Federal Court  Cour fédérale

Date: 20111026

Docket: IMM-1665-11

Citation: 2011 FC 1184

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 26, 2011

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

Marwan Mohamad CHARABI

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by a member of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB) made pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, (the Act) by Marwan Mohamad Charabi (the applicant). The panel refused to grant a new stay of removal on humanitarian and compassionate grounds.

[2] The applicant was born in Syria in 1965 and came to Canada in 1987. He became a permanent resident. Between 1989 and 1996, he was convicted of the following five offences:

- 1989: obstructing a police officer
- 1992: assaults
- 1993: unlawful manufacturing of tobacco
- 1994: uttering threats
- 1996: conspiracy to commit an indictable offence

[3] On March 9, 1999, the IAD issued a removal order against the applicant after finding that he was inadmissible under subparagraph 27(1)(*d*)(ii) of the former *Immigration Act* (a permanent resident convicted of an offence punishable by a term of imprisonment of five years or more). The applicant appealed this order before the IAD on humanitarian and compassionate grounds and was granted a three-year stay on August 11, 1999. On November 6, 2002, an additional stay of one year was granted.

[4] On May 26, 2004, the IAD had to determine whether an additional stay was warranted. It noted that the applicant had not complied with the conditions imposed under the previous stays, notably a requirement to report any new charges against him. In fact, the applicant had been charged in 2001 with illegal possession of tobacco and also with theft and possession of stolen property. Nonetheless, the IAD granted him an additional stay.

[5] On November 17, 2005, the IAD terminated the stay of removal order. The applicant disputed that decision, and this Court allowed his application for judicial review on August 17, 2006, remitting the matter to the IAD for redetermination. At that time, the applicant was facing new criminal charges and was awaiting trial. The file was therefore suspended.

[6] On October 1, 2010, the applicant admitted committing the offences he had been charged with; he received a conditional discharge, a year of probation and a $58,000 fine. As of today, the entire amount of the fine remains unpaid.

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[7] At paragraph 13 of its decision, the panel considered the factors set out by the Immigration Appeal Board in *Ribic v. Minister of Employment and Immigration* (August 20, 1985), IAB 84-9623, to determine whether there were circumstances justifying an additional stay.

[8] The panel noted that counsel for the applicant's argument that he had committed only two offences was not accurate. In addition, the panel noted that when the applicant committed the 2005 offence he associated with Ibrahim Sobh, his co-perpetrator in the 2001 offence. The conditions of the stay prohibited the applicant from associating with persons who have a lengthy criminal record. The panel found that the applicant had therefore breached this condition as well as the condition requiring him to report any new criminal charges. In the panel's view, the applicant's affidavit attempted to minimize his criminal activities. The panel also found that the applicant was not credible and that his good behaviour since 2005 could be explained by his desire to not make his situation before the criminal court worse.

[9] The panel noted that a stay had been granted to the applicant in 1999 because the IAD had believed he would not reoffend. Moreover, the applicant has Canadian children and their interests

were taken into account. Because he reoffended during the period of the stay, the panel was of the view that the applicant had not considered the impact of his actions on his family.

[10] The IAD acknowledged that, although the applicant would suffer hardship should he return to Syria, where he has two sisters, he would not face a personalized risk.

[11] Last, the panel found that this was not a case of an isolated offence but of a series of criminal acts. The IAD was of the view that the applicant did not regret his actions. Although he has a wife and children in Canada and his departure would cause difficulties for them, and although the offences were not violent, the IAD determined that the negative criteria were more important. The IAD also found that nothing would prevent his family from visiting him in Syria. Last, the IAD held that the applicant had had more than his share of opportunities to change his criminal behaviour.

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[12] The following are the relevant statutory provisions:

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

Humanitarian and compassionate considerations	Motifs d'ordre humanitaire
65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the	**65.** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

regulations.

Appeal allowed

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

(*b*) a principle of natural justice has not been observed; or

(*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.

Fondement de l'appel

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un principe de justice naturelle;

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.

Removal order stayed

68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

Sursis

68. (1) Il est sursis à la mesure de renvoi sur preuve qu'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.

Effect

(2) Where the Immigration Appeal Division stays the removal order

(*a*) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;

(*b*) all conditions imposed by the Immigration Division are cancelled;

(*c*) it may vary or cancel any non-

Effet

(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

prescribed condition imposed under paragraph (a); and

(*d*) it may cancel the stay, on application or on its own initiative.

Reconsideration

(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.

Suivi

(3) Par la suite, l'appel peut, sur demande ou d'office, être repris et il en est disposé au titre de la présente section.

Termination and cancellation

(4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

Classement et annulation

(4) Le sursis de la mesure de renvoi pour interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé.

Criminal Code, R.S.C. 1985, c. C-34:

Conditional and absolute discharge

730. (1) Where an accused, other than an organization, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for fourteen years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under subsection 731(2).

Absolutions inconditionnelles et sous conditions

730. (1) Le tribunal devant lequel comparaît l'accusé, autre qu'une organisation, qui plaide coupable ou est reconnu coupable d'une infraction pour laquelle la loi ne prescrit pas de peine minimale ou qui n'est pas punissable d'un emprisonnement de quatorze ans ou de l'emprisonnement à perpétuité peut, s'il considère qu'il y va de l'intérêt véritable de l'accusé sans nuire à l'intérêt public, au lieu de le condamner, prescrire par ordonnance qu'il soit absous inconditionnellement ou aux conditions prévues dans l'ordonnance rendue aux termes du paragraphe 731(2).

. . .	[…]
Effect of discharge (3) Where a court directs under subsection (1) that an offender be discharged of an offence, the offender shall be deemed not to have been convicted of the offence except that	Conséquence de l'absolution (3) Le délinquant qui est absous en conformité avec le paragraphe (1) est réputé ne pas avoir été condamné à l'égard de l'infraction; toutefois, les règles suivantes s'appliquent :
(*a*) the offender may appeal from the determination of guilt as if it were a conviction in respect of the offence;	*a*) le délinquant peut interjeter appel du verdict de culpabilité comme s'il s'agissait d'une condamnation à l'égard de l'infraction à laquelle se rapporte l'absolution;
(*b*) the Attorney General and, in the case of summary conviction proceedings, the informant or the informant's agent may appeal from the decision of the court not to convict the offender of the offence as if that decision were a judgment or verdict of acquittal of the offence or a dismissal of the information against the offender; and	*b*) le procureur général ou, dans le cas de poursuites sommaires, le dénonciateur ou son mandataire peut interjeter appel de la décision du tribunal de ne pas condamner le délinquant à l'égard de l'infraction à laquelle se rapporte l'absolution comme s'il s'agissait d'un jugement ou d'un verdict d'acquittement de l'infraction ou d'un rejet de l'accusation portée contre lui;
(*c*) the offender may plead *autrefois convict* in respect of any subsequent charge relating to the offence.	*c*) le délinquant peut plaider *autrefois convict* relativement à toute inculpation subséquente relative à l'infraction.

Criminal Records Act, R.S.C. 1985, c. C-47:

Restrictions on application for pardon	Restrictions relatives aux demandes de réhabilitation
4. A person is ineligible to apply for a pardon until the following period has elapsed after the expiration according to law of any sentence, including a sentence of imprisonment, a period of probation and the payment of any fine, imposed for an offence:	**4.** Nul n'est admissible à présenter une demande de réhabilitation avant que la période consécutive à l'expiration légale de la peine, notamment une peine d'emprisonnement, une période de probation ou le paiement d'une amende, énoncée ci-après ne soit écoulée :

(*a*) 10 years, in the case of a serious personal injury offence within the meaning of section 752 of the *Criminal Code*, including manslaughter, for which the applicant was sentenced to imprisonment for a period of two years or more or an offence referred to in Schedule 1 that was prosecuted by indictment, or five years in the case of any other offence prosecuted by indictment, an offence referred to in Schedule 1 that is punishable on summary conviction or an offence that is a service offence within the meaning of the *National Defence Act* for which the offender was punished by a fine of more than two thousand dollars, detention for more than six months, dismissal from Her Majesty's service, imprisonment for more than six months or a punishment that is greater than imprisonment for less than two years in the scale of punishments set out in subsection 139(1) of that Act; or	*a*) dix ans pour les sévices graves à la personne au sens de l'article 752 du *Code criminel*, notamment l'homicide involontaire coupable, en cas de condamnation à l'emprisonnement de deux ans ou plus ou pour une infraction visée à l'annexe 1 qui a fait l'objet d'une poursuite par voie de mise en accusation, ou cinq ans pour toute autre infraction qui a fait l'objet d'une poursuite par voie de mise en accusation, pour une infraction visée à l'annexe 1 qui est punissable sur déclaration de culpabilité par procédure sommaire ou pour une infraction qui est une infraction d'ordre militaire au sens de la *Loi sur la défense nationale* en cas de condamnation à une amende de plus de deux mille dollars, à une peine de détention de plus de six mois, à la destitution du service de Sa Majesté, à l'emprisonnement de plus de six mois ou à une peine plus lourde que l'emprisonnement pour moins de deux ans selon l'échelle des peines établie au paragraphe 139(1) de cette loi;
(*b*) three years, in the case of an offence, other than one referred to in paragraph (a), that is punishable on summary conviction or that is a service offence within the meaning of the *National Defence Act*.	*b*) trois ans pour l'infraction, autre qu'une infraction visée à l'alinéa a), qui est punissable sur déclaration de culpabilité par procédure sommaire ou qui est une infraction d'ordre militaire au sens de la *Loi sur la défense nationale*.

* * * * * * * *

[13] This case raises the following issues:

1. Is the decision reasonable?
2. Did the IAD breach the principles of natural justice by denying the applicant the right to testify?

[14] Questions of fact and questions of mixed fact and law from the IAD are reviewed on a reasonableness standard (see *Bodine v. Minister of Citizenship and Immigration*, 2008 FC 848 at paragraph 17 and *Singh v. Minister of Citizenship and Immigration*, 2010 FC 378 at paragraph 12). In particular, the IAD's assessment of humanitarian and compassionate considerations falls within its expertise (*Gonzalez v. Minister of Citizenship and Immigration*, 2006 FC 1274, 302 F.T.R. 81 at paragraph 21 and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 39 at paragraphs 65-66).

[15] Questions of procedural fairness at the hearing, like pure questions of law, are reviewed on a correctness standard (*Karami v. Minister of Citizenship and Immigration*, 2009 FC 788, 349 F.T.R. 96 at paragraph 18, citing *Canada (Minister of Citizenship and Immigration) v. Suresh*, 2002 SCC 1, [2002] 1 S.C.R. 3).

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A. *Is the decision reasonable?*

[16] The applicant argues that it was unreasonable for the IAD to focus on his convictions between 1989 and 1996 and to minimize the post-2005 period, a period without further charges. Since the 2005 charges resulted in a conditional discharge, he relies on the *Criminal Code*, which at subsection 730(3) provides that the effect of a conditional discharge is that the offender is "deemed not to have been convicted".

[17] The applicant also contends that since subsection 4(*a*) of the *Criminal Records Act*, R.S.C. 1985, c. C-47, provides that a person may apply for a pardon five years after the expiration of his or her sentence for a non-violent indictable offence, this period is indicative of the length of a rehabilitation period.

[18] Last, the applicant submits that, contrary to the IAD's findings, he has always complied with the conditions of previous stays. He did not know that Mr. Sobh was considered a criminal. In any event, the mere fact of having associated with him should not neutralize his 23 years of permanent residence with a family accustomed to Canadian life.

[19] After reviewing the evidence, it appears that the IAD properly applied the criteria in *Ribic*, above, and that the panel made a reasonable decision in refusing to exercise its discretion under subsection 67(1) of the Act.

[20] As the respondent submits, since the standard of review is reasonableness, it is not for this Court to reassess the evidence on judicial review. This type of assessment is within the IAD's jurisdiction (*Sharma v. Minister of Citizenship and Immigration*, 2009 FC 277; *Barm v. Minister of Citizenship and Immigration*, 2008 FC 893 at paragraph 23 and *Gonzalez*, above).

[21] In my opinion, the IAD properly assessed the evidence by taking into account the entire history of the case. Moreover, because of the discretion granted to this panel under subsection 67(1) of the Act and because of its expertise, this Court must review its findings with a high degree of deference (*Khosa* and *Gonzalez*). The applicant has therefore failed to discharge his burden of

establishing exceptional grounds justifying a stay (*Camara v. Minister of Citizenship and Immigration*, 2006 FC 169*; Bhalru v. Minister of Citizenship and Immigration*, 2005 FC 777).

[22] It is well established that the weight to be accorded to each factor will vary according to the particular circumstances of the case (*Ribic*, above, decision cited with approval by the Supreme Court of Canada in *Chieu v. Canada* (*Minister of Citizenship and Immigration*), [2002] 1 S.C.R. 84 at paragraph 77). The respondent is correct in maintaining that the IAD was justified in taking the old convictions into account in light of the jurisprudence that indicates that it must consider what gave rise to the removal order. The applicant benefited from the privileges of a stay for a ten-year period. He only had to carefully comply with the conditions set out in the stay order, which he failed to do.

[23] Furthermore, the respondent correctly emphasizes the IAD's right to consider the applicant's admission and finding of guilt as a factor in refusing the stay. On this point, I concur with the written representations of counsel for the respondent in paragraphs 50 to 57 inclusive of the respondent's further memorandum, supporting the proposition that the IAD may consider the admissions and the finding of guilt even in discharge cases. These paragraphs read as follows:

> [TRANSLATION]
> 50. The criminal courts have frequently had to question the scope of admissions made in a criminal case that ends with an absolute or conditional discharge.
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> 51. In *R. v. Pearson*, [1998] 3 S.C.R. 620, the Supreme Court clearly confirmed that a finding of guilt is a completely different stage from a conviction in the criminal process. Although the conviction stage may be challenged in a case, this does not challenge the finding of guilt.

52. Thus, a person who pleaded guilty or was found guilty remains guilty even if he or she subsequently receives a lenient sentence, i.e. a discharge.

53. The Quebec Court of Appeal in *R. v. Doyon*, 2004 CanLII 50105 (QCCA), confirmed the distinction between a finding of guilt and a conviction. It also established that, in discharge cases, although the offender is deemed not to have been convicted and has no criminal record for that offence, the offender nonetheless pleaded guilty or was found guilty, which subsists in spite of the discharge. Also according to the Court of Appeal, the absence of a conviction does not make the plea or the finding of guilt disappear retroactively, any more than a pardon expunges a conviction retroactively. See also: *Ascenseurs Thyssen Montenay inc. v. Aspirot*, 2007 QCCA 1790.

54. Moreover, the Federal Court confirmed that even though a person has been granted a conditional discharge following a guilty plea, this does not prevent the Minister from exercising his or her discretion to decide whether to issue a transportation security clearance to that person. *Lavoie v. Canada (A.G.)*, 2007 FC 435.

55. Similarly, in *Montréal* (*City*) *v. Québec* (*Commission des droits de la personne et des droits de la jeunesse*), [2008] 2 S.C.R. 698, the Supreme Court established that, unlike a person who is pardoned, there is no basis for concluding that a person who is discharged under section 730(1) benefits from the effects of a pardon as soon as the order of discharge is made.

56. Also in *Houle v. Barreau du Québec*, REJB 2002-35348, [2002] J.Q. No. 4834 (C.A.), (leave to appeal dismissed [2003] 1 S.C.R. xi), a case involving the *Professional Code*, the Quebec Court of Appeal determined that a finding of guilt following a guilty plea does not disappear as a result of a conditional discharge and that only a pardon has that effect.

57. Accordingly, in the current state of Canadian law, a discharge is and always remains a sentence. Although it is a lenient sentence because of the circumstances of a case, there is nonetheless a finding of guilt.

(Please note that the above reference to the *Doyon* case, at paragraph 53, was clarified at the hearing before me.)

[24] The respondent notes that, although the applicant was granted a conditional discharge for the 2005 charges, he admitted committing those crimes and negotiated this discharge. Before the IAD, his probation had not ended and there was no evidence that he had finished paying his $58,000 fine. Moreover, the applicant obtained a number of stays in the past and is therefore not in the same situation as a person who is requesting a stay for the first time.

[25] Thus, although the applicant had been discharged, the conditions of his discharge had not been satisfied at the time of the decision at issue, notably because the probation period was to end in October 2011. Moreover, paragraph 6.1(1)(*b*) of the *Criminal Records Act* provides that the protection against disclosure of information with respect to persons who are conditionally discharged does not take effect until three years after the conditional discharge (see *Montréal* (*City*) *v. Québec (Commission des droits de la personne et des droits de la jeunesse)* above).

[26] In conclusion, I find that in the circumstances the IAD's decision is not unreasonable. The removal order was issued in 1999 and imposed conditions that the applicant failed to satisfy. It was not unreasonable to find that the applicant had associated with a criminal and that he had not reported the charges laid against him. It would have made no sense for the panel to consider only the events that occurred since 2005 and not what had happened since the conditions were imposed in 1999. Thus, the panel could properly find that the applicant was not rehabilitated because he had failed to comply with these conditions and admitted at his trial before the criminal court that he had committed the alleged offences. In this entire context, the fact that the panel took into consideration the overall picture of the applicant's case was reasonable and does not warrant the intervention of this Court.

B. *Procedural fairness and the applicant's testimony*

[27] The applicant contends that, although an affidavit may take the place of testimony, this proceeding was so important that the IAD should have let him testify since he was present at the hearing, was ready to testify and his credibility was at stake. When the applicant stated that he wished to speak, the IAD told him that his counsel had chosen to proceed by way of a detailed affidavit.

[28] The respondent, for his part, maintains that the applicant, with his counsel at the time, chose to proceed by way of affidavit and that written testimony is as valid as oral testimony. The respondent adds that the applicant cannot complain about his own choice and, furthermore, that the IAD clearly considered his written testimony.

[29] It is important to point out that the applicant should have been aware of the fact that he had the choice of testifying orally because he had done so at the previous hearings in 1999, 2002 and 2004. I find that the IAD was correct to proceed as requested by counsel for the applicant. If the applicant had wanted to testify orally, he should have instructed his counsel to that effect. It is clear from the transcript of the hearing that the IAD intended to respect the choice made by the applicant and his counsel to proceed without oral testimony. The IAD clearly explained why it would have been unfair for the other party to change the procedure previously agreed to at the end of the hearing. The applicant therefore has not persuaded me, in the circumstances, that there was a breach of procedural fairness.

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[30] For all these reasons, the application for judicial review is dismissed.

[31] Following the hearing before me, counsel for the respondent submitted the following question for certification:

> [TRANSLATION]
> Did the IAD err in law by considering a criminal offence for which a conditional discharge had been granted?

[32] Counsel for the applicant stated that he did not believe there was a question for certification in this case.

[33] For my part, given the relatively recent and relevant jurisprudence above, which is unequivocal and uncontradicted, I fail to see, at this stage, how this question can be characterized as of general importance. Moreover, taking into account the generally reasonable nature of the IAD's decision, I am not persuaded that the question proposed for certification is determinative. Consequently, the proposed question is not certified.

JUDGMENT

The application for judicial review of the decision by the Immigration Appeal Division of the Immigration and Refugee Board refusing to grant the applicant a new stay of removal on humanitarian and compassionate grounds is dismissed.

"Yvon Pinard"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1665-11
STYLE OF CAUSE:	Marwan Mohamad CHARABI v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 13, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	October 26, 2011

APPEARANCES:

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