Date: 20081120

Docket: IMM-981-08

Citation: 2008 FC 1265

Ottawa, Ontario, November 20, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

COURTNEY MILLER (aka Glen Miller)

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Immigration Division (ID) of the Immigration and Refugee Board on February 14, 2008, that the applicant is inadmissible on grounds of serious criminality pursuant to section 36(1)(a) of the Immigration and Refugee Protection Act (IRPA). The ID issued a deportation order against the applicant.

FACTS

[2] The applicant, a citizen of Trinidad and Tobago, became a permanent resident of Canada in 1976 at the age of 18 years old. Since then the applicant has been convicted of approximately 68 criminal offences including trafficking in narcotics, violence, failure to comply with court orders and interference with the proper administration of justice. The applicant was ordered deported on December 4, 1998, for trafficking cocaine. The applicant appealed this 1998 deportation order to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board on humanitarian and compassionate grounds under the former Immigration Act.

[3] Pending the appeal, on November 7, 2000, the applicant was convicted of 4 assault charges and sentenced to 42 months. An inadmissibility report based on these convictions was filed on September 19, 2002 and referred to the ID for an admissibility hearing.

[4] The record shows that the respondent referred the applicant for an admissibility hearing in 2003 notwithstanding the 1998 deportation order under appeal to the IAD because after the new IRPA came into force in 2002, a ruling that the applicant was inadmissible for serious criminality pursuant to subsection 36(1)(a) of IRPA could not be appealed to the IAD. The record shows that the applicant and the respondent agreed (at a detention hearing before the Immigration Division on June 23, 2003) that the 2002 admissibility hearing under IRPA would not be initiated until the appeal of the 1998 deportation order was heard by the IAD. The respondent thought that no further admissibility hearing would be necessary if the applicant's appeal to the IAD from the 1998

deportation order was dismissed. At the same time, the respondent made clear to the applicant that the 2002 admissibility hearing would proceed if the IAD appeal was allowed.

[5] The IAD heard the appeal on March 2005 and found that the applicant had established that the circumstances of his case warranted special relief and granted him a four-year stay on May 9, 2005. The applicant's November 2000 assault convictions were considered in the IAD decision.

[6] The Minister filed an application in the Federal Court for leave challenging this IAD decision. Leave was granted and the application was scheduled to be heard on April 11, 2006. However, the respondent brought a motion to adjourn the hearing, on the basis that the application may have become moot as the Minister was referring the applicant for an admissibility hearing under IRPA, and a finding that the applicant was inadmissible for serious criminality could not be appealed to the IAD. The adjournment was granted on April 12, 2006 with the consent of the applicant.

[7] The applicant was finally referred for an inadmissibility hearing which took place on June 19, 2007 and on February 14, 2008. The ID found that the applicant was inadmissible pursuant to section 36(1)(a) of IRPA and issued a deportation order. This decision is the subject of this judicial review.

ISSUE

[8] The issue is whether it was an abuse of process to refer the applicant for an admissibility hearing based on convictions known to the IAD at the time that it granted the applicant a four-year stay.

RELEVANT LEGISLATION

[9] Section 36(1)(a) of IRPA provides:

Serious criminality	Grande criminalité
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

[10] The report based on the applicant's November 2000 conviction was filed pursuant to Section 44(1) of IRPA on September 19, 2002 and re-filed on July 26, 2006. The provision states:

Preparation of report	Rapport d'interdiction de territoire
44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	**44.** (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

[11] Section 64 of IRPA provides:

No appeal for inadmissibility	Restriction du droit d'appel
64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.	**64.** (1) L'appel ne peut être interjeté par le résident permanent ou l'étranger qui est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée, ni par dans le cas de l'étranger, son répondant.
Serious criminality	Grande criminalité
(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.	(2) L'interdiction de territoire pour grande criminalité vise l'infraction punie au Canada par un emprisonnement d'au moins deux ans.

STANDARD OF REVIEW

[12] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court stated:

> **¶60** …courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E.*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E.*, which dealt with complex common law rules and conflicting jurisprudence on the doctrines of *res judicata* and abuse of process issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

[13] Accordingly, since the issue is a question of law the appropriate standard of review is one of correctness.

ANALYSIS

Applicant's Position

[14] The applicant argues that referring him to a second admissibility hearing during the stay period, on the basis of convictions and a sentence received before the stay was granted, was an abuse of process.

[15] The applicant submits that the IAD decision granting the applicant a four-year stay in March 2005 considered all the circumstances of the case, including the applicant's November 2000 convictions. The applicant states that the admissibility hearing was an abuse of process for the following reasons:

a. The Minister was aware of the November 2000 convictions prior to the commencement of the IAD appeal on March 1, 2005;
b. The Minister elected not to pursue the September 19, 2002 admissibility report, and instead waited until 2006, after the applicant won his IAD appeal, to pursue a new admissibility hearing based on the November 2000 convictions; and
c. The IAD decision in the applicant's favour granting the stay explicitly considered the November 2000 conviction.

[16] The applicant argues that the respondent could have commenced new admissibility proceedings in 2002 or could have pursued their challenge of the IAD decision. Three years passed between September 2002, when the section 44(1) report was written in light of section 64 of the new IRPA, and May 2005, when the IAD decision was rendered. The applicant argues that the

respondent instead stood by and let the IAD appeal continue with the intention of preparing a new admissibility report if the applicant was successful at the IAD. The applicant argues that the respondent "made a litigation choice" not to proceed with new admissibility proceedings and cannot do so now.

Respondent's Position

[17] The respondent argues that the applicant waived his right to raise these issues and object when he consented to delay the second admissibility hearing pending the outcome of the IAD appeal. This consent is on the record of the June 23, 2003 ID detention review. The respondent submits that the applicant, while represented by counsel, waived any right to complain about the initiation and delay of a second admissibility hearing. According to the respondent, the applicant was required to raise any arguments relating to abuse of process and breach of natural justice at the earliest possible opportunity, which was immediately after the September 19, 2002 report or the June 23, 2003 detention review. Instead, the applicant consented to delay the second inadmissibility hearing pending the IAD appeal, and then, on April 12, 2006, consented to adjourn the appeal of the IAD decision pending the second admissibility hearing.

[18] Additionally, the respondent argues that the new admissibility hearing was not an abuse of process. In support, the respondent cites *Al Yamani v. MCI*, 2003 FCA 482. In that case, after a Federal Court decision quashed a Security Intelligence Review Committee (SIRC) report on the basis that the relevant provision of the Immigration Act violated the Charter, the appellant was found inadmissible under another provision of the Act. Justice Rothstein (as he then was) stated in *Al Yamani* at paragraphs 29 and 31:

> **29** Second, the appellant says that the Minister made a litigation choice not to proceed under clause 19(1)(f)(iii)(B) which has been in force since February 1, 1993. The appellant says the Minister could have abandoned the proceedings he had already taken under paragraphs 19(1)(e) and (g) or consolidated the proceedings he now brings with those prior proceedings. In deciding not to do so, the appellant says the Minister made a "clear and deliberate 'litigation choice.'" The implication appears to be that, having elected to proceed under paragraphs 19(1)(e) and (g), the Minister is precluded from now proceeding under clause 19(1)(f)(iii)(B) as enacted on February 1, 1993.
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> **31** …recognizing that proceeding under the new legislation would have led to further delays, I cannot fault the Minister for attempting to first succeed under the other provisions. When he did not, section 34 allowed him to start again under clause 19(1)(f)(iii)(B).

[19] In this case, the issues and cause of action before the ID on the admissibility hearing were different than the issues and cause of action before the IAD. The second admissibility hearing was a result of the coming into force of section 64 of IRPA. As discussed below, the transitional provisions of the Act provide that section 64 must be applied in this case. The applicant agrees that the issues before the IAD were different, and that *res judicata* does not apply.

The 2005 IAD Decision

[20] When the IRPA provisions came into force, on June 28, 2002, the applicant's case was pending in the IAD. The general rule, set out in section 192 of the IRPA, provides that cases pending in the IAD when the IRPA came into force were continued under the Immigration Act.

Immigration Appeal Division	Anciennes règles, novelles sections
192. If a notice of appeal has been filed with the Immigration Appeal Division immediately before the coming into force of this section, the appeal shall be continued under the former Act by the Immigration Appeal Division of the Board.	**192.** S'il y a eu dépôt d'une demande d'appel à la Section d'appel de l'immigration, à l'entrée en vigueur du présent article, l'appel est continué sous le régime de l'ancienne loi, par la Section d'appel de l'immigration de la Commission.

[21] However, section 196 provides an important and relevant exception to this general rule:

Appeals	Appels
196. Despite section 192, an appeal made to the Immigration Appeal Division before the coming into force of this section shall be discontinued if the appellant has not been granted a stay under the former Act and the appeal could not have been made because of section 64 of this Act.	**196.** Malgré l'article 192, il est mis fin à l'affaire portée en appel devant la Section d'appel de l'immigration si l'intéressé est, alors qu'il ne fait pas l'objet d'un sursis au titre de l'ancienne loi, visé par la restriction du droit d'appel prévue par l'article 64 de la présente loi.

[22] The applicant's appeal to the IAD from his 1998 deportation order proceeded on March 1 and 2, 2005. Under section 196 of IRPA, this appeal should not have proceeded and the IAD had no jurisdiction to hear the appeal or grant the stay on May 9, 2005. This jurisdictional issue was not raised before the IAD and the Court will not take it into consideration in deciding the applicant's appeal from the deportation order from the ID arising from his convictions in 2000. However, it is relevant to understand the complexity of this case.

[23] After June 28, 2002 the applicant had no legal right to bring an appeal for a stay based on humanitarian and compassionate grounds before the IAD. Nevertheless, the parties agreed that that appeal could proceed. At the same time, the parties agreed that following that appeal, the respondent

will proceed with an admissibility hearing with respect to his assault convictions in 2000 if the appeal was successful. If not successful, then the applicant would be deported without any further legal proceeding. I am satisfied that the evidence showed that the applicant and the applicant's counsel understood and agreed to this course of action.

[24] Moreover, after the IAD issued its decision on May 9, 2005, the respondent sought and obtained leave for judicial review from the Federal Court. However, the respondent decided not to proceed with that appeal and instead proceed with an admissibility hearing with respect to the convictions in 2000. The reason for this adjournment was because the application for judicial review to the Federal Court would become moot since the applicant would be subject to deportation under IRPA, and would have no right to apply to the IAD for a stay based on humanitarian and compassionate considerations. The applicant and his counsel agreed to this adjournment with this understanding.

[25] Now the applicant argues that the respondent has abused the process by proceeding with the second admissibility hearing. The applicant argues that it was an abuse of process and unfair for the respondent to allow the appeal to the IAD to proceed and then after the respondent loses, bring a new action under sections 44 and 64 of IRPA for the deportation of the applicant.

[26] The Court finds that:

1. the applicant and the applicant's counsel knew and accepted that the respondent would proceed with the second inadmissibility hearing after the IAD appeal and the applicant did not object. In this respect, the applicant waived his rights. The applicant has a duty to object at the earliest practical opportunity for breach of natural justice or fairness. Instead, the applicant and the applicant's counsel consented to the approach which the respondent followed;
2. the Federal Court of Appeal has recognized that the public interest in the government retaining a continuing ability to take action against inadmissible persons outweighs the public interest in having some finality to litigation. See *Al Yamani* per Rothstein J.A. (as he then was) at paragraph 20; and
3. the Court cannot find that there has been an abuse of process. The respondent explained to the applicant its proposed matter of proceeding and the applicant agreed. This was a fair approach to the applicant and the applicant cannot now claim that it is an abuse of process.

[27] For these reasons, the application for judicial review is dismissed.

[28] Neither party considered that this case raised any serious question of general importance that ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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