Federal Court  Cour fédérale

Date: 20090817

Docket: IMM-5668-08

Citation: 2009 FC 834

OTTAWA, Ontario, August 17, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

BAWO ARIRI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (IAD), rendered December 12, 2008. The IAD denied the applicant's application to reopen a removal order appeal previously dismissed. It had been determined that the applicant had no right to appeal a deportation order issued against him by the Immigration Division on February 23, 2007, pursuant to the operation of paragraph 36(1)(a) and section 64 of the IRPA (criminality).

[2] The applicant, Bawo Ariri, is a citizen of Nigeria who was a permanent resident of Canada from the time of his landing in 1993. In addition to earlier convictions for uttering and possession of counterfeit money, in June 2006 he was convicted of a number of charges including fraud over $5000.00, human trafficking and smuggling, and possession of counterfeit money. The conviction on the charge of fraud over $5000.00 was the basis for the deportation order.

[3] As a result of these criminal convictions, specifically on the charge for fraud over $5000.00, the Immigration Division issued a deportation order against the applicant, due to serious criminality. The applicant's attempt to appeal the deportation order was unsuccessful as the IAD held, on September 7, 2007, that it had no jurisdiction to determine the appeal due to the fact that the applicant had been "punished by a term of imprisonment of at least two years" and therefore had no right to appeal pursuant to subsection 64(2) of IRPA".

[4] The applicant filed an application for leave and for judicial review with respect to the September 7, 2007, dismissal of his appeal. The application for leave was dismissed on December 12, 2007, due to the applicant's failure to file an Application Record (*Ariri v. Canada (Minister of Public Safety and Emergency Preparedness)* Court file IMM-4039-07, dismissed December 12, 2007, per Justice François Lemieux).

[5] In June 2008, the applicant filed a motion to re-open his appeal against the deportation order on the basis of the Supreme Court of Canada decision in *R. v. Mathieu*, 2008 SCC 21 [*Mathieu*] which was rendered on May 1, 2008. The applicant asserted that there had been a breach of natural

justice as his pre-sentence custody should not have been considered punishment and he should therefore have retained his right of appeal.

[6] After a review of the parties' submissions and material, including the transcript of the guilty plea, as well as consideration of two recent IAD decisions dealing with the impact of *Mathieu* on the interpretation of subsection 64(2), the IAD determined that the September 7, 2007 determination was correct in law both then and now. The IAD found that there had been no breach of natural justice (*Mihalkov v. M.P.S.E.P.* (IAD file TA7-05378) October 21, 2008; *Nana-Effah v. M.P.S.E.P.* (IAD file MA8-02628) October 29, 2008).

[7] The IAD also noted that even if there had been a change in the law as a result of the *Mathieu* decision, in keeping with *ABZ v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 804, at para. 13 and *Wang v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 125, at para. 29 the changes are not applied retroactively. The IAD further noted that even if it was wrong and the original decision was an error of law, it could be challenged by judicial review. An error of law *per se* is not the same as a breach of natural justice. The IAD therefore denied the application to reopen.

[8] The single issue to be determined is whether the IAD erred in refusing to re-open the appeal.

[9] The standard of review for decisions interpreting facts or mixed facts and law is one of reasonableness. In questions of law, or of procedural fairness or rules of natural justice, the standard is correctness (*Dunsmuir v. New Brunswuick*, [2008] 1 S.C.R. 190). In *Dunsmuir* and in *Minister of*

Citizenship and Immigration v. Khosa, 2009 SCC 12, the Supreme Court of Canada reiterated that decisions of administrative tribunals are entitled to deference.

[10] Section 71 of IRPA reads as follows:

Reopening appeal	Réouverture de l'appel
71. The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.	**71.** L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.

[11] Subsection 64(2) of IRPA establishes that, where a person was found to be inadmissible based on serious criminality for a crime punished in Canada by a term of imprisonment of at least 2 years, no appeal lies to the Immigration Appeal Division. Section 64 provides:

No appeal for inadmissibility	Restriction du droit d'appel
64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	**64.** (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
Serious criminality	Grande criminalité
(2) For the purpose of subsection	(2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un

(1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.	emprisonnement d'au moins deux ans.

