Federal Court  Cour fédérale

Date: 20181003

Docket: IMM-1417-18

Citation: 2018 FC 985

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 3, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

MOHAMED AMINE BENGHENNI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] Mr. Mohamed Amine Benghenni, a permanent resident of Canada of Algerian origin, pleaded guilty to an offence punishable by a maximum term of imprisonment of at least 10 years, thereby making him inadmissible under the *Immigration and Refugee Protection Act*, SC 2001,

c. 27 [IRPA]. Therefore, a removal order requiring him to leave Canada was issued against him by the Immigration Division [ID] of the Immigration and Refugee Board of Canada.

[2] Mr. Benghenni did not challenge the validity of that removal order, but instead argued that there are sufficient humanitarian and compassionate grounds to warrant special relief and the setting aside of the decision to send him back to Algeria. Since the Immigration Appeal Division [IAD] had dismissed his appeal, Mr. Benghenni is seeking judicial review of that decision.

II. Facts

[3] Mr. Benghenni is 28 years old and has been a permanent resident of Canada since the age of 11. He arrived in Canada in April 2001, along with his mother and four sisters, sponsored by his father who had obtained refugee status.

[4] Mr. Benghenni now has two children, a daughter born in 2011 and a son born in 2016. They live in Terrebonne with their mother, from whom he is separated. He also has several nieces and nephews, two of whom have autism spectrum disorder.

[5] On August 17, 2011, Mr. Benghenni was arrested by the City of Montreal Police Service and charged with possession of 31,780 grams of marijuana for the purpose of trafficking.

[6] On December 2, 2013, he pleaded guilty to possession of a controlled substance under paragraph 5(3)(a) of the *Controlled Drugs and Substances Act*, SC 1996, c. 19 for the purpose of trafficking. That crime is punishable by life imprisonment.

[7] On March 27, 2014, he was sentenced to a conditional sentence of two years less a day, with a three-year probation, further to the joint suggestion of the prosecution and the defence.

[8] Between 2013 and 2015, Mr. Benghenni was also convicted of three counts of obstruction of justice and three counts of breach of undertaking for which he was fined.

[9] Further to an investigation, the ID issued the removal order against him on February 26, 2015. The ID found that the criteria in subsection 36(1) of IRPA were met since Mr. Benghenni had been convicted in Canada of an offence punishable by life imprisonment, which makes him inadmissible.

III. Decision being challenged

[10] The IAD found that there were insufficient humanitarian and compassionate grounds to warrant special relief. In other words, the humanitarian and compassionate grounds invoked do not outweigh the negative factors.

[11] The IAD analyzed the best interests of the children directly affected by the decision, after considering the factors identified in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] IABD no. 4 (QL) and upheld by the Supreme Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, namely:

1. the seriousness of the offence leading to the removal order;
2. the possibility of rehabilitation;
3. the length of time spent, and the degree to which the individual facing removal is established, in Canada;

4. the family and community support available to the individual facing removal;
5. the family in Canada and the dislocation to the family that removal would cause;
6. the degree of hardship that would be caused to the individual facing removal to his country of nationality;

[12] The IAD found the seriousness of the offence to be a factor weighing heavily against Mr. Benghenni. He was arrested in the apartment of one of his sisters, along with four accomplices, one of whom is a high school friend of his, and in possession of over 31 kilos of marijuana. The Applicant denies being the brains behind that operation and even denies having participated in the bagging operation underway at the time. However, his sweater was covered with cannabis at the time of his arrest and he had tried to flee the police.

[13] The IAD also noted that Mr. Benghenni had been late in pleading guilty to the charges against him and that the sentence imposed on him was the maximum conditional sentence.

[14] The IAD considered that Mr. Benghenni had also been convicted of three counts of breach of curfew conditions and three counts of obstruction for refusing to identify himself to the police. It added that this demonstrates his inability to comply with the conditions imposed on him and the inappropriateness, under the circumstances, of a stay of removal.

[15] The IAD noted that Mr. Benghenni shows few signs of rehabilitation or remorse and therefore considers that there is a high risk of re-offending.

[16] It first found that Mr. Benghenni has little credibility, partly because of the multiple versions of the facts regarding his arrest. It noted that the version given at the hearing is significantly different from the one taken by the police on the day of his arrest and the one recorded by an enforcement officer at the preliminary hearing.

[17] The testimony of Mr. Benghenni's two sisters clearly shows that the version he gave them is watered down and not consistent with the facts. Mr. Benghenni explained at the hearing that he had rented the apartment of one of his sisters, who was away, to an acquaintance whom he suspected was involved in criminal activity. However, his sisters testified instead that Mr. Benghenni had loaned the apartment to a friend who had nowhere to sleep.

