Federal Court  Cour fédérale

Date: 20100903

Docket: IMM-389-10

Unrevised certified translation **Citation: 2010 FC 867**

Ottawa, Ontario, September 3, 2010

PRESENT: The Honourable Madam Justice Bédard

BETWEEN:

RAMON EMILIO NOLASCO ESCANO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (IAD) dated December 23, 2009, dismissing the applicant's appeal of a removal order issued against him on February 24, 2009, pursuant to paragraph 36(1)(*a*) of the Act. The IAD found that the humanitarian and compassionate considerations raised by the applicant, in accordance with paragraph 67(1)(*c*) of the Act, did not warrant special relief.

[2] The respondent brought a cross-motion to amend the style of cause by replacing the applicant's name with the letter "X" in order to protect the identity of the applicant's minor child, who was the victim of an indecent act of a sexual nature. The respondent is also asking the Court to seal the record, on the ground that it contains many documents and information that may identify the child. The applicant did not oppose the motions and I am of the view that the best interests of the applicant's child warrant that the record be sealed. However, I do not think it is necessary to amend the style of cause to protect the child's best interests.

[3] For the reasons that follow, the application for judicial review is dismissed.

Context of the application to appeal

[4] The applicant is a citizen of the Dominican Republic. In 1994 he married a Canadian citizen and was granted landing in October 1995 after his spouse sponsored him. From the relationship a daughter, today aged 10, was born. The applicant and his spouse separated in July 2007.

[5] A complaint filed by the former spouse against the applicant in July 2007 led to criminal charges being laid against the applicant as well as an order of preventive detention against him. In April 2008, the applicant pleaded guilty to the following offences:

a. Uttering threats to burn, destroy or damage real or personal property (paragraph 264.1(1)(*b*) of the *Criminal Code*);
b. Criminal harassment (subsection 264(1) of the *Criminal Code*);
c. Possession of child pornography (paragraph 163.1(4)(*a*) of the *Criminal Code*);

d. Failure to comply with a court order (article 145(3)(*a*) of the *Criminal Code*).

[6] The applicant was sentenced to a total of sixteen months in prison, but was given a suspended sentence in light of the fact that he had spent eight (8) months in preventive detention. He also received three years' probation with an order not to communicate with his former spouse and his daughter.

[7] On May 19, 2009, the Superior Court of Quebec rendered a judgment granting the divorce of the applicant from his former spouse. The Court awarded sole custody of the child to the applicant's former spouse and prohibited any contact between him and his daughter or former spouse.

[8] On April 25, 2008, the applicant was the subject of a report pursuant to subsection 44(1) of the Act. On February 24, 2009, an order for his removal was issued against him on the ground that he was inadmissible on grounds of serious criminality pursuant to subsection 35(1) of the Act. It is this removal order that the applicant appealed before the IAD and it is the IAD's decision which is the subject of the application for judicial review. In his appeal, the applicant did not challenge the validity of the removal order; he instead sought consideration on humanitarian and compassionate grounds that, in his view, would warrant the lifting of the order.

[9] The applicant also made a pre-removal risk assessment application that was rejected. The applicant did not file an application for judicial review of that decision.

Issues

[10] The applicant makes several allegations with regard to the IAD's decision, but his allegations are essentially twofold: that the IAD committed errors in its assessment of the applicable criteria for determining whether humanitarian and compassionate considerations warranted the lifting of the removal order, and that the IAD erred in its assessment of the special circumstances cited by the applicant in support of his appeal.

Standard of review

[11] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, the Supreme Court of Canada confirmed that the assessment by the IAD of humanitarian and compassionate considerations cited in support of an appeal of a removal order is reviewable on a standard of reasonableness. In *Khosa*, the Court recognized the discretionary character of the IAD's power and stated that "[n]ot only is it left to the IAD to determine what constitute 'humanitarian and compassionate considerations', but the 'sufficiency' of such considerations in a particular case as well"(para. 57).

[12] The assessment of the evidence submitted by the appellant is also owed the same degree of deference and the Court will intervene only if the IAD's findings and inferences are unreasonable (*Khosa* and *Dunmsuir v. New Brunswick*, 2008 SCC 9). The analytical framework that the Court should use when applying the reasonableness standard is well described by the majority in *Dunsmuir*, at para. 47:

> **47** Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[13] The Court will intervene only if the IAD's findings do not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Analysis

[14] Under paragraph 36(1)(*a*) of the Act, a permanent resident is inadmissible if they have been convicted of an offence punishable by a maximum term of imprisonment of at least ten years, or of an offence for which a term of imprisonment of more than six months has been imposed. Subsection 63(3) of the Act provides that a person may appeal to the IAD against a decision to make a removal order against them. The IAD may allow the appeal and stay the removal order if it finds that humanitarian and compassionate considerations warrant such relief:

> 67(1). To allow an appeal, the IAD must be satisfied that, at the time that the appeal is disposed of,
> . . .
> (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

[15] Section 67 grants the IAD broad power in assessing the humanitarian and compassionate considerations cited in an appeal (*Chieu v. Canada (Minister of Citizenship and Immigration*), 2002 SCC 3). In *Chieu*, the Supreme Court also confirmed the relevance of having the IAD consider, in addition to the best interests of the child, the factors established in the case of *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), namely, the seriousness of the offence or offences leading to the deportation order, the possibility of rehabilitation, or, in the alternative, the circumstances surrounding the failure to meet the conditions of admissibility which led to the deportation order, the length of time spent in Canada and the degree of establishment, the family and the dislocation that deportation would cause them, the support provided by the family and community and the degree of hardship that would be caused to the appellant if he were to return to his country of origin.

[16] The applicant's complaints against the IAD are as follows:

a. The IAD imposed on the applicant [TRANSLATION] "an excessive and disproportionate punishment contrary to the law, the liberty and the dignity of the person and contrary to the Canadian legal and political humanitarian tradition in similar matters, given the particular context of the present case";

b. The IAD erroneously based its entire decision on the applicant's guilty plea without properly assessing the particular circumstances of the case;

c. The IAD also failed to properly consider the criteria developed in *Ribic* and confirmed by the Supreme Court in *Chieu* which, in this case, would have led it to render a

subjective decision. Specifically, it appears that the IAD did not assign the necessary weight to the following factors: the support of the community, the best interests of the child, the acknowledgement of wrongdoing and rehabilitation. Further, it allegedly gave undue weight to the applicant's guilty plea;

d. The IAD erred in its assessment of the applicant's possibility of rehabilitation. First, the IAD failed to consider the fact that the applicant had been badly advised by his counsel and that measures were being taken to withdraw the guilty pleas. The IAD should have also considered the fact that the criminal court did not consider him to be at risk of reoffending. Furthermore, the IAD failed to consider the fact that the applicant had complied with the conditions of his parole. Lastly, the IAD doubted the possibility of the applicant's rehabilitation because he had not had any therapy, even though no therapy had been ordered by the criminal court;

- The IAD failed to consider the fact that the applicant's child could have been the victim of an insidious [TRANSLATION] "exercise in persuasion" on the part of his ex-spouse and that he should not be [TRANSLATION] "considered as the only one responsible for this difficult situation to the point where the only possible solution would be his deportation from Canada";

- The IAD did not sufficiently take into account the guilt expressed by the applicant at the hearing, the dissuasive nature of his preventive detention, his conduct after he was released and his compliance with the conditions of his probation;

- The IAD erred in its assessment of the degree of establishment of the applicant in Canada and, specifically, the fact that he has worked since he arrived in this country, that he had found numerous jobs in the restaurant business and that his employers and the people he associated with expressed satisfaction with regard to his work;
- The IAD erred in its assessment of the best interests of the child by not finding that it would be contrary to the child's best interests to separate her from her father for good;
- The IAD dismissed the importance of testimony in support of the applicant and wrongly assessed his testimony, which was [TRANSLATION] "frank, sincere and honest", rather than indirect, as was mentioned in the decision;
- The IAD failed to consider the difficulty a return to his country would pose to the applicant with regard to access to medical care and emergency services given the fact that he wears a pacemaker. He also cites the social ostracism he could face if he were forced to return.

[17] The respondent, for his part, maintains that the IAD's decision is reasonable and that it is not for this Court to reassess or differently assess the *Ribic* factors, to reassess the best interests of the child or to reweigh the evidence adduced before the IAD.

[18] I find the IAD's decision to be entirely reasonable.

[19] A reading of the IAD's decision shows that it scrupulously considered and analyzed all of the criteria identified in *Ribic* and that it assessed all of the circumstances raised by the applicant in light of the evidence adduced. Its findings, with regard to the assessment of all of the criteria and to the weight assigned to them, are intelligible, well articulated and supported by the evidence.

[20] The Board found, as a preliminary matter, that the nature of the offences to which the applicant pleaded guilty and the analysis of his potential for rehabilitation did not favour the granting of special relief. The IAD based this finding on several elements and specifically on the following facts:

- That the applicant had pleaded guilty and was sentenced to a term of imprisonment of sixteen months and three years' probation;
- That the Court had issued an order not to communicate with the victims as well as an order not to hold a job or perform volunteer work that would place him in a position of trust with persons under 14 years of age;
- That a number of aggravating circumstances had led the criminal court judge not to grant bail before the trial;
- That the applicant had failed to comply with a Court order.

