Federal Court  Cour fédérale

Date: 20220913

Docket: IMM-6854-21

Citation: 2022 FC 1286

Ottawa, Ontario, September 13, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

PRINCE UYI IMALENOWA

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Immigration Appeal Division [IAD], dated September 22, 2021 [Decision], staying the Respondent's removal from Canada. The Respondent is a 43-year-old permanent resident of Canada and citizen of Nigeria. The Immigration Division [ID] issued a removal order for reasons of serious criminality, because of the Respondent's conviction for identity theft fraud involving as many as 50 individuals. He

was convicted and sentenced on one count. The Respondent did not challenge the legality of the removal order, but sought a stay from the IAD on humanitarian and compassionate [H&C] grounds.

[2] The Respondent based his request for H&C in part on a fraudulent letter from his ex-spouse in support. The IAD found he had fraudulently written and forged his ex-wife's signature on the letter he gave it. The letter contained material falsehoods. He was found not credible, lacking remorse, did not appreciate the wrong he had done others and had other failings noted by the IAD.

[3] That said, the IAD granted a stay, finding sufficient H&C grounds based on "moderate establishment" in Canada and "hardship" he would suffer if removed to Nigeria. The hardship was based mainly on the state of Nigeria's healthcare system, the IAD finding among other things the Respondent would have to pay for his own drugs, which appears to be relatively common in Nigeria, but which creates hardship for indigent persons. The IAD found the Respondent could "re-establish himself in Nigeria and earn an average person's wages" from which it appears he is not indigent.

[4] The Applicant notes for the first time that the Respondent in his H&C relies on a list of prescriptions that weren't his. The list was someone else's prescription, which was agreed. The Respondent said the fault was with his doctor and or his lawyer, essentially asserting neither looked at them before they were filed with the IAD. I take it he also asserts the IAD likewise failed to examine them. The Respondent filed the proper list before this Court. Respondent's

counsel agreed I should not assess or weigh the different list, but also said essentially that the Court should not ignore his new evidence either. In addition, the medical records relied upon by the IAD were not updated after the ID and were by then 2 ½ years old.

[5] Judicial review will be granted because of my inability to assess the veracity and weight to be given the newly filed prescription list, which was central to the IAD's determination of hardship, and issues with respect to the justification, rationality and intelligibility of the IAD's determinations.

II. Background Facts

[6] The Respondent arrived in Canada in 2011 and made a refugee claim based on his fluid sexual orientation. His refugee claim was rejected.

[7] He met someone in Canada and married her in 2012. The Respondent received his permanent residency through her sponsorship in 2013. The marriage lasted eighteen months or so and ended in divorce.

[8] The Respondent was convicted in April 2018 of one count of identity fraud. The underlying activities took place between July and December 2014. The Respondent was originally charged with fraudulently impersonating at least 50 people to obtain credit cards in their names. His sentence included an intermittent jail sentence of 90 days and two years probation, as well as forfeiture and financial conditions.

[9] Immigration authorities completed a section 44 report under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Respondent had the opportunity to make submissions on H&C factors. As part of this process, the Respondent submitted a letter purportedly from his spouse. The IAD found the letter fraudulent – it was in fact written by the Respondent and contained false information and a forgery for a signature. For example, the letter was dated January 2019 and indicated the couple were married for almost seven years. In fact they were married for only 18 months and divorced in 2015.

[10] As noted, the IAD found the Respondent forged the signature of his ex wife on the fraudulent letter, which I note praised the Respondent for his "honesty", another falsehood.

III. Decision under review

[11] In granting the stay of removal, the IAD set out to review the Respondent's H&C considerations in light of the factors established in *Ribic v Canada (Minister of Employment and Immigration)*, 1986 CarswellNat 1357 at para 14 [*Ribic*]. The IAD considered "the seriousness of the offences giving rise to the removal order; the Appellant's remorse; possibility of rehabilitation and the risk of reoffending; length of time spent in Canada; extent to which the Appellant is established in Canada; family support in Canada and the impact of removal upon the family; community support; and any hardship if the Appellant were to be removed to his country of citizenship."

