Federal Court  Cour fédérale

Date: 20100222

Docket: IMM-258-09

Citation: 2010 FC 193

Ottawa, Ontario, February 22, 2010

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ALDO MALFEO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] The main question raised by this judicial review application is whether a member of the Immigration Appeal Division (the tribunal or the IAD) breached the principles of natural justice and/or the requirements of the law when she dismissed on December 28, 2008 the applicant's request to stay his deportation to Italy. This application was made, pursuant to paragraph 67(1)(c) of the *Immigration and Refugee Protection Act* (IRPA), which enables the tribunal to grant relief if

sufficient humanitarian and compassionate considerations are demonstrated in the light of all of the circumstances.

[2] The special context which gives rise to this case is the joint submission made by counsel for the applicant and the respondent that the stay be granted for a six year period with strict conditions attached. The tribunal did not accept the joint recommendation and dismissed the appeal.

[3] The deportation order, whose legality the applicant did not contest before the IAD, was based on paragraph 36(1)(a) of IRPA which provides a permanent resident or a foreign national is inadmissible on grounds of serious criminality if convicted in Canada of an offence punishable by a maximum term of imprisonment of at least ten years for which a term of imprisonment of more than six months has been imposed. On February 18, 2004, he was convicted of possession of a prohibited firearm with ammunition for which he was sentenced to more than six months in prison and placed on probation for two years.

Background facts

[4] Mr. Malfeo is 53 years old and a citizen of Italy; he landed in Canada in 1980 with his wife and daughter and obtained permanent resident status in 1982. His daughter died of leukemia in 1997. He has a Canadian-born son now thirteen years of age. He separated from his wife in 2003; she has the custody of their son. Mr. Malfeo is restrained from seeing his wife and son. That restraining order was issued in September of 2005 and is in effect for five years.

[5] Around 1985, he began using illicit drugs and developed a drug addiction to cocaine and later to heroin. He contracted Hepatitis C as a result of sharing needles. In efforts to rehabilitate himself, he attended a sixteen month drug rehabilitation program in Italy in 1992. After a relapse, he returned to Italy for another 4 months. He was clean until 1998. More recently, he is enrolled in counselling sessions and Alcoholics Anonymous to address his addiction as part of his responsibilities with the Toronto Bail Program which he entered on August 29, 2007. After his bail release until he was deported to Italy, he lived in a group home for persons with mental illness. He asserted he was suffering from depression and had been seeing a psychologist over the last four to five years.

[6] The tribunal held its hearing on October 22, 2008 via teleconference. After the evidence had been taken in, the scheduled time had run out with the result no oral submissions were made to the tribunal. The tribunal called for written closing submissions. Instead of receiving separate opposing submissions from counsel, the tribunal received a joint submission from counsel, dated November 4, 2008 "to stay the removal order, on stipulated conditions, for a period of six years."

The tribunal's decision

[7] The tribunal stated at the beginning of its reasons, it "received [on November 4, 2008] the joint submission for a stay without any written representations to justify it". The member of the IAD pursued her analysis discussing the merits of the case by considering and weighing the *Ribic* factors approved by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84. In particular, the tribunal found:

- In terms of the possibility of rehabilitation:

> In assessing if there is a possibility of rehabilitation in the circumstances of this case, the tribunal came to the conclusion that the appellant has recently taken the means available to him to try to change his life, but his change of mind is very recent and considering the number of years where he was involved with drugs and criminal activities, the tribunal cannot assume, based on the evidence submitted in the circumstances of this case, that he is really on a serious path towards rehabilitation. [My emphasis.]

- As to the length of time spent in Canada and the degree of establishment (28 years in Canada) it concluded: "that the appellant does not respect Canadian legislation and in doing so, contrary to all Canadians and permanent residents, the appellant does not care to contribute to the Canadian society and has behaved in this fashion for many years".

[8] It also concluded he had no establishment in Canada because "his only possessions are his clothes".

[9] On the issue of the joint recommendation, the tribunal wrote:

> [45] A joint recommendation was made to stay the deportation order against the appellant.
>
> [46] The tribunal does not find this recommendation to be appropriate in the circumstances of this case for the following reasons:
>
> Considering the objectives of the Act which reads as follows:
>
> "3(1)h) to protect the health and safety of Canadians to maintain the security of Canadian society."
>
> Considering that the appellant still represents a danger for his wife and son, and considering that although the appellant has completed a third drug treatment on July 25, 2008, three months prior to this hearing, which is in his favour, the tribunal concludes that this period of three months of measures taken by the appellant to try

> to rehabilitate himself is insufficient to surpass the totality of evidence of a lengthy criminal record and a serious potential of violence. [My emphasis.]

