Federal Court  Cour fédérale

Date: 20170724

Docket: IMM-475-17

Citation: 2017 FC 716

Ottawa, Ontario, July 24, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

AKRAM BOUSALEH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Akram Bousaleh seeks judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board. The IAD dismissed his appeal of a refusal by Citizenship and Immigration Canada [CIC] to grant his brother's application for permanent residence pursuant to s 117(1)(*h*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[2] For the reasons that follow, the IAD's interpretation of s 117(1)(*h*) of the Regulations and the application of that provision to the facts of Mr. Bousaleh's case were reasonable. The approach adopted by the IAD is consistent with the plain language of s 117(1)(*h*), and is supported by the decisions of this Court in *Jordano v Canada (Citizenship and Immigration)*, 2013 FC 1143 [*Jordano*] and *Sendwa v Canada (Citizenship and Immigration)*, 2016 FC 216 [*Sendwa*].

[3] The application for judicial review is therefore dismissed. Given the significance and importance of the issues raised in this case, a question is certified for appeal.

II. Background

[4] Mr. Bousaleh is a Canadian citizen who has no relatives in Canada. In December 2015, he applied to sponsor his brother, Haissam Bou Saleh [Haissam], a citizen of Lebanon, for permanent residence under s 117(1)(*h*) of the Regulations.

[5] In January 2016, the CIC Case Processing Centre in Mississauga informed Mr. Bousaleh that he was not eligible to sponsor his brother. Paragraph 117(1)(*h*) of the Regulations permits the sponsorship of a relative only if the sponsor has no immediate relatives, such as a father or mother, who may otherwise be sponsored. At the time of the sponsorship application, Mr. Bousaleh's father and mother were both still alive and living in Lebanon, and he therefore did not meet the requirements of s 130(1)(*c*) of the Regulations.

[6] The CIC Case Processing Centre nevertheless forwarded the sponsorship application to the Canadian Consulate General in Beirut for decision. In June 2014, the Consulate sent Hassaim a procedural fairness letter advising him that he was ineligible for sponsorship, but inviting him to apply for permanent residence on humanitarian and compassionate [H&C] grounds.

[7] Counsel for Mr. Bousaleh and Hassaim declined to make submissions on H&C grounds, asserting that Mr. Bousaleh's presumed ability to sponsor his parents was "illusory". Counsel argued that the parents' medical conditions rendered them inadmissible to Canada, and Mr. Bousaleh could not sponsor them even if he wanted to. Counsel asked the Consulate to reconsider the decision regarding Mr. Bousaleh's eligibility to sponsor Hassaim, taking into account their parents' inadmissibility.

[8] In September 2016, the Consulate rejected the sponsorship application on the ground that Mr. Bousaleh had a mother and father in Lebanon whom he was eligible to sponsor. Furthermore, the Consulate was not satisfied that the parents would be inadmissible, given that they had never been examined by a CIC-approved physician for the purposes of immigration.

[9] Mr. Bousaleh's father died shortly after the sponsorship application was refused. Mr. Bousaleh requested reconsideration of the application. The Consulate confirmed its refusal, advising Haissam as follows:

> This does not change the fact that your sponsor may sponsor his mother, who is still living, under the provisions of IRPR 117(1)(f). Therefore, you remain ineligible for permanent residence pursuant to IRPR 117(1)(h), as a relative of a sponsor who does not have a relative who is a Canadian citizen or permanent resident, or sponsorable relative.

[10] Mr. Bousaleh appealed the decision of the Consulate to the IAD.

III. Decision under Review

[11] Before the IAD, Mr. Bousaleh argued that if he applied to sponsor his mother, she would likely be found inadmissible to Canada due to her poor health. Even if she were found to be admissible, she would be unable to travel given the medical advice of her doctor. Citing the decision of Justice Michel Shore in *Sendwa*, Mr. Bousaleh argued that the IAD was obliged to consider not only whether his parents were alive, but also whether Mr. Bousaleh would "even be eligible or in a position" to sponsor his mother.

[12] The IAD acknowledged that in *Sendwa*, Justice Shore overturned a decision of the IAD because the tribunal had failed to consider whether the appellant would be eligible to sponsor her parents. The appellant in *Sendwa* maintained that she was ineligible to sponsor her parents due to her limited financial resources. She sought instead to sponsor her niece, for whom the financial eligibility requirements were less stringent.

[13] The IAD found that Mr. Bousaleh's argument was different: he did not dispute his eligibility to sponsor his mother; rather, he said that his mother was unlikely to be admissible due to her poor health. The IAD concluded that the question of the mother's admissibility was separate and apart from the question of Mr. Bousaleh's eligibility to sponsor her (citing *Sendwa* at para 19).

[14] The IAD concluded that Mr. Bousaleh was eligible to sponsor his mother, and he was therefore ineligible to sponsor another family member under s 117(1)(*h*) of the Regulations. According to the IAD, if Parliament had intended to make a family member's admissibility a consideration in respect of the eligibility to sponsor, it would have stated this in s 133.

IV. Issue

[15] The sole issue raised by this application for judicial review is whether the IAD's interpretation of s 117(1)(*h*) of the Regulations was reasonable.

V. Analysis

[16] The IAD's interpretation of s 117(1)(*h*) of the Regulations is subject to review by this Court against the standard of reasonableness (*B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 para 25 [*B010*]; *Sendwa* at para 13). The Court will intervene only if the IAD's decision falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[17] However, because the IAD was engaged in statutory interpretation, the range of reasonable outcomes may be narrow (*Canada (Attorney General) v Canadian Human Rights Commission*, 2013 FCA 75 at paras 13-15).

[18] Subparagraph 117(1)(*h*) of the Regulations provides in the relevant part:

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117 (1)** Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les

[…]	étrangers suivants : […]
(h) a relative of the sponsor […] if the sponsor does not have a […] mother or father […]	**h)** tout autre membre de sa parenté, […] à défaut […] de parents […]
(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.	**(ii)** soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

[19] Mr. Bousaleh says that the term "mother or father" is ambiguous: it is unclear whether this describes a biological or legal relationship, or whether a more qualitative analysis is required. He asks whether an individual who was estranged from his parents and had no other relatives in Canada would be denied recourse to s 117(1)(*h*) of the Regulations.

[20] More germane to this case, Mr. Bousaleh says that the term "may otherwise sponsor" is ambiguous: it is unclear whether this requires consideration of the parents' (or other immediate relatives') admissibility to Canada, or only whether the sponsor is technically eligible to sponsor them.

[21] Mr. Bousaleh notes that one objective of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] is family reunification (IRPA, s 3(1)(*d*)). He says that the interpretation of s 117(1)(*h*) of the Regulations favoured by the IAD may tend to frustrate this objective, and is therefore inconsistent with s 12 of the *Interpretation Act*, RSC 1985, c I-21:

12 Every enactment is deemed remedial, and shall be given	**12** Tout texte est censé apporter une solution de droit

such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[22] Furthermore, Mr. Bousaleh says that s 117(1)(*h*) of the Regulations is benefit-conferring legislation, and should therefore be interpreted in a broad and generous manner (citing *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 36).

[23] In *Jordano*, Justice Peter Annis held that s 117(1)(*h*) of the Regulations "is intended to provide for sponsorship by persons who do not have family members, such as persons who are orphans or do not have the more common relations described in other paragraphs of section 117(1), i.e., spouses, dependent children, parents and grandparents" (para 3). He continued at paragraph 4:

> [4] Normally, applications cannot be made pursuant to paragraph 117(1)(*h*) when the possibility of sponsoring parents is otherwise available under paragraph 117(1)(*c*), because by subparagraph 117(1)(*h*)(ii) recourse may not be had to the provision if the "sponsor may otherwise sponsor" the individual to Canada …

[24] Justice Annis observed at paragraph 9 of *Jordano* that the purpose of the provision is to "favour persons who do not have relations in Canada and have no possibility to sponsor any relations under other provisions."

[25] As noted by the IAD, Justice Shore found in *Sendwa* that the IAD had wrongly read s 117(1)(*h*)(ii) from the perspective of the foreign national, and not from the perspective of the sponsor:

> [19] Secondly, a plain reading of the French and English language versions of subparagraph 117(1)(*h*)(ii) of the IRPR speaks of the capability of an applicant to sponsor a foreign national's application to enter Canada; neither versions speak of the possible admissibility of a foreign national; nor do they speak of the foreign national's ability to be sponsored: …

[26] Justice Shore concluded that, because the IAD did not consider whether the applicant "would (even) be eligible (or in position) to sponsor her parents," but simply rejected the application because her parents were alive, its decision was unreasonable (*Sendwa* at para 21).

[27] In this case, the IAD interpreted and applied s 117(1)(*h*) of the Regulations as follows:

> [17] Had Parliament intended to make an applicant's condition of admissibility a consideration in respect of the eligibility to sponsor it would have said so in section 133. What it does say is that in consideration of person's [*sic*] eligibility for membership in the family class under section 117 of the *Regulations*, in cases where an eligible sponsor has no family members who are otherwise sponsorable under subsections 117(1)(a-g) they are able to sponsor a family member under sub-section (117(1)(h).
>
> [18] Clearly the appellant satisfies the objective criteria under sections 130 and 133 of the *Regulations* and therefore he is eligible to sponsor persons capable of being sponsored as members of the family class under subsection 117(1)(a-g) of the *Regulations*; and this includes his mother, her health condition notwithstanding.
>
> [19] Therefore since the appellant is otherwise able to sponsor his mother he may not sponsor a family member under subsection 117(1)(h) of the *Regulations*. The panel will therefore dismiss the appeal.

[28] I can find nothing unreasonable in the IAD's interpretation of s 117(1)(*h*) of the Regulations or its application of that provision to the facts of Mr. Bousaleh's case. The approach adopted by the IAD is consistent with the plain language of s 117(1)(*h*), and is supported by the decisions of this Court in *Jordano* (at paras 4 and 9) and *Sendwa* (at para 19). The words "whose

application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor" are clearly directed towards the sponsor in Canada, not the foreign national abroad. In the words of Justice Shore, neither the French or English versions of the provision "speak of the possible admissibility of a foreign national; nor do they speak of the foreign national's ability to be sponsored."

[29] The doctrine of comity compels me to follow the Court's prior decisions in *Jordano* and *Sendwa* unless the facts differ, a different question is asked, the decisions are clearly wrong, or the application of the decisions would create an injustice (*Alyafi v Canada (Citizenship and Immigration)*, 2014 FC 952 at para 45). While the Respondent expressed some reservations regarding this Court's analysis in *Sendwa*, neither party suggested that the previous jurisprudence regarding the interpretation of s 117(1)(*h*) of the Regulations should not be applied in this case. The availability of relief on H&C grounds moderates any injustice that may result from a strict application of s 117(1)(*h*) of the Regulations.

[30] Nevertheless, Mr. Bousaleh's arguments raise valid questions from a policy perspective. As this Court has previously noted, a strict reading of s 117(1)(*h*) of the Regulations may lead to harsh results (*Sendwa* at para 11). Is it reasonable to require a citizen with no relatives in Canada to sponsor an estranged parent before he or she may sponsor a close sibling? Is it reasonable to require a citizen with no relatives in Canada to sponsor a parent who is almost certainly inadmissible or who cannot realistically travel to Canada before he or she may sponsor a brother?

[31] The Respondent argues that unusual and difficult circumstances, such as the ones that arise in this case, are well-suited to consideration on H&C grounds. While Mr. Bousaleh objects that H&C determinations are highly discretionary, I agree with the Respondent that this is the scheme mandated by Parliament. Any change to the scheme is a matter for Parliament, not the courts.

VI. Conclusion

[32] The application for judicial review is dismissed.

[33] The parties agree, particularly in light of *Sendwa*, that this Court ought to certify a question for appeal regarding the interpretation of s 117(1)(*h*) of the Regulations. I am satisfied that the answer to this question would be dispositive of the appeal, transcends the interests of the parties, is of broad significance or general importance, has been dealt with by the Court in these reasons and arises from the case itself (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 35-36).

[34] I therefore certify the following question for appeal:

> Does determination of a person's eligibility to sponsor a relative under s 117(1)(*h*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 require consideration of whether an application to sponsor a person enumerated in s 117(1)(*h*) has a reasonable prospect of success?

[35] In light of the recent appointment of the former Deputy Attorney General of Canada as a judge of this Court, the solicitor of record for the Respondent is changed to the Attorney General of Canada.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The following question is certified for appeal:

> Does determination of a person's eligibility to sponsor a relative under s 117(1)(*h*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 require consideration of whether an application to sponsor a person enumerated in s 117(1)(*h*) has a reasonable prospect of success?

3. The solicitor of record for the Respondent is changed to the Attorney General of Canada.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Nikolay Y. Chsherbinin	FOR THE APPLICANT
Alexis Singer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Chsherbinin Litigation Professional Corporation Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT