F ederal Court		Cour fédérale

Date: 20100527

Docket: IMM-5206-09

Citation: 2010 FC 582

Toronto, Ontario, May 27, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

EUGJEN BRACE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] Since immigrating at the age of 16 to Canada in 2001, Eugjen Brace has amassed 12 criminal convictions, leaving aside outstanding criminal charges against him. A deportation order was issued against him because he was convicted of an offence punishable by a maximum term of imprisonment of at least ten years, which makes him inadmissible to Canada on grounds of serious criminality, in accordance with Section 36(1)(a) of the *Immigration and Refugee Protection Act* (IRPA). He was ordered deported.

[2] He was entitled to and did appeal that decision to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, as per Section 63(3) of the IRPA. His appeal was dismissed. This is the judicial review of that decision.

[3] The validity of the deportation order is not in issue. However, the IAD's jurisdiction in matters such as this embraces humanitarian and compassionate considerations, and so it may stay removal and impose conditions. A list of non-exhaustive factors was set out in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), which was later 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.

[4] These factors are:

> In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or, in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. While the general areas of review are similar in each case the facts are rarely, if ever, identical.

[5] Counsel for Mr. Brace submits that any one of three grounds justifies granting judicial review:

a. The first is that Mr. Brace's first conviction occurred when he was still a youth and should not have been taken into account.

b. The second is that at the time of the hearing before the IAD, Mr. Brace had a girlfriend who was three months pregnant. No consideration was given as to the interests of this unborn child.

c. And finally, the decision maker used the word "convinced" three times indicating that she was not assessing the case on the proper standard of proof, which is the balance of probabilities, always a difficult task when one is not assessing whether or not an event has occurred, but rather what will happen in the future, i.e. will Mr. Brace be rehabilitated, will he be a risk to society, should he be given another chance?

YOUTH CRIMINAL JUSTICE ACT

[6] It must be kept in mind that the offence that triggered the determination that Mr. Brace was inadmissible was an offence committed when he was an adult. Section 36(3)(e) of the *Immigration and Refugee Protection Act* provides that inadmissibility under subsections 1 and 2 may not be based on an offence for which a foreign national or permanent resident was found guilty under the *Youth Criminal Justice Act.*

[7] Nevertheless, in considering humanitarian and compassionate factors, in my opinion, it was not only proper, but also essential, that the Member consider all of Mr. Brace's criminal activity while in Canada. Part 6 of the Act deals with the protection of privacy of young persons. Under sections 119(g) and (h), records can only be accessed under specified circumstances for three years after the completion of the sentence, for an offence prosecuted by summary conviction, or five years for an indictable offence. However, if during the access period the youth is subsequently convicted of an offence committed while an adult, s. 119(9)(b) provides that the youth records are deemed to be adult records and Part 6 of the Act no longer applies.

[8] In the case of Mr. Brace, it is unnecessary to examine the timeline in great detail: he was sentenced for assault as a youth in 2002 On June 21st, 2003, when he was nineteen years old, the record indicates that he committed theft under $5000 and failed to comply with a probation order, offences for which he was subsequently convicted. These offences were committed less than three years after his youth sentence was completed: in fact, they were committed less than one year after his youth sentence was imposed. Mr. Brace's youth records are thus clearly covered by s. 119(9)(b), and so are discoverable in any event.

[9] Furthermore, I cannot see how assessing only 11 offences, including the one which led to the deportation order, instead of 12 could have significantly affected the IAD's conclusions.

BEST INTERESTS OF THE CHILDREN

[10] Mr. Brace testified at the hearing before the IAD that he had a pregnant girlfriend who was in the room. His counsel, however, who is not the counsel on this application for judicial review, did not call her as a witness. The Member stated that she was taking into account the interests of any children, but the submission is that this is simply a boiler plate remark and that no analysis was done.

[11] To find the answer to this submission, one need go no further than the decision of the Federal Court of Appeal in *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635 in which Mr. Justice Evans, speaking for the Court, stated at para. 5:

> An immigration officer considering an H & C application must be "alert, alive and sensitive" to, and must not "minimize", the best interests of children who may be adversely affected by a parent's deportation: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 75. However, this duty only arises when it is sufficiently clear from the material submitted to the decision-maker that an application relies on this factor, at least in part. Moreover, an applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless.

[12] It is not enough to say one has a pregnant girlfriend. The burden on the applicant goes much further than that. What was the girlfriend's health? What was her financial situation? Were they living together? Did he intend to support the child? If so, how? There was an insufficient evidentiary basis for the IAD to make any meaningful assessment.

BURDEN OF PROOF

[13] The Member of the IAD stated at the outset that the burden of proof was on the balance of probabilities. This is correct, keeping in mind that one is attempting to predict the future, rather than to assess what happened in the past. However she used the word “convinced” three times in her reasons, which has led to the submission that the burden of proof was only observed in the breach. I cannot agree.

[14] Words have to be considered in context, and so may take on different flavours. However there is nothing in the reasons, read as a whole, to suggest that the IAD was assessing the situation on a standard more stringent than on a balance of probabilities. In this respect, see *Rodriguez v. Canada (Minister of Citizenship and Immigration),* 2006 FC 320. Unless a statute provides otherwise, there is only one standard of proof before civil tribunals, and that is the balance of probabilities. See *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41. There is nothing to indicate that the IAD derogated from that principle.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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