[18] The IAD therefore found that Mr. Benghenni's low credibility and his behaviour following his arrest affect his testimony about his rehabilitation and the risks of him re-offending. While on parole, he was sentenced to three counts of breach of conditions and three counts of obstruction. He also admitted to using marijuana two or three times a week between 2011 and 2015, despite the fact that his probation order prohibited him from using or possessing any drug or other substance for which simple possession is prohibited. The IAD also did not believe Mr. Benghenni when he claimed to have stopped using and found it unlikely that he would be able to comply with the conditions of a stay of removal.

[19] Lastly, the IAD believed that Mr. Benghenni's economic vulnerability and the fact that he shows no remorse for his marijuana use increase the risk of him re-offending.

[20] Regarding Mr. Benghenni's degree of establishment in Canada, the IAD noted that, on the date of the hearing, he was living with one of this sisters, was unemployed and on social assistance and that, essentially, he had not made sufficient efforts to find a job and contribute to Canadian society.

[21] The IAD acknowledged that the presence of his family in Canada is a positive factor for Mr. Benghenni. All the members of his family are Canadian citizens, except for his mother, who is a permanent resident. His older sisters have several Canadian-born children.

[22] Mr. Benghenni has received and continues to receive support from his family. Two of his sisters claimed that he has changed since having children, but the IAD gave little weight to their testimony because of Mr. Benghenni's lack of transparency towards them.

[23] The IAD found that, if Mr. Benghenni were required to return to Algeria, he would experience only normal adjustment difficulties. He spent the first 11 years of his life there and stayed there for four months in 2008, when he had misplaced his Canadian permanent resident card. The fact that he has no family or knowledge that could help him in Algeria and the fact that he speaks Arabic with an accent without being able to read or write it is not enough to conclude that Mr. Benghenni could not integrate into Algeria. He is a 28-year-old man with no job restrictions, and his situation is no different from that of many immigrants who come to Canada without knowing one of the official languages.

[24] The IAD acknowledged that the fact that Mr. Benghenni has several children with him, including his own, is a positive factor. However, it found the evidence to be very weak regarding the presence and support that he provides to them. In any event, the IAD told us, the best interests of the child, although important, are not determinative in and of themselves.

[25] Mr. Benghenni's children live in Terrebonne with their mother, from whom he is separated. He claims to see his children nearly every second day. However, the IAD drew a negative inference from the fact that, at the hearing, his ex-spouse offered no oral or written testimony about Mr. Benghenni's support or his presence in the children's lives.

[26] The IAD further found that Mr. Benghenni and his sisters exaggerated the weekly contact he has with his children and the $500 support that he claims to pay. That amount is high when considering the amount of the monthly social assistance he receives and the $350 rent he claims to pay to his sister.

[27] Mr. Benghenni also has two nephews with autism spectrum disorder. The IAD found that the first one is already well looked after by a brother and three sisters and that he has the support of both his parents. A child psychiatrist's report dated January 2017 states that the child prefers the company of his uncle, who turns out to be Mr. Benghenni's younger brother. In that report, there is no mention of his relationship with Mr. Benghenni.

[28] As for the second autistic nephew, the IAD found that he, too, has the support of both his parents, even though they are separated. The IAD accepted that Mr. Benghenni is an additional

resource for his sister, but added that, if he were to find a job, his presence with his nephews would necessarily decrease.

[29] In summary, even though the best interests of the child are a positive factor, in this case, it does not outweigh the negative factors considered by the IAD.

[30] For all these reasons, especially the seriousness of Mr. Benghenni's crime, his counts of obstruction and of breach of conditions, his moderate degree of establishment and his low potential for rehabilitation, the IAD found that the evidence does not demonstrate, on a balance of probabilities, that the humanitarian and compassionate grounds invoked warrant special relief.

IV. Issues and standard of review

[31] The Applicant raises several issues that I believe can be summarized as follows:

Did the IAD err in its analysis of the humanitarian and compassionate considerations?

[32] There is no dispute that the applicable standard of review is reasonableness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paras. 52-58).

V. Analysis

[33] The factors considered by the IAD and discussed by the parties are, in addition to the best interests of the children directly affected by the decision:

1) the seriousness of the offence leading to the removal order;
2) the possibility of rehabilitation and the risk of re-offending;

3) the length of time spent, and the degree to which the individual facing removal is established, in Canada;

4) the family in Canada and the dislocation to the family that removal would cause;

5) the family and community support available to the individual facing removal;

6) the degree of hardship that would be caused to the individual facing removal to his country of nationality;

A. *The seriousness of the offence leading to the removal order*

[34] It is not clear to what extent Mr. Benghenni considers unreasonable the IAD's findings regarding the seriousness of the offences that he committed. However, he maintains that his credibility cannot be affected by the version of events identified by the enforcement officer because it is not clear where that version comes from. As for his breach of curfew upon returning from a trip south in March 2013, he feels that this should not be taken into account because he had validated the legality of his actions with his lawyer prior to his departure.

[35] In my opinion, it was entirely reasonable for the IAD to find that there are a number of aggravating factors relating to the offence of possession of cannabis for the purpose of trafficking, even though it was a non-violent crime for which Mr. Benghenni did not receive a firm sentence of imprisonment. He was arrested along with four accomplices and in possession of over 31 kilos of marijuana, which gives the crime a certain organized nature.

[36] The IAD was also justified in assigning little credibility to Mr. Benghenni because of the differing versions of the event that he provided to the police, his family and the court. It is not for this Court to interfere with the IAD's findings regarding Mr. Benghenni's credibility. Moreover,

even putting aside the enforcement officer's version, it is reasonable to conclude that there are still contradictions between the version provided by Mr. Benghenni before the IAD and the one recorded in the police report.

B. *The possibility of rehabilitation and the risk of re-offending*

[37] Mr. Benghenni finds unreasonable the IAD's assessment of the risk of re-offending. The IAD had found that his economic vulnerability made him vulnerable to re-offending, whereas he had only a single profit-driven conviction, seven years prior to the hearing before the IAD. He adds that it was unreasonable to conclude that there is no remorse and any risk related to associating with criminalized individuals when the events in question date back to 2011.

[38] In my view, however, the IAD could reasonably reach the conclusion that Mr. Benghenni's rehabilitation and accountability were weak. He had been found guilty of three breaches of conditions and three counts of obstructing the work of police officers and, at the hearing, he had admitted using cannabis, contrary to his conditions of release, two or three times a week since 2011, including during his conditional sentence period.

[39] The IAD could also reasonably find that it was possible that Mr. Benghenni was still using marijuana, in contravention of his conditions of release. Even though two of his sisters testified that he had changed in recent years, it was reasonable for the IAD to assign little weight to that version, given Mr. Benghenni's lack of transparency towards them.

[40] It is true that it would also have been reasonable for the IAD to find that, since Mr. Benghenni is now well aware of the impact that a breach of his conditions can have on his status in Canada, he would be less likely to re-offend. However, the mere existence of an alternative outcome does not mean that the decision being challenged is unreasonable.

C. *Length of time spent, and the degree to which the individual facing removal is established, in Canada*

[41] Mr. Benghenni argues that the IAD did not sufficiently consider the difficulty that a criminal record causes when looking for a job. Nor did it retain from his testimony and that of his sister that it was possible for him to work for his brother-in-law's moving company in the summer of 2018.

[42] However, I am more of the opinion that the IAD reasonably considered the Applicant's entire situation before finding his degree of establishment in Canada to be low.

[43] First, his claim that he was to work for his brother-in-law in 2018 is not supported by the documentary evidence, and that possibility is not even mentioned in the letter of support written by the brother-in-law in question.

[44] Mr. Benghenni demonstrated low economic establishment and, as noted by the IAD, there are contradictions between his tax returns and the jobs that he claims to have had.

[45] After "crediting" Mr. Benghenni with the period during which he was on compensation due to an industrial accident, the IAD could reasonably find that his industrial accident and his criminal record should not have prevented him from finding a job in 2017. His compensation payments ended in summer 2016 and, at the time of the hearing in February 2018, he had not seen a doctor for a year. Also, his criminal record did not prevent him from finding the jobs that he claims to have had before his industrial accident. He worked for at least 14 months while serving his conditional sentence.

[46] Lastly, I am of the opinion that it was reasonable for the IAD to find that Mr. Benghenni's degree of establishment in Canada is low and that the possibility of a potential job in the summer of 2018, when he did not have that job, although available in 2017, in no way changes his situation.

D. *The family in Canada and the dislocation to the family that removal would cause*

[47] Mr. Benghenni contends that the IAD failed to take a humanitarian and compassionate approach in analyzing the consequences that his removal would have on the members of his family, especially his mother, who has a history of depression, and two of his sisters, who have an autistic child (*A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 1170 at para. 18). Mr. Benghenni claims that his mother suffers from back problems, depression and obesity and that he helps her go to the bathroom, do household chores and do the shopping. He also helps his two sisters by taking in one of his autistic nephews when he returns from daycare and by doing various activities with the other one.

[48] With respect, I believe that the IAD duly considered the impact of removal on Mr. Benghenni's mother and sisters. The IAD acknowledged that, given his close contact with all the members of his family in Canada, dislocation would inevitably result from his removal to Algeria and that this is a factor in Mr. Benghenni's favour.

[49] The analysis of Mr. Benghenni's relationships with the members of his family, especially his mother and sisters, seems to me to be reasonable on the whole. The IAD could reasonably find that Mr. Benghenni does assist his mother, but that he is not the only one able to do so. It is true that one of his sisters stated that Mr. Benghenni was the only one able to help their mother get around. However, the IAD could reasonably find that his 17-year-old brother, who lives with their mother, could take over from Mr. Benghenni. In addition, regarding the impact of Mr. Benghenni's removal on their mother's depression, the IAD was able to draw from the evidence that her psychiatric follow-up ended in 2015 and that the evidence of her condition since then is insufficient.

[50] It is true that the IAD's analysis of the impact on the family from the care required by the autistic children seems to lack empathy and compassion. However, in the context where the professionals' reports indicate that those children require professional resources and assistance, which Mr. Benghenni is not able to provide, and that none of those reports mentions him or his relationship with those children, it was reasonable for the IAD to find that there was insufficient evidence about the impact of his removal on his sisters who have autistic children. In other words, I do not believe that this apparent lack of empathy is sufficient to conclude that the IAD's

analysis is unreasonable. Even so, the IAD found that a dislocation would occur as a result of Mr. Benghenni's removal and that the family relationships factor was in his favour.

E. *The family and community support available to the individual facing removal*

[51] The IAD reasonably found that Mr. Benghenni receives support from his family and that this is a positive factor. The parties did not attempt to challenge that finding.

F. *The degree of hardship that would be caused to the individual facing removal to his country of nationality*

[52] Mr. Benghenni contends that the IAD lacked compassion and empathy in analyzing the hardship that he would face if he were removed to Algeria. Since arriving in Canada at the age of 11, he has returned to Algeria only twice. He speaks "broken" Arabic and cannot read or write it. He has no family or knowledge that could help him in Algeria. He would be separated from his entire family, including his children.

[53] Again, I believe that the IAD's analysis on this point is reasonable. The record shows that Mr. Benghenni can communicate in Arabic and that nothing would prevent him from working in Algeria. The obligation to leave Canada inevitably involves some inherent difficulties, but that in itself does not warrant relief on humanitarian and compassionate grounds (*Kanthasamy v. Canada (Citizenship and Immigration*), 2015 SCC 61 at para. 23). Mr. Benghenni did not demonstrate any special circumstances that would justify cancellation of his removal.

G. *The best interests of the children directly affected by the decision*

[54] Mr. Benghenni believes that the IAD's analysis of the best interests of the children also lacks compassion and empathy, both for his own children and for his autistic nephews.

[55] Mr. Benghenni has a seven-year-old daughter and a two-year-old son who live with their mother. He testified that he sees them almost every other day and contends that the IAD wrongly minimized the frequency of their contact by bringing up the distance between his residence and that of his ex-spouse, the contradictions between his testimony and that of his sisters, and the fact that it is impossible for Mr. Benghenni to have devoted the time that he claims to have devoted to his children, his autistic nephews, and his mother.

[56] Similarly, Mr. Benghenni contends that the IAD failed to consider the situation and needs of its two autistic nephews. He states that he helps one of his sisters when her son has a crisis and that he had taught him to walk. He takes in one of his nephews when he returns from day care and takes the other one swimming on Tuesdays and Thursdays. His sisters confirm that Mr. Benghenni is a great help to them.

[57] In my view, the analysis of the evidence of Mr. Benghenni's relationships with his children and nephews is reasonable on the whole.

[58] The IAD found that this factor was in Mr. Benghenni's favour, but that the evidence was insufficient to counterbalance the negative factors and tip the scale in his favour. It is worthwhile

recalling that Mr. Benghenni had the burden of proving the impact of his removal on his children and nephews.

[59] It is true that Mr. Benghenni's evidence of his relationships with his children contains a number of flaws and contradictions. The frequency of contact varies from "almost every day" to "almost every other day" to "almost every week". Given that vagueness, the IAD was able to give considerable weight to the fact that the children's mother, who has custody of them, did not present any oral or written evidence. It was also able to consider the evidence that it is the maternal grandmother who looks after her grandchildren when the mother is absent.

[60] In light of all the evidence, the IAD was at liberty to find that it was implausible that Mr. Benghenni could devote so much time to his mother and nephews while continuing such regular visits with his children who live some distance away. It was also at liberty to find that his financial contribution, too, was exaggerated, given the amount of social assistance received from which he had to deduct the rent paid to his sister. Moreover, he provided no documentary evidence of that contribution.

[61] That being said, even though the IAD found the frequency of Mr. Benghenni's visits to be exaggerated, it still found [TRANSLATION] "that, objectively, a father's presence in the lives of his children is usually a positive factor for an appellant and, although exaggerated, some presence and some support have been proven."

[62] The best interests of the child must be " 'well identified and defined' and examined 'with a great deal of attention' in light of all the evidence" (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 39). Also:

> The "best interests" principle is "highly contextual" because of the "multitude of factors that may impinge on the child's best interest". It must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity. The child's level of development will guide its precise application in the context of a particular case.
>
> [References omitted.]
>
> (*Kanthasamy* at para. 35.)

[63] The best interests of the children cannot be analyzed in a factual vacuum. In this case, the evidence provided is somewhat more limited, as the IAD rightly observed:

> [TRANSLATION]
>
> It is surprising to note that, in such a case where the best interests of the children should be a strength in the appellant's argument, the evidence is equally deficient. The IAD could reasonably expect to receive evidence on this point, but there is nothing at all in this one.

[64] I now quote Justice Patrick Gleeson, whose comments are particularly relevant:

> [TRANSLATION]
>
> In this case, the officer's decision to not exercise his discretion based on humanitarian and compassionate considerations was based on the lack of objective, relevant evidence to support the claims made to justify the relief sought. *Kanthasamy* was not intending to alter the well-established principle that "an applicant has the burden of adducing proofof any claim on which the humanitarian and compassionate application relies". This principle emerges from *Kanthasamy*, where Abella J., speaking for the majority, concluded as follows at para. 39:

> A decision under s. 25(1) will therefore be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered. Thus, the officer cannot simply say that he is taking those interests into account. The best interests of the child must be "well identified and defined" and examined "with great deal of attention" **in light of all the evidence**.
>
> [References omitted; bolding and underlining as in the original.]
>
> (*D'Aguiar-Juman v. Canada (Citizenship and Immigration*), 2016 FC 6 at para. 9.)

[65] With respect to Mr. Benghenni's two autistic nephews, the IAD noted that he is close to them, but again found that there is no evidence that he has a crucial role in their lives. Those children are supported by both of their parents, their brothers and sisters, and other members of their extended family.

[66] It is true that the IAD does not place any emphasis on the special needs of an autistic child nor on the support that parents of autistic children often need. However, there was no objective evidence before the IAD regarding the impact of his removal on those two children. As noted above, the only objective evidence shows that one of those two children is particularly attached to Mr. Benghenni's younger brother and that both children require professional support, which he is unable to provide to them.

[67] Nor was it unreasonable for the IAD to consider that the time that Mr. Benghenni claims to devote to his nephews, even though it considers his testimony exaggerated, would be even less if Mr. Benghenni had a job.

[68] Again, even though the IAD found this to be a positive factor in its analysis, that factor is not determinative in this case and, in light of the evidence presented, it is not sufficient to counterbalance the negative factors.

[69] The IAD considered and weighed all the factors raised by Mr. Benghenni, and its findings fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, [2008] SCC 9 at para. 47).

VI. Conclusion

[70] Special relief on humanitarian and compassionate grounds is a discretionary remedy. The assessment of the *Ribic* factors and their respective weight falls within the IAD's exclusive area of jurisdiction. In this case, there is no doubt that there are humanitarian and compassionate grounds, but the IAD found, in light of the evidence, that they did not warrant special relief.

[71] In this Court, an applicant has the burden of showing that the IAD's decision was unreasonable. In my opinion, despite some shortcomings in the IAD's analysis, the decision to not grant special relief is reasonable and justified in light of an overall analysis of all the relevant factors.

[72] Lastly, the Respondent rightly requests that the style of cause be changed so that the Respondent is the "Minister of Citizenship and Immigration" rather than the "Minister of Public Safety and Emergency Preparedness". I will allow that request.

JUDGMENT in IMM-1417-18

THE COURT RULES that:

1. The application for judicial review is dismissed;

2. The style of cause is changed so that the Respondent is the Minister of Citizenship and Immigration;

3. No question of general importance is certified.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1417-18
STYLE OF CAUSE:	MOHAMED AMINE BENGHENNI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTREAL, QUEBEC
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