Date: 20080325

Docket: IMM-2367-07

Citation: 2008 FC 373

Ottawa, Ontario, March 25, 2008

PRESENT: The Honourable Barry Strayer, Deputy Judge

BETWEEN:

GREGORY BARRY GITTENS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT

Introduction

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board (Immigration Appeal Division) (IAD) of May 25, 2007 cancelling the Applicant's stay of deportation and dismissing the appeal of his deportation order.

Facts

[2] The Applicant was born in Barbados in about 1968 and came to Canada with his mother and siblings in 1980. He is a citizen of Barbados. Between his arrival in Canada and the year 2000 he had a criminal record of about 40 convictions, over half of them involving theft. In the year 2000, following a conviction for trafficking in drugs, he was ordered deported to Barbados for serious criminality. He appealed that order and on June 26, 2002 his deportation order was stayed by the IAD for five years on condition that he keep the peace, be of good behaviour, not commit further criminal offences, forthwith report any change in employment, report forthwith in writing any criminal convictions, and attend counselling with Dr. Alex Russell, a psychologist. This stay was reviewed orally on February 24, 2004 by the IAD which noted that he had in the meantime been convicted of several offences under the *Highway Traffic Act*. His stay was, however, continued. On March 24, 2006 the IAD advised that it would hold a closed review of the Applicant's stay on May 29 and 30, 2006. However, the Minister advised the IAD that after the 2004 hearing the Applicant had been convicted of six further offences for theft, dangerous operation of a motor vehicle, failure to stop for police and assault of a police officer. He had been incarcerated for approximately five months from August 2005 until January 30, 2006. The IAD decided to hold an oral review and in July, 2006, in consultation with counsel for the Applicant, set a date of December 19, 2006. On October 12, 2006 the Applicant's counsel, who had been advised that Dr. Russell would not be available on December 19, 2006 to appear as a witness for the Applicant, asked for an adjournment. Subsequently, she suggested a preferable date of April 26, 2007, some four months later. She was advised by telephone on November 9, 2006 that the adjournment was denied. She made further

representations and was finally advised on December 13, 2006 that the hearing would proceed on December 19, 2006. Prior to that hearing the Applicant had a further meeting with Dr. Russell who submitted a lengthy report in writing. On the day fixed for the hearing, counsel for the Applicant appeared and she opened with the following remarks:

> This is really just a renewed request for an adjournment in this matter, and I'll just tell you, briefly that we are prepared to go. The history is Mr. Gittens has a psychologist, he is ordered to attend for therapy.

She referred to the report from Dr. Russell dated December 14 which was before the IAD and she went on to say:

> …but we really wanted to have Dr. Russell up here in person to give *viva voce* evidence.

She said that when the date had been originally chosen in July it was tentative in her view, depending on Dr. Russell's availability. After some discussion the IAD member ruled as follows:

> You have provided a written document. I think that is a reasonable way to present evidence of a person who is not available. As you know, the IAD does control its process. There is a responsibility to act in a timely fashion. I don't think it's appropriate to potentially postpone this matter until, well, some time, whether it's when our schedule allows for, which might be April or for after the further outstanding charges which the Appellant is indicating might be resolved in July. I think there is a public interest in these types of cases that we proceed in a timely fashion. I will allow the Minister to have time to review what I would take to be important evidence, the psychiatrist's report – the psychologist's report, pardon me, so I am going to give Ms. Henrique half an hour to review that document. I think that's what I wanted to say.
>
> We will proceed today.

[3] The IAD heard testimony from the Applicant and his wife, and from a Hearings Officer for the Canada Border Services Agency who testified as a witness for the Minister. It also had the report from Dr. Alex Russell. The general thrust of Dr. Russell's report was that while the Applicant had a long history of criminality he had made progress through therapy and through relationships he had developed, having fathered one child, in June, 2002 and then having married in September, 2006 to a different women with whom he had a child in October, 2006. Dr. Russell acknowledged that he had not met the Applicant's wife nor apparently his infant son who would then have been approximately 2 months old. Nevertheless, he described the Applicant as having a "strong bond with his wife and children". (He had observed the Applicant together with his older child Kanisha, the daughter born in 2002). He expressed the opinion that the Applicant's continuing encounters with the criminal justice system ought to be viewed as a "relapse" rather than an indication that he was likely to become re-engaged in criminal activity. He went on to say that the removal of the Applicant from Canada "would have a tremendously detrimental impact on his family and the well-being of his children". He noted that the Applicant's removal would sever his relationship with his daughter, Kanisha, which would be a negative factor. He adds, however: "this would not necessarily be my opinion if Mr. Gittens were to become immersed in a criminal lifestyle … ." He finishes by saying that he has no hesitation finding that the Applicant's presence in Canada "does more good than harm in terms of the best interests of his children".

[4] The IAD after hearing the matter in December, 2006 issued its decision on May 25, 2007. It decided to cancel the stay of the Applicant's removal order and to dismiss his appeal of that order. It found that he had breached the conditions of his stay by committing a number of further criminal

acts and it was not prepared to characterize this criminal behaviour as a "relapse" as did Dr. Russell. The panel identified various factors that it considered: the lack of rehabilitation displayed by the Applicant; his inability to comply with conditions imposed for his remaining in Canada; the threat to public safety and well-being that his behaviour presented; and the fact that he had been a long-term resident of Canada and had a wife and two Canadian-born children. The panel spent some time analysing the nature of the Applicant's offences since the last stay hearing of 2004 and it concluded for reasons stated that the criminal and highway offences revealed separate and deliberate violations of the law which did not demonstrate any adequate sense of social responsibility. After some considerable discussion of the Applicant's family circumstances the Panel recognized that his relationship with his wife and two children "is the strongest factor in his favour" and it had no doubt that these people would be affected if he were removed. The panel expressly referred to the factors for the exercise of its decision first outlined in *Ribic* case and endorsed by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 and in *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 133. All of those factors are referred to specifically in the reasons. The panel said it had given particular weight to the Applicant's criminality after he was allowed to stay in Canada following his deportation order and was not satisfied that he had demonstrated that he could rehabilitate. It concluded by saying:

> The panel has the responsibility to consider the health and safety of the wider community and it's [*sic*] conclusion in this case is that the appellant may well offend again given his behaviour to date. The appellant's stay is cancelled and the appeal is dismissed.

[5] The Applicant attacks this decision on several grounds. First, he says that the IAD denied him procedural fairness by refusing to adjourn the hearing so that the psychologist could attend and

present *viva voce* evidence. Second, the IAD misconstrued and ignored evidence by concluding that the Applicant's recent criminality could not be seen as a relapse, because this conclusion contradicted the opinion set out in the report of the psychologist. Third, the IAD erred in law by minimising the best interests of the Applicant's children and by ignoring the evidence in the psychologist's report. Fourth, the IAD erred in law by exercising its discretion in a "capricious and vexatious manner", in particular by "disregarding the submissions of counsel" and by failing to consider patently relevant factors. Fifth, the IAD erred in law by drawing conclusions without regard to the evidence before it.

[6] At the hearing of this judicial review, counsel for the Respondent sought to put in new evidence showing that after the decision of the IAD on May 25, 2007 the Applicant had been charged with new offences and that his pre-hearing criminal record included a number of offences not disclosed to the IAD before it made its decision. The evidence indicated that he had been arrested on August 29, 2007 and thereafter spent time in custody. I refused to admit this evidence on the judicial review of the decision of the IAD of May 25, 2007 because it concerned facts arising after the IAD hearing or was evidence of previous events which was not before the IAD. The Court records do disclose, however, that the Applicant's removal was ordered for December 17, 2007, that he sought a stay of that removal, and the application for stay was dismissed. I am advised that he has been removed from Canada.

Analysis

[7] I think the only issue of substance raised by the Applicant is that the IAD might have denied him procedural fairness by refusing to grant the adjournment to enable the psychologist to testify *viva voce*. The authoritative factors for consideration by the IAD in deciding in whether or not to grant an adjournment are set out in the Immigration Appeal Division Rules, subsection 48(4) which states as follows:

48(4) In deciding the application, the Division must consider any relevant factors, including	48(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :
(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;	*a*) dans le cas où elle a fixé la date et l'heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;
(*b*) when the party made the application;	*b*) le moment auquel la demande a été faite;
(*c*) the time the party has had to prepare for the proceeding;	*c*) le temps dont la partie a disposé pour se préparer;
(*d*) the efforts made by the party to be ready to start or continue the proceeding;	*d*) les efforts qu'elle a faits pour être prête à commencer ou à poursuivre la procédure;
(*e*) in the case of a party who wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;	*e*) dans le cas où la partie a besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans

	causer une injustice;
(*f*) the knowledge and experience of any counsel who represents the party;	*f*) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;
(*g*) any previous delays and the reasons for them;	*g*) tout report antérieur et sa justification;
(*h*) whether the time and date fixed for the proceeding were peremptory;	*h*) si la date et l'heure qui avaient été fixées étaient péremptoires;
(*i*) whether allowing the application would unreasonably delay the proceedings; and	*i*) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable;
(*j*) the nature and complexity of the matter to be heard.	*j*) la nature et la complexité de l'affaire.

I would first observe that the opening words of the subsection direct the Division to consider "relevant factors" including the ones enumerated. This does not mean that the IAD must expressly consider each of the factors enumerated whether relevant or not to the particular case. I do not take that to be a direction to the IAD to recite in its reasons a formulaic consideration of each enumerated point whether relevant or not. The spirit of this exercise is, I think, described in *Siloch v. Canada (Minister of Employment and Immigration)* (FCA), [1993] F.C.J. No. 10 where Justice Décary in speaking of a similar situation not governed by the specific rules said that in exercising his discretion whether to grant an adjournment or not, an adjudicator should direct his attention to factors "such as" and then listed a number of factors similar to those in subsection 48(4) of the Immigration Appeal Division Rules.

[8] I believe a careful reading of the IAD decision would indicate that attention was paid to the relevant factors referred to in the Appeal Division Rules, subsection 48(4). With respect to (a), the tentative date of December 19, 2006 was set in consultation with counsel. Thereafter counsel made several requests for an adjournment all for the same reason, namely that Dr. Russell could not be available on December 19th. It is apparent that the IAD did not think that was such an exceptional circumstance as to require an adjournment, having regarded to the fact that Dr. Russell's written opinion would be available. Factor (b) was therefore not important: the request for an adjournment was made in a timely fashion and was dismissed on the merits, the IAD feeling that the written report would suffice. Relevant to these considerations is the fact that the Applicant and his counsel knew since September that it was the intention of the IAD to go ahead and they therefore had ample time to prepare. Therefore factors (c), (d), and (e) were irrelevant. Factor (f) was also irrelevant: there was no question as to the knowledge and experience of counsel for the Applicant nor that she was in any way unavailable to represent her client at the time in question. Factors (g) and (i) were obviously considered by the IAD, having regard to the seven years that the Applicant had been under order of deportation subject to stays whose conditions he had not respected. Factor (h) is irrelevant on its terms. Factor (j) was obviously taken into account by the IAD in considering that the issues which the psychologist could usefully address could be adequately treated by the written report.

[9] I believe it was open to the trier of fact to reach that conclusion, considering the nature of the Tribunal and the fact that it often receives evidence in writing. Counsel for the Applicant suggests that a quite different result might have flown from having the psychologist testifying in

person. The fundamental issue was whether the Applicant's many breaches of the terms of his stay, involving criminal and quasi criminal acts, could simply be treated as a "relapse". It was certainly open to the IAD to come to an independent conclusion on that and it was not bound to follow the pronouncements of the psychologist whether written or oral. I am not satisfied that the Applicant suffered any injustice from not having the oral evidence of Dr. Russell placed before the IAD: see *Tripathi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1232.

[10] The Court owes no deference to the Tribunal in respect of questions of procedural fairness: *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539. However, I am satisfied that the hearing by the IAD was procedurally fair even though an adjournment was refused. It must be kept in mind that this was not a case where, by reason of refusal of an adjournment, the Applicant had no counsel. There are numerous cases where a refusal to adjourn because counsel is not available have been held to be procedurally unfair because the presence of counsel adds a quality to the whole presentation which may not be available otherwise. In the present case the issue had to do with one witness, a witness who had provided his opinion in writing, and which the Panel clearly considered seriously. I might add also that the Panel had before it Dr. Russell's *curriculum vitae* which disclosed that he was not an authority on recidivism of criminals but rather on family relations. This would be a factor to be considered if the matter were sent back for re-hearing and which suggests to me that there would be no point in sending it back.

[11] The remainder of the Applicant's objections to the decision really amount to a complaint that the IAD did not come to the right conclusion on the evidence or that it did not assign the proper

weight with respect to the interests of the Applicant's Canadian children. While it had been previously thought that the standard of review for decisions by the IAD in reviewing a removal order on humanitarian and compassionate grounds was that of patent unreasonability, a majority in the Federal Court of Appeal in *Khosa v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 139 has held that the standard is reasonability. That decision is under appeal. I am prepared to assume that the standard of review is reasonability but I find nothing unreasonable in the conclusions of the IAD in this case on the issues of substance.

[12] The main issue is whether the IAD had proper regard to the totality of evidence in regard to the relevant factors. Those factors were set out in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 which have been approved by the Supreme Court of Canada as relevant factors: see *Chieu*, *supra*, at para. 40. These factors were listed by Justice Nadon in *Burgess v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1302 at para. 16 as follows:

> (1) the seriousness of the offence leading to the deportation order;
> (2) the possibility of rehabilitation;
> (3) the length of time spent in Canada and the degree to which the appellant is established here;
> (4) the family in Canada and the dislocation to the family that deportation would cause;
> (5) the support available to the appellant, not only within the family but also within the community;
> (6) the degree of hardship that would be caused to the appellant by his return to his country of nationality.

A careful and fair reading of the decision of the IAD will disclose that it considered all of those factors in a meaningful way. The Applicant complains that the IAD did not focus on the seriousness of the offence leading to the deportation order. In the opening sentence of the reasons for decision the IAD relates that the Applicant was ordered deported on December 1, 2000 on the grounds that he had been convicted of "an offence for which a term of imprisonment of six months was imposed or ten years or more may have been imposed… ." It is implicit in the Applicant's criticism that the Board should have focused on the first part of the description of the offence and not the last part: that is it is should have measured the seriousness of the offence by the sentence the Applicant received and not by the sentence he might have received. The IAD obviously was aware of the sentence actually received. But it was at liberty to consider an offence of trafficking a "serious offence", regardless of the sentence imposed. This was only one of the factors the Panel had to take into account. Given the history of the matter, viewed from seven years from the original order of deportation, the Panel was legitimately more concerned with the Applicant's subsequent failures to observe the conditions imposed on his remaining in Canada. In considering, for example, factor (2) "the possibility of rehabilitation" the IAD could properly look at his previous 40 convictions and six convictions subsequent to the 2004 stay to see whether this man's record showed a pattern of criminality that was likely to change.

[13] The Applicant focuses much of his attack on the Panel's decision in the charge that the Panel did not have adequate regard for the best interests of the Applicant's children. But the IAD discusses those interests seriously and at length. It stated that it was of the opinion

> that the best interests of the Appellant's children would be to have him active in their lives given their ages and the role the Appellant

> has played to date in their lives. The Panel has given long and careful consideration of these facts.

But it goes on to say that the appellant ultimately had only himself to blame for his actions when he committed further crimes knowing full well the possible consequences and that it had a responsibility to consider the health and safety of the wider community and the fact that the appellant might well offend again given his behaviour to date. It would certainly have been open to the IAD to conclude that the person who had the least regard for the best interests of his children was the Applicant himself: after having been ordered deported from Canada, he had two children in Canada. By committing further offences, he withdrew himself from the company and support of those children. On one occasion he had custody of his daughter Kanisha which he lost when he went to jail in August, 2005.

[14] It was the responsibility of the IAD to weigh the various factors and this it has clearly done. The best interests of children are not necessarily determinative: *Legault v. Canada (Minister of Citizenship and Immigration)* (2002), 212 D.L.R. (4th) 139 at para. 12 (F.C.A.). I am unable to conclude that its decision was unreasonable.

Disposition

[15] I will therefore dismiss the application for judicial review. Counsel requested an opportunity to see the reasons before making submissions on certified questions. They will have fifteen days from the date of these reasons to make any such submissions which can be made in writing (by e-

mail if preferred) to the Court. A copy of submissions should be sent to opposing counsel who will have seven days from their receipt to make submissions to the Court.

"Barry L. Strayer"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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