Federal Court  Cour fédérale

Date: 20120907

Docket: IMM-6572-11

Citation: 2012 FC 1062

Ottawa, Ontario, September 7, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

LIU, HUA FU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant was ordered deported in July 2007 because he had been convicted of a serious criminal offense. He appealed that order on humanitarian and compassionate grounds. On November 15, 2010 the Immigration Appeal Division of the Immigration and Refugee Board denied the appeal. This is his application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons that follow, the application is dismissed.

BACKGROUND:

[3] The applicant was born in Vietnam of mixed Chinese and Vietnamese ethnicity. He was sponsored by his sister and landed in Canada from China in 1990 at the age of 16 with his parents and other siblings. The applicant married a Canadian citizen in 2005 and they have a child born in 2002. The wife and child live in British Columbia. He lives in Ottawa with a girlfriend and they have two children born in 2004 and 2006.

[4] The applicant's criminal history, and that of several of his siblings, began shortly after their arrival in Canada. In police and Canada Border Security Agency documents in the Certified Tribunal Record, the applicant is alleged to have been a member of gangs in Ottawa and on Vancouver Island. The applicant incurred a series of convictions between 1993 and 1995. Other charges were laid but stayed or withdrawn between 1993 and 1999. An immigration inquiry was initiated in 1994 but, for reasons which are unclear in the record, did not result in a deportation order.

[5] In 2006, the applicant was sentenced to time served (130 days) and 18 months' probation after being convicted of unlawfully being in a dwelling house and assault. As a result he was ordered deported pursuant to section 36(1) (a) of the Act on July 25, 2007. He appealed that decision to the Immigration Appeal Division (the "Board").

[6] The first hearing date in 2008 was adjourned when the applicant filed additional materials after the deadline for doing so. It was rescheduled for June 2009 but adjourned again when the

applicant's counsel removed himself from the record and new counsel was retained. The appeal hearing was rescheduled for October 19 and 20, 2010.

[7] While on immigration bail, the applicant was charged with robbery and extortion with a firearm. Those charges were withdrawn when the applicant pleaded guilty in March 2010 to possession of stolen property for which he received time served and a suspended sentence.

[8] On July 29, 2010, the applicant's counsel wrote to the Board to inform it that he had been unable to obtain instructions from the applicant in the previous 10 months and that he must therefore remove himself from the record. Counsel confirmed that he had advised the applicant of the hearing scheduled for the following October. Despite several attempts, a case management officer from the Board was unable to reach the applicant to advise him to bring his appeal record to the hearing and to verify whether he had new counsel.

[9] The applicant came to the hearing as scheduled. On the first day, he stated that he did not have a lawyer because he could not afford one, and he asked the Board to recommend someone, which it declined to do. The applicant then stated that he was ready to proceed with the hearing. He did not have his appeal record. After some discussion, it was decided that, where necessary, the Minister's representative would show him documents from her copy of the appeal record. The first day of the hearing proceeded and the Board told the applicant to bring his appeal record the next day.

[10] When the hearing resumed the next day, the applicant still did not have his full appeal record. He asked for an adjournment to allow him to retain counsel. The Board rejected this request in light of the previous adjournments, its view that the matter was straightforward, and the ample notice provided to the applicant after previous counsel withdrew. The hearing resumed with the applicant representing himself.

DECISION UNDER REVIEW:

[11] The Board's decision was rendered on November 15, 2010. At the outset, the Board reiterated the reasons that had been stated at the hearing when the adjournment request was denied, relying on *Mervilus v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1206.

[12] Dealing with the merits of the appeal, the Board considered the factors affirmed in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, and reviewed the applicant's testimony relevant to each factor. The Board found the applicant's testimony not to be credible and that he had not accepted responsibility for his actions. The Board gave the most weight to the seriousness of the offense and the lack of evidence of rehabilitation.

