Federal Court  Cour fédérale

Date: 20190201

Docket: IMM-3921-18

Citation: 2019 FC 140

Ottawa, Ontario, February 1, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

XYZ

Respondent

JUDGMENT AND REASONS

[1] This is an application by the Minister of Citizenship and Immigration [Minister] challenging a decision by the Immigration Appeal Division of the Immigration and Refugee Board [IAD] allowing an appeal by the Respondent thereby preserving the Respondent's permanent resident status.

[2] At the root of the Respondent's immigration problems are criminal convictions in 2008 for sexual assault and sexual interference involving his young step-daughter. After pleading guilty, the Respondent was sentenced to eight and one-half (8.5) months followed by three years on probation.

[3] The Respondent's subsequent immigration history is complicated. On March 13, 2009, he was ordered deported by the Immigration Division. That decision was appealed by the IAD where the removal order was stayed for three years subject to thirteen conditions. Condition 10 required the Respondent to "engage in or continue psychotherapy or counselling after the probation period is ended".

[4] Because the Respondent failed to fulfill the requirement to continue counselling, his case was returned to the IAD for reconsideration. When that hearing was convened on January 23, 2014, the Respondent appeared without counsel. His request for an adjournment to retain counsel was refused by the IAD without reasons. The Respondent's appeal was then dismissed.

[5] The Respondent sought judicial review and on January 14, 2015, the matter was ordered returned to the IAD on consent based on an asserted breach of procedural fairness (i.e. the absence of reasons for refusing an adjournment).

[6] When the matter came back to the IAD, the Minister sought to introduce the transcript from the January 23, 2014 hearing where the Respondent had testified without the benefit of counsel. The IAD refused to admit the transcript. However, it dismissed the Respondent's

appeal. Once again, the Respondent sought judicial review and again, he was successful. On January 25, 2017, Chief Justice Paul Crampton dealt with the issue of the Respondent's breach of Condition 10 in the following way:

> [51] At the end of its analysis, the IAD stated that an additional stay was not warranted because of [XYZ]'s "inability to meet the conditions of his prior stay." The Court was required to read the Certified Tribunal Record and counsel's submissions to understand that the "conditions" in question was the condition that required [XYZ] to engage in or continue psychotherapy or counselling after his probation period had been completed.
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> [52] In and of itself, the IAD's decision to lift the stay on the basis of the breach of one or more of the conditions of the initial stay would have been reasonably open to the IAD to make. Conditions of a stay are just that, conditions. The breach of any one of them can justify the lifting of a stay. In addition to constituting a violation of the very basis for a stay, a breach also constitutes an important "circumstance of the case," as contemplated by subsection 68(1) and paragraph 67(1)(c).
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> [53] However, the bald conclusion expressed by the IAD, in a lengthy decision that discusses other matters entirely, was unreasonable. In short, it did not form part of a *process of articulating reasons* that was appropriately justified, transparent or intelligible. This is particularly so given that the IAD then proceeded to state its overall conclusion and did not mention this matter in summarizing its analysis.
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> [54 I acknowledge that [XYZ] made significant efforts to obtain the required counselling and treatment after being reminded of the condition in question. However, it is very troubling that he apparently was unaware of that condition. It will be up to the IAD to decide, in the exercise of its broad discretion, whether to accept [XYZ]'s explanation and actions in the circumstances.
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> [55] [XYZ] questions the significance of the condition that he breached, on the basis that its purpose was to assist him to demonstrate that he could live in Canada without committing further offences. I acknowledge that [XYZ] in fact appears not to have committed further offences, and that he therefore appears to have availed himself of the "second chance" that he was given when the initial stay was granted. However, it bears reiterating that when a stay is granted on conditions, any breach of those conditions is a serious matter. It cannot be left to the individuals

> whose removal from Canada has been stayed pursuant to the exercise of discretion in their favour, to decide which conditions of the stay they may or may not honour. In [XYZ]'s case, the condition in question went to the heart of both the risk that he posed to one of the most vulnerable segments of society, and the rehabilitation issue that was the basis for the IAD's initial issuance of a stay of his removal from this country. This will be another matter for the IAD to consider on redetermination.

[7] Accordingly, for the fourth time the Respondent's appeal was returned to the IAD and, for the second time, the Minister's counsel sought leave to introduce the transcript of the IAD hearing on January 23, 2014. In an interlocutory ruling dated November 28, 2017, the IAD rejected the Minister's motion on the following basis:

> [9] I agree with the submissions of Minister's counsel on two points. First, I agree that the IAD policy on not including transcripts and reasons for decision where the Division's duty of procedural fairness to the appellant was breached is not a hard and fast rule. It is a policy put in place to safeguard re-determinations by the IAD not being tainted by a breach of procedural fairness in the original proceedings. However, one could conjure up many examples of breaches in a later stage of the hearing including a refusal to provide an opportunity to submit fresh evidence or submissions at the post-hearing stage where a breach of procedural fairness does not taint the earlier proceedings.
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> [10] I find the Minister's counsel accurately sets out the essence of the matter at issue in paragraph 21 of his memorandum with reference to the Federal Court's decision in *Cheema*: "if a breach of natural justice taints the whole proceeding to such a degree that it would be unfair to use a transcript of that proceeding at a subsequent hearing, then the transcript is inadmissible."
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> [11] I find in this case that it would be unfair to use the transcript of proceedings and reasons for decision from the 2014 hearing in which the appellant was not prepared and had been denied an adjournment in order to obtain legal counsel. I find that it would taint proceedings in the second Court-ordered *de novo* redetermination of the reconsideration of the appellant's stay of removal to rely on the 2014 transcript and decision, and I find the motive of the Minister to cross-examine the appellant on the transcript of that proceeding to be improper. Finally, I find the

> parsing of the cursory reasons of the Department of Justice in consenting to judicial review of the March 2014 decision as representing only a failure to provide adequate reasons without taking into account the nature of the duty breached to be an unreasonable position.
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> [12] The circumstances of the breach of procedural fairness taint the entire proceedings because they took place at the outset of the 2014 hearing. The appellant was not prepared for a hearing *de novo*. He requested an adjournment so he could be represented by counsel. The application was denied without reasons. I find that absent clear and cogent reasons, refusing the appellant's application for an adjournment and compelling him to proceed despite not being prepared or represented in counsel, in a hearing in which his right to remain in Canada was at stake, was a substantial breach of the appellant's rights to procedural fairness. I find that the nature of the breach tainted the following proceedings and that admission of the transcript of proceedings and reasons for decision from the 2014 decision would taint these proceedings as well.
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> [Footnotes omitted.]

[8] The IAD went on to reconsider the Respondent's appeal and, on July 25, 2018, it found that sufficient humanitarian and compassionate grounds were present to justify special relief. The removal order of March 13, 2009 was set aside without conditions. It is from this decision that this application is brought by the Minister.

[9] The Minister contends that the IAD decision is riddled with reviewable errors including analytical errors, unreasonable findings and breaches of procedural fairness. The Minister also takes issue with the IAD's interlocutory ruling refusing to accept the transcript from its January 23, 2014 hearing. For issues arising from the IAD's assessment of the evidence or for issues of mixed fact and law, the standard of review of reasonableness applies. Issues of true procedural fairness, of course, attract correctness review.

[10] Much of the Minister's case is based on the assertion that the IAD largely ignored the Minister's arguments and the evidence related to those arguments. The contention is that the IAD simply accepted all of the Respondent's exculpatory explanations for breaching Condition 10 without considering the evidence showing the breach to be deliberate and flagrant. The Minister also maintains that it was unreasonable for the IAD to conclude, without supporting evidence, that the Respondent would no longer benefit from ongoing counselling.

[11] The fundamental weakness to the Minister's first point is that the IAD's acceptance of the Respondent's evidence concerning the breach of Condition 10 was based on its favourable assessment of his credibility along with reservations about some of the evidence relied upon by the Minister. This is evident from the IAD's positive characterization of the Respondent as "a credible and reliable witness" and its stated concerns about the Minister's attempt to recast the Respondent's criminal conduct more than a decade later. In short, the IAD accepted the Respondent's explanation for failing to comply with Condition 10 and, by implication, it refused to draw unfavourable inferences from the evidence relied upon by the Minister. It is also of some significance that the Respondent was aggressively cross-examined on this issue and offered plausible answers consistent with the IAD's finding. A particularly telling exchange on the point was the following:

> Q That's fine. That's fine, but the point here is this: So you obviously knew that you had a condition to renew your passport and provide a copy to Immigration authorities? You knew that condition, right?
>
> A Mm-hmm.
>
> Q So how is it that you knew to fulfill that condition which is a relatively -- of all the conditions that you had imposed upon you is relatively minor condition. How is it that you

remembered to impose -- to do that one but not the more important condition?

A Again, my probation was over in 2012, sometime 2012, and I thought I was done with my conditions. In my own mind I was complying with everything else, like reporting, even going and register every year at a police station as a sex offender, and I was doing everything and it was not in my head that I was missing one of the conditions. I thought I was -- I had them all covered, so it is my fault in my mind that I didn't go back and grab the papers or put it on my fridge or something because I thought I was complying with all of them.

Q And you mentioned this a couple of times, that you should have reviewed it more often and so I -- the question -- the obvious question is then if staying in Canada is so important to you, and more importantly, if complying with these conditions is so important with you, why did you not review it more often? Like, it doesn't make sense to me. Like, this is your chance to stay in Canada.

A I know and --

Q After committing this very serious crime, so why just review it once in three years?

