Date: 20091030

Docket: IMM-1677-09

Citation: 2009 FC 1097

Ottawa, Ontario, October 30, 2009

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

OSCAR BLADIMIR MENDOZA REYES

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act). The Minister of Public Safety and Emergency Preparedness (the Minister) is challenging the IAD's decision dated on or about March 20, 2009, to grant a stay of the removal order against Oscar Bladimir Mendoza Reyes (the respondent).

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[2] The respondent is a Salvadoran citizen. He arrived in Canada in 1994 at the age of ten.

[3] He was convicted of assault with a weapon and mischief before the Court of Québec Youth Division on February 18, 2002. He was convicted of theft under $5,000 before an adult court on June 5, 2002. He was convicted of failure to comply with an undertaking and failure to comply with a decision by the Court of Québec Youth Division on July 11, 2002. He was convicted of possession of a weapon for a dangerous purpose on May 1, 2003.

[4] After this last conviction, an inadmissibility report was prepared under section 44 of the Act and a removal order was issued against the respondent on July 23, 2003, under paragraph 36(1)(*a*) of the Act. The respondent appealed this decision, citing humanitarian and compassionate grounds. In the meantime, he was convicted of breaching probation and violating an undertaking in June 2004, and again in November of the same year.

[5] However, on December 9, 2004, the IAD granted him a stay of the removal order for a period of four years on the joint recommendation of the respondent's counsel and the Minister's counsel. This stay was subject to conditions, including that of not committing any criminal offences.

[6] The respondent pleaded guilty to a charge of simple possession of cocaine in December 2005. The Minister then requested a review of the stay.

[7] The stay was reviewed on March 16, 2006. The IAD upheld the stay term and conditions. In fact, the respondent had not been informed of the fact that the charge of simple possession of cocaine had not been set aside by a guilty plea for breach of conditions in June 2004. Once he was informed of his actual situation, he informed the Minister of this and pleaded guilty. The IAD therefore considered that there had not been a breach of the conditions imposed on his stay. Furthermore, it took into account the fact that the respondent had held a stable job and had even been promoted by his employer, his stable family situation, and the fact that he was taking secondary education part time and therapy for his previous alcohol problems.

[8] The respondent was accused of impaired driving and refusal to provide a breath sample in May 2008.

[9] He failed to report to immigration authorities, in accordance with the conditions imposed on his stay, in June 2008 and in December of the same year.

[10] The respondent was convicted of assault and theft in October 2008.

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[11] The decision the Minister is now requesting be reviewed is the final review of the stay granted to the respondent in 2004. Scheduled for December 9, 2008, it finally took place on March 17, 2009. It is important to note that the decision was delivered orally.

[12] The IAD stated that "[e]verything seemed to be going well between 2004 and 2007", but that after the respondent's breakup with his girlfriend, his problems started again. The panel considered the fact that the respondent had only "one conviction out of a number of charges against you," as well as the support of his family.

[13] The IAD noted that the offences the respondent committed or allegedly committed in 2007 and 2008 were not as serious as the one that was followed by the removal order issued in 2003, but recalled that a crucial stay condition was that the respondent not commit any offence, regardless of its seriousness. The panel also stated that it was concerned about the impaired driving charge and the respondent's lies regarding his alcohol consumption.

[14] The panel, nevertheless, rejected the application to cancel the stay presented by the Minister and instead extended the stay until March 17, 2011, with a provisional reconsideration to be held on or around March 17, 2010.

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[15] The following provisions of the Act are relevant in this case:

3. (1) The objectives of this Act with respect to immigration are:	**3.** (1) En matière d'immigration, la présente loi a pour objet :
(*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;	*h*) de protéger la santé des Canadiens et de garantir leur sécurité;
(*i*) to promote international justice and security by fostering respect	*i*) de promouvoir, à l'échelle

for human rights and by denying access to Canadian territory to persons who are criminals or security risks;

internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

those cases, the Minister may make a removal order.

45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:

(*d*) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :

d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

63. (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

(2) Where the Immigration Appeal Division stays the removal order

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 motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de

(*a*) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;

(*b*) all conditions imposed by the Immigration Division are cancelled;

(*c*) it may vary or cancel any non-prescribed condition imposed under paragraph (*a*); and

(*d*) it may cancel the stay, on application or on its own initiative.

l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

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[16] Relying on *Ivanov v. Canada (Minister of Citizenship and Immigration)*, [2008] 2 F.C.R. 502 (F.C.A.), the Minister maintains that the factors set out by the IAD in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] 1 I.A.B.D. No. 4 (QL), apply to the granting of a stay and to the subsequent review of it.

[17] These factors, summarized by the Federal Court of Appeal at paragraph 3 of *Ivanov*, are as follows:

- the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation;
- the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order;
- the length of time spent in Canada and the degree to which the applicant is established;
- the existence of family in Canada and the dislocation to that family that deportation of the applicant would cause;

- the support available for the applicant not only within the family but also within the community;
- the degree of hardship that would be caused to the applicant by his return to his country of nationality (this factor is sometimes referred to as "foreign hardship".

[18] According to the Minister, the IAD [TRANSLATION] "completely disregarded" these factors. The Minister maintains that the failure to specifically mention these factors is an error open to review by this Court. In this regard, he cites this Court's decision in *Canada (Minister of Citizenship and Immigration) v. Stephenson*, [2008] 4 F.C.R. 351, in which Justice Eleanor Dawson wrote the following at paragraph 32:

> From the failure of the IAD to specifically mention the *Ribic* factors or to consider the matters discussed above, at paragraph 30, and from the absence of evidence before the IAD concerning the continuing existence of humanitarian and compassionate factors, . . . the IAD erred in law by failing to consider all of the circumstances of the case when it exercised its discretion. . . .

[19] According to the Minister, the panel not only failed to mention the *Ribic* factors, but also completely failed to consider them in its decision.

[20] In this proceeding, it is not necessary to decide whether the panel must absolutely reiterate the *Ribic* factors in its decision. It is, at the very least, arguable whether requiring it would not demonstrate unjustified formalism with respect to an administrative tribunal. The important thing is that the panel actually take these factors into account in its decision.

[21] In the case at bar, the IAD took some of these factors into account, in particular, the seriousness of the offences committed by the respondent and the respondent's family situation.

[22] Furthermore, I am of the opinion that the Minister's argument, which is that the mere fact of not mentioning foreign hardships is enough to invalidate the panel's decision, is not justified when the panel is deciding, on the basis of all of the other factors, to grant a stay. Analyzing this last factor thus becomes irrelevant, and invalidating decisions by the IAD on this basis would be absurd. In *Ivanov*, above, the IAD decided on the respondent's removal without analyzing the difficulties with which he would be confronted upon his return to his country of nationality.

[23] However, it is true, as the Minister maintains, that the IAD overlooked certain other factors. In particular, it overlooked the respondent's chances of rehabilitation and the degree to which he is established in Canada.

[24] The Minister submits that the IAD [TRANSLATION] "completely disregarded the evidence" and that its findings were contrary to this evidence and to the testimony it heard.

[25] The Minister challenges what he considers to be the IAD's [TRANSLATION] "finding" regarding the respondent's missed appointments.

[26] The Minister claims that the panel failed to take into account the fact that the respondent [TRANSLATION] "committed five violent criminal offences as well as several breaches of

conditions", the seriousness of which the panel should also have recognized. Furthermore, according to the Minister, the respondent did not explain or mitigate the offences he committed, and the panel therefore had no reason to give him another chance.

[27] The Minister also claims that the IAD [TRANSLATION] "clearly underestimated the seriousness of the alcohol consumption problem" of the respondent, a problem to which the respondent's family allegedly contributed [TRANSLATION] "consent and concurrence". The Minister notes that the panel acknowledged that the respondent lied with respect to his alcohol consumption.

[28] Finally, the Minister maintains that the IAD disregarded Nathalie Bélanger's statutory declaration (Exhibit P of Hélène Exantus's affidavit, Applicant's Record, at page 100), which states that the respondent failed to inform immigration authorities of the fact that criminal charges (impaired driving, refusal to provide a breath sample, theft and assault) had been brought against him.

[29] In conclusion, the Minister refers to Justice Michael Phelan who, in *Canada (Minister of Public Safety and Emergency Preparedness) v. Udo*, 79 Imm. L.R. (3d) 303, at paragraph 17, wrote the following:

> Against this background, to grant a further stay is tantamount to condoning Mr. Udo's past criminal record and his continuing disregard for his obligation to comply with the conditions of immigration orders. To support this IAD decision would be to make a mockery of the legitimate and law abiding behaviour of the rest of Canadian society, including the deserving immigrant community.

[30] The findings made by the IAD in applying—even if only implicitly—the *Ribic* factors, above, are findings of fact. They are only reviewable if unreasonable. The IAD's decision must be justified in a transparent and intelligible manner and fall within a range of "possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at paragraph 47).

[31] In this case, the IAD's decision is not very transparent or intelligible. It is not at all clear why, while it acknowledged the seriousness of the offences committed by the respondent and the charges brought against him (even if they were obviously not "five violent criminal offences"), the respondent's lack of justification for the breaches of the conditions and the persistence of his alcohol problem, the panel still decided to continue the stay. If the panel had explained what mitigating factors had, in its mind, counterbalanced these overwhelming circumstances, it would not be up to the Court to substitute its assessment for that of the panel. However, the panel did not do this. Its decision will therefore not be considered reasonable and must be set aside.

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[32] For all of these reasons, the application for judicial review is allowed and the matter is referred back to a differently constituted panel of the Immigration Appeal Division of the Immigration and Refugee Board for a new review of the respondent's stay.

JUDGMENT

The application for judicial review of the decision delivered on or about March 20, 2009, by the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board is allowed. The matter is referred back to a differently constituted panel of the IAD for a new review of the respondent's stay.

"Yvon Pinard"

Judge

Certified true translation,
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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