[13] The Board found that the evidence of the applicant's establishment in Canada was weak notwithstanding his 21 years in Canada as of the time of the decision. This finding was based on his irregular work history, lack of assets, and lack of close contact with family members who are in Canada and failure to become a citizen. It was noted that the applicant has a brother in China and speaks Cantonese which would lessen the hardship that his relocation to China would cause.

[14] The Board considered the impact that the applicant's deportation would have on his children but noted that they are in the care of their mothers, both of whom are employed. He concluded that the children's best interests would be served because they would remain in Canada in their mothers' care.

ISSUES:

[15] The issues raised in this application are as follows:

a. Was the applicant denied procedural fairness?

b. Is the Board's decision on the merits of the appeal reasonable?

ANALYSIS:

Standard of Review:

[16] Where procedural fairness is in question, as here, the proper approach is to ask whether the requirements of natural justice in the particular circumstances of the case have been met: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43.

[17] The Board's decisions about whether humanitarian and compassionate considerations warrant relief on appeal from a deportation order are reviewable on the reasonableness standard: *Khan v Canada (Minister of Citizenship and Immigration)*, 2009 FC 762 at para 21.

Was the applicant denied procedural fairness?

[18] The applicant submits that he was not afforded due process because his adjournment request was denied. Because he did not have counsel at the hearing, counsel argues, "many relevant questions militating for the applicant could not be raised." He contends further that the Board had a duty to assist him and that the Board should have called the two witnesses listed by previous counsel in December 3, 2008: his wife and girlfriend. Because these witnesses were not called, the applicant argues, significant evidence of his establishment in Canada was not before the Board.

[19] The Board had no obligation to call witnesses for the applicant even if the witnesses were listed by his prior counsel. Although the applicant stated that he did not know his girlfriend could have attended the hearing, he was asked on the first day of the hearing whether he would be calling any witnesses and his answer was no. Even when he indicated that he had not realized she could attend, he does not mention having her testify but rather talks about how he would have liked to have her there to support him. As the applicant's wife lived in British Columbia, she was not available as a witness.

[20] The applicant had several months' notice that his counsel had withdrawn, but he did not retain new counsel by the date of the hearing nor did he seek legal aid. The applicant's explanation to the Board that he did not seek legal aid because he does not believe that lawyers who work for free are competent was unreasonable given the issues at stake. The right to counsel is not absolute: *Yanez Tecuapetla v Canada (Minister of Citizenship and Immigration)*, 2012 FC 225 at para 25.

[21] The applicant's education is limited, but that does not excuse his effective lack of participation in the proceedings, as demonstrated by his failure to inform the Board that his phone number had changed and the fact that he did not bring his copies of the appeal record to the hearing. His prior counsel withdrew because of the applicant's failure to instruct him.

[22] The applicant agreed to proceed on the first day of the hearing without counsel. Given that the matter had already been delayed more than three years and that a full day of the hearing had already transpired, the Board did not breach procedural fairness by proceeding with the rest of the hearing.

[23] At paragraph 25 of *Mervilus*, above, cited by the Board, the Court held the following:

> [A]lthough the right to counsel is not absolute in an administrative proceeding, refusing an individual the possibility to retain counsel by not allowing a postponement is reviewable if the following factors are in play: the case is complex, the consequences of the decision are serious, the individual does not have the resources - whether in terms of intellect or legal knowledge - to properly represent his interests.

[24] Here, the matter was straightforward and, although the consequences serious in that the applicant faces deportation, no evidence of hardship he would face by having to relocate to China was presented. As set out above, the applicant was in a position to properly represent his interests and to the extent that he did not do so, it was of his own doing. The Board adapted its usual procedure because the applicant was representing himself, and he was given the opportunity to call witnesses and to make submissions. The applicant had the chance to put forward any other evidence or raise any other issues not raised in the hearing, and he cannot now complain that the Board did not have all of the information when he had the opportunity to put that information forward.

[25] Counsel for the applicant has also suggested that the Board member disclosed bias by a reference in the decision to the applicant's "lengthy record…a total of 150 pages". He contends that the only conviction that is relevant is that leading to the deportation order.

