Federal Court  Cour fédérale

Date: 20130726

Docket: IMM-11463-12

Citation: 2013 FC 819

Ottawa, Ontario, July 26, 2013

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

NADICA MARKOVSKA

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Markovska's days in Canada may be numbered:

a. if the Minister succeeds in this judicial review;

b. if the Immigration Appeal Division, of the Immigration and Refugee Board of Canada, re-imposes a deportation order;

and

c. if that deportation order is not suspended.

It came about this way.

[2] Ms. Markovska came to Canada on a temporary visa in the late 1980s. She suffered a workplace accident in 1992 and has been on disability ever since. She became a permanent resident in 1993.

[3] Depressed, she developed a gambling addiction. To fuel that addiction, she turned to a life of crime. She was convicted on three fraud related charges. In addition, other fraud related charges, which go back several years, are still outstanding.

[4] She was written up under s. 44 of the *Immigration and Refugee Protection Act* on the grounds that she might be inadmissible. The basis of the report was the three criminal convictions. She was then found to be inadmissible on the grounds of serious criminality, and so a deportation order was issued against her in 2008.

[5] As a permanent resident (who was losing that status), she had the right to appeal to the Immigration Appeal Division (IAD) of the Immigration and Refuge Board of Canada. Among other things, the IAD may stay a deportation order taking into consideration the best interests of children directly affected and on the basis that sufficient humanitarian and compassionate considerations warrant special relief in the circumstances.

[6] In 2010, the IAD stayed Ms. Markovska's deportation for two years provided that she abide by 10 conditions. One condition was that she repay her victims of her fraud. Indeed, that was ordered in her original sentences.

[7] After the two years had passed, she appeared before another member of the IAD. This time, the condition that she repay was lifted and her deportation order was set aside. This is the judicial review requested by the Minister of the IAD's decision dated 19 October 2012, which allowed Ms. Markovska's appeal on the basis that "the tribunal is satisfied that there are sufficient humanitarian and compassionate reasons in this case to overcome the inadmissibility."

MS. MARKOVSKA'S CRIMINAL CONVICTIONS

[8] Ms. Markovska convictions are as follows:

a. 8 November 2000: she was convicted of fraud over $5,000 in Ontario, a crime subject to a term of imprisonment not exceeding 14 years. She was given a two year suspended sentence with two years probation. She was also ordered to make restitution in the amount of $4,900;

b. 2 January 2001: she was convicted of obtaining more than $5,000 by way of false pretences, an indictable offence liable to imprisonment for a term not exceeding 10 years. She was given a three-year suspended sentence with three years probation and ordered to pay $11,000 in restitution;

c. 29 May 2001: she was convicted of uttering forged documents, which may also lead to imprisonment for a term not more than 10 years. She was sentenced to 35 days in jail and ordered to pay the restitution amount of $6,749.85;

[9] In addition, there are a number of fraud related charges for offences allegedly committed in 2003 and 2004, as well as failure to attend court in 2005. It is important to keep in mind that these

outstanding charges did not form part of the s. 44 report, which led to the determination that she was inadmissible and to the issuance of a deportation order.

[10] The 2010 decision, which led to a two-year stay of her deportation, was subject to 10 conditions. The most relevant one, condition 10, reads:

> Make restitution, if you have not already done so, and provide proof that you have made restitution to the victims of the offences of which you were convicted, as originally ordered by the courts, or by any subsequent modifications, in the sentences handed down on November 8, 2000, January 2, 2001 and May 29, 2001.

[11] Another condition was that she obtain a permanent resident card from Citizenship and Immigration Canada, which she has done. Furthermore, conditions 4, 5 and 6 read that she:

> [4] Not commit any criminal offences.
>
> [5] If charged with a criminal offence, immediately report that fact in writing to the Agency.
>
> [6] If convicted of a criminal offence, immediately report that fact in writing to the Agency and the IAD.

THE IAD DECISION IN 2012

[12] After the passage of two years, Ms. Markovska's appeal was reactivated. The decision maker was guided by the decision of the IAB in *Ribic v Canada (Minister of Employment and Immigration)* (T84-9623), [1985] IABD No.4 (QL), endorsed by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84. These factors, which serve as a useful guideline as to the circumstances in which the IAD may take into account humanitarian and compassionate factors, are:

- The seriousness of the offence(s) leading to the removal order;
- The possibility of rehabilitation and the risk of re-offending;
- The length of time spent in Canada and the degree to which the appellant is established here;
- The family in Canada and the dislocation to the family that a removal would cause;
- The degree of hardship that would be caused to the family by the appellant's return to her country of nationality;
- The support available to the appellant within the family and the community;
- The degree of hardship that would be caused to the appellant by her return to her country of nationality.

[13] The decision sets out in detail the hardship which would be suffered by Ms. Markovska and her family, including her disabled sister with whom she lives, her sons, and her two grandchildren, for whom she cares for on a daily basis. There would also be hardship were she to be returned to her country of nationality, the former Yugoslavia, now Macedonia, where she has no family left. Indeed, she missed her court appearance in 2005 because she was in Macedonia burying her mother.

[14] The Minister's position before the IAD was that Ms. Markovska's appeal either be dismissed or that the stay be maintained with condition 10 still in force, *i.e.* she had to repay the amounts that were due.

[15] Although some money remains owing, the exact amount is not known. Ms. Markovska certainly has paid something via her probation officer. However, the officer is no longer employed and the record has been sealed. She testified that the court restitution clerk in Brampton told her that $3,400 was still owed. As to the amount owing in Barrie, she would either have to retain a lawyer to make inquiries or show up in person. She said she cannot afford a lawyer and that if she goes to Ontario and is arrested she would possibly be in breach of one of the conditions of her stay.

[16] Her monthly income, which is not in dispute, is $875 from disability benefits.

[17] The IAD was of the view that imposing a stay with condition 10 in place would not be appropriate. Ms. Markovska clearly is unable to fulfil that condition, and indeed was not able to fulfil it when it was imposed in 2010, perhaps then because of lack of information or evidence the condition was imposed in the first place. The IAD stated that imposing that condition, "would not achieve any goal towards the rehabilitation process."

[18] Although the IAD recognized the seriousness of the offences, considering that her last conviction went back to 2001 "and that she did not commit any other infractions since that time, she [has] shown that she was able not to re-offend." The risk of re-offending was very low.

[19] She acknowledged that there were pending charges, so that the only way one can read the comment that Ms. Markovska had not committed any other infractions since 2001 is that it has not been proved that any such offences were committed.

ANALYSIS

[20] The Minister engaged in a very tight analysis of the language used by the IAD. Indeed, one can make out a case that there is some inconsistency. At one point, the IAD referred to a pending charge against her for failing to repay the amounts due. That may be the only pending charge relating to her convictions. Certainly in other passages the IAD acknowledged there were other

pending charges against her, charges which were not part of the s. 44 report, and which did not figure in the 2010 decision of the IAD.

[21] In my view, these inconsistencies do not take away from the overall reasonableness of the decision. As Mr. Justice Joyal noted in *Miranda v Canada (Minister of Employment and Immigration)*, 63 FTR 81, [1993] FCJ No 437 (QL), in addressing issues of errors in decisions of an administrative tribunal, at paragraph 5:

> It is true that artful pleaders can find any number of errors when dealing with decisions of administrative tribunals. Yet we must always remind ourselves of what the Supreme Court of Canada said on a criminal appeal where the grounds for appeal were some 12 errors in the judge's charge to the jury. In rendering judgment, the Court stated that it had found 18 errors in the judge's charge, but that in the absence of any miscarriage of justice, the appeal could not succeed.

[22] As the Supreme Court stated in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, which aids in determining whether a decision is reasonable, at paragraph 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But 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.

[23] Considering, as well, *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, 340 DLR (4th) 7, which invites the Court to probe the record, and considering the deference owed to the IAD in discretionary decisions, I find that the decision is reasonable and should not be disturbed.

[24] The IAD dropped condition 10 because it was satisfied Ms. Markovska could never repay the amount owing, whatever it may be. On that basis, what purpose would be served by re-imposing the condition? This brings to mind the infamous debtors prisons mentioned in so many of Charles Dickens' novels. The condition would hold her *in terrorem*. If she did not repay, which the IAD reasonably found she could not, she would constantly run the risk of deportation.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The appeal is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11463-12
STYLE OF CAUSE:	MCI v NADICA MARKOVSKA
PLACE OF HEARING:	MONTREAL, QUEBEC
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