Federal Court  Cour fédérale

Date: 20120720

Docket: IMM-9476-11

Citation: 2012 FC 919

Ottawa, Ontario, July 20, 2012

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

ALIM MOHAMED HANIFF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] Mr. Alim Mohamed Haniff, the Applicant in this application for judicial review, is a citizen of Guyana who has been in Canada since 1995. Between April 2003 and December 2006, the Applicant acquired five criminal convictions. As a result, by decision dated October 26, 2005, he was ordered removed from Canada, on grounds of "serious criminality" under

s. 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. A Deportation Order was issued against him.

[2] The Applicant appealed his Deportation Order, seeking a stay of his removal. In a decision dated April 18, 2007, a panel of the Immigration and Refugee Board, Immigration Appeal Division (the IAD) granted Mr. Haniff a four-year stay of the Deportation Order on certain conditions. In 2011, the Minister of Public Safety and Emergency Preparedness (the Minister) requested a review of the stay, alleging that the Applicant had breached several conditions. Specifically, the Minister claimed that the Applicant had breached the conditions of his stay in the following manner:

- on August 28, 2009, he was convicted of impaired driving and failing or refusing to provide a sample of his blood;

- he did not provide proof of completion of an anger management program, an intimate partner abuse program and a substance abuse program; and

- he had accumulated outstanding fines in the amount of $3,230.00.

[3] A review hearing was held on November 10, 2011, before a member of the IAD (the Member). In a decision dated November 18, 2011, the Member determined that the stay should not continue. The effect of this decision is that the Applicant's appeal of his removal has been dismissed and his removal order may be acted on by the Minister.

[4] The Applicant seeks judicial review of the decision of the Member.

II. Issues

[5] The issues before me on this application for judicial review, as clarified during oral submissions, are the following:

1. Did the Member fail to provide the Applicant with a full and fair hearing:

    a) by permitting the late filing of evidence by the Minister, in contravention of Rule 30 of the *Immigration Appeal Division Rules*, SOR/2002-230 [*IAD Rules*];

    b) by curtailing the Applicant's right to re-examine his mother, who was the only other witness at the hearing;

    c) by unduly interfering with counsel's questioning of the Applicant or his mother; and

    d) by making statements that amounted to a pre-determination of the outcome of the hearing?

2. Did the Member fail to have regard to the best interests of the Applicant's young child?

III. Statutory Framework

[6] I begin by briefly describing the statutory framework affecting this application.

[7] There is no dispute that the Applicant is inadmissible under s. 36(1)(a) of *IRPA* on grounds of serious criminality. A permanent resident is inadmissible under that provision if he or she has been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence for which a term of imprisonment of more than six months has been imposed. Because of the Applicant's inadmissibility, pursuant to s. 45(d), the Immigration Division (the ID) was obliged to issue a removal order (in this case, the Deportation Order).

[8] Under s. 63(3) of *IRPA*, an admissibility decision of the ID can be appealed to the IAD. After considering the appeal, the IAD, pursuant to s. 66, shall order one of the following: (a) "allow the appeal in accordance with section 67"; (b) "stay the removal order in accordance with section 68"; or (c) "dismiss the appeal in accordance with section 69".

[9] Section 68 of *IRPA* deals with staying removal orders. Pursuant to s. 68(1), in order to stay a removal order, the IAD must be satisfied, taking into account the best interests of a child directly affected, that sufficient humanitarian and compassionate considerations warrant special

relief in light of all the circumstances of the case. In granting a stay of a removal order, the IAD "shall impose any condition that is prescribed and may impose any condition that it considers necessary".

[10] Once the IAD has stayed a removal order it may, at any time, and on its own initiative or on application, reconsider the appeal (s. 68(3)). Under s. 69(1), the IAD shall dismiss an appeal if it does not allow the appeal or does not stay the removal order.

IV. Standard of Review

[11] As determined by the Supreme Court in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, the standard of review of a decision of the IAD is reasonableness. Justice Binnie described this standard as follows at paragraph 59:

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

[12] The Supreme Court's guidance in *Khosa* is of particular assistance since that case dealt with a person similarly situated to the Applicant in the case at bar. In *Khosa*, a young man had been determined to be inadmissible to Canada for serious criminality and the IAD had dismissed the appeal brought pursuant to s. 67(1)(c). The task of the IAD was explained by Justice Binnie at paragraph 57 as follows:

> In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(*c*) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(*c*) requires the IAD to be "satisfied that, at the time that the appeal is disposed of . . . sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(*c*) calls for a fact-dependent and policy-driven assessment by the IAD itself.
>
> [Emphasis added]

[13] The issue of the procedural fairness of the hearing before the Member is not reviewable on a standard of review; either the hearing was fair or it was not.

V. Analysis

A. *Issue #1: Fairness*

[14] In support of his argument that the hearing before the Member was unfair, the Applicant raises four alleged problems that, in his view, resulted in an unfair hearing.

[15] The overarching concern that I have with these arguments is that, during the hearing, counsel for the Applicant raised none of the problems now alleged. At no time did the Applicant or his counsel attempt to question the Member on his actions, seek an adjournment or bring a motion for the Member to recuse himself. It is incumbent on a person seeking to overturn a decision on this basis to bring forward any alleged unfairness or bias at the first opportunity (see e.g. *In re Human Rights Tribunal and Atomic Energy Can* (1985), [1986] 1 FC 103 (CA), 24 DLR (4th) 675; and *Yassine v Minister of Employment and Immigration* (1994), 172 NR 308 at para 7 (FCA), 27 Imm LR (2d) 135). As pointed out by Justice Near in *Zhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 279 at para 22, [2011] FCJ No 323 (QL):

> Failure to raise a timely objection to a perceived breach of natural justice is considered by the jurisprudence of this Court to be an implied waiver of any such breach that might have occurred (*Kamara v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 448, 157 ACWS (3d) 398 at para 26).

[16] In response, the Applicant argues that his counsel was likely "intimidated" by the Member. This is simply not an excuse for counsel permitting an allegedly unfair hearing to proceed.

[17] This is sufficient to dispose of this issue. However, a review of the allegedly unfair actions demonstrates that, either singly or cumulatively, they do not demonstrate that the hearing was unfair.

[18] The Applicant's first concern relates to a package of documents faxed by the Minister to the IAD and the Applicant (the November 4 Package) six days prior to the commencement of the hearing. The November 4 Package calls into question the credibility of the Applicant's testimony

with respect to his girlfriend (AR). The Applicant acknowledges that the *IAD Rules* permit the late filing of evidence in the Member's discretion but argues that the Member erred by admitting this particular evidence. I do not agree.

[19] At the hearing, counsel for the Applicant objected to the admissibility of the November 4 Package on the basis that: (1) he had only received that document six days before the hearing; and (2) it was not directly relevant to the Applicant. The Member considered the arguments of counsel and held that the documents were relevant and had probative value. The Member further explained that the Applicant would have an opportunity to address the evidence.

[20] In addition to the fact that, by not objecting, the Applicant had impliedly waived his objection, I observe that counsel for the Applicant received the documents six days prior to the hearing. Thus, counsel and the Applicant had six days to prepare a response. Indeed, the transcript of the hearing reveals that the Applicant was able to address this evidence when questioned by the Minister's counsel, and that he had in fact reflected on the impugned evidence and discussed it with AR prior to the hearing. It should also be noted that the Applicant appears to have attempted to conceal this evidence on direct examination, as he suggested that the only obstacle preventing him from marrying AR was his need to develop personally. However, in response to a question from the Member, the Applicant conceded that "the real reason" he cannot marry AR is that she is married to someone else.

[21] The acceptance of the November 4 Package into evidence was not a breach of natural justice.

[22] The Applicant's second argument is that the Member breached the rules of procedural fairness by rushing the hearing. Once again, I do not see any error in the manner in which the Member acted.

[23] Aside from the Applicant, the Applicant's mother was the only witness to testify at the hearing. The Applicant submits that the Member contravened the rules of procedural fairness by curtailing or rushing his counsel's questioning of his mother. After seven pages of questions from counsel for the Applicant and nearly seven pages of questions from the Minister's counsel, counsel for the Applicant indicated that he had "a few questions" on re-examination. The following brief exchange then took place between counsel for the Applicant and the Member:

> **MEMBER:** Make if brief counsel because we are coming to twelve. We have had a lot of questions and answers in this hearing so far and I need to hear submissions. So I want to finish by 12:00. I need to finish by 12:00 actually.
>
> **COUNSEL:** I will be brief. [….]

[24] Counsel for the Applicant then proceeded to ask the Applicant's mother four questions. After the Member refused to accept documents regarding the purchase of the family home into evidence, counsel for the Applicant agreed to proceed to his submissions:

> **MEMBER:** All right counsel's submissions now.
>
> **COUNSEL:** Yes. [….]

[25] While rushing on the part of a tribunal may deprive a party of a fair hearing (see e.g. *Mazouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1519 at para 8, [2003] FCJ No 1927 (QL)), that does not appear to be the case here. Counsel was not prevented from re-

examining the witness. The Applicant has not pointed to any evidence which he would have adduced had he been given additional time.

[26] In these circumstances, the Member's statement that counsel should be "brief" did not prevent the Applicant from receiving a full and fair hearing or breach the principles of natural justice or procedural fairness.

[27] The Applicant further argues that he was denied a full and fair hearing because the Member "seemed to 'prosecute'" the case by interrupting his counsel's examination in chief to "interject his own line of questioning". Once again, I do not agree.

[28] A review of the transcript does not demonstrate that the Member's questioning was intrusive or that the Applicant was prevented, by such interruptions, from presenting his case.

[29] The decision of *Kumar v Canada* (1987), [1988] 2 FC 14 (CA), 81 NR 157 [*Kumar*], upon which the Applicant relies, is distinguishable. In *Kumar*, above at 18, the Court of Appeal found that the applicant had been denied natural justice as a result of the chairman's "gross interference with the orderly presentation of [his] case". In reaching that conclusion, the Court of Appeal noted that the chairman had made several "intrusive and intimidating" interjections, including the statement that he considered cross-examination to be unnecessary because "This is one of the most ridiculous cases I have ever heard in my life" (*Kumar*, above at 16). The Member's interjections in this case bear little resemblance to those at issue in *Kumar*: They were

posed in an orderly fashion, did not curtail any of the Applicant's answers, and in no way dominated the examination in chief.

[30] In my view, the Member's questioning does not give rise to a denial of natural justice that would justify intervention by the Court.

[31] Finally, the Applicant argues that the Member came to the hearing having pre-determined the matter. This, argues the Applicant, resulted in an unfair hearing. The Applicant submits that the following statement, made by the Member during counsel's closing submissions, indicates that the Member had pre-determined the result:

> **COUNSEL**: [….] Sir I am respectfully submitting that this appeal should be allowed or in the alternative this stay should be extended.
>
> **MEMBER**: Honestly I do not see how you can reasonably submit that the appeal should be allowed. I mean that is not… I do not usually comment on people's submissions when I make them but I expect people to make responsible and reasonable submissions. There has been several serious breaches here. Non-reporting, a new offence, two counts actually of convictions. How can you possibly say in the light of all of this that I should allow the appeal outright. I do not understand that. I do not understand the basis of that submission.

[32] The Member, faced with an appeal by the Applicant, stated at the opening of the hearing that there were three possible outcomes: (1) he could allow the appeal and effectively vacate the Deportation Order; (2) he could continue the stay on conditions; or (3) he could dismiss the appeal. By his comments – both at the commencement of the hearing and as noted above at the end – it appears that the Member foreclosed the possibility of allowing the appeal. Given the extent and nature of the Applicant's breaches of the conditions of his stay, the Member's

statement was not surprising or unreasonable. Nothing presented in evidence changed the fact that the Applicant had a lengthy criminal history and had seriously breached the conditions of his stay. However, what is more important is that the Member clearly did not foreclose the possibility of continuing the stay and proceeded, after the above comment, to listen attentively to counsel's submissions on that possibility.

[33] The transcript demonstrates that, when the Member set out his views on the possibility of allowing the appeal, counsel accepted that result without question and carried on to argue the Applicant's alternative position. On these facts, there was no error.

[34] Overall, based on my reading of the history of this matter and the transcript of the hearing, I conclude that the hearing was conducted in accordance with the rules of procedural fairness. The four examples cited by the Applicant, when read in the context of the entire record, do not lead me to doubt the fairness of the proceeding.

B. *Issue #2: Best interests of the child*

[35] Although he does not reside with his child, the Applicant is father to a young boy in Canada. The Applicant asserts that the Member failed to take the best interests of his son into account when determining whether the stay should be continued.

[36] As required by s. 68(1) of *IRPA*, the IAD must take into account the best interests of a child directly affected by its decision to stay a removal order. It is well-established, however, that

the interests of a child are not determinative; the IAD must examine all factors relevant to the stay. Those factors are referred to as the "*Ribic* factors", as first set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) [*Ribic*], which was approved by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84. The weighing of those factors is the responsibility of the IAD. As noted above, the task of the IAD was described by Justice Binnie in *Khosa*, above at paragraph 57, as being to "determine what constitute 'humanitarian and compassionate considerations'", as well as "the 'sufficiency' of such considerations in a particular case [...]".

[37] In this case, the Member examined the facts relating to the Applicant's child; no evidence was ignored. The Member concluded that "it is in the best interests of the [Applicant's] son to have both of his parents in Canada; however, it is not determinative". The Member then proceeded to weigh this positive factor along with the other *Ribic* factors. I do not see how the Court can intervene in the Member's assessment of the child's interests or his weighing of the *Ribic* factors.

VI. Conclusion

[38] For these reasons, the application for judicial review will be dismissed. Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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