

Date: 20071220

Docket: IMM-5973-06

Citation: 2007 FC 1352

Ottawa, Ontario, December 20, 2007

Present: The Honourable Mr. Justice Lemieux

BETWEEN:

ZIAD ROBERT ZIADE

Applicant

and

**MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] Ziad Robert Ziade (the applicant), a Lebanese citizen, was born in the Ivory Coast in 1980 and was landed in Canada with his family in 1992 at the age of 12. On January 21, 2002, he was granted a stay of removal on various terms and conditions. The Immigration Appeal Division (the IAD), exercising the discretion conferred on it by section 70 of the former *Immigration Act*, issued the stay on humanitarian and compassionate grounds.

[2] In a decision dated October 5, 2006, a member of the IAD (the panel) terminated the stay, a decision that the applicant seeks to have set aside on this application for judicial review.

[3] Mr. Ziade raises three grounds against the impugned decision:

- He did not have a fair hearing because of the incompetence or negligence of the lawyer who represented him at the hearing before the panel;
- The panel erred in not giving sufficient weight to the best interests of his child; and
- The panel quickly decided that he was not credible and made palpable errors in assessing the evidence.

Facts

[4] As mentioned, Mr. Ziade arrived in Canada in September 1992 with his family when he was only twelve years old. He never resided in Lebanon, having lived in the Ivory Coast until his departure for Canada. He has no family in Lebanon; his mother, brother and sister are all in Canada.

[5] He has been living with his girlfriend, Lida Phon, a Canadian citizen, since April 2000 and married her on December 15, 2006. From this relationship, a son was born on November 28, 2001.

[6] He has committed a multitude of offences. On January 28, 2000, he was convicted of producing 41 marijuana plants and of possession of a substance for the purpose of trafficking; he

was sentenced to a year in prison. He was also convicted of possession of crack and was sentenced to 23 months in prison. On February 25, 2000, he was convicted of uttering death threats.

[7] According to the panel, the evidence in the record showed that they were not the only offences that Mr. Ziade had been convicted of; he had a criminal record that began when he was a young offender. He appeared before the Youth Court. On a number of occasions, he also breached a recognizance entered into before a judge, and in 1999, he pleaded guilty to obstructing a peace officer in the performance of his duties.

[8] As a result of the offences committed by Mr. Ziade, the Adjudication Division issued a removal order against him. In January 2002, at his appeal before the IAD, Mr. Ziade did not dispute the validity of the removal order; as previously mentioned, the IAD granted a stay of removal for a period of four years subject to ten terms and conditions.

[9] I note that, before the IAD in January 2002, the parties presented a joint recommendation to the panel about staying the removal. On May 23, 2003, a review took place, which resulted in maintaining the stay subject to the ten terms and conditions.

[10] I also note that at the 2006 hearing, the applicant had suggested allowing the appeal, which would have had the effect of eliminating the necessity for a stay, but the Minister opposed that and suggested that the stay be extended for a year.

[11] As we will see, the absence of Mr. Ziade's family at the hearing before the panel on April 18 was a determinative factor in the panel's conclusion that Mr. Ziade had not established sufficient humanitarian and compassionate grounds to extend the stay for at least a year, as the Minister requested at the hearing.

[12] In his affidavit in support of his application for judicial review, on which he was not cross-examined, Mr. Ziade states the following at paragraphs 14 to 18:

[TRANSLATION]

14. During the hearing, the member interrupted me frequently. It was difficult for me to answer the questions and provide the necessary explanations;

15. At the hearing before the Immigration Appeal Division on April 18, 2006, I was represented by Daniel Couture;

16. He gave me bad advice when he told me that it was not necessary for my family (wife, mother, sister and mother-in-law) to be present at the hearing. This is what appears from Mr. Couture's letter, which is attached to this affidavit as exhibit D-3 as well as from the affidavits of my wife (D-4), my mother (D-5) and my sister (D-6);

17. He told me that it was a mere formality and that the only purpose of the hearing was to explain the alleged breaches of conditions;

18. That is why my family was not present at the hearing before Member Barazi.

[13] I reproduce in its entirety the letter from Daniel Couture dated November 9, 2006, Exhibit D-3 to Mr. Ziade's affidavit:

[TRANSLATION]

Robert Ziade Ziade's family was present when the initial stay was granted.

The evidence was admitted and filed in the record.

The evidence was that humanitarian and compassionate grounds existed and were proven.

There was no dispute between the parties.

There was a first review, and the humanitarian and compassionate grounds were not disputed.

At the review on April 18, 2006, the evidence as to humanitarian and compassionate grounds was not challenged.

At the final review, there was no notice by the Minister's representative that would have led us to believe that this part of the evidence would be disputed.

And it was not disputed at the review hearing.

[14] After hearing the parties in Montréal on September 12, 2007, the Court suggested that Mr. Couture be summoned before the Court and given the opportunity to present his view of the allegations made against him in Mr. Ziade's affidavit and also to explain the circumstances and the contents of Exhibit D-3 to Mr. Ziade's affidavit. Mr. Couture appeared voluntarily before the Court on October 9, 2006.

[15] Mr. Couture had represented Mr. Ziade at the IAD hearings on January 10, 2002, when the initial stay was granted on the joint proposal of Mr. Zaide and the Minister, and at the review on March 26, 2003, when the issue was the applicant's breach of one of the conditions of his stay.

[16] I would add that the stay had been granted in 2002 for a number of reasons, the first being that almost all his family was in Canada (his mother, sister, brother and uncle) but, even more important, that he was living with his girlfriend and had a son. A second reason noted by the panel was that Mr. Ziade had committed the offences when he was young and that his behaviour had changed according to the criminologists' reports that were filed; the 2002 panel was of the view that the risks of recidivism were minimal.

[17] Mr. Couture's testimony can be summarized as follows:

- He did not remember telling Mr. Ziade [TRANSLATION] "don't bring your family" and would be surprised if he had said that;
- He indicated that he wrote Exhibit D-3 at Mr. Ziade's request and that it does not contain any allegation that he was negligent;
- The humanitarian evidence had not changed since the first stay, and the Minister had never disputed it;
- The tribunal raised the family's absence at the end of the hearing; he would have asked for an adjournment if this issue had been raised at the beginning.

The panel's decision

[18] On April 18, 2006, the panel commended a review of the stay. The panel found that Mr. Ziade had not complied with three conditions of his stay, in particular:

- First, he breached condition number 6 by associating with a person who has a criminal record or who is engaged in criminal activities. The panel stated: “In fact, on June 4, 2003, he was found in Montréal in the company of Ricardel Saint-Louis in front of an automatic teller. Ricardel Saint-Louis was convicted of automatic teller fraud and he received a sentence. The appellant testified that he was not aware of that person’s criminal activities, which the panel finds neither credible nor plausible, given that the appellant has stated that Ricardel Saint-Louis is a friend whom he has known since school.”
- Second, Mr. Ziade breached condition number 3 by failing to report his arrest in Ottawa on December 2, 2003. The panel wrote “The police report regarding that incident mentions the appellant’s non-authorized use of credit card data . . . Although the charge was stayed, the fact remains that the appellant did not inform Citizenship and Immigration Canada. His explanation that he simply forgot to do so is not credible. And even if it were, that omission proves that the appellant takes the conditions imposed on him lightly.”
- Third, the IAD was not notified of Mr. Ziade’s change of address. The panel wrote: “It is worth noting that, according to condition number 2, the appellant had to notify

CIC and the IAD of any change of address. The appellant is no longer a child; he is an adult of 26 years and the father of a 4-year-old child who was granted a stay. He knows very well what the consequences are if he fails to comply with one or more of the conditions of his stay.”

[19] In the panel’s opinion, Mr. Ziade “has not established the existence of any evidence or factors to support his case.” The panel wrote:

Fatherhood does not seem to have made him think any differently: although he is the father of a month-and-a-half-old child, he supplements his income by trafficking drugs. The authorities granted him a stay so that he would have the chance to turn his life around, but he has not complied with certain conditions. Although he claims to live with his spouse, their child and his parents-in-law, the panel notes that none of them came to the hearing to testify on his behalf or to support him at such an important event as the final review of his stay. When asked why they were absent, the appellant answered that he did not want to [Translation] “drag” them to the hearing. The panel does not find his explanation credible or convincing because it was in his interest to show the panel that he could count on the moral support of his immediate family and his friends. Moreover, neither his older sister, his brother Walid, his mother nor his maternal uncle, who was once a protective figure, was present. As for his older brother Khaled, he was deported to Lebanon, where their father also lives. [Emphasis added.]

