Federal Court Cour fédérale

Date: 20191031

Docket: IMM-3209-18

Citation: 2019 FC 1371

Winnipeg, Manitoba, October 31, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

ROSALYN PETINGLAY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Background

[1] Rosalyn Petinglay came to Canada in January 2016 to work as a live-in caregiver for Suzanne and Scott Henuset. Her sister Mylin is married to Scott Henuset's brother, Michael, and Mylin works in the large liquor store that her husband manages. The store is owned by Wayne Henuset, who is the father of Scott and Michael Henuset.

[2] The Applicant would go to the store to visit her sister, and she would sometimes operate the cash register when her sister had to take short breaks. Acting on a tip that Rosalyn was

working without authorization, Canada Border Services Agency (CBSA) agents undertook an investigation. They observed Rosalyn behind the cash, serving customers. They purchased a bottle of liquor at her cash, and the receipt showed that her name was registered in the system.

[3] The agents arrested her for working without authorization, since the work permit she had been issued allowed her only to act as a caregiver, not a cashier.

[4] The Immigration Division (ID) held a hearing and heard testimony from the store owner, Wayne Henuset, as well as the Applicant and the CBSA officer in charge of the investigation. The ID concluded that the Applicant's conduct did not fall within either branch of the definition of "work" set out in the *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 2 [*IRPR*].

[5] The first branch of that definition defines work as an activity for which wages or commissions are paid, but in this case the Applicant did not receive any compensation, had not been asked or directed to work, and was not supervised or required to attend at any particular time. The second branch of the test asks whether the activity is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market. The ID found that the Applicant's occasional replacement of her sister at the cash did not have such an effect. It therefore denied the Minister's application.

[6] The Minister appealed to the Immigration Appeal Division (IAD). The parties agreed that the matter would be decided on the basis of the record and their submissions, and so the IAD did not hold a new hearing. The IAD decided that the Applicant's conduct did constitute "work"

within the definition in the *IRPR*, in view of the jurisprudence on the interpretation of that term and the facts on the record.

[7] This is an application for judicial review of that decision.

II. Issues and Standard of Review

[8] The Applicant submits that there are two issues; whether the IAD erred in determining that the Applicant had directly competed with the activities of Canadian citizens or permanent residents; and whether the IAD erred in failing to provide any meaningful analysis of the ID decision or providing any reasons why the IAD should depart from it.

[9] The Respondent submits that the only issue is whether the IAD decision is reasonable.

[10] I find that the issue in this case is whether the IAD decision is reasonable. That issue has two components:

(1) Did the IAD make a reviewable error in its assessment of whether the Applicant was "working" within the definition set out in the *IRPR*?

(2) Was it reasonable for the IAD to find that the ID erred in law, without explaining in its reasons any basis for that conclusion?

[11] The parties submit that the standard of review on both issues is reasonableness, and I agree (*Juneja v Canada (Citizenship and Immigration)*, 2007 FC 301 [*Juneja*]; *Yu Lung v Canada (Citizenship and Immigration)* (June 27, 2013), IMM-5523-12 (FC) [*Yu Lung*]).

III. Analysis

A. *The Arguments of the Parties*

[12] On the first issue, the Applicant submits that the IAD committed two key errors in assessing this case against the definition of work in the *IRPR*: (1) it failed to properly consider the test for determining whether a person is in "direct competition" in the labour market; and (2) it ignored the factual differences between this case and the precedents it relied upon. These errors, it is submitted, are sufficient to render the decision unreasonable.

[13] In support of the argument that the idea of direct competition with someone in the Canadian labour market is at the core of the definition in the *IRPR*, the Applicant refers to previous decisions of this Court including *Georgas v Canada (Employment and Immigration)*, [1979] 1 FC 349 (CA) [*Georgas*] and *Juneja*. The *Juneja* decision as well as *R v Sarraf* (1986), 73 NSR (2d) 326, [1986] NSJ No 519 (QL) (NS Co Ct) indicate that to be work, the activity in question must be of a substantial nature necessary to the conduct of the business and it must be of benefit to the employer.

