Date: 20090304

Docket: IMM-2241-08

Citation: 2009 FC 239

Ottawa, Ontario, March 4, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ESSIEN CHARLES UDO

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review filed by the Minister seeking to quash an extension of an existing stay of removal. The stay of removal at issue in this decision will expire on April 29, 2009. This decision may be academic, but may give guidance to the review which is ordered and any application for further extension of the Respondent's stay of removal.

II. BACKGROUND

[2] Mr. Udo, the Respondent in this judicial review, has resided in Canada for 30 years having come here at age 17. He holds Nigerian and U.K. citizenship.

[3] To say that Mr. Udo has not been a shining light of our immigration system is an understatement. Between 1988 and 1995 he acquired nine criminal convictions including: four (4) counts of possession of stolen property, theft, possession of a narcotic, and forcible confinement. He has outstanding warrants in Manitoba for failure to pay fines. For the past four years he has been collecting social assistance continuously.

[4] Finally, in October 2003, Mr. Udo was found to be inadmissible due to serious criminality in respect of forcible confinement of his girlfriend.

[5] For reasons which are not entirely clear, in November 2005 the Immigration Appeal Division (IAD) stayed Mr. Udo's removal for two years subject to a number of mandatory terms and conditions.

[6] Continuing his less than stellar conduct, Mr. Udo breached a number of these conditions by:

a. failing to pay off existing fines as he was ordered;

b. failing to settle an outstanding warrant;

c. failing to obtain a passport; and

d. failing to report on May 15, 2007.

He also failed to report for an immigration oral interview scheduled for November 27, 2007.

[7] The IAD considered that the issue in the hearing for a further extension of the stay of removal was whether Mr. Udo had breached the conditions of his stay and whether there were sufficient humanitarian and compassionate grounds, taking into consideration the best interests of any child affected, to allow special relief to either allow the appeal or extend the stay of removal.

[8] The IAD noted the *Ribic* factors (*Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL)) and said it was guided by s. 3(1)*(h)* of the *Immigration and Refugee Protection Act* (IRPA) (protection of health, safety and security of Canadians).

In addressing the *Ribic* factors, the IAD found:

Seriousness of offence

Possession of narcotics, forcible confinement, and assault were serious convictions.

Possibility of Rehabilitation

On this issue, the IAD made the critical finding that he had not been, and was unlikely to be, rehabilitated. The IAD noted his indifference to the conditions of his stay and concluded that his failure to comply with the conditions negated any positive weight that could be accorded to his lack of additional criminal convictions since 1995.

Length of Time in Canada and Degree of Establishment

The IAD concluded that he was not economically established and gave no weight to the alleged relationship he had, particularly as there were no children who would be affected by his removal.

Family in Canada and Dislocation

The IAD acknowledged the hardship Mr. Udo's removal might cause his mother.

Support Available

Despite his mother's support, Mr. Udo had not changed and was unlikely to do so.

Potential Hardship upon Removal

Having been born in the U.K., raised in Nigeria, and with no evidence of country of return being presented, the IAD concluded that starting afresh at 47 in a new country would cause considerable hardship.

[9] Having conducted this analysis, the IAD then went on to state that "it becomes very difficult to issue a stay of removal or extend that stay when the results are meaningless". That said, and despite the earlier finding that the breach of conditions resulted in no positive weight being given to the absence of further criminal convictions since 1995, the IAD concluded that "he has remained crime-free since that date and that factor weighs in his favour".

III. ANALYSIS

A. *Standard of Review*

[10] While the Applicant Minister attempted to characterize this IAD decision as engaging an error of law for which the standard of review is correctness, the errors at issue are of fact or of mixed fact and law, as well as of logical inconsistency and transparency of the decision.

[11] In the post-*Dunsmuir* era (*Dunsmuir v. New Brunswick*, 2008 SCC 9), issues of fact and mixed fact and law are generally reviewed on a reasonableness standard. While deference is owed to factual determinations, inconsistencies and overall unreasonableness are reviewable errors.

B. *Reasonableness*

[12] The evidence of hardship was thin, but at least some existed. The Court does not accept that in using the word "considerable" under the heading of "potential hardship upon removal", the IAD applied the wrong legal test to all the circumstances of this case. If the IAD had concluded that starting afresh at age 47 was the predominant factor constituting humanitarian and compassionate grounds and overcoming all the negatives in this case, that would have been an error (*Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3).

[13] The Court also does not accept that Mr. Udo's "unclean hands" precluded the IAD from granting equitable relief. The very process of determining H&C grounds starts with an "unclean hands" situation – the breach of the conditions of a stay order. The full quote from

Thanabalasingham v. Canada (Minister of Citizenship and Immigration), 2006 FCA 14, upon which the Applicant relied on only in part, is:

> In my view, the jurisprudence cited by the Minister does not support the proposition advanced in paragraph 23 of counsel's memorandum of fact and law that, "where it appears that an applicant has not come to the Court with clean hands, the Court must initially determine whether in fact the party has unclean hands, and if that is proven, the Court must refuse to hear or grant the application on its merits." Rather, the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.
>
> [Emphasis added]

[14] However, the IAD's decision was, overall, unreasonable. The unreasonableness of the IAD's decision lies in several places. The reference to and reliance on the best interests of non-existent children is the least egregious since the comment may be attributed to the unthinking use of boilerplate language.

[15] The IAD's findings on Mr. Udo's criminal convictions, or lack thereof, since 1995 are inconsistent and contradictory. While the IAD determined that it would give no weight to the post-1995 absence of convictions given his absences of rehabilitation, it went on in its conclusions to give the post-1995 absence of convictions positive weight.

[16] The IAD further found that Mr. Udo breached the terms of his stay order, showed no rehabilitation nor likelihood of rehabilitation in the future, demonstrated an uncaring attitude, had no

significant ties to Canada, and that a further stay would produce meaningless results. To then grant a stay is unreasonable in the extreme. It is impossible to square this conclusion to grant a further stay with a consideration of s. 3(1)*(h)* of IRPA.

[17] Against this background, to grant a further stay is tantamount to condoning Mr. Udo's past criminal record and his continuing disregard for his obligation to comply with the conditions of immigration orders. To support this IAD decision would be to make a mockery of the legitimate and law abiding behaviour of the rest of Canadian society, including the deserving immigrant community.

IV. CONCLUSION

[18] Therefore, this judicial review will be granted, the IAD's decision quashed, and the matter referred to a new panel for a fresh determination consistent with the reasons of this Court. There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is granted, the Immigration Appeal Division's decision is quashed, and the matter is to be referred to a new panel for a fresh determination consistent with the reasons of this Court.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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