Federal Court  Cour fédérale

Date: 2010029

Docket: IMM-4194-09

Citation: 2010 FC 334

Ottawa, Ontario, March 29, 2010

Present: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

LABLU HUSSAIN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) against a decision rendered July 29, 2009, by the Immigration Appeal Division (the panel) of the Immigration and Refugee Board, dismissing the appeal made by Lablu Hussain (the applicant) on humanitarian and compassionate grounds.

THE FACTS

[2] The applicant is a citizen of Bangladesh. He arrived in Canada in 1997 and has been a permanent resident since 2000. Shortly after arriving in Canada, he married a Canadian citizen. The couple has two daughters, both born in Canada: the oldest in 1998 and the youngest in 2004.

[3] In 2007 and 2008, the applicant pleaded guilty to a series of fraud charges. The first involved two fraudulent credit card applications, made by a friend in the applicant's name in exchange for $1000. The second involved a payment made by the applicant with a false credit card, which he said belonged to the same friend, at a gas station in Rigaud during a trip to Ottawa, for which the applicant's friend had offered him $200.

[4] The applicant pleaded guilty to the first offence on September 5, 2007, and was sentenced to 30 days in prison. He had already pleaded guilty to the second offence on March 30 of that year. He has since repaid the amount owed and claims that he is no longer in contact with the friend. He was sentenced to pay a fine and subjected to a probation order prohibiting him from returning to the gas station where he committed the fraud and from possessing a credit card.

[5] After these convictions, a report was prepared against the applicant pursuant to subsection 44(1) of the Act. The Immigration Division, to which the report was referred for investigation, found that the applicant was inadmissible for serious criminality under

subsection 36(1) of the Act and issued a removal order against him. The applicant appealed this decision on humanitarian and compassionate grounds under paragraph 67(1)(*c*) of the Act. The dismissal of that appeal is the subject of this judicial review.

[6] In the meantime, the applicant continued to have run-ins with the law. On June 23, 2008, he pleaded guilty to 17 counts of fraud for depositing not-sufficient-funds cheques dated July 14, 2005.

[7] In February 2009, he received a suspended sentence of 730 days (2 years) for a conviction under the *Criminal Code* and an $850 fine. At the hearing, the applicant claimed to have forgotten the reasons for the conviction. He stated that he had paid between $300 and $400 of his fine. The panel gave him two weeks to adduce evidence of this payment, but he did not do so.

[8] The applicant was also charged with breach of probation under paragraph 733.1(*b*) of the *Criminal Code* for fraudulent use of a credit card on August 9, 2008. The terms of his probation order prohibited him from using a credit card. Following this incident, new fraud charges were brought against him on November 3, 2008, and the case is pending.

THE IAD DECISION

[9] The panel noted that the applicant was not challenging the legal validity of his removal order. The applicant based his appeal solely on humanitarian and compassionate considerations. The panel therefore applied the factors from *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), cited with approval by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 CSC 3, [2002] 1 S.C.R. 84.

[10] With respect to the seriousness of the offences resulting in the removal order and the applicant's chances of rehabilitation, the panel noted that he was blasé about the offences he had committed and that he showed no remorse, instead blaming his actions on others and on the poor economy. Although the applicant said that he wanted to abstain from criminal activity because he feared that his wife would ask him for a divorce, the panel concluded that this fear had not prevented him from reoffending. The applicant also admitted that he had not been honest with his wife about his problems, which, according to the panel, weakened his credibility and limited his wife's ability to assist him in his rehabilitation. The panel found that the applicant had committed the same offences repeatedly and had breached the conditions of his probation. The panel therefore had no reason to believe that he would respect any conditions that it might impose.

[11] The panel considered the fact that the applicant was relatively established in Canada, having lived here for the past 12 years and having been employed for all that

time, except for 2005 to May 2008. Since May 2008, he has been working as a shipper for GTI inc. However, he did not file any notices of assessment or tax returns as evidence during the hearing. The panel was therefore not convinced that the applicant had made legitimate earnings or that he had paid income tax on it. It gave him an extension to allow him to adduce evidence of his salary and paid income tax, but he did not do so.

[12] With respect to his family situation, the panel noted that his parents and five of his siblings live in Bangladesh, while his wife's family lives in Canada. The applicant also has a sister in England and a younger bother in the United States. He is in touch with his siblings and communicates daily with his family in Bangladesh, as well as providing them with financial support.