[14] The Applicant contends that the evidence in this case does not support a conclusion that her activities were in direct competition with anyone, nor that they were of a substantial nature or of any real benefit to the employer. In particular, there is no evidence as to how the Applicant ever provided "assistance" to customers or how she responded to their questions. Her sister created a log-in identification for the Applicant because it was required at the business to prevent fraud.

[15] The Applicant points out that she was never asked by any other employee to work at the checkout, nor did she ever do any other work at the store. She was not required to report to anyone, and she could come and go as she pleased. Her hours were never tracked and she was not fulfilling any specific job duties. Most tellingly, according to the Applicant, if she failed to attend the store on a particular day no one else would be called in to replace her, and the company did not hire anyone when she stopped coming after her arrest by CBSA officers.

[16] The Applicant argues that the IAD erred in finding that her activities at the store were substantial enough to constitute work. In addition, the IAD's conclusion that the Applicant's activities at the store prevented others from doing work or gaining experience is not supported in the evidence. There is no evidence of what the Applicant said to customers when CBSA officers observed her interacting with them. The Applicant denies providing assistance to customers other than when she occasionally filled in for her sister at the cash register. The IAD concluded, however, that the Applicant did provide assistance to customers, and that in doing so she was in direct competition with others in the labour market. This finding is not supported in the evidence.

[17] The Applicant contends that the facts of this case are completely dissimilar to the facts of the cases relied on by the IAD. In *Juneja*, the individual performed work on the promise of being paid later, once he obtained a work permit. In *Yu Lung*, the evidence showed that the applicant's sister would call her to perform duties at a small family business when the sister had to go home to look after her children. Similarly, in *Canada (Public Safety and Emergency Preparedness) v Rosenstein*, 2011 CanLII 24685 (IRB) [*Rosenstein*], the individual would replace his sister and he would then be the only salesperson at the store. In these cases, it was obvious that without the

assistance of the foreign national, the businesses would have had to hire someone else to perform these duties. The facts of these cases are completely distinguishable from the facts here.

[18] The Applicant points to the evidence that the store owner took no benefit from the Applicant's activities, and that there were many other employees engaging with customers and working at the cash registers whenever the Applicant was present in the store. There was no job for her, she was not paid, she was never called in or expected to work, and she could leave whenever she wished. The Applicant's minimal and sporadic activities to help out her sister did not deny other employees any training opportunities nor did they prevent any other employee from gaining experience working with customers.

[19] The Applicant argues that the IAD ignored these highly relevant distinctions, and has drawn a conclusion which is contrary to the evidence and which contradicts the sworn testimony of the Applicant before the ID. Since the IAD did not hold a hearing, it had no basis to overturn the ID decision on the basis of an implicit finding that the CBSA officer's evidence was more credible than that of the Applicant on this point.

[20] This leads to the argument on the second issue, which questions the absence of reasons by the IAD to explain its conclusion that the ID erred in law. The Applicant argues that the IAD was required, at a minimum, to offer some explanation for why it reached the opposite conclusion to that of the ID. This was not a true *de novo* hearing. The finding of the Federal Court of Appeal in *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 at para 79 [*Huruglica*], which stated a hearing was not truly *de novo* because the record of the first instance

was before the decision-maker, although stated in regard to the Refugee Appeal Division, should be applied here.

[21] The IAD did not hold an oral hearing, and had no basis to draw different conclusions regarding the credibility of the witnesses. This case is very similar to *Keto v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 119 [*Keto*], in which Justice Russel Zinn found that where the IAD does not hold an oral hearing, it should only deviate from the ID's credibility findings when it has "strong, persuasive evidence based on the written record that the ID's findings were incorrect" (at para 16).

