Federal Court  Cour fédérale

Date: 20140320

Docket: IMM-4646-13

Citation: 2014 FC 272

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, March 20, 2014

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

MARGARITA VERONICA VASQUEZ SANCHEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated May 30, 2013, upholding the deportation order against the applicant, issued on August 25, 2010, by the Immigration Division pursuant to paragraph 36(1)(*a*) of the Act.

FACTUAL BACKGROUND

[2] The applicant is a citizen of Peru. She became a permanent resident of Canada in 1996.

[3] The applicant was ordered deported because, on November 4, 2004, she pleaded guilty to two counts of theft of property of a value not exceeding $5,000, one count of conspiracy to commit the indictable offence of theft and one count of possession of break-in instruments. These offences are part of a pattern of similar offences committed by the applicant since 2000.

[4] The applicant appealed the decision of the Immigration Division before the IAD, on the grounds that humanitarian and compassionate considerations warranted special relief. The appeal was dismissed on May 30, 2013. She is seeking judicial review of that decision.

PANEL'S DECISION

[5] The IAD's decision is not based on the legal validity of the deportation order, as it is not in dispute. The appeal is based on the discretionary jurisdiction of the IAD.

[6] In a case such as this, the onus is on the applicant to prove that special circumstances warrant the exercise of discretion. In the exercise of this discretion, the IAD considered the factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 4 (*Ribic*), reiterated by the Supreme Court in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (*Chieu*), namely:

- the seriousness of the offence leading to the removal order;
- the possibility of rehabilitation;
- the length of time spent in Canada and the degree to which the appellant is established here;
- the family in Canada and the dislocation to the family that removal would cause;
- the support available to the appellant, within the family and within the community;
- the potential foreign hardship the appellant will face in the likely country of removal.

[7] The IAD also considered paragraph 3(1)(*h*) of the Act, which states that one of the objectives of the Act is "to protect the health and safety of Canadians and to maintain the security of Canadian society". The IAD further noted that it was guided by the best interests of the child, as described in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (*Baker*).

STANDARD OF REVIEW

[8] Section 67 of the Act grants the IAD wide discretion for assessing humanitarian and compassionate considerations in the context of an appeal of a removal order (*Chieu*, above). Consequently, the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 58 (*Khosa*); see also *Ho v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 597 at paragraph 32, and *Canada (Minister of Citizenship and Immigration) v Awaleh*, 2009 FC 1154 at paragraph 24).

[9] The Court must therefore exercise deference and great restraint in determining whether the findings are justified, transparent and intelligible, and whether they fall 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 (*Dunsmuir*)).

ARGUMENTS OF THE PARTIES

Applicant's submissions

[10] The applicant begins by arguing that the IAD mischaracterized her. Indeed, the IAD is alleged to have failed to consider the fact that the thefts were committed after she had fallen in with the wrong crowd and that the applicant consulted a psychologist who noted that she was making progress in her therapy. Solely the applicant's impulsiveness was purportedly taken into account in the dismissal of the appeal. Furthermore, it was wrong to conclude that she was a danger to the security of Canadians under paragraph 3(1)(*h*) of the Act because she had not committed any thefts since July 25, 2009. The IAD also ostensibly underestimated her potential for rehabilitation.

[11] The emphasis placed on the security risk she posed for Canadians clouded the IAD's findings with respect to the best interests of the child, a factor that was not assigned the appropriate weight. Indeed, despite the fact that the IAD itself had acknowledged that the applicant's daughters would face hardship if they were to be separated from their mother or if they were to follow her to Peru, it nonetheless gave more weight to the crimes committed by the applicant.

[12] With regard to the age of the children, although the IAD mentioned that the applicant's eldest daughter would soon become an adult, it failed to consider that the eldest daughter was still in school, or that the younger daughter was in her early teens.

[13] In addition, the children's establishment in Canada was not taken into consideration. Being Canadian citizens and having spent all of their school years in Canada, the consequences of a potential move to Peru were not taken into account.

[14] In light of the foregoing, the applicant submits that the IAD was not sensitive to the impact her deportation would have on her children, and thus failed to meet both the stringent requirements set out in *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, and the analysis of factors relating to the best interests of the child in their full context as indicated at paragraph 11 of *Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165.

Respondent's arguments

[15] The respondent begins by arguing that the IAD carefully analyzed the evidence and that the factors set out in *Ribic*, above, and approved by the Supreme Court in *Chieu*, above, were taken into consideration. The Court noted that these factors are not exhaustive and that it is at the discretion of the decision-maker to determine the weight to be accorded to each factor, depending on the circumstances of each case (*Nekoie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 363 at paragraph 33 (*Nekoie*); *Iamkhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 355 at paragraph 42 (*Iamkhong*); *Philistin v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1333 at paragraph 17 (*Philistin*)).

[16] The respondent then summarizes offences committed by the applicant in order to highlight their seriousness, including those that led to the deportation order. The IAD reasonably found that

the applicant's conduct endangered the safety of Canadians, in view of the fact that the thefts were not committed to ensure her survival or that of her family.

[17] Although the panel must be sensitive to the interests of the children affected, the Federal Court of Appeal noted in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, and reaffirmed in *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, that this factor does not lead to a specific result and is not a paramount consideration.

[18] The respondent reiterates that it is not for the Court to reweigh the evidence or to determine the weight to be accorded to each factor, and that the IAD's decision in this case falls within a range of possible and reasonable outcomes.

ANALYSIS

[19] The central issue in this case is whether the IAD exercised its discretion reasonably in its analysis of humanitarian and compassionate considerations.

[20] As the respondent has emphasized, the weighing of these factors must be done on the basis of the circumstances of the case. Justice Martineau illustrates the point in *Philistin*, above, at paragraph 17:

> Further, since the weighing of these factors was not only discretionary, but also largely depended on the facts of each case, the factual matters decided by the IAD are reviewable on the reasonableness standard (*Harb v Canada (Minister of Citizenship and Immigration*), 2003 FCA 39 at para 14, [2003] FCJ 108). In that sense, the Court's review is limited to "the existence of justification, transparency and intelligibility within the decision making process" and "whether the decision falls 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 para 47).

[21] Justice Bédard also indicates in *Nekoie*, above, at paragraph 33 that "it is at the discretion of the IAD to determine the weight to be accorded to each factor and to each piece of evidence; this Court ought not to interfere with those determinations regardless of whether or not the Court agrees with the outcomes" (citations omitted).

[22] Furthermore, in *Iamkhong*, above, at paragraph 42, Justice Noël notes that "the exercise of the IAD's discretion is to be guided by these factors, but that they are not the full extent of the analysis to be undertaken", indicating that these factors are merely indicators. The IAD is not even required to undertake a point-by-point analysis of these factors because "[t]he important thing is that the panel actually take these factors into account in its decision" (*Canada (Minister of Public Safety and Emergency Preparedness) v Reyes*, 2009 FC 1097 at paragraph 20, cited in *Iamkhong*, above, at paragraph 43).

[23] In this case, I find that the analysis of the factors by the IAD was reasonable. In order to gauge the seriousness of the applicant's criminality and her potential for rehabilitation, it was well within the IAD's discretion to consider the numerous offences committed by the applicant, some of which were committed after the deportation order was issued, and her failure to comply with certain orders of the Court.

[24] In addition, it was reasonable for the IAD to conclude that despite the fact that the removal of the applicant to Peru could cause her some hardship, having not lived there since she arrived in

Canada in 1995, she would not find herself destitute. Indeed, her parents and sister are there, she speaks Spanish, and her qualifications as a housekeeping attendant are not specific to employment in Canada.

[25] As for the best interests of the children, contrary to what the applicant claims, the IAD did not simply mention in passing that it had been alert and sensitive to the interests of the children, but considered the points raised by the applicant in its analysis**.**

[26] It recognized that the girls were attached to their mother and that a potential separation or move to Peru would surely cause hardship with regard to the continuation of their studies in Spanish, as this excerpt form the decision attests:

> The panel accepted written statements from the girls and it is obvious that they are very attached to their mother. If they are separated from their mother, they will certainly suffer emotional hardship and if they choose to accompany their mother to Peru, they will no doubt experience hardships, even though they speak Spanish, that they never encountered in Canada where they were born and educated. (paragraph 21)

[27] The IAD also rightly noted that the girls could live with their father, which would allow them to remain in Canada to finish their studies.

[28] As the respondent indicated, while the panel was sensitive to the interests of the children, the presence of children does not lead to a certain result, and it was up to the IAD to determine the weight that should be given to this factor in the circumstances, as the Federal Court of Appeal indicated in *Legault*, above, at paragraph 12 and in *Kisana*, above, at paragraphs 24 and 72.

[29] I am satisfied that the IAD properly analyzed the girls' situation. It is not for the Court to reweigh the evidence, but to determine whether the conclusions of the IAD fall within a range of possible outcomes with respect to the facts and law (*Dunsmuir*, above, at paragraph 47). Such is the case here.

[30] For these reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Danièle Tremblay-Lamer"
Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4646-13

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LAMER J.

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