Federal Court  Cour fédérale

Date: 20110203

Docket: IMM-1966-10

Citation: 2011 FC 124

Ottawa, Ontario, February 3, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

DESMOND ANTHONY ALLEN

Respondent

REASONS FOR ORDER AND ORDER

[1] The Minister of Public Safety and Emergency Preparedness (the "Applicant") seeks judicial review of a decision made by the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board (the "Board") on March 19, 2010. In its decision the IAD stayed a removal order against Mr. Desmond Anthony Allen (the "Respondent"), pursuant to paragraph 67(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") for a three year period, upon certain conditions.

[2] The Respondent is a citizen of Jamaica. He came to Canada in 1990 and obtained permanent resident status in 1992. He married and fathered three children prior to the termination of the marriage by divorce. He acted in the role of step-father to three children of his former wife. He fathered another child in an extra-marital relationship. He had a number of girlfriends.

[3] The Respondent was convicted of sexual assault and sexual interference on January 4, 2007. The victim of these crimes was a teen-aged daughter of his then girlfriend. The Respondent was sentenced to time served, three months imprisonment, together with three years probation for the offence of sexual assault. He was sentenced to time served plus one day, and three years probation for the offence of sexual interference, to be served concurrently. The maximum punishment for sexual assault, pursuant to section 271 of the *Criminal Code*, R.S.C. 1985, c. C-46, is a term of imprisonment not exceeding ten years.

[4] The Respondent was convicted on eight occasions between 1994 and 2007, of a number of criminal offences, including the two sexual offences mentioned above.

[5] On March 19, 2007, a report was issued against the Respondent pursuant to subsection 44(1) of the Act, alleging that the Respondent was inadmissibile on grounds of serious criminality. The Immigration Division of the Board found the Respondent to be inadmissible in Canada by virtue of paragraph 36(1)(a) of the Act, that is on the grounds of serious criminality, on August 24, 2007. A removal order was issued by the Immigration Division on October 30, 2007.

[6] The Respondent appealed the removal order to the IAD pursuant to subsection 63(3) of the Act. Conceding the legal validity of the removal order he sought discretionary relief pursuant to paragraph 67(1)(c) of the Act which provides as follows:

Appeal allowed	Fondement de l'appel
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 a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, 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.

[7] The IAD heard evidence from the Respondent. As well, it was provided with a record of his criminal convictions, a copy of the transcript of the hearing before the Immigration Division on August 24, 2007 and a copy of a report prepared by Dr. Rita C. Bradley a clinical psychologist. Dr. Bradley's associate, Dr. Harry Bradley, had counseled the Respondent, who was referred for such counseling by his Probation Officer. This report was tendered as an expert report.

[8] The IAD specifically addressed the factors set out in the decision of *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (Q.L.). The "Ribic" factors, set out at pages 4 and 5 of the IAD's decision in *Ribic*, are as follows:

> In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include 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.

[9] In *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, the Supreme Court of Canada positively affirmed these factors as being relevant and appropriate to the discretion accorded to the IAD to stay a removal order.

[10] The IAD found that only one of the six factors weighed in favour of the Respondent, saying the following, at paragraphs 36 and 49 of its decision:

> *Possibility of Rehabilitation*
> It is this last point which, to my mind, saves the day for the appellant. As noted earlier, the appellant has had no discernable contact with the criminal justice system since he was released from custody a little more than three years ago.
> …
>
> I am accordingly of the view that the appellant ahs demonstrated a willingness to turn his life around and he does deserve a chance to do

> so, but not at the risk to the community bearing in mind the specific provisions [sic] section 3(1) of *IRPA*.

[11] The IAD granted a three year stay of the removal order pursuant to section 68 of the Act. Conditions were imposed, including the following:

> Make arrangements for ongoing psychological rehabilitation through the office of Dr. Rita Bradley, or some other suitably qualified mental health professional and provide written confirmation of such arrangements on or before October 1, 2010 (specify details such as type of program, frequency and duration of participation, etc.) ***(Note If you do not meet the foregoing condition, the Minister may bring an application to cancel the stay and dismiss the appeal)*** [emphasis in original].

[12] The Applicant argues that the IAD committed several errors: by failing to weigh the *Ribic* factors, by using the wrong test in granting the stay and by ignoring evidence, specifically in concluding that the Respondent was a good candidate for a stay and in concluding that the Respondent could access psychological treatment.

[13] The Applicant cited much jurisprudence, beginning with a decision of the Supreme Court of Canada in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539. He relied upon this case for the proposition that under the current immigration statutory regime, security is the predominant consideration.

[14] The Applicant then moved to the majority decision of the Federal Court of Appeal in *Khosa v. Canada (Minister of Citizenship and Immigration)*, [2007] 4 F.C.R. 332, rev'd [2009] 1 S.C.R.

339, for the proposition that the concept of rehabilitation, involving as it does principles of criminal law, does not lie within the expertise of the IAD.

[15] He argues, by inference, that less deference is owed to the IAD in that regard.

[16] The Applicant relies on the decisions in *Veerasingam v. Canada (Minister of Citizenship and Immigration),* 2004 FC 1661 and *Cepeda-Gutierrez et al. v. Canada (Minister of Citizenship and Immigration)* (1998) 157 F.T.R. 35 (T.D.).

[17] The Respondent takes the position that, having regard to the discretionary power of the IAD pursuant to subsection 67(1)(c) as discussed by the Supreme Court of Canada in *Chieu* and *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, the IAD made a decision based on the evidence and that it was legally entitled to make.

Discussion and Disposition

[18] The first issue to be addressed is the applicable standard of review. In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R.190, the Supreme Court of Canada said that there are only two standards of review by which decisions of statutory decision-makers can be reviewed, that is correctness for questions of law and procedural fairness and reasonableness for findings of fact and questions of mixed fact and law.

[19] The Applicant argues that the IAD, by failing to weigh the *Ribic* factors, used the wrong legal test for the exercise of discretion pursuant to paragraph 67(1)(c). If such an error was made, it

is reviewable on the standard of correctness. However, having regard to the written reasons of the IAD, I am not persuaded that there was any such error.

[20] The IAD identified the *Ribic* factors. He addressed each one and found that five of them did not weigh in favour of the Applicant. The IAD found one factor in favour of positive exercise of discretion and although the IAD did not use the words “weigh” or “balance”, it is clear from what is written that all the factors were weighed.

[21] Through his arguments, the Applicant has essentially invited this Court to reweigh the evidence before the IAD.

[22] I refer again to the decision of the Supreme Court of Canada in *Khosa*. As noted above, *Khosa* arose from a decision of the IAD where, in a split decision, the majority found that the evidence did not justify the positive exercise of discretion under paragraph 67(1)(c) of IRPA.

[23] Upon judicial review by the Federal Court, the applications judge determined that a high degree of deference was to be given to the decision of the IAD, applying the standard of patent unreasonableness. That standard of review was available prior to the release of the decision in *Dunsmuir*.

[24] The Federal Court of Appeal, also in a split decision, disposed with the judgment of the application and applied a standard of reasonableness.

[25] Upon further appeal to the Supreme Court of Canada, that Court restored the judgment of the application judge, endorsing the view that in the post-*Dunsmuir* period, the decisions of the IAD dealing with the assessment of evidence are reviewable on the standard of reasonableness.

[26] I will refer only to the judgment of Justice Binnie in the decision of the Supreme Court of Canada in *Khosa*. He noted, at paras. 17 and 62, that Parliament, in enacting paragraph 67(1)(c), had granted the IAD the power to decide if "sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case." This power was not granted to the Courts. The Court is to take a deferential view of the IAD's decision and not engage in its own weighing of the evidence in light of the *Ribic* factors.

[27] In reviewing the IAD's decision in *Khosa*, Justice Binnie said the following at para. 65:

> In terms of transparent and intelligible reasons, the majority considered each of the *Ribic* factors. It rightly observed that the factors are not exhaustive and that the weight to be attributed to them will vary from case to case (para. 12). The majority reviewed the evidence and decided that, in the circumstances of this case, most of the factors did not militate strongly for or against relief…

[28] I note that Justice Binnie specifically endorsed the view that the "factors are not exhaustive and the weight to be attributed to them will vary from case to case".

[29] The same applies in the present case, in my opinion. The IAD did consider the *Ribic* factors and it found that one factor weighed heavily in favour of relief, that is the possibility of

rehabilitation. It considered a related but non-specific factor in favour of the Respondent, that is the fact that the Respondent had not been involved in any criminal activities for three years.

[30] In its assessment of potential for rehabilitation, the IAD focused on the relatively recent and on-going changes the Respondent made to his life in pursuit of rehabilitation, rather than the Respondent's historical circumstances. This approach was reasonable in my opinion, and any evidence not explicitly mentioned by the IAD was consistent with this approach.

[31] The IAD explicitly deals with the availability of psychological treatment by making it a condition of the stay on the removal order against the Respondent. In the conditions that it imposed, the IAD highlights the fact that if the Respondent does not undergo treatment with an appropriate psychologist, he may be subject to removal from Canada. In my opinion, the IAD did not ignore any evidence in this regard.

[32] At para. 66 of *Khosa*, Justice Binnie said the following:

> The weight to be given to the respondent's evidence of remorse and his prospects for rehabilitation depended on an assessment of his evidence in light of all the circumstances of the case. The IAD has a mandate different from that of the criminal courts. Khosa did not testify at his criminal trial, but he did before the IAD. The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence. It did so.

[33] Again, in my opinion, these observations apply in the present case. The IAD here considered the prospects of the rehabilitation of the Respondent for the purpose of considering if those prospects warranted special relief. It concluded that they did and exercised its discretion accordingly. I see no error in the manner in which it did so.

[34] For these reasons, this application for judicial review is dismissed. No question for certification was proposed.

ORDER

THIS COURT ORDERS that the application for judicial review is dismissed. No question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Maria Burgos	FOR THE APPLICANT
Omar Khan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Myles J. Kirvan Deputy Attorney General of Canada Toronto, ON	FOR THE APPLICANT
Omar Shabbir Khan Barrister and Solicitor Hamilton, ON	FOR THE RESPONDENT