A Again, I think I was going through -- and I am not trying to minimize anything. So again, I'm not trying to make excuses for anything. Going through all these things, it's been like a lot. My mind has been like very busy and I have no excuse to say that it was because of this or that. The only thing I can say over and over again is just because I mistook -- I thought I was done with my -- my -- I was complying with all of them and I -- I screwed up by no reviewing the conditions and yeah, I missed the one. I missed that condition and it was very important if -- because I was blaming myself because if I have done everything else, and I started a maintenance program for that long and I was doing everything else. Why would I don't enrol myself into counselling if I knew I have to? I mean, I would have done it but it was not on my -- on my head.

Also see the Certified Tribunal Record at pages 2452-2453.

[12] It was not unreasonable for the IAD to accept this testimony and having done so, it was not required to recite all or any of the circumstantial evidence or arguments put up by the Minister in support of a contrary inference. While there may be cases where the Dunsmuir requirements for transparency, intelligibility and justification will require a decision-maker to directly confront both sides of an evidentiary point this is not one of them. Having heard the Respondent in person, the IAD enjoyed a distinct testimonial advantage. It is not the role of this Court on judicial review to second-guess the IAD simply because a different finding could have been made on evidence; see Canada (Citizenship and Immigration) v Awaleh, 2009 FC 1154 at paras 50 to 54, [2009] FCJ No 1439. That is particulary the case where a finding is based on a credibility assessment.

[13] It is perhaps worth noting that this proceeding is brought by the Minister more than ten years after the precipitating conduct and, in the intervening period, the Respondent had never been accused of anything similar. In the meantime, he has gotten on with his life and has established new relationships. Nevertheless, the Minister seeks to remove him to Guatemala where he has not lived for almost 20 years. The passage of time is a factor that permeates the IAD's decision, most notably in its discussion of resettlement, clean hands, intervening events and new relationships. It is also clear that the IAD appropriately applied the Ribic factors to its analysis. Taken in context, the IAD's decision to protect the Respondent from removal was a reasonable if not a compelling disposition.

[14] I reject the Minister's argument that the IAD's interlocutory decision to refuse to accept evidence from the January 23, 2014 hearing was made in error or was procedurally unfair. In

fact, the decision was thorough and well supported by the relevant legal authorities. Furthermore, the Minister has failed to show how the introduction of the Respondent's earlier testimony would possibly have altered the outcome of the case. The concern is, accordingly, purely hypothetical.

[15] The Minister also complains that the IAD erred by making an unreasonable finding that the Respondent had not "committed" any further offences. The suggestion is that this was an over reach because complaints about sexual abuse are often not reported and it was, therefore, possible that the Respondent had reoffended. This argument has no merit. While the IAD perhaps should have said only that there was no evidence that the Respondent had reoffended, this is a distinction without a difference. In the absence of some evidence that the Respondent may have reoffended in some way, the IAD could only treat him as a one-time offender. It was not open to the IAD to harbour a suspicion that perhaps the Respondent had subsequently acted inappropriately and had not been reported for it.

[16] The Minister's further argument challenging the IAD's decision to cancel Condition 10 is more meritorious. On this issue, I accept the Minister's point that the IAD's removal of the counselling requirement was devoid of evidentiary support and inconsistent with its own finding "that the appellant continues to lack significant insight into why he sexually assaulted his step-daughter". Condition 10 was clearly imposed with a view to the Respondent gaining insight into his wrongful behaviour. This was also an issue identified in the Respondent's pre-sentence report in support of a counselling condition during probation. The IAD's findings that the Respondent has "made progress" and would "never engage in similar behaviour again in the

future" required something more than the Respondent's bare and unsupported testimony. Indeed, it is inexplicable that, despite the Respondent's several attendances for counselling in 2015, he tendered no evidence from his treatment providers to support a finding that he no longer represented a serious risk to re-offend.

[17] It may well be the case that, notwithstanding an apparent lack of insight, the Respondent is unlikely to reoffend, but to make such a finding and to remove Condition 10 required some supporting evidence from someone in a position to offer that opinion. Even at that, the IAD could never reasonably come to the conclusion that the Respondent carried absolutely no recidivist risk.

[18] For the foregoing reasons, this application is allowed in part and the IAD's decision of July 25, 2018 removing Condition 10 from the March 19, 2010 IAD stay order is set aside. That issue alone is to be re-determined on the merits by a different decision-maker.

[19] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT in IMM-3921-18

THIS COURT'S JUDGMENT is that the application is allowed in part and the IAD's decision of July 25, 2018 removing Condition 10 from the March 19, 2010 IAD stay order is set aside. That issue alone is to be re-determined on the merits by a different decision-maker.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Marjan Double	FOR THE APPLICANT
Erin Roth	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE APPLICANT
Edelmann & Co. Barristers and Solicitors Vancouver, British Columbia	FOR THE RESPONDENT