Federal Court  Cour fédérale

Date: 20100128

Docket: IMM-2024-09

Citation: 2010 FC 93

Ottawa, Ontario, January 28, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

NGHIA TRONG NGUYEN-TRAN
(Also known as: Tran Trong Nghi NGUYEN)

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Mr. Nghia Trong Nguyen-Tran, was born in Vietnam. He came to Canada in 1993 as a dependent child and has, since his arrival, gathered an extensive criminal record. He was convicted, in 2002, of two counts of trafficking in narcotics. This triggered the Immigration Division (ID) of the Immigration and Refugee Board to issue a Removal Order on the grounds of

"serious criminality", as described in s. 36(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (*IRPA*). The Applicant appealed his removal to a panel of the Immigration Appeal Division of the Immigration and Refugee Board (the IAD). The basis of his appeal was s. 67(1)(c) of *IRPA* which provides that the IAD may allow an appeal of a Removal Order where, taking into account the best interests of a child directly affected by his removal from Canada, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of his case.

[2] In its decision, dated April 7, 2009, the IAD determined that: (a) the Removal Order was valid in law (a matter not disputed by the Applicant); and (b) the Applicant had not demonstrated sufficient humanitarian and compassionate considerations to warrant the granting of discretionary relief. The IAD dismissed the appeal. The Applicant seeks judicial review of the decision, alleging that the IAD made two errors:

1. The IAD erred by importing an aggravating factor (membership in a criminal gang) from s. 121 of *IRPA* into its analysis; and

2. The IAD erred in relying on a determination that the Applicant's presence in Canada posed a secondary danger or risk to third parties (primarily, his mother and step-sister).

[3] For the reasons that follow, I have concluded that there are no grounds to intervene in the IAD decision; this application will be dismissed.

II. Nature and scope of the IAD's discretion

[4] When reviewing the decision of the IAD in this matter, it is important to understand the nature and scope of the IAD's discretion in granting relief under s. 67(1)(c).

[5] This specific matter began with the Applicant's conviction for trafficking cocaine that attracts a maximum term of life imprisonment. This offence falls within the ambit of s. 36 of *IRPA*, where serious criminality applies where the conviction is for an offence punishable by a maximum term of imprisonment of at least ten years. There is no dispute that the Applicant became inadmissible to Canada pursuant to s. 36. The ID issued a Removal Order against the Applicant. The Applicant appealed the Removal Order to the IAD pursuant to s. 63(3) of *IRPA*:

63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	63. (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.

[6] In this case, the Applicant did not question the validity of the Removal Order; rather, he asked the IAD to exercise its discretionary authority under s. 67(1)(c):

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of . . .	67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé: . . .
(c) other than in the case of an appeal by the Minister, taking into account the best interests of	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant

a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[7] The Supreme Court's guidance in the recent case of *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R., 339 (*Khosa*), is particularly helpful. That case dealt with a very similar set of facts: a young man had been determined to be inadmissible to Canada for serious criminality, and the IAD had dismissed the appeal brought pursuant to s. 67(1)(c). The task of the IAD was described by Justice Binnie in *Khosa*, above, at paragraph 57 as follows:

> In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(c) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(c) requires the IAD to be "satisfied that, at the time that the appeal is disposed of ... sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(c) calls for a fact dependent and policy driven assessment by the IAD itself. [Emphasis added.]

[8] As determined by *Khosa*, the standard of review of the IAD's decision is reasonableness. Justice Binnie explained this standard as follows (*Khosa*, above, at para. 59):

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome.

> However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[9] Within its broad mandate, it is well-settled that the IAD, when considering whether special relief is warranted, should be guided by the factors adopted in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4. These factors (the *Ribic* factors) were endorsed by the Supreme Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at paragraphs 40, 41 and 90, and, more recently, in *Khosa*, above, at paragraphs 65 and 66. The *Ribic* factors are:

1. the seriousness of the offence leading to the removal order;

2. the possibility of rehabilitation;

3. the length of time spent, and the degree to which the individual facing removal is established, in Canada;

4. the family and community support available to the individual facing removal;

5. the family in Canada and the dislocation to the family that removal would cause; and

6. the degree of hardship that would be caused to the individual facing removal to his country of nationality.

