Matusicky's significant period of time without criminal activity was one of the most important factors to consider when examining his rehabilitation: *Canada (Minister of Public Safety and Emergency Preparedness) v. DAA*, 2011 FC 124 at para 30, *Brar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 691 at para 17 and *Thamber v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 177 at para 17.

[25] First, I do not agree with the submission that the applicant "has contributed to his community by sharing with young people the dangers of using drugs by holding himself and his current tenuous situation out as an example to them of the dangerous ramifications of using drugs." The evidence before the IAD was that the applicant had talked to only one young person about his experience and the dangers of using drugs and this was his spouse's nephew. Although this is a positive factor, it is much less than "contributing to the community" in general as the applicant would have the Court believe.

[26] Second, although I agree that the other factors listed by the applicant are positive factors and favour Mr. Matusicky's prospects of rehabilitation, I am not persuaded that the IAD failed to consider them. There is a presumption that the decision-maker considered all the evidence: *Florea v Canada (Minister of Employment and Immigration) (FCA)*, [1993] FCJ No 598. As stated in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 16:

> [T]he reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration*) (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada*

> *(Minister of Employment and Immigration*) (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources.

[27] None of the positive factors that were allegedly overlooked were so material or so significant that one would have expected them to have been specifically referenced by the IAD. As such, I am not convinced that the IAD failed to consider any of relevant H&C elements, especially those that favoured the applicant. This application must be dismissed.

[28] No question was proposed for certification.

[29] At the hearing I granted the respondent's request, on consent, to amend the Style of Cause to substitute The Minister of Citizenship and Immigration for The Minister of Public Safety and Emergency Preparedness.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Style of Cause is amended to change the respondent from THE MINISTER OF PUBLC SAFETY AND EMERGENCY PREPAREDNESS to THE MINISTER OF CITIZENSHIP AND IMMIGRATION; and

2. The application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6927-11
STYLE OF CAUSE:	DAVID MATUSICKY v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	May 3, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	May 15, 2012

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