Federal Court  Cour fédérale

Date: 20200128

Docket: IMM-2705-19

Citation: 2020 FC 147

Ottawa, Ontario, January 28, 2020

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

AMIR HAMZA NASHIR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board [IAD] wherein the IAD dismissed the Applicant's appeal and found the removal order against the Applicant to be valid [Decision]. The removal order was issued because the Immigration Division [ID] found the Applicant to be

inadmissible on grounds of serious criminality pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Facts

[2] The Applicant is a 33-year-old citizen of Afghanistan. He became a permanent resident in Canada in July, 2015, having been sponsored by his spouse. The IAD reports the Applicant had been convicted of 18 criminal offences, the first of which occurred approximately three months after he landed in Canada, for assault and theft under $5,000.

[3] The Applicant was found inadmissible for only one of his offences [the reportable offence], in which he was convicted of assault with a weapon, a cell phone, contrary to section 267(a) of the *Criminal Code*, RSC, 1985, c C-46. Assault with a weapon is punishable by a maximum term of 10 years imprisonment. The victim was his girlfriend. He was sentenced to one day in jail, 23 days of pre-sentence custody, two years of probation, an order of prohibition/seizure for 10 years, and a $100 fine.

[4] The events related are as follows. In April, 2016, the Applicant began dating a woman he met online. In May, 2016, the Applicant visited the woman's home, where she lived with her young son from a previous relationship. In an altercation between the Applicant and the woman, the Applicant took the woman's cell phone and, when she tried to get it back, he took the cell phone and struck her in the mouth with it. The Applicant also assaulted the woman's young son when he tried to help his mother, although no charges were laid in this respect.

[5] In January, 2017, a Canada Border Services Agency [CBSA] officer recommended the Applicant be referred to an admissibility hearing on the basis of his criminal history in Canada including the reportable offence and the escalation of his criminal offences [Case Review and Recommendation document]. The CBSA officer noted the Applicant had 13 convictions between 2015 and 2016 prior to his conviction for the reportable offence, and that on January 25, 2017, additional new charges were laid for assault, breach of probation order, and possession of a controlled substance (crack cocaine).

[6] In addition, while the Applicant was ordered to attend a program for domestic violence, he missed three sessions - and was expelled from the program.

[7] The Applicant was self-represented at the ID hearing held in March, 2017. The ID found the Applicant inadmissible for serious criminality and issued a removal order. The Applicant appealed the removal order to the IAD. He retained counsel to represent him at the IAD hearing held in January, 2019.

III. Decision under review

[8] The IAD released its decision upholding the removal order in March, 2019. At this appeal the Applicant's submitted that all but the first two convictions were "lies" based on guilty pleas prompted by poor advice from his criminal lawyer. He said he didn't know he could be removed from Canada for the attack with a weapon on the woman, the reportable offence. He also submitted humanitarian and compassionate [H&C] considerations warranted special relief in his case; the IAD dismissed these submissions.

[9] The IAD considered the Applicant's testimony that he did not commit the reportable offence or all but two of the others.

[10] The IAD reviewed documentary evidence outlining the circumstances of the reportable offence including the Crown Brief Synopsis prepared by the Waterloo Regional Police Service dated May 12, 2016, and a report from the Applicant's Probation and Parole Officer from Mississauga Probation and Parole dated October 17, 2018 [Parole Report].

[11] The IAD identified the non-exhaustive list of factors to consider provided in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 4 and endorsed in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, and *AI Sagban v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4. The IAD Decision assessed a number of factors identified as appropriate in the circumstances.