[12] The statute clearly indicates that in order for the IAD to reopen an appeal the latter must be satisfied that it failed to observe a principle of natural justice when it originally decided the matter.

[13] The applicant however claims that the root of his complaint is found in the Federal Court decision in *Canada (Minister of Citizenship and Immigration) v. Atwal*, 2004 FC 7, which perverted the intentions of the Supreme Court in *R v. Wust*, [2000] 1 S.C.R. 455 from protection against double punishment and fairness to a convict at the time of sentencing into an excuse for unwarranted and unintended pure harm, and effective loss of a constitutional right, resulting in an increased weight of consequences following conviction when dead time is arbitrarily weighed and taken into account to expand the scope of subsection 64(2) of IRPA.

[14] Moreover, he claims that while the government has the right to deport permanent residents for criminality, the fact is that all convicts, whether citizens or permanent residents, have the right under section 15 of the *Charter* to rely upon the same meaning for words in the *Criminal Code* specifically "punishment", "a term of imprisonment", and "sentence".

[15] The applicant recognizes that he was properly and appropriately ordered deported for "serious criminality" as defined in paragraph 36(1)(a) of IRPA for both reasons, being that the potential punishment for his offence was a maximum of 10 years or more and that the sentence imposed was more than 6 months. Where he takes issue however is, according to him, the "serious

criminality" herein was not with respect to a crime that was punished in Canada by a term of imprisonment of at least 2 years; therefore he should not have been deprived of his right of appeal pursuant to subsection 64(1) of IRPA.

[16] For the reasons that follow, the applicant's argument must fail.

[17] The words "term of imprisonment" in subsection 64(2) of IRPA must be read in a way that gives meaning to the scheme and purpose of the legislation. With subsection 64(2) of IRPA, Parliament sought to set an objective standard or "threshold" of serious criminality. In *Atwal*, above, Justice Yvon Pinard noted as follows:

> [15] With section 64 of the *IRPA*, Parliament sought to set an objective standard of criminality beyond which a permanent resident loses his or her appeal right, and Parliament can be presumed to have known the reality that time spent in pre-sentence custody is used to compute sentences under section 719 of the *Criminal Code*. To omit consideration of pre-sentence custody under section 64 of the *IRPA* when it was expressly factored into the criminal sentence would defeat the intent of Parliament in enacting this provision.

[18] The Federal Court has repeatedly agreed that it would defeat the intent of Parliament to leave out consideration of pre-sentence custody under IRPA where it was expressly credited towards the punishment imposed in the criminal context as part of the term of imprisonment. To interpret it otherwise would effectively create incongruity regarding the "threshold" of criminality which Parliament chose when enacting subsection 64(2) of IRPA (*Magtouf v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 483 at paras. 19-24; *Canada (Minister of Citizenship and*

Immigration) v. Smith, 2004 FC 63 at paras. 9-10; *Canada (Minister of Citizenship and Immigration) v. Gomes*, 2005 FC 299 at paras. 18-19; *Cheddesingh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 667 at para. 14; *Jamil v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 758 at para. 23; *Shepherd v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1033 at paras. 11-15; *Cheddesingh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 124 at paras. 28-29).

[19] Furthermore, the Federal Court decisions cited above apply the purposive approach used by the Supreme Court in *Mathieu* and are consistent with what the Supreme Court referred in the latter decision as the ability on an exceptional basis to treat the time spent in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence. (*Mathieu*, above, para. 7)

[20] In the case at bar, the pre-sentence custody was credited towards the term of imprisonment by the Judge determining the appropriate punishment for the conviction. The transcript of the Guilty Plea indicates that the applicant was credited for the time in pre-sentence custody at a ratio of 2:1. The IAD member noted that the original finding in September 2007 was that the <u>total term</u> of imprisonment was 30 months (with a credit of 15 months, thus leaving 15 months to be served) and thus the applicant was found to be a person described in subsection 64(1) of the IRPA (my emphasis).

[21] The IAD's reasons are tenable as support for the decision. It cannot be said that there is no line of analysis which supports the decision in this case or that the decision evinces such a marked departure from what is rational as to be unsustainable. In my opinion, there is no basis for this Court's intervention.

[22] Finally, the Supreme Court of Canada stressed in *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 the fact that the most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. This is recognized also by subsection 6(1) of the *Constitutional Act (1982)*, which provides that citizens have the right "to enter, remain in and leave Canada". The applicant is not a Canadian citizen. Parliament has made legitimate choices as to circumstances in which it is not in the public interest that a non-citizen be permitted to remain here. The aggregate term of imprisonment for the offences of which the applicant was convicted was two and a half years or 30 months. Therefore, termination of applicant's right to remain in Canada did not, in my opinion, constitute a breach of fundamental justice.

[23] For the above reasons, the application for judicial review will be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question of general importance has been submitted for certification.

"Louis S. Tannenbaum"
Deputy Judge

AUTHORITIES CONSULTED BY THE COURT

1. *Chiarelli v. Canada*, [1992] 1 S.C.R. 711
2. *R. v. Wust*, [2000] 1 S.C.R. 455
3. *Canada (M.C.I.) v. Atwal*, 2004 FC 7
4. *Wu v. Canada (M.C.I.)*, [1989] 2 F.C. 175
5. *Kurniewica v. Canada (M.M.I.)*, [1974], F.C.J. No. 922
6. *Saleh v. Canada (M.E.I.)*, [1990] 3 F.C. 314
7. *Virk v. Canada (M.E.I.)*, [1991], F.C.J. No. 72
8. *Bains v. Canada (M.E.I.)*, [1990], F.C.J. No. 457
9. *R. v. Mathieu*, 2008 SCC 21
10. *Mihalkov v. M.P.S.E.P.*, IAD TA7-05378
11. *Nana*-Effah *v. M.P.S.E.P.*, AID MA8-02628
12. *ABZ v. Canada (M.C.I.)*, [2001] F.C.J. No. 804
13. *Wang v. Canada (M.C.I.)*, 2002 FCT 125
14. *Medovarski v. Canada (M.C.I.)*, 2005 SCC 51
15. *Canada (M.C.I.) v. Cuskic*, [2001] 2 F.C. 3
16. *Mokelu v. Canada (M.C.I.)*, 2002 FCT 757
17. *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025
18. *R. v. Arthurs*, 2000 SCC 19
19. *R. v. Arrance*, 2000 SCC 20
20. *R. v. Fice*, 2005 SCC 32
21. *Canada (M.C.I.) v. Smith*, 2004 FC 63
22. *Canada (M.C.I.) v. Gomes*, 2005 FC 299

23. *Cheddesingh v. Canada (M.C.I.)*, 2005 FC 667

24. *Jamil v. Canada (M.C.I.)*, 2005 FC 758

25. *Sherzad v. Canada (M.C.I.)*, 2005 FC 757

26. *Shepherd v. Canada (M.C.I.)*, 2005 FC 1033

27. *Cheddesingh v. Canada (M.C.I.)*, 2006 FC 124

28. *Magtouf v. Canada (M.C.I.)*, 2007 FC 483

29. *Martin v. Canada (M.C.I.)*, 2005 FC 60

30. *Cartwright v. Canada (M.C.I.)*, 2003 FCT 792

31. *Nabiloo v. Canada (M.C.I.)*, 2008 FC 125

32. *R. v. Sooch*, 2008 ABCA 186

33. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15

34. *Dunsmuir v. New Brunswick*, 2008 SCC 9

35. *Canada (M.C.I.) v. Khosa*, 2009 SCC 12

FEDERAL COURT

SOLICITORS OF RECORD

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