Federal Court  Cour fédérale

Date: 20170125

Docket: IMM-2839-16

Citation: 2017 FC 95

Montréal, Quebec, January 25, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MING FA CHEN

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 pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision by the Immigration Appeal Division [IAD] dated June 9, 2016, which dismissed the Applicant's appeal based on humanitarian and compassionate grounds [H&C] of a departure order issued by the Immigration

Division [ID] pursuant to paragraph 41(b) of the IRPA following his failure to comply with the requirements of subsection 27(2) of the IRPA.

II. Facts

[2] The Applicant, aged 66, is a citizen of Taiwan. He divorced his first wife in Taiwan in 2013 or 2014. He has an adult son from his first marriage. The Applicant met his current spouse, a Canadian citizen, in 2009 and they married on September 20, 2014.

[3] On May 17, 2005, the Applicant, upon landing, became a permanent resident of Canada in the entrepreneur class.

[4] On August 21, 2005, the Applicant incorporated a business in North York, Ontario. The business was never operational.

[5] On April 7, 2010, a report was issued by an Immigration Officer concluding that the Applicant "did not comply with any of the conditions attached to the entrepreneur class" under section 98 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations]. The Officer stated in the report that the Applicant was inadmissible pursuant to paragraph 41(b) of the IRPA. The matter was referred before the ID pursuant to subsection 44(2) of the IRPA.

[6] On April 26, 2010, the Applicant established a new business – a driving school – in Laval, Quebec.

[7] On January 20, 2011, the Applicant was self-represented at his hearing before the ID. On February 23, 2011, the ID issued a departure order against him. The Applicant did not receive a copy of the ID decision, which he was only made aware of after returning to Canada from a trip abroad in May 2012.

[8] The Applicant's appeal to the IAD did not contest the ID's conclusion that he was inadmissible in Canada nor the validity of the departure order, but rather argued that there were sufficient H&C factors to warrant special relief.

III. Decision

[9] On June 9, 2016, the IAD found the Applicant had not demonstrated sufficient H&C considerations to warrant special relief:

> [9] The appellant's wife was not present at the hearing and consequently the panel was not provided with any evidence as to what impact the appellant's removal would have on her. The panel notes that, even if the appellant loses his status, he is exempt from the requirement to obtain a temporary resident visa, in order to visit his wife. She would also be free to sponsor him if she so desires.

[10] The IAD also stressed that the driving school, which the Applicant claims to operate with his wife out of the basement of their home, has had no client for a long time, according to his own testimony. The panel found that the Applicant was well off, and that he had no dependants in Canada.

[11] The Applicant's appeal was therefore dismissed by the IAD.

IV. Issue

1) This matter raises the following issue: Were the IAD's conclusions reasonable in light of the evidence presented?

[12] This issue should be reviewed on a standard of reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

V. Relevant Provisions

[13] Paragraph 41(b) of the IRPA states:

Non-compliance with Act	**Manquement à la loi**
41 A person is inadmissible for failing to comply with this Act	**41** S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.
(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.	

[14] Subsection 27(2) of the IRPA creates the obligation to respect any conditions imposed under the Regulations:

Conditions	**Conditions**
27 (2) A permanent resident must comply with any conditions imposed under the regulations or under instructions given under subsection 14.1(1).	**27 (2)** Le résident permanent est assujetti aux conditions imposées par règlement ou par instructions données en vertu du paragraphe 14.1(1).

[15] Section 98 of the Regulations – as it read at the time of the ID's decision on January 20, 2011 – describes the conditions to be met by a permanent resident of the entrepreneur class:

Permanent residence	**Résident permanent**
98 (1) Subject to subsection (2), an entrepreneur who becomes a permanent resident must meet the following conditions:	**98 (1)** Sous réserve du paragraphe (2), l'entrepreneur qui devient résident permanent est assujetti aux conditions suivantes :
(a) the entrepreneur must control a percentage of the equity of a qualifying Canadian business equal to or greater than 33 1/3 per cent;	a) il a le contrôle d'un pourcentage des capitaux propres de l'entreprise canadienne admissible égal ou supérieur à 33 1/3 %;
(b) the entrepreneur must provide active and ongoing management of the qualifying Canadian business; and	b) il assure la gestion de celle-ci de façon active et suivie;
(c) the entrepreneur must create at least one incremental full-time job equivalent in the qualifying Canadian business for Canadian citizens or permanent residents, other than the entrepreneur and their family members.	c) il crée pour des citoyens canadiens ou des résidents permanents, à l'exclusion de lui-même et des membres de sa famille, au moins un équivalent d'emploi à temps plein dans l'entreprise canadienne admissible.

VI. Submissions of the Parties

A. *Applicant's submissions*

[16] The Applicant's wife was present at the hearing, but was asked to leave, so as not to be influenced by the Applicant's testimony. The IAD concluded during the hearing that the genuineness of their marriage was not in doubt. Had the Applicant's wife testified, she could have discussed the impact that her husband's departure would have had on both of them; however, that is not in doubt as the marriage was acknowledged as a bona fide marriage.

[17] The Applicant further argues that the IAD decision is unreasonable, given that the panel did not address the circumstances surrounding his failure to meet the conditions that led to the removal order. The IAD did not take into account the efforts undertaken by the Applicant to respect the conditions under the entrepreneur class, the difficulties he has met in this regard, and the fact that he returned to Taiwan on several occasions in order to take care of his elderly parents.

B. *Respondent's submissions*

[18] The Respondent submits that the Applicant received a full and fair hearing. The Applicant bore the onus to establish sufficient H&C considerations in his case and failed to do so during the hearing. The Applicant should bear the consequences of his freely chosen counsel's conduct.

[19] The Respondent also submits that the IAD decision is reasonable. The panel acted within its discretionary jurisdiction in staying the valid removal order against the Applicant. It was open to the IAD to find that the explanations submitted by the Applicant were insufficient to justify his non-compliance with any of the conditions to his permanent residence; the fact that the IAD did not mention the Applicant's explanations does not mean that they were not considered. The onus to bring convincing evidence before the IAD demonstrating that he should not be removed from Canada rested with the Applicant.

VII. Analysis

A. *Were the IAD's conclusions reasonable in light of the evidence presented?*

[20] The Court finds that the IAD decision falls within a range of possible, acceptable outcomes in light of the evidence that was provided by the Applicant. The onus to demonstrate the existence of H&C factors warranting special relief is on the Applicant. According to the *Ribic* factors in *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84, 2002 SCC 3 [*Chieu*], it was open to the IAD to take into account the seriousness of the Applicant's failure to comply with the entrepreneur class conditions:

> [40] Employing such a broad approach to s. 70(1)(b), the I.A.D. itself has long considered foreign hardship to be an appropriate factor to take into account when dealing with appeals brought under this section. In *Ribic*, supra, at pp. 4-5, the I.A.B. summarized the relevant factors to be considered under its discretionary jurisdiction pursuant to what is now s. 70(1)(b) of the Act:
>
> > In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to

> the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. While the general areas of review are similar in each case the facts are rarely, if ever, identical. [Emphasis added.]
>
> This list is illustrative, and not exhaustive. The weight to be accorded to any particular factor will vary according to the particular circumstances of a case. While the majority of these factors look to domestic considerations, the final factor includes consideration of potential foreign hardship.

[21] In doing so, the IAD acted within its discretion. The panel was not held to give weight to the Applicant's explanations and could decide that they did not outweigh the extent of his non-compliance with the conditions:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.
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> (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62)

[22] The panel made no reviewable error in its weighing of the Applicant's explanations, holding that his non-compliance with the conditions was at the crux of the matter.

VIII. Conclusion

[23] The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be dismissed.

There is no serious question of general importance to be certified.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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