Federal Court Cour fédérale

Date: 20140526

Docket: IMM-5287-13

Citation: 2014 FC 496

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 26, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ONKAR SINGH SANGHA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] **CONSIDERING** the application for judicial review of a decision by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated July 22, 2013;

[2] **WHEREAS** the IAD had dismissed the appeal of a deportation order issued against Mr. Sangha on September 2, 2010, by reason of inadmissibility on grounds of serious criminality within the meaning of paragraph 36(1)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act);

[3] **WHEREAS** this is an application for judicial review made under section 72 of the Act;

[4] **CONSIDERING** the parties' submissions and upon reviewing the record, the Court has reached the conclusion that the application for judicial review should be dismissed for the reasons that follow.

[5] The applicant became a permanent resident of Canada on April 4, 1998, when he was 23 years old. In February 2003, he sponsored a permanent residence visa application, which was refused in May 2004 when the visa officer determined that he had married his brother's wife for immigration purposes. Once she was sponsored in Canada, she would then sponsor the applicant's brother.

[6] The offence that led to the application of paragraph 36(1)(*b*) of the Act occurred in May 2004. The applicant drove a semi-trailer to the United States loaded with a shipment of marijuana. The shipment weighed 264 pounds and the applicant had made at least one delivery prior to being intercepted by police. Released on $28,000 bail on July 8, 2004, he returned to Canada while awaiting a court appearance in the United States.

[7] A few months after his return to Canada, and while his was still out on bail pending his trial in the United States, the applicant got married on December 11, 2004. The couple purchased a house in 2005. They had a first daughter in 2005 and a second in 2011 after his incarceration in the United States. Indeed, having failed to appear in court in the United States, the applicant was arrested in Canada on an extradition warrant. Released once again on $100,000 bail on September 13, 2007, he was re-arrested on October 23, 2007 and detained for extradition. He was extradited in April 2008. In January 2009 he pleaded guilty to two drug-related charges in the United States. He served 24 months of a 28-month sentence (he was also placed on probation for four years) and was deported to Canada in May 2010.

[8] Thus, the applicant was held in detention for the following periods since his arrest in May 2004:

- July to September 2007, and October 2007 to April 2008: extradition to the United States;
- April 2008 to April 2010: served prison sentence.

He was detained for a total of 32 months.

[9] The natural consequence of the sentence in the United States ensued on September 2, 2010, when the applicant was declared inadmissible by the Immigration Division pursuant to paragraph 36(1)(*b*) of the Act, which reads as follows:

Serious criminality	**Grande criminalité**
36. (1) A permanent resident or a foreign national is inadmissible on grounds of	36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

serious criminality for	
[…]	[…]
(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;

[10] That decision was appealed to the IAD under section 63 of the Act. The applicant is seeking to avail himself of the provision at section 67 and is attempting to rely on paragraph 67(1)(*c*), which reads:

Appeal allowed	**Fondement de l'appel**
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
[…]	[…]
(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

[11] The issue here is whether the IAD's decision, in which it was determined that there were insufficient humanitarian and compassionate grounds, taking into account the best interests of the children affected by the decision, to warrant special relief, is reasonable.

[12] Indeed, the standard of review to be applied is reasonableness. The leasing case with respect to this matter is *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12; [2009] 1 SCR 339 (*Khosa*]), in which the Supreme Court was called upon to determine which standard of review was to be applied, on judicial review, to an IAD decision in relation to the application of paragraph 67(1)(*c*) of the Act, which is exactly the situation we find ourselves before today. After a lengthy analysis, the Court had concluded that a reasonableness standard ought to be applied. We will therefore proceed accordingly.

[13] The role of a judge in a judicial review is not to substitute his or her view of the facts, but rather, to ensure that the decision rendered was reasonable. Thus, the decision must be within the realm of reasonableness in the sense intended in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 (*Dunsmuir*):

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> (Para 47.)

[14] Sympathy is not enough. The applicant is in need of a demonstration that a highly discretionary decision was unreasonable. Such a demonstration has not been made.

[15] It is not in dispute that discretion is exercised with the aid of the non-exhaustive list of factors to consider set out in *Ribic v Canada (MEI)*, [1985] IABD No 4 (QL) and confirmed by the Supreme Court in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3; [2002] 1 SCR 84 and *Khosa*:

- the seriousness of the offences;
- the possibility of rehabilitation;
- length of time spent in Canada and degree of establishment;
- the impact on the family in Canada;
- the community support available;
- that hardship the person would experience if they were to be returned to their country of origin;
- and any other relevant circumstances of the case.

[16] I cannot help but find the decision in *Khosa* striking. The facts, which in my view were significantly more sympathetic than those in the present case, nonetheless produced a refusal to apply the provisions of paragraph 67(1)(*c*) of the Act. Mr. Khosa, an Indian citizen, was 18 years old when he participated in a street race the end result of which was a conviction for criminal negligence causing death. The British Columbia Court of Appeal had even concluded that the possibilities of rehabilitation were good, his remorse was genuine and Mr. Khosa had never committed a crime prior to this conviction. The Supreme Court deferred to the analysis by the IAD, which had dismissed Mr. Khosa's appeal. The weight given to different factors is owed deference.

[17] To be sure, the IAD is required to conduct its own analysis, as each matter turns on its own specific facts. And this analysis was well articulated. In the present case, I fail to see how the IAD can be criticized for having assigned significant weight to the offences committed and to the circumstances surrounding the subsequent conviction. Not only were the quantities of

marijuana considerable, but the applicant failed to meet his obligations, becoming a fugitive whose extradition to the United States our government was forced to order.

[18] The IAD demonstrated concern with regard to the possibilities of rehabilitation. At the time his inadmissibility to Canada was being reviewed, the applicant continued to claim that he had been unaware that marijuana was illegal in the United States. Rather stunning. Indeed, such an attitude diminishes the relative weight of the remorse the applicant claims to feel. One has to wonder whether it is not confusion between remorse and regrets, regrets about having risked so much for financial gain. The applicant ended up losing many assets, served 24 months in prison in addition to eight months in preventive detention and is currently facing deportation.

[19] If there are any positive aspects, they are more with regard to the impact the deportation could have on his family. This is not negligible. And the consequences are clear to see.

[20] But these consequences naturally arise from the offence committed in May 2004, from the applicant's flight during the three years that followed, and from the subsequent three years he spent in detention. For him to attempt to show a high degree of establishment in Canada since his deportation in mid-2010, when he knows he is facing deportation from Canada in view of his inadmissibility, is certainly positive, but I fail to see how this could carry more weight than the other factors examined.

[21] The IAD also examined the alleged hardship the applicant would face if he were to return to India and the fact that he had attempted to commit immigration fraud in 2003. The allegation

regarding the danger for truck drivers in India was not very convincing and immigration fraud is certainly not a positive factor, especially given the fact that other criminal charges were pending against the applicant at the time of the IAD decision.

[22] However, these factors appear to me to have been discussed more for the purposes of thoroughness than to attribute considerable weight to them. An abuse of the Act from 10 years ago and charges to which a presumption of innocence apply carry little weight compared to the seriousness of the offences committed in the United States and an attitude that shows only slight remorse.

[23] The applicant failed to discharge his burden of demonstrating that the weight assigned to the various factors listed was not reasonable, rendering the decision unreasonable within the meaning of *Dunsmuir*.

[24] The decision-making process was transparent and intelligible and the outcome was one that was possible and acceptable. The applicant's arguments seek a re-weighing of the facts – "the IAD did not assign the necessary weight to the following factors," wrote the applicant- which is not the role of this Court in a judicial review. The IAD is a specialized tribunal, one of whose tasks is to review these types of cases; it applied the correct test, and its reasoning was clear and justifiable.

[25] Accordingly, the application for judicial review is dismissed. No serious question of general importance was proposed by the parties and there is no question for certification.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. There is no question to certify.

"Yvan Roy"

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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