Federal Court  Cour fédérale

Date: 20181116

Docket: IMM-5495-17

Citation: 2018 FC 1164

Ottawa, Ontario, November 16, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

ZAKARIA HASSAN ALI AHMED

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Zakaria Hassan Ali Ahmed, was born in Djibouti in 1987. The Applicant was recognized as a Convention Refugee in 2002 along with his aunt, sisters and brother. He applies for judicial review of a decision dated December 1, 2017, whereby the Immigration Appeal Division (IAD) upheld the Minister of Public Safety and Emergency Preparedness's (MPSEP) deportation order issued against the Applicant, who was found inadmissible to Canada

for serious criminality as a person described in para 36(1)(a) of the *Immigration and Refugee Protection Act* (IRPA). For the reasons that follow, the application for judicial review is dismissed.

II. Background

[2] The Applicant was born in Djibouti in 1987, and shortly after, his family moved to Somalia. His family then left Somalia because of the war. His mother was killed when he was six or seven years old, and his father disappeared. The Applicant came to Canada with his aunt, sisters and one brother. They were recognized as Convention refugees in 2002; however, the Applicant never obtained his permanent residency.

[3] The Applicant was taken out of his aunt's home when he was a teenager by child welfare and put in foster homes. The Applicant subsequently developed dependencies to drugs and alcohol.

[4] In August 2012, the Applicant was issued a deportation order because the MPSEP determined that on June 1, 2010, the Applicant was convicted of one count of intimidation, a criminal offence liable to a term of imprisonment not exceeding five years for which a sentence of more than six months was imposed. While the June 1, 2010, conviction was the basis of the decision to deport the Applicant, he has also had other criminal convictions related to assaults and drug-related offences and several warnings.

[5] After the deportation order was issued against him, the Applicant appealed the order to the IAD. The hearing at the IAD was delayed twice: the first time, because the Applicant's counsel's mother passed away. The second delay came when the IAD notified the Applicant that his counsel was no longer a member in good standing of the Law Society of Ontario, or any other province, so he could not represent the Applicant. The Applicant then retained new counsel for the hearing.

III. The IAD's Decision

[6] In its decision, the IAD first notes that the Applicant is seeking discretionary relief from the removal order, and the Applicant contends that in taking into account the best interest of the child, there is sufficient humanitarian and compassionate (H&C) considerations to warrant special relief. The Applicant asked for the deportation order to be stayed for three years.

[7] The IAD explains that in determining whether to exercise its discretion, it must consider the factors established in *Ribic v Canada (Minister of Employment and Immigration)* [1985] IADD No 4 [*Ribic*], which were affirmed in the Supreme Court's *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3. The IAD notes that they are not exhaustive factors, and weight assigned to them will vary depending on the circumstances of the case. The IAD adds that the onus is on the Applicant to show why his appeal should not be dismissed.

[8] In analyzing the Applicant's possibility of rehabilitation, the IAD lists the Applicant's criminal history. The IAD writes that "the evidence demonstrates that the appellant has several serious convictions involving violence and some were committed after the deportation order."

The IAD explains that the Applicant has had three detention reviews where the CBSA reported the Applicant's behaviour. The evidence shows that the Applicant engaged in violent behaviour and that he constitutes a risk to public security. The IAD notes that the Applicant did not provide evidence that he took concrete steps to modify his behaviour, that he did not acknowledge having been violent even though he pleaded guilty to the infractions. Because of the Applicant's lack of concrete evidence that he took steps towards rehabilitation, the IAD found that the Applicant failed to demonstrate on a balance of probabilities that there is a possibility of rehabilitation.

[9] The IAD then looks at the Applicant's time spent in Canada and his degree of establishment. The IAD gave significant weight to the period of time (15 years) the Applicant has spent in Canada. However, the IAD finds that his establishment is weak. He stopped going to school after grade 11, and gave no evidence of his past work experience. While the Applicant disclosed at the hearing that he worked illegally for a restaurant and made about $800 per month undeclared by babysitting and teaching French, English and Arabic to neighbours; he did not produce evidence to corroborate how he was able to provide for himself, and he does not receive social assistance. The IAD said the Applicant "offers circular arguments: he cannot apply for a formal job because he does not have a work permit, and he doesn't apply for the work permit because he does not have a job and he can't afford it." The IAD found that the Applicant's lack of establishment was a negative factor.

