Federal Court  Cour fédérale

Date: 20130506

Docket: IMM-7951-12

Citation: 2013 FC 470

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 6, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

LUIGI D'AMICO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This application is a judicial review of the negative decision of the Immigration Appeal Division (IAD) of July 20, 2012, relating to the appeal of a removal order issued against the applicant on February 14, 2006.

I. Facts

[2] The applicant was born on December 14, 1938, in Italy. He immigrated to Canada at the age of 18 and is now 73 years old. He is a permanent resident.

[3] He is divorced and lives alone in Granby in an apartment. He has four children and eleven grandchildren who are Canadian, several of whom live close to applicant's home in Granby or on the South Shore. He no longer has a spouse.

[4] In 1992, the applicant was convicted of attempting to obstruct justice and for failure to appear. In 1995 and 1997, he was convicted following two charges of driving while impaired by alcohol. In 1998, Citizenship and Immigration Canada (CIC) sent him a letter advising him that he had committed a serious offence, that of attempting to obstruct justice for which he could be deported from Canada. Nevertheless, CIC chose not to investigate the applicant and decided that it would reassess the situation if the applicant was found guilty of other criminal offences.

[5] On November 25, 2005, the applicant was the subject of a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (IRPA), because of convictions for trafficking in cocaine, possession of drugs for the purposes of trafficking and driving while impaired by alcohol, for which he pled guilty.

[6] A deportation order was issued against the appelant on February 14, 2006, by the Immigration Division (ID), since it was determined that he was a person described under paragraph 36(1)(*a*) of the IRPA.

[7] The applicant appealed this decision before the IAD. It decided on February 20, 2007, to stay the execution of the deportation order for three years to give the applicant the opportunity to show that he was rehabilitated.

[8] On September 12, 2007, the applicant was charged with the production of cannabis, possession of cannabis, possession of cannabis for the purpose of trafficking and driving a motor vehicle when he was prohibited from doing so. The applicant did not advise the Canada Border Services Agency (CBSA) of these charges.

[9] On May 30, 2008, it was decided that the stay would be upheld with the same conditions until the final review, scheduled on or around February 20, 2010.

[10] On October 13, 2009, the IAD decided to uphold the stay issued to the applicant while waiting for the results of the criminal charges brought against him in September 2007, reminding him that he was in violation of conditions 2, 5 and 9 of his stay.

[11] On May 3, 2010, the applicant did not attend his semiannual appointment with the CBSA and presented himself a month later.

[12] During Projet Colisée, it was discovered that the applicant and his sons Patrizio and Tiziano have connections to the mafia. The applicant admitted that he considers Francesco Arcadi as his son and that he was involved in reimbursing his son for $900,000 in construction costs.

[13] On January 13, 2012, the applicant was acquitted of the charges laid against him in 2007 because of the absence of an important witness.

II. Decision under review

[14] The IAD, in its decision rendered following the final review under subsection 68(3) of the IRPA, which took place on April 4, 2012, determined that the applicant should be returned to Italy.

[15] First, the IAD heard the testimony of the appellant during the hearing of April 2012 and heard the recording of the hearing of 2007. It then reviewed the case law applicable to the matter of an appeal of a deportation order on the grounds of serious criminality and, specifically, the factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4, 1986 CarswellNat 1357 (*Ribic*), affirmed in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84, and *Al Sagban v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4, [2002] 1 SCR 133, by the Supreme Court of Canada.

[16] With respect to the seriousness of the offences leading to the deportation order, the IAD found that these were significant. The applicant received a stern warning from the CIC in 1998 and he nevertheless committed other serious crimes and the IAD thus found that the first factor in *Ribic*, above, does not favour the applicant.

[17] Second, the IAD found that the applicant has not demonstrated the possibility of rehabilitation. The IAD noted that he did not respect four conditions issued in 2007. The applicant did not notify the CBSA in writing and in a timely manner of the criminal charges brought against him in 2007. Instead, the applicant was confronted with this fact during his semiannual appointment approximately two years after being charged. He falsely stated that he was acquitted of these charges. Further, the applicant failed to present himself at the CBSA on March 20, 2008, and May 3, 2010. The applicant provided a copy of his passport two years after this condition was issued by the panel. Finally, he failed to inform the CBSA of his meetings with his parole officer and provide a copy of his release report (condition number 10).

