Federal Court  Cour fédérale

Date: 20160819

Docket: IMM-573-16

Citation: 2016 FC 952

Ottawa, Ontario, August 19, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

IMAN DANDACHI
ABDULRAZAK EZEDEEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mrs. Iman Dandachi and her son Mr. Abdulrazak Ezedeen, are citizens of Syria. Since they did not comply with their residency obligations as permanent residents under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the Minister's delegate issued departure orders against them in July 2013, as well as against Mrs. Dandachi's

daughter, Ms. Tala Ezeddin. On January 19, 2016, the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada dismissed their appeal of the departure orders. The IAD found that Mrs. Dandachi and her son did not prove sufficient humanitarian and compassionate [H&C] grounds pursuant to paragraph 67(1)(c) of IRPA to overcome their inadmissibility to Canada for failure to comply with their residency requirements [the Decision]. In the Decision, the IAD however concluded that Ms. Ezeddin had provided sufficient H&C considerations to justify the granting of special relief in her case.

[1] The IAD recognized the difficulties that Mrs. Dandachi and her son would encounter if their appeals were dismissed and noted the temporary suspension of removals to Syria since March 2012. However, the IAD determined that Mrs. Dandachi and her children did not come directly from Syria but had rather lived in Qatar for 14 years since 1999. Further to its review of the various H&C considerations identified by Mrs. Dandachi and her son and the circumstances of their case, the IAD concluded that the negative factors were more important than the positive ones.

[2] Mrs. Dandachi and her son are seeking judicial review of the IAD Decision. They submit that, in its Decision, the IAD did not properly consider the question of the hardship they would face if they were deported from Canada, and that this is sufficient to render the Decision unreasonable. They ask this Court to quash the IAD Decision and to order that a different panel reconsider their appeal of the departure orders issued against them.

[3] The sole issue to be determined is whether the IAD Decision is reasonable. For the reasons that follow, I conclude that the IAD Decision does not fall within the range of possible, acceptable outcomes based on the facts and the law as, in its assessment and weighing of the various factors at stake, the IAD clearly failed to properly consider the hardship that Mrs. Dandachi and her son would encounter if removed from Canada. This application for judicial review must therefore be allowed.

II. The IAD Decision

[4] In its Decision, the IAD laid out the analytical framework for its appeal function under paragraph 67(1)(c) of IRPA, and specifically listed the various criteria elaborated by the Courts to guide the IAD in the exercise of its discretion in residency obligation appeals. The IAD identified those as being the importance of legal impediment, the duration and the degree of establishment of Mrs. Dandachi and her children in Canada, the impact of the dismissal of the appeals on their family, the reasons for leaving Canada and whether they returned at the first reasonable opportunity, the best interests of the children affected, their integration in Canadian society, and the hardship Mrs. Dandachi and her children would face if deported to their country of citizenship.

[5] I pause to note that these factors are known as the *Ribic* factors, first outlined in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD 4 (QL) and endorsed by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship & Immigration)*, 2002 SCC 3 [*Chieu*] at paras 40-41 and 77 (*Canada (Minister of Citizenship & Immigration) v Wright*, 2015 FC 3 at paras 75-78).

[6] The IAD then reviewed the evidence on each of these factors. Since Mrs. Dandachi and her son strictly raise issues with respect to the treatment of hardship by the IAD, only this factor will be discussed.

[7] With respect to hardship, the IAD recognized the difficulties that Mrs. Dandachi and her son would encounter if their appeals were to be dismissed, noting that the temporary suspension of removals to Syria was "a sign that the situation in Syria is extremely difficult and that it would be an undue hardship if the appellants were sent back to Syria". However, the IAD found that "the evidence is to the effect that the three appellants did not come from Syria" but have rather lived in Qatar for 14 years, from 1999 to 2013.

[8] The IAD noted that, according to the Qatar country documentation, "the husband or father can sponsor his unmarried daughter, his wife and his son who is 25 or younger", and that Mrs. Dandachi and her children could thus benefit from the father's work to get visas to live in Qatar with him. The IAD therefore concluded that if Mrs. Dandachi and her children were dismissed from Canada, it is likely they would obtain temporary visas for Qatar, even though, in the case of Mr. Ezedeen, it would cease when he would reach 26.

[9] Regarding "undue hardship", the IAD stated that, in its view, it was not likely that Mrs. Dandachi and her children "would go back to Syria at present" and added that the "hardship of uncertainty is important but it is not the same as undue hardship of going back to Syria". The IAD went on to indicate that this factor "is a positive factor but it is not as important as it would be if the appellants had to go back to Syria".

[10] In its conclusions, the IAD then relied on the following elements to support its finding of insufficient H&C grounds and to decline to exercise its discretion in favour of Mrs. Dandachi and her children. The factors found to be positive were: the presence of distant family in Canada, the growth of their establishment and their integration into Canadian society since 2013, a very limited positive effect of the best interests of the little girl which Mrs. Dandachi babysat since her birth, and their continuous residency in Canada since 2013. Conversely, the following criteria were found to be negative, or against Mrs. Dandachi and her children: the importance of the legal impediment, the fact that they did not have imperative reasons to stay away from Canada, their failure to return to Canada at the first opportunity, and the fact that the refusal of the appeal would not cause the dislocation of the family as the father has lived separately from the mother and children since 2013.

[11] The IAD concluded that the negative factors outweighed the positive factors in the case of Mrs. Dandachi and her son.

III. Standard of Review

[12] It is established case law that the applicable standard of review is reasonableness. In *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*], the Supreme Court specifically determined that the standard of review of the IAD's decisions based on H&C considerations and the exercise of its equitable discretion under paragraph 67(1)(c) of IRPA is reasonableness (*Khosa* at paras 57-59, 64 and 67). I add that the determination of the residency obligation under IRPA involves the interpretation by the IAD of its constituent statute with which it has particular familiarity. Since *Alberta (Information and Privacy Commissioner) v*

Alberta Teachers' Association, 2011 SCC 61 [*Alberta Teachers*], the Supreme Court has repeatedly stated that "when an administrative tribunal interprets or applies its home statute, there is a presumption that the standard of review applicable to its decision is reasonableness" (*Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 32). This is the case here.

[13] When reviewing a decision on the standard of reasonableness, the analysis is concerned with the existence of justification, transparency and intelligibility within the decision-making process, and the decision-maker's findings should not be disturbed if the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47). Under a reasonableness standard, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, and the decision is supported by acceptable evidence that can be justified in fact and in law, a reviewing court should not substitute its own view of a preferable outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at paras 16-17).

IV. Analysis

[14] Mrs. Dandachi and her son challenge the IAD Decision solely on its treatment of hardship. They claim that, while the IAD looked at the risk they faced in Syria, it did not address the risk in Qatar, with respect to the political context and their uncertain situation. Mrs. Dandachi and her son further argue that, in stating that they could obtain status in Qatar, the IAD speculated and made findings without adequate regard for the record before it. They plead that

the IAD failed to analyze the likelihood that they could obtain any kind of semi-permanent status in Qatar. Furthermore, Mrs. Dandachi and her son argue that the IAD omitted to consider the impact of its own admission that they would suffer undue hardship if they were sent back in Syria. As a result, they argue that the IAD erroneously found that the hardship they would face by returning at first in Qatar, and not going back to Syria "at present", cannot be "as important as it would be" if they had to go back directly to Syria. They more specifically point to the fact that the son, Mr. Ezedeen, would not be eligible to stay in Qatar on his father's sponsorship once he turns 26. Similarly, considering that her husband is about to retire, Mrs. Dandachi submits that she might also find herself without a visa in Qatar in a short timeline.

[15] It is true that the IAD did acknowledge the documentary evidence to the effect that Mr. Ezedeen's sponsorship would cease when he would be 26 years old. However, I am not satisfied that the IAD considered what could likely happen if Mrs. Dandachi and her son were deported to Qatar and the potential cascading effect of their removal. Given that Mr. Ezedeen could face deportation to Syria as soon as 2019 because of his age, and given the potential retirement of Mrs. Dandachi's husband, without evidence that the situation in Syria is about to change, the IAD had to assess not only the hardship of uncertainty but also the impact of a potential removal to Syria subsequent to a return of Mrs. Dandachi and her son to Qatar. I agree with Mrs. Dandachi and her son that, in these circumstances, concluding to an absence of likelihood of removal to Syria (and of undue hardship in that respect) does not sound reasonable. In the context of Canadian immigration and citizenship laws, the assessment of hardship is a forward-looking exercise. As a result, the IAD could not reasonably restrict its analysis to the hardship Mrs. Dandachi and her son might encounter at present, but needed to take full account

of all the relevant factors of the case, namely that a future removal from Qatar to Syria was probable. I am not persuaded that, in the circumstances of this case and in light of the evidence before the IAD, finding no undue hardship of going back to Syria "at present", and only acknowledging a "hardship of uncertainty", falls within the range of possible, acceptable outcomes.

[16] But there is a more fundamental problem with the IAD Decision.

[17] In the Decision, after having discussed the various factors and the evidence relating to each of them, including hardship, the IAD proceeded in the "Conclusion" portion of its reasons to its assessment and balancing of the various factors, qualifying each of them as negative or positive. It then determined that the negative factors surpassed and exceeded the positive ones.

[18] The problem is that nowhere in the IAD's "Conclusion" is there any reference to "hardship" even though that element was clearly identified earlier in the Decision as a "positive factor" favouring Mrs. Dandachi and her son. Nor is there any indication of any weight given to it in the IAD's assessment of "all the combined factors", despite the fact that the "hardship of uncertainty" was specifically identified by the IAD as a positive factor. While it was described as "not as important" as "undue hardship of going back to Syria" would be, there is no doubt that such hardship was distinctly singled out as a factor to consider in the case of Mrs. Dandachi and her son.

[19] At the hearing, counsel for the Minister indeed acknowledged that there was no reference to the "hardship" factor in the "Conclusion" section of the IAD Decision, where the IAD carried out its balancing exercise of the H&C grounds. I am thus left with a decision where, on its face, the IAD does not appear to have even considered its own finding of hardship in the balancing exercise it conducted. This omission is sufficient to render the Decision unreasonable and to put it well outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). As the Supreme Court restated in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 25, immigration officers making H&C determinations "must substantively consider and weigh *all* the relevant facts and factors before them".

[20] I acknowledge that a decision-maker is not required to refer to each and every detail supporting his or her conclusion. It is sufficient if the reasons permit the Court to understand why the decision was made and determine whether the conclusion falls within the range of possible, acceptable outcomes (*Newfoundland Nurses* at para 16). Under the reasonableness standard, the reasons are to be read as a whole, in conjunction with the record, in order to determine whether the reasons provide the justification, transparency and intelligibility required of a reasonable decision (*Dunsmuir* at para 47; *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 51-53). Similarly, it is not this Court's role to re-assess the evidence or the weight given to a particular element by a decision-maker in the exercise of its discretion.

[21] The IAD is even free to give no weight whatsoever to any of the *Ribic* factors. But when it has identified one factor as being relevant, as it did here with respect to hardship, it cannot ignore it in its balancing analysis.

[22] Under a reasonableness review, the Court's role is limited to "finding irrationality or arbitrariness of the sort that implicates our rule of law jurisdiction", such as the presence of illogic or irrationality in the fact-finding process or in the analysis, or the making of factual findings without any acceptable basis whatsoever (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99). But the standard of reasonableness requires that the findings and overall conclusion of a decision-maker withstand a somewhat probing examination. Where parts of the evidence are not considered or are misapprehended and where the findings do not follow from the evidence, a decision will not withstand the probing examination. This is the situation here.

[23] The IAD specifically acknowledged that the "hardship of uncertainty" is "not as important as it would be if the appellants had to go back to Syria". Yet, it did not even factor this less important hardship in its analysis of the positive and negative factors. The IAD had to consider the degree of hardship that would be caused to Mrs. Dandachi and her son by a return to their country of nationality, or country of removal, and had to take it into account. As the Supreme Court stated in *Chieu*, the IAD "must consider, first, whether there is a likely country of removal and, if so, whether any hardships the appellant could potentially face in that country are sufficient to alter the previous balance of relevant factors and thereby permit the appellant to remain in Canada" (*Chieu* at para 91). It failed to do so.

[24] As they stand, the conclusions of the IAD do not allow the parties or the Court to know how the hardship factor was considered and to appreciate why the Decision was made. In fact, the conclusions of the IAD rather indicate that this factor, which was far from being a peripheral point in the IAD analysis but instead stood at the very heart of the weighing exercise it had to conduct, was totally ignored by the decision-maker in its balancing of the positive and negative factors in order to determine if special relief should be granted to Mrs. Dandachi and her children. No matter what hardship may have been concerned, whether it is the hardship of uncertainty or the undue hardship of a potential removal to Syria, the IAD's conclusions are totally silent on this factor.

[25] I do not agree with the Minister that this is simply a disagreement as to the weight given to the evidence. It is rather a case where the decision-maker remained totally blind to a factor it had identified as relevant and which suddenly vanished from the ultimate balancing analysis leading to its conclusion that Mrs. Dandachi and her son had provided insufficient H&C grounds to be granted special relief under paragraph 67(1)(c) of IRPA. Such an erroneous analysis calls for the Court's intervention.

[26] It has been suggested that since *Newfoundland Nurses*, the Courts must show deference to the reasons of a decision-maker and that an alleged insufficiency of reasons is no longer a stand-alone basis for granting judicial review. However, *Newfoundland Nurses* and its progeny is not an invitation to the Courts to provide reasons that were not given, nor is it a licence to guess what findings might have been made or to speculate as to what a decision-maker might have been thinking (*Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at

para 11). Showing deference and giving respectful attention to the reasons offered in support of a decision of an administrative tribunal does not amount to a "'carte blanche' to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (*Alberta Teachers* at para 54, citing *Petro-Canada v British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para 56).

[27] In the circumstances of this case, I am not satisfied that the reasons of the IAD provide the justification, transparency and intelligibility required of a reasonable decision. Upon reading the IAD's conclusions, I have no way of knowing whether, when including the "positive" factor of hardship – even the somehow diminished one of "hardship of uncertainty" –, the IAD would have weighed the positive and negative factors differently, or whether the inclusion of the hardship element might have altered the balance of relevant factors and tilted it in favour of Mrs. Dandachi and her son.

[28] I am mindful of the fact that, by returning this matter to the IAD, the outcome of the balancing exercise could be the same after a new review is conducted and takes into account the hardship faced by Mrs. Dandachi and her son if removed from Canada. However, this is an assessment and a weighing exercise that the IAD, not the Court, has to conduct, and to which Mrs. Dandachi and her son are entitled in the decision regarding their appeal of the departure orders. Informed by these reasons of both the error committed by the IAD and the necessity to properly consider the issue of hardship, another panel might come to a different conclusion. I cannot say that the case leans so heavily against granting the appeals of Mrs. Dandachi and her son that sending the case back to IAD would serve no useful purpose (*Lemus v Canada*

(Citizenship and Immigration), 2014 FCA 114 at para 38). Quite the contrary. The hardship factor could well play a pivotal role in the balancing analysis of the IAD in this case.

V. Conclusion

[29] For the reasons detailed above, the application for judicial review filed by Mrs. Dandachi and her son must be allowed as the IAD Decision is unreasonable and does not represent a possible, acceptable outcome based on the law and the evidence presented before the IAD.

[30] Neither party has proposed a question of general importance for me to certify.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, without costs;

2. The January 19, 2016 decision of the Immigration Appeal Division dismissing the appeals of Mrs. Iman Dandachi and Mr. Abdulrazak Ezedeen is set aside;

3. The matter is referred back to the Immigration Appeal Division for re-determination on the merits by a differently constituted panel;

4. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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