Federal Court  Cour fédérale

Date: 20171016

Docket: IMM-1227-17

Citation: 2017 FC 915

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, October 16, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

HUU SON NGUYEN

Respondent

JUDGMENT AND REASONS

[1] The Attorney General of Canada, on behalf of the Minister of Public Safety and Emergency Preparedness, is seeking judicial review of the decision rendered by the Immigration Appeal Division [IAD] to allow the appeal by Mr. Nguyen, against whom the Immigration Division had issued a deportation order on September 6, 2012.

[2] The rules that apply to the judicial review of administrative decisions are the same regardless of whether the judicial review is sought by the Attorney General or a litigant. What constitutes a reasonable decision for a litigant who applies to the Court will be governed by the same rules if it is the Attorney General who is seeking a judicial review. For the reasons that follow, the Attorney General's application for judicial review is dismissed.

I. The facts

[3] The Immigration Division issued the deportation order against Mr. Nguyen because he is inadmissible on grounds of serious criminality. The order was issued under paragraph 36(1)(a) of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [IRPA], which reads as follows:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	**a)** être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

[4] The validity of that deportation order is not in dispute. Offences for which Mr. Nguyen was convicted qualify under paragraph 36(1)(a). Rather, on appeal, the IAD found that there

were humanitarian and compassionate considerations in Mr. Nguyen's favour. In that regard, it is paragraph 67(1)(c) of the IRPA that applies:

Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(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.	**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.

[5] Mr. Nguyen has lived in Canada for 27 years. He never became a Canadian citizen and is now 46 years old.

[6] The Attorney General argues that Mr. Nguyen's past precludes him from benefitting from humanitarian and compassionate considerations to avoid being deported to his home country of Vietnam. To that end, Mr. Nguyen's past must of course be weighed against the considerations cited by the IAD.

[7] Mr. Nguyen's case is unclear. The facts presented are ambiguous, and information that might have been useful was not made available. Regardless, Mr. Nguyen's past that the Attorney

General wishes to highlight consists essentially of criminal activities. That criminal past has two components.

[8] First, Mr. Nguyen was convicted in April 1996 for the serious offence of trafficking in narcotics, namely heroin. Mr. Nguyen was 25 years old at the time and had been in Canada since 1990. He was sentenced to three years of incarceration.

[9] A deportation order was not issued against him until November 16, 2000. However, that order was stayed for a period of three years in a decision rendered on December 10, 2001. The record is unclear as to why the Canada Border Services Agency sought to have the stay of the deportation order cancelled in February 2005, since the stay should have already expired. One might infer that this measure was taken after Mr. Nguyen was arrested on August 6, 2004, for production and possession of marijuana for the purpose of trafficking. Ironically, those charges were withdrawn on October 6, 2005. Nevertheless, the IAD cancelled the stay on May 2, 2006. The circumstances surrounding those events are unclear, but Mr. Nguyen never returned to his country of origin.

[10] In any event, Mr. Nguyen applied to have his criminal record suspended under the *Criminal Records Act* (RSC, 1985, c C-47). That application was submitted to the Parole Board of Canada on September 14, 2006, and was granted on April 24, 2008.

[11] However, Mr. Nguyen was arrested again in October 2009. That time, he was charged with possession of marijuana for the purpose of trafficking and conspiracy. What must be noted

is that he was apparently involved from June 26 to October 9, 2007, in what seemed to be a major network (88 people arrested) that was under police investigation for a number of years. In other words, his arrest in October 2009 was for events that had occurred more than two years earlier. His actual role in that possession of marijuana for the purpose of trafficking within a network is not explained in the Court record. What we do know is that Mr. Nguyen pleaded guilty to the offence on December 14, 2011. He was sentenced to 14 months in prison.

[12] Note that Mr. Nguyen had been granted conditional release following his arrest in October 2009. One of the conditions seems to have been that he was not to be in possession of a cell phone. However, on November 28, 2011, he was found driving a motor vehicle while using a cell phone. When the police stopped him, they quickly realized that there was a breach of one of his release conditions and therefore laid charges under paragraph 145(3)(b) of the *Criminal Code* (RSC, 1985, c C-46). Mr. Nguyen pleaded guilty to that charge the same day that he pleaded guilty to possession of narcotics for the purpose of trafficking, on December 14, 2011. He was given a fine of $500.

[13] It thus appears that Mr. Nguyen was guilty of three offences, for which he pleaded guilty in April 1996 and in December 2011. For the first charge, he was granted a suspension of his criminal record. The other two offences are somewhat related, in that the charge under paragraph 145(3)(b) was a direct result of the charge for possession of marijuana for the purpose of trafficking.

[14] The Attorney General also submitted that Mr. Nguyen was arrested on August 6, 2004, again in connection with narcotics. However, those charges were withdrawn on October 6, 2005, making it hard for me to see how they could have any impact. The respondent cannot be required to defend himself regarding a charge that was withdrawn. Similarly, when he was arrested in November 2011, there was a plastic sword in the vehicle for which a charge appears to have been laid. However, Mr. Nguyen was acquitted of that charge in January 2012. As a result, no negative inference can be drawn from that event. Lastly, an amount of money was found in the vehicle the respondent was driving on November 28, 2011, a vehicle he did not own. There were also no charges laid regarding the possession of that money.

[15] On the other side of the scale are the humanitarian and compassionate considerations raised by the IAD. The IAD considered that Mr. Nguyen's deportation would cause hardship and dislocation for his family. Mr. Nguyen and his spouse have three minor sons, aged 8, 11 and 13 at the time of the decision. His common-law spouse and the three sons are all Canadian citizens and would not accompany Mr. Nguyen if he were required to leave Canada. The respondent also has a daughter, age 20 at the time of the decision, who is a university student in Toronto. However, she testified that she frequently returned to Montreal to live with her father and her three half-brothers. She testified that her three half-brothers would be devastated if their father were deported. The IAD thus states in its decision that "[t]he best interests of the appellant's three minor boys would be best served if their father could continue to play a hands-on role in their upbringing" (paragraph 22).

[16] Moreover, the IAD highlighted the fact that the only criminal offence for which the respondent was convicted since the incidents that occurred between June and October 2007 was the use of a cell phone while prohibited from doing so under his bail conditions. None of the offences for which he was convicted involved the use of violence.

[17] Thus, the IAD noted that Mr. Nguyen "has demonstrated a possibility that he can function in society without reoffending, and in all likelihood, he is capable of living a crime free [sic] life" (paragraph 21). He had been gainfully employed for two years and reported his income to the tax authorities. Consequently, the IAD allowed the appeal, thus preventing Mr. Nguyen's deportation.

II. Standard of review and analysis

[18] There is no doubt that the standard of review in this case is that of reasonableness. In fact, the Supreme Court of Canada made a decision on this issue as part of a judicial review of an appeal decided by the IAD under paragraph 67(1)(c) of the IRPA in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*]. It is worth noting how discretionary a decision made under paragraph 67(1)(c) is. In *Khosa*, Justice Binnie, writing for a majority of five of the seven justices who heard the case, wrote the following at paragraphs 57 and 58:

> [57] In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(*c*) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(*c*) requires the IAD to be "satisfied that, at the time that the appeal is disposed of. .. sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations",

> but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(*c*) calls for a fact-dependent and policy-driven assessment by the IAD itself....
>
> [58] The respondent raised no issue of practice or procedure. He accepted that the removal order had been validly made against him pursuant to s. 36(1) of the *IRPA*. His attack was simply a frontal challenge to the IAD's refusal to grant him a "discretionary privilege". The IAD decision to withhold relief was based on an assessment of the facts of the file. The IAD had the advantage of conducting the hearings and assessing the evidence presented, including the evidence of the respondent himself. IAD members have considerable expertise in determining appeals under the *IRPA*. Those factors, considered altogether, clearly point to the application of a reasonableness standard of review. There are no considerations that might lead to a different result. Nor is there anything in s. 18.1(4) that would conflict with the adoption of a "reasonableness" standard of review in s. 67(1)(*c*) cases. I conclude, accordingly, that "reasonableness" is the appropriate standard of review.

[19] It follows that a person challenging such a decision to have it examined on judicial review must demonstrate, on a balance of probabilities, that said decision is unreasonable. In *Khosa*, Binnie J. clearly expresses the consequences of such a burden. Paragraph 59 of the decision reads as follows:

> [59] Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[20] On closer examination, it is clear that the IAD was correct in highlighting that the conviction for possession for the purpose of trafficking dated back to events that had occurred between June and October 2007. The only setback was in November 2011, when Mr. Nguyen was stopped while using a cell phone, which was prohibited under his release conditions. The matter was resolved by a $500 fine.

[21] I questioned counsel for the Attorney General about the first conviction, in 1996, in connection with what many would call a hard drug, heroin. In fact, Mr. Nguyen was sentenced to three years in a penitentiary. However, that conviction was suspended under the *Criminal Records Act*. Counsel was largely silent when questioned about the effect of such a suspension and what the effect would be of a conviction after the suspension was granted. According to counsel, the record was unclear. It was stated that the effect of the suspension was not to damage the applicant's reputation. In fact, section 2.3 of the *Criminal Records Act* stipulates not only that the reputation of the person whose criminal record has been suspended should not be damaged, but also that the suspension establishes that the applicant was of good conduct and that the suspension "removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament." Thus, unless the suspension is subsequently revoked, the judicial record of the person granted the suspension is kept separate and apart from other criminal records, and any disqualification or obligation is removed. The applicant was unable to provide the Court with clarification on the effect of the suspension granted and whether it had been revoked.

[22] In any event, unless it is revoked, it would seem that the weight to be given to a conviction in 1996 but for which the criminal record has been suspended is clearly limited. One could have expected the government to be clearer on this matter. Moreover, counsel stated that he based his argument more on the guilty pleas in December 2011.

[23] In light of the above, the applicant's argument that the unreasonable error made was apparently minimizing the seriousness of the crimes the respondent committed does not hold water.

[24] Regarding the conviction, the record does not reveal whether the criminal record suspension is still valid and what effect that would have on the IAD's decision. Regardless, the offence was committed over 20 years ago, and the Attorney General instead wanted to rely on the two more recent convictions.

[25] I found no indication of the minimization of the seriousness of the offences as the applicant alleges. It is true that the events that led to the narcotics charge date back to 2007. The evidence does not confirm what role Mr. Nguyen played or whether violence was involved. Concluding that there were no aggravating factors is not an unreasonable minimization of the seriousness of the offence.

[26] The IAD cannot be criticized for the attempt to nuance the case by referring to other events. Charges that have been withdrawn or for which an acquittal has been made should not, in my opinion, be given any weight. This is all the more true when charges were not even laid.

While suspicions may exist concerning certain events, that does not make a decision by an administrative tribunal unreasonable.

[27] The applicant also argues that the IAD did not conduct a reasonable assessment of the factors set out in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] IABD No. 4 (QL) [*Ribic*]. Those factors, which the Supreme Court of Canada endorsed in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84 [*Chieu*] are used to assess the circumstances that may warrant special relief, thus preventing deportation on humanitarian and compassionate grounds. The list is indicative and is not exhaustive. It is appropriate to quote the paragraph of *Ribic* that the Supreme Court of Canada endorses at paragraph 40 of *Chieu*:

> In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. While the general areas of review are similar in each case the facts are rarely, if ever, identical.

[28] The applicant submits that the IAD's conclusion that the respondent is rehabilitated is unreasonable and irrational on its face. In addition to being a bold statement, it is difficult to understand its basis. First, the IAD did not conclude that the respondent is rehabilitated. Rather,

it simply acknowledged his ability to function in society without a risk of recidivism. Moreover, the applicant does not demonstrate how that conclusion would be unreasonable. The Federal Court of Appeal made the following remarks in *Delios v. Canada (Attorney General)*, 2015 FCA 117:

> [28] Under the reasonableness standard, we do not develop our own view of the matter and then apply it to the administrator's decision, finding any inconsistency to be unreasonable. In other words, as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did, finding any inconsistency to be unreasonable. That is nothing more than the court developing, asserting and enforcing its own view of the matter – correctness review.

[29] The applicant never demonstrated any lack of reasonableness in that decision and is asking the Court to accept the argument because, in his opinion, the IAD's conclusion is unreasonable on its face (paragraph 5, memorandum of fact and law). Stating something is insufficient to demonstrate that it is so. It is also insufficient to argue that a different outcome is possible, or even more appropriate. It must be shown that the decision does not fall within the range of possible, acceptable outcomes in respect of the facts and law. The applicant claims that there is a history of violating the law. On closer examination, it is not unreasonable to conclude that this violation, which ultimately dates back to October 2007 with one setback in 2011, has not been demonstrated to the extent that the humanitarian and compassionate considerations do not outweigh it. If we consider Mr. Nguyen's criminal record for what it is, we could reasonably conclude that it is not extensive. Withdrawn charges, acquittals and charges that were not laid cannot be considered. That is what the IAD did. The applicant is dismissing the humanitarian and compassionate considerations raised by the IAD. However, I find those considerations to be very real, and they ought to have been weighed in the decision. The applicant's silence on this

point is of no help to him. These considerations are not only relevant, but they are also essential to an assessment under paragraph 67(1)(c) of the IRPA.

[30] One can imagine that a conclusion different from that reached by the IAD could be possible in respect of the facts and law. However, the burden on the applicant is to demonstrate that the IAD's conclusion is not a possible, acceptable outcome in respect of the facts and law. That was not demonstrated, and the Attorney General is held to the same standards as any other litigant. Moreover, the IAD's decision is justified, transparent and intelligible, as the state of the law requires (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 47). The evidence that was available to the IAD is fully consistent with its decision when the criminal record, on which the Attorney General solely relies, is appropriately examined and weighed against the humanitarian and compassionate considerations, including the best interests of the children. The criminal record is weighed against the 27 years the respondent has spent in Canada, his family, the dislocation that would be caused and the hardship he would encounter in Vietnam, which he left in 1987. The applicant did not discharge his burden.

[31] Consequently, the application for judicial review must be dismissed.

JUDGMENT in IMM-1227-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties did not raise any serious questions of general importance. There is no such question to be certified.

3. There is no need to impose costs.

"Yvan Roy"
Judge

Certified true translation
This 29th day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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