[18] The search warrants obtained by the Granby police were based on several reports dating from 1999 spanning the years up to April 2003, which shows that the applicant trafficked drugs over a larger period than what was reported. Further, several elements of his testimony at the 2012 hearing directly contradict his 2007 testimony in particular with respect to the detail about drug trafficking and his contact with people engaging in criminal activities.

[19] The IAD also considered that since the stay was issued in 2007, the applicant was again charged with possession of cannabis, possession of cannabis for the purpose of trafficking and driving a motor vehicle when he was prohibited from doing so. His explanations, specifically his ignorance of the fact that three locations in proximity of his daily life were used to store drugs, were considered by the IAD to be lacking credibility.

[20] With respect to the applicant's degree of establishment in Canada, the IAD noted that he has been in Canada for more than 50 years, that he did not provide any evidence of sources of income and that the companies that he opened are no longer operating and that he lives off of his children's help, in addition to his old age pension.

[21] With respect to the impact of the applicant's removal on his family, the IAD noted that the applicant is divorced, that he has children and grandchildren, but no spouse. It found that the applicant's family is a positive factor for the applicant.

[22] With respect to the best interests of the applicant's grandchildren, the IAD found that it is not in their interests to maintain ties with their grandfather, who has links with the mafia and has committed several criminal acts, and further since it will still be possible for them to visit him in Italy.

[23] Finally, the IAD considered that the appellant's support within the community is not in his favour because he seems to spend time with people who are linked to the mafia, and further since his return to Italy, a democratic country, would not be difficult because members of his family are there.

III. Position of the applicant

[24] In its decision, the IAD continuously alluded to the applicant's evidence and testimony submitted in 2007, five years earlier, during the hearing with respect to the granting of the stay and

found that there were elements contradicting the evidence and testimony of the hearing of April 4, 2012. At no time did the IAD inform the applicant that it considered the testimony provided during the 2007 hearing. The applicant is of the opinion that it should have given the applicant the opportunity to face such contradictions and give explanations and could not draw any negative finding on his credibility without giving the applicant this opportunity. Such a rule falls within natural justice. Neither could the IAD note a violation of condition number 10 of the stay without giving the applicant the opportunity to explain this. Further, the applicant is of the opinion that credibility is a key point of the IAD's decision.

[25] The IAD committed significant errors by noting that during the 2007 hearing, the applicant and his son Tiziano testified in support of the appeal. Further, the IAD erred in mentioning that the applicant said that he met Nick Piccirilli during his discussions with Frank Arcadi. In fact, the applicant never met Nick Piccirilli and does not know anyone by that name. This demonstrates that the IAD did not have a good understanding of the record.

[26] In addition, the IAD criticizes the applicant's son, Patrizio, of not being frank with respect to his criminal past during the hearing in 2007, because he apparently did not state that he had been charged with an offence in 2009. This offence had not yet been committed.

[27] The IAD erred in the number of brothers and sisters that the applicant has in Italy. Further, contrary to the panel's claims, the applicant no longer has any contact with his brothers and sisters and he never stated that he had contact with his family in Italy.

[28] The IAD did not make a fair assessment of the degree of establishment and rehabilitation of the applicant. The IAD was also not sensible and attentive to the best interests of minor children directly affected by the deportation order.

IV. Position of the respondent

[29] The respondent submitted that the applicant is seeking to have the Court reassess the evidence in a way that is more favourable for him. It is not this Court's role to reconsider the weight given to each of the factors of *Ribic*, above.

[30] The respondent submitted that there was no breach of natural justice by the IAD. It was not obliged to confront the applicant during the hearing on April 4, 2012, on the 2007 version of his testimony. In fact, if the applicant was telling the truth, both versions would have been the same. Thus, it was open to the IAD to make negative findings against the applicant. Further, it did not have to confront the applicant with the violation of condition number 10, i.e. his failure to send his parole officer's report, because the applicant's explanations about it would not have changed anything.

[31] Further, it was established in *Martinez de Quijano v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1232, 2009 CarswellNat 4947, that the panel is not obligated to confront the applicant with evidence that is not extrinsic.