[12] As part of its analysis of the seriousness of the offence, the IAD also referred to the testimony of the Applicant. It is fair to say that this evidence was contradictory and inconsistent in many respects. The Applicant's version of events differed from the version of events reported in the Crown Brief Synopsis, and was summarized by the IAD:

> [15] The appellant testified that the reportable offence was not his first offence in Canada. His first offence was in 2015, about five or six months after he arrived to Canada. If he had known that he would be issued with a removal order, he would not have pled guilty to the reportable offence. He would have fought the charge. But, it was only later that he learned about the removal order when the immigration authorities came to see him whilst he was detained, and after he had pled guilty. The Appellant's criminal counsel did not give him any advice about the immigration consequences of pleading guilty to the reportable offence. The

> appellant's criminal counsel told him that if he wanted a trial, it would take three or four months or longer, during which period the appellant would remain imprisoned without anyone to bail him out, whereas, if the appellant pled guilty, he would serve only 20 or 25 days' imprisonment. Because the appellant did not want to stay in jail for four months, and because he did not have anyone to bail him out, he did not fight, and instead pled guilty to the reportable offence even though he did not commit the offence.
>
> [16] In cross - examination, the appellant confirmed that the woman in Kitchener lied because she wants him (the appellant) to be with her. He told the police that she was blackmailing him, made up a story about an assault, and had called the police because she wants to be with him. The appellant confirmed that he is a victim of that woman's lies. When he refused to be with her, she falsely accused him. He is in this situation because of the lies the woman in Kitchener told. If she had known that he would be issued with a removal order, she would never have done it.

[13] The IAD concluded the reportable offence did not fall on the very serious end of the spectrum because of the relatively small sentence. However, the IAD stated the conviction for assault with a weapon – the reportable offence - formed part of a pattern of domestic disputes, which weighed against him. The IAD noted:

> [45] There is copious evidence before me of multiple criminal convictions following the first two offences in 2015 for which the appellant has claimed some responsibility, including further convictions in which the appellant's now estranged spouse was the victim. Throughout his testimony, the appellant denied or minimized his actions. Throughout his testimony, the appellant blamed his spouse, his spouse's family, and the woman in Kitchener for his criminal charges and convictions. The appellant also blamed immigration authorities and his criminal counsel for his having pled guilty to charges, his having convictions subsequent to the first two offences in 2015, and his having been issued with a removal order in relation to the reportable offence. The appellant testified to having pled guilty to charges because he had nobody to bail him out, and to spend as little time in jail as possible. He testified that he had breached conditions/probation inadvertently (i.e. his spouse called him and he went over). Although he has testified that he is remorseful, he accepts limited to no responsibility for his negative behaviours. I find that there is

> insufficient persuasive evidence to establish that the appellant is genuinely remorseful for the offences, including for the reportable offence. I give the appellant's alleged remorse little evidentiary weight and find that it does not attract any special relief in the appellant's H&C analysis.

[14] The IAD discussed additional H&C factors including the "Possibility of rehabilitation," "Length of time spent in Canada," "Establishment in Canada/Community support in Canada," "Family in Canada, dislocation to family caused by removal, and family support in Canada," "Hardship caused to the appellant by his return to his country of nationality," and "Best interests of the child".

[15] The IAD concluded:

> **CONCLUSION**
>
> [88] Counsel for the appellant submitted that the appellant should be placed on a three-year stay of removal to give the appellant a chance to live up to the conditions imposed on a stay, taking into account the hardship he would face upon removal to Afghanistan.
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> [89] Minister's counsel argued that the appeal should be dismissed and that the appellant is using his potential removal to Afghanistan as a shield. In the Minister's view, all of the other H&C factors assessed are significantly negative - the appellant has demonstrated no capacity for rehabilitation, has ongoing and condoned criminality, and will breach a stay of removal.
>
> [90] I do not find that a stay of removal is an appropriate disposition in this case. In determining that a stay of removal is not appropriate, I consider the appellant's criminal history in Canada, the past instances where he has breached conditions, his very limited prospects for rehabilitation, and his high risk to re-offend. The appellant's convictions demonstrate a pattern of repeated behaviour against his now estranged spouse. The appellant's convictions for breaches of conditions speak to his unwillingness and/or inability to comply with conditions imposed. The appellant asserts that he has inadvertently breached conditions. The appellant has not engaged in any form of sustained therapy or counselling.

> He denies any anger or substance abuse issues, and has taken no steps to voluntarily avail of counselling for anger or substance abuse. He continues to blame his spouse, her family, and the victim in Kitchener for his immigration and criminal justice problems. Evidence demonstrates that the appellant has extremely limited prospects for rehabilitation. There is insufficient evidence to establish that the appellant has taken any steps to address any concerns which may underlie his criminality, and thus, there is also insufficient evidence to establish that the appellant has the tools necessary to comply with conditions imposed if a stay were to be granted.
>
> [91] Though hardship to the appellant is a positive factor, the negative factors in this case are significant and overwhelming. The hardship the appellant would face in Afghanistan is overshadowed by the appellant‘s lack of genuine remorse for the reportable offence as well as prior and subsequent offences, his high risk to re-offend, his very limited prospects of rehabilitation, his brief time in Canada, his lack of establishment in Canada, and his lack of family ties in Canada. I find that the appellant has not proven, on a balance of probabilities, and taking into account the best interests of any child directly affected by the decision, that there are sufficient H&C considerations to warrant special relief in all of the circumstances of his case.

IV. Issues

[16] The Applicant raises three issues for determination:

1) The IAD relied on unproven statements as findings of facts, erring in law and fact.

2) The IAD ignored evidence surrounding the guilty pleadings.

3) The IAD’s assessment of hardship in Afghanistan contained an error in law and was unreasonable.

[17] In my view, each of these issues is an argument as to whether the Decision is reasonable.

I will address each.

V. Standard of Review

[18] This application for judicial review was heard shortly after the Supreme Court of Canada decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, majority reasons by Chief Justice Wagner [*Vavilov*], and *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*]. The parties made their original submissions under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. In this decision I will apply the standard of review framework set out in *Vavilov* and *Canada Post*. No unfairness arises because prior to the hearing I invited parties to make submissions regarding the application of the standard of review analysis in *Vavilov*.

[19] As to the standard of review, in *Canada Post* Justice Rowe said that *Vavilov* set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. This presumption can be rebutted in certain situations, none of which apply in this case. Therefore, the Decision is reviewable on a standard of reasonableness.

[20] Reasonableness review is both robust and responsive to context: *Vavilov* at para 67. Applying the *Vavilov* framework in *Canada Post*, Justice Rowe explains what is required for a reasonable decision and what is required of a court reviewing on the reasonableness standard of review:

> [31] A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, at para. 85). Accordingly, when conducting

> reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100). In this case, that burden lies with the Union.

[21] Notably, reasons must not be assessed against a standard of perfection. And as pre-*Vavilov*, a reasonableness review is not a "line-by-line treasure hunt for error":

> [91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.
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> …

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.
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> …
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> [102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56.

VI. Submissions and analysis

A. *Convictions*

[22] The Applicant submits the IAD committed reviewable errors by blindly relying on unproven statements as fact and for not stating why unproven statements were preferred over other evidence including the testimony of the Applicant. The Applicant criticizes reliance on the Crown Brief Synopsis prepared in respect of the reportable offence. The Applicant takes issue with the following paragraphs in the Decision:

[8] The circumstances of the reportable offence of assault with a weapon for which the appellant was convicted on August 12, 2016, occurred on May 11, 2016 in Kitchener, and involved the appellant, an adult female the appellant had met on 3 Kijiji dating platform, and her 10-year-oid son. The Crown's case file synopsis provides as follows:

