Federal Court  Cour fédérale

Date: 20100413

Docket: IMM-3969-09

Citation: 2010 FC 395

Ottawa, Ontario, April 13, 2010

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

VERNON VAROON VIJAYASINGHAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada, dated July 13, 2009, denying the applicant's appeal against a removal order made against him, on the basis that the order was valid and there were no sufficient humanitarian and compassionate (H&C) considerations to revoke or

stay the removal order. These are my reasons for determining that the application must be allowed and the matter reconsidered by a differently constituted panel.

Background

[2] Vernon Varoon Vijayasingham, the applicant, is a citizen of Sri Lanka. He came to Canada and became a permanent resident in 1993, when he was 10 years old. His parents and three siblings all live in Canada. For the three weeks preceding his hearing before the IAD, he had been living with his girlfriend and their daughter, then aged a year and a half.

[3] His only family member in Sri Lanka is an aunt, with whom he has not kept in touch and whose whereabouts are unknown to him.

[4] The applicant completed grade 11. After leaving school, he held a variety of jobs. His longest single period of employment was 18 months. He has also intermittently received social assistance.

[5] Starting in 2001, the applicant accumulated a series of criminal convictions: two for uttering threats, two for theft, two for failure to comply with a recognizance, one for robbery, and one of breaking and entering with the intent of committing an indictable offence. His conviction for robbery, in 2004, led to a report being completed against him and, ultimately, to the present proceedings. His last conviction was entered in December 2008.

Decision Under Review

[6] The hearing started with the applicant requesting, and the IAD refusing, an adjournment so that the applicant might retain counsel. The IAD noted that while it was the applicant's first such request, he had previously been to the assignment court in February 2009, and was told about his right to counsel. He now claimed that he was saving money towards the lawyer's fee, but presented neither any evidence of his savings nor a letter from a lawyer indicating that he had discussed a retainer with the applicant. Therefore, the IAD was not satisfied that he would, in fact, be in a different position by the next hearing.

[7] The IAD further observed that despite having ample time to do so, the applicant failed to make arrangements so that his family members could be present at the hearings or provide letters of support. Again, the IAD was not satisfied that a postponement would assist the applicant.

[8] In addition, the IAD noted that the applicant had known for some time that he would not be represented on the day of his scheduled hearing, yet failed to notify it of this problem. He also failed to raise any concerns when he attended assignment court. The "eleventh-hour" request for an adjournment was, in the IAD's view, merely a delay tactic.

[9] Finally, the IAD was of the view that the applicant understood the nature of the proceeding. It considered that while its consequences for the applicant were serious, the issues were "not complex," and the applicant was capable of addressing them.

[10] As for the substance of the applicant's appeal, the IAD noted he was not challenging the validity of the removal order. Therefore the only issue was whether the appeal should nevertheless be allowed on the basis of H&C considerations, pursuant to paragraph 67(1)(c) of the IRPA. The test for answering this question was the one developed in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), and approved by the Supreme Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84. The IAD also took note of paragraph 3(1)(h) of the IRPA, which provides that one of that statute's objectives is "to protect the health and safety of Canadians and to maintain the security of Canadian society."

[11] The IAD observed that the applicant refused to take full responsibility for his conduct and diminished his guilt; that he had an anger management problem; and that he had been verbally abusive towards his girlfriend. It also noted that his last conviction occurred after the immigration authorities had issued a report against him, and he must have been aware of the serious consequences which would result from a further failure to obey the law. The IAD concluded that the applicant "has no qualms about breaking the law when he thinks he is justified in doing so," and that he was not a person trying to rehabilitate himself.

[12] The IAD concluded that the applicant's removal to Sri Lanka would inevitably cause him hardship given the time elapsed since he had left that country. But this factor, though weighing in his favour, was not enough to overcome his criminality and lack of rehabilitation. Furthermore, he was "clearly not established in Canada."

[13] The IAD also noted that the applicant's family lives in Canada. Though none of them appeared or provided a letter in his support, the IAD accepted that his removal would cause them some hardship. It also considered, however, that they would be able to visit him in Sri Lanka.

[14] The most important factor weighing in the applicant's favour were the best interests of his daughter to live with her two parents. However, the IAD concluded that the hardship which the applicant's removal would cause to his girlfriend and daughter could be alleviated by the presence of his mother and stepfather. There was also no reason why the applicant's girlfriend would not be able to work to support herself and their daughter. In addition, given the applicant's criminality, he was "not a good role model and it may very well be in [his daughter's] best interests not to live with him." Overall, her best interests weighed moderately in the applicant's favour.

[15] Finally, on the issue of the hardship the applicant would face in Sri Lanka, the IAD took into account his failure to raise his concerns over security there at his admissibility hearing or to make a claim for refugee protection. Furthermore, there was no "credible testimony in that regard," the applicant merely claiming that he was afraid of going back because he heard that Tamils are being persecuted by the Sri Lankan government. The IAD concluded that although the applicant would face some hardship in Sri Lanka, it could not outweigh his lack of rehabilitation and establishment in Canada.

Issues

[16] While the applicant raises a number of issues, including an alleged breach of his right to counsel, the issue whether it erred in its assessment of the hardship the applicant would face in Sri Lanka is, in my view, dispositive of this application.

Analysis

[17] The substance of the IAD's decision in an appeal based on H&C considerations is reviewable on a standard of reasonableness. (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339) On this standard, a decision which is justified, transparent, intelligible, and which "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" ought not to be disturbed (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

[18] The applicant submits that the IAD erred in its appreciation of the hardship he would suffer in Sri Lanka by concluding that it would be mitigated by his lack of support, rehabilitation, and establishment in Canada. He argues that this conclusion is illogical and unjustified. He adds that the IAD's analysis of the hardship he would be exposed to in Sri Lanka is insufficient, and a failure to consider foreign hardship is a reviewable error of law.

[19] In the respondent's view, the IAD properly analysed the hardship the applicant would be exposed to in Sri Lanka, taking relevant factors into account. The applicant is dissatisfied with the

weight it gave to this factor, but that is not a ground for this Court's intervention. Further, the IAD's reasons need not be perfect, but only adequate, which they are. Its reasoning is transparent when considered as a whole and in context.

[20] In *Ivanov v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 315, [2008] 2 F.C.R. 502, at par. 11, the Federal Court of Appeal held that a "failure to consider the Ribic factor of foreign hardship is an error of law." While in the present case the IAD did not altogether fail to consider this factor, I am of the view that its analysis on this point was so perfunctory and tainted by a consideration of irrelevant factors as to warrant this Court's intervention.

[21] I agree with the applicant that the IAD's analysis of the hardship to which he would be subject in Sri Lanka was confused by its reference to his lack of rehabilitation in Canada. While rehabilitation and establishment in Canada are among the factors which the IAD must take into account, they bear no relation to the degree of hardship a person will suffer in a country to which he or she is removed. A person who is not established in Canada may yet have no ties to the country to which he or she is removed, and suffer great difficulties there. Conversely, one may be well-established in Canada, and yet be able to return to another country without suffering undue hardship.

[22] The fact that the applicant did not address the likelihood of suffering undue hardship in Sri Lanka at his admissibility hearing was also not relevant. The applicant told the IAD that he was afraid of going back to his country of nationality. This evidence is similar to that which was held, in

Ivanov, above, to be sufficient to trigger the IAD's obligation to address this issue. The IAD does not explain why it did not consider the applicant's testimony to be credible in this respect.

[23] Thus, even if the IAD did not err in law by failing to consider the foreign hardship factor in its decision, its reasoning is not transparent and justified. Its decision must therefore be set aside.

[24] No questions were proposed for certification.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application for judicial review is granted and the matter is returned to the Board for redetermination by a differently constituted panel. There are no questions to certify.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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