Federal Court Cour fédérale

Date: 20121227

Docket: IMM-3680-12

Citation: 2012 FC 1545

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, December 27, 2012

Present: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

SAID NAMOUH

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 subsection 63(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], of a negative decision rendered by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board on March 13, 2012, with respect to the appeal of a removal order issued against the applicant on June 5, 2009.

FACTUAL BACKGROUND

[2] The applicant is a citizen of Morocco. Sponsored by his spouse, he obtained permanent residence upon his arrival in Canada on September 9, 2003. In 2006, he divorced his spouse.

[3] On November 27, 2007, the applicant pleaded guilty to a charge of breaking and entering into a residential dwelling (that of his ex-spouse) with intent to commit an indictable offence therein, contrary to subsection 349(1) of the *Criminal Code*, RSC 1985, c C-46 [CrC]. On the same day, the applicant was found guilty under paragraph 145(5.1)(*a*) of the CrC of failing to comply with a condition of an undertaking to appear. He was later found to be inadmissible for serious criminality under paragraph 36(1)(*a*) of the Act. A removal order was issued against him on June 5, 2009, by the Immigration Division [ID] of the Immigration and Refugee Board pursuant to paragraph 45(*d*) of the Act.

[4] On October 1, 2009, the applicant was convicted of the following offences by the Court of Québec (*R v Namouh*, 2009 QCCQ 9324 [*R v Namouh*]):

a. conspiring to deliver, place, discharge or detonate an explosive or other lethal device to, into, in or against a place of public use with intent to cause death or serious bodily injury or with intent to cause extensive destruction of such a place (paragraph 465(1)(*c*) and subsection 431.2(2) CrC), for which he received a sentence of life imprisonment without parole for 10 years;

b. participating in or contributing to, directly or indirectly, an activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or

carry out a terrorist activity (section 83.2 CrC), for which he was sentenced to four years' imprisonment;

c. facilitating a terrorist activity (section 83.19 CrC) and committing extortion for the benefit of, at the direction of or in association with a terrorist group (section 83.2 CrC). He received an eight-year sentence for each count, which he must serve consecutively. All of these sentences must be served concurrently with the original life sentence.

[5] In his appeal before the IAD, the applicant did not challenge the legality of the removal order but rather sought a stay of the order on humanitarian and compassionate grounds.

DECISION OF THE IAD

[6] To determine whether there existed humanitarian and compassionate considerations warranting special relief, such as the best interests of the child, the IAD took into account the factors in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD no 4 [*Ribic*], as reiterated by the Supreme Court in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 [*Chieu*].

[7] However, considering the life sentence that the applicant is currently serving with no possibility of parole before September 2017, in addition to the other sentences ranging from four to eight years that he must serve concurrently, the IAD found that there was no evidence that the applicant's removal was imminent. It concluded that it was impossible to predict what the

situation would be in Morocco in 2017 or later, or whether the applicant, once released and returned to Morocco, would indeed be detained.

[8] While recognizing Morocco's troubling human rights record, the IAD concluded that the applicant's particular circumstances made it difficult to assess the extent of the hardship he might face in the event of his return to Morocco in several years, finding that any such assessment would be speculative at this stage. Ultimately, it gave more weight to the other *Ribic* factors, such as the seriousness of the applicant's offences, and found that there were insufficient humanitarian and compassionate considerations warranting special relief to allow the appeal or stay the removal order.

ISSUE

[9] The issue in this case is whether it was unreasonable for the IAD to conclude, given the applicant's incarceration until 2017, that any assessment of the hardship he might face in the event of a removal to Morocco would be premature.

STANDARD OF REVIEW

[10] Section 67 of the Act grants the IAD a wide discretion for assessing the humanitarian and compassionate considerations in the context of an appeal of a removal order. This case is similar to *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, which involved the review of an IAD decision regarding whether humanitarian and compassionate considerations warranted granting a stay of the applicant's removal. At paragraph 58, the Supreme Court wrote the following:

> . . . [the applicant] accepted that the removal order had been validly made against him pursuant to s. 36(1) of the *IRPA*. His attack was simply a frontal challenge to the IAD's refusal to grant him a "discretionary privilege". The IAD decision to withhold relief was based on an assessment of the facts of the file. The IAD had the advantage of conducting the hearings and assessing the evidence presented, including the evidence of the respondent himself. IAD members have considerable expertise in determining appeals under the *IRPA*. Those factors, considered altogether, clearly point to the application of a reasonableness standard of review. There are no considerations that might lead to a different result. (Emphasis added.)

[11] The Supreme Court continues at paragraph 59 with, "The question whether [the applicant] had shown 'sufficient humanitarian and compassionate considerations' to warrant relief from his removal order . . . was a decision which Parliament confided to the IAD, not to the courts." Accordingly, this Court must show considerable deference in determining whether the panel's findings are justified, transparent and intelligible, and therefore falling within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47).

ANALYSIS

Applicant's arguments

[12] The applicant submits that the panel failed to consider the particular circumstances relating to a substantial risk of torture upon his return to Morocco. These warrant the granting of special relief in the form of a stay of the removal order. Executing the removal order would expose him to a substantial risk of torture by Moroccan law enforcement agents, and there is no evidence that the risk will diminish in the near future. No assurances can be obtained from the Moroccan authorities, despite the fact that the Moroccan legislature has made torture an offence

and that Morocco is a party to the *Convention Against Torture*. It has been established not only that torture is a common practice among the Moroccan law enforcement authorities, but also that it is basically encouraged as a result of the impunity enjoyed by the perpetrators of torture in Morocco.

[13] The applicant also submits that he is expecting a judgment from the Quebec Court of Appeal in the coming months that could result in a reduction of his sentence. His removal would therefore be imminent if the Court of Appeal were to order his release or reduce the length of his sentence of imprisonment, a fact that the IAD neglected to consider in reaching its decision.

[14] He is therefore asking the Federal Court, on the grounds of the substantial risk of torture to which he would be exposed, to order a permanent stay of the removal order issued against him pursuant to paragraph 36(1)(*a*) of the Act by the ID.

Respondent's arguments

[15] The respondent is of the view, for the reasons that follow, that it was reasonable for the IAD to find that an assessment of the risks to which the applicant could be exposed should he return to Morocco was premature.

[16] Under paragraph 50(*b*) of the Act, the applicant benefits from a regulatory stay of his removal order until 2017, in other words, "until the sentence [of a term of imprisonment in Canada] is completed". At the time of his appeal to the IAD, the applicant's removal was not only uncertain but also contrary to the Act. The hypothetical nature of the applicant's potential

removal is accentuated by the fact that he has not yet exhausted his administrative remedies. When the time comes, he would have the option of applying for a PRRA under sections 112 and following of the Act, in which case the applicant's potential hardship in Morocco would be assessed by the Minister.

[17] Moreover, the applicant could obtain Canada's protection after the Minister has weighed the factors listed in section 97 of the Act and reviewed whether the applicant is a danger to the public in Canada. Pursuant to subsection 114(1) of the Act, a decision to allow the application for protection would have the effect of staying the removal order issued against the applicant. Moreover, in *Balathavarajan v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 340 [*Balathavarajan*], the Federal Court of Appeal noted that in some circumstances, it is not necessary for the IAD to consider the potential hardship of an applicant in the event of his removal from Canada. Justice Linden wrote the following for the Court at paragraph 9: ". . . It was, at the time of the IAD appeal, not only unlikely but legally improper to remove the appellant to Sri Lanka. For the IAD to consider potential hardship the appellant might face if deported to Sri Lanka would have been a hypothetical and speculative exercise. This it need not do."

[18] The IAD did not need to speculate on facts that could not be established until 2017 at the earliest and did not have to take into account the potential outcome of the applicant's appeals to the Quebec Court of Appeal.

[19] None of the four remedies sought by the applicant can be granted by this Court. Not only are these applications premature, but it is for the IAD alone to exercise its jurisdiction to grant the regulatory stay referred to in subsection 68(1) of the Act and to impose the conditions referred to in subsection 68(2). Paragraph 67(1)(*c*) and subsection 68(1) of the Act grant the IAD a wide discretion to assess the humanitarian and compassionate considerations raised in the context of a removal order appeal (*Chieu* at paragraph 66; *Khosa* at paragraph 60).

ANALYSIS

[20] In this case, the IAD did not fail to consider the effect of the applicant's particular circumstances on whether he would be exposed to a substantial risk of torture in Morocco. It explicitly mentioned his concerns about the human rights situation in that country but concluded that that the issue was premature. For the reasons below, I am of the view that this decision was reasonable.

[21] First, it should be noted that the removal order issued against the applicant has yet to be executed. He has been incarcerated since September 2007 and therefore benefits from an automatic stay under paragraph 50(*b*) of the Act until he has served his entire sentence, which, in this case, constitutes a life sentence plus additional sentences to be served concurrently. He will not be eligible for parole before 2017.

[22] The issue will remain premature as long as the removal order has not been executed. As explained by Justice Lagacé in *Shephard v Canada (Minister of Citizenship and Immigration*), 2003 FC 379 at paragraph 32 [*Shephard*], a removal order has two stages. The distinction is

“. . . plain in the Act, and the importance of the distinction is that only an ‘enforceable removal order’ allows for a person to be removed (subsection 48(2) of the Act), unlike a removal order that has ‘come into force’, which becomes enforceable only if it is not stayed (subsection 48(1) of the Act)” (*Shephard* at paragraph 32).

[23] Moreover, a removal order does not become enforceable automatically, given section 232 of the Regulations, under which the removal order is stayed as soon as the Department notifies the applicant, in accordance with subsections 160(1) and (3) of the Regulations, that he may make an application under subsection 112(1) of the Act, which will have the effect of staying the removal order against him. Furthermore, “. . . the risks faced by the applicant, as listed in section 97 of the Act, will not be considered at any point before the removal order becomes enforceable, unless he waives the risk assessment. In the event that his application is allowed, the applicant will be granted a stay of removal for an unlimited time, or until it is revoked by the Minister for good cause” (*Shephard* at paragraph 37).

[24] The removal order issued against the applicant was not enforceable when the IAD rendered its decision, nor is it enforceable now. It would be premature at the very least to conclude that it will become enforceable. No arrangements have been made in this respect and no date has been set for a removal (*Anandappa v Canada (Minister of Citizenship and Immigration*), 2002 FCT 701); see also *Derbas v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1194 at paragraph 33 and *Balathavarajan*). As long as an applicant has not in fact been granted a reduced sentence or parole, is not at risk of imminent removal because the order has become enforceable, has not exhausted all of his administrative remedies and has

not been subjected to breaches of procedural fairness on account of institutional bias, the IAD would be dealing in pure speculation. Therefore, the IAD was not required to enter into a detailed review of the *Ribic* factors.

[25] For these reasons, the applicant's application is dismissed and no question is certified. Given this finding, this Court need not consider the admissibility of the remedies sought by the applicant.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

"Danièle Tremblay-Lamer"
Judge

Certified true translation,
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3680-12
STYLE OF CAUSE:	*Said Namouh v The Minister of Public Safety and Emergency Preparedness*
PLACE OF HEARING:	Québec, Quebec
DATE OF HEARING:	December 13, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	TREMBLAY-LAMER J.
DATED:	December 27, 2012

APPEARANCES:

Marie-Pier Couturier	FOR THE APPLICANT
Normand Lemyre	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Duval Lauzon Ménard Coté Couturier Trois-Rivières, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Québec, Quebec	FOR THE RESPONDENT