The Standard of Review

[10] The law is clear that a breach of natural justice or procedural fairness is reviewable on the correctness standard (see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 43). No deference is owed to the decision maker.

Analysis and Conclusions

(1) Procedural Fairness

[11] Recently, the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 79 and 80, wrote per Justices Bastarache and LeBel that: (1) “Procedural fairness is a cornerstone of modern Canadian administrative law”; (2) “Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual”; and, (3) "The concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case".

(2) The principles on joint submissions

[12] The use of joint submissions is a concept well-known in criminal law where the Crown and the defence make joint submissions, for example, in sentencing. It is not unknown in administrative law cases and has been applied by this Court in the context of immigration law (see *Nguyen v. Canada (Minister of Citizenship and Immigration)*, 196 F.T.R. 236), a case which bears similarity with the case at hand since it involved an application by Mr. Nguyen to the then Appeal Division for the exercise of its humanitarian and compassionate jurisdiction under a provision of the now

repealed *Immigration Act* similar to paragraph 67(1)(c) of IRPA. That case involved the failure of the tribunal to explain why the joint submission of counsel proposing a five year stay was not endorsed. The purpose of staying the deportation is, in that case as it is in this case, to give the applicant an opportunity to demonstrate, on the ground so to speak, becoming a decent law abiding resident of this country.

[13] Borrowing upon criminal law jurisprudence, but appreciating the clear distinction between a deportation which is non criminal and the criminal context, this Court wrote at paragraph 11 as follows:

> [11] Nevertheless, I am attracted to the underlying rationale behind joint submissions in a section 70(1)(b) case where the tribunal's jurisdiction is quite wide, the reasons for the deportation in this case are based on criminal offences and the factors outlined in *Chieu*, supra, (seriousness of the offence, possibility of rehabilitation, impact of the crime on the victim, remorsefulness of the applicant) are analogous to the matters which are taken into account in sentencing upon conviction.

[14] I cited certain extracts from the Quebec Court of Appeal's judgment in *R. v. Dubuc*, 1998 CanLII 12524 (QC C.A.), (1998), 131 C.C.C. (3d) 250, written by Justice Fish, then of that Court, which set aside the sentence and substituted the sentence jointly suggested. Fish J.A. wrote:

> […] I repeat, the trial judge was not bound by the shared recommendation of counsel. For appropriate reasons, explained even summarily, he was entitled to depart from the sentence jointly proposed. The judge could properly accept or reject the submission. But not disregard or ignore it. Still less, simply overlook it.

[15] Justice Fish in *Dubuc* also stated "serious consideration" should be given to by the court to the recommendations of Crown counsel and "it should not lightly be disregarded".

[16] In *Nguyen*, reference was also made to the Manitoba Court of Appeal's judgment in *R. v. Chartrand*, (1998), 131 C.C.C. (3d) 122 where Kroft J.A. stated the following:

> [8] A sentencing judge is not bound to accept the recommendation, but it should not be rejected unless there is good cause for so doing. This case does not fall into that category.

Conclusion

[17] For the following reasons, in the circumstances of this case, the Court's intervention is necessary in order to render justice.

[18] Having received the joint submission albeit unexpectedly, the tribunal breached procedural fairness by rejecting it outright without asking for further input. The applicant in these circumstances was not given a fair hearing. The consequences on the applicant were significant. Clearly, a review of the terms and conditions of the proposed stay which included a requirement he not commit any criminal offences, make reasonable efforts to seek and maintain full time employment, engage in and continue psychotherapy, submit to random urine drug testing and respect court orders (which would include respecting the restraining order) address the tribunal's concerns. The tribunal provided no analysis and did not even refer to the proposed terms and conditions.

[19] Second, it is also clear the tribunal did not give serious consideration to the joint submission. Again, it provided no analysis of its terms and dismissed the joint submission in a perfunctory manner.

[20] The reasons it put forward for rejecting the joint submission also lack analysis and do not withstand reasonable scrutiny.

[21] During the hearing, I was informed the applicant did not appear for his removal on October 14, 2009 in the aftermath of losing his stay application. I referred the parties to the Federal Court of Appeal's recent judgment in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 and called for written submissions. Counsel for the respondent did not urge upon me I should not decide the case on the merits. Rather his position was that I should not order the Minister to return to Canada should he be successful in this judicial review application pending the re-determination by the IAD. I agree with counsel for the respondent's submissions particularly on the lack of prejudice. However, I would urge the IAD to proceed as quickly as is reasonable in the circumstances with the rehearing.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES this judicial review application is granted, the tribunal's decision is set aside and the matter is remitted to the IAD for re-determination by a differently constituted tribunal.

"François Lemieux"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-258-09
STYLE OF CAUSE:	ALDO MALFEO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 16, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Lemieux J.
DATED:	February 22, 2010

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