Federal Court  Cour fédérale

Date: 20110224

Docket: IMM-4947-10

Citation: 2011 FC 223

Vancouver, British Columbia, February 24, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THEMAR KUONY TUEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In *Grillas v. Canada (Minister of Manpower and Immigration)*, [1972] S.C.R. 577, the Supreme Court held that the Immigration Appeal Division's (IAD) discretion to stay a deportation order on humanitarian and compassionate (H&C) grounds is a legislative delegation of the Crown's prerogative to determine who may enter and remain in Canada. As such, the IAD's exercise of its discretion is entitled to considerable deference. The courts have repeatedly emphasized the

discretionary nature of this relief. In *Prata v. Canada (Minister of Manpower and Immigration)*, [1976] 1 S.C.R. 376, the Supreme Court stated that a removal order:

> … establishes that, in the absence of some special privilege existing, [an individual subject to a lawful removal order] has no right whatever to remain in Canada. [An individual appealing a lawful removal order] does not, therefore, attempt to assert a right, but, rather, attempts to obtain a discretionary privilege.

II. Introduction

[2] The Applicant was convicted of assault with a weapon in Canada and ordered deported on April 24, 2007. On appeal, the IAD stayed the deportation order in February 2008 for two years on certain terms and conditions including reporting any subsequent criminal charges or convictions. The Applicant has acknowledged that she has breached several of the terms and conditions including the fact that, in July 2008, she was charged with criminal harassment, uttering threats and assault with a weapon and she failed to advise the IAD or the Canada Border Services Agency (CBSA). On reconsideration of the stay of the deportation order, the IAD cancelled the stay and dismissed the Applicant's appeal. The Applicant challenges the IAD decision arguing that it failed to give adequate consideration to the submissions of her counsel and the Minister's representative, and that it erred in its factual findings.

[3] Contrary to the Applicant's contention, the Court agrees with the Respondent that the IAD gave serious consideration to the submissions of counsel and provided entirely clear and cogent reasons, substantiated in both law and fact, for dismissing the appeal. With respect to findings of the IAD, it considered all of the facts and circumstances including any mitigating factors. The Applicant's breach of the terms and conditions of the initial stay of the deportation order and her

stated inability at the time (due to her obligations to her children), to comply with any proposed terms and conditions which includes complying with an outstanding warrant for her arrest to complete her court-imposed sentence were also part of the IAD's consideration in refusing to grant an extension of the stay and dismiss the appeal.

III. Background

[4] The Applicant, Ms. Themar Kuony Tuel, is a citizen of Sudan, born in 1979. She was designated a Convention refugee and she obtained permanent residence in Canada on August 23, 2000 when she arrived in Canada with her husband and child as sponsored refugees.

[5] On March 12, 2004, Ms. Tuel was convicted in the Provincial Court of Alberta of assault with a weapon contrary to subsection 267(*a*) of the *Criminal Code*, R.S., 1985, c. C-46, for which she was sentenced to 60 days in jail to be served intermittently on weekends. Ms. Tuel failed to appear to complete her sentence and a warrant for arrest was issued by the Alberta Provincial Court Judge in April 2004.

[6] Ms. Tuel was reported inadmissible on the ground of serious criminality pursuant to paragraph 36(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) due to her criminal conviction.

[7] On April 24 2007, at an admissibility hearing, an Immigration Officer determined that Ms. Tuel was inadmissible as described and issued a deportation order.

[8] Ms. Tuel appealed the deportation order to the IAD. Ms. Tuel did not contest the legal validity of the deportation order. At the IAD hearing in February 2008, Ms. Tuel requested the IAD to exercise its discretion and take into consideration H&C grounds to warrant special relief. By decision dated February 25, 2008, the IAD granted a two-year stay of the deportation order on the following terms and conditions including, *inter alia*:

> 4. Not commit any criminal offences;
>
> 5. If charged with a criminal offence, immediately report that fact in writing to the Department;
>
> 6. If convicted of a criminal offence, immediately report that fact in writing to the Department and the Division;

(Applicant's Record (AR), IAD Decision, dated February 25, 2008, at p. 95)

[9] On February 4, 2010, the Minister's counsel advised the IAD that Ms. Tuel was charged in Canada with three further offences, harassment, uttering threats and assault with a weapon, which allegedly occurred on May 20 and 28, 2008. The Minister's representative requested that the appeal be brought before the IAD for reconsideration of the stay of the deportation order (AR, Minister's submissions, dated February 4, 2010, at p. 23).

[10] The IAD gave notice to the parties that it would reconsider the appeal at an oral hearing on May 25, 2010. Ms. Tuel attended at the hearing represented by counsel and testified.

[11] Subsequent to the hearing, the parties provided written submissions to the IAD. By letter, dated June 2, 2010, Ms. Tuel, through her counsel, submitted that a continued stay of the deportation order is appropriate on H&C grounds. By letter dated June 4, 2010, Minister's counsel

submitted that a stay of the deportation be continued but on certain additional terms and conditions including the condition that within four months from the date of the order, Ms. Tuel present herself to a Peace Officer in the Province of Alberta with a copy of the Warrant for Arrest and to comply and to complete any existing or future sentences pronounced by the Court. By letter, dated June 11, 2010, Ms. Tuel's counsel stated an inability to agree to the condition that she report to a Peace Officer in Alberta for the purpose of complying with the Court-ordered sentence. It was submitted on behalf of Ms. Tuel that this condition was too "onerous" and "not feasible" because she did not have the financial resources to travel to Alberta or the necessary child-care arrangements (AR, at pp. 35-42).

[12] By decision dated July 30, 2010, the IAD cancelled the stay of the deportation order and the appeal was dismissed. The IAD found:

a. Ms. Tuel has failed to comply with at least three of the terms of her stay: (i) to keep the peace and be of good behaviour; (ii) to provide the CBSA with a copy of her passport or her passport application; (iii) she has not dealt with her outstanding warrant for arrest in Alberta and has no intention of doing so at the present time. Ms. Tuel has three charges brought against her in 2008 which are serious matters including death threats and assault with a weapon as well as criminal harassment. These charges of assault correspond in nature and type with the 2004 charge of assault with a weapon.

b. In considering the H&C relief, the panel considered the following factors along with the best interests of any children directly affected:

i. **Seriousness of the offence** – Assault with a weapon – offence for which Ms. Tuel was convicted is a serious matter. Since then she has been charged again with the same offence as well as uttering death threats and criminal harassment. There is no diminishment of her behaviour with respect to the seriousness of the criminal charges and this situation is increasing rather than decreasing in seriousness;

ii. **Possibility of rehabilitation** – this is speculative rather than concrete. Ms. Tuel has been in treatment or in a therapeutic program and had been in receipt of social worker assistance and yet she continued to drink and engage in violent behaviour leading to further criminal charges. The panel cannot find any real possibility of rehabilitation;

iii. **Establishment/Ties to Canada** – has been in Canada for almost ten years having been accepted abroad as a Convention refugee. She has no business or employment ties to Canada but she has ties that bind any refugee to the place of refuge and protection;

iv. **Effect on family in Canada** – Ms. Tuel has seven children in Canada: two are with their father in Alberta where she has no plans or intention to visit them; four are in the care of provincial child welfare authorities and it is questionable what contact she will be able to have with them in future; the youngest is with her. Should she be removed from Canada, this will have some impact on the children, although the nature and extent of that impact and whether there would be a reverse impact is difficult to judge with

precision. There would be some dislocation to the children if Ms. Tuel were removed from Canada;

v. **Family and Community Support** – There is a wide range of community support available to Ms. Tuel; however, she stated at the time that she was unable to avail herself of these resources in any meaningful way;

vi. **Hardship caused on removal** – Ms. Tuel is a Convention refugee and, therefore, unless other steps are taken, she cannot be removed to Sudan. No evidence was led as to what would or might wait for her in that country, were she to return. Little or no evidence was presented as to what effect it would have on her, were she to leave Canada.

c. The combined weight of all of these factors does not support an extension of the stay or cancellation or allowance of the appeal. The overall situation is considerably worse than when the stay was first granted. Since the stay was granted in 2008, Ms. Tuel has failed to comply with the terms and conditions imposed, failed to change her behaviour which continues to be violent, failed to deal with the fact that she will be arrested if she returns to Alberta.

d. Ms. Tuel was not, at the time, prepared to abide by terms and conditions which may be imposed.

e. Submissions were made by counsel for Ms. Tuel and the Minister's representative that the stay should be extended. The IAD reviewed the written submissions and gave them "very serious consideration".

f. The purpose of granting the stay on terms and conditions is to give the Applicant an opportunity to demonstrate that she can and is prepared to change. Stays will not be

granted if the person is going to violate the terms and conditions. In this case, it is evident that Ms. Tuel has repeatedly specified that she was unable to comply with the law; she has violated the terms and conditions of her stay, she has committed further acts which have led to serious criminal charges and she has remained determined not to deal with the outstanding warrant for her arrest. In such circumstances, the IAD must consider what purpose would be served by an extension of the stay.

g. The IAD did not accept Ms. Tuel's assertions that now she will do as required. Firstly, because she said that before and did not keep her word; secondly, her current assertion is only partially true since she has also stated that, at the present time, she is unable and, thus, does not intend to deal with the outstanding warrant for her arrest in Alberta; therefore, there is no significant evidence that Ms. Tuel will comply with the terms of any stay which is imposed at this time.

h. There is little or no evidence regarding the best interests of the children such as would lead the IAD to extend the stay or allow the appeal. Some of the children are in Alberta where she claims to be unable to go. Others are in care in British Columbia and she has only limited access. The youngest, a baby, is with her but there is insufficient evidence regarding those circumstances to allow that the best interests of the child would lead to an extension of the stay.

[13] Ms. Tuel now seeks leave to judicially review the IAD decision to cancel the stay of the deportation order and dismiss her appeal.

IV. Issues

[14] The issues are:

(1) Did an error or breach of procedural fairness occur due to failure to consider counsel's submissions?

