Federal Court  Cour fédérale

Date: 20120918

Docket: IMM-9279-11

Citation: 2012 FC 1086

Ottawa, Ontario, September 18, 2012

PRESENT: THE CHIEF JUSTICE

BETWEEN:

RONALD ANTONIO CASTELLON VIERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Ronald Antonio Castellon Viera, is a citizen of El Salvador. He was found by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada to be inadmissible to Canada based on his uncontested membership in the Mara Salvatrucha (MS) gang. He joined the MS, also known as the MS-13, sometime between the age of ten or 12 and voluntarily left it when he was 15 or 16.

[2] The IAD and the Immigration Division each found that the MS is a criminal organization within the meaning of paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA]. They also both determined that Mr. Castellon did not have the requisite mental capacity to form the intent to join the MS, but that he did achieve that mental capacity sometime before he left the gang.

[3] However, they disagreed on whether he had remained with the MS under duress after he achieved that mental capacity. The Immigration Division found that, after he achieved the requisite mental capacity, Mr. Castellon remained with the gang under duress until he departed "when the earliest real opportunity presented itself." By contrast, the IAD found that he had not made out the test for duress, after finding certain aspects of his testimony to be implausible and after finding that he was unreliable as a witness. The IAD stated that this undermined his overall credibility and that it preferred the testimony of two other witnesses. The IAD appears to have relied primarily, or to at least a significant degree, on the evidence of those two witnesses in finding that Mr. Castellon had not established the test for duress.

[4] Mr. Castellon submits that the IAD erred by:

a. failing to determine that either (a) the decision of the Immigration Division was wrong in law or fact or mixed law and fact, or (b) a principle of natural justice had not been observed, as set forth in paragraphs 67(1)(a) and (b) of the IRPA;

b. failing to make a determination described in paragraphs 67(1)(a) or (b), on a balance of probabilities;

c. making a negative credibility finding against him without affording him an opportunity to be heard; and

d. making an unreasonable finding with respect to his credibility.

[5] For the reasons that follow, I have concluded that the IAD did not commit the first two errors alleged by Mr. Castellon, but that it did commit the third. Accordingly, this application will be granted, without the need to address the fourth issue.

I. Standard of Review

[6] The first two issues raised by Mr. Castellon concern the scope of the IAD's jurisdiction. Accordingly, they are reviewable on a standard of correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 59, [2008] 1 S.C.R. 190 [*Dunsmuir*]; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, at para 42, [2009] 1 SCR 339 [*Khosa*]).

[7] The third issue is a question of procedural fairness, which is subject to review on a standard of correctness (*Dunsmuir*, above, at paras 55, 79 and 87; *Khosa*, above, at para 43).

[8] Had it been necessary to address fourth issue raised by Mr. Castellon, regarding the reasonableness of the IAD's finding with respect to his credibility, that issue would have been reviewable on a standard of reasonableness (*Dunsmuir*, above, at paras 51-55; *Khosa*, above, at paras 46-47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, at paras 11 - 18).

II. Analysis

A. *Did the IAD err by failing to determine that either (a) the decision of the Immigration Division was wrong in law or fact or mixed law and fact, or (b) a principle of natural justice had not been observed, as set forth in paragraphs 67(1)(a) and (b) of the IRPA?*

[9] Mr. Castellon asserts that the IAD erred by failing to consider or mention paragraphs 67(1)(a) and (b), which were the only grounds upon which the IAB had the jurisdiction to allow the Minister's appeal from the Immigration Division's decision. Stated alternatively, he asserts that the IAD erred by ignoring the lower tribunal's decision and looking at the case afresh. I disagree.

