Federal Court  Cour fédérale

Date: 20131209

Docket: IMM-2845-13

Citation: 2013 FC 1223

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 9, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

MUSTAFA YUZGULEC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[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 a decision, dated March 27, 2013, by a member of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada dismissing the applicant's appeal from the removal order issued against him by the Immigration Division (ID) on March 24, 2010 following a determination of inadmissibility in application of paragraph 36(1)(*a*) of the IRPA.

II. Facts

[2] The applicant was born in Turkey on September 27, 1986, and arrived in Canada in October 1986 when he was one month old. He obtained permanent resident status on March 19, 1992. He is not a Canadian citizen.

[3] In 2008, the applicant was convicted of drug trafficking and received a six-month conditional sentence

[4] Following these convictions, a report pursuant to subsection 44(1) of the IRPA was written on September 17, 2009, and the Minister referred the matter to the ID on November 24, 2009, pursuant to subsection 44(2) of the IRPA.

[5] After an investigation by the ID, the applicant was declared inadmissible on March 24, 2010.

[6] He appealed that decision before the IAD, which heard the appeal on January 22, 2013, and rendered its decision on March 27, 2013, dismissing the applicant's appeal and refusing to grant a stay of removal.

III. Impugned decision

[7] The IAD ultimately found that the removal order issued against the applicant was well founded in law, in particular because he had not, on a balance of probabilities, discharged his

burden of establishing that, in the circumstances of this case, he ought to be granted special relief on humanitarian and compassionate grounds and because it was in the best interests of a child.

[8] In its decision, the IAD noted various errors or inconsistencies in the applicant's testimony that undermined his credibility. Here are a few notable examples. The applicant contradicted himself about knowing the identity of the persons with whom he committed the offences. He also contradicted himself when he claimed to have been involved in drug trafficking for 5 months, when in fact it was more like 10 months. The applicant became mixed up when asked about the number of charges he faced in 2011, stating that it was four rather than six. He claimed to have committed the offences for which he was convicted in 2009 because he was having financial problems and because of the bankruptcy of the business he worked for, when it was not until 2011 that it went bankrupt. The applicant subsequently changed his story and stated that he was influenced too easily.

[9] The hearing also led the IAD to the conclusion that the applicant was not even conscious of the fact that he was on probation at the time of the hearing and that he was unable to remember all of the offences he had been charged with. In addition, the applicant was facing two other charges at the time of the hearing – one for fraud, another for possession of narcotics – about which he knew few details even though these had been recent incidents. Furthermore, the applicant had a removal order against him since 2010, but continued to commit crimes and to reoffend. For all of those reasons, the IAD determined that the applicant did not take his criminal behaviour seriously and that he was not likely to comply with the conditions that would be imposed on him in the event he were to be granted a stay.

[10] With respect to the seriousness of the applicant's criminal past, the IAD noted, among other things, that he admitted to having ties to organized crime, in particular the Hells Angels, and that he had been convicted of numerous offences.

[11] As for any support that could be provided to the applicant by his friends and family, the IAD found that he had already benefited from the support of this network and nothing had changed: his network had never been able to keep him on the straight and narrow.

[12] The IAD also took into account the feeble attempts made by the applicant in his studies and work. With regard to his employment, the IAD was of the opinion that the applicant had not worked much and had not made enough of an effort to find employment given his criminal record. In terms of his studies, the applicant, who has not obtained a high school diploma, tried twice to obtain his Secondary V equivalency. The last time, he arrived late for the exam and was refused admittance. The IAD saw in these actions a lack of will. The applicant stated that he had moved into his mother's home – to which he contributes nothing financially – so that he could be under her supervision, but given that he had only been living there for three or four months, the IAD found that this was simply a gesture to impress the panel. The same conclusion applies to the applicant's meagre and unsuccessful efforts at doing volunteer work in January 2013.

[13] In addition, the IAD examined the issue of the best interests of a child likely to be affected by the removal order, in this case his godson, his best friend's son, who was born two weeks before the hearing; the applicant has no children of his own. The IAD was of the opinion that the best interests of the child were not relevant to the case.

[14] Furthermore, the applicant raised humanitarian and compassionate considerations in support of his appeal application. He stated that he feared returning to Turkey, in particular because he had not fulfilled that country's compulsory military service and therefore risked prosecution and imprisonment. The IAD cited the few efforts made by the applicant to verify whether he was in fact subject to this obligation; the applicant did not even bother making any inquiries at the embassy, which the IAD construed as negligence. Instead, the documentary evidence appears to indicate that the applicant could be exempted from this obligation and, at any rate, the fact of his having to fulfill his military service is not a sufficient humanitarian and compassionate consideration. The applicant further stated that he did not know anyone in Turkey and that he did not speak Turkish. However, the applicant's father and one of his aunts live there. In short, the IAD found that the various humanitarian and compassionate grounds raised by the applicant were not enough to counter the negative effects of his poor record.

[15] The IAD further concluded that in light of the high number of convictions for reoffending, omissions and failure to comply, the applicant's possibilities for rehabilitation were very low, or indeed non-existent, and the chances that he would comply with any conditions imposed on him as a result of a stay were slim to none.

[16] Lastly, the IAD indicated that the only factor in the applicant's favour was the fact that he has lived here a long time, but that this factor alone was not sufficient to overcome the other negative considerations, particularly his negligible contribution to Canadian society.

[17] The IAD indicated that it had no confidence in the applicant, in particular due to the seriousness of his criminal record and his recidivism, the low likelihood of rehabilitation, his negligible contribution to Canadian society, the little support he would receive from his family, his lack of remorse and the fact that he takes his criminal behaviour and removal order lightly. Moreover, it was not in the least convinced that would comply with the conditions of any potential stay.

IV. Applicant's arguments

[18] The applicant submits that the IAD's decision is unreasonable and raises five arguments in support of his claims.

[19] First, the IAD examined his testimony in a microscopic way for the purpose of pointing out contradictions or implausibilities regarding non-determinative elements. The applicant also casts doubt on the relevance of certain details the IAD focused on in its decision, such as the fact that he could not remember the names of old acquaintances from 2008 or did not know the exact number of charges he was facing for a specific offence, details he deemed to be of little importance and which could not seriously mine his credibility.

[20] Second, the IAD did not correctly assess the evidence in the record, in particular, that which related to the links between the applicant and organized crime, his relationship with his family, the reasonable explanations he provided as to why he had been unable to find employment. On this point, the applicant contends that his sister's testimony – which the IAD characterized as credible – substantiated his assertion that he had made efforts to seek employment.

[21] Third, the IAD had not been receptive, sensitive and attentive to the best interests of the child directly affected by the applicant's removal, namely, his godson. The IAD mixed up the child's sex, referring to it as a girl when in fact it was a boy, thus demonstrating a lack of sensitivity with regard to the child.

[22] Fourth, the IAD incorrectly assessed the hardships the applicant would face upon his return to Turkey, particularly because of the fact that he has spent his entire life in Canada and knows nothing about Turkey, the country he left when he was a month old and to which he has never returned. He has no contacts in Turkey, except for his father, with whom he does not speak, and an aunt he does not know. The IAD should have considered the documentary evidence in the record showing that he would surely be arrested upon his arrival in Turkey and prosecuted for not having fulfilled his compulsory military service.

[23] Fifth, the IAD erred because it had not indicated in its reasons why it had not taken into account its past decisions regarding the granting of a stay when it ought to have done so.

V. Respondent's arguments

[24] The respondent contends that the IAD's decision is reasonable and employs two arguments in support of this position.

[25] First, the IAD's decision is reasonable since it was arrived at after a review all of the relevant evidence that was before it. The applicant is simply asking the Court to re-weigh the

evidence because he is unhappy about the importance the IAD assigned to various pieces of evidence, when the role of the Court is limited to determining the reasonableness (or lack thereof) of the impugned decision.

[26] Thus, the IAD did in fact undertake a detailed review of the following elements: the seriousness and circumstances of the applicant's criminal behaviour, the slim possibility of rehabilitation and his negligible contribution to Canadian society, the little support his family could provide for him and the tenuous reestablishment challenges he would face.

[27] Second, the IAD was under no obligation to evaluate its past decisions because it was required to make findings following its own assessment of the evidence. The principle of judicial comity does not apply to questions of fact and the granting of special relief is a discretionary power that is essentially a matter to be assessed on a case by case basis. Furthermore, in most of the decisions cited by the applicant, the appellant had taken steps to turn his life around, which is not the case with the applicant. At any rate, the IAD does not have to refer to all of the arguments in its reasons.

[28] All in all, the respondent submits that the IAD proceeded with the analyses pursuant to paragraph 67(1)(*c*) and subsection 68(1) of the IRPA and that its decision was reasonable.

VI. Applicant's reply memorandum

[29] The applicant filed a memorandum in reply to the respondent's claims in which he essentially referred to various arguments that had already been raised in his original memorandum. He therefore raised no new argument that would be worthy of mention in this case.

VII. Issues

[30] In their respective memoranda, the parties raise different issues which I would rephrase as follows:

1. Did the IAD err in its assessment of the evidence, particularly with regard to the best interests of the child and the risks the applicant would face upon returning to Turkey?

2. Was the IAD required to address its past decisions in similar cases?

VIII. Standard of review

[31] The first issue relates to the assessment of evidence by the IAD and thus constitutes a question of mixed fact and law that is reviewable on a standard of reasonableness and subject to considerable deference (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58, [2009] 1 SCR 339; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 (*Dunsmuir*)).

[32] The second question at issue is a question of law and must therefore be reviewed on a correctness standard (*Dunsmuir*, above, at para 59).

IX. Analysis

Preliminary remarks

[33] Before undertaking an analysis of the issues, some details on the factual and legal background of this case should be provided.

[34] In Canada, a permanent can be declared inadmissible for serious criminality if they commit one of the offences set out in subsection 36(1) of the IRPA and, as a result, be subject to a removal order pursuant to paragraph 45(1)(*d*) of the IRPA. A permanent resident against whom a removal order has been issued may appeal to the IAD under subsection 63(3) of the IRPA.

[35] Section 66 of the IRPA provides three options to the IAD, which may either allow the appeal, stay the removal order, or dismiss the appeal. In situations where a permanent resident submits and establishes the existence of humanitarian and compassionate grounds, the IAD has but two options: it may allow the appeal (IRPA, para 67(1)(*c*) and ss. 68(1)). If such is the case, the IAD must be satisfied "that 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." If the IAD decides to stay the removal order, it must impose the conditions set out in section 251 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[36] In order to decide whether to exercise its discretion, the IAD must take into consideration the factors established in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] DIAD No 4 (QL/Lexis), and upheld by the Supreme Court of Canada in *Chieu v Canada (Minister of*

*Citizenship and Immigration)***,** 2002 SCC 3 at paras 40 and 41, [2002] 1 SCR 84 (*Chieu*). A decision of this Court, *Kacprzak v Canada (Minister of Citizenship and Immigration)*, 2011 FC 53, [2011] FCJ No 59, summarizes these criteria at para 29:

> **[29]** The relevant factors set out in *Ribic*, above, are the following:
>
> a. the seriousness of the offence leading to the removal order;
> b. the possibility of rehabilitation;
> c. the length of time spent in Canada and the degree to which the applicant is established;
> d. family in Canada and the dislocation to that family that deportation of the applicant would cause;
> e. the support available for the applicant not only within the family but also within the community; and
> f. the degree of hardship that would be caused to the applicant by his return to his country of nationality.

[37] The onus of establishing these reasons falls on the permanent resident (*Chieu*, above, at para 90). This means, therefore, that it is always up to the applicant to persuade the IAD that there are sufficient reasons for him to remain in Canada.

A. *Did the IAD err in its assessment of the evidence, particularly with regard to the best interests of the child and the risks the applicant would face upon returning to Turkey?*

[38] The Court is of the opinion that the IAD did not err in its assessment of the evidence in the record, both generally and with respect to the best interests of the child, as well as with respect to the hardships the applicant would face upon returning to Turkey. The decision is reasonable because the IAD relied on the evidence that was before it before making its decision and because it addressed all of the important elements in its decision. The applicant, in effect, is asking this Court to re-examine the evidence in the record, which is not within its jurisdiction to do.

1. Children - Best interests of the child

[39] The applicant claims that the IAD was not receptive, sensitive and attentive to the interests of the child directly affected by the removal order issued against him. As the sole argument in support of his allegations, the applicant contends that the IAD made an error regarding the sex of the child, referring to the applicant's godson as a girl, when he is obviously a boy. The applicant submits no other argument. The Court acknowledges that this was indeed an error, but nonetheless finds that the applicant has not demonstrated how this simple mistake, which is basically anecdotal, renders the decision unreasonable.

2. Risks upon returning to Turkey

[40] The applicant asserts that the IAD wrongly assessed the hardships the applicant would face upon returning to Turkey. For its part, the respondent is of the view that the IAD did consider the tenuous adaptation difficulties that the applicant would face if he were to return to the country of his birth. The Court agrees with the respondent's arguments. Relying on the evidence in the record, the IAD reasonably concluded that the applicant would not face undue hardship, in particular because he knows people who live in Turkey, including his father.

[41] Specifically, with regard to compulsory military service in Turkey, the Court is of the view that it was reasonable for the IAD to conclude that the applicant had demonstrated carelessness since he made no effort to find out if there was any possibility of postponing his compulsory military service or being exempted from this obligation, given the fact that he arrived in Canada when he was only one month old. In its decision, the IAD stated that it had read the documentary evidence on compulsory military service, but that the applicant by his own admission had never

made any inquiries at the embassy about his options in this regard. His claims were based on Internet searches. Yet the evidence in the record shows that it is possible to defer this obligation or have it reduced. The IAD's conclusion was therefore reasonable.

