Date: 20080404

Docket: IMM-2465-07

Citation: 2008 FC 442

BETWEEN:

FABIAN BIELECKI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing at Toronto on the 12th of March, 2008 of an application for judicial review of a decision of the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board rejecting an appeal from a determination by a member of the Immigration Division, following an admissibility hearing, that Fabian Bielecki (the "Applicant") is a person described in paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*[1] (the "*Act*").

[2] The opening words of subsection 36(1) of the *Act* and paragraph (a) of that subsection read as follows:

[1] S.C. 2001, c. 27.

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;
…	…

[3] By reason of the finding of the member of the Immigration Division, an order issued providing for the removal of the Applicant from Canada.

BACKGROUND

[4] The Applicant is a citizen of Poland who was twenty-five (25) years of age at the 12th of July, 2007. He became a permanent resident of Canada on the 16th of October, 1992, when he was ten (10) years of age. He and his parents and at least one (1) sibling, who are Roma, came to Canada to escape anti-Roma sentiment in Poland. They were admitted to Canada in the Refugee Claimant Designated Class as part of a "backlog" programme. As members of that class, they required a "credible basis" to their refugee claims but no determination on the merits of their refugee claims was required or made.

[5] The Applicant is in a common-law marriage and he and his partner have two (2) young children.

[6] The Applicant has an extensive criminal record which commenced at least as early as February, 1998 when he was convicted of robbery. His latest conviction as at the dates of his hearing before the IAD was for dangerous operation of a motor vehicle. That conviction was entered on the 7th of June, 2006. The index offence leading to the determination that the Applicant is a person described in paragraph 36(1)(a) of the *Act* was for trafficking in cocaine. That conviction was entered against the Applicant on the 15th of May, 2001. The quantity of cocaine trafficked by the Applicant was very small.

[7] The Applicant has limited education and his employment record is rather dismal.

PRELIMINARY ISSUES

[8] On the Applicant's first hearing date before the IAD, counsel for the Applicant raised the question of his status in Canada. Counsel urged that the Applicant is a Convention refugee by virtue of his admission under the "backlog" programme. As such, it was urged, the determination that the Applicant was a person described in paragraph 36(1)(a) of IRPA was fatally flawed since no "danger opinion", urged to be a condition precedent to such a determination, was first obtained from the Respondent. The IAD rejected this submission.

[9] Following the Applicant's second and last day of hearing before the IAD, the Respondent's counsel made an application to submit post-hearing evidence to the effect that two (2) days before the close of the Applicant's hearing, the Applicant was charged with several further criminal

offences. Those charges were not disclosed to the IAD by the Applicant or his father during the course of their testimony before the IAD. While the IAD acknowledged that it could not rely on evidence of new outstanding charges as proof of on-going criminality, it determined to admit the post-hearing evidence for the purpose of assessing the Applicant's credibility and, indeed, the credibility of the Applicant's father. The IAD wrote:

> While, per *Thanaratnam*, the panel cannot rely on the evidence of outstanding charges as proof of on-going criminality, the fact that, when asked directly, both the appellant [here the Applicant] and his father chose not to reveal that he had outstanding charges, calls the credibility and trustworthiness of their evidence into question, which is the thrust of the Minister's submission. The panel finds that both the appellant and his father have been less than straightforward in their testimony. Thus the new evidence is relevant insofar as it goes to the credibility of the appellant and his father. Accordingly, the Minister's application to admit the evidence of new charges is granted. The evidence is admitted for the purpose of assessing the appellant's credibility.[2]

[10] More will be said with regard to these two (2) preliminary issues in the "Analysis" portion of these reasons.

THE DECISION UNDER REVIEW

[11] The IAD commenced its analysis with the following paragraphs:

> The onus is on the appellant [here the Applicant] to show why his appeal ought not to be dismissed. The panel heard testimony from the appellant, his father and the appellant's common-law spouse. Documentary evidence was also disclosed. At the close of the hearing the appellant's counsel submitted that there were sufficient humanitarian and compassionate considerations on which to stay the execution of the deportation order for a period of two years. A position with which the Minister's counsel did not agree. She argued that the appeal should be dismissed or, in the alternative, a stay of at least four years should be imposed.
>
> In analysing the evidence presented, the panel considered the non-exhaustive factors set out in *Ribic* and approved by the Supreme Court of Canada in *Chieu*. As can be seen from the discussion below, looked at objectively, the evidence reveals

[2] The reference to *Thanaratnam* in the quoted paragraph is to *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C. 301 (F.C.) and 2005 FC 122, April 8, 2005 (F.C.A.).

> both positive and negative factors. The best interests of the appellant's child [now children] being the factor that most weighed heavily in his favour.[3]

[12] The IAD then went on to analyze the evidence before it under the following variation of the *Ribic* factors:

- The Seriousness of the Offences Leading to the Removal Order;
- The Length of Time Spent and the Degree to which the Appellant is Established in Canada;
- The Extent of Family and Community Support that the Appellant Enjoys;
- The Best Interests of the Appellant's Children;
- Potential Hardship in the Home Country; and
- Other Considerations.

[13] Following its analysis under the foregoing headings, under the heading "Disposition", and after setting forth the options available to it, that is to say, to allow the appeal, to stay the removal order and to dismiss the appeal, the IAD concluded:

> In the panel's view, when the credibility concerns set out above are coupled with the seriousness of the appellant's crimes, his lack of meaningful establishment in Canada, his equivocal remorse and limited rehabilitation and weighed against the need to protect the health and safety of Canadians, and the impact of his removal on his spouse and children, the balance does not tip in favour of the appellant. Having come to this conclusion, the panel finds that, in accordance with *IRPA* Section 69, it must dismiss this appeal.

THE ISSUES

[14] In the Memorandum of Argument filed on behalf of the Applicant, counsel identified five (5) issues on this application for judicial review, the first two (2) arising out of the preliminary issues earlier referred to in these reasons: first, whether the IAD erred in concluding that the Applicant is not a Convention refugee or protected person; secondly, whether the IAD breached principles of fairness and natural justice in admitting post-hearing evidence regarding new criminal

[3] The reference in the quotation to *Ribic* is to *Ribic, Marida v. M.E.I.*, IAB T84-9623, August 20, 1985 and the reference to *Chieu* is to *Chieu* v. *Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84.

charges laid against the Applicant; thirdly, whether the IAD erred by failing to properly consider evidence, in particular, Dr. Celinski's Neuropsychological Assessment Report; fourthly, whether the IAD misdirected itself as to the applicable law or misapplied the applicable law with respect to potential hardships for the Applicant in his home country; and finally, whether the IAD made errors by misstating evidence and by arriving at patently unreasonable conclusions with respect to its credibility findings.

[15] In addition to the foregoing issues, standard of review continues to be an issue applicable on all applications for judicial review before this Court, such as this.

ANALYSIS

a) Standard of Review

[16] This matter was heard on the 13th of March, 2008, at Toronto. Less than a week earlier, the Supreme Court of Canada delivered its judgment in *Dunsmuir v. New Brunswick*.[4] That judgment impacted significantly on the standard of review analysis on applications for judicial review. Neither counsel before me commented extensively on the issue of standard of review but I will nonetheless record my following observations.

[17] Until very recently, it had generally been accepted that the standard of review of IAD decisions will vary according to the nature of the decision. On questions of law, the appropriate standard was that of correctness; on questions of mixed fact and law, reasonableness; and on

[4] 2008 SCC 9, March 7, 2008, ("*Dunsmuir*").

questions of fact, patent unreasonableness.[5] More particularly, the standard of review for factual findings of the IAD in relation to applications such as that here under review was patent unreasonableness.[6] This Court had held that it would not interfere as long as the IAD had exercised its discretion in good faith and without regard to extraneous or irrelevant considerations.[7]

[18] On Friday, the 7th of March, the world changed. In *Dunsmuir*, the Supreme Court merged the "patent unreasonableness" and reasonableness *simpliciter* standards of review and thus reduced the standards from three (3) to two (2), those being "correctness" and "reasonableness". The Court further re-identified the concept "pragmatic and functional analysis" with the same process now to be referred to as "standard of review analysis."[8]

[19] A few paragraphs from the majority judgment delivered by Justices Bastarache and Lebel are of interest here. At paragraph [51], the Justices wrote:

> Having dealt with the nature of the standards of review we now turn our attention to the method for selecting the appropriate standard in the individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

Subject to what follows, I read the foregoing paragraph to require a reconsideration of this Court's position with regard to judicial reviews such as this.

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[5] See: *Buttar v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1607, at para. 8.
[6] See: *Chang v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 217 at para. 21.
[7] See: *Mohammed v. Canada* [1997] 3 FC 299 (T.D.).
[8] *Dunsmuir*, *supra*, para. [63].

[20] Justice Bastarache and Lebel continued at paragraph [57] of their reasons:

> An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard… This simply means that the analysis required is already deemed to have been performed and need not be repeated.
>
> [citation omitted]

I regard the foregoing paragraph as being equally applicable in the determination of questions that generally fell to be determined according to the "reasonableness *simpliciter*" or "patent unreasonableness" standard, as they once existed. Based on earlier jurisprudence of this Court, I am satisfied that here the analysis generally required has already been performed and therefore need not be repeated.

[21] In *Dunsmuir*, the Court did not address paragraph 18.1(4)(d) of the *Federal Courts Act*.[9] The relevant portions of subsection 18.1(4) read as follows:

18.1 (4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	**18.1** (4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
…	…
(*d*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	*d*) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;
…	…

[9] R.S.C. 1985, c. F-7.

I am satisfied that it remains clear that, where this Court is called upon to review a finding of a federal board, commission or other tribunal, the decision of which is under judicial review by this Court, this Court is still entitled, and indeed obliged, to grant relief if it determines that the finding is indeed a finding of fact and that it was made in a perverse or capricious manner or without regard for the material before the federal board, commission or other tribunal. This "standard of review" has been interpreted as akin to the now abolished standard of "patent unreasonableness".[10]

[22] In the result, I am satisfied that, on the facts of this matter, very little has changed with respect to the issue of standard of review except that the description "patent unreasonableness" is no longer appropriate and in its place reference should be made to review of determinations of fact under the standard of review provided by paragraph 18.1(4)(d) of the *Federal Courts Act*, above.

[23] Justices Bastarache and Lebel also commented at some length on the concept of the deference owed by Courts to administrative boards, commissions and other tribunals with specialized expertise. I am satisfied that the IAD is such a board, commission or other tribunal with specialized expertise. Thus, significant deference is owed to its decisions and, in particular its decisions based on the evaluation and weighing of the evidence before it.

b) Is the Applicant a Convention refugee or protected person?

[10]See: *Sketchley v. Canada (Attorney General)* 2005 FCA 404, [2005] F.C.J. No. 2056 (QL) at para. 65.

[24] The section 97 of the *Act* concept of "protected person" did not exist at the time the Applicant and his parents entered Canada. Nothing in the *Act* is argued on behalf of the Applicant to make that concept retrospective.

[25] In *Chieu*[11], Justice Iacobucci, for the Court, wrote at paragraph 84:

> Only the C.R.D.D. [now the R.P.D.] has the jurisdiction to determine that an individual is a Convention refugee. The I.A.D. cannot make such a finding, nor does it do so when it exercises its discretion to allow a permanent resident facing removal to remain in Canada. When exercising its discretionary jurisdiction, the I.A.D. does not directly apply the *1951 Geneva Convention*, which protects individuals against persecution based on race, religion, nationality, membership in a particular social group, or political opinion. Instead, the I.A.D. considers a broader range of factors, many of which are closely related to the individual being removed, such as considerations relating to language, family, health, and children. Even when examining country conditions, the I.A.D. can consider factors such as famine, that are not considered by the C.R.D.D. when determining if an individual is a Convention refugee. These foreign concerns are weighed against the relevant domestic considerations in making the final decision as to the proper exercise of the I.A.D.'s discretion. As a result of this broad-based balancing exercise, the protections offered to non-refugee permanent residents are of a different nature than those provided to Convention refugees. In this respect, I reiterate that it is only refugees who are protected from *refoulement*, as guaranteed by Article 33 of the *1951 Geneva Convention*… .

[26] Similarly, neither the C.R.D.D. nor its successor determined the Applicant, or for that matter, his parents, to be Convention refugees. The Applicant and his parents were admitted to Canada under a "backlog" programme. They were never determined to be Convention refugees. Rather, they were found to have done nothing more than establish a "credible basis" for refugee claims. As the IAD noted in its reasons, establishing a "credible basis" for a refugee claim is simply

[11] *Supra*, note 3.

not the same as making a refugee claim and having a determination of the merits of that claim made by the C.R.D.D. or its successor.

[27] Against a standard of review of correctness, or whatever lesser standard might be appropriate on all of the facts of this matter, the IAD made no reviewable error in deciding as it did on this issue.

c) Did the IAD breach the principles of fairness and natural justice in admitting post-hearing evidence of new charges against the Applicant, not for the purpose of establishing proof of on-going criminality but for the purpose of impugning the credibility and trust worthiness of evidence provided to it by the Applicant and his father?

[28] Where an issue of procedural fairness is raised, and it was not in dispute before the Court that this particular issue was indeed an issue of procedural fairness, the appropriate standard of review is correctness.

[29] The “new charges” that were drawn to the IAD’s attention by the Respondent, were laid only two (2) days before the last day of the Applicant’s hearing before the IAD. That being said, the Applicant’s first Court appearance on those charges was the same day on which they were laid, which is to say, before the close of the Applicant’s hearing before the IAD. As in the normal course, the circumstances giving rise to the charges were described in some detail in the charges. In all of the circumstances, it is beyond reason to suggest that the Applicant and his father were

unaware of the new charges when they testified on the last day of the Applicant's hearing before the IAD. I conclude that the Applicant had sufficient knowledge of the charges on the last day of the hearing before the IAD to testify as to their existence and to deny their validity. Both the Applicant and his father simply failed to do so.

[30] In *Kharrat v. Canada (Minister of Citizenship and Immigration)*[12], my colleague Justice Teitelbaum wrote at paragraph 20 of his reasons:

> However, in the recent case of *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, … the Federal Court of Appeal confirmed the legal principle to be applied when faced with the issue of whether evidence surrounding charges can be considered in a decision:
>
> > The jurisprudence of this Court indicates that evidence surrounding withdrawn or dismissed charges can be taken into consideration at an immigration hearing. However, such charges cannot be used in and of themselves, as evidence of an individual's criminality:…
> >
> > [citations omitted]

While the charges at issue here were neither "withdrawn" or "dismissed", I am satisfied that the same principle should apply on the facts of this matter.

[31] I am satisfied that the IAD made no reviewable error against a standard of review of correctness in taking into account evidence of the new charges against the Applicant, solely for the purpose of evaluating the credibility of the testimony before it of the Applicant and his father.

d) Did the IAD err in failing to properly consider the neuropsychological assessment report that was before it?

[12] [2007] F.C.J. No. 1096 (QL), not cited before the Court.

[32] A federal board, commission or other tribunal is presumed to have considered all of the evidence before it.[13] It is the heartland of such a board, commission or tribunal's discretion to weigh the evidence before it since it, and it alone, has the benefit of observing persons such as the Applicant in this matter, and his father, in testifying before it. The IAD wrote at paragraph [37] of its reasons:

> Reference was made during the hearing to the appellant suffering some type of mental disability as a result of a fall during childhood. The psychological report does not support this claim; rather it alludes at page 4 to the appellant hitting his head during a rock climbing accident in 2000. The appellant's criminal activity commenced some six years earlier in 1994, which undermines the claims of the appellant's father. Furthermore, while the psychologist was under the impression that the appellant has no family in Poland who would be able to support him, as noted earlier, the father's testimony that he has a number of cousins who will receive him belies this statement. Thus, while the psychologist has offered the opinion that the appellant ought not to be deported from Canada, the panel gives little weight to her opinion.

Thus, the IAD did not ignore the neuropsychological assessment report that was before it but rather, weighed it together with the totality of the evidence that was before it and determined to give it little weight. Against a standard of review of whether or not the decision of the IAD was perverse, capricious or otherwise made without regard to the material before it, I simply cannot conclude that the IAD erred in a reviewable manner in this regard. Undoubtedly the Applicant and his counsel would have weighed the evidence differently. That is not the test. I am satisfied that the decision that the IAD made with regard to the weighing of this particular element of the evidence before it was open to it.

e) Did the IAD misdirect itself or misapply applicable law with respect to potential hardships for the Applicant if he were returned to Poland or did it err

[13] See: *Florea v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 598 (F.C.A.), (QL).

by arriving at patently unreasonable conclusions with respect to its credibility findings?

[33] Under this subheading, I will briefly deal with the final two (2) issues raised on behalf of the Applicant. Both raise the issue of the IAD's weighing or evaluating of the evidence before it.

[34] With regard to country conditions in Poland and the potential "hardship" for the Applicant if he were returned to that country, the IAD wrote:

> [28] The appellant [here the Applicant] testified that he has not returned to Poland since he came to Canada. He also testified that he did not have any relatives remaining in Canada [sic, should read Poland], however, as stated earlier his father's testimony contradicted him, in that the appellant's father testified that the appellant did, in fact, have cousins in Poland and that it would be to these cousins he would go if returned to Poland. In addition, the panel is satisfied that the appellant does speak Polish as he used a Polish speaking interpreter to assist him in his hearing.
>
> [29] The panel is satisfied that if perceived to be a Roma person, the appellant would, possibly, suffer discrimination in Poland. The country conditions submitted by both counsel indicate that the Roma do suffer discrimination in Poland, however, the panel finds that the country conditions documents do not provide a sufficient basis for her to conclude that the appellant would, as he claimed, likely suffer persecution in Poland.

[35] Apart from the fact that the Applicant did not use a Polish speaking interpreter to assist him before the IAD, it remains accurate to say that he does speak Polish. While it may not be his first language after so many years in Canada, the evidence clearly establishes that he aids his parents through his fluency in the Polish language.

[36] "Hardship" is not the test in determining whether persons such as the Applicant, who are subject to a removal order that is valid in law, and here, the validity in law of the removal order outstanding against the Applicant was not challenged, is not the test. Rather, the issue before the

IAD was simply whether humanitarian and compassionate considerations, weighed in the context of all of the circumstances leading to the issuance of the removal order outstanding against the Applicant, justified either the allowance of his appeal from the issuance of the removal order, or a stay of the removal order. In that balancing process, the circumstances that the Applicant would face in Poland if returned to that country is only simply one (1) factor.

[37] I conclude that the IAD made no reviewable error in its brief analysis under the heading "Potential Hardship in the Home Country".

[38] I am further satisfied that the IAD neither misstated evidence in any material respect or arrived at a patently unreasonable conclusion with respect to the Applicant's credibility.

[39] In *Phon v. Canada (Minister of Citizenship and Immigration)*[14], Justice Rouleau, wrote at paragraph [21] of his reasons:

> By his arguments the Plaintiff is essentially seeking to substitute his opinion for that of the Appeal Division in assessing the evidence submitted at the hearing; he is also seeking to belatedly provide explanations regarding deficiencies found in his evidence by the panel. From my reading of the Appeal Division record, I am satisfied that it exercised its discretion "objectively, dispassionately and in a bona fide manner after carefully considering relevant factors": see *Chieu*, *supra*, at para. 90.

[40] I am satisfied that precisely the same might be said on the facts of this matter and with respect to the issues raised on behalf of the Applicant that are identified in the foregoing subheading. I am satisfied that in the aspects of its decision here under discussion, the IAD did not

[14] (2003), 236 F.T.R. 161.

base its decision on an erroneous finding or findings of fact that it made in a perverse or capricious manner or without regard for the material before it.

CONCLUSION

[41] For the foregoing reasons, this application for judicial review will be dismissed.

CERTIFICATION OF QUESTION

[42] These reasons will be distributed. Counsel for the Applicant will have seven (7) days from the date of distribution of these reasons to serve and file any submissions he may wish to make on the issue of certification of a question. Thereafter, counsel for the Respondent will have three (3) days to serve and file a reply to any such submissions. Only thereafter will an order issue giving effect to the Court's conclusion and taking into account counsels' submissions regarding certification of a question and the Court's conclusion in that regard.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario.
April 4, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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