[22] The Applicant points out that in this case only the Minister had a right of appeal to the IAD, and the Ministers should not have two entirely new and different opportunities to prove its case. It cannot have been Parliament's intention that the IAD should completely ignore the findings of the ID, the specialized body that heard the witnesses, considered the other evidence, and then delivered detailed and thorough reasons in support of its conclusion. Either the IAD must show some deference to the findings of the ID or, at a minimum, it must explain why it is departing from them. Otherwise, the principles of comity and transparency are undermined.

[23] The Respondent argues that the IAD is an expert administrative body with specific expertise and knowledge of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] as well as the *IRPR*, and therefore its determinations should be accorded great deference by a reviewing court. In this case, the IAD was given the mandate by Parliament to examine the exact questions which were addressed in this case.

[24] On the first issue, relating to the definition of work, the Respondent contends that the Applicant is simply asking the Court to re-weigh the evidence, but that is not the role of a court on a judicial review. In this case, the CBSA officers observed the Applicant answering customers' questions, processing payments, and issuing receipts under her own log-in at the cash register. The receipt clearly showed her identification – the receipt had the name ROSIEP on it, and she identified herself as "Rosie" to the CBSA officers. Any customer being served by her at the cash register would reasonably conclude that she was an employee and not a mere casual visitor to the store.

[25] The jurisprudence has adopted a strict interpretation of the amended definition of work in the *IRPR* and there is no basis to apply the jurisprudence cited by the Applicant, which relates to the previous wording, to the new definition set out in the *IRPR*. There is no requirement that work be of a "substantial nature" or "benefit to the employer" in the definition, and there is no basis to read such a limitation into it. In *Yu Lung*, this Court found that the amount of time a person spends at a workplace is not an essential element for determining whether they engaged in work. Filling in for an employee, even for a short period of time, could constitute work within the current definition. Although the ID preferred the evidence of the Applicant, it was not unreasonable for the IAD to prefer the objective evidence of the CBSA officer. That was within the purview of the IAD and does not render the decision unreasonable.

[26] On the second issue, the Respondent submits that the Applicant's arguments are fundamentally about the sufficiency of the IAD's reasons. The jurisprudence is clear that a decision-maker's reasons need not be perfect, but rather they must simply provide a basis for a reviewing court to understand why the decision was made. Here, the IAD has provided thorough

and detailed reasons explaining its reasoning in great detail. Nothing more is required by reasonableness review (*Nguyen v Canada (Citizenship and Immigration*), 2016 FC 1207 at paras 36-37; *Wu v Canada (Citizenship and Immigration)*, 2016 FC 621 at para 31).

[27] It is settled law that an appeal to the IAD is a *de novo* hearing in a broad sense, where the IAD is required to determine whether the applicant is admissible, not whether the ID decision is reasonable (*Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086 [*Castellon Viera*] at paras 10-11). Therefore, the IAD did not owe any deference to the ID. The IAD was under no obligation to determine where or how the ID erred. Its findings in this case were not grounded in the credibility of the Applicant, and therefore the ID did not have an advantage over the IAD in considering the evidence.

[28] The Respondent submits that the IAD properly assessed the evidence in light of binding caselaw before arriving at a transparent and intelligible conclusion. This decision is reasonable and should not be overturned.

B. *Discussion*

(1) Did the IAD make a reviewable error in its assessment of whether the Applicant was "working" within the definition set out in the *IRPR*?

[29] Subsection 30(1) of *IRPA* provides that "[a] foreign national may not work or study in Canada unless authorized to do so under this Act." Paragraph 41(a) of *IRPA* states that a foreign national who does not comply with the Act is inadmissible to Canada. The Applicant was only authorized to work in Canada as a live-in caregiver. This case turns on whether her activities in the store fell within the definition of "work" set out in section 2 of the *IRPR*:

Interpretation	**Définitions**
2 The definitions in this section apply in these Regulations.	**2** Les définitions qui suivent s'appliquent au présent règlement.
…	[…]
work means an activity for which wages are paid or commission is earned, or that is in direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market. (*travail*)	***travail*** Activité qui donne lieu au paiement d'un salaire ou d'une commission, ou qui est en concurrence directe avec les activités des citoyens canadiens ou des résidents permanents sur le marché du travail au Canada. (*work*)

[30] It is not disputed that the Applicant did not receive any remuneration for her activities in the store, and so the case falls to be determined with reference to the second element of the definition: whether her actions were of such a nature as to be in "direct competition with the activities of Canadian citizens or permanent residents in the Canadian labour market."

[31] The IAD found that the Applicant's activities in the store did bring her within this element of the definition. The IAD refers to the on-line operational guidance provided by Immigration, Refugees and Citizenship Canada on the question of what activities would constitute work through direct competition, which includes the following question: "[w]ill they be doing an activity that a Canadian or permanent resident should really have an opportunity to do?" It continues: "[a]n activity which does not really 'take away' from opportunities for Canadians or permanent residents to gain employment or experience in the workplace is not 'work' for the purposes of the definition."

[32] The IAD notes that the guidance also provides examples, including "unremunerated help by a friend or family member during a visit, such as a mother assisting a daughter with childcare,

or an uncle helping his nephew build his own cottage." Finally, the guidance document provides the following summary:

> There may be other types of unpaid short-term work where the work is really incidental to the main reason that a person is visiting Canada and is not a competitive activity, even though non-monetary valuable consideration is received. For instance, if a tourist wishes to stay on a family farm and work part-time just for room and board for a short period (i.e. one to four weeks), this person would not be considered a worker…

[33] The IAD then cites jurisprudence on the breadth of the definition, beginning with *Yu Lung*, where the applicant was found to have engaged in work even though her evidence was that she only helped customers for a brief time while her sister was away from the store to care for her sick child. Justice André Scott concluded that it was open to the ID to determine that the length of time a person assisted with the business was not an essential element of the definition, and that the strict reading of the definition was justified in the circumstances.

[34] Similarly, in *Georgas*, it was found that the family relationship between the parties was not relevant to a determination of whether the activity constituted work. The IAD found the case of *Rojas Rodriguez v Canada (Public Safety and Emergency Preparedness)*, 2012 CanLII 61358 (IRB) [*Rojas Rodriguez*] to be closer to the situation of the Applicant. In that case, Mr. Rodriquez had helped his friend on three occasions with office installations; his friend testified that he would not have hired anyone else to do the work if Mr. Rodriquez had not been present. The ID concluded that whether another person would have been hired is not a necessary element of the definition; rather, it was merely necessary to establish that someone should have had the opportunity to carry out the same activity, whether it was for pay or simply for the purposes of gaining experience.

[35] Applying this law to the facts of the case, the IAD concluded that the Applicant had engaged in work within the definition of the *IRPR*. The IAD found at para 23 that "the line was crossed between simply hanging out at her sister's place of work to working at her sister's place of work when she stepped behind the cash register and started processing purchases and payments made by customers." This fell within the definition because "[t]he times that [the Applicant] was there and assisting customers, was time that the staff, including Mylin, could perform other tasks and assist other customers… Thus [the Applicant's] activities freed up her sister to complete other tasks within the store. [The Applicant's] activities also prevented other staff members on the floor from interacting with the customers and performing their sales duties" (at para 25).

[36] The Applicant argues that this conclusion is unreasonable because it fails to apply the governing jurisprudence properly, and it is based on an unexplained rejection of the Applicant's evidence on these specific points. Related to this is the Applicant's argument on the second point, which is that the IAD did not explain its rationale for rejecting the conclusions reached by the ID, and therefore the decision is unreasonable. For the reasons set out below, I find that I do not need to answer the second question, because I find the conclusion reached by the IAD on whether the activities fell within the definition of work to be unreasonable. The IAD has failed to consider the substantial differences between the facts in the cases it cited and the facts before it in this matter; it has also made factual findings in a manner which is neither intelligible nor transparent.

[37] I find that the IAD's interpretation of the law as set out in the jurisprudence it cites to be unreasonable because it fails to take into account the substantial and significant differences in the

factual foundations for those decisions, in contrast to the facts before it in this case. For example, in *Georgas*, the person had carried out work of a substantial nature necessary to the conduct of the brother-in-law's business every day for five hours at a time, and in doing so had "deprived someone else of gainful employment" (at para 2).

[38] In both *Rosenstein* and *Yu Lung*, cited by the IAD, the facts showed that the individual was the only employee in the store to serve customers and that they did so on a recurring basis. This was not a situation where the evidence was that the person only helped out on a few occasions; rather, they became *de facto* employees on a regular basis, and they were the only ones available to serve customers.

[39] Finally, in *Rojas Rodriguez*, the employer testified that he would not have hired another employee if the applicant was not present, but he also testified that the applicant's help allowed him to spend more time supervising the work. In addition, he had issued the applicant a company uniform, and the applicant testified that he had hoped to be able to find employment in this field with the experience he gained helping out his friend. All of these elements brought these activities within the definition of work.

[40] In the case at bar, the IAD does not appear to have considered how the facts of this case differ from the circumstances in the jurisprudence it cites. For example, the evidence shows that the store in which the Applicant was found was one of the largest liquor stores in North America, with approximately 90 employees, of whom there would be 25 to 35 on duty at any time, including 10 to 20 employees on the sales floor. All of the employees on the floor were trained in assisting customers and operating the cash.

[41] Furthermore, in her testimony before the ID, the Applicant denied providing sales assistance to customers other than by ringing in their purchases at the cash. There was no evidence as to what she had said to any of the customers, and yet the IAD concluded that she had been observed "assisting customers."

[42] In reaching this conclusion, the IAD appears to have favoured the evidence of the CBSA officer over the testimony of the Applicant, but without any explanation as to why it reached that conclusion. Nor is there any explanation as to how the activities of the Applicant "prevented other staff members on the floor from interacting with the customers and performing their sales duties" (at para 25).

[43] This conclusion is neither intelligible nor transparent, as required by the reasonableness standard, because the IAD has not explained how it arrived at this result given the evidence, and in the absence of an oral hearing (see *Canada (Citizenship and Immigration) v Kang*, 2009 FC 941; and *Patel v Canada (Citizenship and Immigration)*, 2013 FC 1224 at para 27).

[44] I agree with the Applicant that the *Keto* decision is applicable here, because the IAD did not hold an oral hearing, and so was limited to a review of the record before it. On that record, it was unreasonable for the IAD to come to a different conclusion on this particular point absent any indication as to why the ID erred. In the words of Zinn J. in *Keto*:

> [16] … [I]n these circumstances the IAD should only deviate from the ID's credibility findings when it has strong, persuasive evidence based on the written record that the ID's findings were incorrect.
>
> …

> [20] The case under review illustrates the dangers in an appeal body making different credibility findings than the body whose decision it is examining when the appeal proceeds only on the basis of the written record.

[45] For all of these reasons, I find the IAD decision to be unreasonable. In view of my conclusion on this question, it is not necessary to deal with the second issue in equal depth, and so I will simply review it briefly.

> (2) Was it reasonable for the IAD to find that the ID erred in law, without explaining in its reasons any basis for that conclusion?

[46] The Applicant submits that the IAD owed deference to the findings of the ID or, at a minimum, that it owed an explanation for reaching the opposite conclusion. The structure of the appeal provisions in *IRPA*, as well as the over-arching goal of finality and certainty in decision-making, would be undermined if the IAD could simply ignore the findings of the specialized body assigned to deal with the cases at first instance, in particular where the ID decision is based on credibility findings and the IAD does not hold an oral hearing.

[47] The Applicant contends that this is similar to the situation involving appeals from the Refugee Protection Division (RPD) to the Refugee Appeal Division (RAD), in which the jurisprudence is clear: it is not a true *de novo* appeal, because the RAD does not discard the record that was before the RPD, and it will often not hold an oral hearing. (*Huruglica* at para 79). In the recent decision of *Rozas del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 [*Rozas del Solar*], Justice Alan Diner elaborated on this point:

> [99] … The RAD does not perform a *de novo* review but is constrained by the record before it and its appellate function (*Huruglica* at paras 79, 103). Rather, I agree with the Applicants that because it is not the RAD's role to carry out a *de novo*

> consideration of the claim, the RAD is tethered to the RPD's decision (see, for instance, *Canada (Public Safety and Emergency Preparedness) v Gebrewold*, 2018 FC 374 at para 25).

[48] The Applicant submits that, in a similar way, the IAD is "tethered" to the ID's decision. While it was not bound to follow the ID, at the very least it had to explain why the ID erred.

[49] The Respondent points to *Castellon Viera* as authority for the proposition that the IAD hearing is a *de novo* review. It notes that this conclusion was affirmed by this Court in: *Yiu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 480 at para 16, and *Musabyimana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 50 at paras 24-27.

[50] In *Verbanov v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 324 at paragraph 26, Justice Martine St-Louis provides the following summary of the jurisprudence:

> [26] An appeal before the IAD is a hearing *de novo* in the broad sense and is not limited to the record before the ID (*Yiu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 480 at para 16 [*Yiu*]; *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086 at para 10 [*Castellon Viera*]). The IAD can set aside the ID's decision and substitute a determination that, in its opinion, should have been made (subsection 67(2) of the Immigration Act). The IAD owes no deference to the ID, nor is it bound by the ID's findings (*Musabyimana v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 50 at para 24; *Yiu* at para 16; *Castellon Viera* at para 12). The IAD must not determine whether the ID correctly or reasonably concluded that a person is inadmissible, but rather whether the person is in fact inadmissible (*Castellon Viera* at para 11). Nonetheless, the IAD should consider the ID's findings where the applicant has not testified before the IAD (*Patel v Canada (Citizenship and Immigration)*, 2013 FC 1224 at para 27).

[51] In light of my conclusion on the first issue, it is not necessary for me to make a determination on this point.

[52] I would simply note that the decision in *Castellon Viera* was rendered without the benefit of the Federal Court of Appeal's decision in *Huruglica*, or the more recent discussion in *Rozas del Solar*. At paragraph 57 of its decision in *Huruglica*, the Federal Court of Appeal notes the similarity in wording of the powers of the IAD and the RAD to intervene (set out in paragraphs 67(1)(a) and 111(2)(a) of *IRPA*), but does not elaborate on the point. Since then, *Castellon Viera* has been followed and applied, though it has also been noted that the IAD should consider the ID's findings where the applicant does not testify before it.

[53] It is not clear whether an argument based on *Huruglica* was advanced in any of the more recent decisions that have applied *Castellon Viera*, and there are obvious similarities and differences in the wording of the provisions that govern appeals to the RAD and the IAD. Whether or how *Huruglica* or *Rozas del Solar* may alter or refine the analysis on the relationship between the IAD and the ID is better left to a case where the matter is fully argued and necessary for the resolution of the matter.

IV. Conclusion

[54] For the reasons set out above, I find the decision of the IAD to be unreasonable. The matter is remitted for consideration by a different panel.

[55] The Applicant proposed a question for certification relating to the second issue, whether an appeal to the IAD is a true *de novo* hearing. In light of my conclusions in this matter, this question would not meet the test for certification. (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, [2018] 3 FCR 674,).

JUDGMENT in IMM-3209-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the Immigration Appeal Division of the Immigration and Refugee Board, dated June 20, 2018, is set aside and the matter is referred to another member of the Immigration Appeal Division for redetermination.

3. No question of general importance is certified.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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