[32] Finally, the contradictions raised do not form the basis of the IAD decision. They only corroborate the objective documentary evidence with which applicant was confronted that he constantly minimized his criminal past to receive a stay.

[33] The respondent is of the view that the IAD could note all the violations to the conditions of the stay even if they were not all raised by it.

[34] The respondent noted that the applicant provided contradictory testimony about his relationship with his family in Italy, because although he stated in his affidavit that he no longer had contact with them, he stated in 2007 that he spoke to them regularly.

[35] In addition, the evidence filed with respect to Projet Colisée, which was not available in 2007, shed serious doubt on the applicant's credibility. In addition, the applicant was confronted with the evidence filed by the respondent and outright denied that anything in it was true.

[36] With respect to the impact of his removal on his grandchildren, the IAD was sensitive to their interests and it is open to the IAD give the weight that it considers appropriate to this factor.

[37] Finally, with respect to the two errors of fact noted by the applicant, the respondent acknowledged them, but is of the view that they are of no consequence. As for the error with respect to the mention of Nick Piccirilli, it is clear that, rather, the IAD was referring to Sergio Piccirilli and Mr. Varacalli.

V. Issues

1. Did the IAD err in not allowing the applicant to provide an explanation about the contradictions from his testimony?

2. Did the IAD render a reasonable decision?

VI. Standard of review

[38] The IAD's obligation to allow the applicant to respond to contradictions noted by him is a question of procedural fairness, which must be assessed on a standard of correctness (see *Azali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 517, at para 12, 167 ACWS (3d) 164 (*Azali*)). The review of the decisions rendered under paragraph 67(1)(*c*) of the IRPA by the IAD must be done on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 58, [2009] 1 SCR 339).

VII. Analysis

A. *Did the IAD err in not allowing the applicant to provide an explanation about the contradictions from his testimony?*

[39] The applicant, as a result of his criminal behaviour, became the subject of an inadmissibility report in accordance with subsection 44(1) of the IRPA. The ID found that the applicant was inadmissible for serious criminality under paragraph 36(1)(*a*) and, consequently, a removal order was issued against him on February 14, 2006, and he therefore lost his permanent resident status (see paragraph 46(1)(*c*) of the IRPA).

[40] The applicant filed an appeal under subsection 63(3) of the IRPA before the IAD. On February 20, 2007, it granted a stay with conditions that was upheld on May 30, 2008. On February 13, 2009, it was decided to wait for the outcome of new criminal charges against the applicant before proceeding to the final review of the stay. The file was referred for final review on January 6, 2011.

[41] To succeed in appeal, the applicant had the burden of proving the [TRANSLATION] "exceptional reasons" justifying the need for him to stay in Canada (see *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, at para 90, [2002] 1 SCR 84). The applicant did not meet this burden.

[42] The IAD reviewed the factors set out in *Ribic*, above, and found that the applicant did not discharge his burden of showing that the humanitarian and compassionate grounds justify upholding the stay of execution of the removal order.

[43] Le applicant criticized the IAD for not bringing to his attention the contradictions between the testimony that he provided in 2007 and that of 2012 so as to allow him to give appropriate explanations.

[44] The applicant testified under oath on February 20, 2007, and on April 4, 2012. In both cases, the objective of the testimony was to obtain a stay or a renewal of the stay. The testimony was given in the same appeal process and addressed the facts alleged against the applicant both before and after 2007.

[45] At the start of the hearing of April 2012, it was specified that the documents filed during the hearing of February 2007 were part of the tribunal record in the same way as the other documents posted subsequently. During the last hearing, express or implicit reference was made to the witnesses of the 2007 hearing or even to the facts initially presented. In the argument of the Minister's counsel, from the start, he immediately brought up the 2007 hearing and the IAD decision.

[46] The applicant changed counsel three times. At the hearing of April 2012, the new counsel of the applicant was asked by the IAD to address the factors in *Ribic*, above, and the lunch break was extended to allow him to prepare himself adequately. In the afternoon, counsel for the applicant examined him at length although he had already examined him at the start of the hearing. Counsel for the applicant objected, argued and asked for details during the examination by the Minister's counsel. He did the same when the IAD examined the applicant. He stated at the end of the applicant's testimony that he had [TRANSLATION] "gone around" and that [TRANSLATION] "… it [was] all for [them]".

[47] The hearing of February 2007 was recorded. It was transcribed on December 27, 2012.

[48] The question here is not to use extrinsic evidence, but actually the answers given by the applicant under oath on two occasions within the same appeal process (see *Azali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 517, at para 26, 167 ACWS (3d) 164). During testimony under oath, the truth must be told, thus, the presumption of truthfulness applicable to the testimony provided under oath (*Maldonado v Canada (Minister of Employment and Immigration)*,

[1980] 2 FC 302, 31 NR 34 (CA)). When one testifies on the same facts, one must expect that they will be of the same tenor. If they are not, that means that the contradictory versions given do not have the seal of truth required. Therefore, a decision-maker may draw the appropriate conclusions from them.

[49] In its decision, the IAD referred to certain contradictions between the two testimonies given and the new evidence submitted at the hearing of April 2012, which enabled him to shed light on the applicant's testimony in 2007, several aspects of which were not credible:

1. In 2007, the applicant stated that he was purchasing his drugs for re-sale in Saint-Hubert and now he stated instead that it was [TRANSLATION] "from some people in Montréal".

2. In 2007, the applicant claimed that he did not associate with people with a criminal record, while the new evidence shows that he had associated with some.

3. In 2007, the applicant stated that his son Tiziano had not obtained his liquor licence for his restaurant because of his convictions for possession and trafficking drugs, although he recently explained that it was rather the D'Amico family's ties with the Italian mafia that were the reason.

4. In 2007, the applicant's son Patrizio explained that his father worked all his life, but that in 2002-2003 his fragile state forced him to engage in trafficking drugs and in 2007, the

applicant denied received social assistance while he was engaging in trafficking drugs. Further, the recently filed narrative report from 2005 contradicted these statements.

5. The testimony of the applicant's son Patrizio in 2007 was also contradicted by the recent documentary evidence with respect to his relationship with people who have criminal records and his criminal record for offences committed in 1994.

[50] Using these contradictions, the IAD made the connection with the recent documentary evidence and found that the evidence submitted by the applicant in 2007 to obtain a stay of the removal order was not consistent with the new evidence.

[51] In a similar case, an applicant must submit consistent evidence on the basis of a single factual foundation, because it is the same procedure using different steps. It must be presumed that during successive testimony, the same factual answers will be given. An applicant, whose obligation is to be truthful in his answers, does not have to be confronted with his own inconsistencies (*Quijano v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1232, at para 30, 184 ACWS (3d) 1087).

[52] Further, the applicant also had the opportunity to correct the facts if needed through his counsel during objections, questions and cross-examination. Given that the documents submitted into evidence during the hearing of February 2007 were part of the review of the stay of April 2012, it goes without saying that the recording of the hearing of February 2007 was also part of it in the

same way as the decision granting the stay. In such a situation, the applicant has to expect that the IAD has full knowledge of the file to be able to draw the appropriate findings.

[53] The principles of natural justice, applicable in appeal proceedings like this one, do not require that the applicant be confronted with his contradictions from two testimonies given under oath during the same proceeding in connection with all the documentary evidence submitted by the parties. It has been well established since *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at paras 21-22, 243 NR 22, that the obligation of procedural fairness is flexible and variable and that it rests on an appreciation of circumstances specific to each case. In this case, the applicant, who was duly represented by counsel, had the opportunity to be heard, to add details or provide explanations during his examination and re-examination. He was even invited to testify again to address each factor in *Ribic*, above, which he did. Taking into account all of this, there was no breach of the rules of natural justice that would not prevent the applicant from providing explanations on his contradictions.

[54] Another argument regarding the breach of natural justice was presented by the applicant. It was suggested that the finding that condition number 10 (obligation to file the parole officer's report, which the applicant neglected to do) of the 2007 IAD decision was not met should not have been addressed by the IAD without giving the applicant the opportunity to provide his version. Counsel for the Minister did not raise it. This condition was part of the 2007 decision granting the stay. The applicant knew about it. He could have commented on it, which he did not do. For the same reasons noted above, the IAD was not obliged to raise the violation of this condition at the hearing. The applicant has the burden of showing [TRANSLATION] "exceptional circumstances",

which includes the obligation of respecting the conditions of the granted temporary stay. It comes within the scope of the IAD to verify whether the conditions of the 2007 temporary stay were respected to assess the possibility of rehabilitating the applicant.

[55] With respect to the importance given by the IAD to the contradictions between the two testimonies, this is only one of the reasons why the IAD found that the factors of *Ribic*, above, support the appeal being dismissed. The applicant faced new charges following the stay, although they did not lead to a conviction. In addition to the violation of condition number 10 of the stay of the applicant, which was subject to the previous subsection, the IAD noted three other breaches to the conditions imposed in the applicant's stay:

1) the applicant failed to inform the CBSA in writing and without delay of the criminal charges brought against him in 2007

2) the applicant did not provide a copy of his passport within a reasonable timeframe

3) the applicant did not attend his appointment at the CBSA on March 20, 2008, and May 3, 2010

B. *Did the IAD render a reasonable decision?*

[56] The applicant claimed that the IAD decision is erroneous in several respects that make it unreasonable. The errors are as follows:

1. The IAD noted that the applicant's son Tiziano testified in support of the appeal of 2007, which is not the case. He was supposed to testify, but counsel for the applicant stated that he would not testify because he would not add anything to the testimony of the other son, Patrizio, who testified.

2. The IAD noted in the decision that the applicant met Nick Piccirerilli during discussions with Frank Arcadi. The evidence did not show that the applicant met this person. According to the respondent, it seems that the IAD was instead referring to Sergio Piccirerilli and to Nick Varacelli.

3. The IAD alleged that, in his testimony of 2007, the applicant's son Patrizio was not honest because he did not talk about a charge under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, SC 2000, c 17 for an offence that was allegedly committed in 2009.

4. The IAD erred when it noted that the applicant has three brothers in Italy when he has two and one sister. In addition, it is erroneous to say that the applicant still speaks to his brothers and sister when his testimony of 2012 said the opposite. The respondent reiterated that in 2007, his testimony was that he still had contact with his brothers and sister at Christmas, Easter or if someone was sick.

[57] Having reviewed the applicant's allegations with respect to some parts of the IAD decision, it can be noted that the errors about the fact that his son Tiziano did not testify in 2007, the

applicant's allegation that he had never met Nick Piccirerilli and that the applicant has two and not three brothers do not have the importance necessary to lead to the unreasonableness of the IAD decision. These are simple errors without consequence.

[58] As to Patrizio's criminal record, Exhibit R-20 shows that, in 1994, he was convicted for offences that contradict his testimony given in 2007, during which he stated that he had no criminal record. The IAD also noted that Patrizio was the subject of additional criminal charges in 2009. Thus, the IAD simply related the fact that Patrizio did not give an honest answer in 2007 about his criminal past and did not commit any error.

[59] Finally, the applicant's recent testimony is that he no longer speaks to his brothers and sister in Italy. The Court noted that according to his testimony in 2007, he was speaking to them at least twice a year, as noted above, and this fact was related in the IAD decision. This finding of the IAD in no way justifies declaring the decision unreasonable.

[60] Considering the IAD's decision, the analysis of the seven factors in *Ribic*, above, the objectives of the IRPA with respect to the security of Canadians and the documentary evidence submitted by the parties for both the 2007 hearing and the 2012 hearing, the following IAD finding is reasonable and justified:

> "[129] The panel is of the opinion that the appeal must be dismissed. The panel is of the opinion that an extension of the stay would not be appropriate in this case because the appellant has not demonstrated a real possibility of being rehabilitated. The appellant's disregard for the warnings from immigration authorities in 1998 and in 2005, as well as his lack of respect for the conditions of stay imposed by the panel in 2007, demonstrate that the appellant had many opportunities

> to show that he could be rehabilitated. One can only conclude that in 2012, this possibility no longer exists—if, in fact, it was ever grounded in reality at all."

[61] Therefore, the application for judicial review of the IAD decision dated July 20, 2012, is dismissed.

[62] The parties were invited to submit a question for certification, but none was proposed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review of the IAD decision dated July 20, 2012, is dismissed. No question will be certified.

"Simon Noël"

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Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7951-12
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