Federal Court  Cour fédérale

Date: 20160812

Docket: IMM-321-16

Citation: 2016 FC 916

Ottawa, Ontario, August 12, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

SYEDA HAFSA IMRAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under s. 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] by Syeda Hafsa Imran [the Applicant] of a decision by the Immigration Appeal Division [IAD] dated December 17, 2015, dismissing the Applicant's sponsorship appeal for the Applicant's mother (Kausar Sultana), father (Habeeb Imran) and younger brother (Habeeb Furqan) (collectively the family members or the Applicants) [the Decision].

II. Facts

[2] The Applicant is Ms. Syeda Hafsa Imran, who applied to sponsor her mother, father and brother for permanent residence to Canada. The three family members currently live in India.

[3] The Applicant initially came to Canada in 2000 for her studies. She has since obtained permanent residence and gainful employment in Canada. The Applicant's older brother arrived in Canada around the same time and also obtained status in Canada. He is married and has an eight-year-old son.

[4] The mother and younger brother initially accompanied the Applicant when she moved to Canada. Their status expired. They argue this occurred due to their immigration consultant getting severely injured in an accident and failing to submit their materials on time. No complaints were filed. Then, allegedly following a new immigration consultant's advice, the mother and brother filed fraudulent claims for refugee status alleging domestic abuse. These were found, and they admit they were found correctly, to have no credible basis. Again, the mother and brother allege the immigration consultant's defective advice led them to make this unsupported claim. The mother and brother stayed in Canada. There is no evidence on the record of a complaint having been made against the immigration consultant(s) involved, which is generally required before this Court will consider such a complaint as a ground for judicial review: *Kim v Canada (Citizenship and Immigration)*, 2012 FC 687 (Shore J).

[5] The Applicant's father came to Canada in 2002 on a visitor visa. When the visa was about to expire, he made a refugee claim on the basis of his inability to practice his Muslim faith in India. Though found to be credible by the Officer, his claim was refused because of adequate state protection.

[6] Once the family members had all failed in their refugee claims, they applied for permanent residence on humanitarian and compassionate grounds in 2004. Meanwhile, departure orders became effective against the family members. The family had gainful employment in Canada.

[7] At this time, allegedly in preparation for a likely departure from Canada, the family members moved from their home and into an apartment rented under the Applicant's name. While living at the apartment, the family members were sent a notice to attend their PRRA. The family members claim never to have received the notice for the PRRA interview. The family members did not to attend their PRRA meeting; the PRRA claims were dismissed. Warrants were issued.

[8] In December 2007, CBSA officers attended the family apartment and arrested the mother, who was alone at home. The warrants against the brother and father were executed some days later. The mother returned to India within the week; the brother and father returned a bit later due to the need to renew their passports. The FOSS notes from the CBSA officers state that the mother was not cooperative during the arrest.

[9] The mother testified before the IAD of her version of the arrest, which contradicted in part the FOSS notes. In her testimony, she explained she was caught by surprise and was cooperative with the officers upon their attendance to her residence in 2007.

[10] When the Applicant sought to sponsor her family members, they were found inadmissible under section 52(1) of the *IRPA*. The family members sought an authorization to return to Canada (ARC), which was refused. There was no appeal of the inadmissibility finding. Only the refusal of the ARC request was on appeal before the Immigration Appeal Division.The IAD's refusal to allow their appeal of the ARC decision is before this Court on judicial review.

III. Decision

[11] The applicants were denied an authorization to return to Canada (ARC) after an inadmissibility finding pursuant to section 52 of the *IRPA*. After a hearing, the IAD dismissed the appeal of the decision to refuse special relief, on the grounds the applicants showed continuing disregard for Canada's laws and immigration processes, weighing heavily against granting them special relief pursuant to section 67(1)(c) of the *IRPA*. Additionally, there was little hardship experienced, and there were no compelling best interests of the child.

IV. Issues

[12] As stated by the Applicants, this Application raises the following issues: is the decision of the IAD reasonable and in particular did it err in relying on the FOSS notes of the arrest in 2007, and was the BIOC of the nephew/grandchild properly assessed.

V. Analysis

A. *Standard of Review*

[13] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." It is well known that findings of credibility by the IAD are judicially reviewed on the reasonableness standard: *Enright v Canada (Minister of Citizenship and Immigration)*, 2013 FC 209 at para 41.

[14] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

B. *Analysis*

Is the decision of the IAD reasonable and in particular did it err in relying on the FOSS notes of the arrest in 2007?

[15] In my view, the decision of the IAD is reasonable in this case as that term is considered in *Dunsmuir*. It considered and relied upon far more than the mother's cooperation or lack of

cooperation on her arrest in 2007. While no doubt that was a factor in the overall assessment by the IAD, and while it arises from a comment in the FOSS notes, it was not the only basis for the impugned Decision.

[16] First, to deal with the FOSS comment directly, in my view the IAD is entitled to accept what is stated by the arresting officer in the notes including the observation that the mother was not cooperative. The notes were prepared by the arresting officer contemporaneously with the arrest, unlike the mother's evidence which was based on her recollection of events 8 years earlier when she herself admitted to being under stress at the time the events took place. Contrary to what the Applicants allege, the IAD is given authority by Parliament by paragraph 175(1)(b) of *IRPA* to receive and base a decision on evidence that it considers to be credible and trustworthy in the circumstances – that is, the IAD need not follow strict rules of evidence, This is legislated as follows:

Proceedings	**Fonctionnement**
175 (1) The Immigration Appeal Division, in any proceeding before it,	**175 (1)** Dans toute affaire dont elle est saisie, la Section d'appel de l'immigration
(a) must, in the case of an appeal under subsection 63(4), hold a hearing;	**a)** dispose de l'appel formé au titre du paragraphe 63(4) par la tenue d'une audience;
(b) is not bound by any legal or technical rules of evidence; and	**b)** n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(c) may receive and base a decision on evidence adduced in the proceedings that it considers credible or	**c)** peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder

trustworthy in the circumstances.	sur eux sa décision.
[emphasis added]	[Je souligne.]

[17] That evidence may be tenuous; it is for the IAD and not this Court to decide the weight to be given to the evidence. The Federal Court of Appeal in *Balathavarajan v. Canada (Minister of Citizenship and Immigration)* 2006 FCA 340 [*Balathavarajan*] at paras 11 and 12 put it this way per Linden JA:

> [11] The appellant further argues that the Judge erred when she affirmed the IAD in its finding that he was a gang member, because it relied on unidentified informant evidence, which was incapable of being tested. It is argued that this was a denial of natural justice. This is in error. These are merely questions of fact and this Court will defer to the Federal Court Judge's decision in the absence of palpable and overriding error: *Housen, supra*, at para. 36.
>
> [12] Section 175 of the IRPA permits the IAD to receive and base a decision on evidence adduced in immigration proceedings that it considers to be credible and trustworthy in the circumstances. The evidence can sometime be tenuous and may include evidence of informants: *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, [2004] 3 F.C.R. 523 (T.D.), at para.107; aff'd, [2004] 3 F.C.R. 572 (C.A.). It is up to the IAD, not the Court to decide the weight to be given to the evidence.
>
> [emphasis added]

[18] The Applicants rely on *Du v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 485 at paras 11-14 [*Du]*, *Hoang v Canada (MCI)*, 2011 FC 545 and *Tharmavarathan v Canada (MCI)*, 2010 FC 985 at paras 18-19, 22-23. I raised the last two cases at the hearing and invited written submissions in that connection. Having considered the matter accordingly, in my respectful opinion these cases are distinguishable. They deal with the admissibility of FOSS or

CAIPS notes, that is, notes prepared by various officers, and do so in the context of a hearing before the Federal Court itself. The Federal Court is governed by the laws of evidence. These laws, however, do not apply to the IAD as I just explained. I therefore conclude that FOSS notes may be accepted into evidence before the IAD, and may be found by the IAD, as happened here, to be "credible or trustworthy in the circumstances", subject to the reasonableness of the decision as determined on subsequent judicial review by this Court.

[19] In addition, there were inconsistencies and other difficulties with the mother's evidence; for example her claim to difficulty with the English language is questionable given she attended university in India and had been examined in English, and that she had workplace experience requiring use of English. Further, the mother persisted before the IAD in casting blame for her situation on the consultant whom she testified was the "root" of their problems. The IAD properly noted this showed a lack of remorse, and a refusal to accept responsibility for her past misconduct, and it in effect reaffirmed in the present context a disrespect for Canada's immigration process. In this connection, it is worthwhile recalling that the mother participated in her own fraudulent refugee claim, and while now she says she did not misrepresent her situation, when confronted with her false refugee claim, the IAD was entitled to accept at a minimum that she wrongfully attested to the truth of her false PIF. This illustrates that her credibility was in issue concerning more than just her attitude on arrest: she filed a false refugee claim, it was rejected as having no credible basis, and indeed she had likely perjured herself at her refugee hearing.

[20] I do not make anything of the family's failure to attend at the PRRA meeting in 2007; it may have been that they did not get the notice.

[21] To summarize on the FOSS notes, they were properly admitted and considered by the IAD and it was for the IAD to weigh them in assessing credibility as it did. Credibility lies at the heartland of the jurisdiction of the IAD particularly where, as here, the IAD held a hearing. It is beyond doubt that the IAD is entitled to considerable deference in assessing credibility and in determining the weight of evidence, as noted by the Federal Court of Appeal in Balathavarajan. In my view, this aspect of the application involves a disagreement with the assessment of credibility and the weight of evidence. It is up to the IAD and not the Court to decide the weight to be given to the evidence.

C. *Also at issue is whether the IAD properly assessed BIOC of the nephew/grandchild*

[22] The Applicants allege the IAD erred in assessing the BIOC of the Applicant's nephew in Canada. The issue is whether and to what extent his interests may suffer in continuing to be separated from his grandparents and uncle, i.e., the family members sponsored by the Applicant. In my respectful view there is no merit in this submission. The IAD correctly noted the child had both parents in Canada, that there was no evidence of dependency between the child and either his grandparents or uncle in India, and there was no suggestion that the child had special needs relating to these relatives. The IAD also noted that while the child could not travel to India with his mother due to her medical condition, he could do so with his father and later by himself.

[23] I am asked to apply the two-part analysis requirement discussed in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166. I disagree. First, I see no need for any particular formulaic approach to the assessment of the best interests of a child to be super-added or glossed on to current practices. In any event, to the extent immigration authorities might be required to first define their terms and set out what is in the best interests of the child, which I find they need not do, the IAD met this test in this case. In my respectful view, BIOC was reasonably assessed by the IAD.

VI. Conclusion

[24] Judicial review is not a treasure hunt for error; even if it were, and I speak of the FOSS notes issue, I found no error in the IAD's acceptance or assessment of the evidence as "credible and trustworthy". Moreover, the decision on judicial review is to be reviewed as an organic whole, the question being whether the Decision falls within the permitted range of decisions that are possible, acceptable outcomes defensible in respect of the facts and law. In my view the IAD's decision falls well within this permitted range. Therefore this application must be dismissed.

[25] The Applicants proposed the following question be certified, while the Respondent opposed:

> In a best interests of the child analysis, is an Officer required first to explicitly establish what the child's best interests are, and then to establish the degree to which the child's interests are compromised by one potential decision over another, in order to show that the Officer has been alert, alive and sensitive to the best interests of the child?

[26] No question will be certified because as can be seen from the above, in my view the answer would not dispose of this application in the circumstances of this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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