Federal Court  Cour fédérale

**Date: 20150911**

**Docket: IMM-333-15**

**Citation: 2015 FC 1059**

**Ottawa, Ontario, September 11, 2015**

**PRESENT: The Honourable Mr. Justice Southcott**

**BETWEEN:**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Applicant**

**and**

**MICHAEL CLAREL FERRY**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision dated January 6, 2015 by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board whereby, for humanitarian and compassionate considerations, the respondent Mr. Michael Clarel Ferry was granted a two-year stay of the removal order previously issued against him. The applicant, the Minister of Public Safety and Emergency Preparedness, seeks judicial review of this decision on

the basis that it contains erroneous and contradictory factual findings and conclusions and is unreasonable.

[2] For the reasons that follow, this application is dismissed.

## I. Background

[3] The respondent is a 37 year-old citizen of Mauritius. In 2009, he came to Canada on a work permit and was employed full-time as a sanitation worker for a company that provides cleaning services to industrial meat processing plants. A portion of the money he earns is sent regularly to his wife and two daughters, aged six and nine at the time of the hearing, who remain in Mauritius. His wife works two part-time jobs as a housecleaner. In 2011, he applied for a permanent resident visa at the Canadian Embassy in Nairobi.

[4] On August 12, 2012, the respondent was involved in a traffic accident on the highway near Strathmore, Alberta. At the hearing before the IAD, he explained that he had been drinking with friends from work the night before. A friend drove him home, he slept for about four hours, and then he left home around 5 AM to drive to the garage of a friend who had offered to fix his car that morning. He said he felt hungover, but able to drive. He was in the left lane when a cyclist suddenly crossed the road, and he and the car to his right abruptly stopped. Believing he had missed the cyclist, he kept driving, but said he regretted not having turned back to see if the cyclist was alright. The respondent was stopped shortly thereafter by the police, and a breathalyzer test identified his blood alcohol concentration to be 170 mg/100 mL, well above the limit of 80 mg /100 mL. He was charged under s. 253(1)(b) of the *Criminal Code* as a result.

[5] In September 2012, the respondent's permanent visa application was granted by the Canadian Embassy in Nairobi, and on September 15th 2012, he sought to finalize his immigration as a permanent resident with immigration authorities in Canada. However, his landing was deferred given the outstanding charges laid against him.

[6] On December 18, 2012, the respondent pled guilty to a charge of impaired driving under paragraph 253(1)(b) of the *Criminal Code*, and was sentenced to a fine of $ 2500, which he elected to pay through community service, a victim surcharge fee of $ 375 and a one year driving prohibition.

[7] On December 27, 2012, the respondent was issued a removal order as he was found to be inadmissible on grounds of criminality for having been convicted in Canada of an indictable offence pursuant to paragraph 36(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. On December 29th 2012, he filed an appeal of his removal order to the IAD.

[8] Meanwhile, the respondent's permanent resident visa expired in June 2013, and his work permit expired on December 15, 2013. He applied for a "bridging open work permit" and restoration of status, which was refused on May 23, 2014 because he had failed to apply within 4 months of the expiry of his work permit, had been declared inadmissible for criminality, and was not eligible for a bridging work permit because this type of permit is only a facilitative permit for those whose permanent resident application is imminent.

[9] The respondent continued to work despite the expiry of his work permit because he claimed that an agent of the Canadian Border Services Agency (CBSA) that had issued the removal order had told him he could continue to work, and that he would be informed if that changed. He stated at the IAD hearing that he thought he could continue to work pending the processing of his appeal, and that in any case he had no choice but to work to pay his bills.

[10] The hearing before the IAD took place on September 25, 2014, and the decision at issue in this application was rendered on January 6, 2015. The respondent did not challenge the inadmissibility finding, but invoked the IAD's jurisdiction to consider humanitarian and compassionate considerations that might warrant special relief pursuant to paragraph 67(1)(c) of the IRPA.

## II. IAD Decision

[11] The IAD member summarized the factors to be considered on an appeal for humanitarian and compassionate consideration as affirmed by the Supreme Court in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84 [*Chieu*] , and considered each of the factors in turn as follows.

[12] At the outset, the IAD member indicated the respondent was found to be a credible witness. With respect to the seriousness of the offence, the IAD noted that the level of impaired driving (alcohol concentration over double the legal limit) made it a serious offence. However, the IAD indicated that the respondent showed genuine remorse for the incident, and that this was a positive factor.

[13] The IAD then noted that the respondent's authorization to work had expired and that he "is only able to work because of the latitude being afforded to him by Canada Border Services Agency (CBSA) during the appeal period, i.e. before the present decision is issued".

[14] On rehabilitation, the IAD noted that the respondent had no other charges or convictions, and showed remorse, although there was no specific evidence of efforts at rehabilitation such as participation in workshops or meetings to help him understand the seriousness of impaired driving. The IAD found that he was unlikely to reoffend given his awareness of the consequences, particularly the consequences for his "dream" of having his family reunited in Canada, and that this was a positive factor.

[15] On establishment, the IAD noted there was little evidence of financial establishment. Besides a cousin in Montreal, the respondent's family ties were all in Mauritius. The IAD also noted numerous letters of support from friends, co-workers, his employer and landlord, and concluded that establishment was a neutral factor.

[16] With respect to hardship, the IAD remarked that there was no evidence of hardship in Mauritius besides Mr. Ferry's testimony that he would have difficulty finding employment in Mauritius, that there was rampant corruption, and that police routinely came to his house on account of his brothers' previous drug offences. The IAD noted that he had returned to Mauritius in 2012, and that hardship would be mitigated somewhat by being reunited with his wife and children there. The IAD indicated that the lack of corroborating evidence lessened the weight that could be given to Mr. Ferry's testimony on this point.

[17] Regarding the best interests of the children, the IAD considered the respondent's claim that he would be unable to provide sufficient income for his family in Mauritius. The IAD noted there was no evidence to corroborate this claim or demonstrate the impact on the children's education, food, housing and health. The IAD found on a balance of probabilities that it was in the best interests of the children that their father "remain in Canada working to support them with an eye to possibly reuniting in Canada". The IAD noted that this point warranted significant weight.

[18] The IAD member concluded that Mr. Ferry had demonstrated sufficient humanitarian and compassionate grounds to warrant special relief, and granted a two-year stay of removal on the conditions that he make reasonable efforts to seek and maintain full-time employment, report any change in employment to the CBSA, and keep the peace and be of good behaviour.

## III. Issues and Standard of Review

[19] The applicant disputes certain factual findings made by the IAD. The parties agree, as do I, that these issues are all reviewable on the reasonableness standard. The IAD's determination as to whether humanitarian and compassionate considerations warrant special relief under paragraph 67(1)(c) of the IRPA is a discretionary decision involving a fact-specific and policy-driven assessment within the IAD's expertise, and is therefore reviewable on the reasonableness standard (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 55-58, [2009] 1 SCR 339 [*Khosa*]). When conducting review of a decision on the reasonableness standard, the reviewing court is concerned with the "existence of justification, transparency and intelligibility with 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, [2008] 1 SCR 190).

[20] As a result, the issue for the Court's consideration is whether the IAD's decision to grant relief on humanitarian and compassionate grounds was reasonable.

## IV. Submissions of the Parties

### *A. Applicant's Submissions*

[21] The applicant contends that the IAD's assessment of the best interests of the children affected by the application was unreasonable and based on erroneous or contradictory findings.

[22] The applicant argues that the IAD made contradictory findings by, on the one hand, stating that there was no corroborative evidence to support the respondent's testimony that he would be unable to make a sufficient income for his family in Mauritius and that limited weight would be assigned to his testimony and, on the other hand, concluding that it was in the best interests of the children that their father remain in Canada to work and provide income.

[23] The applicant also emphasizes that the respondent is not authorized to work in Canada, that he continued to work illegally, and that the applicant made no representations at the hearing to the effect that the CBSA gave him any "latitude" to work pending the outcome of his appeal. In the applicant's position, the finding that it was in the best interests of the children that the respondent remain in Canada to work was based on an erroneous finding, when in fact the

respondent had been working illegally, and at the very least, the IAD should have considered that the respondent would need to reapply for a work permit if the stay was granted. The applicant noted that, subsequent to the IAD's decision, the respondent applied for and was issued a work permit as contemplated by section 206 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, but the respondent emphasized that this status did not exist at the time of the IAD's decision.

[24] The applicant also argues that the IAD erred by commenting that it was in the best interests of the children that the respondent remain with "an eye to possibly reuniting [the family] in Canada ", when there was no real probability of reunification given that the respondent has no status in Canada, and given the hurdles faced by the respondent in achieving such a result due to his criminal conviction.

[25] On the subject of establishment, the applicant submits that the IAD found only marginal evidence of any establishment, and yet it concluded that this was a "neutral factor". In the applicant's view, the IAD's conclusion amounts to saying that establishment can never be a negative factor, and shows that the IAD member believed the respondent was presumed to be entitled to remain in Canada.

[26] Finally, the applicant contends in written submissions that the IAD made a contradictory and unintelligible finding by stating, on the one hand, that there were sufficient humanitarian and compassionate factors to warrant special relief, while stating, on the other hand, that there were sufficient negative factors to warrant a stay of removal for a period of two years. The applicant

argues that these conclusions are contradictory, confusing and affect the intelligibility of the decision.

[27] In oral argument, the applicant focused in particular on the IAD's findings with respect to the respondent's entitlement to work and the possibility of his family's reunification. The applicant principal position is that these are erroneous findings and, as these factors weighed significantly in the IAD's decision, the decision is unreasonable.

*B. Respondent's Submissions*

[28] With respect to establishment, the respondent argues that the assertion that the IAD member presumed he was entitled to remain is entirely conjecture. He emphasizes that he resided in Canada as a temporary resident for five years, and that it was appropriate to give this factor neutral weight in the circumstances.

[29] Regarding family reunification, the respondent contends that the IAD was simply reiterating the respondent's stated desire, and that he had not claimed that reunification in Canada was probable. In oral submissions, the respondent argued that there is possibility of reunification if the respondent abides by the conditions of the stay issued by the IAD.

[30] On the subject of the best interests of the children, the respondent submits that the IAD's decision is reasonable and reflects his testimony, which the IAD found to be credible, regarding the difficulty he would have in generating sufficient income in Mauritius. In relation to the entitlement to work, the respondent argued in oral submissions that the IAD would have been

aware of the significant possibility of the respondent subsequently being issued a work permit, as has in fact occurred.

[31] Overall, the respondent argues that this Court should not interfere with the IAD's weighing of the evidence, that the IAD relied on credible testimony, and that the IAD clearly explained how much weight was given to each factor and why. He emphasizes there may be a broad range of reasonable outcomes where the decision is discretionary, fact-based and policy oriented, and that this decision falls within that range.

## V. Analysis

### *A. Legislative Framework*

[32] A foreign national with a permanent resident visa against whom a removal order is issued has a right of appeal to the IAD under subsection 63(2) of the IRPA. According to section 66 of the IRPA, the IAD has three options as to the disposition of an appeal:

| Disposition | Décision |
|---|---|
| **66.** After considering the appeal of a decision, the Immigration Appeal Division shall | **66.** Il est statué sur l'appel comme il suit : |
| (a) allow the appeal in accordance with section 67; | a) il y fait droit conformément à l'article 67; |
| (b) stay the removal order in accordance with section 68; or | b) il est sursis à la mesure de renvoi conformément à l'article 68; |
| (c) dismiss the appeal in accordance with section 69. | c) il est rejeté conformément à l'article 69. |

[33] In addition to substantive errors in the removal order and violations of procedural fairness, the IAD may allow an appeal on the basis of humanitarian and compassionate considerations under paragraph 67(1)*(c)* of the IRPA, which reads as follows:

| | |
|---|---|
| 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. |

[34] A stay of a removal order may also be granted where there are humanitarian and compassionate considerations:

| | |
|---|---|
| Removal order stayed | Sursis |
| **68.** (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best 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. | **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 directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales. |

[35] Where a stay is granted, the IAD typically imposes conditions, and it is entitled to reconsider the stay at any time to ensure that the conditions are being complied with and that the circumstances still warrant a stay of removal (s. 68(2) and (3) of the IRPA).

*B. Reasonableness of IAD Decision*

[36] It is well-established that the relevant factors on an appeal to the IAD based on humanitarian and compassionate considerations are those laid out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) at para 14 and endorsed by the Supreme Court in *Chieu* at paras 40-41, 90:

> 14 Whenever the Board exercises its equitable jurisdiction pursuant to paragraph 72(1)(b) it does so only after having found that the deportation order is valid in law. In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation 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 to his country of nationality.
>
> [Emphasis added]

[37] In my assessment, the IAD's conclusions regarding establishment were not contradictory and do not warrant this Court's interference. There were elements related to establishment that operated in either direction. On the one hand, as the IAD noted, there was little evidence of financial establishment (no real or invested assets in Canada, no tax returns, no banking or employment records) or of family relationships in Canada (just one cousin in Montreal, while the

rest of the family was still in Mauritius). On the other hand, the IAD took note of numerous letters of support on the file from friends, co-workers and the respondent's employer, and the respondent's own testimony, and concluded that he had "put down some roots in his community". It is in the context of both positive and negative elements that the IAD concluded that establishment was a neutral factor in the decision which, in my view, was a reasonable conclusion.

[38] I also disagree with the applicant's contention that there is a contradiction or confusion between the IAD's statements, on the one hand, that there were sufficient humanitarian and compassionate factors to warrant special relief, and on the other hand, that there were sufficient negative factors to warrant a stay of removal for a period of two years. According to section 66 of the IRPA, the IAD may either allow the appeal, dismiss the appeal, or grant a stay. Where there are humanitarian and compassionate considerations warranting special relief, either a stay or allowing the appeal are available remedies (s. 67(1)(c) and s. 68). There is nothing contradictory in finding that there are sufficient humanitarian and compassionate grounds for special relief, while concluding that certain negative factors warrant granting a stay rather than allowing the appeal. As I read the decision, when the IAD highlighted negative factors, it was not contradicting its earlier finding that there are sufficient humanitarian and compassionate for special relief. Rather, it was explaining why it chose to grant the respondent the less favourable of the two remedies. The IAD's reasoning on this point is justified and intelligible.

[39] Similarly, I do not find the IAD's conclusions with respect to the best interests of the children to be unreasonable. As the applicant and the IAD both noted, there was no documentary evidence to support Mr. Ferry's testimony to the effect that he would have difficulty gaining sufficient income for his family in Mauritius. However, the IAD also found Mr. Ferry to be a

credible witness, and he testified that he came to Canada because he had a very low income job in Mauritius, and that it would be difficult for him to reintegrate and find sufficient income on his return. It is well-established that where an applicant submits sworn evidence, a rebuttable presumption of truthfulness applies (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, [1979] FCJ No 248). Despite the lack of documentary evidence to corroborate the respondent's testimony, the IAD was entitled to give some weight to his testimony, particularly given its assessment of his credibility. The IAD concluded that, given the lack of corroboration, it was able to assign "limited" weight to his oral evidence. This does not represent a basis for interfering with the IAD's subsequent conclusion that it was in the best interests of the children that he be allowed to remain in Canada.

[40] I do agree with the applicant that the IAD made an erroneous finding with respect to the respondent's authorization to work. The IAD did correctly note that the respondent's work permit had expired and that his application for a bridging open work permit was refused. However, the evidence does not support the IAD's statement that "he is only able to work because of the latitude being afforded to him by Canada Border Services Agency (CBSA) during the appeal period, i.e. before the present decision issued". The applicant's counsel did not indicate to the IAD that the CBSA was giving the respondent "latitude" to work. In fact, the transcript of the hearing indicates that counsel argued that the respondent was working illegally. The IAD's comment most likely stems from the following passages of the respondent's testimony:

> Q. Okay, and do you have an authorization to work in Canada right now?
>
> A. No official authorization. My work permit expired.

> Q. So why do you work in Canada if you don't have a legal authorization to work?
>
> A. Yes, I have to (indiscernible) for that. The first – when I went to the border and the officer checked my stuff and gave me the deportation order, he told me I can work and if – should that change they will contact me and let me know. I haven't heard anything yet and secondly, if I did not work I wouldn't have anywhere to survive, neither my family past two years.
>
> Q. And what document did you have when you worked in Canada legally?
>
> A. Work permit.
>
> Q. And when did it expire?
>
> A. December 2013.
>
> Q. So did you attempt to extend?
>
> A. Yes, I sent – they told me because my employer had set out on the work permit and stuff, they told me to try and open bridging open work permit. I did that but they said since the visa office already made a decision they can't give me bridging open work permit.
>
> […]
>
> Q. Okay, so sir, when the application for work permit was refused by the Department of Immigration, why did you continue to work?
>
> A. I had no other choice, honestly, but, like I said, if someone has come and said, "You know what, you have to stop working right away." I would have stopped but based on the letter, my work permit, no work permit, I knew I didn't have the right to work based on the work permit but based on the appeal I thought – I still think I don't have a choice to work in order to stay here.

[41] The evidence indicates that the respondent continued working because he had no other way of paying his expenses while awaiting the outcome of his appeal. A CBSA officer might have told him when the removal order was issued in December 2012, at a time when his work permit was still valid, that he could continue working until he was told otherwise. But this does

not mean that the CBSA was allowing him to continue working after December 2013, when his work permit expired, until the appeal was decided. Regardless of whether the respondent believed that he had this latitude, it is clear to me that the IAD erred in finding that the CBSA was in fact giving the respondent latitude to work pending the appeal.

[42] That said, I do not think this error impacted the IAD's decision or indicates that the IAD disregarded the respondent's lack of status. The IAD's statement that "[h]e is only able to work because of the latitude being afforded to him by Canada Border Services Agency (CBSA) during the appeal period, i.e. before the present decision is issued" (my emphasis) clearly indicates that the IAD recognized that the respondent had no legal authorization to work beyond the time of the decision resulting from his appeal. As a condition to the stay, the IAD required that the respondent "make reasonable efforts to seek and maintain full-time employment and immediately report any change in employment to the Agency". In the circumstances, this requirement could include taking appropriate measures to obtain a valid work permit. The IAD could have been more explicit about the challenge posed by Mr. Ferry's lack of present status, but I am not convinced that this renders the decision unreasonable.

[43] Similarly, I do not consider it to have been unreasonable for the IAD to have based its decision on the best interests of the children significantly on the respondent "working to support them with an eye to possibly reuniting in Canada". This language does not suggest that the IAD was unaware of the challenges to reunification that would be faced by the respondent, merely that it was a possibility.

[44] I would also note that the respondent's ability to support his children by working in Canada, with a view to possible reunification in Canada, were not the only factors underlying the

IAD's decision to grant the stay. The IAD concluded that the respondent showed genuine remorse and awareness of the consequences of his actions, had no other convictions and was unlikely to reoffend. Overall, the decision reads as an exercise of the IAD's discretion to grant a two year stay of removal to a hard-working man who was doing his best to set things right. It is not for this Court to interfere in the weight given to the particular factors in a discretionary decision or to reweigh the evidence (*Khosa*, at para 61).

## VI. Conclusion

[45] For the reasons above, I consider the IAD's decision to be reasonable, and this application is dismissed. The parties were consulted and confirmed that neither wishes to propose a question for certification for appeal.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** this application is dismissed. No question is certified for appeal.

"Richard F. Southcott"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-333-15 |
| **STYLE OF CAUSE:** | THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. MICHAEL CLAREL FERRY |
| **PLACE OF HEARING:** | CALGARY, ALBERTA |
| **DATE OF HEARING:** | AUGUST 10, 2015 |
| **JUDGMENT AND REASONS:** | SOUTHCOTT, J. |
| **DATED:** | SEPTEMBER 11, 2015 |

**APPEARANCES:**

| | |
|---|---|
| Galina Bining | FOR THE APPLICANT |
| Massood Joomratty | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| William F. Pentney<br>Deputy Attorney General of Canada<br>Winnipeg, Manitoba | FOR THE APPLICANT |
| Massood Joomratty<br>Barrister & Solicitor<br>Surrey, British Columbia | FOR THE RESPONDENT |