Federal Court Cour fédérale

Date: 20160708

Docket: IMM-7666-14

Citation: 2016 FC 785

Ottawa, Ontario, July 8, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

CHUN JIE KUANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is a judicial review of a decision by the Immigration Appeal Division [IAD] upholding a Deportation Order issued by virtue of a decision [Decision] of the Immigration Division [ID].

The Applicant was found to be inadmissible on grounds of serious criminality pursuant to s 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] having been convicted of an offence under s 7(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19.

[2] It is important to note that the validity of the Deportation Order was not in issue before the IAD. H&C considerations were in issue and that is the only matter properly before the Court.

II. Background

[3] The Applicant is a citizen of China, a permanent resident by virtue of the sponsorship of his wife from whom he is now divorced.

[4] The Applicant separated from his wife two months after his arrival in Canada allegedly on grounds that an injury to his toes so disgusted his wife that the marriage collapsed. The couple divorced in February 2012.

[5] The Applicant went to work as a chef on a farm which turned out to be a “grow op”. Despite knowing it was an illegal grow op, the Applicant stayed on, and was arrested when the farm was raided by the RCMP.

[6] He was convicted and given a conditional sentence of two years less a day. At the time the offence could have resulted in a sentence of up to seven years’ imprisonment.

[7] The ID conducted an inadmissibility hearing where the sole issue was whether a "term of imprisonment" for purposes of IRPA s 36(1)(a) included a conditional sentence.

[8] Having been unsuccessful on that issue, the Applicant appealed to the IAD and relied exclusively on H&C grounds for the appeal. No appeal was made regarding the legal validity of the Deportation Order – the issue of a conditional sentence.

[9] The IAD decided against the Applicant on these H&C grounds in June 2015.

[10] Subsequently, the Applicant advised the Court of the Federal Court of Appeal's pending decision in *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237, 392 DLR (4th) 351 [*Tran*], which dealt with the issue of a conditional sentence in the context of "a term of imprisonment". Both parties declined to make further submissions on the impact of the *Tran* decision.

[11] In the IAD decision, which is the subject of this judicial review, the issue was whether there were sufficient H&C considerations to warrant special relief in light of all the circumstances of the case.

[12] In the IAD decision, the relevant factors for the exercise of IAD jurisdiction were identified as:

- the seriousness of the offence in issue;
- the remorsefulness of the Applicant;

- the possibility and extent of rehabilitation;
- the length of time in Canada and degree of establishment;
- the Applicant's family in Canada and the impact of removal;
- the best interests of the child (if any);
- family and community support available; and
- degree of hardship caused by removal.

[13] In the IAD decision, the panel concluded:

- the Applicant's actions fell on the serious end of the spectrum – a point admitted by his counsel;
- the Applicant was remorseful and on the path to rehabilitation – a positive factor;
- the marriage was likely a marriage of convenience and the Applicant working and paying taxes constituted limited establishment;
- the Applicant had no family in Canada so there would be no significant impact resulting from his removal;
- there were no children; and
- despite the Applicant's claim of hardship due to risk of being disowned by his family, this was not an undue hardship.

[14] The IAD's conclusion was that negative factors outweighed positive factors. Based on the crime committed, the length of sentence, the short stay in Canada and the lack of establishment, a stay of removal was not justified.

III. Analysis

A. *Standard of Review*

[15] Considerable deference is owed to tribunals exercising highly discretionary functions. The legal issue of whether a conditional sentence constitutes a "term of imprisonment" is not before this Court and the Court will not exercise its discretion to broaden the judicial review beyond the IAD decision.

[16] Since the legal validity of the ID's decision is not in issue, the substantive issue is the H&C aspect of the IAD decision. The standard of review is reasonableness (*Canada (Citizenship and Immigration v Khosa*, 2009 SCC 12, [2009] 1 SCR 339).

To the extent that there is a procedural fairness issue in respect to the comments about the Applicant's marriage, it is subject to a correctness standard of review.

B. *Validity of Deportation Order*

[17] In *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, the Supreme Court, while noting the breadth of a court's judicial review authority to consider an issue not raised before the tribunal where appropriate, held that where an issue could have been raised but was not, this discretion should not be exercised.

[18] The Record establishes that the issue of a conditional sentence counting as imprisonment was the only one before the ID. However, the Applicant did not appeal the decision on that ground nor did he make submissions to the IAD on that issue.

[19] It would be inappropriate to now allow the Applicant to seek judicial review on a grounds which he essentially abandoned before the IAD and on which the IAD made no determination. Judicial review is intended to be a review of the decision of a tribunal not to decide a matter at first instance.

The Court is mindful of the *Tran* decision and even if *Tran* were reversed, the Court should not entertain this previously abandoned issue.

C. *H&C Assessment*

[20] The IAD considered the proper legal test and factors as discussed in *Ribic v Canada (Minister of Employment and Immigration)* (1986), [1985] IABD No 4 (Imm App Bd) [*Ribic*]. The IAD weighed the relevant factors. Any suggestions that the analysis could have been more expansive is nothing more than "armchair quarterbacking" – the Applicant knew the factors addressed and the reason for the tribunal's determination.

[21] If "deference" in terms of respect for the function of the tribunal means anything, it is accepting the very type of weighing of factors exhibited by the IAD.

[22] There is no basis for overturning the H&C determination.

D. *Procedural Fairness*

[23] The Applicant contends that by making a finding that the marriage was one of convenience, the IAD breached procedural fairness because there was no notice that the issue would be determined.

[24] The Applicant's reliance on *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 273, 406 FTR 139, is misplaced. That decision is distinguishable because the issue there was that the claimant was inadmissible because she had misrepresented her marital status.

[25] In the present case, there was no determination as to the *bona fides* of the marriage as a grounds for inadmissibility. At most, the marriage situation was context for a determination of whether the Applicant was married or had a degree of establishment in Canada. Credibility was not an issue in the *Ribic* factors.

[26] The relevant determination was that the Applicant was no longer married nor were there children at issue.

[27] Since nothing turned on the IAD's comment, there was no breach of procedural fairness in this instance.

IV. Conclusion

[28] For these reasons, this judicial review will be dismissed. There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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