Federal Court

Cour fédérale

Date: 20170208

Docket: IMM-3441-16

Citation: 2017 FC 151

Toronto, Ontario, February 8, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

ARTHMEEGAN VIGNESWARALINGAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Proceeding

[1] The Applicant has applied for judicial review of a decision [the Decision] of the Immigration Appeal Division [IAD] dated July 20, 2016 to cancel the stay of his removal order and dismiss his appeal. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

II. Background

[2] The Applicant is a 34 year old male citizen of Sri Lanka and a permanent resident [PR] of Canada. He fled Sri Lanka as a child and his family was granted refugee protection in Canada. The Applicant became a PR on July 23, 1996 at age 13.

[3] The Applicant was found inadmissible on March 1 2005. A deportation order was issued on that date. The Applicant appealed to the IAD pursuant to subsection 63(3) of the IRPA.

[4] On August 14, 2007, the IAD stayed the removal order subject to conditions for 4 years.

[5] On February 9, 2012, the IAD granted a further one year stay to be reviewed on or after February 7, 2013. However, the review was postponed five times until it was finally heard on June 10, 2016.

III. Decision

[6] The IAD held that the removal order was valid in law, but that insufficient Humanitarian and Compassionate (H&C) grounds existed to justify relief. The IAD considered the following factors set in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.D.D. No. 636:

1. Seriousness of the offence
2. Possibility of rehabilitation and risk of reoffending
3. Length of time in Canada
4. Establishment in Canada
5. Family support and the impact of removal on the family

6. Community support
7. Potential hardship upon return to the home country

[7] The IAD noted that "as the appellant has the status of a protected person, the last factor, hardship upon removal to his country…in not a relevant consideration."

1. Seriousness of the offence

[8] The IAD treated the seriousness of the Applicant's conviction and sentence for assault with a weapon as aggravating factors.

2. Possibility of rehabilitation and risk of reoffending

[9] The IAD found that the Applicant's failure to address his ongoing problems with alcohol and drugs "point to both a high risk of reoffending and diminished prospects for rehabilitation."

[10] The IAD also found that the Applicant has breached his stay conditions. He allowed his alcohol issues to endanger others, and failed to keep the peace and maintain good behaviour. He was convicted of operating a motor vehicle while impaired and refusing to provide a breath sample in 2012. He was convicted of driving while under suspension in 2016. He admitted to recently buying and consuming cocaine worth $350.00.

[11] The Applicant disclosed a driver extract dated November 5, 2015 which said that he had failed to complete a remedial program for impaired drivers. He and his wife had previously testified that he had stopped drinking, but evidently he had relapsed. The Applicant testified that

fines totalling approximately $400.00 under Ontario's *Liquor License Act* and *Trespass to Property Act* were not outstanding because Service Ontario had told him that he had no outstanding fines. The IAD found that the Applicant's testimony to the effect that these fines did not exist was "disingenuous at best" and "constitutes disrespect for the justice system bordering on mockery."

3. Length of time in Canada

[12] The Applicant has been in Canada since 1996.

4. Degree of establishment in Canada

[13] The Applicant disclosed two recent offers of temporary fulltime employment, an undated employer's commendation, and a single paystub for the pay-period ending April 29, 2015. The Applicant testified that he had been placed on long-term disability but provided no supporting documentary evidence. The IAD found that "the abject lack of corroborating evidence of employment since April 2015 is an aggravating factor…"

[14] The Applicant obtained a high school diploma in 2013 and started a post-secondary certification that was later interrupted. The IAD found that the Applicant's establishment was a 'neutral' factor.

5. Family support in Canada and impact of removal on them

[15] The IAD noted that the Applicant had been married, separated and divorced. He had a total of four children, two of whom died very young. The Applicant's separation agreement indicated that his wife had sole custody and was not entitled to support. However, the Applicant produced an undated, non-notarized letter from his wife indicating he provided $500 in support per month. He provided no evidence to show that these payments were continuing.

6. Community support

[16] The Applicant provided a single letter from a church which was over 10 years old. The lack of evidence of community support was an "aggravating factor."

[17] No family members testified at the hearing. The IAD found that there was "no persuasive evidence of ongoing support from…family in Canada" and that on the balance of probabilities the impact of his removal on his family would be minimal.

Best interests of the child

[18] The IAD also considered the best interests of the Applicant's two children. The IAD was satisfied that he maintained regular contact with them. However, there was no persuasive evidence of financial support. While generally children's best interests militate against removal, the IAD found that this factor was "mitigated" by the Applicant's drug and alcohol problems. The IAD concluded that the BIOC was a 'neutral' factor at best.

[19] The Applicant submitted that he had mental health problems and might be suffering from PTSD. He provided a psychologist's report (the Report) and presented two prescription medications at the hearing without any medical evidence about the conditions they were prescribed to treat. The IAD gave little weight to the Report because the diagnoses were unclear and largely based on self-reporting. The IAD found that the Applicant had "not provided persuasive proof of any underlying mental condition which would constitute a mitigating factor."

[20] In summary, the IAD assessed 6 factors. Three assessments (seriousness of the offence, rehabilitation and risk of re-offending and community support) led to findings that were seriously negative. The other three findings were neutral or neutral "at best" and neither his children nor his mental health were mitigating factors.

[21] The IAD found that the Applicant had failed to show, "at the date of hearing [sic], a preponderance of clear and convincing evidence to support a further extension of the stay." Given that H&C considerations did not justify relief, the IAD cancelled the stay of removal and dismissed the appeal.

IV. The Issue

Was the IAD's analysis reasonable?

V. Discussion and Conclusions

[22] The Applicant says that the Decision was unreasonable for a number of reasons including:

1. Disregard for the diagnosis of depression in the Report.
2. Failure to accept his explanation that the family was absent because of the numerous postponements of the hearing.
3. Failure to appreciate his employer's undated letter of commendation.
4. Failure to take his wife's observations that he is a "good father" into consideration.
5. Failure to reasonably consider rehabilitation.

[23] It is not necessary to discuss all these issues because the first issue is dispositive. The Applicant's counsel submits that the Applicant suffers from depression and that this explains his job loss, his addiction to alcohol, his effort to commit suicide with cocaine and his inconsistent efforts to seek psychiatric assistance. The Report said the following:

> During the testing phase of the assessment, Mr. Vigneswaralingam completed the Beck Depression Inventory-II (BDI-II). On the BDI-II, the patient endorsed a severe range of symptoms. In addition, the patient completed the Beck Anxiety Inventory (BAI), the results of which reflected a severe level of anxiety.

[24] However, the IAD found that the Report did not provide a clear diagnosis and said "…the appellant has not provided persuasive proof of any underlying mental health condition which would constitute a mitigating factor in my evaluation."

[25] In my view this conclusion was unreasonable because it was contrary to the Report which found severe symptoms of depression. The Respondent argued that this was not a clear diagnosis but I was not persuaded by this submission.

VI. Decision

[26] For this reason the application will be allowed.

VII. Certification

[27] No questions were posed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is hereby allowed and the matter is to be reconsidered by a different member of the IAD.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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