Federal Court  Cour fédérale

Date: 20160920

Docket: IMM-914-16

Citation: 2016 FC 1059

Ottawa, Ontario, September 20, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

KULJEET SINGH BISLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Kuljeet Singh Bisla [the Applicant or Mr. Bisla], challenges a deportation order [Decision] issued by the Immigration Division [the ID, or Board] dated April 27, 2015 pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. Mr. Bisla, who appeared by telephone, was (a) self-represented before the ID and (b) required a Punjabi translator. It was these two aspects of that ID hearing which have been

challenged in this judicial review application. For the reasons set out below, the application is dismissed.

I. Background

[2] Mr. Bisla was born October 7, 1986 and is a citizen of India. He became a Canadian permanent resident on February 19, 2001, as an accompanying child of his parents. He never became a Canadian citizen and thus finds himself in the current predicament.

[3] On January 19, 2015, Mr. Bisla pled guilty and was convicted of sexual interference with a minor contrary to section 151 of the *Canadian Criminal Code*, RSC 1985, c C-46. The maximum term of incarceration for this offence is ten years. Mr. Bisla was sentenced to 18 months in jail and two years of probation, given that "the accused alone is responsible for these offences", which "are serious offences such that his moral culpability is at the higher end of the scale".

[4] In the sentencing report, the Court recognized that Mr. Bisla "likely has some cognitive difficulties" and was "immature", but nonetheless, he had maintained a job for many years, and lived in the family home.

[5] On February 23, 2015, a report under section 44(1) of the Act was issued against Mr. Bisla and he was determined to be inadmissible to Canada pursuant to section 36(1)(a) of the Act.

[6] On April 27, 2015, Mr. Bisla appeared by phone before the ID for an admissibility hearing. At the hearing, which took place via teleconference, Mr. Bisla requested a Punjabi translator shortly after the hearing had begun. Once a translator was arranged, the ID Member reviewed what had been previously discussed. Mr. Bisla confirmed that he had been convicted of sexual interference with a minor. A deportation order was issued against Mr. Bisla at the end of the proceedings.

II. Issues raised

[7] Applicant's counsel, by way of this judicial review, argues that because an interpreter was not provided from the start of the hearing, Mr. Bisla was unable to appreciate the nature of the proceedings at the ID and lacked the opportunity for proper translation and legal representation, rendering the process unfair.

[8] The Applicant further argues that a designated representative should have been appointed per *the Immigration Division Rules*, SOR/2002-229, and that he should have been advised of a right to counsel instead of just being asked whether he had counsel, to which he responded that he was unable to find a lawyer, so he would not be represented.

[9] The Respondent, relying on *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 927 at para 14, counters that the appropriate standard of review for an applicant's access to counsel is reasonableness. The Respondent contends that Mr. Bisla was specifically asked if he understood the reason for the proceedings and he answered "yes". The questions posed by the ID

Member were simple confirmations of the Applicant's conviction and sentence. The Applicant did not express concern with the questions posed to him.

[10] Furthermore, the Respondent asserts that the ID provided an interpreter immediately upon the Applicant's request, and that Mr. Bisla understood the interpreter. The decision, and process, in the Respondent's view, were entirely reasonable,

III. Analysis

[11] The standard of review applicable to questions of procedural fairness is the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12. The Courts give no deference to decision-makers where the application of the duty of fairness is called into question: *Re: Sound v Fitness Industry Council of Canada and Goodlife Fitness Centres Inc.*, 2014 FCA 48, at para 35. Any errors of fact, on the other hand, are to be reviewed on a standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[12] I agree with the Respondent in finding that the Applicant's rights to natural justice and procedural fairness were not breached in the ID proceedings under review.

[13] Regarding comprehension of the proceedings, I note first that Mr. Bisla was asked at all points in the proceedings whether he understood, and he answered that he did. He both asked and answered questions of the ID Member, without any indication of a lack of understanding.

[14] Also noteworthy is the fact that the Applicant underwent various interviews with different CBSA officers. He provided significant input during these interviews and no interpreter was present. The evidence also shows that the Applicant maintained a job in Canada for many years.

[15] Second, when Mr. Bisla decided that he wanted an interpreter after the ID hearing had commenced, the Member immediately acceded to this request and went off the record, waiting for the interpreter. When the interpreter joined shortly afterwards, the ID Member reviewed what had taken place earlier -- with interpretation.

[16] As for the lack of counsel, the purpose of this ID proceeding was to confirm Mr. Bisla's prior conviction. This required a simple "yes" or "no" answer; one which I find Mr. Bisla was capable of both understanding and providing with or without counsel. Then, having confirmed that the Applicant had been convicted of an indictable offence and receiving a sentence of over six months, the ID Member had no choice but to issue a deportation order in the circumstances (by operation of subsection 45(d) of the Act and para 229(1)(c) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227). As Jusice de Montigny held in *Canada (Citizenship and Immigration) v Fox,* 2009 FC 987 at para 39:

> The Tribunal's function at the admissibility hearing is exclusively to find facts. If the member finds the person described in section 36(1)*(a)* of the *IRPA*, then pursuant to section 45*(d)* of the *IRPA* and section 229(1)(c) of the *Immigration and Refugee Protection Regulations*, the Tribunal must issue a Deportation Order against the person.

[17] Furthermore, no medical or psychological evidence pertaining to Mr. Bisla's alleged cognitive disability was placed before the ID Member. I agree with Mr. Bisla's counsel in this judicial review that any disability of Mr. Bisla, as a permanent resident, should be considered at the start of the ID hearing: *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at para 41. That said, I do not find that the Board erred in proceeding with the inadmissibility hearing based on the background documentation, and/or its interaction with the Applicant during the hearing, both before and after the interpreter was present. In short, the Applicant's duty of fairness was respected.

[18] I also disagree with the Applicant's argument that Rules 18 and 50 *Immigration Division Rules*, SOR/2002-229, assist Mr. Bisla. These Rules read as follows:

> **Rule 18 – Duty of counsel to notify the Division**
>
> If counsel for a party believes that the Division should designate a representative for the permanent resident or foreign national in the proceedings because they are under 18 years of age or unable to appreciate the nature of the proceedings, counsel must without delay notify the Division and the other party in writing. If counsel is aware of a person in Canada who meets the requirements to be designated as a representative, counsel must provide the person's contact information in the notice.
>
> **Rule 50 – Powers of the Division**
>
> The Division may
>
> (a) act on its own, without a party having to make an application or request to the Division;
>
> (b) change a requirement of a rule;
>
> (c) excuse a person from a requirement of a rule; and
>
> (d) extend or shorten a time limit, before or after the time limit has passed.

[19] There was no obligation in this instance for the Member to have made available a designated representative on the basis of Rules 50 and 18. To hold otherwise would be to impose a positive obligation on opposing counsel and the ID Member to assess an applicant's mental capacity where the Applicant confirmed that he understood the nature of the proceedings, and the Board believed the Applicant appreciated the nature of the proceedings. In other words, the Member met his obligation to satisfy himself of the Applicant's capacity to understand the proceedings, based on the input of the Applicant, his exchanges with the Applicant and the documentation placed before the Board.

[20] Finally, the Applicant raised an issue with the pre-removal risk assessment [PRRA]. This Court neither has the facts nor supporting documentation to make any determination with respect to a previous PRRA. The only evidence presented in this judicial review is a single sentence in the Affidavit of Gail Begley stating that she offered Mr. Bisla a PRRA, and he responded that he was not going to apply for it. The PRRA issue falls outside of the scope of this judicial review. If the Applicant feels that any PRRA-related procedure was breached, that should be raised in a separate application with supporting materials.

[21] Ultimately, Parliament drew a harsh line when it drafted subsection 45(d) and paragraph 129(1)(c) of the Act and its Regulations respectively. These provisions provide that once the ID receives a s. 44 referral for serious criminality, its sole function is to conduct a factual inquiry. If the facts underlying the inadmissibility based on serious criminality are correct, the ID has no choice but to issue the removal order. Here, the facts before the ID were that the Applicant received an 18 month prison sentence for having committed the offence.

[22] As explained to Applicant's counsel at the judicial review hearing, this judicial review application was not the right context in which to raise or contest humanitarian and risk-related factors, given the stage of enforcement being challenged. Rather, the right time to have raised those considerations would have been when there may have been some limited discretion for the officer, before issuance of the section 44(1) report. However, that train had long left the station by the time the matter arrived at Federal Court.

[23] In sum, I find no error in the ID Member's finding that the Applicant had committed the offence in question, and in subsequently issuing the deportation order. The application for judicial review is accordingly dismissed.

IV. CONCLUSION

[24] This application for judicial review is dismissed. Neither counsel raised any questions for certification. No costs will be ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed;

2. Neither counsel raised any questions for certification;

3. No costs will be ordered.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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