Date: 20090908

Docket: IMM-947-09

Citation: 2009 FC 853

Ottawa, Ontario, September 8, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CHOLARAM KAWALL TOTARAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Kawall Totaram was issued a deportation order dated September 9, 2007, pursuant to subsection 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C . 2001 c. 27, as a result of his conviction of having caused bodily harm while operating a motor vehicle while impaired. He was also issued an exclusion order on the same day after a finding that he had made a misrepresentation on an application to sponsor his

spouse and as such he was found to be a person described in subsection 40(1)(a) of the Act.

[2] The Applicant appealed both orders to the Immigration Appeal Division. He did not challenge the legal validity of either order but asked the Panel to exercise its discretion and stay them. The Panel denied the appeals. The Applicant seeks judicial review of that decision.

Background

[3] Mr. Kawall Totaram is a citizen of Guyana. He was born on December 22, 1980. He became a permanent resident of Canada on November 15, 1996, when at 15 he came to Canada as a dependent child of his father. Since coming to Canada, Mr. Kawall Totaram has worked steadily and developed a life here but he never obtained Canadian citizenship. He currently lives with his mentally handicapped sister who depends, in part, on him for assistance and meeting her daily needs.

[4] On or about October 26, 2003, Mr. Kawall Totaram was driving a motor vehicle with his brother-in-law as a passenger. He was impaired and involved in an accident with a police cruiser, resulting in severe injury and permanent brain damage to his brother-in-law and minor injury to the police officer. Mr. Kawall Totaram was charged with impaired driving causing bodily harm under s. 255(2) of the *Criminal Code of Canada*. He was released on a promise to appear, and later plead guilty to the charge. On

September 13, 2006, he was sentenced to 10 months imprisonment and 12 months probation.

[5] Prior to Mr. Kawall Totaram's conviction, he met his spouse, a Guyanese citizen. On April 23, 2006, they were married. On September 7, 2006, a week before his conviction, Mr. Kawall Totaram applied to sponsor his wife, and submitted the necessary application. Section E, Question 16, of that application asks: 'Have you been charged with an offence under an *Act of Parliament* punishable by a maximum term of imprisonment of at least 10 years?' Section 255(2) of the *Criminal Code* with which he had been charged is an offence punishable by a maximum term of imprisonment of at least 10 years. The answer to this question on Mr. Kawall Totaram's form was incorrectly marked 'No'.

[6] On January 23, 2007, two inadmissibility reports were prepared pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, and the reports were referred to the Immigration Division for an inadmissibility hearing. At the hearing Mr. Kawall Totaram conceded that he was indeed convicted of the charge in question, and that a misrepresentation was made on his application to sponsor his spouse.

[7] Consequently, the Immigration Division found that there were reasonable grounds to believe that Mr. Kawall Totaram was inadmissible on the grounds of serious criminality according to subsection 36(1) of the Act, and a deportation order was issued. The Immigration Division also found that Mr. Kawall Totaram was a person described

under subsection 40(1)(a), was thus inadmissible for misrepresentation, and issued an exclusion order.

[8] Pursuant to subsection 63(3) of the Act, Mr. Kawall Totaram exercised his statutory right to appeal both orders to the Immigration Appeal Division. A hearing was held before a Panel of the IAD on January 7, 2009. On February 5, 2009, the Panel rendered a negative decision rejecting Mr. Kawall Totaram's appeal.

[9] The Panel stated that it had "carefully considered all the evidence before it, including the oral testimony of the appellant and his aunt Tooliah Latchman, the documentary evidence and the Appeal Record, and the oral submissions of both counsels." The Panel noted that it was guided in its exercise of discretion by the non-exhaustive factors outlined in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL) and *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.

[10] The Panel found the criminal conduct for which Mr. Kawall Totaram was ordered deported to be very serious, but also noted that he had plead guilty, and had respected the terms of his release on a promise to appear pending trial, as well as the terms of his probation. The Panel noted that Mr. Kawall Totaram had continued to work while serving his sentence. The Panel adopted the submission of the Minister's counsel that it "could reasonably have considered him as a candidate for a stay of the removal order

were it not for the misrepresentation." The Panel then turned to the issue of misrepresentation which was the focus of its decision.