[10] The IAD then examined the presence of the Applicant's family in Canada. The Applicant testified that he has no family support in Canada. The Applicant does not know his brother's and his aunt's whereabouts. One of his sisters lives in Guam and he has not spoken to her in over a

year. His other sister works in South Soudan and last spoke to her over six months ago. However, the Applicant produced letters from both his sisters dated April 2017, which speak of his involvement in the life of his daughter. Tiffany, the mother of his child (and ex-spouse) also wrote a letter of support, but the IAD notes that the Applicant was still under an order not to contact Tiffany after the charges of domestic violence were removed. The IAD found this was a negative factor.

[11] The IAD then analyzes the best interest of the child directly affected by the decision. The Applicant has a three-year-old daughter, and has joint custody of his daughter, caring for her every two weeks. The IAD writes that there is no court order for custody; the Applicant states that the "child service agency" decided this. However, there is no evidence to support this. The IAD notes that Tiffany, the mother of the Applicant's child, said that he is an "amazing loving and caring father". However, Tiffany's letter remains general as to the Applicant's real involvement in the child's life. The IAD finds the Applicant brought no evidence to show how he supports the child financially, no evidence that the child lives with him, not even a picture. The IAD writes that the Applicant was not a reliable witness, and was asked more than once why he did not file supporting documents, to which he replied that "they were at home". The IAD explains that it is difficult to assess the best interest of a child in the abstract. It adds: "The best interests of his child is that the appellant remains in Canada. Here, it is mitigated by the fact that his real involvement in her life is not demonstrated."

[12] The IAD notes that the Applicant did not offer evidence that he benefits support in the community, so it finds this a negative factor. In terms of the degree of hardship caused by his

return to Djibouti, the IAD said there is no need consider this factor in this issue, as the Minister did not issue a danger opinion.

[13] Overall, the Applicant did not offer independent evidence that he respected conditions imposed upon him by the criminal courts (like enrolling in anger management classes and drug abuse programs). He did not respect the court order to avoid contact with Tiffany. There is no probative evidence that he made positive steps between offences and the appeal towards rehabilitation. The Applicant did not apply for a work permit since 2010 to make it possible to have a formal and steady employment, although he was warned on several occasions in the past. All in all, the IAD found that a stay removal was not appropriate, as the Applicant has not made necessary steps to demonstrate that he is willing to rehabilitate himself.

IV. Issues

[14] This matter raises the following issues:

1. Did the IAD breach natural justice principles in failing to consider the Applicant's mental health issues, and failing to ascertain whether the Applicant understood the nature and consequences of the proceeding?
2. Did the IAD breach natural justice principles by relying on documents which were not provided to the Applicant prior or at any point in the proceeding?
3. Did the IAD render an unreasonable decision with respect to the best interests of the Applicant's daughter, "by ignoring and misstating the evidence and failing to be alive, alert and attentive to her best interests"?

V. Standard of Review

[15] The Respondent submits that when an Applicant has not exhausted his appeal options, it is a question of statutory interpretation, and the Court offers no deference: *Habtenkiel v Canada (Citizenship and Immigration)*, 2014 FCA 180 at para 23. While questions of procedural fairness are generally reviewed on the correctness standard, in *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132, Justice Stratus of the Federal Court of Appeal (FCA) stated that the appropriate standard of review for alleged breaches of procedural fairness is unsettled.

[16] The Respondent also submits that the reasonableness standard should be applied (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47-49 [*Dunsmuir*]). This Court agrees.

VI. Preliminary Points

A. *Further Affidavit of Ms. Coni Grills-Reid*

[17] The Applicant contends that Ms. Coni Grills-Reid's affidavit is not admissible. In the affidavit, Ms. Grills-Reid alleges that given a standard procedure, the Applicant would have been provided with the documents that were before the IAD member because they were included in the exhibits in his detention review of August 27, 2012. The Applicant submits that this is hearsay as Ms. Grills-Reid was not there, and it fails to adhere to the best evidence rule with no explanation as to why an affidavit from the actual presiding officer was not produced. This Court agrees with the Applicant's argument. The affidavit of Ms. Galls-Reid will not be considered by the Court.

VII. Submissions of the Parties

A. *Procedural Fairness*

[18] The Respondent argues that the allegations that the IAD breached procedural fairness, in issue for questions 1 (mental health issues) and 2 (reliance on documents), should not be considered by this court because the Applicant has not exhausted his appeal rights before the IAD. Therefore, the Applicant is statutorily barred from making these allegations to this Court. The Respondent relies on s 71 and s 72(2)(a) of the IRPA to support this argument. Since the Applicant can apply to the IAD to reopen his appeal due to the breach of procedural fairness, he has not exhausted his right of appeal and the judicial review should not proceed with these allegations (*Smodi v Canada (Citizenship and Immigration)*, 2009 FCA 288 at para 23; *Habtenkiel v Canada (Citizenship and Immigration)*, 2014 FCA 180 at paras 35-36; *Slatineanu v Canada (Citizenship and Immigration)*, 2017 FC 1129 at paras 14-19).

[19] This Court agrees with the Respondent's argument that the Applicant is statutorily barred from seeking judicial review on the allegations of any breaches of procedural fairness. The Applicant must exhaust his right to apply to the IAD to reopen his case. This disposes of issues 1 and 2 and therefore this Court will address issue 3 regarding the reasonableness of the IAD decision.

3. Did the IAD render an unreasonable decision with respect to the best interests of the Applicant's daughter, "by ignoring and misstating the evidence and failing to be alive, alert and attentive to her best interests"?

(1) Applicant

[20] The Applicant's daughter, Amaya, was born on April 24, 2013. He testified that his daughter lives with him every second week, that he takes her to school every day on the bus and picks her up, and that he is involved in her life. The IAD refers in its decision to the fact that the Applicant's daughter stays with him every two weeks, but omits all the other evidence, and notes that the Applicant did not provide evidence that his daughter has a place in his home. In fact, the IAD found that the Applicant's evidence is not reliable. The Applicant submits this is an error, first, because the Applicant's testimony is presumed to be true. The IAD did not indicate why the Applicant was unreliable and "we are left speculating whether or not she believed his testimony pertaining to his daughter". Second, the Applicant argues that the IAD must explain why it was not for the best interest of the child for her father to stay in Canada. The IAD failed to do so, therefore rendered an unreasonable decision. In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, the Supreme Court provides a clear direction on reaching a reasonable determination of a child's best interests:

> [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: *Baker*, at para. 75. This means that decision-makers must do more than simply *state* that the interests of a child have been taken into account: *Hawthorne*, at para. 32. Those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence: *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.), at paras. 12 and 31; *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 323 F.T.R. 181, at paras. 9-12.
>
> [40] Where, as here, the legislation specifically directs that the best interests of a child who is "directly affected" be considered, those interests are a singularly significant focus and perspective: *A.C.*, at paras. 80-81. […]

[21] The Applicant also relies on *Cerezo v Canada (Citizenship and Immigration)*, 2016 FC 1224:

> [8] In the decision in *Kolosovs*, cited with approval in the above passage from *Kanthasamy*, at paragraph 8 the specific issues engaged in arriving at a reasonable determination of a child's best interests are stated:
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> > *Baker* at para. 75 states that an H&C decision will be unreasonable if the decision-maker does not adequately consider the best interests of the children affected by the decision:
>
> The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. [Emphasis in the original]
>
> […] To come to a reasonable decision, a decision-maker must demonstrate that he or she is alert, alive and sensitive to the best interests of the children under consideration. Therefore, in order to assess whether the Officer was "alert, alive and sensitive", the content of this requirement must be addressed.
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> [9] *Kolosovs* at paragraph 12 states the content of sensitivity:
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> > It is only after a visa officer has gained a full understanding of the real life impact of a negative H&C decision on the best interests of a child can the officer give those best interests sensitive consideration. To demonstrate sensitivity, the officer must be able to clearly articulate the suffering of a child that will result from a negative decision, and then say whether, together with a consideration of other factors, the suffering warrants humanitarian and compassionate relief. As stated in *Baker* at para. 75:
> >
> > " ... where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable".
>
> [Emphasis added]

[22] Because the IAD did not articulate “to any extent” the possible suffering of the Applicant’s daughter if he is deported, the decision is unreasonable.

(2) Respondent

[23] The Respondent argues that the IAD’S BIOC assessment was reasonable. It considered the evidence presented, as well as the fact that the Applicant did not provide documentary or other evidence to support his testimony regarding his involvement with his daughter, other than a letter from his daughter’s mother. There was no evidence that the Applicant supports the child financially, or if she has a place to stay with him.

[24] The IAD found that while it is generally in a child’s best interests to remain with both parents, the absence of supporting documents found it difficult to assess this child’s specific interests.

(3) Analysis

[25] Regarding the best interest of the child’s analysis, the Court cannot agree that the IAD’s decision was unreasonable. It is clear that the IAD properly considered the Applicant’s testimony; however, the Applicant gave no documentary evidence to support his claims, other than a letter from the child’s mother and letters from his sisters who do not live in Canada. The IAD notes that the short letter from the child’s mother “remains general as to his real involvement in the child’s life”. The IAD also wrote: “the evidence tends to show that they are not in Canada so as to constitute reliable evidence of their effective support and his real

involvement in his daughter's life." The IAD did acknowledge that it is the best interests of his child that he remains in Canada; however, because of the lack of evidence on his real involvement in his daughter's life, it was difficult to assess the best interests of the child. This was a reasonable conclusion to reach based on the evidence.

VIII. Conclusions

[26] It is the Court's determination that the IAD's decision is reasonable, as it falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir* at para 47). This application for judicial review is dismissed.

[27] The Applicant proposed a question for certification in written submissions after the hearing concerning the obligation and standard to be applied by the IAD with respect to an appellant's mental health. The Applicant relies on *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA 51 *[Hillary]*.

[28] The Respondent says that the question posed by the Applicant has already been answered in *Hillary*. The Respondent relies on the following passages:

> [40] It is always within the discretion of the IAD to raise the issue itself and to inquire into the appellant's capacity. However, if the IAD makes no such inquiry, the Court should intervene only if satisfied on the basis of an examination of the entire context that the Board's inaction was unreasonable and fairness required the IAD to be proactive.
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> [41] In my opinion, given the adversarial nature of the IAD's procedure, it will only be in the most unusual circumstances that a panel is obliged to make inquiries in a case where the appellant is represented by counsel who has not raised the issue of the client's

> ability to understand the nature of the proceedings Such is not the case here.
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> [42] That the IAD does not bear primary responsibility for identifying appellants who are especially vulnerable is indicated by subsection 19(1) of the Immigration Appeal Division Rules, SOR/2002-230 (Rules), which imposes on counsel for the appellant and for the Minister a duty to advise the IAD if they believe that a designated representative should be appointed because of the appellant's inability to appreciate the nature of the proceedings.
>
> [43] Similarly, the Board's Guideline 8, Guidelines on Procedures with Respect to Vulnerable Persons Appearing Before the IRB, effective date December 15, 2006, states (at section 7.3) that counsel is best places to bring to the Board's attention the special vulnerability of a person who may require some kind of procedural accommodation. However, the Board may also act on its own initiative (section 7.4).

[29] The Court is persuaded by the argument of the Respondent and, accordingly, the Court will not certify the question posed by the Applicant.

JUDGMENT in IMM-5495-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. There is no question of general importance to be certified and no order for costs. The Style of Cause herein be amended to properly reference the Respondent as the Minister of Citizenship and Immigration.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Talia Joundi	FOR THE APPLICANT
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Poulton Law Office Professional Corporation Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT