Federal Court Cour fédérale

Date: 20180201

Docket: IMM-3648-17

Citation: 2018 FC 110

Ottawa, Ontario, February 1, 2018

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

SARABJIT SINGH MOMI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This application for judicial review challenges a decision of the Immigration Appeal Division of the Immigration Refugee Board [IAD] rendered on July 26, 2017.

[2] The Applicant, Sarabjit Singh Momi [Mr. Momi], argues that the IAD erred when it denied his appeal from a refusal of a sponsored application to admit his father, Sukhdev Singh [Mr. Singh], and mother, Satinder Kaur Momi, as permanent residents.

[3] When Mr. Momi applied to sponsor his parents in 2005, he was told that his father was inadmissible because he had been the subject of an earlier enforced removal order. This impediment could be removed if Mr. Singh obtained an authorization to return to Canada [ARC]. However, when Mr. Singh applied for an ARC, it was refused. This refusal, in turn, led to the refusal of Mr. Momi's sponsorship application on May 26, 2014. It was from this decision that Mr. Momi appealed to the IAD on humanitarian and compassionate grounds. In addition, Mr. Momi complained that the ARC process was unfair such that the ARC refusal should be set aside.

[4] The IAD accepted that it had the jurisdiction to determine whether the ARC refusal decision was valid to the extent only that an ARC was legally required and that the process followed was fair. The IAD did not, however, assume a jurisdiction to consider the ARC refusal decision on its merits. The IAD dismissed Mr. Momi's procedural fairness argument for the following reasons:

> [22] Global Case Management System ("GCMS") Note 16, states that an "ARC interview [is] to be scheduled." Note 8, states that "Interview call-in letter dated 05 February 2014 sent to applicant's consultant at e-mail ID 'pjoshi.law@gmail.com' for 20 March 2014 at 09:30 hrs. at New Delhi." In the letter, the interview is described as "concerning your application for permanent residence in Canada." While it is unfortunate that a specific reference was not made in the letter that the interview would focus on the ARC application, I find it likely, on a balance of probabilities, that the applicant knew – or could reasonably be expected to have known – that questions regarding his ARC application would arise during the interview. There is no evidence before me to show that the applicant raised this concern contemporaneously – as would have been expected if he had been caught "off guard." I see no reason to find that the visa office inadvertently or intentionally failed to communicate to the appellant that the ARC would be discussed at the 19 March 2014 interview.

…

> [25] I am satisfied that the notes found on pages 2-3 of Exhibit R1 demonstrate that while all the factors identified in the OP-l manual may not have been addressed, there was a reasonable and fair attempt by the visa officer to adduce relevant information upon which to base his or her determination.
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> [26] On balance, I find that while the refusal documentation in this case is not perfect, it need not be perfect for the process to be found to have been conducted fairly. It is not the conclusion the appellant had hoped for, of course, but when weighed on a balance of probabilities, I find the refusal is legally valid.
>
> [Footnotes omitted.]

[5] The IAD then proceeded to consider the case for humanitarian and compassionate relief. In the exercise of that discretion, it observed that Mr. Singh's immigration lapses were not criminal in nature but, nevertheless, exhibited a willingness "to flout Canada's laws, seemingly without much second thought".[1] That history of misconduct was weighed against the benefit of family reunification. The IAD noted that the only minor children in the family lived in England and that no special family circumstances had been shown that could not be met through a temporary travel visa. The IAD summed up its humanitarian analysis as follows:

> [34] The evidence and argument presented by the appellant lead me to find that dismissing this appeal would more likely lead to a *lost opportunity or disappointment* rather than to any real hardship to the appellant and his family. The potential consequences of a family being unable to reunite in Canada is not, in and of itself, evidence of the kind of misfortune referred to in *Chirwa*.
>
> [35] I am also required to consider my decision within the context of the *Act*'s overall objectives, one of which is to promote the reunification of family members in Canada. In the case at bar, however, allowing the appeal would on one hand unite the appellant with his parents while, on the other hand, separating them from family in India and the UK. I find that it cannot he said conclusively that a weighty reason to allow this appeal would be

[1] In the absence of documentary evidence, the IAD discounted the weight of Mr. Singh's testimony that he had quickly and covertly left Canada after being ordered to leave.

> family reunification in Canada. In my view, the family would <u>not</u> be unified in Canada if the appeal allowed.
>
> [36] The appellant and his wife do not have any minor (or adult children and the applicant's children are fully grown. The only aspect of this case where the best interests of a child might be relevant is with respect to the appellant's grandchildren. These children live in England, however, and would be closer to their grandparents if the latter were living in India than in Canada.
>
> [37] On balance, I find that while there are some positive factors before me, there is simply not enough evidence to cause me to grant the relief afforded to the IAD by s. 67 of the *Act*.

[6] Counsel for Mr. Momi contends that the IAD erred by finding that his father was not a member of the family class under subsection 12(1) of the *Immigration and Refugee Protection Act* [*IRPA*]. That argument is untenable because the impugned statement in the IAD's reasons is clearly a typographical error. It was never disputed that Mr. Momi is the son of Mr. Singh—a fact that is acknowledged in paragraphs 1 and 4 of the IAD's reasons. Furthermore, if there was no family relationship, the IAD had no basis to subsequently resolve the appeal on its merits: see section 65 of the *IRPA*.

[7] Mr. Momi's principal argument is that the IAD failed to determine if the decision to deny an ARC to his father was "correctly made" and to "consider the significance of the ARC refusal". An appropriate assessment of these issues, he says, required the IAD to consider the factors set out in Article 6 of the OP1 Procedures Manual. Mr. Momi's Memorandum of Argument articulates this concern in the following way:

> The Board did not engage itself on doing its own analysis of the facts and evidence as to whether or not to allow [Mr. Singh's] ARC application. As stated above and confirmed by the Honourable Court in the numerous decisions the hearing before the Board is a de novo hearing. What the Board ought to have done is

> assess all the factors as outlined in the OP 1 manual. The Counsel for the applicant specifically argued and asked the Board to weigh these factors, but still the Board ignored to consider and weigh these factors.
>
> First the Visa Officer did not consider and weigh the OP 1 manual factors, while making a determination on the ARC application, secondly, when the Board was conducting a de novo hearing, the Presiding Member did not consider and weigh the OP 1 manual factors.

This expansive view of the IAD's jurisdiction is said to be found in earlier IAD decisions: see, for example, *Vlad v Canada*, IAD File No. TB2-07412 and the detailed jurisprudential review set out in *Pal v Canada*, IAD File No. TA9-05542.

[8] I do not agree that the IAD's jurisdiction on appeal from a family sponsorship refusal extends this far. It seems quite apparent to me that no appeal lies to the IAD from a decision to refuse an ARC: see subsection 63(1) of the *IRPA*. The only basis to challenge such a decision lies in this Court on judicial review. The IAD does, however, have the jurisdiction to hear the appeal of an applicant like Mr. Momi whose application to sponsor a family member has been refused. The person being sponsored (in this case, Mr. Singh) has, though, no right to initiate such an appeal. Provided that the prerequisites for a family sponsorship are present, section 65 of the *IRPA* then allows the IAD to grant humanitarian and compassionate relief even where an ARC has been refused.

[9] What Mr. Momi is essentially seeking is a recognition that the IAD can, on a sponsorship appeal, consider the merits of an earlier underlying decision refusing an ARC to a person other than the appellant/sponsor. This would, of course, effectively confer upon the IAD the right to

reconsider the merits of a decision to refuse an ARC to a person other than an appellant. That is an authority that is nowhere to be found in the *IRPA*.

[10] In my view, the IAD was correct when it refused to recognize a jurisdiction as broad as the one asserted by Mr. Momi. The IAD accepted that it was entitled to consider whether the ARC refusal decision was fairly made but it could not assess the decision on its merits.[2] The IAD then went on to determine if sufficient humanitarian and compassionate factors were present to overcome the absence of an ARC. This represents the correct approach and accords with the Federal Court of Appeal's decision in *Canada (Solicitor General) v. Kainth*, [1994] FCJ No 906, 26 Imm LR (2d) 226 (FCA).

[11] It is true that many of the factors relevant to an ARC refusal decision will overlap with the IAD's humanitarian assessment. For example, Article 6.2 of OP1 indicates that the severity of a person's immigration misconduct is to be weighed against, among other things, family, medical, employment, and other factors supporting entry. But this does not mean that the IAD can examine the merits of an ARC refusal decision. Instead, the IAD is required to examine the history of what has occurred, including the severity of any immigration misconduct, and weigh that history in the balance at the date of its own assessment. In some cases, the passage of time since the date of an ARC refusal may alone be sufficient to justify humanitarian relief; but, in any event, the evidentiary record will almost always be different as between the two processes. Given the IAD's broad humanitarian discretion, the reasons for an earlier ARC refusal are thus effectively rendered moot.

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[2] I have reservations about whether the IAD has even this limited authority but the issue is of no legal consequence in this case.

[12] The question that remains is whether the IAD in this case carried out a sufficient assessment of the humanitarian and compassionate factors and rendered a decision that is intelligible, transparent, and justifiable. In my view, it did.

[13] The IAD's assessment of the humanitarian and compassionate factors was brief, but, at the same time, the relevant evidence in support of that relief was not compelling. Beyond the desire to reunify the family, there was little else presented to overcome Mr. Singh's immigration misconduct. There were no minor children in Canada and no indication that any of the adults were in need of special care or attention.

[14] Although a different outcome was certainly open to the IAD, I can identify no error in its treatment of the evidence. It is, of course, not the Court's role on judicial review to reweigh the evidence or to substitute a conclusion for that reached by the appointed decision-maker.

[15] For the foregoing reasons, this application is dismissed.

[16] Despite being invited at the hearing to propose a certified question, none was offered. Subsequently, counsel for Mr. Momi wrote to the Court and proposed the following questions for certification:

> (a) Should the IAD consider only the H&C factors on an appeal from the ARC refusal application, without considering, weighing and adjudicating on the applicable and relevant factors for an ARC application at a hearing De-Novo?
>
> (b) Can [the] IAD revisit [the] prior decision of a fellow Member, made on the issue of jurisdiction, in the same appeal, with a view to either affirm or reverse the same?

[17] Counsel for the Minister then wrote to the Court opposing the request because it was late and because the proposed questions would not be dispositive.

[18] Although the approach taken by Mr. Momi's counsel is unorthodox and not to be encouraged, I am prepared to certify a reformulated question. In my view, there is a jurisdictional issue arising from my decision that is not well settled in the jurisprudence and which could be dispositive of this case. I will, therefore, certify the following question:

(a) Does the IAD have the authority on an appeal from a family sponsorship refusal brought under subsection 63(1) of the *IRPA* to consider and set aside an earlier refusal of an ARC to the sponsored family member?

<u>JUDGMENT in IMM-3648-17</u>

THIS COURT'S JUDGMENT is that the judicial review application is dismissed.

THE COURT FURTHER ADJUGES that the following question be certified:

(a) Does the IAD have the authority on an appeal from a family sponsorship refusal brought under subsection 63(1) of the *IRPA* to consider and set aside an earlier refusal of an ARC to the sponsored family member?

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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