Federal Court  Cour fédérale

Date: 20140514

Docket: IMM-2177-13

Citation: 2014 FC 468

Ottawa, Ontario, May 14, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

GAK ATEM BULGAK

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Immigration Appeal Division of the Immigration and Refugee Board of Canada [IAD] declined to grant a stay of a deportation order made by the Immigration Division [ID], having considered humanitarian and compassionate [H&C] considerations in accordance with the IAD's discretion under subsection 68(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] For the reasons that follow, that decision is set aside.

Background

[3] Mr. Bulgak is 24 years old. He was born to Sudanese parents in a refugee camp in Ethiopia, moved to a refugee camp in Kenya around age three, and lived there until around age 10 when he moved to Canada with his parents and five siblings. He is the third child in the family.

[4] He resides at home with his two younger siblings who were 15 and 17 at the time of the hearing. His two older brothers are deceased, and his father has been estranged for many years and has more recently returned to South Sudan (or possibly Sudan).

[5] His two older brothers became involved in drug trafficking and criminal activity. One was shot in the family's backyard and the other died in a car accident as a result of his own intoxication. After the death of her two eldest sons, Mr. Bulgak's mother took the remaining children to the USA for two years. She returned to Canada and currently works away from Calgary in the oilfields in northern Alberta. At the time of the IAD hearing, she was hoping to return to her occupation as a care aid, later in 2013.

[6] Mr. Bulgak has been unemployed since 2008 and generally relies on his mother for financial support. He cares for his mother's home and is the de facto guardian of his two minor siblings while she is away.

[7] On December 9, 2008, Mr. Bulgak pleaded guilty and was convicted of possession of a machete with a 17 inch blade in his vehicle, for which he received a suspended sentence and 12 months probation. In that incident, police responded to a disturbance at which Mr. Bulgak and others were present. Police found the machete and 4.5 grams of marijuana along with a digital mini scale and $575 cash in Mr. Bulgak's car.

[8] During a separate incident, he pleaded guilty to carrying a concealed weapon (a switchblade knife in his car) and was fined $500, and he was also convicted of mischief under $5000 and fined $300 for damaging a window and door of a night club, during the same incident. He has a prior youth court conviction from April 25, 2007 for assault, for which he received nine months probation. On a separate incident, he was also convicted of obstruction for lying to a police officer about his name when he was pulled over while driving.

[9] Paragraph 36(1)(a) of the *IRPA* renders inadmissible a permanent resident or a foreign national on grounds of serious criminality for having been convicted of any offence punishable by a maximum term of imprisonment of at least 10 years. Possession of a dangerous weapon for a dangerous purpose contrary to section 81(1) of the *Criminal Code of Canada* is punishable by up to 10 years in prison. On this basis, Mr. Bulgak was rendered inadmissible.

Decision Under Review

[10] The IAD found that Mr. Bulgak had led a troubled life, having been exposed to violence and abuse as a child. It noted that his mother would experience difficulty if he were removed

having already lost her two eldest sons, but that there would be no financial impact on her, nor were there any positive connections to the community outside of his family relationships. The IAD determined that there were no children that stood to be affected by Mr. Bulgak's removal, and therefore, did not consider the best interests of the children. It is noted that this finding was not challenged in this application; however, contrary to this finding, Mr. Bulgak took care of his two minor siblings while their mother worked in the oil sands and the effect of his absence on his two minor siblings should be considered when the matter is re-determined.

[11] The IAD determined that the most pivotal factor was the likelihood of rehabilitation and seriousness of the criminal behaviour. It determined that the conviction was serious because of the threat of physical harm to the public, aggravated by the pattern of criminality. It noted that Mr. Bulgak was relatively non-forthcoming about the details of the events surrounding his criminal convictions until cross-examined and did not demonstrate genuine remorse or acknowledgment of responsibility. The IAD noted a credible assertion that his criminal troubles were generally associated with alcohol abuse and acknowledged that he had reduced his drinking. However, the IAD found that the alcohol abuse, possession of weapons, and ongoing use of a motor vehicle were troubling combinations that had not been effectively addressed and therefore, there was not a positive likelihood of rehabilitation.

[12] The critical finding and that which is the basis for this application was the determination by the IAD that because there was no country of removal confirmed, no assessment of foreign hardship to Mr. Bulgak was made.

Analysis

[13] In *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84 [*Chieu*], the Supreme Court of Canada decided that the jurisdiction of the IAD allows it to consider potential foreign hardship a permanent resident would face if removed from Canada; it is not restricted to only domestic factors. The Supreme Court unanimously held that the onus is on the applicant to establish a likely country of removal on a balance of probabilities. Where that burden has been discharged, the IAD will be obligated to consider potential foreign hardship of removal to that country. Where, however, the applicant fails to establish a likely country of removal, and the Minister has not selected a country of removal, the IAD will be unable to assess foreign hardship, and this is not an error. In order to not assess foreign hardship, the IAD must make an explicit finding that no likely country of removal has been established.

[14] The Federal Court of Appeal in *Ivanov v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 315, [2008] 2 FCR 502 [*Ivanov*] at para 11, held that "the failure to consider the *Ribic* factor of foreign hardship is an error of law."

[15] As previously noted, the IAD determined here that "while removal would inevitably require adjustment for the appellant, I make no further assessment of that hardship because a country of removal was not confirmed" (emphasis added). I agree with Mr. Bulgak that the IAD imposed the wrong test in requiring that a country of removal be confirmed in order to consider foreign hardship. The proper test is whether the likely country of removal has been established on the evidence.

[16] Mr. Bulgak submits that the objective evidence in this case clearly established Sudan as the likely country of removal and he points to the fact that there was no evidence that any other country was being considered.

[17] The Minister submits that there was no evidence before the IAD that Mr. Bulgak was a citizen of Sudan, only that he was Sudanese, without reference to which part of the country he was a citizen of before its break up (Sudan, or South Sudan). In fact, the Minister says, the evidence in the record suggests in one instance, that he was born in Ethiopia, and in another instance, in Uganda. There is also reference to him living in Kenya prior to Canada. It is submitted that he could have clarified the issue of citizenship by presenting his Record of Landing, which was referred to before the ID. Finally, it is said that there was no objective evidence about country conditions in Sudan or any other country presented to the IAD and therefore his hardship could not be assessed.

[18] In my view, a reading of the record and particularly the transcript of the IAD hearing at which both Mr. Bulgak and his mother testified, makes it clear that all involved in the hearing accepted that Sudan was the likely country of removal, although there may have been some confusion as to whether Sudan or South Sudan were separate countries. The evidence that leads me to this view is the following.

[19] First, in an affidavit in the record sworn by Mr. Bulgak's counsel in respect of a motion to extend time for filing the notice of appeal, she states that "Gak and his family came to Canada as refugees from what is now Southern Sudan."

[20] Second, at the hearing itself, when asked what his nationality was, the Applicant testified that he was "Sudanese, South Sudan."

[21] Third, his counsel led him down a line of questioning related to what his connections were in Sudan. She asked him whether he would be able to live with his father, who had returned to Sudan and he replied that it was not a possibility. He even clarified that he was in fact "speaking of Sudan" when asked about going "home."

[22] Fourth, when his mother testified, she stated "he does not know anybody in Sudan… and you know, South Sudan, it's not stable now."

[23] Fifth, counsel for Mr. Gak Atem Bulgak in her submissions referred to him having "no connections with Sudan other than a father, who is absent from the family."

[24] Sixth, and most importantly, counsel for the Minister herself made submissions on Sudan, stating that "however, at this point, he does have ties in Sudan of his father… If he has government connections, I'm sure [his father would] be able to get him a job in Sudan, assist him to settle and find family and support there" (emphasis added).

[25] I reject the submission of the Minister that there was no evidence before the IAD of country conditions in Sudan or South Sudan. Even "scant" evidence of foreign hardship is sufficient to trigger the requirement that it be considered and analyzed. In *Ivanov*, the Court of

Appeal found that the applicant's statement reproduced below, while scant, triggered a requirement that the IAD consider foreign hardship:

> If I have to be deported, there is no use of – there is no other country I know. This is the only thing, I lived here, I grew up, this is the people I love and the country I know. And if I have to be deported, then I don't even think I want to live, to be honest. There is no, no – there is nothing there no more for me.

[26] There was arguably more evidence in this case than in *Ivanov*. Mr. Bulgak's mother testified as follows:

> He doesn't know anybody in Sudan. He was born in Ethiopia and we came here to Canada. He doesn't know anybody. His dad, he just left. We don't know him. He didn't even say: "Okay, I'm leaving." He just left like that and I – I left alone with them. And you know South Sudan, it's not stable now. There is insecure [*sic*], so I don't know where to take this boy to. I'm not really sure because I don't have anybody and he doesn't have any friend [*sic*]. He doesn't know anybody. (emphasis added)

[27] In both this case and in *Ivanov*, there was evidence that the applicant had no connection to the likely country of removal. However, in addition to that hardship factor, here there was evidence, as scant as it may have been, that the likely country of removal also posed a hardship as it was not a stable and secure place to live.

[28] For these reasons, the decision of the IAD must be set aside and the matter remitted for redetermination, after a new hearing, to a differently constituted panel.

[29] Neither party had a question for certification to propose.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is granted, the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada dated January 4, 2013, is set aside, the appeal of Mr. Gak Atem Bulgak is remitted for redetermination, after a new hearing, to a differently constituted panel, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2177-13
STYLE OF CAUSE:	GAK ATEM BULGAK v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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