Date: 20071105

Docket: IMM-6137-06

Citation: 2007 FC 1146

Ottawa, Ontario, November 5, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

NAHMAN CHARLES

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board, dated October 31, 2006, which extended the respondent's stay of removal for a period of two years.

[2] The applicant requests that the decision be set aside and the matter be remitted to a differently constituted panel of the IAD.

Background

[3] The respondent, Nahman Charles, is a citizen of Pakistan. He came to Canada in 1987 as a visitor at the age of 5 and became a permanent resident on March 6, 1993. While in Canada, the respondent has been convicted of the following offences:

- Assault with a weapon on May 29, 2000 for which he received a sentence of 15 days imprisonment;
- Uttering threats on August 2, 2000 for which he received a sentence of 1 day imprisonment;
- Mischief over $5000 on March 23, 2001 for which he received a sentence of 30 days imprisonment;
- Robbery on March 23, 2001 for which he received a sentence of 3 months and 2 weeks of imprisonment, 84 days of pre-sentence custody and 2 years probation; and
- Possession of cannabis on March 12, 2002 for which he received a sentence of 9 days of pre-sentence custody.

[4] As a result of the respondent's robbery conviction, a deportation order was issued on January 7, 2002. The respondent appealed the deportation order to the IAD. The appeal did not contest the validity of the deportation order, but instead was made pursuant to paragraph 70(1)(b) of

IRPA, that having regard to all the circumstances of the case, the appellant should not be removed from Canada.

[5] The IAD panel heard testimony over two days on November 27, 2002 and February 17, 2003. A decision was rendered on March 12, 2003. The IAD panel issued an order staying the respondent's deportation for a period of three years. The panel found that while the respondent's criminal convictions were indeed serious, he had taken significant steps to rehabilitate. The stay order was made with a number of conditions, most notably that the respondent:

- inform the Department of Citizenship and Immigration and the Immigration Appeal Division in writing in advance of any change in address;
- keep the peace and be of good behaviour; and
- make reasonable efforts to seek and maintain full-time employment and immediately report any change in employment to the Department.

[6] On August 21, 2006, the IAD conducted an oral review of the stay of the respondent's removal order. The respondent was alleged to have breached the three above noted conditions of the order. The IAD issued a written decision dated October 31, 2006, which extended the stay of removal for another two years. This is the judicial review of the IAD's decision.

IAD's Reasons

[7] The IAD began by noting the three specific conditions of the order that the respondent was alleged to have breached:

- That he inform both the Department of Citizenship and Immigration and the Immigration Appeal Division in writing in advance of any changes in address;
- That he keep the peace and be of good behaviour; and
- That he make reasonable efforts to seek and maintain fill-time employment.

Change of Address

[8] With regards to the condition of reporting changes of address, the IAD acknowledged that a breach of the said condition had occurred, but found it not to be a serious breach.

Keep Peace and Good Behaviour

[9] On the condition of keeping peace and being of good behaviour, the IAD began by noting the seriousness of breaching this condition. The IAD noted that between May 2003 and October 2004, the respondent had been convicted of 11 offences under the *Highway Traffic Act* and the *Compulsory Automobile Insurance Act.* In relation to these convictions, the IAD made the following findings:

- Such actions are not those of an individual who is making scrupulous efforts to be law-abiding so as not to jeopardize his already precarious status in Canada.

- The respondent's convictions for failure to stop at a red light have the potential of endangering the public.
- The respondent is a reckless and dangerous driver who is not deterred by repeated convictions for the same offences, who drives uninsured vehicles, and who drives while under suspension.
- The respondent's lack of re-offending since October 2004 and payment of all fines associated with these convictions is acknowledged, but is no reason to credit him without reservation.

Full-time Employment

[10] The IAD began their review of this condition by noting that the evidence before the IAD was at best inconclusive. The IAD found the respondent's testimony on the issue "glib and unpersuasive". The IAD took issue with the following submissions made by the respondent:

- The respondent claimed to be "controlling everything" in his barber shop business, but did not know how much his employees were being paid because his brother "takes care of paperwork".
- The respondent testified before the IAD panel that he sells clothing at a flea market in Downsview Park under the name "Block Productions", but yet did not know whether the business was registered.
- The respondent informed the IAD that his flea market operation (Block Productions) was at some point being paid cash "under the table". When asked if he was aware that this could be

> an offence under the *Income Tax Act*, the respondent explained that he did not "understand the system" and did not "know the procedure".

[11] The IAD also noted that in light of the respondent's testimony concerning employment matters, his income tax information was reviewed with considerable interest. The IAD highlighted a number of discrepancies and peculiarities in the respondent's 2004 and 2005 income tax returns. The IAD found that the respondent's evidence was problematic and raised more questions than it was capable of answering. Furthermore, the IAD found that much of the respondent's evidence lacked credibility and reliability.

[12] Having reviewed the alleged breaches individually, the IAD made the following comments before rendering its decision:

> In the panel's view, the evidence is such as to bring the [respondent] to the very edge of having his stay cancelled and the appeal dismissed. At this review, the [respondent] has failed to establish that he complied with a number of the conditions imposed on him in 2003, and has not impressed the panel with his indifference and feigned ignorance. After some reflection on this borderline case, the panel has decided to give the [respondent] one final opportunity to demonstrate that he is willing and able to comply with all Canadian laws, federal, provincial, and municipal, criminal or otherwise, including tax laws.

[13] The IAD extended the stay of the removal order for a period of two years.

Issues

[14] The applicant submitted the following issue for consideration:

1. Did the IAD err in law by breaching its duty of fairness and its statutory duty to provide reasons for its decision?

[15] I would rephrase the issue as follows:

1. Did the IAD breach the duty of procedural fairness by failing to provide adequate reasons for its decision?

Applicant's Submissions

[16] The applicant submitted that the IAD erred in law by breaching its duty of fairness and its statutory duty to provide reasons for its decision. The applicant submitted that subsection 54(1) of the *Immigration Appeal Division Rules*, SOR/2002-230 mandates that the IAD provide reasons for decisions to stay removal orders. It was submitted that the duty to give reasons is only fulfilled if the reasons provided are adequate (*VIA Rail Canada Inc.* v. *National Transportation Agency*, [2001] 2 F.C. 25 at 21 (C.A.)). With regards to the adequacy of reasons, the applicant submitted that this is a matter to be determined on a case by case basis, but as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. (*VIA Rail Canada Inc.* above).

[17] The applicant submitted that in immigration matters, reasons must be sufficiently clear, precise and intelligible to allow the Minister and the individual affected to understand the grounds on which the decision is based. This in turn enables the parties to exercise their right to seek leave and judicial review and allows the Court to satisfy itself that the IAD exercised its jurisdiction in accordance with the law. The applicant noted that reasons must be proper, adequate and intelligible and must give consideration to the substantial point of argument raised by the parties (see *Mehterian* v. *Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 545 (C.A.)). The applicant also submitted that when written reasons are required, it is not sufficient to state that the determination in the affirmative is based on the evidence without further explanation (*Canada (Minister of Citizenship and Immigration)* v. *Koriagin*, 2003 FC 1210).

[18] The applicant noted that the entire thrust of the IAD's findings and analysis was that the respondent had failed to comply with the terms of his stay; moreover, no findings or analysis were provided in support of the decision made. The applicant submitted that the lack of findings and analysis in support of the conclusion rendered has left the applicant to speculate as to the IAD's rationale for extending the respondent's stay order. Furthermore, the applicant submits that it is not enough that the IAD simply assert a conclusion without further explanation. The applicant argued that this constitutes a breach of the IAD's duty of fairness and statutory duty to provide reasons for its decision. The applicant submitted that a question as to the adequacy of reasons raises an issue of procedural fairness and is reviewable on a standard of correctness (*C.U.P.E.* v. *Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539).

Respondent's Submissions

[19] The respondent agreed with the applicant's submission that the test for adequacy of reasons is as articulated by the Federal Court of Appeal in *VIA Rail Canada Inc.* above. However, the respondent submitted that the reasons given by the IAD were adequate in the particular circumstances of this case.

[20] The respondent submitted that the IAD was entitled to and was required to review the respondent's initial situation and any new matters that arose since the stay was imposed (*Beaumont* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1718). The respondent submitted that in order to understand the respondent's initial situation, the reasons for the decision in the August 2006 reconsideration are required to be read in conjunction with the initial March 2003 decision. The respondent submitted when the two decisions are read together it becomes clear that the respondent had breached two conditions of his stay, and possibly breached a third, but definitively met the numerous remaining terms and conditions of the stay. As such, the respondent submitted that when the IAD's decision is read in conjunction with the original stay decision, the reasons for the decision are adequate.

[21] The respondent submitted that the applicant does not take issue with the adequacy of the decision, but yet the weight that the IAD placed on the finding that the respondent had breached only two terms and conditions of his stay order. The respondent further submitted that issues of fact must be judged against a standard of patent unreasonableness (*Canada (Minister of Citizenship and*

Immigration) v. *Bryan*, [2006] F.C.J. No 190). Based on the standard of patent unreasonableness, the respondent submitted that the IAD's decision is not so unreasonable as to warrant the intervention of the Court.

Applicant's Reply

[22] In response to the respondent's submissions, the applicant replied that while the respondent has provided various reasons for which he believes his stay of removal order was continued, these reasons were not provided by the IAD in its decision. The applicant submitted that even if the March 2003 reasons and decision are taken into consideration (as the respondent submitted they should be), they shed little light on why the stay was continued in this case.

[23] With regards to the respondent's submission that the applicant is really taking issue with the weighing of the evidence and as such the appropriate standard is one of patent unreasonableness, the applicant submitted that this is simply not so. The applicant submitted that the IAD's failure to give adequate reasons has effectively precluded the Minister from exercising his right to challenge the decision on the basis alleged by the respondent.

Analysis and Decision

Standard of Review

[24] A question as to the adequacy of the IAD's reasons raises an issue of procedural fairness and is reviewable on a standard of correctness (*C.U.P.E.* above).

[25] **Issue 1**

Did the IAD breach the duty of procedural fairness by failing to provide adequate reasons for its decision?

The applicant submitted that the IAD breached procedural fairness by failing to provide adequate reasons for the decision to extend the respondent's stay order. The respondent submitted that adequate reasons were provided and that the applicant was in fact taking issue with the IAD's weighing of evidence, not the adequacy of reasons.

[26] I am of the view that the applicant is questioning the adequacy of the reasons and not the weighing of the evidence by the IAD.

[27] In *VIA Rail Canada Inc.* above, the Federal Court of Appeal stated at paragraphs 21 and 22:

> [21] The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "Any attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must

> ultimately reflect the purposes served by a duty to give reasons." (J.M. Evans et al., Administrative Law (4th ed.) (Toronto: Emond Montgomery, 1995) at 507).
>
> 22] The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. (*Northwestern Utilities Ltd.* v. *Edmonton (City),* [1979] 1 S.C.R. 684 at 706, 89 D.L.R. (3d) 161.) Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. (*Desai* v. *Brantford General Hospital* (1991), 87 D.L.R. (4th) 140 (Ont. Div. Ct.) at 148.) The reasons must address the major points in issue. The reasoning process followed by the decision-maker must be set out (*Northwestern Utilities, supra* at 707) and must reflect consideration of the main relevant factors. (*Suresh* v. *Canada (Minister of Citizenship and Immigration),* [2000] 2 F.C. 592 at 637 and 687-688, 183 D.L.R. (4th) 629 (C.A.)).

[28] The IAD's decision did not merely recite the submissions and evidence of the parties and state a conclusion. In fact, the IAD made a number of findings throughout its decision, such as:

- The finding that the breach of the condition of reporting changes of address was not a serious breach.
- The finding that the respondent is a reckless and dangerous driver who is not deterred by repeated convictions for the same offences, who drives uninsured vehicles, and who drives while under suspension.
- The finding that the respondent's submissions and evidence regarding his efforts to maintain full-time employment were at best inconclusive.

[29] The final paragraph of the IAD's decision reads as follows:

> In the panel's view, the evidence is such as to bring the appellant to the very edge of having his stay cancelled and the appeal dismissed. At this review, the appellant has failed to establish that he complied with a number of the conditions imposed on him in 2003, and has not impressed the panel with his indifference and feigned ignorance. After some reflection on this borderline case, the panel has decided to give the appellant one final opportunity to demonstrate that he is willing and able to comply with all Canadian laws, federal, provincial, and municipal, criminal or otherwise, including tax laws. To this end, the appellant's stay of removal will be extended for two years.

[30] It appears from a review of the IAD's decision that the findings made by the IAD do not seem to support the final conclusion reached by the IAD. The decision rendered was favourable to the respondent, but the findings made by the IAD were not of the same nature. The reasons provided do not explain how the IAD came to its conclusion based on the findings it made. The reasons do not explain upon what evidence and finding the final decision was made. While the IAD may have had good reason for extending he respondent's stay order, it failed to expressly state them in the decision. The IAD's reasoning process was not explained.

[31] The respondent argued that in order to fully understand the reasons for the IAD's decision, the March 2003 decision must be read together with the October 2006 decision. While I agree that the submissions, evidence and reasons of the March 2003 decision can be considered to provide some insight into why the IAD reached the decision it did, it is not the role of this Court to speculate as to the rationale behind the IAD's decision. The rationale is stated by the issuance of adequate reasons.

[32] The duty to provide reasons contributes critically to the accomplishment of an agency's mandate. As articulated by the Supreme Court of Canada in *Baker* v. *Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193, reasons fulfill a number of purposes:

- they ensure that issues and reasoning are well articulated;
- they allow parties to see that the applicable issues have been carefully considered; and
- they are invaluable if a decision is to be appealed, questioned, or considered on judicial review.

[33] According to the judgment in *VIA Rail Canada Inc.* above at paragraph 21, the purposes for providing reasons are relevant to their adequacy: "adequate reasons are those that serve the functions for which the duty to provide them was imposed."

[34] In the case at bar, I am of the opinion that these purposes have not been served by the reasons provided. The reasons provided by the IAD have not ensured that the reasoning upon which the decision was made was well articulated. Furthermore, the inadequacy of the reasons provided deprives the applicant of a full assessment of the possible grounds of appeal or review. This is especially relevant given that the IAD's decision is subject to a deferential standard of review. The IAD did not provide adequate reasons for its conclusion.

[35] For these reasons, I am of the view that the IAD breached the duty of procedural fairness by failing to provide adequate reasons for its decision. The application for judicial review is allowed and the matter is referred to a different panel of the IAD for redetermination.

[36] Neither party wished to submit a proposes serious question of general importance for consideration for certification.

JUDGMENT

[37] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the IAD for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration Appeal Division Rules*, S.O.R.12002-230:

54.(1) The Division must provide to the parties, together with the notice of decision, written reasons for a decision on an appeal by a sponsor or for a decision that stays a removal order.	54.(1) La Section transmet aux parties, avec l'avis de décision, les motifs écrits de la décision portant sur un appel interjeté par un répondant ou prononçant le sursis d'une mesure de renvoi.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6137-06
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION - and - NAHMAN CHARLES
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 23, 2007
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	November 5, 2007

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