> This brief deals with a police investigation into a domestic dispute which occurred at approximately 7:30 pm, Wednesday, May 11, 2016, between the victim, 49-year-old [name redacted] and her ex-boyfriend, 30-year-old Amir NASHIR.... The incident occurred at her [the victim's] residence….
>
> The victim and the accused met on Kijiji within a friendship network listing and had been conversing back and forth since April 24, 2016 and within that week started dating. They have no children together; however, the victim has a l0-year-old son from a previous relationship who is also a victim and witness to this altercation. Alcohol was not a factor in this incident.
>
> This is the first reported domestic incident between the accused and victim. The victim indicated no prior altercations between the two of them and understands the reasoning behind the accused's actions. The accused is fearful of immigration and his wife finding out about the extra-marital relationship…
>
> On Wednesday, May 11, 2016, as a result of their conversation, the victim began to feel sorry for the accused and agreed to drive to Mississauga to pick him up. The victim met the accused at a strip mall…and returned home with the accused and her son.
>
> Later that evening, the victim and accused were in her bedroom when the accused became agitated with [name redacted] as he thought [name redacted] was taking pictures of them with the victim's cell phone. The accused took the victim's cell phone, wanting to go through it. The victim attempted to retrieve her cell phone back and, during the process, the accused struck the victim in the mouth area with the cell phone. The victim's son [name redacted]

> attempted to intervene and was pushed away by the accused. [Name redacted] pushed the accused back into the dresser. The accused told [name redacted] to 'fuck off' and pushed him violently onto the bed. [Name redacted] attempted to hold the door shut while the victim was telling the accused to leave. The accused was able to force his way into the bedroom, where he continued to yell at the victim and her son. After the altercation, the accused asked the victim for money. The victim refused, stating she did not have any money and that her rent was already behind. The victim did however leave with the accused and provided him with $17.00 to take the bus home.
>
> The accused currently resides out of this Region and his daily routine is unknown; as such police are requesting a warrant for his arrest. The victim during a conversation with the accused mentioned she was going to notify police at which point the accused stated something along the lines of he wasn't scared of the police.
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> …
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> [20] …Nevertheless, the appellant's conviction for assault with a weapon of a former girlfriend, which appears to form part of a pattern of domestic disputes, does weigh against him.
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> …
>
> [90]…The appellant's convictions demonstrate a pattern of repeated behaviour against his now estranged spouse…
>
> [Emphasis added]

[23] The Applicant notes the IAD had other evidence before it that conveyed a different side of the story, namely the testimony of the Applicant, where the Applicant denied his guilt and blamed his lawyer for incomplete advice. The Applicant submits that notwithstanding his guilty pleas to the reportable offence and to all but two of the other 16 criminal convictions, without a fact finding from the criminal courts, the IAD erred in law in preferring unproven written

documentary evidence to the testimony of the Applicant, without reasons for preferring one over the other.

[24] The Applicant relies on *Rajagopal v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 523 [*Rajagopal*] where Justice Mosley stated at paras 39 to 43:

> [39] Clearly it is open to the IAD to determine the weight to be given to evidence before it, and to rely on that evidence it if is found to be relevant, credible and trustworthy. It was also certainly open to the IAD to reject the applicant's explanation of the facts underlying his offence in favor of those found in the police report.
>
> [40] That being said, the applicant in the present case is arguing that the IAD erred because it mischaracterized the evidence, by proceeding on the incorrect assumption that the report set out the facts on which the plea was based. In support of this contention, the applicant points to the fact that after describing the applicant's version of events the IAD went on to state: "[h]owever, **as the appellant pled guilty to the charge as described in the report**, I find that I prefer the above over the testimony of the appellant and that it is the truth as to what happened, on a balance of probabilities" [emphasis mine]. The IAD further stated that it could not go behind the conviction.
>
> [41] At first glance, it is not clear whether the IAD's statement emphasized above is a finding of fact or an assumption that the plea of guilty must necessarily correspond to the facts as alleged in the police report.
>
> [42] To meet the reasonable standard the reasons of the IAD as a whole must withstand a somewhat probing examination. As I have noted above however, the reasonableness of the IAD's decision relies so heavily on this one finding, the reasonableness of the decision really turns on this one underlying point.
>
> [43] When this particular statement is examined, it appears that the emphasized portion is the rationale for why the IAD determined that it preferred the reports content over the testimony of the applicant. Though it would have been open to the IAD to make this finding, it is inappropriate for it to have been assumed. This is a mischaracterization of the nature of the police report. The report contains allegations as the officer recorded them upon investigating the complaint, not the findings of fact reached by the

> court that convicted the applicant and imposed sentence. Though the IAD could have referred to evidence or testimony to support an argument that on a balance of probabilities the police report likely characterized the underlying facts of the offence in an accurate manner, the IAD did not do so. It is not open to the Court to revisit or re-weigh the evidence in order to substantiate the findings of the IAD.
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> [Emphasis in original]

[25] The Applicant submits the IAD ignored evidence surrounding the guilty pleas. The Applicant relies on *Canada (Minister of Citizenship and Immigration) v Hua*, 2001 FCT 722 , per O'Keefe J [Hua], where the Minister applied for judicial review of a decision of the IAD and the Minister argued the IAD exceeded its jurisdiction by going behind the conviction, and in effect, determining the respondent had not committed the offences despite his guilty plea and conviction:

> [5] In August of 1997, eight charges were laid against the respondent including sexual interference, sexual assault and invitation to sexual touching for the time period of May 1 to August 4, 1997. There were four alleged victims. On October 15, 1998 the respondent pleaded guilty to count 2 in relation to one victim. He received a conditional sentence for one year and probation for two years. All other charges were withdrawn by the Crown.
>
> [6] The respondent maintains that the allegations were made as a means for the youths to justify their robbery and that he pleaded guilty because he was advised to do so by his counsel and because he wished to save the expense.
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> …
>
> [34] The applicant submits that the Tribunal exceeded its jurisdiction by going behind the guilty plea which resulted in the criminal conviction and sentence of the respondent. There is no doubt that a criminal conviction is admissible in a subsequent civil matter such as the present case. The conviction however, can be explained away by the accused at his civil hearing or its effect

> lessened. In *Cromarty v. Monteith* (1957), 8 D.L.R. (2d) 112 (B.C.S.C.) at page 114, Wilson J. stated:
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> > Wigmore on Evidence, 3rd ed., art. 1066 says: "An *accused's pleading* in a criminal case, offered in a *subsequent civil case,* would seem to be proper."
>
> I think that Mr. Phillipps has correctly stated the law. The plea of guilty is receivable in evidence as an admission against interest but it is not conclusive. It must be regarded as would any other admission by a litigant, and evidence of the circumstances under which it was made must be received in order to decide upon the weight to be attached to it. The fact that the admission has been made in a judicial proceeding is a factor to be considered, but any presumption which might arise from this circumstance might be rebutted by evidence, for instance, that the plea had been induced by fraud or threats. The defendant may also, I think, be heard in a subsequent civil trial, to say that the admission was made under a misapprehension of law (See Roscoe's Evidence in Civil Actions, 20th et., p. 65, and *Newton v. Liddiard* (1848), 12 Q.B. 925, 116 E.R. 1117, therein cited). But I think that once the admission is placed on record, it is incumbent upon the litigant to prove the existence of circumstances which detract from its apparent effect….
>
> [Emphasis added]

[26] In my view, and with respect, these cases do not assist the Applicant.

[27] The Applicant had the onus “to prove the existence of circumstances which detract from” the apparent effect of the guilty pleas, as held in *Hua* at para 34. This is particularly the case where the applicant was represented by counsel, as this Applicant was before the IAD.

[28] And while the Applicant says his criminal lawyer was incompetent, the Court was not pointed to a complaint to the Law Society of Ontario, as required where incompetence is alleged

in this Court: see *Molnar v Canada (Minister of Citizenship and Immigration)*, 2012 FC 530, per Russell J, at para 60:

> [60] Although the Applicants take issue with the RPD's inquiry into whether they filed a complaint with the Law Society of Upper Canada (Law Society) about previous counsel, the Respondent points to this Court's jurisprudence which establishes that a refugee claimant must notify a former representative of any allegations of incompetence and give the former representative an opportunity to respond. Claimants are also obligated to make a complaint to the body which regulates the former representative (See *Nunez v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 555; *Shirvan v Canada (Minister of Citizenship and Immigration)* 2005 FC 1509; *Kizil v Canada (Minister of Citizenship and Immigration)* 2004 FC 137; *Mutinda v Canada (Minister of Citizenship and Immigration)* 2004 FC 365; *Gonzalez v Canada (Minister of Citizenship and Immigration)* 2006 FC 1274; and *Thamotharampillai v Canada (Minister of Citizenship and Immigration)* 2011 FC 438.

[29] In the present case, the Applicant testified he pleaded guilty to the reportable offence to avoid time in jail at the advice of his counsel. He said he was not told about the immigration consequences of his plea and would not have pleaded guilty if he had known. The IAD heard and, as noted, faithfully reported this evidence.

[30] However, and with respect, it is clear from the Decision that while the Applicant's testimony was considered by the IAD, the IAD chose not to rely on it. It is well established that it is up to the IAD, not the Court to decide the weight to be given to the evidence, as noted by the Federal Court of Appeal in *Balathavarajan v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 340 at para 12.

[31] In my view, this aspect of the application simply involves a disagreement with the assessment of credibility and the weight of evidence.

[32] In my respectful view, when it holds a hearing, IAD is in the same position concerning the weighing and assessment of evidence as the RPD. It is well established that analyzing findings of fact and making determinations of credibility fall within the heartland of the IAD's expertise, just as they fall within the RPD's expertise: *Giron v Canada (Minister of Employment and Immigration)*, 1992 CarswellNat 555, [1992] FCJ No 481 (FCA), at para 1. The Federal Court of Appeal reviewed this issue with respect to the RPD in *Siad v Canada (Secretary of State)*, 1996 CanLII 4099, [1997] 1 FC 608 (FCA). There the Federal Court of Appeal held the RPD, and I would add the IAD:

> …is uniquely situated to assess the credibility of a refugee claimant; credibility determinations, which lie within 'the heartland of the discretion of triers of fact' are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence.

[33] In essence and at their core, the Applicant's submissions in this respect ask the Court to reweigh the evidence and substitute his view of a preferable outcome, despite direction by the Supreme Court to the contrary in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61 [*Khosa*] and *Vavilov* at para 125. It is not the function of a reviewing court to reweigh evidence.

[34] In addition, Parliament has determined that the IAD is not bound by any legal or technical rules of evidence: see paragraph 175(1)(b) of *IRPA*:

Proceedings	**Fonctionnement**
175 (1) The Immigration Appeal Division, in any proceeding before it,	**175 (1)** Dans toute affaire dont elle est saisie, la Section d'appel de l'immigration:
…	…
(b) is not bound by any legal or technical rules of evidence; and	**b)** n'est pas liée par les règles légales ou techniques de présentation de la preuve;
…	…

[35] Paragraph 175(1)(b) provides an additional and solid basis on which the IAD was entitled to rely on the written documentary evidence, namely the Crown Brief Synopsis prepared by the Waterloo Regional Police Service, the Parole Report and the Case Review and Recommendation, prepared in respect of the reportable offence and the Applicant's criminal history. See *Abbas v Canada (Citizenship and Immigration)*, 2019 FC 12 in which police reports were preferred over the testimony of the applicant, where, as will be considered next, the applicant's testimony was not credible in part.

[36] It is also material in assessing the Applicant's credibility – which was the central concern in this case - that the Applicant's own testimony before the IAD gave rise to serious credibility issues apart from those in relation to the reportable conviction. In my respectful view, this Applicant provided very inconsistent evidence not only about whether he was violent with his

spouse, but also concerning use of drugs and alcohol. In this respect the IAD had reasonable credibility grounds to reject his evidence:

> [63] There is evidence before me from the appellant's probation and parole officer which provides that the appellant is considered to pose a high risk to re-offend. He blames his spouse for his continued problems with the criminal justice system, has continuously re-offended against her, and accepts minimal responsibility for his actions. He does not believe that he needs counseling as he denies having a substance abuse problem, contrary to consistent statements provided by his spouse. He is resistant to counseling. His prospects for rehabilitation are extremely limited. I do not find the appellant to be credible with respect to his testimony concerning his limited drug use. Taking all of the above into account, I find there is insufficient evidence to establish the possibility of rehabilitation in his circumstances. This is a negative factor in the appellant's H&C analysis.
>
> [Emphasis added]

[37] The IAD also found – which was certainly open to it on the record - "a pattern of domestic disputes" involving this Applicant. The IAD concluded, reasonably in my view, that this pattern of domestic abuse also weighed against him:

> [20] Assault with a weapon carries a maximum sentence of 10 years' imprisonment. By comparison, the appellant was sentenced to one day in jail, 23 days of pre-sentence custody, probation for two years, and an order of prohibition/seizure for 10 years. Given the appellant's light sentence, I find that the reportable offence does not fall on the very serious end of the spectrum. Nevertheless, the appellant's conviction for assault with a weapon of a former girlfriend, which appears to form part of a pattern of domestic disputes, does weigh against him.

B. *Hardship*

[38] I am unable to agree with the Applicant's submission that the IAD erred in its H&C analysis by not giving the hardship factor more weight due to his allegation that he was a drug

addict. In this respect, and in my respectful view, the IAD understood the Applicant's submissions but simply found insufficient evidence to grant his appeal. The Applicant's challenge to the IAD's hardship finding once again asks this Court to reweigh the evidence and to substitute his view of a preferable outcome, despite direction to the contrary by the Supreme Court in *Khosa* and *Vavilov*, cited above.

[39] In response to the Applicant's argument that the IAD applied the wrong standard when considering hardship, the Court has been consistent in articulating the principle that an applicant must show a link between the generalized risk in a country to a personalized risk that the applicant states they will experience. In this respect, the Respondent relies on *Dorlean v Canada (Citizenship and Immigration)*, 2013 FC 1024, per Shore J at paras 35-36:

> [35] The case law of this Court has repeatedly confirmed that H&C applications must present a particular risk that is personalized to the applicant (*Lalane v Canada (Minister of Citizenship and Immigration*), 2009 FC 6, 338 FTR 224; *Ye v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1072, at paragraph 10). The Court refers to the observations in *Lalane*, above:
>
> > [38] The allegation of risks made in an H&C application must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application. That conclusion would be an error in the exercise of the discretion provided for in section 25 of the IRPA which is delegated to, inter alia, the PRRA officer by the Minister…
> >
> > […]

> [36] There must necessarily be a link between evidence supporting generalized risk and that of personalized risk. Thus, the onus is on the applicant to demonstrate a link between the risk and her personal situation. Even if generalized risk could be proven in this case, this is not enough to succeed in an H&C claim (see *Paul v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1300, [2010] 1 FCR 232; *Ramotar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 362; *Chand v Canada (Minister of Citizenship and Immigration)*, 2009 FC 964).

[40] With respect, the IAD considered and reasonably weighed a multitude of H&C factors in reaching its Decision. The IAD was clear and transparent in its assessment of the evidence and fulfilled its obligation to provide detailed reasons where the consequences may threaten the Applicant's life, liberty, dignity or livelihood when he goes back to Afghanistan.

VII. Conclusion

[41] In summary, the Court concludes that the reasons of the IAD display an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision-maker. Considering the Decision holistically and not as a treasure hunt for errors, and paying 'respectful attention' to the reasoning process and its outcome, I find the Decision is justified, transparent, and intelligible. Therefore, this application for judicial review will be dismissed.

VIII. Certified Question

[42] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-2705-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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