[10] It is now settled that an appeal before the IAD is "a hearing de novo in a broad sense" (*Kahlon v Canada (Minister of Employment and Immigration)*, 1989 FCJ No 104, at para 5 [*Kahlon*]; *Mohamed v Canada (Minister of Employment and Immigration)*, [1986] 3 FC 90, at paras 9-13 (CA) [*Mohamed*]; *Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1963, at para 8; *Ni v Canada (Minister of Citizenship and Immigration)*, 2005 FC 241, at para 9; *Canada (Minister of Citizenship and Immigration) v Savard*, 2006 FC 109, at para 16; *Canada (Minister of Citizenship and Immigration) v Venegas*, 2006 FC 929, at para 18; *Contreras Mendoza v Canada (Minister of Citizenship and Immigration)*, 2007 FC 934, at paras 17-20 [*Contreras Mendoza*]).

[11] Accordingly, the IAD is not limited to determining whether the Immigration Division correctly or reasonably concluded that a person seeking admission to Canada was of an inadmissible class. Rather, the IAD is required to determine whether the person is in fact inadmissible (*Mohamed*, above; *Kahlon*, above; *Contreras Mendoza*, above). Contrary to Mr. Castellon's submissions, there is nothing in the IRPA or the jurisprudence which limits the exercise of *de novo*

jurisdiction by the IAD to situations in which new evidence which was not before the Immigration Division has been adduced.

[12] It follows from the foregoing that the IAD was not required to give any deference to the Immigration's Division's findings, or to explicitly state that either (a) the Immigration Division's decision was wrong in law or fact or mix law and fact, or (b) a principle of natural justice had not been observed. It is sufficient for this Court to find, upon a review of the IAD's decision as a whole, that the IAD was in fact satisfied, at the time the appeal was disposed of, that either (a) the decision appealed was wrong in law or fact or mixed fact and law, or (b) a principle of natural justice had not been observed.

[13] Having reviewed the IAD's decision, I have no difficulty finding that the IAD was in fact satisfied that the Immigration Division's decision was wrong for reasons of mixed fact and law.

[14] At the outset of its decision, the IAD correctly articulated its task as being to determine whether, "based on all the evidence before the panel … there [are] reasonable grounds to believe that the respondent is inadmissible as a member of a criminal organization pursuant to paragraph 37(1)(a)" of the IRPA.

[15] Among other things, the IAD proceeded to note that Mr. Castellon had acknowledged that he is a foreign national, that the MS is a criminal organization within the meaning of paragraph 37(1)(a) of the IRPA, and that he was a member of the MS.

[16] The IAD then turned to the issue of whether Mr. Castellon ought not to be considered to have been a member of the MS based on his age and level of understanding at the time of his involvement with that organization. After quoting excerpts from *Poshteh v Canada (Minister of Citizenship and Immigration)* 2005 FCA 85, at paras 51 and 53, the IAD found that the reasoning in that case, which concerned an allegation of membership in a terrorist organization by person who was a minor at the time, applied equally to membership in a criminal organization.

[17] The IAD then reviewed the evidence and agreed with the Immigration Division's finding that the evidence established that Mr. Castellon's membership in the MS commenced before the age of 12. However, it noted that whereas the Immigration Division found that his membership "ended in his mid-teens, well before he reached the age of majority," the IAD could only conclude that his membership ended before he came an adult, but not necessarily "well before" that time, given his acknowledgment to an enforcement officer that he left the MS when he was "like 17."

[18] The IAD proceeded to note that Mr. Castellon's activities with the MS included transporting quantities of cocaine, robbing people and businesses of their belongings and money while armed with a knife, witnessing serious crimes that included seeing two people murdered by fellow gang members, and being present at meetings where he heard other gang members planning and discussing murders. The IAD also noted that while he was committing his crimes, he wore the gang's colors and identifying clothing and his victims were able to identify his gang membership because of his tattoos.

[19] After discussing the test for duress, as it was briefly discussed in *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, at para 40, the IAD discussed Mr. Castellon's testimony regarding his efforts to obtain help from the school that he attended to leave the gang, the risks that he believed he faced if he attempted to leave the gang, and his eventual departure from the gang to join a "rehabilitation centre." The IAD also discussed the testimony of an expert who testified on behalf of the Minister, as well as the testimony of someone who had worked at the school that Mr. Castellon attended.

[20] Ultimately, the IAD concluded that Mr. Castellon had not made out the first of the three conjunctive elements of the test for duress, namely, that he faced a situation of "imminent physical peril" (*Oberlander v Canada (Attorney General)*, 2009 FCA 330, at para 25). Accordingly, the IAD concluded, based on all of the evidence before it, that Mr. Castellon is a person described in paragraph 37(1)(a) of the IRPA.

[21] Given the foregoing, I have no difficulty concluding that the IAD satisfied itself that the Immigration Division's decision was wrong for reasons of mixed fact and law. After correctly articulating the scope of its jurisdiction, the IAD correctly stated the test to be applied on the key issue of duress and discussed the testimony of Mr. Castellon and two other witnesses. Ultimately, the IAD found that the facts did not establish that there were reasonable grounds to believe that a person of his age, intelligence and experience would have apprehended that "he was in such imminent physical peril as to deprive him of [the] freedom to choose the right and refrain from the wrong." In making that finding, the Board implicitly satisfied itself that the decision appealed from was wrong for reasons of mixed fact and law, as provided by paragraph 67(1)(a) of the IRPA.

[22] Mr. Castellon further asserted that the principles of estoppel and *res judicata* prevented the IAD from reversing the Immigration Division's decision without new evidence and without regard to the grounds of appeal set forth in subsection 67(1) of the IRPA. I disagree.

[23] As discussed above, the IAD did implicitly conclude that the Immigration Division's decision on the issue of duress was wrong in mixed fact and law. In so doing, it met the precondition to its exercise of jurisdiction set forth in paragraph 67(1)(a). Given that the Immigration Division's decision was not a "final" decision, the principles of issue estoppel and *res judicata* do not apply (*Danyluk v Ainsworth Technolgies Inc.*, 2001 SCC 44, at para 25, [2001] SCR 460; *Angle v Minister of National Revenue*, [1975] 2 SCR 248 at paras 20-25).

B. *Did the IAD err by failing to make a determination described in paragraphs 67(1)(a) or (b), on a balance of probabilities?*

[24] Mr. Castellon asserted that the IAD cannot allow an appeal of the Immigration Division unless it is satisfied, on a balance of probabilities, that the Immigration Division erred. I disagree.

[25] In my view, Mr. Castellon's position would undermine the precautionary and preventative rationale underlying the "reasonable grounds to believe" standard of proof in paragraph 37(1)(a) (*Re Jaballah*, 2010 FC 79, at paras 58-59, and 64).

[26] As noted above, the IAD is not limited to determining whether the Immigration Division correctly or reasonably concluded that a person seeking admission to Canada is of an inadmissible class. Rather, the IAD is required to determine whether the person is in fact inadmissible

(*Mohamed*, above; *Kahlon*, above; *Contreras Mendoza*, above; *Rattan v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 32, at para 7 [*Rattan*]). In other words, on an appeal from the Immigration Division, the IAD is in essentially the same position as was the Immigration Division. In the context of this case, that means that its task was to determine if Mr. Castellon was inadmissible to Canada based on the test set forth in paragraph 37(1)(a) of the IRPA, and the rules of interpretation set forth in section 33. Those rules state, in unambiguous terms, that "[t]he facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur."

[27] Accordingly, the IAD did not err by failing to find, on a balance of probabilities, that the decision of the Immigration Division was wrong in law or fact or mixed law and fact.

C. Did the IAD err by making a negative credibility finding without affording Mr. Castellani an opportunity to be heard?

[28] Mr. Castellon asserts that the IAD erred by failing to inform him that it intended to reassess the credibility of his testimony and by failing to afford him an opportunity to testify in person, as he had done before the Immigration Division. I agree.

[29] The IAD initially scheduled an oral hearing in this matter. However, the parties made a joint written application on July 7, 2011 for that hearing to be cancelled, and for the appeal to be conducted in writing. The basis for their position was as stated as follows: "Neither party intends to

call further evidence and both intend to rely exclusively on the Record of Appeal and make legal submissions" (emphasis added).