[12] The IAD found the offence was serious: the conviction involved credit card fraud, which despite not being a violent crime, has “grave consequences for the victim” of which there were as many as 50.

[13] The IAD found the Respondent “was not sincere when he expressed remorse”. The IAD found the Respondent lacked credibility when addressing both the conviction and the fraudulent letter. The IAD found that “[h]is submitting a forged letter to immigration authorities after having been convicted amounts to his committing a further fraud.”

[14] Although the Respondent testified at the hearing that he did not know what he was doing with the credit cards was illegal, the IAD found this testimony untruthful and that the Respondent recognized he was involved in a criminal activity from the beginning. The IAD found the Respondent “wrote the letter himself, signed it fraudulently as his former spouse, and submitted it to immigration authorities.”

[15] The IAD found the Respondent had not fully accepted responsibility for either of his actions, the criminal conviction or the fraudulent letter.

[16] The IAD found the Respondent posed a “moderate risk” of reoffending based on his having no further convictions since the reportable offence. It also found he had a moderate possibility of rehabilitation. He had taken a number of courses and certificates to make himself more employable. He also completed his probation. The IAD noted that normally an individual

with one conviction and attempts to rehabilitate himself would have a high possibility or rehabilitation and pose a low risk for reoffending.

[17] However, the IAD found the Respondent did not appreciate the consequences of his actions, evidenced by his lack of credibility at the hearing and the fraudulent letter. The IAD found the Respondent had not "fully made efforts to address the factors that led to his criminal behaviour", leading to the IAD concluding the Respondent had a moderate possibility of rehabilitation and a moderate risk of reoffending.

[18] The IAD found the Respondent's time in Canada was a moderately positive factor, as he had spent 10 years in Canada, but committed the offences within four years of arriving. The IAD also found the Respondent was only moderately established in Canada, as he owned no real estate and had no investments, but had a job, a car, and some savings. Notably, the record shows the steady job was recently acquired.

[19] The IAD found the Respondent had no family support in Canada. It assigned little weight to the support letters he filed from his friends, because the letter he filed from his ex wife was fraudulent.

[20] The IAD found the Respondent would suffer a hardship if he were removed to Nigeria due to diabetes, high cholesterol, a pulmonary embolism, cataracts, and a number of surgeries. However his medical records were two and a half years old and it appears not all of these conditions were still relevant. Although the submitted medical documents were dated to 2019,

the IAD found it was more likely than not the Respondent was still affected by diabetes and the pulmonary embolism, again based on his testimony which this time it believed. Notably the IAD earlier rejected his testimony.

[21] The IAD found the Respondent could "re-establish himself in Nigeria and earn an average person's wages", but that his medical conditions "would be difficult for him to address in Nigeria because of the state of the Nigerian healthcare system". As previously noted it appears most Nigerians pay for their own medications.

[22] The IAD found the best interests of the child were neutral. The Respondent has a 15-year-old daughter in the United States, but he had not seen her since she was seven – eight years ago. The Respondent's relationship with his daughter was electronic and the IAD found returning the Respondent to Nigeria would have little impact on how he related to his child.

IV. Issues

[23] The Applicant submits "[t]he IAD's decision lacks an internally coherent chain of analysis justified in relation to the facts". The Respondent submits the issue is "[w]hether the decision is reasonable."

[24] Respectfully, the only issues are whether the Decision is reasonable, and whether this Court should assess the just now filed list of his prescriptions.

V. Standard of Review

[25] Both parties submit the standard on review should be reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. I agree. Regarding reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

> [Emphasis added]

[26] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
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> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
>
> [Emphasis added]

[27] The Supreme Court of Canada in *Vavilov* at para 86 states, "it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision-maker to those to whom the decision applies," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant

> evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

VI. Legislation

[28] The IAD granted the stay pursuant to section 68(1) of the *IRPA*:

Removal order stayed	**Sursis**
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.	**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.

VII. Case law

[29] In *Ribic*, the Immigration Appeal Board established an application for equitable jurisdiction under section 72(1)(b) of the *Immigration Act*, 1976, SC 1976-77, c 52 (the analogous provision in prior legislation) should consider the circumstances of the case, including:

> … the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The

> Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. While the general areas of review are similar in each case the facts are rarely, if ever, identical (*Ribic* at para 14).

[30] In *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 77, the Supreme Court of Canada (SCC) endorsed the *Ribic* approach when assessing removals under section 70(1)(b) of the *Immigration Act*, RSC 1985, c I-2. The SCC confirmed the *Ribic* factors apply to *IRPA* in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 137.

VIII. Analysis

[31] The Applicant submits the Decision lacks an internally coherent chain of analysis and that the IAD granted exceptional relief on an unjustifiably low standard. Overall, I agree.

[32] The Respondent submits the Applicant is asking the Court to reweigh the evidence and reach a different conclusion. The Respondent's submissions focus on the broad, discretionary jurisdiction of the IAD regime and the SCC's endorsement of the *Ribic* factors in *Chieu and Khosa*. The Respondent submits the IAD properly considered the *Ribic* factors in the Decision.

A. *The reasons lacked an internally coherent and rational chain of analysis*

(1) Medical conditions and records

[33] The Applicant alleges the Decision lacks internal rationality in how the IAD treated the Respondent's medical conditions and documents. First, the Applicant submits the IAD's acceptance of the Respondent's testimony on his continuing medical conditions in lieu of documentary support, given the credibility findings, was irrational. Second, the Applicant submits the IAD misapprehended evidence on a central aspect of the Decision.

[34] In my view, the determinative issue is the treatment of the medical records. The Applicant submits, and I agree, that the IAD misapprehended evidence on a central aspect of the Decision. The Decision was largely based on the assertion the Respondent required prescription medication, but the prescription records submitted to the IAD were not the Respondent's. The Respondent and his team produced and relied on someone else's prescription list.

[35] In effect the Respondent says neither he, his pharmacist, his lawyer nor the IAD actually looked at the prescriptions he filed with the IAD. Instead it seems it is up to the Court to assess this central new evidence *de novo*.

[36] That said, a central and key findings of the IAD is the Respondent would suffer hardship caused by difficulty in obtaining his required medications in Nigeria. The IAD noted the Respondent's medical documents were only dated to 2019, but found it was likely the

Respondent was still affected by the conditions. Whether or not the Respondent requires prescription medication is therefore central to the Decision.

[37] Yet, and with respect, we do not know whether and to what extent prescriptions are needed and for what and in what amounts, frequency or otherwise.

[38] The Respondent acknowledges the prescription record was not in his name – although he has to because that is obvious on the record. He says an "accurate and updated Prescription history" is an exhibit attached to his Affidavit. I am unable to assess that assertion.

[39] The prescription record submitted by the Respondent is dated December 7, 2021, which is after the Decision was issued.

[40] The Applicant contends the Respondent's acknowledgement of the erroneous records and submission of revised records supports the argument the IAD misapprehended evidence on central aspect of decision. The Applicant further submits the provision of evidence dated after the Decision confirms the matter should be sent back for redetermination. I cannot but agree with these self evident submissions.

[41] In my view, the entirely inappropriate and inaccurate prescription record filed, and the obvious inattention to it by all parties including the IAD are sufficient grounds to grant this judicial review. The hardship, particularly in obtaining prescription medications, was a key

factor in the Decision granting the stay on H&C grounds. If the Respondent does not require prescription medication, that ground is invalid.

[42] Further, the fact the issue was not raised at the hearing and the Respondent did not have an opportunity to address the issue, also supports allowing this application and remitting the Decision for redetermination.

[43] Additionally, it is well established that judicial review is based on the material before the decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright*), 2012 FCA 22 at para 20). Therefore, this Court is unable to consider whether the updated medical records are sufficient to establish whether the Respondent still requires prescription medication.

