Federal Court of Appeal | Cour d'appel fédérale

Date: 20170331

Docket: A-100-16

Citation: 2017 FCA 68

CORAM: **WEBB J.A.**
SCOTT J.A.
GLEASON J.A.

BETWEEN:

MARCO ANTONIO CHUNG

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Winnipeg, Manitoba, on February 16, 2017.

Judgment delivered at Ottawa, Ontario, on March 31, 2017.

REASONS FOR JUDGMENT BY: GLEASON J.A.

CONCURRED IN BY: WEBB J.A.
SCOTT J.A.

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REASONS FOR JUDGMENT

GLEASON J.A.

[1] In this appeal, Mr. Chung seeks to set aside the November 30, 2015 judgment of the Federal Court in *Chung v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 1329, 261 A.C.W.S. (3d) 687 [*Chung* FC], dismissing Mr. Chung's application for judicial review of the January 28, 2015 decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada (the IAD) in *Chung v. Canada (Public Safety and Emergency*

Preparedness), IAD File No. VB3-02012 (available on CanLII) [*Chung* IAD]. In that decision, the IAD dismissed Mr. Chung's application for humanitarian and compassionate (H&C) relief under sections 67 and 68 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), finding there were insufficient grounds to allow the appeal or stay the deportation order made against Mr. Chung. In coming to its decision, the IAD considered the factors laid out in *Ribic v. Canada (Minister of Employment & Immigration)*, [1985] I.A.B.D. No. 4 at para. 14, 1986 CarswellNat 1357 [*Ribic*], which include the possibility of rehabilitation. In finding there to have been a low possibility of Mr. Chung's rehabilitation, the IAD relied in part on its factual determination that Mr. Chung exhibited no remorse for his most recent crimes because he maintained he was innocent of them.

[2] Mr. Chung alleges that in so finding the IAD committed a reviewable error as he asserts that it is improper for the IAD to treat as a negative or aggravating factor the fact that an individual maintains that he or she is innocent of the crimes that form the basis for the deportation order under the IRPA. In support of this argument, Mr. Chung draws an analogy to the well-developed principle in the sentencing context that prohibits a criminal court from considering as an aggravating factor in setting a sentence the fact that an accused pled not guilty and maintains his or her innocence.

[3] The Federal Court dismissed this argument, holding that the IAD did not err in its treatment of the remorse issue and that its decision on other aspects of Mr. Chung's appeal was reasonable. The Federal Court certified the following question under section 74 of the IRPA:

> Does the Immigration Appeal Division of the Immigration and Refugee Board, in the exercise of its humanitarian jurisdiction, err in law in considering adverse to

> an appellant lack of remorse for an offence for which the appellant has pled not guilty but was convicted?

[4] For the reasons that follow I would answer this question in the negative and would dismiss this appeal.

I. Background

[5] The relevant facts are summarized at length in the reasons of the IAD and the Federal Court, and, for purposes of this decision, it is only necessary for me to highlight the most salient of them.

[6] Mr. Chung is a Chilean national with a criminal record that includes convictions for drug trafficking, attempted theft and fraud. A deportation order was issued against him in 1997 following two separate convictions for possession of cocaine for the purposes of trafficking. In 1999, the IAD granted Mr. Chung a stay of this deportation order. Mr. Chung committed no further crimes between 1997 and 2006, and in 2006 the IAD quashed the deportation order.

[7] In 2008, Mr. Chung pled guilty to a charge of fraud and in 2011, following a trial, was convicted a third time of possession of cocaine for the purposes of trafficking. He was sentenced to 15 months imprisonment. A new deportation order was issued against him on August 26, 2013, and Mr. Chung appealed this second order to the IAD. In support of his application for H&C relief, Mr. Chung relied on his lengthy establishment and work history in Canada as well as his relationship with his common-law partner and his two adult children in Canada and their families, including a newborn grandson.

[8] At his hearing before the IAD, Mr. Chung alleged he had committed neither fraud nor the third instance of cocaine trafficking. He claimed that the police had lied during his trafficking trial and that he pled guilty to the fraud charge as a matter of convenience.

II. Decisions of the IAD and of the Federal Court

[9] The IAD commenced its decision by enumerating the factors it ought to consider in assessing the appeal, which it held were outlined in *Ribic* and later endorsed by the Supreme Court of Canada in *Chieu v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 3 at para. 40, [2002] 1 S.C.R. 84 and *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4 at para. 11, [2002] 1 S.C.R. 133. The IAD noted that these factors included: the seriousness of the offence or offences leading to the removal order; the possibility of rehabilitation; the length of time the appellant has been in Canada and the degree to which the appellant is established; the impact the appellant's removal from Canada would have on members of the appellant's family; family in Canada and the dislocation to that family that removal of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return; and the hardship the appellant would face in the country to which he would likely be removed. While it appears that there may be some overlap or duplication in these factors as listed, the existence of such overlap or duplication is not the issue in this appeal.

[10] The IAD then moved to discuss Mr. Chung's criminal record and the fact that he was sentenced to 15 months imprisonment for the third trafficking offence, finding this offence was a serious one. The IAD next considered the possibility of Mr. Chung's rehabilitation, holding that

his "lack of remorse and acceptance of responsibility despite his conviction [was] not a positive factor". The IAD noted that while there were several years between Mr. Chung's earlier and more recent convictions, "considering the combination of his prior criminal history for the same offence along with his lack of acceptance of responsibility and minimal remorse" there was little possibility of Mr. Chung's rehabilitation, which was a "negative factor" in his appeal (*Chung* IAD at paras. 10-13).

[11] The IAD next considered the positive factors in support of the appeal, including the supports in place that Mr. Chung alleged would help him from re-offending, the degree of Mr. Chung's establishment in Canada, his relationship with his partner and family and the best interests of his infant grandson. The IAD noted that in light of the grandson's age, there would be minimal impact on the child's best interests if his grandfather were deported.

[12] After reviewing all the factors, the IAD concluded that while the positive factors indicated there were some H&C grounds to support a stay of the deportation order, they were "not sufficient to overcome the seriousness of [Mr. Chung's] offence and [his] lack of acceptance of responsibility or remorse which [affected] the possibility of rehabilitation" (*Chung* IAD at para. 29). It therefore dismissed the appeal.

[13] In its review of this decision, the Federal Court applied the correctness standard to the review of the IAD's treatment of the remorse issue, agreeing with Mr. Chung that this issue raises a "general principle of law, which should be interpreted consistently across jurisdictions"

(*Chung* FC at para. 15). The Federal Court applied the reasonableness standard to the review of the balance of the IAD's decision.

[14] On the merits, the Federal Court disagreed that the IAD had considered Mr. Chung's lack of remorse to be an aggravating factor and instead found that it had focussed its discussion on the possibility of rehabilitation. The Federal Court further found that the IAD was entitled to consider the convictions as proof that Mr. Chung had committed the offences in question and to find a poor likelihood of rehabilitation based in part on his lack of remorse and acceptance of responsibility for the crimes. The Federal Court then considered the other factors examined by the IAD and its overall conclusion and determined that both were reasonable.

III. Analysis

[15] In this appeal, this Court is required to step into the shoes of the Federal Court and determine whether it selected the appropriate standards of review and whether it applied those standards correctly: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras. 45-47, [2013] 2 S.C.R. 559.

[16] Here, I believe the Federal Court erred in selecting the correctness standard as being applicable to the assessment of the IAD's treatment of the remorse issue. That consideration was merely one point in its analysis of whether Mr. Chung warranted H&C consideration under sections 67 and 68 of the IRPA and cannot be viewed in isolation from the rest of its decision. It is firmly settled that the deferential reasonableness standard applies to review of decisions like that made in the present case, which involve an exercise of discretion by the IAD: *Canada*

(Minister of Citizenship and Immigration) v. Khosa, 2009 SCC 12 at paras. 52-59, [2009] 1 S.C.R. 339 [*Khosa*].

[17] Moreover, the only potentially relevant exception to the presumptive application of the reasonableness standard in this case is the possible exception which mandates selection of the correctness standard in those narrow situations when the point decided is one of general importance to the legal system as a whole that falls outside the expertise of the administrative decision-maker: *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 58-61, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 30, [2011] 3 S.C.R. 654; *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2016 FCA 200 at para. 62, 402 D.L.R. (4th) 160. In the present case, evaluation of Mr. Chung's lack of remorse was connected to the IAD's assessment of his rehabilitative potential – a factor that is squarely within the IAD's expertise and a matter for it to consider under *Ribic* and the other applicable authorities from the Supreme Court of Canada and this Court. Thus, even if the IAD's treatment of the remorse issue can be viewed in isolation from the rest of the decision in Mr. Chung's case, it is nonetheless subject to review under the reasonableness standard.

[18] I accordingly believe that the Federal Court ought to have applied the reasonableness standard to its review of the entirety of the IAD's decision.

[19] Turning to the merits of Mr. Chung's arguments, I agree with him that when the IAD's reasons are fairly read, it must be viewed as having treated Mr. Chung's lack of remorse as an aggravating factor. However, I disagree that it was not open to the IAD to do so.

[20] The cases from the criminal context that are relied upon by Mr. Chung – notably *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *R. v. Forsyth*, 2003 CMAC 9 (available on CanLII); *R. v. Bremner*, 2000 BCCA 345, 146 C.C.C. (3d) 59; *R. v. Vickers*, 105 B.C.A.C. 42 (available on CanLII) (BCCA); *R. v. Alasti*, 2011 BCSC 824, 95 W.C.B. (2d) 218 [*Alasti*] – are inapplicable to Mr. Chung's situation. There is a significant difference between treatment of remorse in the context of a criminal trial and treatment of remorse in an immigration proceeding, like that conducted by the IAD under sections 67 and 68 of the IRPA. In a criminal trial, the accused individual benefits from the presumption of innocence throughout the proceeding: *R. v. MacDougall*, [1998] 3 S.C.R. 45 at para. 10, 165 D.L.R. (4th) 193. Accordingly, a criminal court may not treat a plea of not guilty and lack of remorse as an aggravating factor during sentencing as this would undercut the presumption of innocence, as noted for example in *Alasti* at paragraphs 25 to 30.

[21] The presumption of innocence is inapplicable outside the criminal context. Moreover, where, as here, the civil inquiry is conducted after the criminal proceedings are completed, it is difficult to see how the inquiry could have any bearing whatsoever on the presumption of innocence.

[22] In many situations similar to that before the IAD, decision-makers have regard to an individual's lack of remorse as an aggravating factor. For example, lack of remorse and a continued failure to recognize guilt is routinely viewed by the Parole Board as an aggravating factor, which is a practice that has been endorsed by this Court in *Ouellette v. Canada (Attorney General)*, 2013 FCA 54 at paras. 30, 74-76 (available on CanLII). Similarly, labour adjudicators consider as an aggravating factor in assessing an appropriate penalty for employee workplace-related criminal conduct the employee's failure to accept responsibility for crimes for which he or she was convicted: see, for example, *Basra v. Deputy Head (Correctional Service of Canada)*, 2014 PSLRB 28 at para. 71, 118 C.L.A.S. 171; *Stene v. Deputy Head (Correctional Service of Canada)*, 2016 PSLREB 36 at para. 151, 127 C.L.A.S. 223.

[23] In many respects, this case is similar to *Khosa*. There, the IAD held that statements made to it by Mr. Khosa, contesting the validity of his conviction, were "not to his credit". However, it did not go so far as to identify Mr. Khosa's claimed innocence as a negative factor: *Khosa v. Canada (Minister of Citizenship and Immigration)*, [2004] I.A.D.D. No. 1268 at paras. 13-15, 2004 CarswellNat 6953 [*Khosa* IAD]. The Supreme Court upheld the IAD's treatment of this factor and its assessment that Mr. Khosa did not warrant H&C consideration, finding the decision to be reasonable.

[24] The respondent concedes that the slightly different treatment of the issue by the IAD in the present case renders the question certified by the Federal Court appropriate as this case is not on all fours with *Khosa*. While I agree that this is so, I believe that *Khosa* is highly instructive and leads to the conclusion that it was open to the IAD to treat Mr. Chung's lack of remorse in

the present case in the manner it did. Thus, the principal argument advanced by Mr. Chung in this appeal fails.

[25] In addition to the arguments related to the certified question, Mr. Chung also contested the IAD's treatment of the positive factors in its decision.

[26] Only one of the arguments advanced by Mr. Chung in this regard has any possible merit. More specifically, I agree with him that the IAD's comment about his grandson was inappropriate as the young age of a child ought not be a justification to separate a child from a family member. However, this one comment does not warrant interfering with the IAD's decision as there was very little evidence before the IAD to support any real degree of connection between Mr. Chung and the child or the likelihood that Mr. Chung would be involved in any significant way in the child's future. Indeed, when questioned about this issue, the grandson's father (Mr. Chung's adult son) had to be prompted by counsel to give an answer that was even moderately favorable to Mr. Chung's position (Appeal Book at page 103). Thus, the IAD's conclusion that the best interests of the grandson did not warrant granting the requested stay was reasonable.

[27] The other points raised by Mr. Chung have no merit as the IAD did consider as positive his relationship with his family and partner and did look at the factors that Mr. Chung claimed would help him to avoid re-offending. It simply found the former insufficient to warrant the relief Mr. Chung sought and the latter unconvincing. I see nothing unreasonable in either assessment. Nor do I find the IAD's rejection of the requested stay unreasonable. The result

reached was certainly open to the IAD, especially in light of Mr. Chung's record and lack of rehabilitative potential.

[28] I would therefore dismiss this appeal and would answer the certified question as follows:

> Question : Does the Immigration Appeal Division of the Immigration and Refugee Board, in the exercise of its humanitarian jurisdiction, err in law in considering adverse to an appellant lack of remorse for an offence for which the appellant has pled not guilty but was convicted?
>
> Answer: No.

"Mary J.L. Gleason"

J.A.

"I agree.
Wyman W. Webb J.A."

"I agree.
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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