[13] Finally, the panel recognized that the applicant would face significant hardship were he to return to Bangladesh, as he would be separated from his wife and children. The panel also emphasized that it would be in the best interests of the children for the applicant to remain in Canada. However, there is no reason to believe that they could not visit him in Bangladesh or even live there if they chose to.

[14] The panel concluded that although the applicant was then working and claimed to want to stop offending, not enough time had passed to determine that he would not reoffend, particularly if he were to find himself unemployed once again. The applicant's testimony was unreliable, and he did not perform his undertakings to the panel, casting doubt on his ability to respect the conditions of a stay. In short, the applicant had not

established sufficient humanitarian and compassionate considerations to warrant special relief. Despite the Minister's recommendation that he be granted a three-year stay, the panel dismissed the applicant's appeal.

THE ISSUES

1) Did the panel err in drawing a negative inference from the applicant's failure to adduce additional documents?

2) Did the panel err in disregarding the recommendation by the Minister's representative to stay the removal order?

3) Did the panel err in concluding that there were insufficient humanitarian and compassionate considerations to justify allowing the applicant's appeal?

THE STANDARD OF REVIEW

[15] The first two issues raised by the applicant involve the fairness of the IAD proceedings. In the words of the Supreme Court in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29, at para. 100, "[i]t is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Therefore, the Court owes no deference to the panel's decision on these issues.

[16] However, the merits of the panel's decision are subject to judicial review on a standard of reasonableness (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339).

ANALYSIS

Did the panel err in drawing a negative inference from the applicant's failure to adduce additional documents?

[17] The applicant criticizes the panel for finding that he had failed to adduce the additional documents that his counsel had undertaken during the hearing to file within the two weeks that followed, and for drawing a negative inference about his credibility therefrom. It was his counsel who undertook to provide the documents to the panel. The panel should not have held against him a failure to respect an undertaking that was not his own.

[18] The Minister submits that counsel acts on the applicant's behalf and represents his *alter ego* in judicial proceedings. It is therefore not appropriate to separate counsel from client in the manner proposed by the applicant. I agree.

[19] In *Dukuzumuremyi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 278, at para. 19, Mr. Justice Martineau wrote the following:

> In the great majority of cases, we do not distinguish the facts and acts of counsel from those of the client. Counsel is his client's agent and, as severe as it may seem, if the client retains the services of mediocre counsel (which, in passing, was not established here by the applicant), he must suffer the consequences. However, in exceptional cases, counsel's incompetence may raise a question of natural justice. The incompetence and the alleged prejudice must therefore be clearly established.

In this case, there is no reason to believe that counsel representing the applicant before the IAD was incompetent. Moreover, if the failure to file the documents required by the panel had been due to circumstances beyond the applicant's control, this would be an issue of procedural fairness, and he could have adduced evidence to that effect, for instance, an affidavit from his former counsel. However, despite the hypotheses suggested by his counsel during the hearing, there is no evidence indicating that he is not responsible for this omission.

Did the panel err in disregarding the recommendation by the Minister's representative to stay the removal order?

[20] The applicant notes that, at the IAD hearing, the Minister's representative recommended that he be granted a three-year stay of his removal order. He suggested that the panel could not disregard the Minister's recommendation, at least not without notification of its intention to do so.

[21] As the Minister pointed out, a recommendation from its representative does not limit the exercise of the panel's discretion. When the parties agree on a joint recommendation, the panel must take this into consideration and cannot disregard it lightly or without providing reasons (*Malfeo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 193). In my view, that is not what happened here. The panel explained precisely why it concluded that a stay would not be appropriate. It held that because of the applicant's systematic breaches of the conditions imposed by various tribunals, it could not believe that he would respect any conditions that it might impose

on the stay. This explanation is transparent and intelligible, and the panel provided sufficient reasons for its decision to disregard the recommendation provided.

Did the panel err in concluding that there were insufficient humanitarian and compassionate considerations to justify allowing the applicant's appeal?

[22] The applicant submits that the panel erred in refusing to allow his appeal. More specifically, the panel was wrong to hold him accountable for offences for which he has not yet been found guilty, speculating on his risk of reoffending and disregarding the best interests of his children.

[23] The applicant notes that the panel took into account events that were not mentioned in the report drafted pursuant to section 44 of the Act that gave rise to his inadmissibility. He also specifies that he has not been convicted of some of the offences cited by the panel, as the proceedings are pending. He submits that he must be presumed innocent until proven guilty (pursuant to paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms*).

[24] The applicant also submits that the panel erred in basing its decision on his risk of reoffending. First, if a stay were granted it would automatically be revoked under subsection 68(4) of the Act if he were convicted of another offence referred to in subsection 36(1). As Parliament has opted to manage the risk of reoffending in this manner, it is not open to the panel to refuse the stay on the basis of this factor.

[25] Second, the panel has failed to respect the Act and Canada's international obligations by disregarding the best interests of the applicant's children. It is not enough for the panel to recognize that it would be in the children's best interests that the applicant remain in Canada. Having recognized the children's best interests, the panel had to explain how these were offset by the other circumstances of the case. The panel also erred in concluding that the applicant's children could visit him in Bangladesh in the absence of evidence that they would be permitted to do so. Moreover, the panel should have questioned the applicant's wife about the hardship that she and her children would face if he were returned.

[26] The Minister submits that the IAD appeal is a *de novo* proceeding and that the panel must not limit its analysis to events preceding the Immigration Division's decision, rendered almost a year earlier. The panel may consider all of the evidence, including that arising after the decision by the Immigration Division and other evidence not before the Immigration Division. As the applicant is inadmissible on grounds of serious criminality under paragraph 36(1)(*a*) of the Act, his criminal activity is highly relevant to this case.

[27] Moreover, the panel's conclusion regarding the applicant's risk of reoffending is reasonable. The panel did not find the applicant's testimony credible. Although he was working and claimed to want to abstain from criminal activity, the panel noted that his crimes were recent, that he had breached the conditions of his probation order, and that there was no reason to believe that he would respect any conditions that it might impose.

[28] Finally, with respect to the best interests of the applicant's children, the Minister submits that it is open to the panel to conclude that though a parent's presence is generally in a child's best interests, it is not determinative for the purpose of granting relief based on humanitarian and compassionate considerations. In this case, the panel considered the situation of the applicant's children but concluded that this factor was not determinative and did not justify granting the applicant a discretionary stay.

[29] For the following reasons, I do not find any of the applicant's arguments convincing.

[30] First, as the Minister points out, an appeal to the Immigration Appeal Division is an appeal *de novo*. The IAD may therefore consider all the evidence that is adduced before it (see, for example, *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1356, [2009] 4 F.C.R. 91 at para. 37, and the authorities cited therein). The applicant's criminal activity is a relevant factor. Therefore, it was open to the panel to question the applicant on the facts that gave rise to the charges against him and to draw a negative inference from his vague or evasive answers. In so doing, the panel did not deprive the applicant of his right to be presumed innocent. I note that according to section 11 of the Charter, this right applies only to "any person charged with an offence", not to a person subject to a removal order.

[31] Next, the panel did not act unreasonably in taking into account the applicant's risk of reoffending. Rehabilitation is one of the factors recognized in *Ribic, supra*, as being

relevant to a decision on special relief from a removal order. An assessment of the risk of reoffending must underlie the analysis of this factor, either explicitly or implicitly. Parliament's choice of safeguard in subsection 68(4) of the Act does not render this factor any less relevant. It is important to recognize, however, that any assessment of future risk involves a degree of uncertainty; it may be reasonable at the time it is performed, but later be proved incorrect.

[32] Finally, I am of the view that the panel gave appropriate consideration to the best interests of the applicant's children. It would be in their best interests for their father to remain in Canada. However, it decided that other factors were more important, specifically, the risk represented by the applicant's history of criminal activity, his lack of remorse, and the unlikelihood of his rehabilitation.

[33] It was well established by the Federal Court of Appeal in *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358, that the best interests of children are not a determinative factor and that as long as the panel takes them into account, it may decide that other factors are more important. It is for the panel to weigh that factor in light of the circumstances of each case.

[34] Although the panel should not have commented, in the absence of evidence, on the possibility of the applicant's children visiting him in Bangladesh, I do not consider this error to be determinative. In *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 56, the Supreme Court noted that for an administrative

decision to be reasonable, “[t]his does not mean that every element of the reasoning given must independently pass a test for reasonableness. . . . Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.” That is the case here.

[35] For all these reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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