Federal Court  Cour fédérale

Date: 20210903

Docket: IMM-5659-19

Citation: 2021 FC 918

Ottawa, Ontario, September 3, 2021

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

RONALDO DOMINGO RUPINTA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ronaldo Rupinta, seeks judicial review of a decision by the Immigration Appeal Division (IAD) made on August 25, 2019. The IAD dismissed the Applicant's appeal of a deportation order for serious criminality following a conviction for sexual interference (the Decision).

[2] The Applicant is seeking to have the Decision quashed and the matter remitted to a differently constituted panel for reconsideration. The Respondent requests this application be dismissed.

[3] For the reasons that follow, this application is granted.

II. **Background Facts**

[4] The Applicant had requested special relief on humanitarian and compassionate considerations pursuant to section 68 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (*IRPA*).

[5] The Applicant is a citizen of the Philippines who has resided in Canada since 2007. He first tried crystal methamphetamines (meth) in 2015 after friends suggested he try it to help stay awake during his night shifts. By June 2016, he was using on a daily basis.

[6] On June 7, 2017, the Applicant plead guilty and was convicted of sexual interference following an event where he followed a 15 year old girl in his apartment complex and embraced her while he was high on meth. He was sentenced to 78 days in jail and 18 days probation. As a result of this criminality, the Applicant became inadmissible to Canada under subsection 36(1) of the *IRPA.*

[7] On January 14, 2019, the Applicant was declared inadmissible to Canada for serious criminality.

III. **Preliminary Issue - Style of Cause**

[8] The Respondent submits that the style of cause should be amended to list the Respondent as the Minister of Public Safety and Emergency Preparedness (MPSEP), as it appears in the IAD decision, pursuant to Rule 5(2)(b) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 and s.4(1) of the *IRPA*.

[9] The *IRPA* states that the Minister of Citizenship and Immigration is responsible for the administration of the *IRPA* except as otherwise provided (s.4(1)). It appears that the Respondent may have erroneously identified the MPSEP as the proper Respondent because they are responsible for the enforcement of *IRPA*, including arrest, detention and removal (s.4(2)(b)). However, this application for judicial review does not deal with the enforcement of a removal, it is a review of the IAD's decision not to stay a deportation order.

[10] I find that the correct respondent is, as stated in the Notice of Application, the Minister of Citizenship and Immigration.

IV. **The Decision under Review**

[11] The Applicant's appeal addressed his request for relief on humanitarian and compassionate (H&C) grounds pursuant to subsection 68(1) of the *IRPA* which states:

Removal order stayed	**Sursis**
68 (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly	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

affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[12] The IAD noted that the Applicant did not challenge the validity of the deportation order. The appeal related only to the request for relief on H&C grounds.

[13] After noting that the Applicant bore the onus to establish his case on a balance of probabilities, the IAD reviewed each of the non-exhaustive factors as confirmed in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) at paragraph 14 [*Ribic*], as confirmed in *Chieu v Canada (Minister of Citizenship and Immigration)* 2002 SCC 3 at para 40.

[14] The main findings by the IAD were:

1. The Applicant's commission of a sexual offence against a minor is serious;
2. Several factors negatively impacted a finding on the possibility of rehabilitation including the applicant's denial of the sexually motivated nature of the crime, the fact that he had not attended any counselling programs for sexual offenders, he had began a drug treatment program only one week prior to the hearing, and he was convicted in 2017 of crimes related to fraud;
3. While he has been in Canada for 12 years, the Applicant was not financially established as he is unemployed and relying on social assistance;
4. There was no evidence that anyone substantially relies on the Applicant;

5. The Applicant's children are adults. Thus, considerations of the best interests of the child were inapplicable; and
6. Though the Applicant would face some hardship re-establishing himself in the Philippines, having spent his formative years there, his knowledge of the language and culture would assist in his reintegration. The Applicant did not dispute that his family in the Philippines would assist.

[15] The parties made a joint recommendation to the IAD that a three-year stay of the removal order would be appropriate. Despite the recommendation of counsel for the Minister, the IAD found the Applicant failed to establish, on a balance of probabilities, that special relief was merited in the circumstances of the case.

[16] The details behind this determination are discussed later in this judgment.

V. **Issues**

[17] The only issue is whether the Decision is reasonable.

[18] Within that the Applicant raises three sub-issues:

1. Did the IAD make conflicting findings about the Applicant's risk of drug relapse?
2. Did the IAD unreasonably assess the Applicant's prospects of rehabilitation?
3. Did the IAD misapply the jurisprudence?

[19] Part and parcel of considering the reasonableness of the Decision is the question of whether the IAD's rejection of the joint recommendation was reasonable. The sub-issues help inform that determination.

[20] I have found that two issues are each determinative of this application: the lack of reasons for rejecting the joint recommendation and the inconsistent findings considering the Applicant's risk of drug relapse. It is not necessary therefore to consider the other issues.

VI. **Standard of Review**

[21] There is no issue as to the standard of review. There is a presumption that, subject to certain exceptions that do not apply here, the standard of review of an administrative decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*) at para 16.

[22] In conducting a reasonableness review, the court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place: *Vavilov* at para 15.

[23] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The

reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85.

VII. **The Joint Recommendation**

[24] As stated, the determinative issue is whether it was reasonable for the IAD to reject the joint recommendation of counsel that the Applicant's removal order be stayed for a period of 3 years.

[25] A joint recommendation from counsel is not binding on a decision maker, but it should be given serious consideration and reasons should be provided if it is rejected: *Grewal v Canada (Citizenship and Immigration)*, 2020 FC 1186 (*Grewal*) at paras 24 and 28 and cases cited therein.

[26] In this matter, the extent of the IAD's consideration of the joint recommendation for a three-year stay is addressed by two sentences at paragraph 42 of the Decision: "I have given consideration to the recommendation of Minister's counsel that a three-year stay would be appropriate in this case. However, the jurisprudence is clear that I am not bound by this recommendation."

[27] The IAD then excerpts a paragraph from *Akkawi v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 21 (*Akkawi*) in which Mr. Justice Pinard acknowledged that it was up to the Appeal Division to determine whether an applicant should be removed from Canada and no comment by counsel could bind the Appeal Division, not even a joint submission, *provided the tribunal explains why it is not following it*. (my emphasis)

[28] The next paragraph in the Decision is one sentence “The appeal is dismissed.”

[29] That is not an analysis. The IAD does not explain at any point why it did not follow the joint recommendation. It was simply dismissed out of hand based on *Akkawi*.

[30] The Respondent submits that “the IAD did not lightly disregard the joint recommendation. It gave it due consideration but did not find this to be an appropriate case for special relief. This finding is explicitly stated in the IAD decision at paragraph 42”.

[31] There is no reference by the IAD to special relief in paragraph 42. With respect, paragraph 42 is the one that I have summarized above in which the IAD says it has given consideration to the recommendation of Minister’s counsel that a three-year stay would be appropriate in this case. Counsel did not point to any reference to, or analysis of, the recommendation or any specific reason given by the IAD for rejecting it.

[32] Relying on *Tuel v Canada (Citizenship and Immigration)*, 2011 FC 223 (*Tuel*), the Respondent submits that where the IAD provides reasons for rejecting a joint recommendation, it may do so. *Tuel* is distinguishable on the facts. In *Tuel* the IAD specifically noted and mentioned the joint recommendations made during a mid-hearing conference and in post-hearing written submissions. Specific submissions made by the applicant in this case were referred to by the IAD.

[33] In the Applicant’s case submissions in support of a joint recommendation were made at the conclusion of the hearing.

[34] With respect to the seriousness of the offence the submissions were that although it was a serious offence, the Applicant's actions were treated at the minor end of the spectrum. This was supported by the fact that the Crown proceeded summarily, with a maximum sentence of 18 months, rather than by indictment, with a maximum of 10 years. The sentence was made intermittent with the Applicant serving jail time only on weekends.

[35] Another submission was that this was the first conviction of any kind for the Applicant and his wife indicated in her letter that she knew he would not have done what he did were he not high on drugs. The Applicant's sister's letter made essentially the same point.

[36] The Minister's counsel before the IAD noted that this was a borderline case to agree to a stay due to the seriousness of the offence of sexual interference with a minor. They explained though that while the Applicant's lack of insight into his reportable conviction (being unable to speak to his exact intentions when the offence happened) was concerning, it was recognized that the Applicant had both admitted his guilt and the fact that his actions were nonetheless wrong.

[37] The Applicant's history of compliance with the Toronto Bail Program and the fact that he had reported 48 times were mentioned as positive factors. Counsel for the Minister also noted the fact that the Applicant had not received any more convictions for sexual offences in the years since the offence in 2016 also made him "a good candidate for a stay".

[38] In considering whether the rejection of the joint recommendation was reasonable I begin by noting that there is a heightened burden on the IAD to justify why it is departing from a joint submission or considering issues that are not in dispute between the parties. This is based on the

fact that it is an agreement between the parties which goes directly to removing issues from determination: *Al-Abdi v Canada (Citizenship and Immigration),* 2016 FC 262 at para 10.

[39] The IAD does not refer to the fact that submissions were made to support the joint recommendation. I find this puzzling considering that the excerpt cited by the IAD included the statement in *Akkawi* that no comment or joint submission could bind the IAD "provided the tribunal explains why it is not following it".

[40] It is not clear whether the Respondent was relying on the reasons in the Decision to support the rejection of the joint recommendation. If so, I rely on *Grewal* in which Mr. Justice McHaffie found that setting out the reasons for decision "does not adequately satisfy this Court's recognition of the import and nature of joint submissions or recommendations regarding an appeal" and "in cases in which this Court found no reviewable error in the rejection of a joint recommendation, the IAD expressly gave the joint recommendation careful consideration, noting that it did not take the contrary decision lightly.": *Grewal* at para 35.

[41] Merely stating the joint recommendation of the parties were considered is not enough. The reasons provided by the IAD fail to show that it considered the joint recommendations. To the contrary, it is as if the joint recommendation did not exist. This failure renders the Decision unreasonable as the reasons for rejection of the joint recommendation are not transparent, intelligible or justified.

VIII. **The IAD made conflicting findings about the Applicant's risk of drug relapse**

[42] The findings in the Decision regarding the Applicant's drug use and potential for relapse are inconsistent. As expressed by the Applicant, "the IAD cannot have it both ways."

[43] The Decision expresses concerns about the Applicant's drug use.

[44] The IAD remarked that there was no corroborative evidence to confirm he was in a treatment program and was no longer using drugs. However, the letter from the John Howard Society, mentioned at paragraph 12 of the Decision, indicates that the Applicant was enrolled in a weekly relapse prevention group that employs a psycho/social approach on topics including anger management, setting achievable goals, health and wellness, harm reduction, and strategies to avoid relapse. This letter should have been addressed, but it was not, other than to mention it existed. It appears that in finding there was no corroborative evidence the IAD ignored evidence to the contrary.

[45] Subsequently, the IAD found that the Applicant's fear that he may face violence in the Philippines because he is a drug addict suggested that his drug use is ongoing or that, at the least, he fears that relapse is a distinct possibility.

[46] However, when considering foreign hardship, the IAD dismisses the possible threat to the Applicant's personal safety as a drug user in the Philippines because the Applicant claimed he was not currently using and relapse remained speculative.

[47] These contradictory findings about the Applicant's drug use, or not, do not exhibit the characteristics of a reasonable decision based on an internally coherent and rational chain of analysis justified in relation to the facts and law: *Vavilov* at paragraph 85.

[48] In *Vavilov*, the Supreme Court stated at paragraphs 102-103, (condensed and citations omitted):

> 102. To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error". However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived." Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment":
>
> 103. […] a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken.

[49] The IAD's findings regarding the Applicant's risk of relapse and its impact on his rehabilitation prospects and risk of foreign hardship are at odds. They are not reconcilable.

[50] No explanation was provided for these contradictory findings.

[51] The lack of internal coherence within the Decision on these points, and the IAD's incorrect comments about the availability of evidence regarding the applicant's treatment

program, reveal flaws in the analysis by the IAD that undermine its overarching logic thereby rendering it unreasonable.

IX. **Conclusion**

[52] For each of the foregoing reasons I am satisfied that the Decision is unreasonable. While there were other errors, it is not necessary to consider them.

[53] The Application is granted and the matter will be returned for redetermination by a different Member of the IAD.

[54] There is no serious question of general importance for certification.

JUDGMENT in IMM-5659-19

THIS COURT'S JUDGMENT is that:

1. The Application is granted and the matter will be returned for redetermination by a different Member of the IAD.
2. There is no serious question of general importance for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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