[44] Judicial review will be ordered on this ground.

(2) Rehabilitation and reoffending

[45] The Applicant also submits, and I also agree, there is a lack of internal rationality in the Decision that is “particularly obvious” in the IAD’s positive weighing of rehabilitation in light of the findings on lack of credibility, the absence of remorse, the lack of insight into his criminality, his moderate likelihood of reoffending and his lack of support not to mention the Respondent’s continued fraud on the IAD itself.

[46] The IAD made numerous explicit findings on the Respondent's lack of remorse and continued use of fraudulent documents. While the Applicant highlights a dozen of the IAD's findings, some of the most significant are:

i. "His submitting a forged letter to immigration authorities after having been convicted amounts to his committing a further fraud";

ii. "His actions after his conviction and his lack of credibility at this hearing indicate that he does not appreciate the consequences of his actions";

iii. "His submitting a fraudulent letter after committing fraud, then testifying in a way that is simply not credible, demonstrate that the Appellant has not fully made efforts to address the factors that led to his criminal behavior"; and

iv. "His submitting the letter mirrors the criminal offence that led to his removal order". The Applicant did not highlight this finding, but in my view, this comment confirms the Respondent was still engaging in the same illegal behaviour that led to the removal order being issued in the first place.

[47] In my respectful view, the IAD's finding the Respondent "has a moderate possibility for rehabilitation and poses a moderate risk of reoffending" in light of the findings on the fraudulent letter and the Respondent's lack of remorse is a close to if not a fatal flaw in the logic of the Decision. The IAD's findings demonstrate that even during the removal proceedings, the Respondent engaged in the sort of fraudulent behaviour that led to his inadmissibility. The IAD does not indicate why, when the Respondent engaged in the same fraudulent activity, is not remorseful, and does not have insight into his criminality, it found his rehabilitation "a moderate possibility". The fraudulent letter was submitted *after* the Respondent completed his probation, which further suggests those actions did not lead to rehabilitation, even moderately. In my view

such conduct attacks the integrity of the immigration system and must be considered in light of constraining law to that effect.

[48] The finding with respect to hardship in the absence of a pharmacy record is an obvious case of an unjustified and unintelligible finding leading to unreasonableness and judicial review. Again here, the IAD does not explain or come to grips with how the cascade of negative findings justify a finding of moderate likelihood of rehabilitation, particularly the blatant fraud on the IAD itself. The Decision does not indicate any programs, treatment, or therapy the Respondent has subsequently engaged in that might assist him in gaining insight into his criminal activities. I am compelled to conclude the finding of a "moderate possibility for rehabilitation" is neither justified nor intelligible and thus unreasonable per *Vavilov*.

B. *The IAD granted exceptional relief on an unreasonably low standard*

[49] The Applicant acknowledges the Court owes a high degree of deference to the IAD's assessment of H&C factors, but submits the IAD granted H&C relief based only on some hardship without considering such relief is exceptional in nature, not routine. I agree. Such a finding is contrary to the majority judgment in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [per Abella J] at para 23: "There will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds" under section 25 of *IRPA*, and I would say the same for subsection 68(1) of *IRPA*.

[50] Further, the Applicant asserts the IAD must not exercise its discretion routinely or lightly, and again I agree: *Canada (Citizenship and Immigration) v Ndir*, 2020 FC 673 [per St-Louis J] at para 31, 39; and *Canada (Public Safety and Emergency Preparedness) v Abou Antoun*, 2018 FC 540 [per Lafrenière J] at para 19.

[51] Otherwise, H&C simply becomes an alternative routine and unexceptional immigration scheme, which it is not.

[52] Judicial review will be granted on these grounds as well.

IX. Conclusion

[53] In my respectful view, the Decision is unreasonable for the reasons noted. Therefore judicial review will be granted.

X. Certified Question

[54] Neither party proposed a question of general importance and none arises.

JUDGMENT in IMM-6854-21

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision of the IAD is set aside, this matter is remanded for reconsideration by a differently constituted IAD, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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