(2) Were the IAD's findings reasonable and based on a consideration of all of the evidence?

V. Analysis

[15] In *Grillas,* above, the Supreme Court held that the IAD discretion to stay a deportation order on H&C grounds is a legislative delegation of the Crown's prerogative to determine who may enter and remain in Canada. As such, the IAD's exercise of its discretion is entitled to considerable deference. The Courts have repeatedly emphasized the discretionary nature of this relief. In *Prata,* above, the Supreme Court stated that a removal order:

> … establishes that, in the absence of some special privilege existing, [an individual subject to a lawful removal order] has no right whatever to remain in Canada. [An individual appealing a lawful removal order] does not, therefore, attempt to assert a right, but, rather, attempts to obtain a discretionary privilege.

[16] As noted by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the IAD has not only the discretion to determine what constitutes "humanitarian and compassionate considerations", but the "sufficiency" of those considerations as well.

[17] The IAD must consider the same factors in *Ribic v. Canada (Minister of Employment and Immigration),* [1985] IABD No. 4 (QL/Lexis), upon reconsideration of the stay as they considered

in the original granting of the stay pursuant to subsection 68(3) of the IRPA (*Abdallah v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 6, 87 Imm. L.R. (3d) 251, at paras. 27-28; *Canada (Minister of Citizenship and Immigration) v. Awaleh*, 2009 FC 1154, [2009] F.C.J. No. 1439 (QL/Lexis), at paras. 21-22; *Canada (Minister of Citizenship and Immigration) v. Stephenson*, 2008 FC 82, [2008] 4 F.C.R. 351, at para. 25).

A. *Standard of Review*

[18] In *Khosa*, above, the Supreme Court held that the appropriate standard of review for the discretionary decision made by the IAD is that of reasonableness. Significant judicial deference is owed to IAD decisions and, in particular, its decisions based on the evaluation and weighing of evidence before it. Reviewing courts ought not to reweigh the evidence or substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within a range of reasonable outcomes. The question as to whether an applicant had established sufficient H&C considerations to warrant relief from his/her removal order is a decision which Parliament confided to the IAD, not to the courts (*Khosa*, above, at paras. 58-60).

B. *The IAD Considered Joint Submissions*

[19] Ms Tuel argues that the IAD breached the principles of natural justice or procedural fairness by “not sufficiently considering joint recommendation”. In particular, Ms. Tuel argues that the IAD failed to address each of the points in her counsel’s written submissions including the proposed terms and conditions of the stay.

[20] There was no error or breach of natural justice. The IAD specifically noted and mentioned the joint recommendations of counsel referenced during the mid-hearing conference and post-hearing written submission and stated that “very serious considerations” were given to these recommendations. The IAD referred to submissions from Ms. Tuel with respect to her circumstances as a Convention refugee who has experienced the trauma of war, forced marriage, violent relationships, language, literacy and cultural barriers in Canada; however, after reviewing all of the *Ribic* factors and the best interests of the children affected by the decision, the IAD set out in clear and cogent terms the reasons why the appeal is dismissed (IAD Decision, at paras. 18-20).

[21] There is no requirement in the context of procedural fairness or natural justice which requires the IAD panel to cite every aspect of submissions of the parties. From the reasons of the IAD, the basis of its dismissal of the appeal is clear notwithstanding the joint submissions of the parties.

[22] The concern, with respect to the proposed terms and conditions, was addressed by the IAD as one of the key components as to why the appeal was dismissed and the extension of the stay was not granted. The IAD noted Ms. Tuel’s admission that she had not abided by the previous terms.

[23] There is no merit to Ms. Tuel’s contention that there was a breach of the duty of fairness in not giving adequate consideration to the joint recommendations. The IAD did not ignore the submissions as is apparent in the reasons.

C. *The IAD Considered all Relevant Facts and Circumstances*

[24] Ms. Tuel argues that the IAD erred in its consideration of all of the relevant facts and circumstances. Ms. Tuel also argues that the IAD failed to consider the many positive factors and mitigating circumstances in her case.

[25] The IAD considered all of the relevant factors in *Ribic* above including Ms. Tuel's explanations and rationalizations of her past actions. For all of the reasons provided, the IAD determined that in the weighing of all of the factors including that of the best interests of the children, it was not enough to weigh in favour of granting the appeal or extending the stay.

[26] As stated by the IAD, no one is exempt from the law and no one may pick and choose which laws to obey and when, nor can one decide for oneself to which conditions to submit and which to ignore. Ms. Tuel continues to refuse to acknowledge that all of the laws in Canada apply to her. The IAD's refusal to extend the stay on terms and conditions and dismissal of the appeal were reasonable based on all of the circumstances of the case and especially in light of Ms. Tuel's stated inability to comply with the terms and conditions of her stay, the laws of Canada and a Court-ordered sentence.

VI. Conclusion

[27] For all of the reasons noted above, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicant's application for judicial review be dismissed. No question of general importance for certification.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Judith Boer	FOR THE APPLICANT
Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ELGIN, CANNON & ASSOCIATES Vancouver, BC	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Vancouver, BC	FOR THE RESPONDENT