[11] The Panel did not believe Mr. Kawall Totaram's testimony that the wife of an acquaintance from work had filled out the application for him. Further, it did not believe his testimony that he had not read the form before he submitted it. His evidence was that not having read the form he was not aware of the need to answer a question regarding his pending criminal charge. The analysis and reasoning of the Panel on this critical point is brief enough that it is worth reproducing in full.

> At the hearing, the appellant explained that he asked the wife of a friend and co-worker to fill out the application as she had successfully filled out others. She returned the application to the appellant and he mailed it without reading it over. The panel does not believe the appellant. The panel notes that the application is very simple to understand and does not require complicated essay-type answers. The appellant, who missed graduating from grade 12 in Ontario by one credit, certainly had the educational background to answer questions in an application basically involving dates, addresses, and yes or no answers. The panel cannot understand what benefit the appellant obtained by having the application filled out by someone who could not even spell Trinidad properly. Furthermore, even if the appellant did not personally fill out the application, the panel finds it implausible that he would have signed and mailed a document, so important for the future of a newlywed couple, without first reading it over, including the undertaking at section G. The person who allegedly filled out the application was not called as a witness by the appellant. The panel finds the appellant's lame excuse shows a lack of remorse and the fact that he made a serious misrepresentation while awaiting trial shows that he is a poor candidate for a stay of the removal order and that the possibility of his rehabilitation is low.
>
> (footnotes omitted)

[12] Given the nature of the misrepresentation, and the fact that Mr. Kawall Totaram would have been ineligible to sponsor his spouse had his criminal charge not been misrepresented, the Panel agreed with his counsel that the misrepresentation was very serious.

[13] The Panel noted the excellent work record of Mr. Kawall Totaram in Canada, as well as the negative economic impact a deportation to Guyana would have on him. The Panel also noted that Mr. Kawall Totaram lives in a basement apartment at his aunt's home with his sister who is mentally challenged and who relies on him to assist with her daily needs. It was her spouse who had been injured in the accident and he left her shortly thereafter. However, the Panel noted that Mr. Kawall Totaram's sister would have some support from her aunt and cousins were Mr. Kawall Totaram to be deported. The Panel also noted that Mr. Kawall Totaram is bereft of close relatives in Guyana, but that he could "cleve" (*sic*) to his spouse and her family for support, even though their relationship had faded considerably during the three years he has been largely absent from her.

Issues

[14] The Applicant raises five alleged issues:

1. The Panel erred in engaging in speculation as its only basis for its adverse credibility conclusion;

2. The Panel erred in law failing to provide reasons for its rehabilitation conclusion;

3. The Panel erred in law in placing undue emphasis on the circumstances leading to the removal order;

4. The Panel erred in law in ignoring relevant factors identified in *Chieu* and *Ribic*, including length of time in Canada and the impact of such on the Applicant, and difficulties with return to country of origin; and

5. The Panel erred in law in failing to apply the correct legal test to an assessment of whether humanitarian factors warranted the grant of special relief, the *Chirwa* factors.

Analysis

[15] In *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, the Supreme Court of Canada noted that considerable deference was owed to the Panel, given its broad discretionary mandate on these appeals, and that the reviewing court's function was not to reweigh the evidence. More specifically, the Panel's assessments of credibility should only be overturned if they are based on irrelevant considerations or ignored important evidence given the fact that the Panel has had the benefit of hearing from the Applicant directly.

[16] In spite of counsel's able and often spirited submissions on these issues, she has failed to convince me that any are significant, save for the first – whether the Panel erred in making its adverse credibility finding concerning the Applicant. In light of my finding

that the decision must be set aside on the basis of the error made on the credibility finding, it is not necessary to detail why the Applicant's submissions on the other issues fail. It is sufficient to state that I am of the view that on a reading of the decision as a whole the Panel considered all relevant facts and applied the proper test. The objections of the Applicant have more to do with the weighing of the factors and I find that the Panel did consider all relevant facts.

[17] The Applicant submits that the Panel's determination on credibility was based on speculation and was not an inference from established facts. I am cognisant of the direction of the Supreme Court in *Khosa* that the Panel's assessment of credibility should only be overturned if it is based on irrelevant considerations or if the Panel ignored important evidence given the fact that it had the benefit of hearing from the Applicant directly. In addition to those two circumstances, I am of the view that a credibility finding cannot stand where it does not logically follow from the reasons asserted as supporting it. I have concluded that the Panel's credibility determination does not follow from the reasons espoused by the Panel and that the decision as a whole must therefore be set aside.

[18] The Panel found the Applicant not to be credible only with respect to two aspects of his testimony. It did not believe the Applicant when he testified that the form was completed by the wife of a co-worker and that he signed and mailed it without reading it.

[19] The Panel found no other aspect of the Applicant's testimony not to be credible. In fact, his testimony in all other respects appears to have been fully accepted by the Panel. Much of it was corroborated by his aunt, the only other witness at the hearing. The evidence of a witness is presumed to be truthful, unless there exists a valid reason to doubt it: *Maldonado v, Canada (Minister of Employment and Immigration)* (1979), 31 N.R. 34 (F.C.A.). One must ask what reasons the Panel offers to doubt the Applicant's evidence that the form was prepared by someone other than himself.

[20] The Panel first notes that the form is "simple to understand" and does not require "complicated essay-type answers". Does it logically follow that all persons with at least a Grade 12 education, such as the Applicant, personally fill out all forms that are simple to understand and that basically involve dates, addresses, and yes and no answers? I think not; otherwise, as Applicant's counsel noted, many immigration consultants, and some lawyers would be without work. In my view, it does not logically follow that because the Applicant could have filled out the form he did fill out the form. All that follows from the fact that he could have filled out the form is that he may have filled it out.

[21] The only other reason the Panel offers to doubt his testimony that he did not fill out the form was that "the panel cannot understand what benefit the appellant obtained by having the application filled out by someone who could not even spell Trinidad properly." The Panel's reference is to the fact that Trinidad was spelled "Trinedad" in the submitted application. One might as easily ask what benefit any literate applicant

obtains from having “simple” forms filled out by a consultant or lawyer. The fact that there may be no benefit to having another fill out a form does not entail that it did not happen. Again, one might question the benefit literate immigrants receive from having these simple forms filled out by consultants and lawyers. Is it required that there in fact be a benefit?

[22] However, the Applicant in this case did provide a response to the Panel’s question concerning a benefit. In fact, he provided the same response twice. The first time was in the following exchange is found in the transcript of the cross-examination by Minister’s counsel:

> Q: Why would you ask a friend of your wife’s – friend’s wife rather (inaudible)?
>
> A: My friend told me – when I told my friend I got married and I am sponsoring my wife and everything like that then he told me his wife did a couple of people paperwork and everything went through okay, everything went through fine. And I couldn’t go to my aunt because my aunt was on vacation at the same time so I went to her. She helped me with it and I gave her like my birth certificate, my passport, everything, all my identification and everything. And same as my wife, all the information I got I gave it to her and she never asked nothing.
>
> I never read the paper over or anything like that.
>
> (emphasis added)

The second time was in response to a question from the Panel member to the Applicant that was asked during the course of the submissions to the Panel by the Respondent’s counsel.

> Q: So what was so complicated about these documents that she had to fill them in? It’s so straightforward.

> Especially the application to sponsor and undertake, it's just filling in your name, your birth date, your phone numbers.
>
> A: Yeah. She – there was nothing difficult about it but at that time she told – Danny told me she would fill quite a few people papers and it went through no problem, the papers that filled out was successful.
>
> Q: Because you can see, I don't know am I mistaken, she even spelled Trinidad wrong at question 11, is that how you spell Trinidad?
>
> BY THE MINISTER'S COUNSEL
>
> - I'll also point out there is another spelling error (inaudible) the word technician on page 33.
>
> BY THE PRESIDING MEMBER (to the Minister's counsel)
>
> Q: So page 27 Trinidad, and what page?
>
> A: Page 33. The position of the technician or should it be (inaudible).
>
> Q: Oh yeah.

[23] It is unfortunate that the Minister's counsel interjected before the Panel found out whether the Applicant knew how to spell Trinidad. If he knows the proper spelling of the word then that would have supported his testimony that he neither drafted nor reviewed the document before he signed it. The Panel did not request a response to its question after counsel's interruption. It should be pointed out that the misspelling of the country in which the Applicant's application for permanent residency was processed was not material to the form under consideration.

[24] The Applicant's aunt testified. Witnesses had been excluded. The aunt corroborated the Applicant's evidence that she was absent on vacation when the application was prepared and sent in by her nephew. She also confirmed that the document had been prepared by the wife of a friend of the Applicant. No one asked how she knew that fact. Nonetheless, the Panel made no adverse credibility findings regarding her testimony and she did corroborate the Applicant's evidence that it was prepared by someone other than himself.

[25] Most significantly, the evidence reproduced in paragraph 22 does indicate the "benefit" the Applicant thought he was obtaining by having his friend's wife fill out the form. She had done so for others and "and everything went through okay". The Panel fails to give any consideration to that perceived benefit – having someone with a track record of success fill out the form; arguably the same perceived benefit clients expect when they go to consultants and lawyers to have these forms prepared.

[26] The Panel's observation that there is no perceived benefit from having someone else fill out the form may be of relevance if the Applicant had sought out this person's help. In fact, his evidence was that it was his workmate who volunteered his wife's services. He did not seek her out to do the job for him. One presumes that if her services had not been volunteered by his friend the Applicant would either have filled the form out himself or have waited until his aunt returned from vacation.

[27] The Panel also rejected the Applicant's evidence that he did not read the form as prepared by this friend's wife before signing and mailing it. The Panel states that it doubts this testimony because it finds it to be "implausible that he would have signed and mailed a document, so important for the future of a newlywed couple, without first reading it over." As was observed by counsel for the Applicant, there is a legion of cases litigated in courts where one party attempts to resile from a contractual commitment on the basis that he or she signed but did not read the document. Many of the documents in these cases are equally as important to the litigant as the spousal sponsorship application form was to Mr. Kawall Totaram. See as an example *Charlton v. Canada Post Corp.,* [2009] O.J. No. 233 (S.C.J.) (QL), where the plaintiff, a vice-president of Canada Post, presumably having more experience than this Applicant with legal documents, sought relief from a Supplementary Executive Retirement Plan agreement that he had signed. His defence was that he had signed it but not read it. In my view, it is not impossible nor even improbable that an applicant who has given the form-preparer what he believes to be all of the relevant documents and who he understands has a track-record of success, would sign the form without reading it. It is most certainly not implausible when the person is otherwise found to be an honest and credible witness.

[28] In this case the basis for the Panel's determination that it doubts the Applicant's testimony with respect to the preparation and signing of the form simply does not follow from the premise the Panel states. Without more, for example, a finding that the Applicant generally lacked credibility based on conflicts between the Applicant's testimony and the written documents or other witnesses, or based on his overall

demeanour, the manner in which he gave evidence, et cetera, the credibility finding cannot stand. In this instance there was nothing more to support the Panel's determination and for this reason the decision must be set aside.

[29] Neither party proposed any question for certification.

[30] It was agreed that the proper Respondent is the Minister of Citizenship and Immigration and the parties consented to an Order making that amendment to the style of cause.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The name of the Respondent in the style of cause is changed to the Minister of Citizenship and Immigration;
2. The decision of the Immigration Appeal Division of the Immigration and Refugee Board dated February 5, 2009 is set aside and referred to another Panel for determination; and
3. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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