[26] I agree that for the purposes of determining whether the deportation order was validly issued under paragraph 36 (1) (a) of the Act, the only relevant conviction is that for the predicate offence which is the basis for the order. However, in considering whether there are humanitarian and compassionate grounds to grant relief from the deportation order the applicant's entire criminal history is relevant. In this matter, the Board had before it a lengthy dossier concerning the applicant compiled by the police and the CBSA over two decades. In my view, it was entirely reasonable for the Board to have made reference to it.

[27] I am satisfied that the Board did not breach its duty of procedural fairness to the applicant and that there is no basis for a finding of a reasonable apprehension of bias.

Is the Board's decision on the merits of the appeal reasonable?

[28] The applicant submits that the Board erred in assessing the humanitarian and compassionate factors in favour of a stay of his deportation. He contends that the Board did not properly consider the factors identified in *Chieu*, above. Regarding the seriousness of his offence, he suggests several questions that could have been asked and states that they are unanswered. On the possibility of rehabilitation, he raises arguments regarding dependence on alcohol or drugs or anger management issues.

[29] In terms of his establishment, the applicant notes that he has not left Canada since his arrival in 1990 and has never been on social assistance. He submits that the Board failed to consider the hardship he would face returning to China after leaving more than 20 years ago and given that he is not in touch with his brother who lives there following deportation from Canada.

[30] Finally, the applicant submits that the Board failed to fully consider his children's best interests. In particular, he notes that the Board did not mention the handwritten schedule provided two years earlier that showed how he and his wife take turns caring for their autistic son. He also argues that the Board failed to ask how he supports his other two children both emotionally and financially.

[31] I note that by the time this matter came on for hearing before the Board the wife and autistic son had returned to British Columbia and there was no indication that the applicant continued to be involved in his son's care. The Board did not err by failing to refer to evidence that was two years old at the time of the hearing and was no longer accurate.

[32] With regard to the two other children, the applicant has failed to demonstrate that the Board did not adequately consider their interests. Although the applicant said that he is somewhat involved in caring for them, he did not provide any evidence – at any point since the appeal was initiated – to this effect, despite his prior counsel having entered into the record several pictures of him, his wife, and their child. Given the total lack of evidence about the other two children, the Board cannot be faulted for concluding that the children's interests did not warrant a stay.

[33] Nor did the Board err in considering the *Chieu* factors. The applicant has a lengthy criminal record dating back to within a few years of his arrival in Canada. He has repeatedly been charged with extortion and uttering threats. At least one of his charges allegedly involved a firearm. While awaiting a hearing on his appeal from the deportation order he was charged with additional offences and pleaded guilty to one. Although the 2006 conviction that led to the deportation order was not a violent offence, the police records indicate that there were children present and that the applicant repeatedly threatened to "kill everyone" and implied that he was in possession of a firearm.

[34] The applicant's criminal history is relevant to the prospect of rehabilitation. When he was questioned about this record at the hearing, he insisted that the charges were falsified, that the victims had since apologized to him for having contacted the police, that a police officer was out to get him, or that the Minister's counsel had falsified the police records. Given his complete failure to take responsibility for his actions, the Board's finding that there was no possibility of rehabilitation is entirely reasonable.

[35] The applicant did not put forward any evidence that he faces hardship if he must return to China other than the assertion that he was no longer familiar with the country having lived here for over two decades and only minimal evidence of his involvement in his children's lives. The applicant bore the burden of establishing that humanitarian and compassionate grounds warranted a stay of his deportation and he simply failed to do so.

[36] The application is dismissed. No questions for certification were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6572-11
STYLE OF CAUSE:	LIU, HUA FU and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 23, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	September 7, 2012

APPEARANCES:

Jacques Bahimanga	FOR THE APPLICANT
Craig Collins-Williams	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JACQUES BAHIMANGA Barrister & Solicitor Ottawa, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT