Federal Court  Cour fédérale

Date: 20161128

Docket: IMM-1585-16

Citation: 2016 FC 1317

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 28, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SAMUEL JEAN-BAPTISTE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS:

I. Nature of the matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration and Refugee Board, Immigration Division (ID) dated April 1, 2016, to decline jurisdiction to order that the

proceedings be stayed and issue a deportation order against the applicant under paragraph 36(1)(a) of the IRPA.

[2] It should be noted that a decision of the Immigration Appeal Division (IAD) dealing with the same circumstances and convictions was rendered on July 8, 2015.

II. Facts

[3] The applicant, age 31, was born in Haiti. Sponsored by his father in 1990, he became a permanent resident of Canada when he was five years old.

[4] After a difficult adolescence, during which he dropped out of school, he was placed in a drug treatment centre due to his behavioural problems and drug use. He committed several criminal offences and found himself before the courts on numerous occasions.

A. *Applicant's criminal record*

[5] According to his account, the applicant's criminal record consists of the events listed below.

[6] On December 1, 2009, the applicant pleaded guilty to a charge of obstructing a police officer—dated July 4, 2007—and was sentenced to fifteen (15) days' imprisonment and two (2) years of probation.

[7] On August 5, 2009, the applicant was charged with breaking and entering and possession of stolen goods. On December 1, 2009, he pleaded guilty to the charge of possession of stolen goods and was sentenced to sixty (60) days imprisonment and two (2) years of probation. There was a stay of proceedings on the charge of breaking and entering.

[8] The applicant pleaded guilty to a charge for possession of marijuana on May 16, 2010 and was fined $80.

[9] On September 13, 2010, the applicant was convicted of the following offences committed on October 30, 2006: extortion, breaking and entering, forcible confinement and uttering threats. He received a 12-month suspended prison sentence.

[10] On March 24, 2011, the applicant pleaded guilty to a charge of video theft—committed on August 11, 2008—and was ordered to pay a fine and costs, for a sum of more than $800.

[11] On August 2, 2010, the applicant was involved in the robbery and second-degree murder of two individuals in connection with a drug deal. On April 22, 2011, an arrest warrant was issued against the applicant. On October 7, 2011, the applicant was arrested in connection with the events of August 2, 2010 and was detained during his trial. On July 27, 2013, the applicant was found guilty of robbery (paragraph 344 (1)(a.1) of the *Criminal Code*, (R.S.C., 1985, c. C-46), an offence punishable by imprisonment for life. On February 19, 2014, the applicant was sentenced to eighty-four (84) months' imprisonment, from which twenty (20) months of remand were deducted.

[12] The applicant's violent behaviour and drug use persisted in prison. Following an altercation between him and another prisoner during which a peace officer intervened on May 22, 2013, the applicant pleaded guilty to charges of assault against a peace officer and was sentenced to three (3) months' imprisonment.

[13] Since June 9, 2014, the applicant has been incarcerated at Archambault Institution. He asked to be admitted to a secure unit to overcome his drug addiction, and all drug tests performed since December 2014 have been negative. The applicant enrolled and completed Correctional Service Canada's moderate intensity Multi-Target Program, which is designed to teach offenders skills that help reduce their risky and harmful behaviours. Finally, the applicant is taking French and mathematics courses, in addition to having undertaken a high school diploma in accounting.

[14] The applicant will be eligible for parole in September 2017.

B. *Applicant's cases before the CBSA, ID and IAD*

[15] On January 6, 2011, a Canada Border Services Agency (CBSA) inadmissibility report was filed under subsection 44(1) of the IRPA following the December 1, 2009 and September 13, 2010 convictions. This report was referred to the ID on February 9, 2011.

[16] On March 15, 2011, a deportation order was issued against the applicant by the ID pursuant to paragraph 36(1)(a) of the IRPA (Decision ID 1 (2011)). He appealed that decision on the same day. An IAD hearing was scheduled for June 17, 2015.

[17] On July 4, 2014, the CBSA issued a new inadmissibility report (subsections 44(1) et al. and paragraph 36(1)(a) of the IRPA) for serious criminality (CBSA Report (2014)) against the applicant. This report was not referred to the ID.

[18] On July 8, 2015, after having reviewed an appeal from Decision ID 1 (2011) rendered on March 15, 2011, the IAD granted the applicant a seven-year stay of the execution of the removal order on humanitarian and compassionate grounds pursuant to section 68 of the IRPA, requiring him to comply with a series of stringent conditions. It is important to note that at the time of the June 17, 2015 hearing and the July 8, 2015 decision, the IAD Member had before him all the elements of the case, including his latest convictions and the sentences imposed in 2013 and 2014.

[19] On November 5, 2015, at the CBSA's request, counsel for the applicant filed its submissions maintaining that the CBSA Report (2014) dated July 4, 2014 should not be referred to the ID for a ruling on inadmissibility for serious criminality. Counsel for the applicant cited the following: the 17 months it took the CBSA to decide whether or not to refer its report; the decision rendered by the IAD on July 8, 2015; the applicant's background, family situation and rehabilitation; and the situation in Haiti.

[20] On November 19, 2015, the CBSA nevertheless re-drafted the July 4, 2014 Report on inadmissibility on grounds of serious criminality.

[21] On December 9, 2015, the CBSA nevertheless referred the applicant's case to the ID. The applicant was notified on January 20, 2016.

[22] On April 1, 2016, the ID Member found the applicant to be covered under paragraph 36(1)(a) of the IRPA and issued a removal order (Decision ID 2 (2016)).

III. Decision

[23] On April 1, 2016, when counsel for the applicant requested that his arguments regarding abuse of process allegedly committed by CBSA officers be heard, the ID Member declined jurisdiction. Citing the *Burton v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 727 (*Burton*) and *Torre v. Canada (Citizenship and Immigration)*, 2015 FC 591 (*Torre*) decisions of our Court, she refused to order the stay of proceedings for abuse of process and issued a deportation order against the applicant under paragraph 36(1)(a) of the IRPA, Decision ID 2 (2016).

IV. Issues

[24] The issues raised in this case are:

1. Pursuant to the CBSA's referral of the report for a hearing before the ID, did the Member err in law in declining jurisdiction to order the stay of proceedings?
2. Does the ID Member's decision not to rule on the stay of proceedings raise an issue of *res judicata*, that of the thing adjudicated?

[25] The issue of abuse of process should be assessed on a standard of correctness (*Herrera Acevedo v. Canada (Citizenship and Immigration)*, 2010 FC 167 at para. 10).

V. Submissions of the parties

A. *Submissions of the applicant*

[26] The applicant challenged the ID Member's decision to decline jurisdiction on the issue of abuse of process, citing *Torre*, supra, and *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44, in support of his arguments that an administrative tribunal can rule on legal issues and order a stay of proceedings where required. Essentially, counsel for the applicant emphasized the seventeen (17) months it took the CBSA to refer a report to the ID and the harm suffered by the applicant as a result of the delays.

[27] According to the applicant, the tests for the thing adjudicated in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44 (*Danyluk*) were met in this case. The applicant maintained that in a case between the same parties, the ID ruled on the same issue that had previously been before the IAD, namely whether the applicant could remain in Canada in light of his July 27, 2013 conviction. The same circumstances and convictions were presented to the IAD and then to the ID, without any new facts. The IAD's decision was a final court decision in that it would end the dispute and was subject to judicial review by this Court.

B. *Submissions of the respondent*

[28] For its part, the respondent argued that the ID Member's decision to decline jurisdiction over the stay of the hearing proceedings before it is well-founded in law. First, the respondent maintained that it was not within the ID's jurisdiction to order the stay of proceedings, providing a completely different interpretation of the *Torre* decision, supra. Next, the respondent claimed that there was no abuse of process by the CBSA adversely affecting the applicant, also relying on *Faroon v. Canada (Citizenship and Immigration)*, 2015 FC 931 (*Faroon*).

[29] The respondent argued that the principle of *res judicata* does not apply and that the stay of removal granted by the IAD on July 8, 2015 did not preclude the ID from rendering its decision on the applicant's inadmissibility. The ID ruled on a different legal issue, deciding that the applicant was inadmissible under paragraph 36(1)(a) of the IRPA, while the IAD determined that humanitarian and compassionate grounds existed under section 68 of the IRPA to grant a stay of removal. In addition, the respondent maintained that the standard of proof applicable to the ID's decision ("reasonable grounds to believe") differs from that of the IAD (preponderance of evidence). The respondent also claimed that the IAD's decision was not final because it did not terminate the appeal. Rather, it granted the applicant a probationary period with conditions.

VI. Analysis

[30] The case before this Court is different than *Burton*, *Torre* and *Faroon*, supra, which dealt with alleged abuses of process. In all three of these decisions, our Court refused to consider the CBSA's delays in referring reports to the ID as abuse of process. Here, however, it is not only

the 17 months that it took the CBSA to refer a second report to the ID, but that it did so after a decision was rendered by the IAD.

[31] At the June 17, 2015 hearing, the deliberations and the July 8, 2015 decision, the IAD Member held all relevant information on the record, including the applicant's conviction for the offence of robbery with a firearm (paragraph 344(1)(a.1) of the *Criminal Code*) on July 27, 2013, and the 84-month sentence imposed on the applicant on February 19, 2014. The hearing before the IAD had been postponed until June 17, 2015 in order to impose the applicant's sentence. The subsequent CBSA report, dated November 19, 2015 and forwarded to the ID, did not involve any new elements.

[32] The principle of *res judicata* is simple: once a panel has rendered a decision, it is not open to the parties to resume proceedings by ignoring that decision if the same issue has been decided; that judicial decision is final, and the same parties are involved (*Danyluk*, supra).

[33] In this case, the ID Member was hearing the matter referred to her by the CBSA on November 19, 2015, although a decision on the same facts had already been rendered by the IAD on July 8, 2015. Admittedly, on April 1, 2016, the ID was studying section 36(1)(a) of the IRPA, while the IAD was assessing the existence of humanitarian and compassionate grounds for granting a stay of removal. The fact remains that the IAD was assessing a deportation order issued by the ID under the same provision of the Act.

[34] In filing a second report with the ID after the IAD had allowed the applicant's appeal, the CBSA chose to circumvent that decision and disregard the principle of *res judicata*. The applicant could have applied for judicial review of the IAD's decision, but did not avail himself of this procedure. The Court cannot approve such a practice.

[35] For these reasons, it is appropriate to set aside the ID's decision and referred the decision to the administrative tribunal before a differently constituted panel.

VII. Conclusion

[36] The application for judicial review is allowed and the ID's April 1, 2016 decision is set aside.

[37] The matter is referred to the ID before a differently constituted panel for reconsideration in accordance with this decision of the Court, given the earlier decision of the IAD, dated July 8, 2015.

JUDGMENT

THIS COURT'S JUDGMENT is that the case be referred to the Immigration Division before a differently constituted panel for reconsideration in accordance with this decision of the Court, given the earlier decision of the Immigration Appeal Division, dated July 8, 2015. There is no question of importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1585-16
STYLE OF CAUSE:	SAMUEL JEAN-BAPTISTE v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	OCTOBER 11, 2016
JUDGMENT AND REASONS:	SHORE J.
DATED:	NOVEMBER 28, 2016

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