[20] With respect to his son, Mr. Ziade did not satisfy the panel “that the presence of his young child was important enough to motivate him to respect the conditions of his stay. The appellant is not a role model that could inspire that child, and the panel must also consider the security and well-being of Canadians.”

[21] The panel concluded:

The appellant has not established, on a balance of probabilities, that, given the best interest of the child directly affected by this decision

and all of the circumstance of this case, there are sufficient humanitarian and compassionate grounds in this case to extend the stay for at least one year, as requested by the Minister's counsel, or to allow the appeal, as requested by the appellant's counsel.
[Emphasis added.]

Analysis

[22] For the following reasons, I believe that this application for judicial review must be allowed on the ground that, in the very special circumstances of this case, there was a breach of the duty of procedural fairness in the conduct of the hearing, with the result that Mr. Ziade did not have a real opportunity to present full and complete evidence as to the humanitarian and compassionate grounds that militated in favour of extending the stay for a limited period.

[23] The Minister does not dispute that the panel had a duty of procedural fairness when reviewing the stay granted to Mr. Ziade. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Madam Justice L'Heureux-Dubé, writing for the Court, held that a duty of procedural fairness applies to decisions made by immigration officers on an application for exemption based on humanitarian and compassionate considerations.

[24] At paragraph 21 of *Baker*, L'Heureux-Dubé J. observed that “[t]he existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances.” She cited *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at page 682: “the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case” and “[a]ll of the circumstances must be considered in order to determine the content of the duty of procedural fairness.”

[25] In the following paragraph of *Baker*, above, L'Heureux-Dubé J., on behalf of the highest Court, delineated the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances, emphasizing “that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.” [Emphasis added.] L'Heureux-Dubé J. set out the following factors:

- the nature of the decision being made and the process followed in making it;
- the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated;
- The legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given circumstances; and

- The analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures or when the agency has an expertise in determining what procedures are appropriate in the circumstances.

[26] At paragraph 28, L’Heureux-Dubé J. stated that the list of factors is not exhaustive and that “[t]hese principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important . . . The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.” [Emphasis added.]

[27] I set out the circumstances that lead me to conclude that the panel breached the duty of fairness in this case:

- Terminating the stay and dismissing the appeal has a huge impact on Mr. Ziade: his removal order is enforceable once the stay is lifted;
- He will probably be separated from his immediate family and his relatives. His country of nationality is Lebanon, but he has never lived there and knows no one there other than his father and perhaps a brother;

- My reading of the transcript of the hearing on April 18, 2006, shows that (1) after all the parties had finished asking questions, the panel asked why his in-laws and his wife were not present; (2) the applicant replied, [TRANSLATION] “that everyone wants to support me”, but that he felt, [TRANSLATION] “a bit bad about dragging everyone with me into these problems” (stenographic note, certified record, page 255); (3) he added, [TRANSLATION] “If it’s necessary, listen, I will bring them, but I don’t want my son to start visiting such places.” [Emphasis added] (stenographic notes, *ibid.*); (4) as for the other members of his family, he repeated that, [TRANSLATION] “he does not want them to come” (stenographic notes, pages 256 and 257).

[28] In my view, the applicant effectively requested an adjournment to have them testify.

[29] In these particular circumstances, the panel was required to give him the opportunity to prove his case before concluding, in the absence of this evidence, that the applicant had not demonstrated that there were humanitarian and compassionate considerations in his favour.

[30] Under these circumstances, it is not necessary to deal with the other issues.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is allowed, the decision of the panel is set aside and the review of the stay granted to the applicant is remitted for reconsideration by a new panel of the Appeal Division.

“François Lemieux”

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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