Federal Court  Cour fédérale

Date: 20130618

Docket: IMM-8546-12

Citation: 2013 FC 681

Ottawa, Ontario, June 18, 2013

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

HUBERT ALEXANDER MCCURVIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated 24 July 2012 (Decision), which refused the appeal of Hubert Alexander McCurvie from a removal order made against him because he is a person described in paragraph 36(1)(*a*) of the Act.

BACKGROUND

[2] The Applicant is a 50-year-old citizen of Jamaica. He moved to the U.S. at the age six or seven, and in 1983 immigrated to Canada as a dependant of his mother. The Applicant has seven children in Canada all of whom have different mothers. He also has several step-children. The children all live in Ontario.

[3] The Applicant began to get into trouble with the law around 1986, and in 1990 moved to the U.S., at least partially to avoid further criminal convictions in Canada. While in the U.S., he was convicted of conspiracy to sell narcotics. He was sentenced to two years, and spent one year in detention. He was deported from the U.S. in 1994, after which he went back to Jamaica for a month and then returned to Canada.

[4] Upon his return to Canada, the Applicant was arrested on charges stemming from incidents that occurred prior to his departure in 1990. In 1995, he was convicted of possession of a restricted weapon, and sentenced to 15 months imprisonment. In 1999, he was issued a deportation order by reason of serious criminality. He appealed to the IAD, and in 2004 his appeal was allowed and his removal order was quashed.

[5] In 2005, the Applicant moved from Ontario to Alberta to pursue work opportunities. On 24 October 2007, in applying for an Alberta Operators Licence he used a wrong birth date. As a result, the Applicant was charged with uttering a forged document and was sentenced to pay a fine of $2,500. This resulted in a removal order being issued against him on 28 March 2011.

[6] The Applicant again appealed to the IAD, asking it to exercise its discretionary jurisdiction to grant special relief. The Applicant has not challenged the legal validity of the deportation order. The IAD denied his appeal on 24 July 2012.

DECISION UNDER REVIEW

[7] The IAD cited the *Ribic* factors to be considered when exercising its discretion as laid out in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3.

[8] The IAD noted that when the Applicant was before a provincial judge in the matter leading to his deportation order, he said that he gave the false birth date because he needed work. At the IAD hearing, he changed his story and said that he owed approximately $8,000 in fines in Ontario, $3,800 of which is still outstanding, and to avoid those fines he moved to Alberta and tried to obtain an operators license. The Applicant indicated in his testimony, and his counsel submitted, that he did not think his offence was very serious. The IAD thought this showed a "lack of insight and perhaps a sense of entitlement;" this was not an inadvertent act and the Applicant had a history of fraud. Still, the IAD noted that the offence was not violent, and taken in isolation was not on the serious end of the spectrum.

[9] The Applicant's past convictions in Canada included an incident with a past girlfriend, three counts of fraud relating to bad cheques, possession of a prohibited weapon, attempting to obstruct justice, possession of an unregistered restricted weapon and failing to attend court. After fleeing Canada, the Applicant was charged with a drug-related offence in the U.S. The IAD noted that the information about his offences in the U.S. only came out in cross-examination; the Applicant

testified that he visited Jamaica for one month, but he failed to disclose that the one-month visit involved deportation from the U.S. before he could obtain permission to re-enter Canada.

[10] The IAD thought that throughout his testimony the Applicant minimized his offences and deflected blame. It viewed the Applicant's reluctance to provide details about his past as demonstrating that he considered his criminal past a bit of a nuisance and not worthy of sincere reflection. The IAD did not find the Applicant remorseful, and did not have confidence that he showed a substantive possibility of rehabilitation.

[11] The IAD also found the Applicant's work history unclear. There was a large difference between what he told the IAD was his business income and what was stated as his income on submitted Notices of Assessment. Between the years 2005-2008, his stated income ranged from $7,866 to $13,821. The Applicant testified that he pays $600-$700 a month in child support, that he owns $40,000 worth of tools, owns a truck worth $6,000, as well as $1,300 in Registered Retirement Savings and $600 in a Tax-Free Savings Account. He also purchased a home in Edmonton in 2008, and paid $5,000 as a down payment. The Applicant could not provide his company's name, where and when he works, or any work references. He collected social assistance in 1996, immediately after his release from detention.

[12] To the IAD, this did not add up, and it was not convinced that the Applicant was a hard worker or that he paid his fair share in taxes. The Applicant still owed $3,800 on his Ontario fines, which have been remitted to a collection agency. He was asked why he paid $5,000 for a down payment on his home instead of paying his fines, and he replied that he did not think of it. The IAD thought this indicated the possibility of rehabilitation was remote, and that this was a negative factor in his appeal.

[13] The Applicant said that he paid $5,000 for a down payment on the house and that his monthly mortgage payments are $2,800. The title of the home he submitted says that the original principal amount of the mortgage was $490,000. The IAD found it unclear how the Applicant would be able to afford this. It found that although his many years in Canada were a positive factor in his appeal, this was offset by his limited establishment. Overall, it found that this was a neutral factor.

[14] The Applicant is father to seven children, all from different women. None of his children reside in Alberta. The Applicant is currently single. Carolyn Keel, an ex-girlfriend and mother of one of his children flew to Alberta from Ontario to support the Applicant and testify at the hearing. She testified that she has known him for 25 years, and said that he is a good father to all five of her children, although he is not the biological father to four of them.

[15] The last time that the Applicant saw any of his children was two years ago. He did not know the whereabouts of two of the children, one he had not seen since she was ten, and one he had little information about. Only two of the children remained minors, one of whom he had never lived with. The Applicant testified that he regularly talks to his youngest child on the phone, and the child's mother wrote a letter of support for the Applicant in which she states that he has a special bond with his son. Also submitted were five letters from the Applicant's children or step-children, four of whom were from Ms. Keel's children.

[16] In terms of financial support, the Applicant testified that he puts $300 a month directly into Ms. Keel's bank account. When asked for receipts, he replied that it would be the receiver of the money who would have to provide them. This did not make sense to the IAD. Ms. Keel testified that she had received $200, $100 and $150 over the past three months. The IAD found that the

Applicant might send money to the children, but did not believe that he sends regular payments of $300 or that anyone relies on his support. The Applicant moved to Alberta for work, but even when he experienced a "severe slowdown in his business" he chose to remain there. He said that he speaks with some of his children regularly on the phone. The IAD placed little weight on the best interests of any child affected by this decision because the Applicant would still be able to speak with the children on the phone if deported.

[17] The Applicant said that he goes to church occasionally, but there was no other evidence of community support. He testified that he has four sisters in Canada with whom he is no longer in contact. Although he had some support from Ms. Keel's family in Ontario, the IAD found that the lack of evidence of a daily routine or community involvement in Alberta, where he has lived since 2005, was a negative factor in his appeal.

[18] As regards the hardship of deportation on the Applicant, the IAD noted that he has been self-employed for years and that these skills would be transferable to Jamaica. The Applicant stated that he has no family in Jamaica, but he is unable to visit his family in the U.S. and has no involvement with his siblings in Canada. He has only had physical visits with his children every couple of years, and there was nothing preventing his children from visiting him in Jamaica. He would be able to maintain regular phone contact from Jamaica.

[19] In summary, the IAD noted that the offence that gave rise to the removal order was not serious or violent, but the Applicant has a long and serious criminal record. The IAD thought his attitude to his criminal record showed little insight and remorse. The Applicant's work history was hazy, but he managed to purchase a home and truck while ignoring his debt to Ontario for outstanding fines. The IAD acknowledged that he has been in Canada for almost 30 years, but he

demonstrated very little community support and limited involvement with his family. There was no documentation to evidence the provision of any financial support. The IAD found that the most hardship any of the Applicant's family members would suffer would be some emotional upset.

[20] The IAD noted that the onus was on the Applicant to show sufficient humanitarian and compassionate (H&C) factors to warrant special relief from the removal order against him. The Applicant had already been deported from the U.S. and had faced a previous deportation order in Canada, yet chose again to break the law. The IAD found that because the Applicant demonstrated little remorse and insight into his behaviour he was not a good candidate to comply with the conditions of a stay of the removal order, and dismissed the Applicant's appeal.

ISSUES

[21] The Applicant raises the following issues in this application:

1. Did the IAD breach the rules of natural justice by failing to conduct the hearing in a manner that offered a fair opportunity to the Applicant to present his case?

2. Did the IAD err in its consideration of the Applicant's criminal record prior to the granting of a stay and the successful appeal upon which that was based in 2001?

3. Did the IAD misconstrue facts, draw unreasonable inferences, and make determinations with adequate evidence?

STANDARD OF REVIEW

[22] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[23] The first issue raised is a matter of procedural fairness. In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)*, 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that it "is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)*, 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review applicable to the first issue in this application is correctness.

[24] The second and third issues go to the IAD's consideration of whether an act of serious criminality was committed by the Applicant, and whether H&C relief is warranted under the circumstances. These are issues of mixed fact and law, and are reviewable on a reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 58 [*Khosa*]; *Iamkhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 355 at paragraph 27; *Omeyaka v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 78 at paragraph 14).

[25] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Khosa*, above, at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[26] The following provisions of the Regulations are applicable in this proceeding:

Serious criminality	**Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants:
(a) having 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 under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Appeal allowed

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

Fondement de l'appel

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

(a) the decision appealed is wrong in law or fact or mixed law and fact;

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

(b) a principle of natural justice has not been observed; or

b) il y a eu manquement à un principe de justice naturelle;

(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.

[…]

[…]

Removal order stayed

68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best

Sursis

68. (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant

interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
[…]	[…]

ARGUMENTS

The Applicant

Procedural Fairness

[27] The Applicant says that, throughout the hearing, the IAD continually pressed him and his counsel to proceed as quickly as possible and so allowed inadequate time for the proper hearing of his case.

[28] During the hearing, the IAD said:

> IAD: I have a few instructions for you. We are limited in time and I know this appeal hearing is very important to you, but we are limited in time and so we want to hear the best evidence that you have.
>
> […]
>
> IAD: If – if you are asked a question and you're going to answer it, I am going to ask that you answer the question as directly as possible. By that I mean, because we're limited in time, you've got to trust your counsel, and he is certainly competent, that he's going to – he's going to take you into areas that is relevant and important to your appeal.
>
> […]
>
> IAD: Why? And be – just be quick because we're running the time here.

[…]

IAD: All right. Okay. If you would just answer some questions, please, I'm really concerned about the time, so I'm just going to turn it over to the Minister's counsel, all right?

[…]

IAD: That's it? All right. Oh boy, we're going to get kicked out of there very soon, out of that courtroom.

Rick, are you there?

UNKNOWN SPEAKER: Yes, ma'am.

IAD: What – how much – when – when do we have to be packed up out of there?

UNKNOWN SPEAKER: At quarter after four.

IAD: Quarter after four, all right….

[…]

IAD: All right. Okay. Just keep in mind the time. If – you have to be out of there at quarter after and so if – I don't know how long your – how long do you think your submissions will take?

[…]

IAD: Okay, we just – I – I just don't want you to be escorted out there. I don't want Rick having to struggle with all of you, so – all right?

[…]

IAD: All right. Mr. Thind, I'm just going to ask you, we need to push on here. It's already 2:15 or pushing that, so perhaps, sir, you can just describe the children, all right? You say you got a slew of children, let's go through each one of them if we could, please. Their dates of birth and where they live, all right?

[29] The Applicant also points out that his hearing took place by videoconference and that he testified from Edmonton while the IAD was in Vancouver. The Applicant submits that it is apparent that the IAD could not hear the Applicant's testimony very well:

> IAD: I can't – I apologize, but I can't hear – I can't hear.
>
> […]
>
> IAD: Okay. Mr. Thind, I couldn't hear the question, so I apologize to you, but I couldn't hear it.
>
> […]
>
> COUNSEL: Speak up, please.
>
> APPLICANT: I think four or five times.
>
> COUNSEL: She has to hear, not me.
>
> […]
>
> IAD: I need you to speak up nice and clearly for me because it is very difficult to hear over – I speak very loudly, so you can probably hear me clearly, but it's very difficult the other way around to hear, so you need to… speak up for me, all right?
>
> […]
>
> IAD: I'm sorry – I'm really sorry to interrupt. I can't hear and it's – it's going to be very difficult if I have to keep repeating or asking to you to repeat.

[30] The Applicant argues that the IAD's constant pressing of the Applicant and his counsel to proceed quickly impaired his opportunity to present his case fairly. This, in combination with the poor auditory facilities of the video connection, resulted in a breach of natural justice and procedural fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817).

The Reasonableness of the Decision

[31] The Applicant submits that the IAD made serious factual errors in the Decision, thus rendering it unreasonable. The offence which resulted in the removal order, and hence the Applicant's appeal, was the act of the Applicant providing a wrong birth date when he applied for an Alberta Operator's License. The Applicant was fined $2,500, of which there is $400 owing.

[32] In the Decision, the IAD states that the Applicant told the judge at his criminal proceeding that he gave the wrong birth date because he needed work, but before the IAD he changed his story and stated that he did this to avoid fines of $8,000 that he had incurred in Ontario, of which $3,800 is still owing. The Applicant submits that there is no evidence that the Applicant told the judge that he needed work and then changed his story, and that there was only $3,800 on the Ontario fines at the time of the hearing.

[33] The IAD conceded that the offence was not one of violence, that it occurred in isolation and was not at the serious end of the spectrum. The Applicant submits that this should have been the IAD's primary consideration. The Applicant had previously succeeded on appeal with respect to his previous criminal history, the last offence of which occurred in 1995. This was approximately 15 years prior to the offence which resulted in the hearing before the IAD.

[34] The Applicant submits that the IAD erred in its consideration of the totality of the Applicant's criminal record in view of the exceptionally long time between his past history and the current offence, which the IAD admitted was not at the serious end of the spectrum. The Applicant's previous criminal history (which had already been dealt with) and the current offence were not related, and the IAD stated that the current offence was an isolated incident. The Applicant

submits that this should have been considered in the IAD's application of the *Ribic* factors, and that the IAD erred by failing to distinguish between the Applicant's criminal history and the offence which was the subject of the appeal.

[35] The IAD also concluded that it did not find the Applicant remorseful. However, the Applicant made the following statements during the hearing:

> Your Honour, I understand that I really made a mess of things right here, but it was never my intention to defraud or do anything out of the context with anyone. In – in terms of purchasing my house, I would not have – would not have done that. That's why I went directly to get something legally in my name to do that. I didn't want – I wasn't trying to – I only came here because of job and I – I really am sorry about that. I know it's costing me job and everything, but I came to say I'm –
>
> […]
>
> No ma'am, I'm not being that ignorant and say something like that. I'm not saying that. It's just that I'm just saying I am more scared now than anything else in the world and it's like that wasn't even something that I – I was more thinking about. I'm not sure if that explanation works for you, but it's all I know.
>
> […]
>
> Your Honour, I – in my – in my most sincerest apologies, I don't – I know I made an error, but I'm asking if you could forgive me and this matter and I don't – I don't have any – anywhere to go. This is where all my life has been and my children and my grandchildren, so this is the only life I know and I'm just asking for leniency.

[36] The Applicant submits that the IAD's conclusion on this issue was unreasonable based on the facts before it and his testimony. The IAD impugned the Applicant's remorse because his criminal history in the U.S. did not become known except through cross-examination. The Applicant says that he was not asked about this conviction except by the Respondent's counsel and the negative inference drawn concerning his remorse was unreasonable. The Applicant submits that his testimony demonstrates sincere remorse and appreciation of the error he had committed.

[37] The IAD also took issue with the Applicant's work history. The Applicant explained that his finances were prepared by an accountant, and that the declared amounts of his income reflected his net personal income after his business deductions, but the IAD did not take this into account. The IAD also ignored his evidence that he had a registered retirement savings plan and a tax-free savings account.

[38] The Applicant submits that the evidence showed that, except for a very brief period of time just after he was released from detention in 1996, he has never received social assistance and has supported himself as a carpenter and home renovator. Nevertheless, the IAD concluded that "the possibilities of rehabilitation appear to be remote; this is a negative factor in his appeal." The IAD went on to find that the years the Applicant has been in Canada are a positive factor in his appeal, but this is offset by his limited establishment for that number of years. The Applicant submits that these conclusions were capricious and made without regard to the evidence that was before the IAD. See (*Toro v Canada (Minister of Employment and Immigration)*, [1980] FCJ No 192 (FCA)).

[39] The IAD also said that the Applicant had no association with his current church and did not identify it. The Applicant says that this is incorrect; he testified that his church was Beulah Church.

[40] With regards to his relationship with his children, the Applicant has traveled back to Toronto where most of his family lives four or five times since 2005. He did not go back recently as he was under the impression that he could not leave Alberta pending the resolution of his case. The Applicant's evidence was that for a period of time he raised his daughter born of his relationship with Charmaine Reid, as well as Ms. Reid's daughter from another relationship. His daughter Tamara went to live with the Applicant in Alberta for approximately six months in 2010. He also

testified about frequent contact with his daughters Renee and Victoria. The Applicant says that the IAD appeared to have no regard for this evidence.

[41] With respect to his son, Caden, the Applicant testified that he provides financial support to him on a monthly basis by depositing cash directly into his mother's account. This is why he did not have any record of these transactions. The Applicant also had close relations with the other children of the mothers of his children, including Chantal, Keisha, Everton, Nishi and Cheneeka. Prior to moving to Alberta, the Applicant also had a close relationship with his nephews and nieces. Carolyn Keel, mother of the Applicant's daughter Jamella, testified that the Applicant was involved with her children from other fathers, and that they call him dad and that none of her other children's fathers are involved in their lives. The Applicant also provides support to her whenever she needs it. He had provided support in each of the months preceding the hearing. Also, contrary to what the IAD said, the Applicant saw four of his children and step-children last year when he paid for their plane tickets to Alberta.

[42] The Applicant has extensive family in Canada, and submits that he maintains close relationships with almost all of his children and a number of the mothers of these children, as well as with his step-children. Up until his last criminal charge he had visited his children approximately once a year since he moved to Edmonton in 2005. Since then, four of his children and step-children had visited him in Edmonton. He also maintains his relationship with them by Skype or telephone. The Applicant submits that, based on the evidence that was before the IAD, its conclusion that he can maintain his relationship with his children equally well from Jamaica is capricious and without regard to the best interests of the children (*Baker*, above, at paragraphs 43, 53).

[43] The Applicant also points out that he has no family in Jamaica or any basis upon which to become established there. The Applicant submits that for the above reasons the IAD erred in law and that this application ought to be granted.

The Respondent

Procedural Fairness

[44] The Respondent says that the Applicant is attempting to manufacture a breach of procedural fairness by taking portions of the transcript out of proper context. There is no evidence of a breach of procedural fairness in this case and the Applicant has waived his right to object on this basis.

[45] The Federal Court of Appeal has held that an applicant has the burden of making this kind of issue known at the earliest possible moment, rather than waiting until the release of a tribunal's decision. In *Yassine v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 949 (FCA) [*Yassine*], the issue was whether waiver results if an objection to the RPD's procedure for receiving additional information is not raised at the hearing. At paragraph 7, the Court found as follows:

> It must also be noted that no objection was taken to the procedure that the Presiding Member adopted for receiving the additional information. That procedure consisted of a direction of November 20, 1990 that the Refugee Hearing Officer make copies of the material available to the appellant's legal counsel and of giving such counsel a period of two weeks within which to submit representations by way of "reply". That procedure was followed. No such reply was submitted. Nor did the appellant raise an objection of any kind as to this way of proceeding. That surely was the time to raise an objection and to ask the panel to reconvene the hearing, assuming that the information could not otherwise be received. The appellant was then in possession of all of the new information and was aware that the panel intended to take notice of it. Not only was no objection made at that time, which I would regard as the "earliest practicable opportunity" to do so (In *re Human Rights Tribunal and*

> *Atomic Energy of Canada Limited*, [1986] 1 F.C. 103 (C.A.), per MacGuigan J., at pages 113-14), the appellant remained silent until after the Refugee Division's decision was released on April 18, 1991. Thus, even if a breach of natural justice did occur, I view the appellant's conduct as an implied waiver of that breach.

[46] In *Mohammadian v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 371 (TD) [*Mohammadian*], the issue was whether waiver results if an objection to the quality of interpretation is not raised by the applicant during the hearing. At paragraph 29, the Court found as follows:

> In this case, I find that the question of the quality of the interpretation should have been raised [page384] before the CRDD because it was obvious to the applicant that there were problems between him and the interpreter. His affidavit refers to the difficulty he had understanding the interpreter and says that at times he did not understand what was being said. This is sufficient to require him to speak out at the time. His failure to do so then is fatal to his claim now….

[47] It follows that in the absence of a timely objection made before the Board, a claimant is precluded from raising it later. As Justice Richard Mosley said in *Benitez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 [*Benitez*] at paragraphs 220-221:

> From the above discussion, I would take the principle that an applicant must raise an allegation of bias or other violation of natural justice before the tribunal at the earliest practical opportunity. The earliest practical opportunity arises when the applicant is aware of the relevant information and it is reasonable to expect him or her to raise an objection.
>
> In the present cases, counsel for the applicants would have been aware of the implementation of Guideline 7 from December 7, 2003. If they were of the view that its application in a particular case would result in a denial of their client's right to a fair hearing, the earliest practical opportunity to raise an objection and to seek an exception from the standard order of questioning would have been in advance of each scheduled hearing, in accordance with rules 43 and 44, or orally, at the hearing itself. A failure to object at the hearing must be

> taken as an implied waiver of any perceived unfairness resulting from the application of the Guideline itself.

[48] In all these cases, the Federal Court and the Federal Court of Appeal applied the common law test for waiver as set out in *Re Human Rights Tribunal and Atomic Energy of Canada Ltd*, [1986] 1 FC 103 (CA) at page 113:

> However, even apart from this express waiver, AECL's whole course - of conduct before the Tribunal constituted an implied waiver of any assertion of a reasonable apprehension of bias on the part of the Tribunal. The only reasonable course of conduct for a party reasonably apprehensive of bias would be to allege a violation of natural justice at the earliest practicable opportunity. Here, AECL called witnesses, cross-examined the witnesses called by the Commission, made many submissions to the Tribunal, and took proceedings before both the Trial Division and this Court, all without challenge to the independence of the Commission. In short, it participated fully in the hearing, and must therefore be taken impliedly to have waived its right to object.

[49] The Respondent submits that the Applicant cannot hold an objection on procedural fairness in reserve in order to use it at some future time. The Applicant had an obligation to raise the alleged breach of procedural fairness at the earliest opportunity and failed to do so. As such, the Applicant has waived his right to object on the basis of the video-conferencing or the time allotted for the hearing. No objections were raised by counsel at the hearing and there is no evidence that the Applicant was not able to present the evidence he wanted or that the video conference issues were not immediately corrected by the Applicant speaking in a loud and clear voice. The Respondent submits that was no breach of procedural fairness.

The Reasonableness of the Decision

[50] The Respondent points out that the Applicant takes no issue with his inadmissibility to Canada, or the validity of his deportation order. He is simply asking the Court to reweigh the evidence on the *Ribic* factors and come to a different conclusion; this is not the function of judicial review. The IAD considered the *Ribic* factors and found that there were insufficient humanitarian considerations to warrant relief. The onus was on the Applicant to establish the "exceptional" reasons why he should be allowed to stay in Canada, and he did not meet this onus (*Chieu*, above, at paragraph 57).

[51] The IAD considered all the *Ribic* factors, and when the Decision is read as a whole it is clear that the IAD had a grasp of the issues and the evidence before it and that no injustice was done (*Medina v Canada (Minister of Employment and Immigration)*, (1990) 120 NR 385 (FCA); *Boulis v Canada (Minister of Manpower and Immigration)*, (1972) 26 DLR (3d) 216 (SCC)).

[52] The Applicant's actions weighed heavily against granting relief. He has demonstrated a consistent pattern of criminal behaviour and continued his criminal ways after having gone through this process on one other occasion. It was reasonable for the IAD to find that his actions were serious and the Applicant takes no material issue with these findings. It is trite law that the seriousness of the criminal history or a misrepresentation can be weighed against the other H&C factors (*Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 238 at paragraph 20).

[53] The IAD's weighing of the H&C factors was reasonable and the H&C considerations in this case were not especially compelling, given the lack of evidence submitted by the Applicant. The

Applicant's arguments amount to nothing more than a disagreement over the weight that the IAD chose to give to the various factors. Furthermore, the vast majority of his arguments are without foundation on a reasonable reading of the Decision and transcript (*Patel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 686).

[54] For example, at pages 232-233 of his Memorandum of Argument the Applicant incorrectly argues that he did not change his story regarding the reasons he uttered the forged documents in Alberta. This is clearly wrong; in his criminal proceedings he told the judge that he did it because he needed a job, or it was necessary for the job and he was not trying to hide himself (see page 161 of the CTR at lines 20-22). Before the IAD the Applicant testified that he had to utter the forged document because his Ontario drivers licence had been suspended for his failure to pay his fines and that he was trying to avoid paying the fines temporarily (page 46 of the CTR at lines 17-23). The Applicant also said that it was just a mistake, and tried to downplay his criminal acts (page 46 of the CTR at line 7), and then claimed he needed the identification to buy a home (page 50 of the CTR at line 5). The Applicant's contention that the reasons he gave to the criminal court and the reasons he gave to the IAD were not inconsistent is simply incorrect.

[55] Furthermore, the Applicant's claim that the fine amount identified by the IAD is incorrect is also wrong. The IAD clearly acknowledges that the amount of the fine owing at the time of the hearing was $3,800, and that the Applicant testified that he had approximately $8,000 in fines (page 46 of the CTR at line 33). There was no error made in this regard.

[56] The Applicant also claims that the IAD should have given more weight to the alleged remorse he claimed to show during the hearing. However, the reality is that throughout his testimony the Applicant continually tried to downplay his past criminal involvement and continued

to break the law after being given a second chance when the first deportation order against him was quashed. It was open to the IAD to assess the level of remorse and prospects of rehabilitation and it is not for this Court to reweigh explanations which were given by the Applicant.

[57] At paragraph 15 of his Memorandum of Argument the Applicant claims that the IAD erred in its consideration of his time in Canada, his work history and his alleged income. The Respondent submits that this argument is without merit. The Applicant clearly failed to provide a statement of business income and has not provided such evidence in this application. He provided a few years of personal income but did not provide any statement of business expenses to demonstrate his claimed business income, or that the business pays its taxes or pays any employees. Further, given the low level of personal income that the Applicant reports it is difficult to understand how he is able to own a home or support himself. The IAD's conclusions in this regard are sound and based on the evidence before it and the IAD was entitled to consider his time in Canada as a neutral factor.

[58] The Applicant also argues that the IAD should have placed more weight on the evidence that he presented regarding his relationship with his children. The Respondent submits that the best interests of the children were considered in this case, and while it is an important factor it is not determinative (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475). The IAD acknowledged the hardship that may be caused by the Applicant's removal from Canada, but noted that his son would still have the support of his mother and family in Canada and that his interests would be protected. The IAD also thought, given the limited contact the Applicant has with his children, seeing them once every few years and providing a little money on occasion, that this can continue if he is removed from Canada. There was no evidence that his children could not visit or that he could not maintain communication with them or provide the same meager level of

support. The fact that the Applicant would have preferred that this be a determinative factor in his favour does not warrant this Court's intervention (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125).

[59] The Applicant also claims that the IAD erred in considering his criminal history in its assessment of whether he is entitled to discretionary relief on H&C grounds. The Applicant's entire immigration and criminal history are factors that need to be weighed in determining whether there are sufficient H&C factors to warrant granting the special relief he was seeking. The Respondent submits that the fact that the deportation order was properly made in relation to the most recent charges does not preclude the IAD from considering the Applicant's criminal record.

[60] The Respondent also submits that the Applicant's allegation that evidence was ignored is not borne out by a review of the Reasons. All the evidence he cites was expressly discussed at paragraphs 8-17 of the Decision. Again, this is simply a disagreement about the weight ascribed to evidence. The Respondent requests that this application be dismissed.

The Applicant's Reply

[61] In response to the Respondent's argument that the Applicant waived his right to complain about the hearing, the Applicant submits that the cases relied on by the Respondent can be distinguished. In *Yassine*, the Board was relying on a statutory provision for the alleged breach. In *Mohammadian*, it was evident from the transcript that the applicant was having problems with the translator during the hearing. In *Benitez*, the applicants clearly had ample opportunity to object. In the Applicant's case, there was not a particular event or concern that can be pointed out. Rather, the problem arose from the IAD conducting the hearing in a rapid and pressing manner. This is less

tangible, and the impact of it cannot be easily assessed at the time. Hence, the Applicant submits there cannot be an implicit waiver of this type of breach of procedural fairness. The Applicant further submits that the Respondent has failed to deal with the factual distinctions between the cases cited and the case of the Applicant.

[62] The Applicant also says that the Respondent has failed to address the error of the IAD in relying on the Applicant's criminal record from 17 years earlier. The Applicant submits that if the IAD erred in this respect then its findings of fact upon which the Respondent relies are all tainted. Furthermore, the Respondent has not addressed the fact that the IAD admitted that the only offence for which the Applicant was being deported was not serious.

[63] The Respondent also claims that the Applicant's family connections were adequately dealt with by the IAD. The Applicant says that, aside from making bald assertions, the Respondent fails to deal with the significant evidence on this point, which shows that the conclusion of the IAD that the Applicant's seven children would not be unduly affected by his deportation was unreasonable. The Applicant states that the Respondent's arguments make statements without reference to the facts which specifically refute the findings of the IAD.

ANALYSIS

[64] As regards procedural unfairness, the Applicant says that the IAD allowed inadequate time for the hearing of his case and that the IAD could not hear his testimony very well because the hearing took place by videoconference. However, the Applicant has provided the Court with no evidence or specifics about what he was not able to present at the hearing, and he did not raise any problems with the IAD. He and his counsel would have known immediately if they had not been

allowed to present the case adequately in the time available, and there is simply no evidence of a failure of communication during the videoconference that has led to some material omission of mistake in the Decision.

[65] The jurisprudence of the Court is clear that, in the absence of a timely objection made before the tribunal, a claimant is precluded from raising it later. See, for example, *Benitez*, above, at paragraphs 220 and 221. If the Applicant and his counsel felt disadvantaged by the time constraints, they could have placed this before the IAD. They cannot now raise it with the Court as a ground of review when they failed to raise it at the appropriate time. There was no breach of procedural fairness in this case.

[66] The Applicant also says that the IAD should not have examined and taken into account his criminal record prior to the stay and successful appeal that was granted in 2001. In fact, in oral argument before me, the Applicant raises *issue estoppel* and says that the issue of his earlier criminality has already been considered and decided, so that it cannot again become a factor before the IAD in this case. He says that, in considering his criminality, the IAD should have left out of account his activities and convictions that came before the IAD in 2001.

[67] As regards his prior criminal record, the Applicant cites no authority for the proposition that his entire criminal record should not be taken into account, and it is difficult to see how the *Ribic* factors could be properly considered and weighed without reference to the Applicant's entire immigration and criminal history. The Applicant's personal history and the possibility of rehabilitation are specifically laid out as factors in the *Ribic* analysis, and the Applicant's criminal history is an unavoidable part of these considerations. The discretion offered to the IAD under paragraph 67(1)(*c*) of the Act is broad, and the Supreme Court reaffirmed in *Khosa*, above, at

paragraph 65, that the *Ribic* factors are not exhaustive, and the analysis will always be highly fact-specific.

[68] Furthermore, Justice Yvon Pinard dealt with this issue at paragraphs 21-22 of *Charabi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1184 [*Charabi*] where he said:

> 21 In my opinion, the IAD properly assessed the evidence by taking into account the entire history of the case. Moreover, because of the discretion granted to this panel under subsection 67(1) of the Act and because of its expertise, this Court must review its findings with a high degree of deference (*Khosa* and *Gonzalez*). The applicant has therefore failed to discharge his burden of establishing exceptional grounds justifying a stay (*Camara v. Minister of Citizenship and Immigration*, 2006 FC 169; *Bhalru v. Minister of Citizenship and Immigration*, 2005 FC 777).
>
> 22 It is well established that the weight to be accorded to each factor will vary according to the particular circumstances of the case (*Ribic*, above, decision cited with approval by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84 at paragraph 77). The respondent is correct in maintaining that the IAD was justified in taking the old convictions into account in light of the jurisprudence that indicates that it must consider what gave rise to the removal order. The applicant benefited from the privileges of a stay for a ten-year period. He only had to carefully comply with the conditions set out in the stay order, which he failed to do.

[69] It is my view that *issue estoppel* does not arise on the facts of this case, and the Applicant cites no authority to support his case on this issue. Different IAD panels were dealing with different removal orders, different evidence and different criminal convictions. It would make no sense to prevent the IAD from considering his previous convictions on the basis of *issue estoppel* but to say that the IAD could take into account the whole of his immigration history for the purposes of other *Ribic* factors.

[70] I certainly agree with the Applicant that the long gap between his previous criminal activity that came before the IAD in 2001 and his latest criminal activities was a matter the IAD had to address in applying the *Ribic* factors on this occasion, but my reading of the Decision leads me to conclude that the IAD is fully aware of this issue and takes it into account.

[71] The mistakes and omissions alleged by the Applicant are not borne out by a reading of the Decision as a whole. Essentially, the Applicant disagrees with the Decision and thinks that more weight should have been given to factors that favour his case. The Court cannot interfere on this basis. See *Iamkhong*, above, at paragraFCA/CAFph 46. The reasons are intelligible and clear and fall within the *Dunsmuir* range.

[72] The Applicant raises the following question for certification:

> In applying the *Ribic* factors should the IAD leave out of account a prior criminal record that has already been considered by a prior IAD panel in a previous positive appeal and dealt with as part of the prior IAD panels decision?

[73] Justice Simon Noël summarized the law of the certification of questions in *Re Harkat*, 2011 FC 75, where he said at paragraph 9:

> In *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89, at para 11, the Federal Court of Appeal framed the question as follows: is there a serious question of general importance which would be determinative of the appeal? Hence, there are two aspects to be considered: 1) whether the question is serious and of general importance; and 2) is this question determinative of the appeal? An important question was determined to be one that transcends the immediate interests of the parties involved in the litigation in order to contemplate issues of "broad significance or general application" (*Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 N.R. 4 (F.C.A.), at para 4). Not only do these factors arise from case law, they are also couched in the very terms of section 82.3 of the IRPA.

[74] Although the issue of whether an applicant's criminal history may be considered as part of the *Ribic* analysis could transcend the facts of this specific case, it is a question that has already been answered (see *Charabi,* above). As such, the question is not one of "broad significance," and I see no reason to certify it.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-8546-12
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