Federal Court Cour fédérale

Date: 20240312

Docket: IMM-3863-22

Citation: 2024 FC 417

Ottawa, Ontario, March 12, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

FILCOR RAYMOND DELA CRUZ

Respondent

JUDGMENT AND REASONS

[1] The Applicant, the Minister of Citizenship and Immigration, seeks judicial review of a decision dated April 12, 2022, of the Immigration Appeal Division [IAD], which stayed a deportation order issued to the Respondent after he was found inadmissible for serious criminality. The IAD found that a significant level of humanitarian and compassionate [H&C] considerations existed warranting special relief.

[2] The Respondent is a 55-year old citizen of the Philippines who became a permanent resident of Canada at the age of 27, in 1993. He lived in Winnipeg for many years, where he has a spouse, two sons and other family members. While in Winnipeg, he was convicted of possession of cocaine and carrying a concealed handgun. He was issued a deportation order as a result of these convictions, but was subsequently granted a stay of removal on H&C grounds.

[3] In 2018, the Respondent moved to Toronto to look for work. Later that year, he committed a sexual offence involving a 14-year old girl. He pleaded guilty to invitation to sexual touching and received a suspended sentence, 156 days of pre-sentence custody and two years' probation. He was also prohibited from having contact with persons under the age of 16 for five years.

[4] In 2020, the Respondent was assessed at the Sexual Behaviours Clinic at the Centre for Addiction and Mental Health [CAMH] as part of his probation, but failed to follow his probation officer's direction to participate in a Sexual Offending Relapse Prevention Program and has not attended the further risk assessment and treatment programs that CAMH recommended.

[5] In December of 2020, the Immigration Division issued a deportation order against the Respondent for serious criminality pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act* [*IRPA*]. The Respondent appealed the deportation order to the IAD. On appeal, the Respondent did not contest the legal validity of the deportation order, but rather sought special relief by way of the IAD's authority to consider H&C grounds.

[6] The IAD examined the H&C considerations in light of the *Ribic* factors, including the seriousness of the offence, the possibility of rehabilitation and risk of reoffending, how long the Respondent had been in Canada, how established the Respondent was in Canada, the Respondent's family support in Canada, the impact removal would have on his family and community support and the hardship the Respondent would face from his removal.

[7] The IAD found that there were sufficient H&C considerations to justify granting special relief to the Respondent. The IAD stayed the deportation order for five years, subject to certain conditions, with an interim reconsideration to take place 14 months from the date of the Decision. The conditions imposed by the IAD included the following, all of which were to be completed in advance of the interim reconsideration hearing: (a) as recommended in the CAMH report, the Respondent was required to participate in cognitive-behavioural treatment aimed at addressing the factors associated with the Respondent's offending behaviour; (b) as recommended in the CAMH report, because the offence involved a child, the Respondent was required to undergo a comprehensive risk assessment; (c) the Respondent was required to participate in a Sexual Offending Relapse Prevention Program; and (d) the Respondent was required to undergo phallometric testing at CAMH's Sexual Behaviours Clinic to assess whether he has pedophilic and/or hebephilic tendencies.

[8] In advance of the interim reconsideration hearing, the Applicant provided the IAD with a written statement, which detailed the Respondent's failure to comply with seven of the conditions imposed by the IAD, including all four requirements detailed in the previous paragraph.

[9] The Respondent failed to appear for the interim reconsideration hearing. As a result, the IAD found that the Respondent was in default of the proceedings and deemed his appeal abandoned pursuant to subsection 168(1) of the *IRPA*.

[10] The Respondent also did not participate in this application for judicial review.

I. <u>Analysis</u>

[11] This application raises two issues:

A. Whether the matter is moot and, if so, whether the Court should nonetheless exercise its discretion to hear the application; and

B. Whether the IAD's decision was unreasonable.

A. *Special circumstances exist warranting the determination of this application*

[12] The doctrine of mootness allows courts to decline to decide a case that raises a merely hypothetical or abstract question. It applies where a decision of the Court will not have the effect of resolving a controversy that affects, or might affect, the rights of the parties. The general policy or practice is for the Court to decline to decide a case, unless the court exercises its discretion to depart from that policy or practice [see *Borowski v Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342 at 353].

[13] In addressing mootness, this Court must apply the two-step analysis established by the Supreme Court of Canada in *Borowski*: (1) determine whether the "tangible and concrete dispute has disappeared and the issues have become academic," such that the case has become moot; and (2) if so, decide whether the Court should exercise its discretion to hear the case nonetheless. This Court may elect to address a moot issue if the circumstances warrant, even if it fails to meet the "live controversy" test [see *Borowski, supra* at 353; *Buck v Canada (Attorney General)*, 2021 FCA 1 at para 15].

[14] At the second step, the Court should consider the following factors discussed in *Borowski*: (i) the presence of an adversarial context; (ii) the concern for judicial economy; and (iii) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework [see *Peckford v Canada (Attorney General)*, 2023 FCA 219 at para 10; *McCotter v Canada (Attorney General)*, 2023 FCA 134 at para 8].

[15] The Applicant initially acknowledged in their written materials that the application was moot. However, at the hearing, the Applicant suggested that it was possible for the Court to find otherwise on the basis that the determination of the application on its merits could have a practical effect on the rights of the parties in the event that: (i) the Respondent seeks to apply to re-open his appeal; and (ii) the Respondent seeks to rely on the IAD's decision in future immigration applications and proceedings.

[16] Despite the new submissions of the Applicant, I am not satisfied that there remains a live dispute between the parties as a result of the IAD's abandonment determination. At best, there is

the potential for a dispute should the Respondent seek to have the appeal re-opened and be successful in his efforts.

[17] I agree with the Applicant that the IAD's findings could have collateral consequences in future immigration applications and proceedings. As was the case in *Pusuma v Canada (Minister of Citizenship and Immigration),* 2015 FC 658 at paras 74 and 76, I find that this consideration is relevant to the second step and supports the Court's exercise of its discretion to determine the application. In that regard, the Respondent is still in Canada and will be subject to additional enforcement proceedings. He also has the ability to file an application for permanent residence based on humanitarian and compassionate [H&C] grounds, could seek a deferral of his removal and/or bring a motion for a stay of removal. In such proceedings, and in particular, in any H&C application, the Respondent and/or the decision-maker could rely on the IAD's determination that the Respondent will suffer hardship if he is returned to the Philippines and that he has a lengthy presence in Canada, the combination of which the IAD found should be afforded so much weight that it outweighed the significant negative factors identified by the IAD — namely, that the Respondent committed a serious criminal offence against a child, is not rehabilitated and poses a risk to the public and, in particular, to children.

[18] In the circumstances, I find that there remains a sufficient broader adversarial context between the parties to warrant the exercise of my discretion to hear this application. Moreover, there is a public interest in the determination of this application given that: (a) the very serious finding that the Respondent poses a risk to children; and (b) the Applicant will have "the benefit of a concrete and tangible effect from the determination of the issue, even if it is moot", by way of

preventing the use by the Respondent of the IAD's findings in other immigration applications and proceedings [see *Sogi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 108 at para 47].

[19] As for the remaining rationales, time has already been devoted to the hearing of this application and the Court has prepared for the hearing. As such, there would be no meaningful savings of judicial resources by declining to decide the matter. This is also not a case in which a decision from this Court could reasonably be considered an intrusion into the functions of the legislative branch of government.

[20] Accordingly, I find that this is an appropriate case for the Court to exercise its discretion to decide this application notwithstanding that it is moot.

B. *The IAD's decision was unreasonable*

[21] The Applicant submits, and I concur, that the applicable standard of review is reasonableness. When reviewing for reasonableness, the Court must take a "reasons first" approach and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified [see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8]. 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 [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of

justification, intelligibility and transparency [see *Adeniji-Adele v Canada (Citizenship and Immigration)*, 2020 FC 418 at para 11].