[30] Mr. Castellon's subsequent written submissions to the IAD, dated August 17, 2011, also clearly reflect that he understood the appeal would be confined to questions of law. At page 2 of those submissions, he stated as follows:

> The Respondent and Minister agreed to limit the appeal to written representations without producing new evidence. This is appropriate as the issues raised by the appellant are legal. Therefore, any errors alleged by the Minister must be on the face of the record.

[31] With respect to the issue of duress, Mr. Castellon's submissions clearly reflect that he was under the impression that the IAD was required to accord "significant deference" to the Immigration Division's determination.

[32] Given the foregoing, the IAD should have (i) notified Mr. Castellon that it intended to revisit the question of his credibility on the issue of duress, and (ii) afforded him an opportunity to make further submissions on that issue. By failing to do so, the IAD breached Mr. Castellon's procedural fairness rights.

D. Did the IAD err by making an unreasonable finding with respect to Mr. Castellon's credibility?

[33] Given the conclusion that I have reached with respect to the third issue raised by Mr. Castellon, it is not necessary to address this issue.

III. Conclusion

[34] This application for judicial review is granted.

IV. No Question for Certification

[35] Mr. Castellon proposed the following two questions for certification:

> 1. When the Minister appeals a decision by the Immigration Division to the Immigration Appeal Division, pursuant to subsection 63(5) of the IRPA, does the Minister have to prove there was an error in fact, law, or mixed fact and law made by the Immigration Division on a balance of probabilities?
>
> 2. When the Minister appeals a decision by the Immigration Division to the Immigration Appeal Division, pursuant to subsection 63(5) of the IRPA, and where the parties agree to conduct the proceedings in writing on the ground that the question to be decided is solely a legal issue and not based on credibility, is it a procedural error for the IAD to determine the case on credibility grounds without allowing the Respondent the opportunity to have an oral hearing?

[36] Counsel to the Minister opposed both of the proposed questions on the ground that they disclose no serious issue and would not be determinative of an appeal. I agree.

[37] Paragraph 74(d) only allows for the certification of "a serious question of general importance." In my view, neither of Mr. Castellon's proposed questions meet this standard.

[38] As to the first of the proposed questions, the jurisprudence has consistently confirmed that the IAD is not limited to determining whether the Immigration Division correctly or reasonably concluded that a person seeking admission to Canada is of an inadmissible class. Rather, the IAD is required to determine whether the person is in fact inadmissible (*Mohamed*, above; *Kahlon*, above; *Contreras Mendoza*, above; *Rattan*, above). When making such determinations, the IAD is in essentially the same position as was the Immigration Division. That is to say, it must determine whether Minister has established the reasonable grounds to believe contemplated by paragraph 37(1)(a) and section 33.

[39] The decisions in *Asgharpour-Khiabani v Canada (Minister of Citizenship and Immigration)*, 2009 FC 810, at para 20 and *Brace v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 582, at para 14, are distinguishable. In brief, *Ashgharpour-Khaibani* did not involve a hearing in respect of which the statutory standard of proof contemplated by paragraph 37(1)(a) and section 33 applied. As to *Bruce*, above, the focus of the Court's analysis was upon the IAD's treatment of the humanitarian and compassionate considerations contemplated by paragraph 67(1)(c) and the relevant assessment factors that have been identified in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) and approved by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84, at para 90. Moreover, in *Brace*, Justice Harrington expressly qualified his statement with the underlined words in the following passage: "Unless a statute provides otherwise, there is only one standard of proof before civil tribunals, and that is the balance of probabilities." (Emphasis added.)

[40] As to the second proposed question, it contemplates a fact pattern that is unique to the facts of this case. It is therefore not an appropriate question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT:

1. The decision of the Immigration Appeal Division ("IAD"), dated November 24, 2011 is set aside and remitted to a differently constituted panel of the IAD for reconsideration in accordance with these reasons.

2. There is no question for certification.

"Paul S. Crampton"
Chief Justice

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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9279-11
STYLE OF CAUSE:	RONALD ANTONIO CASTELLON VIERA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	August 23, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	Crampton CJ.
DATED:	September 18, 2012

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