Federal Court  Cour fédérale

Date: 20180122

Docket: IMM-3710-17

Citation: 2018 FC 57

[ENGLISH TRANSLATION]

Montreal, Quebec, January 22, 2018

PRESENT: The Honourable Mister Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Plaintiff

and

BOON SREE KHONGSAWAT

Defendant

JUDGMENT AND REASONS

I. Nature of the case

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA] of a decision rendered on July 31, 2017, by the Immigration Appeal Division [IAD or panel] of the Immigration and Refugee Board of Canada [IRB]. In that decision, the IAD granted a three-year stay of execution of the deportation order

issued against the Defendant on October 29, 2013, subject to the conditions set out in the stay. The deportation order was issued in keeping with paragraph 36(1)(a) of the IRPA.

II. Facts

[2] The Defendant, 41 years of age, is a citizen of Laos. He is stateless and has protected-person status.

[3] He came to Canada when he was six years old, accompanied by his brother and grandparents. The Defendant's parents passed away when the Defendant was younger. On September 19, 1984, the Defendant was granted permanent resident status in Canada. To date, he still has not obtained his Canadian citizenship.

[4] On September 23, 1999, a deportation order was issued against the Defendant due to 28 previous convictions between 1996 and 1998 for: (i) trafficking; (ii) possession of and conspiracy to traffic in cocaine; (iii) obstruction; (iv) disturbing the peace; (v) failing to comply with an undertaking; and (vi) failing to appear in court. On August 28, 2000, the Defendant's appeal was allowed, and he was granted a five-year stay of execution of the removal order.

[5] On April 6, 2005, during a hearing before the IAD, it was found that the Defendant had breached some of the conditions of the stay order. The panel extended the stay by two years, i.e. until July 11, 2007, adding some new conditions. On December 10, 2007, another hearing took place before the IAD. The panel allowed the Defendant's appeal and set aside the stay.

[6] On July 7, 2010, the Defendant was convicted of stealing a vehicle, resisting arrest by a peace officer and being in possession of a prohibited weapon (pepper spray). He was sentenced to 20 days in prison.

[7] On August 5, 2010, the Defendant was arrested for uttering death threats and for attempting to kill his former partner. During the act in question, the Defendant was allegedly under the effect of drugs and alcohol. However, the Plaintiff decided to dismiss that charge, provided that the Defendant go for therapy to resolve his addiction problem.

[8] On September 3, 2010, the Defendant was admitted as a client to the *Centre L'Envolée* to undergo seven months of therapy. A report was prepared on April 1, 2011, by a special education technician and was filed in evidence before the IAD.

[9] On October 29, 2013, the IRB Immigration Division issued a deportation order against the Defendant further to his criminal conviction on July 7, 2010.

[10] The Defendant then appealed that deportation order before the IAD. He did not object to the legal validity of the deportation order, but applied for a stay of execution of the removal order for humanitarian and compassionate grounds. The Plaintiff then filed an application for leave and judicial review before this Court to challenge the IAD's decision.

[11] On August 3, 2014, the Defendant was arrested and charged with uttering death threats and with assaulting his former partner. At the time of his arrest, he was inebriated. He was also

charged with violating his parole conditions. On October 25, 2016, the Defendant was found guilty of those charges and was sentenced to 30 days in prison.

[12] On February 27, 2017, an initial appeal hearing was held before the IAD.

[13] On April 21, 2017, the Defendant registered for therapy at the Laval *Centre de réadaptation en dépendance*.

[14] On June 21, 2017, a second appeal hearing was held before the IAD.

III. Decision

[15] On July 31, 2017, the IAD found that there are humanitarian and compassionate grounds warranting a stay of execution of the removal order. At that time, the panel granted a three-year stay of execution of the removal order against the Defendant.

[16] To warrant special relief for humanitarian and compassionate grounds, the IAD's decision listed the following factors taken from *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL) [*Ribic*]:

- the seriousness of the offence leading to the removal order;
- the possibility of rehabilitation and the risk of re-offending;
- the length of time spent, and the degree to which the individual facing removal is established, in Canada;
- the family in Canada and the dislocation to the family that removal would cause;

- the family and community support available to the individual facing removal;
- the degree of hardship that would be caused to the individual facing removal to his country of nationality;
- the best interests of a child directly affected.

[17] The IAD also stated in its decision the importance of relying on paragraph 3(1)(h) of the IRPA, which provides that, when it comes to immigration, the purpose of the act is to protect public health and safety and maintain the security of Canadian society.

[18] After summarizing the Defendant's criminal background, the IAD considered as evidence on record the report dated April 1, 2011 from the *Centre L'Envolée*. The Defendant was admitted as a client at the centre on September 3, 2010 to undergo therapy. That report states that, although the Defendant's mental health had improved, he had to be very vigilant about his drug addiction problem, which still needs to be addressed.

[19] In its analysis, the IAD noted the Defendant's criminal history and record. On August 3, 2014, the Defendant was, among other things, arrested and charged with uttering death threats and with assaulting his former partner. In light of the Defendant's particular situation, the IAD found that [translation] "the key issue is whether there is a possibility of rehabilitation" (IAD's reasons for decision, at para. 13).

[20] The IAD heard the Defendant's testimony at the hearing and factored in the particular circumstances around the Defendant's current and previous situations. For example, the IAD noted that the Defendant's relationship with his former partner had ended in August 2014 and

that, today, he has been in a serious and stable conjugal relationship with his new partner since June 26, 2015. The Defendant testified at the hearing that, after the break-up of his first conjugal relationship, he had not used drugs for two or three years and no longer had an alcohol problem.

[21] According to the evidence on record, the IAD raised the following findings in its decision [translation]:

> [12] it is obvious that, even after being ordered deported on October 29, 2013, the appellant failed to comply with the conditions of various probation orders pertaining to him.
>
> [18] The panel points out that the appellant has had an alcohol and drug addiction problem for 25 years. Most of the convictions against him are connected in some way with drug use, including the one for trafficking; also, his violent behaviour resulted from being intoxicated. However, none of the conditions tied to the granting of a stay of execution of a deportation order required the appellant to undergo treatment for his drug and alcohol addiction. The seven months of therapy provided by the *Centre l'Envolée*, which ended on April 3, 2011, was not sufficient, as stated in the letter of April 1, 2011. The appellant just started therapy sessions at the Laval *Centre de réadaptation en dépendance* and, in the panel's opinion, he should be given the opportunity to resolve his drug and alcohol addiction problem. [Court's underlining.]

[22] Lastly, the IAD factored in the testimonies of family members, specifically the Defendant's brother, cousin and aunt. The IAD also heard the testimony of the Defendant's current conjugal partner, and the panel believes that the Defendant's new partner has a positive influence on him. In the IAD's opinion, the possibility of rehabilitation is therefore a factor justifying a stay of execution of the removal order against the defendant.

IV. Issue

[23] The only issue is whether the IAD's decision to allow the Defendant's appeal by granting a three-year stay of execution of the removal order is reasonable.

[24] The standard of review applicable to the IAD's decision whether to allow the Defendant's appeal for humanitarian and compassionate grounds being able to warrant special relief is the reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v. Hassan*, 2017 FC 413 at para. 21). Thus, "as long as the process and outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 59 [*Khosa*]).

V. Relevant provisions

[25] The following provisions apply to this application for judicial review:

Paragraph 36(1)(a) of the IRPA:

Grande criminalité	**Serious criminality**
36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :	**36** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for:
a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au	a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of

moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;	imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

Paragraph 63(3) of the IRPA:

Droit d'appel : mesure de renvoi	**Right to appeal removal order**
63 (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.	**63** (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

Paragraph 67(1)(c) of the IRPA:

Fondement de l'appel	**Appeal allowed**
67 (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :	**67** (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
[…]	[…]
c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.	c) other than in the case of an appeal by the Minister, 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.

Subsections 68(1) and (2) of the IRPA:

Sursis	**Removal order stayed**
68 (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.	**68** (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.
Effet	**Effect**
(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.	(2) Where the Immigration Appeal Division stays the removal order (a) it shall impose any condition that is prescribed and may impose any condition that it considers necessary; (b) all conditions imposed by the Immigration Division are cancelled; (c) it may vary or cancel any non-prescribed condition imposed under paragraph (a); and (d) it may cancel the stay, on application or on its own initiative.

VI. Submissions of the parties

A. *The Plaintiff's claims*

[26] According to the Plaintiff, the IAD's decision is unreasonable and warrants Court intervention. The IAD's reasons are insufficient, so that it is impossible to understand how the IAD weighed the various relevant factors when analyzing the humanitarian and compassionate considerations. Among other things, the Plaintiff claims that the IAD neglected to analyze the

Defendant's risk of re-offending, given his repeated failure to honour the conditions ordered by the IAD. The panel erred in granting the defendant a stay, as concluded in *Canada (Public Safety and Emergency Preparedness) v. Udo*, 2009 FC 239 at para. 17 [translation]:

> [17] In this context, granting an additional stay would equate to tolerating Mr. Udo's criminal history as well as his ongoing indifference towards his obligation to meet the conditions of the immigration orders. Supporting the IAD's decision would make a mockery of law-abiding Canadian citizens, including immigrants.

[27] The Plaintiff argues that the IAD drew arbitrary conclusions without factoring in all the evidence before it. In fact, the Defendant and his spouse both testified at the hearing that the Defendant has not used drugs for two years now and that he drinks alcohol only occasionally on weekends. According to the evidence on record, the Plaintiff understands that the Defendant allegedly no longer had an addiction problem at that time. However, the Plaintiff points out that the Defendant voluntarily registered for therapy at the Laval *Centre de réadaptation en dépendance* on April 21, 2017, which was two months after the date of his first hearing before the IAD. Also, during his testimony, the Defendant was unable to explain his intention to register for therapy, given that he himself had claimed he was no longer using drugs.

[28] The Plaintiff recalls that the Defendant had already undergone a first round of therapy at the *Centre L'Envolée* between 2010 and 2011, and yet, [TRANSLATION] "he returned to a life of crime" (Plaintiff's file, brief of the Plaintiff's arguments, at para. 51). As a result, the Plaintiff claims that the IAD failed to explain how that therapy is "insufficient" or how the therapy that began in 2017 is different from the previous therapy. The IAD disregarded the evidence on record that the Defendant had resolved his addiction problems and it granted the Defendant a stay to give him the possibility of resolving said addiction problems.

[29] The Plaintiff further argues that the IAD relied on criteria and factors that are not relevant to this case. Therefore, the IAD supposedly erred in its analysis because, among other things, it was wrong in finding that the Defendant could not be removed from Canada given his protected-person status. According to the Plaintiff, the IAD's decision is unreasonable and, in its brief of arguments, it quotes the following passage from *Canada (Public Safety and Emergency Preparedness) v. Lotfi*, 2012 FC 1089 at para. 25 [translation]:

> … However, I must point out that reasonableness requires these conclusions to be based on the evidence on record, to be internally logical and not be based on factors devoid of relevance, contrary to the approach taken by the IAD in this case. Some of the IAD's main conclusions seem erroneous in light of the evidence, which leads me to doubt whether the decision can be considered an acceptable outcome. [Plaintiff's underlining.]

[30] The Plaintiff maintains that the IAD should not have invoked subsection 115(2) of the IRPA, given that [translation] "the danger opinion process under subsection 115(2) of the IRPA is a process that is, in practice, usually undertaken after the removal order becomes enforceable" (Plaintiff's file, brief of the Plaintiff's arguments, at para. 70). The Plaintiff argues that it is therefore not up to the IAD, in this case, to decide whether the Defendant can or cannot be returned to his country of origin. It was not a relevant factor to consider as part of granting special relief on humanitarian and compassionate grounds. For that reason alone, the Plaintiff claims that the IAD's decision must be deemed unreasonable (*Maple Lodge Farms Ltd. v. Canada*, [1982] 2 SCR 2 at pages 7-8; *La v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 476 at para. 16).

[31] Lastly, the Defendant argues that section 68 of the IRPA gives the IAD discretion to issue a stay of removal only for humanitarian and compassionate grounds. [Translation] "It is illogical

and contrary to the objectives of the IRPA for the IAD to allow the Defendant to remain in Canada for three more years solely on the basis of the need to protect the health and safety of the public, rather than on the humanitarian and compassionate grounds invoked by the latter" (Plaintiff's file, brief of the Plaintiffs arguments, at para. 76).