[10] These factors are not exhaustive and the weight to be attributed to them will vary (see *Khosa*, above, at para. 65). Nor should the *Ribic* factors be applied in a formulaic manner. Obviously, the facts of each case will lead to different considerations and different outcomes.

III. The decision under review

[11] The IAD, in a lengthy and detailed decision, examined the evidence before it and exercised its discretion in accordance with the analysis of the *Ribic* factors. As I understand it, the Applicant does not assert that the IAD ignored evidence or made erroneous findings of fact. Of particular interest in this application were the following factual findings that, in the view of the IAD, weighed against granting the discretionary relief:

- The Applicant had two convictions as a youth offender and eight further offences as an adult;

- His most serious offence was for drug trafficking, a crime considered to be very serious by both Parliament and the United Nations;

- The Applicant has had problems complying with the terms and conditions of his sentencing and bail;

- The Applicant remains a member, or at the very least is associated with members, of a criminal organization operating in Calgary and involved in a deadly feud with another criminal organization;

- The presence of the Applicant around his step-sister has endangered her life. The Applicant's step-sister was removed from his home by the Alberta Child and Family Services (under court order) to protect her from being collaterally hurt due to the Applicant's gang relations; and

- The on-going gang violence (including two attempts on the Applicant's life) creates a real danger to the Applicant's step-sister and to other innocent people.

[12] The IAD also considered and weighed the evidence that operated in the Applicant's favour. His relationship with his disabled mother and step-sister, his expressions of remorse, his guilty pleas, the potential difficulty in re-establishing himself in Vietnam after 13 years in Canada, and other facts were all taken into account.

[13] The IAD, in conducting its analysis, provided careful explanations of why it preferred the evidence of certain witnesses over others, of why it found the testimony of the Applicant and certain witnesses to be lacking in credibility, and of why certain factors were given more weight on the facts of this case.

[14] Of particular relevance to this judicial review, the IAD considered the Applicant's gang association to be an "aggravating factor" in the seriousness of his crimes. Stated in different words, the IAD concluded that a crime committed in the context of gang violence or membership should be weighed more heavily against the Applicant, compared to a crime that was not. The IAD explained this consideration as follows:

> As part of the evaluation of the effect of the appellant's ongoing association with the FK, I note that another section of the [*IRPA*], section 121, specifically states that when considering penalties under the [*IRPA*] the fact that an offence had been committed in association with a criminal organization is an aggravating factor. I acknowledge that section 121 refers to aggravating factors for offences of human smuggling and trafficking. Therefore this is not a required consideration for me. But the fact that the [*IRPA*] notes that association with a criminal organization is an aggravating factor when committing a crime is indicative of the intention of Parliament when considering such issues. I also take note of the comments of the Supreme Court of Canada in the case of *Medovarski* that "the words of this statute, like any other, must be interpreted as having regard to the object, text and context of the provisions, considered together". Therefore, having regard to the [*IRPA*] as a whole, I import the objective of section 121 to a consideration of the seriousness of the appellant's criminal conviction. The fact that he was convicted of a crime of trafficking, in the presence of an identified member of the FK, and is admittedly having an ongoing association with members of the FK is an aggravating factor; both when considering the seriousness of the appellant's criminal acts and his efforts at rehabilitation. [Emphasis added].

[15] In weighing the *Ribic* factors, the IAD referred to *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 at paragraph 10, where the Supreme Court prioritized security interests. On this basis, the IAD concluded that "[T]he 'non-security' related *Ribic* factors must . . . be disproportionate to outweigh evidence which indicates an

ongoing security risk". In this case, the IAD determined that the Applicant's ongoing association with members of a criminal gang was a serious and important factor:

> It aggravates the seriousness of the appellant's criminal convictions, it remains a significant barrier to the appellant's rehabilitation despite the steps and efforts he has made in that regard, and it presents an ongoing danger to innocent people through their association with the appellant and by his ongoing presence in Canada.

[16] The IAD balanced the *Ribic* factors and determined that the factors in favour of the Applicant were "not sufficiently strong to outweigh the security interests which require the appellant's removal from Canada". The IAD also concluded that there were insufficient humanitarian and compassionate considerations, including the best interests of the child, to warrant relief. The IAD declined to exercise its discretion to grant the special relief under s. 67(1)(c) of *IRPA*.

IV. Analysis

[17] The Applicant objects to two different considerations weighed by the IAD. I will deal with each.

A. *Did the IAD err by "importing" s. 121 of IRPA into its analysis?*

[18] As set out in the citation from the decision above, the IAD decided to "import the objective of section 121 to a consideration of the seriousness of the appellant's criminal conviction". The Applicant submits that the IAD erred by incorporating "aggravating factor", as described in s. 121 of *IRPA*, into its s. 67(1)(c) analysis. The Applicant argues that there is no statutory or common law

authority for the IAD to import factors for unrelated offences (human trafficking and smuggling) into its analysis.

[19] Section 121 of *IRPA* is titled "Aggravating factors". Of particular relevance to this matter is s. 121(b) which states as follows:

121. (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether:	121. (1) Le tribunal tient compte, dans l'infliction de la peine visée aux paragraphes 117(2) et (3) et à l'article 120, des facteurs suivants :
. . .	. . .
(b) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization	b) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou en association avec elle;

[20] There is obviously no direct connection between s. 121 and the task before the IAD under s. 67(1)(c). The Applicant correctly points out that s. 121 establishes aggravating factors for the court (as opposed to the IAD) to assess in the sentencing of human trafficking and smuggling offences under s. 117 of *IRPA* (see *R. v. Ng*, 2008 BCCA 535, 263 B.C.A.C. 300 at paras. 13-17). There is no mention in s. 121 of the IAD, or of humanitarian and compassionate considerations for special relief of valid removal orders. Thus, had the IAD blindly or automatically imported the provisions of s. 121 into its s. 67(1)(c) analysis, it would have erred in law.

[21] While I acknowledge that the IAD's reference to s. 121 is confusing and probably unnecessary, I do not agree that there is any reviewable error.

[22] As seen in the passage above, the IAD did not outright import s. 121 in its entirety. Indeed, the IAD noted it had no jurisdiction to do so. Rather, what was imported was the objective of s. 121 to place more emphasis on the seriousness of a crime when committed in the context of involvement with a criminal organization.

[23] The IAD supported its analysis of the seriousness of organized criminality in the context of criminal convictions by reference only to s. 121 of *IRPA*. I observe that the IAD could have referred to other provisions of *IRPA* to support its interpretation of the intent of Parliament. *IRPA* contains many explicit provisions where organized criminality is considered as a distinct ground for action – over and above criminality itself (see, for example, ss. 37, 64, 123). From this, one can reasonably conclude that Parliament intended organized criminality to be a separate and potentially more serious form of crime.

[24] Thus, while the IAD's stated justification for treating the Applicant's gang association as an "aggravating factor" may be somewhat confusing, its doing so was not unreasonable. It was reasonable for the IAD to take into account the Applicant's previous and continuing gang associations. The IAD was within its broad discretionary mandate to consider that gang association (even if not actual membership) heightened or aggravated the seriousness of the Applicant's criminal convictions.

B. *Did the IAD err by considering the "secondary" danger posed by the Applicant's presence in Canada?*

[25] The IAD found that the Applicant himself was not a danger to the public. However, the IAD took into consideration that, because of his association with criminal gangs and events that had taken place, the Applicant could be targeted by criminals. This could create a secondary danger to the public. In addition, the IAD considered the possible adverse impacts and danger to the Applicant's step-sister. In the IAD's opinion, these factors weighed against the Applicant.

[26] In the Applicant's submission, the *Ribic* factors require that the IAD limit itself to the danger posed by the Applicant himself and not to the dangers third parties caused by the Applicant's presence.. The question of danger or risk is one that the Applicant himself causes to the public, or the risk of him re-offending (see *Sherlock Albertson Hardware v. Canada (Minister of Citizenship and Immigration*), 2009 FC 338, 79 Imm. L.R. (3d) 203, at para. 26). This test of public danger is consistent with the test for a "danger opinion" under s. 115 of the *IRPA* (see *Cruz v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1341, 78 Imm. L.R. (3d) 68).

[27] I do not agree with the Applicant.

[28] The IAD's findings of secondary danger and risk relate to factors wholly within the discretion of the IAD. These are the best interests of the child (see s. 67(1)(c)), and the effect on family members in Canada if the Applicant is removed (see *Ribic* factor #5). Excerpts of the IAD decision reflect how the IAD applied the evidence to the factors.

> Two attempts have been made on the appellant's life, one in the presence of Dawn [his girlfriend]. All of this activity is much

> reported in the media in Calgary. In addition, because of the secondary danger to his sister due to the risk that an attempt on the appellant's life will be made while he is at home, his 9 year old sister has been apprehended from her mother's care pursuant to a court order. These are unusual circumstances for all but the rarest of people;.
>
> […] [U]nknown assailants attempted to shoot the appellant as he was leaving Ms. Ngo's family home. The appellant's presence at the home put the witness and her family at risk of physical injury. Whether or not Ms. Ngo or the appellant are involved in any gang activities becomes irrelevant when considering this factor. The fact remains that the people who threaten the appellant were prepared to attack him while he was at Dawn's family home, thereby secondarily threatening Ms. Ngo and her family. Therefore, despite the evidence demonstrating a significant relationship between the appellant and Dawn Ngo, I conclude that she would not be overwhelmingly adversely affected by the removal of the appellant from Canada. That is not a factor in his favour;
>
> […] [T]he evidence regarding the best interests of this child [his step-sister] is not completely in the appellant's favour. Due to his physical presence in the home, and the risk that someone will attempt to take the appellant's life while he is at home, this child has been apprehended from the care of her mother and brother. According to the information before me she has not been living at home with her mother since the appellant returned home in November 2008;
>
> The benefit to the mother and sister in having the appellant remain in Canada must be weighed against the danger to the public, the seriousness of his crimes and the degree of his rehabilitation. Although the appellant, himself, is not a danger to the public as there is no evidence that he has continued his serious criminal activities which are dangerous to the public, his mere presence in Canada creates a secondary danger. There is risk that another attempt will be made on his life, while in public, creating a risk to other innocent people [Emphasis added.]

[29] Thus, the determination of secondary danger forms the context – a piece of the circumstantial puzzle – that is directly relevant to whether the IAD's discretion should be exercised. There is no reviewable error.

V. Conclusion

[30] As described by Justice Binnie in *Khosa*, above, s. 67(1)(c) calls for a fact dependent and policy driven assessment by the IAD itself. In this case, the IAD exercised its mandate to determine what constituted "humanitarian and compassionate considerations", and the "sufficiency" of such considerations. In particular, the IAD determined that two relevant factors were: (a) the increased seriousness of his criminal conviction due to his gang associations; and (b) secondary danger to the public and his family members if the Applicant remains in Canada. On the facts of this case (acknowledged by the IAD to be "unusual circumstances for all but the rarest of cases"), both of these factors are relevant.

[31] There is no reason for the Court to intervene in this case. The decision falls within the range of outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47).

[32] After some discussion, both parties acknowledged that there is likely no question of general importance to be certified. I agree that this application does not raise a question that warrants certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2024-09
STYLE OF CAUSE:	NGIA TRONG **NGUYEN-TRAN** v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	January 20, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	SNIDER J.
DATED:	January 28, 2010

APPEARANCES:

Mr. Raj Sharma	FOR THE APPLICANT
Mr. Brad Hardstaff	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sharma Harsanyi Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT