Date: 20090505

Docket: IMM-4721-08

Citation: 2009 FC 446

OTTAWA, Ontario, May 5, 2009

PRESENT: The Honourable Max M. Teitelbaum

BETWEEN:

DORIVALDO DE CASTRO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Dorivaldo De Castro ("the applicant") seeks judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board ("IAD") dated September 11, 2008 which dismissed an appeal of his deportation order on humanitarian and compassionate ("H & C") grounds under subsection 68(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA").

Background

[2] The applicant is a 22 year old citizen of Angola. He came to Canada with the help of his grandmother in March 2002 and sought refugee protection alleging persecution in his home country. The applicant witnessed the murder of his mother at the hands of the Angolan military in 2000. His father, grandmother and two sisters live in Angola, though his father is missing and is presumed dead. The applicant was determined to be a Convention refugee on January 16, 2003. There is no evidence that he has remained in contact with his family in Angola since his departure.

[3] When he arrived in Canada, the applicant resided at a home for refugee claimants. He was subsequently placed in two foster homes. The applicant went to high school where he learned to speak English. He was a good student-athlete and actively participated in school activities. The applicant started working while he resided in foster homes. In his affidavit, the applicant states that he "lost his way" after graduating from high school as a result of drugs and alcohol, which led to the events for which he was criminally convicted.

[4] On December 31, 2005, the applicant and his girlfriend (at the time), Ms. Richards, met a young woman at a local restaurant and invited her back to the house they were renting. The applicant and his girlfriend inappropriately fondled her, forced her to engage in sexual acts and unlawfully confined her for two days. Traces of cocaine were found in the young woman's blood. The applicant was arrested on January 5, 2006 and on June 8, 2008 was convicted of forcible confinement and sexual assault.

[5] On June 8, 2008, as I have said, the applicant was convicted of forcible confinement and sexual assault under subsection 279(2) and section 271 of the *Criminal Code* in relation to that incident. He pled guilty to the offences on his lawyer's advice and was sentenced to two years less a day consecutive for each offence. Having regard to time spent in pre-trial custody, the sentencing judge ordered the applicant to serve a further nine days in prison on each count.

[6] On February 27, 2008, the Immigration Division of the IRB held an admissibility hearing at which the applicant was represented by counsel and admitted to the allegations against him, namely that he is a permanent resident of Canada and was convicted of the crimes of forcible confinement and sexual assault for which he was sentenced to two years less one day on each count. The applicant was found inadmissible on grounds of criminality pursuant to paragraph 36(1)(a) of the IRPA and was ordered removed.

[7] The appeal of the applicant's removal order was heard by a Board Member of the IAD on July 30, 2008. On September 11, 2008, the IAD dismissed the appeal on the grounds that there are insufficient H & C factors present to warrant special relief in light of all the circumstances of the case.

Impugned Decision

[8] In setting out its reasons, the IAD noted that in exercising its discretionary jurisdiction to grant special relief in removal order appeals it must consider, but is not limited to, the factors set out by the Court in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL) ("the *Ribic* factors"). These factors include:

a) the seriousness of the offences that have led to the deportation order;

b) the possibility of rehabilitation;

c) the length of time spent in Canada and the degree to which the applicant is established in Canada;

d) the family in Canada and the dislocation to the family that deportation would cause;

e) the family and community support available to the applicant; and

f) the degree of hardship that would be caused to the applicant by his return to his/her country of nationality.

[9] The IAD first described the events that led to the applicant's criminal convictions:

> The applicant began a relationship with Kelly Richards in the late summer of 2005. Ms. Richards is the same age as the applicant and worked as an exotic dancer. On New Year's Eve 2005 (December 31, 2005) the applicant and Ms. Richards met a young woman (the victim) at a local restaurant and invited her to the home they were renting. The applicant was advised that the victim wanted cocaine. The applicant knew a friend who had a friend who sold cocaine. The applicant purchased cocaine for the victim who had no money to pay for the cocaine. The applicant became upset upon learning this fact. He grabbed the victim by the arm and took her to

> the basement of his home. The victim tried to resist the applicant when he touched her inappropriately. The applicant grew angry at the victim, threw her against the wall and told her to remove her clothing. When the victim complied, the applicant inappropriately fondled her and told the victim that she would have to use her body to pay for the cost of the cocaine. She and the applicant subsequently engaged in a sex act. The victim and Ms. Richards also participated in a sex act. The applicant and Ms. Richards gave the victim drinks earlier that evening that made her intoxicated. The victim never drank to the point of intoxication on any prior occasion. The applicant stated that photographs were taken of the various sexual activities in which the applicant, the victim and Ms. Richards participated.
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> The victim was kept at the applicant's residence against her will for the rest of January 1st and into January 2nd. The victim was then driven by the applicant to a Guelph adult entertainment club where she was told that she was going to have to work as a stripper so as to repay her debt to the applicant for the cocaine he provided her. The victim managed to tell her plight to the club disk jockey who then reported her problems to the club manager who, in turn, called the police. By the time police came to the club the applicant and Ms. Richard's fled the club in their car. They were ultimately arrested and charged with several offences.

[10] The IAD re-stated the sentencing judge's opinion that "the offences committed by the applicant constituted an unprovoked attack on an innocent victim who was apparently selected to be the victim" and that "the applicant used excessive force, violence and intimidation in order to commit the two criminal offences for which he was sentenced". The IAD then noted some of the mitigating factors that the sentencing judge took into account on sentencing, including the applicant's background, his age when he committed the crimes, the fact that the victim was not physically harmed by his conduct and the problems of proof the Crown would have faced if the case had gone to trial (i.e., credibility issues with the victim - she said she would not cooperate).

[11] The IAD also indicated that there is conflicting evidence regarding whether a gun was used in the commission of the offences. The Criminal Narrative Report suggests that the applicant was in possession of a handgun that was enveloped in a black shirt or towel. However, the sentencing judge stated that there was no use of a firearm or any other weapon in the case before him. The IAD indicated that during cross-examination at his appeal hearing, the applicant admitted to being in possession of a loaded 22 calibre revolver that he found in the bushes near a sports field in the middle of December and at night. He further admitted that he showed the victim the gun but denied pointing it at her. The IAD noted that the police found the gun in the back seat of his car.

[12] The IAD also mentioned that the applicant agreed to plead guilty on his lawyer's advice even though he had said they planned to go to trial and denies sexually assaulting the victim. The applicant claims that the victim voluntarily performed oral sex with him and that it was Ms. Richards who insisted that the victim remain with them.

[13] The IAD then considered some of the factors that weighed in the applicant's favour. It acknowledged that the applicant had completed several courses while incarcerated. Namely, the applicant obtained four extra high school credits and earned 18 bible study certificates. The IAD also mentioned a letter it received from the Offender Reintegration and Assistance (ORAP) program which states that it is willing to help the applicant find housing and obtain start-up funds and to continue to work with him following his release from prison.

[14] In its analysis, the IAD emphasized the fact that the applicant pled guilty to the charges of forcible confinement and sexual assault, thereby admitting to the "legal ingredients necessary to constitute the crimes charged": *R. v. Adgey* (1974), 13 C.C.C. (2d) 177, (S.C.C.). As such, he cannot re-litigate the criminal charges against him.

[15] The IAD noted a case that suggests it may consider other factors which might militate against the crimes committed by the applicant: *Registrar, Motor Vehicles Act v. Jacobs* (2004), 69 O.R. (3d) 463 (Div. Ct.). However, the IAD said this case is distinguishable because there is evidence before it that was not considered by the sentencing judge, namely that the applicant was in possession of a loaded 22 calibre shotgun during the commission of the offences. The IAD did not find the applicant's explanation for how he obtained the gun credible and re-stated the fact that the applicant had the shotgun with him when he and Ms. Richards drove the victim to the strip club in Guelph.

[16] The IAD recognized the personal tragedy the applicant has suffered and acknowledged the efforts he has made to establish himself in Canada. In particular, the IAD noted that he learned to speak English, graduated from high school, consistently worked, made friends and sought the treatment of a psychiatrist to help him cope with the trauma he suffered in Angola.

[17] The IAD also acknowledged that the applicant has made reasonable efforts to re-establish himself since his release from detention. For instance, he has worked full-time and has been law-abiding. The IAD noted that the applicant has the potential for rehabilitation but held that not

enough time had transpired since he was released from detention to reasonably assess the possibility of his rehabilitation.

[18] The IAD further acknowledged the support of his friends, his employer, his landlady and the ORAP program. However, the IAD noted that the applicant has no family or children in Canada that would be directly affected by its decision.

[19] The IAD concluded that the fine efforts the applicant made since he came to Canada have been offset by his criminal conduct. It found that the negative aspects of the applicant's case (his criminal misconduct) outweigh the positive aspects of his case and that there are insufficient humanitarian and compassionate factors present to warrant special relief in light of all the circumstances of the case. In the result, the appeal was dismissed.

Issues

[20] The applicant submits the following two issues for consideration:

1. Was procedural fairness denied in that the Board Member's decision was not supported by sufficient reasons?
2. In the alternative, was the Board Member's decision reasonable?

Statutory Framework

[21] The relevant statutory provisions are the following:

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;
68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	**68.** (1) Il est sursis à la mesure de renvoi sur preuve qu'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.

Analysis

Standard of Review

[22] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court established that where jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded to a particular category of question there is no need to engage in a standard of review analysis (paragraph 57).

[23] Recently in *Bal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1178, Justice de Montigny held that the assessment of the weight placed on the evidence by the IAD and how it interpreted that evidence is a question of fact that should be reviewed on a standard of reasonableness. This is supported by the decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, wherein the Supreme Court of Canada established that the appropriate standard of review of decisions by immigration officers concerning applications based on humanitarian and compassionate grounds is reasonableness.

[24] Where the appropriate standard of review is reasonableness, it is not for the Court to substitute its assessment of the facts for that of the decision-maker. Rather, the Court must determine “whether the reasons, taken as a whole, are tenable as support for the decision”: *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paragraph 56. The Court will only

intervene if the decision falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and the law: *Dunsmuir*, above.

[25] It is also settled law that issues of procedural fairness are to be reviewed on a standard of correctness: *Pushpanathan v. Canada (M.C.I.)*, [1998], 1 S.C.R. 982 and *Bal v. Canada*, above, at para. 19.

Issue 1: Did the IAD breach its duty of procedural fairness by failing to provide adequate reasons for its decision?

[26] The applicant submits that it is not possible to deduce from the IAD Member's reasons how he reached his conclusion. The Member identified numerous positive factors counting in the applicant's favour and then failed to indicate why they were insufficient to overcome his criminal convictions.

[27] The applicant cites Justice Kelen's decision in *Abdeli v. M.P.S.E.P.* [2006] F.C.J. No. 1322 (F.C.) wherein he turns to the Federal Court of Appeal's decision in *Via Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25 (C.A.) for guidance on what constitute adequate reasons:

> The standard which describes sufficient reasons in a given case was articulated by Mr. Justice Sexton for the Federal Court of Appeal *Via Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25 (C.A.) at paragraphs 21 and 22:

> The duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case.
>
> However, as a general rule, adequate reasons are those that serve the functions for which the duty to provide them was imposed. In the words of my learned colleague Evans J.A., "[a]ny attempt to formulate a standard of adequacy that must be met before a tribunal can be said to have discharged its duty to give reasons must ultimately reflect the purposes served by a duty to give reasons." [Citations omitted]

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision-maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision-maker must set out and must reflect consideration of the main relevant factors.

[28] Here, the applicant argues, the Member failed to conduct the required analysis and failed to support his findings with adequate reasons. Therefore, the applicant contends, the IAD committed a reviewable error.

[29] The respondent submits that the Member's reasons clearly and accurately set out all the factual elements that were taken into consideration. The respondent states that the IAD assessed the *Ribic* factors and found that the criminal offences for which the applicant was convicted outweigh any of the positive factors in his case. The respondent suggests that the applicant's argument amounts to a disagreement with the result.

[30] In setting out his reasons, the IAD Member rightly acknowledged that the *Ribic* factors are not exhaustive. He then proceeded to consider and weigh a number of those factors, some aggravating and others mitigating in the applicant's favour. The IAD Member did not simply recite the submissions and evidence of the parties and state a sweeping conclusion: *Canada (Minister of Citizenship and Immigration) v. Charles*, 2007 FC 1146. The IAD Member made a number of findings throughout his decision, such as:

- The applicant victimized a vulnerable individual;
- The applicant was in the possession of a gun while he committed the criminal offences;
- The applicant's explanation for how he obtained the gun was not credible;
- Despite his guilty plea, the applicant continues to deny his guilt and to claim any responsibility for his actions;
- Two months is an insufficient period of time to assess the possibility of rehabilitation;
- The applicant has limited establishment in Canada.

[31] In the end, the Member decided that the seriousness of the applicant's criminal convictions and misconduct outweigh any of the positive factors that militate in his favour. This conclusion was open to the Member to make on the evidence before him and, in my view, was supported by transparent and intelligible reasons.

[32] The IAD Member has the discretion to weigh the various factors of a case. Here, the Member assessed all the relevant factors and decided to give significant weight to the seriousness of

the applicant's criminal convictions and misconduct. Justice Shore's comments in *Hamzai v. Canada (M.C.I.)*, 2006 FC 1108 are relevant to this discussion:

> This Court is not to lightly interfere with the discretion given to an H&C officer. The H&C decision is not a simple application of legal principles but rather a fact-specific weighing of many factors. As long as the H&C officer considers the relevant, appropriate factors from an H&C perspective, the Court cannot interfere with the weight the H&C officer gives to the different factors, even if it would have weighed the factors differently.
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> [Emphasis added]

[33] I am satisfied that the IAD considered the relevant H&C factors in its analysis; therefore I will not interfere with its discretionary decision.

[34] In my view, what the applicant is challenging is the IAD Member's weighing of the evidence and not the adequacy of his reasons. Simply re-weighing the evidence is beyond the scope of judicial review: *Bal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1178.

Issue 2: Was the IAD's decision reasonable?

[35] The applicant argues that the Court imposed a sentence at the "extreme low end" of the scale having regard to the extensive mitigating factors in the applicant's case, including the fact that the Crown would have had difficulty proving the offences given the witness' lack of credibility.

[36] The applicant further submits that the Member's conclusion is unreasonable given the extensive H & C factors that mitigate his criminal convictions, namely the applicant's tragic background, his youth, his previous clean record, his work history, his education and the efforts he has made to rehabilitate himself since his arrest. It is submitted that having noted these facts, the IAD Member made no finding as to the extent to which they counted as H & C factors weighing in the applicant's favour tending to warrant a stay of the removal order. For example, while noting that the applicant had not been released from prison long enough to assess the possibility of rehabilitation, the Member failed to highlight the evidence that showed he had thoroughly reformed himself. In the result, the applicant argues that the Member's decision does not fall within a range of possible, acceptable outcomes defensible on the facts or evidence.

[37] The respondent submits that the principle factor relied upon by the IAD Member was the seriousness of the criminal offences, which he found outweighed any positive factors in the applicant's case. The respondent suggests that none of the other *Ribic* factors which pertain to possible H&C grounds were particularly favourable to the applicant.

[38] The respondent maintains that tribunals such as the IAD have a margin of appreciation within the range of acceptable and rational outcomes. A question before an administrative tribunal does not necessarily lend itself to one specific result. The respondent submits that the IAD Member's decision falls within a range of possible, acceptable outcomes and suggests that the

applicant's challenge simply amounts to a disagreement with the result, which does not in and of itself raise a reviewable error.

[39] Since the Order granting leave was issued, the Supreme Court of Canada has pronounced itself in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 19 on the relevant standard of proof in respect of decisions of the IAD. The respondent submits that *Khosa* is instructive for the disposition of the application here under review. In *Khosa*, the applicant received a conditional sentence of two years less a day for a conviction of criminal negligence causing death and was issued a removal order. The IAD determined that there were insufficient H & C grounds to warrant special relief against the removal order. The respondent notes that the IAD found that there was insufficient information before it to make a determination as to the prospects of rehabilitation and concluded that the negative factors of the case outweighed the positives. The Supreme Court upheld the decision. The respondent contends that the case at hand is analogous and should be treated accordingly. I agree with the submission of the respondent.

[40] The recent and much anticipated decision of the Supreme Court in *Khosa* provides helpful guidance. While the facts leading up to the criminal conviction in *Khosa* are different to the facts before me, the legal questions that arose are very similar. Both cases are judicial reviews of the IAD's decision to decline to exercise its discretionary jurisdiction to stay or overturn a removal order on humanitarian and compassionate grounds. The following paragraphs of the *Khosa* decision are most instructive:

56 As to the purpose of the IAD as determined by its enabling legislation, the IAD determines a wide range of appeals under the IRPA, including appeals from permanent residents or protected persons of their deportation orders, appeals from persons seeking to sponsor members of the family class, and appeals by permanent residents against decisions made outside of Canada on their residency obligations, as well as appeals by the Minister against decisions of the Immigration Division taken at admissibility hearings (s. 63). A decision of the IAD is reviewable only if the Federal Court grants leave to commence judicial review (s. 72).

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. As noted in Prata v. Minister of Manpower and Immigration, [1976] 1 S.C.R. 376, at p. 380, a removal order

> establishes that, in the absence of some special privilege existing, [an individual subject to a lawful removal order] has no right whatever to remain in Canada. [An individual appealing a lawful removal order] does not, therefore, attempt to assert a right, but, rather, attempts to obtain a discretionary privilege. [Emphasis added.]

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.
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> 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.

[41] I find it appropriate to import the Court’s reasoning, particularly in paragraph 58, for the purposes of the case before me. Having read the IAD’s reasons and the evidence in support of the applicant’s appeal, I am satisfied that the IAD’s decision as a whole falls within a range of possible and acceptable outcomes. The IAD had the benefit of hearing the applicant testify and was required to reach its own conclusions based on its own appreciation of the facts: *Khosa*, above, at para. 66. It did just that and, in my view, the outcome is not unreasonable.

[42] Accordingly, the application for judicial review must be dismissed. No questions have been proposed for certification and none will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

"Max M. Teitelbaum"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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