3. Assessment of the evidence generally

[42] On this point, the applicant raises two objections: first, that the IAD analyzed his testimony microscopically for the purpose of pointing out contradictions or implausibilities regarding non-determinative elements, and second, that the IAD erred in its analysis of the evidence.

[43] Thus, the applicant alleges that the IAD analyzed his testimony solely for the specific purpose of finding inconsistencies therein and casts doubt on the importance it assigned to certain details, such as the fact that he was unable to recall the names of old acquaintances from 2008 or that he was not aware of the exact number of charges he was facing for a particular offence. The applicant sees in this an "overzealousness" on the part of the IAD and feels that these details should in no way be used to undermine his credibility.

[44] Admittedly, taken individually, the inconsistencies and contradictions noted by the IAD may not appear to be determinative of the application, but the applicant's errors and hesitant or evasive answers are so numerous so as to make them so. The applicant, who was represented by counsel, was apparently unaware of his lengthy criminal record. Asked about this numerous times, he simply did not provide enough details to satisfy the IAD, particularly with regard to the persons with whom he committed the offences and the circumstances surrounding those offences or even the sentences he later received for them. Among the fatal errors made by the applicant, one that stood out was that

he did not appear to be aware of the fact that he was subject to a probation order at the time of the hearing or that as a result of this order he had an obligation to comply with a series of conditions.

[45] As for the fraud charges from 2009, the applicant states that he did indeed commit these offences because the company he was working for was going through a difficult period. Although the company declared bankruptcy in 2011, the difficult period would necessarily have preceded the bankruptcy. However, regardless of what he claims in his memorandum, the applicant did in fact acknowledge at the hearing that he had mistakenly cited the bankruptcy of the company he worked for as a reason for having committed fraud. He explained that he needed the money to pay phone bills and credit card statements, in addition to paying for the cars he owned. The Court must therefore conclude that the applicant appears to want to tailor his testimony.

[46] The applicant also claims that the IAD incorrectly assessed the evidence in the record. He maintains that he was never affiliated with the Hells Angels and that this is a significant error on the part of the IAD. A re-reading of the hearing transcript shows that, when asked which criminal organization or gang he had ties with at a certain period, the applicant answered: [TRANSLATION] "I think it was for the Hells Angels, for the bikers. I don't know if it was really for the Hells or … (*sic*)" (Hearing Transcript, p. 134). The fact remains that the applicant himself stated that he thought he had been associated with the Hells Angels. It would be difficult to criticize the IAD for having drawn such a conclusion, which was completely reasonable given the evidence that was before it.

[47] In addition, the applicant argues that his sister was a minor at the time he committed his offences and that this is why she had been unable to supervise him. He submits that things have

since changed a great deal and that the IAD should have considered that. He adds that he was not always able to receive support from his family because they did not take his situation seriously. He further suggests that the IAD disregarded his reasonable explanations as to why he had not been able to find employment and his sister's testimony corroborating his efforts to find work. However, the IAD did not disregard the applicant's explanations; it even referred to them in its analysis. It simply arrived at a different conclusion after having examined the evidence as a whole, including the testimony of the applicant's sister. Therefore this conclusion was also reasonable.

[48] Aside from the aforementioned elements, in a general manner, the IAD reasonably considered the other relevant factors from *Ribic* and *Chieu*, above, including the presence in Canada of the family of the person subject to the removal and the dislocation to the family that his removal would cause, the length of time spent in Canada by the applicant and the support available to him within the family.

[49] Lastly, in its reasoning, the IAD gave considerable weight to two other elements, that is to say the seriousness of the offence leading to the removal and the possibility of the applicant's rehabilitation. Indeed, the applicant was convicted of trafficking in narcotics in 2008, an offence that led to his inadmissibility. And the fact that the applicant was under a removal order did not prevent him from pursuing his criminal endeavours. In 2010, he was convicted on several charges of fraud. He was also convicted of breach of conditions and failure to comply with orders of this Court in 2011. In 2012, he pleaded guilty to charge of obstruction; not to mention that at the time of the hearing the applicant was facing charges in two cases, one for fraud, the other for possession of narcotics. This is what may be described as quite an extensive record for someone facing removal.

[50] The sheer extensiveness of the applicant's criminal activities is such that it would be inconceivable for the IAD not to have taken this into account when it assessed the possibility of the applicant's rehabilitation. Indeed, the applicant never expressed any remorse for his actions. It was quite reasonable for the IAD to conclude that there was little likelihood of the applicant complying with the conditions that would be imposed on him in the event he were to be granted a stay: he had already been convicted of breach of conditions and he continued to pursue his criminal activities after having learned that he was subject to a removal order.

4. Assessment of the evidence – Conclusion

[51] In short, as the respondent pointed out, the applicant is asking the Court to re-examine the evidence in the record because he is dissatisfied with the weight given to various pieces of evidence by the IAD. But it is not for a reviewing court to reweigh the evidence: this had already been reasonably done by a decision maker with considerable discretion, in this case the IAD. Based on the testimony given at the hearing and the evidence in the record, the Court is not persuaded by the applicant that the findings of fact made by the IAD are unreasonable, as they fall within a range of possible outcomes in respect of the facts and law, in addition to being intelligible and supported by reasons. As this Court noted in a very similar case:

> **[50]** The applicant alleges that these factual findings were erroneous, or that the IAD failed to consider his evidence and drew unreasonable conclusions.
>
> **[51]** An analysis of his allegations reveals that he wishes the Court to re-weigh the evidence. The problem with this argument is that courts on judicial review cannot simply re-weigh the evidence and substitute their opinions unless the decision does not,

> according to *Dunsmuir*, supra, "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"; or, if you wish, constitutes perverse and capricious findings under paragraph 18.1(4)(d) of the *Federal Courts Act* (*Sahil v. Minister of Citizenship and Immigration*, 2008 FC 772, at paragraphs 9 and 10; *Matsko v. Minister of Citizenship and Immigration*, 2008 FC 691, at paragraph 8; and *Barm v. Minister of Citizenship and Immigration*, 2008 FC 893, at paragraph 12).
>
> (*Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 277 at paras 50-51, [2009] FCJ No 339.)

[52] Moreover, on the face of the record and in light of the details of this case, it was entirely reasonable for the IAD, under the circumstances, to have given considerable weight to some of the criteria set out in *Ribic* and *Chieu*, above, including the fact that the applicant had only a very slim possibility of rehabilitation, before dismissing his appeal. The IAD was required to engage in an overall balancing exercise and could decide for itself how much weight to assign each of the elements. The decision is therefore reasonable and the intervention of the Court is not warranted on this issue.

B. *Was the IAD required to address its past decisions in similar cases?*

[53] The applicant submitted to the decision-maker a series of decisions the IAD itself had issued in similar circumstances and argues that the IAD had an obligation to analyze these decisions and explain in its reasons why it decided not to follow that jurisprudence. The respondent is of the opinion that the IAD was under no such obligation.

[54] The Court agrees with the respondent's position and must answer the question at issue in the negative. The granting of a stay is an extraordinary and discretionary measure and is reflective of the fact that each case turns on its own facts, has different facts, and requires an examination of the

evidence in the record (*Bal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1178 at para 36, [2008] FCJ No 1460). The applicant relies on this decision, which he interprets as somehow creating an obligation for the IAD:

> **[35]** … By simply stating, "I find the cases cited not helpful as they differ on facts" without any further analysis, it is contended that the IAD offended the principle of *stare decisis*.
>
> **[36]** This argument is without merit. A stay is an extraordinary and discretionary relief, and each case turns on its own facts. The IAD applied the *Ribic* test; that the outcome is not what the Applicant had hoped for does not amount to reviewable error. Seriousness of the offence is not limited to the nature of the charges, but also includes other features of the case. Moreover, it is only one of the factors to be taken into account and weighed in all of the circumstances of the case. Finally, the IAD did not have to proceed with a detailed analysis of the cases submitted by the Applicant; the Member considered these cases and provided brief but entirely adequate reasons to explain why it was not granting a stay despite that jurisprudence.
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> [Emphasis added]

[55] I see no obligation here: in this matter, the IAD was in no way obliged to analyze the decisions submitted by the applicant in detail, but it nonetheless did so and provided a summary of its reasons for not following the jurisprudence. A simple reading of the passage suffices to understand that it is not a confirmation of an obligation for the decision-maker, but merely an attestation of what was done by the decision-maker.

[56] In any event, an administrative decision-maker is presumed to have considered all of the evidence that was before it (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598) and it is settled law that a decision-maker is not required to refer to every piece

of evidence that is contrary to its findings (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425; *Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 317 (FCA)).

[57] For these reasons, I am of the view that there was nothing wrong with the IAD not referring to the jurisprudence submitted by the applicant in its decision. The question does not warrant the intervention of this Court.

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

ORDER

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

"Simon Noël"

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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