B. *Defendant's claims*

[32] The Defendant instead argues that the IAD's decision is reasonable because the IAD based its decision on the very relevant factors from *Ribic*, *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84 [*Chieu*] and *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 133, 2002 SCC 4. The Defendant also maintains that "the weight to be attributed to them [each Ribic factor] will vary from case to case" (*Khosa*, *supra*, at para. 65). As such, the Defendant argues that all the facts that occurred, as well as all the factors analyzed, show that the Defendant is a person who can be rehabilitated or who could even already be considered rehabilitated.

[33] According to the defendant, the IAD came to reasonable conclusions in analyzing each of the *Ribic* factors in consideration of all the evidence. For example, regarding the Defendant's possibility of rehabilitation, the Defendant argues that the IAD's decision is warranted because it is possible to understand the panel differentiating between "addiction" and "use". In fact, the Defendant testified at the hearing before the IAD that he had no longer been using drugs for nearly two years, and counsel for the Defendant claims that it is possible for a person to no longer be using substances, but still have an addiction to those substances.

[34] The Defendant emphasizes that he has protected-person status under section 115 of the IRPA. Therefore, the IAD allegedly did not err in its decision in coming to the following conclusion [translation]:

> The panel is also led to make this decision in light of the fact that the appellant has protected-person status; under section 115 of the Act, even if his appeal had to be dismissed, he could not be deported from Canada because, according to the Minister, there is nothing indicating that he constitutes a danger to the public in Canada.
>
> (IAD's reasons for decision, at para. 19.)

[35] Lastly, contrary to what the Plaintiff alleges, the Defendant claims that the IAD did not overstep its jurisdiction. In fact, the IAD acted within its jurisdiction provided for in paragraph 67(1)(c) of the IRPA, which gives the IAD the power to grant a stay of the removal order on humanitarian and compassionate grounds.

VII. Analysis

[36] For the following reasons, this application for judicial review is allowed.

[37] The Court is of the same opinion as the Minister and finds that the IAD's decision did not undergo a "somewhat probing analysis" in order to be deemed reasonable (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para. 63). The Supreme Court of Canada also stated the following in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 SCR 748 at para. 56:

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the

> reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. [Court's underlining.]

[38] The Court is aware that the IAD applies the *Ribic* factors in decisions that it has to make under paragraph 67(1)(c) of the IRPA and that "The weight to be accorded to any particular factor will vary according to the particular circumstances of a case." (*Chieu*, *supra*, at para. 40-41). In this case, given the Defendant's particular situation, the IAD decided to concentrate its analysis on the Defendant's possibility of rehabilitation (one of the *Ribic* factors). Specifically, the IAD expressed the following question in its decision: [translation] "In other words, has the appellant demonstrated that it is possible for him to function in society without re-offending, that he can truly live a life free of crime?" (IAD's reasons for decision, at para. 13).

[39] However, the Court agrees with the Minister's arguments. Considering the offence committed in 2014 after the first round of therapy in 2011 and after the deportation order issued against the Defendant in 2013, the Court finds that the IAD failed to substantiate, even briefly, how the second round of therapy that started in 2017 to resolve the Defendant's usage problems differed from the therapy in 2011. Nor did the IAD explain why it was necessary for the Defendant to start or continue the new therapy, when the evidence before the IAD clearly revealed that the Defendant himself admitted during the hearing that he had not been using drugs for two years. [Translation] "It is about whether the decision is reasonable, including whether the evidence on record supports the decision" (*Canada (Citizenship and Immigration) v. Safi*, 2014 FC 947 at para. 14). That is not the case in this instance.

[40] "Justification and intelligibility are present when a basis for a decision hasbeen given, and the basis is understandable, with some discernablerationality and logic." (*Ralph v. Canada (Attorney General)*, 2010 FCA 256 at para. 18; *Canada (Public Safety and Emergency Preparedness) v. Ramirez*, 2013 FC 387 at para. 36). Therefore, despite the considerable expertise and discretionary power of IAD members (*Khosa*, *supra*, at para. 58), the Court must intervene in this case because the decision is not justified and intelligible (*Dunsmuir*, *supra*, at para. 47). The IAD's decision to grant a three-year stay of execution of the deportation order issued against the Defendant on October 29, 2013 does not fall within the range of "possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, *supra*, at para. 47).

VIII. Conclusion

[41] This application for judicial review is allowed.

JUDGMENT in case IMM-3710-17

THE COURT RULES that the application for judicial review be allowed. There is no question of importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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