[22] I agree with the Applicant that the IAD's reasons lack an internally coherent and rational chain of analysis and that there are fundamental gaps in the reasoning, which render the decision unreasonable.

[23] The sole positive considerations identified by the IAD were: (i) the Respondent's establishment in Canada; and (ii) the hardship the Respondent would face transitioning to life in the Philippines. However, these positive considerations were discounted by the IAD. In relation to establishment, while the IAD concluded that the Respondent's three decades in Canada supported special relief, the significance of this factor was diminished by the fact that: (i) the Respondent had relied on social assistance since he was released from jail in 2019; (ii) his material establishment was "effectively non-existent" and weighed against special relief; (iii) there was "no evidence of social establishment in Canada, such as volunteer or community involvement"; (iv) the Respondent provides no financial support to his family in Winnipeg and effectively has no contact with them; (v) the Respondent has little to no family support in Canada; and (vi) there was a paucity of evidence to support any assertion that he was presently established in Toronto with his girlfriend.

[24] In relation to the potential challenges that the Respondent would face in the Philippines, the IAD found that the Respondent had identified various concerns that he believed would constitute hardships (such as having no place to live, no job, being at risk because of political

conflicts and being unable to access mental health services). However, the IAD found that his concerns were not supported by any details or corroborating evidence. Moreover, the IAD noted that the Respondent was 27 when he left the Philippines, he speaks Tagalog and has a work history in the Philippines. However, the IAD concluded that he was likely to face some challenges in the Philippines as it is not clear where he would live and how he would support himself abroad.

[25] However, balanced against these discounted positive considerations were many serious, negative factors that the IAD properly found weighed against the stay of removal. Specifically, the IAD concluded that: (i) the Respondent is not rehabilitated; (ii) the Respondent did not show a reasonable prospect of rehabilitation; (iii) the Respondent poses a <u>significant</u> risk to public safety; (iv) the Respondent downplayed the incident in which he tried to have sex with a 14-year old; (v) the Respondent did not take responsibility for his actions; (vi) the Respondent showed no remorse his crime; and (vii) the Respondent had failed to follow the directions of his probation officer and CAMH's recommendations.

[26] Notwithstanding the clear imbalance between positive and negative factors, and the IAD's acknowledgement that significant H&C considerations would be required due to the seriousness of the Respondent's offence, the IAD somehow came to the conclusion that this was a "borderline case" and ultimately warranted a stay of removal, on conditions. The IAD's decision is entirely illogical and fails to exhibit the required degree of justification and intelligibility [see *Horvath v Canada (Citizenship and Immigration)*, 2022 FC 628 at para 15]. The IAD has failed to provide an internally coherent and rational chain of analysis as to how the two positive factors it identified,

when balanced against the many serious, negative factors, were sufficient to tip the scale in favour of granting special relief.

[27] Moreover, the IAD's reasons contain a troubling inconsistency regarding the IAD's consideration of the risk the Respondent poses to children. At paragraph 64, the IAD states: "I am particularly concerned about the potential risk to children from the [Respondent]. If the evidence in the present proceeding reliably showed a risk to children, I would have dismissed this appeal". Yet, earlier in the decision, the IAD found that the Respondent was not rehabilitated, that he had a low possibility of rehabilitation, that he continues to be at risk of reoffending and that he poses a risk to public safety, particularly as it relates to children. This inconsistency underscores the lack of intelligibility of the IAD's reasons.

II. Conclusion

[28] Accordingly, the IAD's decision dated April 12, 2022 granting the Respondent a stay of his removal is hereby quashed. As the Respondent's appeal has subsequently been determined to have been abandoned, I see no point in sending the appeal back to the IAD for redetermination. However, I direct that no consideration should be given to any findings made by the IAD in its April 12, 2022 decision in any subsequent immigration applications or proceedings.

[29] The Applicant proposed no question for certification and I agree that none arises.

JUDGMENT in IMM-3863-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the decision of the Immigration Appeal Division dated April 12, 2022 is hereby quashed.

2. The Applicant proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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