Federal Court  Cour fédérale

Date: 20110224

Docket: IMM-1312-10

Citation: 2011 FC 220

Ottawa, Ontario, February 24, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

KERWIN DIZON CUNANAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Board), dated February 25, 2010, wherein the Board dismissed an appeal from a removal order.

[2] The applicant requests that the decision of the Board be set aside and the matter be referred back for redetermination by a differently constituted.

Background

[3] Kerwin Dizon Cunanan (the applicant) was born on September 4, 1987. He is a citizen of the Philippines. He came to Canada on June 4, 2002 as a dependant child to his father who was sponsored by his mother as a member of the family class. He resides with his parents, sister and brother and maintains that they have a close relationship.

[4] The applicant attended high school in Canada but did not complete Grade 12. He has no other formal education or training.

[5] The applicant began taking and selling drugs at the age of 17. These included marijuana, cocaine and ecstasy.

[6] On January 16, 2007, the applicant and five other people broke into a known drug dealer's apartment. The applicant recruited two of the members of this group for the act. They assaulted the victim, tied him up and left him and his girlfriend in the bathroom. The group carried a bb gun with them at this time. They stole $600 in cash, a videogame machine and a quantity of marijuana.

[7] The applicant was subsequently arrested while on bail for the above offences. His mother was his surety at the time and he was living with his family. He was found in possession of nine grams of cocaine.

[8] The applicant was charged with robbery, break and enter, failure to comply and possession of a controlled substance. He pled guilty and was convicted on July 21, 2008. He then testified against his co-accused. He was sentenced to 23 months in jail and three years probation, which he began serving on August 19, 2008.

[9] On June 10, 2009, the applicant was denied parole because of issues concerning lack of employment and education, previous choice of associates and the seriousness of the offence. He was subsequently released from detention on December 21, 2009 and is currently on parole.

[10] The applicant was served with a valid removal order as a result of his conviction for these offences.

Board's Decision

[11] As there was no issue as to the validity of the order, the Board was to determine whether there were sufficient humanitarian and compassionate (H&C) considerations to warrant relief. The Board found that the onus was on the applicant.

[12] The Board found the applicant to be mostly credible but found that he failed to provide sufficient evidence on why he is engaged in rehabilitation and what he learned from his negative experience.

[13] The Board reviewed and weighed the *Ribic* factors outlined in *R. v. Ribic*, [1985] I.A.B.D. No. 4 and affirmed in *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339. These factors include:

1. The seriousness of the offence leading to the removal order;
2. The possibility of rehabilitation;
3. The length of time spent and the degree to which the individual facing removal is established in Canada;
4. The family and community support available to the individual facing removal;
5. The family in Canada and the dislocation to the family that removal would cause; and
6. The degree of hardship that would be caused to the individual facing removal to his country of nationality.

Seriousness of the Offence

[14] The Board found the offence to be very serious evidenced by the 23 months and 10 day custodial sentence he was given, as well as the maximum life sentence for the offence. The Board found that the applicant provided people to participate in the offence and because of this, he benefited disproportionately from the proceeds of the crime. The Board found that a bb gun was

involved in the offence which was pre-meditated and that bringing this gun to the victim's house put the applicant and the public at risk.

[15] The Board also noted that the applicant failed to comply with his recognizance and was found in possession of a controlled substance while on bail. The Board noted that the applicant was a multiple-substance user who had a $200 a day drug habit which began in high school. The Board noted that the applicant previously trafficked drugs in order to support this habit. The Board did not find the applicant's offence to be an isolated one. Rather, it found that his substance abuse and criminal behaviour is escalating. The Board found this to be a negative factor.

Possibility of Rehabilitation

[16] The Board found that the possibility for rehabilitation was low. The Board noted that the applicant has attended various substance abuse programmes and that he has strong family ties. However, the Board found that the applicant did not provide evidence that he is aware of the causes of his substance abuse and criminality. It found that the applicant had used drugs after attending substance abuse programmes in the past. The Board noted that the applicant had told his addiction counsellor that he remained abstinent since March 2007 but that he testified that he had stopped using drugs once he was in detention. The Board found that the applicant did not spontaneously express remorse for the offence. The Board gave no weight to his guilty plea.

[17] In addition, the Board found that the applicant's likelihood to re-offend is high. He was not deterred by the possibility of losing his liberty and re-offended while out on bail. The Board found that he is not aware of the primary reasons for his criminal act or the cause of substance abuse. The Board found this to be a negative factor.

Length of Time and Establishment in Canada

[18] The Board found that the applicant has been in Canada for eight years but has not integrated well into society. This, coupled with the seriousness of his negative behaviour, resulted in the Board giving this little or no positive weight. The Board did consider the applicant's family in Canada to be a positive factor for establishment. The Board found that the applicant has not completed high school, has no job, no vocational training, no assets, no bank account and no savings. The economic factor does not favour the applicant. As such, the Board found this factor overall to be neutral.

Family and Community Support and Impact on Family if Removed

[19] The Board was not persuaded that the family support for the applicant is strong enough to be a veritable help towards rehabilitation or to prevent future criminal acting out. The Board noted that the applicant had immediate family and extended family in Canada who care for him and with whom he attends church. However, the Board found that this was the case during his substance abuse, criminal activity and non-compliance with his recognizance. In addition, the applicant's mother was the surety when the applicant re-offended during his bail. The Board gave this moderate positive weight.

[20] With regards to hardship on the family members, the Board recognized that the emotional hardship would be disproportionate. However, the Board noted that the applicant has been removed from his family for the past year during his incarceration. It further found that the family has family in the Philippines and can communicate with the applicant electronically and visit him there. The Board found that there was not sufficient evidence that anyone in the applicant's family relies on him for financial support. The Board found this to be a neutral factor.

Hardship if Returned to the Philippines

[21] The Board did not find this to be a positive factor. The applicant was born and grew up in the Philippines and emigrated to Canada at age 15. He is fluent in the local language. He has some family still there and while he has no discernable skills, this would not put him at a disadvantage compared to finding a job in Canada. The Board did not find that there would be undue or disproportionate hardship.

[22] Based on the weighing of all of the *Ribic* above, factors, the Board upheld the deportation order.

Issues

[23] The applicant submitted the following issues for consideration:

1. Is there any evidence which supports the applicant's submissions with respect to the issue set out below and are any of these issues either singly or in combination, serious ones?

2. Did the Board err in fact, err in law, breach fairness, raise an apprehension of fairness, in dismissing the appeal of the removal order against the applicant?

[24] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board base its decision on an erroneous finding of fact that it made without regard to the material before it?

3. Did the Board err in law by not notifying the applicant of a discrepancy between his oral and documentary evidence?

Applicant's Written Submissions

[25] The applicant submits that the Board based its decision on numerous erroneous findings of fact.

[26] The applicant submits that the Board erred in finding that anyone could have been wounded with the bb gun used by the applicant, because it was not loaded. The Board erred in finding that the crime was not isolated because before the conviction, the applicant had never engaged in violent acts, act with weapons, theft or robbery. The Board erred in finding that the applicant's remorse was not spontaneous. It further erred in finding that the applicant organized the robbery as he testified that a friend organized the robbery and asked him to bring two people. The Board further erred in the reason it found for why parole was denied. Parole was only denied because the applicant could not prove he had a job if he was released.

[27] The applicant submits that the Board erred significantly in finding that the applicant had a $200 per day drug habit. In fact, the applicant testified it was $200 per week. This error affected the Board's findings in several areas: it caused the Board to find that the family support was a less positive factor; it affected the Board's assessment of how the applicant would be assisted by rehabilitation programs; and because $200 per day far exceeded his income, the Board took the view that the applicant was supplementing his income by illegal and violent means.

[28] Further, the applicant submits that the Board erred when it gave no weight to the fact that the applicant pled guilty and testified against co-accused for the Crown. The Board misconstrued the evidence in stating that the applicant recruited people and then reported them to the police. In fact, the applicant testified that he cooperated with the police and then agreed as a condition of sentencing to testify at the trials of the co-accused. The applicant's cooperation with the Crown shows that the applicant is willing to comply with Canadian law and was relevant to rehabilitation.

[29] Finally, the applicant submits that the Board erred in law by not informing him of the discrepancy between a letter from his addiction counsellor and his testimony regarding when he stopped using drugs. The letter states that the applicant was abstinent from drugs from March 2007, but the applicant testified that he abstained from August 2008 when he was incarcerated. The Board was required to put this discrepancy to the applicant for a response.

[30] These wide-ranging errors resulted in an unreasonable decision by the Board.

Respondent's Written Submissions

[31] The respondent submits that the Board's power to grant relief from a removal order is fact-dependent and policy-driven. Board members have considerable expertise in determining appeals under the Act. Because of the broad scope of the discretion, the reasonableness standard of review applies. This standard does not allow for any reweighing of evidence by this Court.

[32] The respondent submits that there were no material errors in the Board's decision.

[33] Regarding the bb gun, the Board was not concerned with whether the bb gun was loaded or not. The Board found that the applicant lacked concern for the severe violence that could have occurred in the apartment where the victim lived. This was based on the nature of the victim; a known drug dealer, not on the presence, or lack of, bullets in the bb gun.

[34] Regarding the discrepancy in the drug habit of $200 per day versus per week, the respondent submits that this was not a material error. A $200 per week drug habit was still serious enough to motivate home invasion. The Board's concerns were about escalating behavior of the applicant due to substance abuse which is not diminished if he spends $200 per week.

[35] The respondent submits that there was no error in finding that the criminality was not isolated. The Board looked at the facts: the robbery was pre-meditated, the applicant recruited two people, the applicant began using drugs well before the robbery and trafficked in drugs to support

his addiction and that he was re-arrested for possession of cocaine while on bail. To find that the robbery was not an isolated crime was reasonable.

[36] The respondent submits that there were no errors in not giving weight to the applicant's cooperation with the Crown. The Board assessed the applicant's behavior and found that recruiting people for a criminal scheme and then reporting their participation to police cannot be an act worthy of credit in an H&C analysis or a mitigating factor so the Board gave it no weight which was within its scope to do.

[37] Finally, the respondent submits that there was no error in the Board's finding that the applicant's rehabilitation programs did not satisfy the parole board that the applicant would not be a risk. Parole was denied because there was no confirmation of school/work/counseling so the applicant would be an unmanageable risk.

[38] The respondent submits that the Board duly considered the *Ribic* above, factors but felt that the prospects for the applicant's rehabilitation were not such that relief was warranted. The Board took all of the evidence into consideration when considering each factor and it determined that the possible threat to himself and the public, if the applicant had a relapse, was high. This decision fell within the reasonable and acceptable outcomes and the Court should not interfere.

[39] The respondent submits that there was no breach of procedural fairness. The Board was not required to put to the applicant for clarification, the areas of his testimony which it found unconvincing. In addition, the fact that there was a discrepancy in the applicant's testimony and the

letter from the addiction counselor was not central to the Board's decision. There was also other evidence before the Board which supported the applicant's testimony that he had not been abstinent since 2007. Specifically, his arrest for possession in March 2008.

Analysis and Decision

[40] **Issue 1**

What is the appropriate standard of review?

Recognizing that hardship may come from removal, Parliament provided the Board with the power to grant exceptional relief pursuant to paragraph 67(1)(c), of the Act. Paragraph 67(1)(c) requires a fact-dependent and policy-driven assessment by the Board. Board members have considerable expertise in determining appeals under the Act. The Act confers a broad scope of discretion on the Board and a high level of deference is owed to it. The decision should therefore be reviewed on the standard of reasonableness (see *Khosa* above, at paragraphs 57 to 60).

[41] The standard of reasonableness does not allow this Court to reweigh the evidence that was before the Board. Similarly, the Court cannot find that it was unreasonable for the Board to weigh one factor more heavily than another. The Court is only concerned with ". . .the existence of justification, transparency and intelligibility within decision-making process is." The Court should only intervene if the decision falls outside of the ". . . range of acceptable outcomes, which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47).

[42] **Issue 2**

Did the Board base its decision on an erroneous finding of fact that it made without regard to the material before it?

A review of the file shows that the Board made an error in relation to the extent of the applicant's use of drugs. The Board stated that the applicant's drug habit was costing him $200 per day. However, the evidence before the Board was that the applicant's drug habit had been costing him $200 per week. In my view, that is a significant difference.

[43] The extent of drug use was relevant to the Board's assessment of the chance of successful rehabilitation of the applicant. This is evidenced by the Board's remarks at paragraph 19 in the decision:

> To iterate, he had a $200-a-day habit, which as the panel understands it is very dependent.

At paragraph 27 of the decision:

> The panel is not persuaded that the programmes he has taken are sufficient to deal with his extensive and multiple-substance abuse.

And at paragraph 29 of the decision:

> Where the Appellant is on the spectrum of the possibility of rehabilitation must be evaluated in the context of the severity of his criminal acting out, his serious drug abuse issues, his motivation for rehabilitation, the length of time he has been engaged in programme, the duration of the programmes, not knowing or addressing the cause of his anti-social behaviour for such a long time, and extent of his family and community support, to name the most importing elements. . . .
>
> [Emphasis added]

[44] I have no way of knowing how or to what extent the correct evidence of drug usage would have effected the Board's decision in this case. That decision is to be made by the Board, not the Court.

[45] As a result, I am of the view that this was a material error of fact which requires that the Board's decision must be set aside.

[46] The applicant has raised other issues but I need not deal with them because of my finding on Issue 2.

[47] The application for judicial review is therefore allowed and the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

[48] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[49] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

67.(1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67.(1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
. . .	. . .
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, 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.
72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1312-10
STYLE OF CAUSE:	KERWIN DIZON CUNANAN - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 23, 2010
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	February 24, 2011

APPEARANCES:

Micheal Crane	FOR THE APPLICANT
Nimanthika Kareira	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Micheal Crane Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT