Federal Court  Cour fédérale

Date: 20161021

Docket: IMM-1763-16

Citation: 2016 FC 1177

Ottawa, Ontario, October 21, 2016

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

KHALED ASHRAF NIZAMI
IMRANA KHALED NIZAMI

Respondents

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review from the Applicant pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, dated April 12, 2016, which granted the Respondents' appeal against departure orders issued following

their failure to comply with residency requirements of section 28 of the IRPA, based on humanitarian and compassionate grounds [H&C].

II. Facts

[2] The Respondents, aged 73 and 66, are citizens of Pakistan who lived and worked in Abu Dhabi, United Arab Emirates [UAE], since 1979. The male Respondent worked as an engineer and the female Respondent as a school teacher.

[3] The Respondents have three children. Their eldest daughter and their son are now Canadian citizens, and their youngest daughter is a permanent resident of Canada. They have three grandchildren in Canada, all Canadian citizens.

[4] In 2004, their eldest daughter sponsored the Respondents as permanent residents. They became permanent residents of Canada on July 12, 2005.

[5] Between 2005 and 2012, the male Respondent could not find work in Canada as a consultant in engineering. Furthermore, he would have had to take courses and exams in order to become member of the engineering association of Ontario. He decided to renew his employment in Abu Dhabi until June 30, 2012, which allowed him to pay for his son's university and to buy a house for his family in Ottawa. The female Respondent continued to teach in Abu Dhabi until she retired in 2009. They invested in housing and in mutual funds. They both visited Canada biannually.

[6] In 2012, the Respondents' permanent residencies were examined by immigration officers. On March 23 and November 30, 2012, the Respondents respectively stated having spent over two years in Canada during the five-year reference period. The stamps in their passports indicated the male Respondent had spent only 336 days in Canada and the female Respondent, only 267 days.

[7] Immigration officers determined that both Respondents had made false declarations and handled multiple passports. Criminal charges were commenced against them, to which they pleaded not guilty, and departure orders were issued against the Respondents.

III. Decision

[8] The IAD found that the clean hands principle had no application and that there were sufficient H&C considerations to warrant a special relief in the case of the Respondents. To reach this finding, the IAD considered various factors of the Respondents' situation: their continuing intention to return to Canada, their strong family ties, the best interest of their grandson Y.S., their involvement in the Ottawa community, their 37 years of absence from Pakistan, their regrets and apologies for their misrepresentations. The IAD decided that the extent of the Respondents' misconduct did not merit the loss of their permanent residency. In this case, the objective of reuniting families in Canada overcame the need to maintain the integrity of the immigration system.

[9] On April 12, 2016, the appeal was allowed and the removal orders against the Respondents set aside.

IV. Issues

[10] This matter raises the following issue:

Did the IAD err in its consideration of the Respondents' misconduct in its analysis of humanitarian and compassionate considerations?

[11] This issue should be reviewed on a standard of reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

V. Relevant provisions

[12] Paragraph 67(1)*c*) of the IRPA finds application in H&C considerations, in regard of the clean hands principle.

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
…	[…]
(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

VI. Submissions of the parties

A. *Applicant's submissions*

[13] The Applicant claims that the IAD made a reviewable error by failing to consider the Respondents' misconduct in its analysis of the H&C considerations. Underlining that the Respondents were charged under indictment rather than summary convictions, the Applicant also asserts that the IAD failed to consider relevant evidence, namely the seriousness of the Respondents' misrepresentations and of the charges they are facing. In doing so, the IAD erred in its application of the *Ribic* factors (*Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No. 636).

B. *Respondents' submissions*

[14] The Respondents argue that the IAD findings were reasonable. They suggest that the IAD fully took into account their misconduct as well as the charges against them. They highlight that they are to be presumed innocent and that no negative inference can be made from the existence of pending criminal charges.

VII. Analysis

[15] The Court has to determine if the IAD decision to set aside the removal orders against the Respondents, based on the H&C grounds, was reasonable. In other words, was the IAD's consideration of the Respondents' misconduct in accordance with the clean hands principle?

[16] As stressed by Justice Denis Gascon and Justice Henry S. Brown of our Court (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15; *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 at para 24), it is fundamental to reassert that H&C exemptions are exceptional and represent a discretionary remedy (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15), and should therefore only remain available for exceptional cases in order to avoid becoming an "alternative immigration stream or an appeal mechanism" (*Kanthasamy v Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61 at para 90). Thus, it remains essential to ensure the maintenance of the immigration system's integrity and to assure the respect of Canadian legislation as per the above jurisprudence.

[17] Consideration is to be given to the conduct of the permanent residency seeker:

> [8] Applying *Legault*, we are of the view that the Immigration Officer was authorized - indeed mandated when regard is had to the wording of subsection 25(1) of IRPA - to consider all relevant circumstances, including those surrounding the conduct of the appellant.
>
> (*Thiara v Canada (Citizenship and Immigration)*, 2008 FCA 151)

[18] The IAD may dismiss an appeal on the grounds of the Appellant's lies or misconduct:

> [9] In my view, the jurisprudence cited by the Minister does not support the proposition advanced in paragraph 23 of counsel's memorandum of fact and law that, "where it appears that an applicant has not come to the Court with clean hands, the Court must initially determine whether in fact the party has unclean hands, and if that is proven, the Court must refuse to hear or grant the application on its merits." Rather, the case law suggests that, if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief.

(*Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14)

[19] Therefore, the Court, further to consideration of the *Ribic* factors, has determined that this is a case which must be returned to the IAD for consideration anew by a differently constituted panel (*Wang v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1059, confirmed by *Wang v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 345).

[20] The charges as specified in this matter are deemed to be serious; thus necessitating recognition by the Court that the Respondents do not have clean hands (*Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326). This matter demonstrates that there are, therefore, serious reasons to consider the departure order of the Respondents as per an earlier decision in their regard by immigration officers, but that is for the differently constituted panel to decide.

[21] The Court finds that the IAD made a reviewable error in assessing the Respondents' misconduct in its analysis of H&C considerations. The IAD decision did not meet the reasonableness criteria.

VIII. Conclusion

[22] The application for judicial review is granted. The IAD decision is returned to a differently constituted panel for a decision anew.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the IAD decision be returned to a differently constituted panel for a decision anew. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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