Federal Court  Cour fédérale

Date: 20170215

Docket: IMM-3241-16

Citation: 2017 FC 191

Toronto, Ontario, February 15, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

NAVDEEP SINGH DHALIWAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant has applied for judicial review of a decision of the Immigration Appeal Division [IAD] dated July 8, 2016 [the Decision] upholding a visa officer's finding that the Applicant was ineligible to sponsor his parents and brother for permanent resident visas because he did not have the minimum necessary income [MNI] specified by the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR]. The IAD found that there were insufficient humanitarian and compassionate [H&C] grounds to warrant special relief. This application for

judicial review is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

I. **BACKGROUND**

[2] The Applicant was born in India, and is now a 35 year old Canadian citizen. He is married with a young son.

[3] The Applicant's parents are 63 and 60 years old. His brother is 28 years old. All three live in India. They will be described as the Family. They applied for permanent resident visas with the Applicant as their sponsor in 2008 [the Application]. In order to qualify as a sponsor at that time, the IRPR required the Applicant's MNI in the year prior to the Application, to be equal to or greater than the Low Income Cut-Off [LICO] for a family of five.

[4] The Applicant received a letter dated October 23, 2012 stating that he did not meet the MNI requirements. The letter indicated that the Application would be forwarded to a visa officer for final determination.

[5] Amendments to the IRPR came into force on January 1, 2014 which raised the MNI to 30% above the LICO for each of the three consecutive taxation years prior to the sponsorship application [the MNI Amendments].

[6] The Applicant and the Family received letters dated February 24, 2014 [the Refusal Letters], which confirmed that the Application had been rejected because the Applicant's income was less than $44,686, which was the LICO for a family of five in 2008.

A. The IAD Decision

[7] The Applicant's MNI at the time of his appeal to the IAD in 2016 was the LICO plus 30% for a family of six, because the Applicant's son had been born. The requirements were: $73,773 for 2015, $73,072 for 2014, and $71,991 for 2013.

[8] The Applicant provided a Notice of Assessment showing a total income of $76,337 for 2015 and a Notice of Re-assessment showing $75,708 for 2014. He also provided a Notice of Re-assessment dated May 12, 2014 [the Re-assessment] revising his total income for 2013, upward by 27% from $57,125 to $72,500.

[9] The IAD relied on the decision of Mr. Justice Rennie (now of the Federal Court of Appeal) in *Motala v Canada (Citizenship and Immigration)*, 2012 FC 123 [*Motala*] and declined to accept the Re-assessment at face value. The IAD was concerned about the reliability of the Re-assessment because the Applicant was self-employed and the Re-assessment was based on his self-reported income. As well, it was dated after the Notice of Appeal to the IAD and after the implementation of the MNI Amendments.

[10] Since the Applicant was unable to provide the reason for the increase in his income in 2013 and since his accountant was not called to testify, the IAD rejected the Applicant's explanation that his accountant had only recently alerted him to an error in his 2013 reported income. The IAD found it implausible that the Applicant could not explain the reason for the

large increase. The Panel was not satisfied that the Applicant's income for 2013 was $72,500 instead of $57,125 as first assessed.

[11] The IAD also noted that the lower figure for 2013 was consistent with income reported for 2009 to 2012 in the Application. The IAD concluded on a balance of probabilities that the Applicant had not remedied the problem identified in the Refusal Letters. In other words, his income for 2013 was over-stated and he still did not meet the MNI requirement for that year. He was therefore required to satisfy the threshold for H&C relief based on hardship, established in *Chirwa v Canada* (*Minister of Citizenship and Immigration*) (1970), 41 AC 338 [*Chirwa*]. The relevant passage is found in paragraph 13. It reads:

> …humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act"…

[12] Turning to the H&C considerations, the IAD noted that the Applicant is well established in Canada. He is also close to his Family and is expected for cultural reasons to care for his aging parents.

[13] The IAD reviewed the Family's situation and found that there was "no evidence of undue hardship" should the Application fail. Other than the Applicant, the Family's only tie to Canada, is the father's sister in Vancouver. The IAD noted that the Family has always resided in India. The IAD noted that differing levels of income and economic development do not usually constitute "undue hardship for the purpose of discretionary relief in such cases."

[14] The IAD rejected the Applicant's father's explanation that he had not visited Canada because he had to care for his adult son in India. The IAD inferred that the father "is not at all interested in visiting…[the Applicant]… in Canada." The IAD noted that the parents had successfully obtained visitor's visas to Canada and would likely qualify for a longer term "super visa."

[15] The IAD also noted that although they were likely available, no one from the Family had been called to testify about any hardships they might face if the Application were to be refused.

[16] Lastly, the IAD found it "doubtful that [the Applicant's Canadian-born son] had much interaction or significant emotional bonds with his grandparents in India." The IAD said:

> There is no evidence that any harm or undue hardship will result to this child if the applicants are not granted permanent residence in Canada. While the applicants may assist with childcare if they are here, this is more of an issue of convenience and not usually considered an undue hardship.

[17] The IAD was satisfied that the visa officer's decision was valid in law and concluded that the Applicant had failed to adduce "clear, cogent and convincing" evidence to meet the *Chirwa* threshold. Taking into account the BIOC, the IAD found that insufficient H&C grounds existed to justify special relief.

II. **ISSUES**

i. The Re-assessment - Did the IAD err by refusing to accept the Applicant's 2013 Notice of Re-assessment as proof of income, thereby concluding that he still had

not met the MNI for 2013 and therefore holding him to the *Chirwa* test for discretionary relief rather than the more lenient standard set out in *Jugpall v Canada (Minister of Citizenship and Immigration Canada)* [1999] IADD No. 600 [*Jugpall*]?

ii. The BOIC - Did the IAD err by requiring the Applicant to demonstrate harm or undue hardship to his Canadian-born son?

III. **STANDARD OF REVIEW**

[18] The parties agree that the Decision is reviewable on a reasonableness standard.

IV. **DISCUSSION AND CONCLUSIONS**

B. Issue I (The Re-assessment)

[19] When a visa officer considers a sponsorship application and determines whether the Applicant meets the MNI, the IRPR currently provides that the sponsor's income for that purpose is the income that is shown on Notices of Assessment for the three consecutive taxation years prior to filing the sponsorship application. The applicable portions of IRPR 134 [the Regulation] read as follows:

(1.1) Subject to subsection (3), for the purpose of clause 133(1)(j)(i)(B), the sponsor's total income shall be calculated in accordance with the following rules:	(1.1) Sous réserve du paragraphe (3) et pour l'application de la division 133(1)j)(i)(B), le revenu total du répondant est calculé selon les règles suivantes :
(a) the sponsor's income shall be calculated on the basis of	a) le calcul du revenu du répondant se fait sur la base

the income earned as reported in the notices of assessment, or an equivalent document, issued by the Minister of National Revenue in respect of each of the three consecutive taxation years immediately preceding the date of filing of the sponsorship application;	des avis de cotisation qui lui ont été délivrés par le ministre du Revenu national à l'égard de chacune des trois années d'imposition consécutives précédant la date de dépôt de la demande de parrainage, ou de tout document équivalent délivré par celui-ci;
(b) the sponsor's income is the income earned as reported in the documents referred to in paragraph (a), not including…	b) son revenu équivaut alors à la somme indiquée sur les documents visés à l'alinéa a), exclusion faite de ce qui suit…
[Emphasis added.]	[Je souligne.]

[20] The parties agree that a visa officer is bound by the Regulation and must accept a Notice of Assessment as proof of income when a sponsorship application is filed. However, they disagree about whether the Regulation binds the IAD on an appeal from a sponsorship refusal.

[21] The Applicant says that, although the Regulation speaks only of the three tax years before a sponsorship application is filed, it should be read to apply to an appeal before the IAD as well. He says that appeals are essentially *de novo* sponsorship applications and that in this case, because it reviewed the 2013, 2014 and 2015 taxation years, the IAD was in fact considering the Applicant's application as if it had been made in 2016. The Applicant says that, if the MNI requirements are met by the income stated on Notices of Assessment, the intent of Parliament as expressed in the IRPR means that the IAD has no discretion under section 67 (1) (c) of the IRPA to question the genuineness of that income.

[22] The Applicant says that this means that the IAD was bound to accept the income the Canada Revenue Agency stated on the Re-assessment. That being the case, the Applicant's position is that the more lenient *Jugpall* standard should have been applied on the H&C review, because the Applicant had remedied the problem that caused the Refusal Letters in that he had met the MNI requirements for 2015, 2014 and 2013.

[23] The Applicant also argues that the IAD erred when it relied on *Motala*. He says that *Motala* was wrongly decided because Mr. Justice Rennie relied on the Federal Court's decision in *Chahal v Canada (Citizenship and Immigration)*, 2007 FC 953 [*Chahal*] when it was not, in fact, a precedent.

[24] When *Chahal* and *Motala* were decided in September 2007 and February 2012 respectively, the calculation of an Applicant's income for the purposes of the MNI was not based only on Notices of Assessment. Regulation 134 then said in part:

134 (1) Subject to subsection (3), for the purpose of clause 133(1)(j)(i)(A), the sponsor's total income shall be calculated in accordance with the following rules:	**134 (1)** Sous réserve du paragraphe (3) et pour l'application de la division 133(1)j)(i)(A), le revenu total du répondant est calculé selon les règles suivantes:
(a) the sponsor's income shall be calculated on the basis of the last notice of assessment, or an equivalent document, issued by the Minister of National Revenue in respect of the most recent taxation year preceding the date of filing of the sponsorship application;	**a)** le calcul du revenu se fait sur la base du dernier avis de cotisation qui lui a été délivré par le ministre du Revenu national avant la date de dépôt de la demande de parrainage, à l'égard de l'année d'imposition la plus récente, ou tout document équivalent délivré par celui-ci;
(b) if the sponsor produces a	**b)** si le répondant produit un

document referred to in paragraph (a), the sponsor's income is the income earned as reported in that document less the amounts referred to in subparagraphs (c)(i) to (v);	document visé à l'alinéa a), son revenu équivaut à la différence entre la somme indiquée sur ce document et les sommes visées aux sous-alinéas c)(i) à (v);
(c) if the sponsor does not produce a document referred to in paragraph (a), or if the sponsor's income as calculated under paragraph (b) is less than their minimum necessary income, the sponsor's Canadian income for the 12-month period preceding the date of filing of the sponsorship application is the income earned by the sponsor not including	**c)** si le répondant ne produit pas de document visé à l'alinéa a) ou si son revenu calculé conformément à l'alinéa b) est inférieur à son revenu vital minimum, son revenu correspond à l'ensemble de ses revenus canadiens gagnés au cours des douze mois précédant la date du dépôt de la demande de parrainage, exclusion faite de ce qui suit:
(i) …	**(i)** …
(ii) …	**(ii)** …
(iii) …	**(iii)** …
(iv) …	**(iv)** …
(v) …	**(v)** …
(vi) …	**(vi)** …
(d) …	**d)** …

[25] *Chahal* was a judicial review of a visa officer's refusal of a sponsorship application. The case did not concern the IAD. As noted above, at the time *Chahal* was decided, Regulation 134 (1) (c) said that income could be calculated by a visa officer based on reliable financial documents, if, as was the situation in *Chahal*, the Notice of Assessment did not disclose an income that met the MNI. In *Chahal* the sponsorship applicant provided his Notices of Assessment but said that he had also provided a Statement of Business Activities [the Statement]

to show how his income was earned. It allegedly showed that all his earnings were in the final 6 months of the year.

[26] There was an issue in *Chahal* about whether the Statement had in fact been provided. As well, the Applicant did not tell the Visa Officer that he required a calculation to prorate his income over 6 rather than 12 months. The Officer therefor relied only on the income in the Notices of Assessment and assumed it was earned evenly and monthly. However, when the calculation was done on this basis, the Applicant's income did not meet the MNI. The question then was whether the Applicant's other documents should have been considered.

[27] In addition to the Statement (which the Court found had never been produced), the Applicant in *Chahal* provided an unsubstantiated Statement of Income for a six month period which showed an amount that did not appear reasonable and was not explained. The Statement of Income was therefore ignored and the income was calculated based only on the Notices of Assessment.

[28] Accordingly, in *Chahal*, the issue was not whether the Officer could look at documents other than the Notices of Assessment. It was clear under the IRPR at the time that they could be considered in the circumstances of that case. The issue was whether the Officer had considered those other documents adequately.

[29] The Court ruled as follows:

> If a sponsor is proposing a different methodology and seeks to rely upon source documents other than Notices of Assessment issued

> by the CRA, he carries the burden of establishing the reliability of the evidence and for explaining how it ought to be applied to the calculation.

[30] For these reasons, *Chahal* does not stand for the proposition that the IAD can reject or look behind a Notice of Assessment and it therefore did not serve as a precedent for *Motala*.

[31] *Motala* was a judicial review of an IAD decision. In *Motala,* no secondary documents were provided as proof of income. The IAD was considering only Notices of Assessment under IRPR 134 (1) (a) and was concerned, as in the present case, that self-reported income was overstated. The IAD deducted the income it decided was not genuine and as a result, the Applicant did not meet the MNI. The Applicant said that the IAD had no jurisdiction to "go behind" the Notice of Assessment and was required by the Regulation to accept it as proof of income under 134 (1) (a).

[32] In *Motala* at paragraph 22, the Court concluded that as a consequence of its discretionary power, the IAD had authority to "question the accuracy and veracity of certain financial documents submitted in support of sponsorship applications and to assign relative and proportionate evidentiary weight to them."

[33] Since the issue in *Motala* was whether the IAD was entitled to reject self-reported income on a Notice of Assessment, the Court's reference to "certain financial documents" must be understood to encompass Notices of Assessment.

[34] Accordingly, although I agree with the Applicant that *Chahal* was not an applicable precedent for *Motala*, I am satisfied nevertheless that *Motala* was rightly decided.

[35] I say this because the jurisdiction of the IAD is set out in section 67 (1) (c) of the IRPA. It reads:

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.

[36] In *Jugpall*, the IAD said in paragraph 34 that "The exercise of the Appeal Division's statutory discretion must be carried out in such a way as to ensure the integrity of the Act is preserved and appellants are also treated fairly".

[37] Turning to the case at bar, it is my conclusion that under the current Regulation, a visa officer must accept the income on Notices of Assessment at the application stage. However I agree with the Respondent that the Regulation does not apply at the IAD. The Regulation only mandates the use of Notices of Assessment at the time the application is filed, and although the appeal is a *de novo* hearing of application, the appeal is not held when the application is filed.

The IAD's policy of using 3 years of Notices of Assessment to determine income, respects the integrity of the Act and Regulations, but in my view, that policy decision does not create a new filing date and does not diminish the broad discretion to consider all the circumstances granted to the IAD in section 67 of the IRPA. It was open to Parliament to limit the IAD's discretion by saying that Notices of Assessment "shall" be income on appeal. However, that wording is not in the Regulation.

[38] As the Respondent argues and as Mr. Justice Rennie notes in *Motala*, the integrity of the Act also requires the IAD to consider whether self-reported income from self-employment is fairly stated. This is of concern because sponsorships should not be approved when an applicant cannot bear the cost.

[39] In my view on the facts of this case, *Motala* is an applicable precedent and the IAD was entitled to rely on it and "look behind" the Re-assessment.

C. Issue II (The BOIC)

[40] This issue was raised as a new argument in the Applicant's further memorandum which was filed after leave was granted. Since it is not based on facts which were unknown at the leave stage and since it is unrelated to the issue on which leave was granted, the Respondent says it should not be considered. This submission is based on two of the factors listed by Madam Justice Dawson (now of the Federal Court of Appeal) in *Al Mansuri v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 22 at para 12.

[41] Madam Justice Dawson also indicated that delay and prejudice and the strength of the new argument should be considered. In my view, adding the BOIC issue cannot be said to cause delay or prejudice. I turn then to, the strength of the proposed argument.

[42] The IAD said the following about the Applicant's son:

> The appellant does have a Canadian born son who is a toddler. It is doubtful he has much interaction or significant emotional bonds with his grandparents in India. This is no different than the situation with this child's maternal grandmother who resides in California. There is no evidence that any harm or undue hardship will result to this child if the applicants are not granted permanent residence. While the applicants may assist with childcare if they are here, this is more of an issue of convenience and not usually considered an undue hardship.

[43] In my view, the use of the term "hardship" alone does not vitiate an analysis which was reasonably directed to the appropriate issue, which was whether there was any dependency between the Applicant's son and his grandparents. Having heard the Applicant's submissions, I concluded that the argument against the BOIC analysis was weak and agreed with the Respondent that the issue should not be addressed.

[44] Accordingly, I will not further consider the BOIC.

V. **CONCLUSION**

[45] For all these reasons the application will be dismissed.

VI. **CERTIFICATION**

[46] The Applicant asks me to certify the question that was certified in *Motala*. It reads:

> Is the Appeal Division of the Immigration and Refugee Board of Canada, in hearing an appeal from a decision of a Visa Officer dismissing an application to sponsor family members, bound to accept as conclusive the income as reported in the applicant's Notice of Assessment, by Regulation 134 of the Immigration and Refugee Protection Regulations (SOR/2002-227)?

[47] The Respondent opposes certification on the basis that *Motala* has been followed in numerous cases, and the question therefore no longer meets the test for certification.

[48] I am persuaded that the question is not a serious question of general importance. Accordingly, certification is refused.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is hereby dismissed.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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