Federal Court  Cour fédérale

Date: 20111107

Docket: IMM-567-11

Citation: 2011 FC 1264

Ottawa, Ontario, November 7, 2011

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

STERIE CRACIUN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Protection Board, dated December 23, 2010 (the impugned decision), which reconsidered its previous direction staying the execution of the applicant's removal order and dismissed his appeal pursuant to subsection 68(3) of the *Immigration and Refugee Protection Act* SC 2001, c 27 (IRPA) on the basis that he has violated the conditions of his stay.

BACKGROUND

[2] The applicant is a 41 year old citizen of Romania. He landed in Canada in June 1995 and became a permanent resident on April 17, 1997.

[3] The applicant was convicted of a fraud-related crime on January 28, 2002. He was subsequently found inadmissible for serious criminality in that he was a permanent resident of Canada who had been convicted of an offence punishable by a maximum term of imprisonment of at least ten years pursuant to paragraph 36(1)*a*) of the IRPA, and a removal order was consequently issued against him on May 15, 2003.

[4] The applicant appealed this removal order pursuant to subsection 63(3) of the IRPA. On March 9, 2004, the IAD granted the applicant a stay of removal for a period of five years subject to terms and conditions on the basis of humanitarian and compassionate considerations and the best interests of a child directly affected by the removal order. The stay was reconsidered and maintained on January 23, 2006. The conditions of stay were extended in February 2010.

[5] The applicant was arrested in May 2009 for possession of stolen credit cards in Toronto. Although the charges laid against him had subsequently been withdrawn, on December 23, 2010, the IAD reconsidered the existing stay order and dismissed the applicant's appeal in view of his breach of the terms and conditions of the stay, namely condition #11, not to associate, knowingly, with individuals who have a criminal record or who are engaged in criminal activity, and condition #5, to report any criminal charges to the immigration authorities.

[6] Supervising Sergeant Pierre Filion of the Sûreté du Québec (SQ), Criminal Intelligence Projects Service (SPRC), Organized Crime Involving Individuals of Eastern European Descent (COSEE), testified at the hearing. Sergeant Filion was involved in a SQ project to establish a portrait of the Eastern European criminality in Canada with the aim of validating and corroborating the information obtained by the RCPM with regard to certain individuals, including the applicant.

[7] Sergeant Filion testified before the IAD that he conducted surveillance on the applicant from November 25, 2005 to February 2007. He testified that the SQ put an end to the surveillance in February 2007 as the information collected was sufficient to establish the criminality of the applicant, namely that he was a cell leader in bank and card cloning. According to Sergeant Filion, the applicant's file should have "fell between the cracks" since no charges were ever laid against him subsequent to the investigations.

[8] Of importance, Sergeant Filion testified on the basis of a report that he authored on the occasion of the investigations, that the applicant had been observed while meeting with a number of individuals with longstanding criminal records. The IAD noted the circumstances of the alleged meetings and dates on which they have occurred, and decided, after questioning the applicant with regard to the allegations against him, that "significant weight" was to be given "to the criminal profile compiled by Sergeant Filion, especially in light of the fact that such report is uncontradicted by any evidence save for the denials of the appellant who was a less that credible witness" (impugned decision, paragraph 21).

[9] The IAD noted that the applicant's testimony at the hearing was vague and that he was unable to recall certain incidents. The IAD also noted that the applicant had neglected to provide the required evidence of employment and had only filed evidence of income.

[10] The applicant's wife, Mrs. Elena Cristina Abrudan, also testified at the hearing contending that her husband's criminal profile is not true since he has never been arrested on the basis of that profile. The IAD mentioned that the applicant's wife is the sole proprietor of the hairdressing salon where she works although not being a permanent resident of Canada, she is not legally allowed to work since March 13, 2006, on which date her employment authorization expired. The IAD then somewhat hastily noted that Mrs. Abrudan has a disregard for the law because she is working without having the required employment authorization.

[11] In view of these considerations, and noting the longstanding involvement of the applicant in fraud-related crime and his association with individuals with criminal records even after he was granted a stay subject to conditions requiring him to refrain from criminal activity, the IAD stated its preference for Sergeant Filion's testimony, rather than that of the applicant and his wife whose testimony were considered as lacking in sincerity and not credible.

ISSUES

[12] The applicant is challenging the IAD's decision to deny his request to maintain the stay, arguing that in denying his request the IAD erred in law and in fact. He raises the following issues with regard to the impugned decision:

1. Did the IAD err in law by misinterpreting its powers on the reconsideration?

2. Is the decision unreasonable?

3. Did the IAD err by failing to consider the best interests of the applicant's children?

4. Was the determination that the applicant's wife is not credible, reasonable?

ANALYSIS

[13] The principles governing appeals from removal orders before the IAD are noted by this Court in *Canada (Minister of Citizenship and Immigration) v Awaleh***,** 2009 FC 1154 at paras 20-22:

> The IAD is bestowed with a great deal of discretion in conducting appeals of removal orders. Pursuant to subsections 67(1)(c) and 68(1), the IAD may allow an appeal or stay a removal order where they are 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."
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> As noted by the Supreme Court in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraph 57 (*Khosa*), the IAD is left with the discretion to determine, not only what constitutes "humanitarian and compassionate considerations", but the "sufficiency" of those considerations as well.
>
> While the decision under review is not the original grant of the stay, the IAD must consider the same factors upon reconsideration of the stay, as they consider in granting it. According to *Canada (Minister of Citizenship and Immigration) v. Stephenson*, 2008 FC 82 at paragraph 25 (*Stephenson*), "the *Ribic* factors continue to be the factors that the IAD is required to consider when reconsidering a decision pursuant to subsection 68(3) of the Act."

[14] I have come to the conclusion that the arguments of attack raised against the impugned decision by the applicant are without merit. In so doing, I have considered the oral and written submissions made on behalf of the parties and the case law cited by counsel. This includes the respondent's supplementary memorandum which has been served and filed pursuant to paragraph 9 of the Order granting leave rendered on August 4, 2011. I have dismissed the objection made by the

applicant's counsel that the respondent's supplementary memorandum of argument cannot be considered by the Court on the grounds that there has been no further affidavits on cross-examinations, or that the applicant has not served and filed himself a supplementary memorandum.

The IAD did not err in its interpretation of its powers on the reconsideration

[15] The applicant contends the IAD erred by referring to this reconsideration as "final", arguing that the IRPA does not limit the availability of reconsiderations or address any sort of final reconsideration of a stay. The applicant contends that by referring to this reconsideration as "final" the IAD concluded that the only possible outcomes were either to allow or to dismiss the appeal, and that continuing the stay was not considered as a possible outcome, contrary to section 66 of the IRPA. The applicant submitted that the IAD therefore erred in law.

[16] The respondent argues that the IAD did not fetter its discretion since the September 13, 2010 notice to appear, sent out before the hearing, set out the possibility that the stay could be continued and that the applicant cannot complain that the stay was cancelled as he clearly failed to comply with the conditions.

[17] In the Court's view, the applicant's argument cannot stand. The use of the word "final", which I interpret as meaning that the IAD is referring to the latest reconsideration, as there have been a few, does not indicate in any ways that the IAD was not open to continue the stay or that it otherwise fettered its discretion as submitted by the applicant.

The decision is reasonable

[18] It was not unreasonable for the tribunal to conclude that the applicant breached certain conditions of his stay (conditions #5 and #11). The applicant submits that the IAD erred in noting that he was charged with assault with a weapon in 2002, which is not true and constitutes a reviewable error. In the Court's view, this factual error is not material and does not warrant intervention. What the applicant was charged with is irrelevant in so far that it is proven that he failed to properly report the charges.

[19] The applicant contends that he reported the 2009 charges to the immigration authorities and that the IAD failed to consider this evidence. He argues that the decision was therefore based exclusively on his association with individuals with criminal records and claims that he ignored the fact that those individuals had criminal records. On the other hand, the applicant submits that the respondent Minister failed to meet the burden of proving that he knew he was associating with criminals and that the IAD's finding, on a balance of probabilities, that he associated with criminals is insufficient to conclude that he knowingly associated with them.

[20] The respondent notes that one of the conditions of the applicant's stay was that he reports any charges to the immigration authorities in writing, which he failed to do, and that there was no evidence that he ever did report the charges. I note that the evidence filed by the respondent (affidavit of Dominique Toilon, statutory declaration of Natalie Bélange of Canada Border Services Agency) points out that upon review of the applicant's paper file and the computer-based data regarding the applicant, no evidence exists that the he alerted them in writing or by any other means

of communication of any charges against him. This evidence has not been contradicted by the applicant.

[21] The respondent also notes there is ample evidence of the applicant's association with criminals and it was therefore reasonable for the IAD to discount the applicant's assertion that he was unaware that the individuals with whom he was associating had criminal records. The respondent argues that the onus was on the applicant to prove he complied with the conditions and therefore the IAD's conclusion that he breached two of them was reasonable.

[22] In view of the Court, the IAD's conclusions about knowingly associating with criminals are reasonable. It should be reminded that reasonableness requires the "existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir c Nouveau-Brunswick*, 2008 SCC 9 at para 47). The IAD's assessment of the evidence, too, is owed the same degree of deference and the Court should intervene only if the IAD's findings and inferences are unreasonable.

[23] The applicant asserts that the words "not knowingly" in condition #11 connote a requirement of specific knowledge that an individual has a criminal record or will engage in criminal activity and therefore the burden of proof to establish specific knowledge is more onerous that general knowledge and cannot be proved on a balance of probabilities, as the IAD did. It is submitted that the IAD's use of the balance of probabilities test against the individuals with criminal records or who were engaged in criminal activity might satisfy a general condition not to associate

with individuals with criminal records or engaged in criminal activity, but it does not satisfy a specific condition requiring that the applicant “not knowingly” associated with individuals with criminal records or engaged in criminal activity. The applicant contends that the IAD committed an error in law by applying the wrong burden of proof.

[24] Alternatively, the applicant submits that since there was no finding by the IAD of actual knowledge on the part of the applicant, its finding of the applicant’s awareness (or specific knowledge) is unreasonable since the test of balance of probabilities was applied to evidence of suspicion which cannot be the basis of constructive knowledge.

[25] In my opinion, the applicant confuses two distinct concepts: that of the evidential burden and that of the legal burden of proof. The burden of proof (or the evidential burden) refers to the scope of the evidence required in terms of facts, matters or criteria in respect of which proof must be advanced. The legal or the persuasive burden, in contrast, refers to the onus that a party bears to prove each point on either the balance of probabilities in a civil case, or to beyond a reasonable doubt in a criminal case. There is no third legal burden of proof as the applicant suggests. See Sopinka Lederman & Bryant: *The Law of Evidence in Canada*, 3rd ed (Markham, Ontario: LexisNexis, 2009) at page 90, paragraph 3.11.

[26] The IAD thus applied the correct legal burden of proof, namely that of the balance of probabilities, and did not have to differentiate between specific or general knowledge of the applicant of the individuals that he frequented when weighing the balance of probabilities. The IAD did not err in its assessment of the evidentiary or probative value of the evidence as the

applicant suggests. The conclusion that the applicant breached condition #11 of his stay does not require any positive evidence to the effect that he did in fact have knowledge of the criminal record or activities of the individuals that he frequented. He could, however, bring before the IAD the evidence that he did not have that knowledge, which he seems to have failed to do. More precisely, the IAD's reliance on Sergeant Filion's report and testimony is not unreasonable given the fact that, as the IAD noted, the applicant did not provide anything to rebut this determinative evidence.

The IAD did not fail to consider the best interests of the applicant's children

[27] The applicant simply asserts that his children will be prejudiced by his removal and claims that the IAD failed to consider this issue at all. The respondent argues that the IAD considered this prejudice but found that it was outweighed by his breach of the conditions of the stay. The respondent also notes that the applicant bore the burden of giving evidence of his children's interests and that he failed to provide any further evidence with this respect to warrant greater consideration.

[28] In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 57, the Supreme Court confirmed that the assessment by the IAD of humanitarian and compassionate considerations cited in support of an appeal of a removal order is reviewable on a standard of reasonableness.

[29] The impugned decision of the IAD did consider the children's interests, albeit briefly. However, it is true that there was no evidence to require a more fulsome consideration of the children's interests. Moreover, since children's best interest is not a determinative factor that would

suffice to outweigh any other consideration (*Dela Rea Manalang v Canada*, 2007 FC 1368 at para 110), the Court considers the impugned decision to be reasonable.

The credibility determination about the applicant's wife was not material

[30] The applicant lastly argues that the IAD erred by not considering his wife's pending humanitarian and compassionate application from 2001(which has been approved in principal in 2003 but no confirmation has been forthcoming since then), since the credibility determination was based on her working without the required employment authorization. The respondent reiterates the applicant's wife's disregard for the immigration system demonstrated by her working illegally and submits that the applicant is merely expressing his disagreement with the weight the IAD gave to different factors in its assessment of the evidence.

[31] At the hearing before this Court, counsel took issue with the statement made by the IAD that "[a]s regards the appellant's wife, her own lack of respect for Canadian law elicits little sympathy from the tribunal". However, according to counsel, this was not material in the credibility assessment the IAD had to make.

[32] That said, I notice the IAD specifically dealt with Mrs. Abrudan's credibility but concluded that it "prefers Sgt Filion's testimony to that of the appellant and his wife who were less than credible witnesses in that their testimony was lacking in sincerity and was not convincing".

[33] Although the IAD's comment with regard to Mrs. Abrudan's disregard for the law may be nonsensical or difficult to understand, it has to be replaced in his context – the IAD was examining

the prejudice that the non-continuance or cancellation of the stay would have on the applicant's family, including his wife and children. Moreover, it is clear in the reasons of the impugned decision, and reasonable, that the assessment of this issue was not material to the outcome of the decision. It must be reminded in this respect that the *Ribic* factors are considered to be "illustrative, and not exhaustive" and that "the weight to be accorded to any particular factor will vary according to the particular circumstances of a case" (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4 at para 40).

[34] In view of the above reasons, this application for judicial review must fail. At the hearing, the applicant has left the Court discretion to decide whether the reference by the tribunal to the reconsideration as "final" raises a question of general importance. In my opinion, the law is clear and the answer already given by the Court to the argument made by the applicant does not generate a question of general importance. Accordingly, no question shall be certified in the circumstances.

JUDGMENT

THIS COURT'S JUDGMENT is that the present application for judicial review be dismissed. No question shall be certified in the circumstances.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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