[21] These factors led the IAD to conclude that "[the applicant's] criminal record is serious" and that "[t]he nature of the [applicant's] criminal record … weighs heavily against the granting of special relief".

[22] The IAD also analyzed this factor in the context of all of the circumstances of the case and considered the applicant's rehabilitation potential and the risk of reoffending. In this regard, the IAD determined that although the applicant had tried to portray himself as a victim, the evidence shows that it was the applicant's former spouse and child who were in fact the victims. The IAD also dismissed the applicant's argument that his counsel had not properly informed him of the consequences of a guilty plea, noting, among other things, that the applicant continued to retain the services of the same counsel for his family law proceedings. The IAD also found that, at the hearing, the applicant failed to acknowledge the offences he committed for which he had pleaded guilty. The IAD found the applicant's claim that he never had child pornography in his possession not to be credible. The IAD also noted that the applicant had not undergone any therapy to treat the behaviour he admitted he was guilty of. From these factors it determined that the applicant's testimony and attitude in no way warranted the granting of special relief. The IAD stated the following:

> [24] (…) To justify obtaining a stay, an appellant must prove that he is shouldering responsibility for his criminal behaviour, admit his guilt and accept the fact that he must rehabilitate in order to become a person who is respectful of the law and an active member of Canadian society. Through his testimony, the appellant proved the opposite.
>
> [25] The panel feels that the appellant in his testimony and prior statements has expressed neither remorse nor regret for his criminal behaviour and in no way recognizes his responsibility, preferring to blame his criminal lawyer whom he feels represented him poorly, and to blame his ex-spouse whom he feels had plotted all of this against him and continued to harass him after his release.
>
> [26] These circumstances in the opinion of the panel argue against the granting of special relief. In light of the evidence submitted to it, the panel considers that the appellant's rehabilitation potential is at the moment very weak.

[23] In addition to the seriousness of the offences and the applicant's potential for rehabilitation, the IAD considered the other criteria identified in *Ribic*.

[24] With regard to the degree of establishment, the IAD considered the factors raised by the applicant, namely, that he has lived in Canada for about fifteen years and has always worked. It nonetheless found that these factors were not sufficient "to overlook the seriousness of the charges and his lack of rehabilitation" (para. 29 of the decision).

[25] The IAD also considered the evidence with respect to the amount of support available to the applicant from his family and from the community as well as the potential hardship his family and friends could suffer if he were to leave. In its analysis, the IAD took into account the fact that the only members of the applicant's family who live in Canada are his former spouse and his daughter, both of whom he is prohibited from contacting. Also taken into consideration was testimony from the chaplain at the detention centre, from a friend of the applicant and from his new spouse. The IAD determined that, in light of the evidence, neither the applicant's friends nor his former spouse or his daughter would suffer undue hardship as a result of his removal.

[26] As for the hardship the applicant claims he would suffer should he be removed to the Dominican Republic, the IAD noted that the applicant still had immediate family in his country, that he had a place to live and that he had not demonstrated any risk of serious harm.

[27] The IAD also considered the best interests of the child. In its assessment, it took into account the fact that the applicant had not had any contact with his daughter since July 2007 and that a court order prohibited him from contacting her. The IAD also considered the findings of a psychologist and of a child psychiatric assessment describing the hardship experienced by the child and revealing that she did not want to see her father. The IAD determined that while it is generally in the best interests of the child not to be separated from his or her parents, the circumstances in this case led it to conclude that the applicant's daughter would suffer no harm if her father were to be removed from Canada.

[28] The applicant essentially disagrees with the IAD's findings and is asking the Court to review the weight ascribed to the various criteria considered by the IAD and to reassess both these factors and the evidence submitted by the applicant. This is not the role of the reviewing Court. It is not for this Court to reassess the totality of the evidence and the weight ascribed to each factor, but rather to determine whether the IAD's decision falls within a range of reasonable conclusions it could have drawn from the evidence and from the circumstances of the case.

[29] I am of the view that the IAD properly exercised its discretion, that it analyzed the circumstances raised by the applicant and that its findings are reasonable with respect to the facts and law.

[30] The present application for judicial review must therefore be dismissed.

[31] Counsel proposed no questions of general importance for certification.

JUDGMENT

THE COURT dismisses the application for judicial review. No question is certified.

The record is sealed.

"Marie-Josée Bédard"
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-389-10
STYLE OF CAUSE:	RAMON EMILIO NOLASCO ESCANO and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	August 26, 2010
REASONS FOR JUDGMENT:	BÉDARD J.
DATED:	September 3, 2010

APPEARANCES:

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Lisa Maziade	FOR THE RESPONDENT

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