Date: 20071003

Docket: A-409-06

Citation: 2007 FCA 315

CORAM: **NADON J.A.**
SEXTON J.A.
SHARLOW J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

LEONID IVANOV

Respondent

Heard at Toronto, Ontario, on October 1, 2007.

Judgment delivered at Toronto, Ontario, on October 3, 2007.

REASONS FOR JUDGMENT BY: SEXTON J.A.

CONCURRED IN BY: NADON J.A.
SHARLOW J.A.

Date: 20071003

Docket: A-409-06

Citation: 2007 FCA 315

CORAM: **NADON J.A.**
SEXTON J.A.
SHARLOW J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Appellant

and

LEONID IVANOV

Respondent

REASONS FOR JUDGMENT

SEXTON J.A.

[1] This appeal considers whether the Federal Court correctly determined that the Immigration and Refugee Board, Immigration Appeal Division (the "IAD") is obliged to consider all of the relevant factors raised by the applicant's evidence even if the applicant has neither referred to nor relied on these factors in his submissions as a basis for staying a deportation order. I would conclude that the IAD does have such a duty and I would dismiss the appeal.

[2] This is an appeal of the decision of Justice Kelen of the Federal Court in *Leonid Ivanov v. Minister of Citizenship and Immigration*, 2006 FC 1055. In the Court below, Leonid Ivanov (the "respondent") successfully obtained judicial review of a decision of the IAD in which the IAD cancelled its 2001 direction staying the execution of the respondent's removal order and dismissed his appeal under subparagraph 74(3)(*b*)(i) of the now repealed *Immigration Act*, R.S.C. 1985, c. I-2 (the "former Act"). Justice Kelen also certified the following serious question of general importance:

> Is the Immigration Appeal Division of the Immigration and Refugee Board obliged to consider all of the relevant factors raised by the applicant's evidence when the applicant has not presented these factors in his submissions as a basis for staying the deportation order?

[3] Where a permanent resident seeks a stay of a deportation order pursuant to s. 70(1)(*b*) of the former Act, the IAD must have "regard to all the circumstances of the case" in deciding that the claimant should not be removed from Canada. The Supreme Court of Canada, in *Chieu v. Canada (Minister of Citizenship and Immigration)* [2002] 1 S.C.R. 84, confirmed that the circumstances to be considered are those sometimes referred to as the "*Ribic* factors", after the IAD decision of *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] 1 I.A.B.D. No. 4 (QL). The *Ribic* factors are as follows:

- the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation;
- the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order;

- the length of time spent in Canada and the degree to which the applicant is established;
- the existence of family in Canada and the dislocation to that family that deportation of the applicant would cause;
- the support available for the applicant not only within the family but also within the community; and
- the degree of hardship that would be caused to the applicant by his return to his country of nationality (this factor is sometimes referred to as “foreign hardship”).

The *Ribic* factors are illustrative of the circumstances the IAD should consider when hearing appeals under subparagraph 70(1)(*b*), but the factors are not exhaustive: *Chieu*, *supra.*, at paragraph 40.

[4] The Supreme Court in *Chieu* also clarified that the IAD is entitled to consider potential foreign hardship under s. 70(1)(*b*) of the former Act, if, as in this case, a likely country of removal is identified by the permanent resident facing removal. Since the Supreme Court’s reasons in *Chieu* were not released until 2002, in the 2001 hearing originally granting a stay to the respondent the IAD did not address the issue of foreign hardship and, under the then current jurisprudence, was not obliged to do so. However, the IAD decision that is the subject of this appeal was rendered after *Chieu*.

[5] A preliminary question this Court must answer is whether the *Ribic* factors apply to the cancellation of a stay pursuant to subparagraph 74(3)(*b*) of the former Act, which makes no

reference to an obligation to consider “all the circumstances of the case.” It appears to me that established IAD and Federal Court practice answers this question in the affirmative. See, for instance, *Beaumont v. Canada (Minister of Citizenship and Immigration)* (2002) 25 Imm. L.R. (3d) 189 (F.C.T.D.) and *Burgess v. Canada (Minister of Citizenship and Immigration)* [1998] F.C.J. No. 1302 (F.C.T.D.) per Nadon J. (as he then was) at paragraphs 16 to 19. I see no reason to disturb the practices of the IAD and the Federal Court in this regard.

[6] I now turn to the certified question, namely, whether the IAD is obligated to consider evidence that applies to *Ribic* factors not argued in the claimant’s submissions. The appellant makes reference to two cases of this Court: *Owusu v. Canada (M.C.I.)* [2004] 2 F.C. 635, 2004 FCA 38, and *Ranganathan v. Canada (M.C.I.)* [2001] 2 F.C. 164 (C.A.). Neither case is apposite to this appeal.

[7] The case of *Owusu* considered the failure of an immigration officer to consider the claimant’s argument that if he were forced to return to Ghana he would not have any way to support his family financially. However, in that case, there was no evidence presented to support this submission. In that sense, the issue in *Owusu* is opposite from the case at bar: this case deals with evidence, but no submissions. In *Owusu*, there was a legal submission with no supporting evidence.

[8] The appellant also makes reference to the case of *Ranganathan*, *supra.*, for the proposition that the respondent could not have possibly thought that foreign hardship was an important factor if it had not been presented to the IAD as such in his submissions. Thus, so the logic goes, the IAD

would not have had to consider this factor. However, the case of *Ranganathan* concerned the availability of an internal flight alternative ("IFA") in Colombo in a refugee claim. The question was not whether the Convention Refugee Determination Division had considered a specific factor, but rather whether they had considered a specific piece of evidence in relation to the question of IFA. More importantly, there were established facts that directly contradicted the evidence that had been omitted from the Board's decision.

[9] In my opinion, once there is evidence that relates to a *Ribic* factor, the IAD must consider that *Ribic* factor in its reasons. This is not tantamount to an obligation to elicit evidence, as the appellant suggests. The evidentiary burden to demonstrate why a stay ought not to be cancelled remains on the permanent resident facing deportation.

[10] Applying that reasoning to the case at bar, the IAD failed to consider the factor of foreign hardship. Moreover, while it was scant, some evidence had been presented on this issue. The relevant evidence reads (the emphasis is my own):

> **COUNSEL:** Okay. Look, I understand that. But I'm more interested in the more immediate aftermath. Okay? What I want to know is, you get deported, what happens to provisions of the daily care of your mother and grandmother?
>
> **APPELLANT:** There's going to be no care. They're probably going to end up dying and that's it. There's going to be nothing there. <u>And to be quite honest, you know, you guys decide to deport me, why don't you just – you know, I don't even want to live. I don't really want to think about that.</u> You know - - -
>
> **COUNSEL:** <u>Why not?</u>
>
> **APPELLANT:** If I have to be deported, there is no use of – <u>there is no other country I know. This is the only thing, I lived here, I grew up, this is the people I love and the country</u>

> I know. And if I have to be deported, then I don't even think I want to live, to be honest. There is no, no – there is nothing there no more for me.

[11] The failure to consider the *Ribic* factor of foreign hardship is an error of law. Thus, the decision of the IAD dated November 10, 2005 must be set aside. The matter must be remitted to the IAD for redetermination by a differently constituted panel. I will not address the other grounds of appeal as it is not necessary to do so.

[12] I would answer the certified question in the affirmative and dismiss the appeal.

"J. Edgar Sexton"
J.A.

"I agree
M. Nadon"

"I agree
K. Sharlow"

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-409-06
STYLE OF CAUSE:	MINISTER OF CITIZENSHIP AND IMMIGRATION Appellant and LEONID IVANOV Respondent
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 1, 2007
REASONS FOR JUDGMENT:	SEXTON J.A.
CONCURRED IN BY:	NADON J.A. SHARLOW J.A.
DATED:	OCTOBER 3, 2007

APPEARANCES:

LORNE McCLENAGHAN	FOR THE APPELLANT / APPLICANT
RON POULTON	FOR THE RESPONDENT

SOLICITORS OF RECORD:

JOHN H. SIMS, Q.C. DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE APPELLANT / APPLICANT
MAMANN AND ASSOCIATES TORONTO, ON	FOR THE RESPONDENT