Disturbing Trends in the Federal Court
Zhang v MCI 2020 FC 927

For the Ottawa Immigration Law Conference

23 September 2021

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Overview

- Facts of the Case
- The IRB Decision:
  - Rejected a joint recommendation for a stay (Practice tip!!)
  - DLO's soap box on "remorse"
- The Federal Court Decision:
  - No breach of procedural fairness in refusing the joint recommendation (indeed, was there impropriety by counsel before the board?)
  - Mister Justice Annis' "modern" articulated approach to A67(1)(c)/68(1)
  - Assessing the risk of reoffending

The Facts

- Citizen of China; landed as a dependent child at age 12

- Convicted of forcible confinement (s.279(2) of the *Code*), for an incident that occurred weeks after his 18th birthday. The victim and co-accused were just weeks younger than Mr. Zhang, but all minors. He received 23 mos CSO that confined him to 24 house arrest except when attending school or completing community service.

- Ordered deported due to serious criminality – A36(1)(a)

- At the IAD appeal, evidence was advanced to show that the appellant had, since conviction: graduated high school; obtained admission on scholarship to an engineering program, and completed first year – all while complying with the terms of his highly restrictive CSO. His psych eval. suggested that he was not at high risk for reoffending.

- We sought relief pursuant to A67, and (in the alternative) a stay of removal, the latter of which Minister's Counsel endorsed in closing submissions.

The IRB Refuses Joint Recommendation for Stay

- In spite of the joint recommendation for a stay of removal, the Board denied the appeal (2019 CanLii 129223) in a rather perfunctory way, citing the general deterrent value of ordering Mr. Zhang's removal:

> *Actions such as those by the Appellant undermine public confidence in the IRPA and they undermine public support for Canada's generous immigration and refugee system. They cast a cloud of suspicion over the many honest and hardworking immigrants trying to make a better life for themselves in Canada. The public would be offended if the Appellant was allowed to remain in Canada, even with conditions. A stay of the deportation order is not appropriate.*

The IRB on Remorse

- From the testimony:
  - In direct: Q - Do you blame your friends for their involvement in the incident? A – No, I believe that they were…trying to stand up for me. It's my problem
  - In cross: Q - How did you feel about the fact that your friends were arrested and suspended from school? A - I feel very….apology toward them because the things started with me, and I left them into a lot of mess and they faced a lot of troubles. I blame myself.

- From the IRB Decision

  [14] The Appellant's expression of remorse is called into question by conflicting evidence concerning his role in the incident. While during the hearing he expressed remorse for his actions and the consequences to him and his friends who were present, he also testified that his friends were somewhat responsible, though he does not blame them. I also note the evidence referenced above where the Appellant states that he was too influenced by his friends who encouraged him. I find that this equivocal evidence, which suggests an attempt to rationalize or justify his behavior, considerably reduces the credibility of the Appellant's statements of remorse. Overall I find that the level of remorse detracts from the weight that I can attribute to the Appellant's efforts at rehabilitation.

- Nick Smith, *Guidelines for Evaluating Apologies and Remorse in Criminal Contexts: Summary Version for Practitioners [2017 C4eJ 9]* "Apologies and remorse are a cornerstone of criminal justice and serve as a foundation upholding millions of sentences. They are also a crumbling, counterintuitive, and deceptive parody of justice".

The Federal Court Decision

- At Federal Court, we argued that the Board's dismissal of the joint recommendation – without significant reasons/analysis – breached procedural fairness (citing *Malfeo v Canada* 2010 FC 193, *Ambat v Canada* 2011 FC 292 and *Al-Abidi v Canada* 2016 FC 262)
- Mr. Justice Annis dismissed this argument, finding instead that the parties (particularly the Respondent) committed a 'procedural breach' by consenting to the stay so late in the hearing. Para 30 - this failed to "ensure that the IAD was able to conduct a proper hearing", and then (at para 32):

Furthermore, because a joint submission places the Board at a disadvantage in not having the benefit of an adversarial challenge to the request for a stay, the Attorney General is required to provide the Board with a balanced analysis describing why it supports the reasoning relied on by the Applicant to grant the stay. In effect, it should indicate that it has made its best efforts to obtain all the relevant evidence supporting and opposing granting the stay, i.e., aspects of the equitable case, and particularly those relevant to the safety and security of the appellant remaining in Canada. Supporting a stay of removal should not be a pro forma exercise on the part of the Attorney General.

The FC Decision (Part 2)

- Mr. Justice Annis' decision articulates a differential (he calls it "modern") interpretation of A67(1)(c) & 68(1).
- He conducts a historical review of the jurisprudence and a somewhat dense statutory interpretation exercise – pointing out that when *Ribic* was decided, A25(1) language hadn't been rolled into A67(1)(c)/A68(1), and more generic "all the circumstances of the case" wording for equitable relief at the board.
- He then parses the 7 *Ribic* factors into two groups – the 5 equitable "hardship" factors, and the 2 "public safety and security" factors (seriousness of the offence and possibility of rehabilitation), and concludes that Parliament's intent is that equitable relief mechanisms be accessed by way of a two-tier approach:
  - First appellants must establish entitlement to relief in accordance with A25(1) reasoning
  - Second, if they establish #1, they must pass public safety and security components
- Unless both elements of the test are satisfied, the appeal fails. But the second part of the analysis is not necessary unless the first part is successful.

Different Standards for Different Relief

- New standards for demonstrating entitlement to equitable relief:
  - To obtain relief under A67(1)(c): Must establish that the reoffending is not ***likely*** to occur (goes beyond demonstrating a mere "possibility of rehabilitation") as at the time of the disposition of the appeal
  - To obtain relief under A68(1) : Must establish that the reoffending is not ***likely*** to occur as at the time of the disposition of the stay request of not reoffending *upon completion of the period of the stay granted* (para 99)

Risk of Reoffending

- What guidance does he provide for assessing future likelihood of reoffending?

> [109] *Assessing the likelihood of any future conduct like that of reoffending is a challenging determination at the best of times. It is simpler to assess past intention to commit a crime than to assess the likelihood of committing a crime in the future. In essence, it is an attempt to judge the character of the appellant, in that deterrence often does not prevent reoffending when illegal situations of high self-interest present themselves, if not restrained by some moral or educative consideration. It is not a conclusion that should be arrived at without considerable care.*

- Other comments related to assessing risk of re-offending:
  - the appellant's motivation is a fertile area for examination (though unclear how this is to be assessed and applied) [para 109]
  - the seriousness of the offence impacts the risk analysis, b/c the degree of the possibility of harm will be severe even if the likelihood of harm is relatively low [para 122-3]

Questions?