Federal Court  Cour fédérale

Date: 20101112

Docket: IMM-1430-10

Citation: 2010 FC 1134

Ottawa, Ontario, November 12, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

CHOU ENG FONG

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 s. 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board. The IAD denied the applicant's application for a stay of his deportation order on humanitarian and compassionate grounds.

[2] This application must be allowed. The IAD erred in admitting into evidence police reports graphically describing alleged offences for which the applicant had been acquitted and in mischaracterizing the criminal offences of which the applicant was convicted. In so doing, the applicant's right to procedural fairness was violated.

[3] The applicant is a 32 year-old man. He is a permanent resident of Canada and has been living here since he was 13. He is a citizen of Malaysia having been born there on October 28, 1978. The events that gave rise to the issuance of his deportation order are not in dispute.

[4] On May 31, 2005, at age 26, Mr. Fong was convicted of one count of possession of child pornography contrary to s. 163.1(4) of the *Criminal Code of Canada*, R.S., 1985, c. C-46. The maximum sentence for this offence is less than 10 years. A conditional sentence of 16 months was ordered, but not a period of incarceration. He was further sentenced to a period of probation which was to expire November 30, 2006. One of the terms of the probation order was that Mr. Fong was "not to be found in the company of someone under the age of 18 years unless in the company of someone over the age of 21 years of age."

[5] On March 14, 2006, Mr. Fong was arrested and charged with four offences: luring a child under 16, contrary to s. 172.1(1)(b) of the *Criminal Code*, sexual assault, contrary to s. 271 of the *Criminal Code*, and two counts of failing to comply with probation, contrary to s. 733.1(1) of the *Criminal Code*. Mr. Fong pled guilty to the breach of probation charges and, after a four-day trial, was acquitted of the other charges. He was sentenced to a term of imprisonment, in addition to the time he

had spent in pre-sentence custody. The Ontario Court of Appeal reduced the sentence, providing a brief judgment (2007 ONCA 657), as follows:

> 1 In our view, this sentence was manifestly excessive. The trial judge in effect imposed a 34-month sentence, given the pre-sentence custody. The appellant had no prior record for breach of probation, had never been sentenced to imprisonment and had successfully served a conditional sentence without incident.
>
> 2 These breaches were serious and a jail term was required but in our view a sentence in the range of 3-6 months would have been appropriate.
>
> 3 Accordingly, the appeal is allowed and the sentence is reduced to time served. The record should reflect that the appellant was given credit for 6 months pre-trial custody on a 2:1 basis. The probation order will stand.

[6] On June 4, 2008, the Immigration Division of the Immigration and Refugee Board issued a deportation order against the applicant after finding that he was inadmissible under s. 36(1)(a) of the Act for serious criminality. Mr. Fong appealed to the IAD pursuant to s. 63 of the Act, seeking a stay of the removal order. Subsection 68(1) of the Act provides that the IAD may stay the removal order if it is satisfied "that sufficient humanitarian and compassionate considerations warrant the special relief in light of all the circumstances of the case."

[7] When considering an application for a stay of a deportation order, the IAD considers the factors set out in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4:

> 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.

[8] The IAD hearing was scheduled for November 10, 2009; however, on October 27, 2009, counsel for the Minister disclosed to the applicant (with a copy to the Registrar of the IAD) material on which the Minister might rely at the hearing. The Minister wrote that that these documents were being provided to the IAD "to allow the Board Member(s) hearing this matter an opportunity to review the documents prior to the hearing." Included in that package of material were police reports relating to the charges for which the applicant had been tried and acquitted. These reports set out in graphic detail under the heading "Officer's Opinion" and "Synopsis" the factual allegations which the police considered supported the charges that were laid. These allegations were obtained either from the girl that the applicant was accused of having lured and sexually assaulted, or from her father.

[9] Upon receipt, counsel for the applicant wrote to the IAD objecting to the documents being placed before it because "those pages contain scurrilous accusations which, in the particular circumstances of this matter, are overwhelmingly likely to prejudice the appellant's opportunity to receive a fair hearing." He added that the pages were a "nasty misrepresentation of the facts" that would prejudice his client.

[10] At the hearing, the IAD admitted these documents as evidence, ruling as follows:

> The Panel has read the communication between counsels [*sic*] with respect to the disclosure, in particular the attachment of the police

> synopsis of the allegations surrounding the failure to comply with probation.
>
> I draw to counsel's attention … [that] under … [section] 33, the facts that constitute inadmissibility under Sections 34 to 37, and this is a 36(1)(a), include facts arising from omissions and unless otherwise provided includes facts for which there are reasonable grounds to believe that they have occurred, occurring, or may occur.
>
> Also turning attention to Section 175(1)(c) of the *Act* which states that the Immigration Appeal Division in any proceeding may receive and base a decision on evidence adduced in the preceding that it considers credible or trustworthy in the circumstances.
>
> Based on those two statutory, I'll call them, guidelines at this point, and based on the jurisprudence before the IAD, jurisprudence, which no doubt both of you are familiar with, the Panel has decided to admit the evidence in to -- admit those documents in to evidence and at the end of the day it will decide what weight to give to it, if any.

[11] The IAD erred in two respects in making its ruling. First, the matter before it was not an admissibility hearing under section 36(1)(a) of the Act. That hearing had been held previously and the applicant had been found inadmissible. The basis of the inadmissibility finding was the applicant's criminal convictions; he was not convicted on the charges of sexual assault and luring which were the subjects of the police reports being accepted into evidence.

[12] Secondly, the IAD, prior to accepting these documents as evidence, made no finding that the police reports met the test for admissibility set out by the Federal Court of Appeal in *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326. Although *Sittampalam* dealt with an admissibility hearing under section 37(1)(a) of the Act, its observations apply equally to the hearing being conducted. The Federal Court of Appeal held at para. 49 that:

> In admissibility hearings, the Board is not bound by the strict rules of evidence. Once the tribunal determines that the evidence is credible and

> trustworthy then it is admissible, and the question of how the evidence was obtained becomes relevant merely as to the weight attached to the evidence: section 173, IRPA.

[13] Here, there was no finding by the IAD that the police reports were either credible or trustworthy. In light of the acquittal of the applicant on the charges to which they related, they were *prima facie* neither credible nor trustworthy as they set out the factual foundation for charges laid that were subsequently not proven. The police reports should not have been admitted into evidence in these circumstances.

[14] I digress to observe that I am very troubled by the fact that the Minister's counsel offered into evidence the police reports when the applicant had been tried and acquitted of those charges to which the reports relate and there was a record available of the Judgment of Justice Hamilton. The Judgment detailed the reasons for the acquittal and also provided the basis for the sentence that was imposed for the breaches of probation: See *R. v. Fong*, [2007] O.J. No. 5243 (S.C.J.). If any document relating to the charges against the applicant was appropriate to be placed before the IAD, it was the reasons of the trial judge that set out his findings of fact, not the mere allegations set out in the police reports, which ultimately proved to be untrue.

[15] Having found that the police reports were improperly admitted, the Court must consider whether that error breached the applicant's right to a fair hearing.

[16] In its written decision the IAD states that the impugned documents were not considered:

> Having considered the totality of the evidence, in the context of this case, the panel finds that the narratives as they relate to the Appellant's

> conduct relevant to the sexual assault charges, has no probative value in the context of this case. Significantly, the appellant was acquitted of sexual assault. Therefore, it would be an error in law to use the document to make any assessment about the Appellant's criminality.

[17] The IAD goes on to state that it is alert and alive to the legal principle that it is required to give full effect to the acquittal and that "it is improper to attempt to impeach a judicial finding by the 'impermissible route' of re-litigating in a different forum." The IAD also addresses the concern expressed by applicant's counsel that the contents of the documents would "overwhelmingly [be] likely to prejudice the Appellant's opportunity to receive a fair hearing" and, citing *De Leon v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1532 (T.D.), states that it is satisfied that it "has the capacity to cull and has culled only the relevant and probative information from the document."

[18] The probative information the IAD says that it has culled from the police documents is the following:

> In admitting the document, the panel does not cast doubt on the validity of the Appellant's acquittal. Rather, the panel focuses on the hearing process, and concludes that, in the circumstances of this case, where there is no other information before it about the factual underpinning of the criminal offenses for which the Appellant was convicted, it is necessary to admit the documents to enhance the credibility and the effectiveness of the adjudicative process of the hearing, as a whole. Consistent with this legal principle, the panel uses the Respondent's impugned documentary evidence only to appreciate the factual underpinnings of the two breaches of the probation order and why the Superior Court of Justice and the Ontario Court of Appeal determined that the Appellant's "breaches were serious and a jail term was required" to the extent that a relatively long custodial sentence was imposed. Therefore, to the extent that the narratives in the police report are relevant and sufficient to meet the ingredients of the offenses, the panel accepts the document into evidence. [emphasis added]

[19] I note that the applicant testified in this proceeding, as one would expect given the nature of the proceeding. His evidence was subject to cross-examination by the Minister and through that process the "factual underpinnings" of the breaches of probation were obtained. I fail to see why the IAD thought it required the police reports prior to the hearing rather than waiting to see whether the evidence placed before it through sworn testimony was sufficient to establish the factual underpinnings.

[20] The further difficulty with the statement of the IAD reproduced above is that it assumes that the police reports set out the factual underpinnings of the breaches of probation. I have compared the allegations set out in the police reports with the evidence given by the applicant, the evidence given by the complainant, and the facts as found by the trial judge. Many of the allegations contained in the police reports were not factual – they misrepresented the facts and, in many instances were false. Justice Hamilton's decision makes it clear that the allegations of a violent sexual assault contained in the police reports were unfounded:

> At no time was she yelling or screaming at him even though she told the police that she was yelling, it hurt.
> …
> When asked why she continued to have sex, she did not have a good answer and at no time did she remember saying stop.
> …
> Previously, the complainant had stated the accused pushed her and dragged her to his car after the encounter in the woods; however, at trial she stated they held hands and he did not push or drag her.
>
> With respect to March 12th, the complainant told the police she screamed and yelled during the 3 hour incident. At trial, she acknowledged this was incorrect. She did not scream or yell.

The appropriate tool for the Board Member to determine why the Ontario courts determined that a jail term was required would logically be the publicly available decisions where the courts specifically

answered this question. Contrary to the IAD's statement excerpted above, the police reports could not help it appreciate either the factual underpinnings of the breach or the reasons for the sentence imposed.

[21] I have also concluded that in making her decision the IAD Member was not fully successful in removing from her mind the statements contained in the police reports that related to the charges on which the applicant was acquitted. The decision contains wording that makes it clear that the IAD Member considered the applicant's crime to be the sexual contact with the girl, not the breach of his probationary term. At the very least she conflated the two.

[22] The circumstances of the breach of probation are relevant when applying the *Ribic* factors. Relevant considerations include the inadvertence or deliberateness of the breach, the actions of the applicant on becoming aware of the breach, the number of breaches, and the circumstances of the breaches.

[23] In this case, the breaches were deliberate, repeated, and during one breach the applicant had sex with a 15 year-old girl. However, that sexual contact was consensual. The sex was not the crime; the crime was being alone with someone under 18.

[24] The IAD Member writes in her decision that the applicant "committed a sexual offence." That is factually incorrect.

[25] The IAD Member recognizes that the age of sexual consent at the time of the contact with the girl was 14 but says that in restricting the applicant's ability to be alone with a person under 18 years of age the Court created an "inchoate crime" specific to the applicant. It was not an inchoate sexual crime; it was not an inchoate crime at all. *Black's Law Dictionary*, 9th ed., defines an "inchoate offence" as "A step toward the commission of another crime, the step itself being serious enough to merit punishment." Since at the time of the sexual encounter the age of consent was 14, the applicant was not taking a step toward the commission of a crime. The crime was breaching a probation order, in this case by having unsupervised contact with a person under 18. If the applicant had sex with a girl under 14 that would have been a sexual crime and if he had forced the girl to have sex then that too would have been a sexual crime. However, neither happened. His only crime was being alone with the girl. The consensual sexual acts, however repugnant they may be to the IAD Member or to me, did not in themselves constitute a crime. Because the Member focused her decision on the applicant's alleged "sexual offence" I find that the applicant failed to receive a fair and impartial hearing.

[26] I do not accept the applicant's submission that the IAD erred in rejecting the joint submission of the Minister and applicant.

[27] At the IAD hearing, the applicant gave evidence in chief and was then cross-examined by the Minister. After his testimony, the IAD Member took the afternoon break during which counsel for the parties agreed to a joint recommendation for the disposition of the appeal. The proposed disposition would have stayed the deportation order for a period of four years during which the applicant would have been subject to certain conditions.

[28] When the IAD Member was informed that there was a joint recommendation to be made, she responded: “You can make it, but I’m going to tell you I’m going to have to think on it very seriously. I am quite prepared to take your submissions.”

[29] The applicant then made his submissions. It is fair to say that during the submissions, the IAD Member interjected with many comments that would have alerted the applicant, if the statement above had not, that she was having difficulty accepting the joint submission. One such statement, which is also reflective of the previously noted error, is the following:

> The Panel is not talking about deviant behaviour, I don’t think I used that diction [*sic*]. I talked about inappropriate sexual conduct, a 28 year old man going in to the house of a 15 year old with consent or not. The law of consent changed recently and I know it is not retroactive to make it 16, but whether he knew or not this would have weighed heavily against him.

[30] The applicant submits that the IAD Member rejected the joint recommendation “out of hand” and dismissed the Minister’s participation in the recommendation, and that this was a breach of procedural fairness. The applicant says that at the time of the joint recommendation his supporters (family and Church members) were brought into the hearing room for the presentation of the joint submission, but were not invited by the IAD Member to leave and return to testify.

[31] I agree with the submission of the respondent that the IAD is entitled to reject a joint submission so long as it provides reasons for so doing: *Hussain v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 334, *Malfeo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 193, *Akkawi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 21, and *Nguyen v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1843 (T.D.). The IAD Member

did not reject the joint submission out of hand. She provided reasons that transparently and intelligibly explained why the joint submission was rejected.

[32] The IAD Member was not obliged to invite the parties to provide further evidence after indicating that it would not automatically accept the joint submission. It was incumbent on the applicant to call further evidence if he wished to bolster the joint submission. The applicant decided not to call any further evidence and there was no unfairness or impropriety in the manner the IAD dealt with the joint submission.

[33] For the reasons given the IAD's decision must be set aside.

[34] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT IS that:

1. This application is allowed, the decision of the Immigration Appeal Division of the Immigration and Refugee Board dated February 22, 2010, is set aside and the applicant's appeal of the deportation order issued by the Immigration Division of the Immigration and Refugee Board is referred to another member of the Immigration Appeal Division of the Immigration and Refugee Board for re-determination; and

2. No question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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