Federal Court  Cour fédérale

Date: 20100720

Docket: IMM-6375-09

Citation: 2010 FC 761

Ottawa, Ontario, July 20, 2010

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SAID ALEM MOUDOODI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Said Alem Moudoodi (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Appeal Division (the "IAD"). In its decision dated November 16, 2009, the IAD dismissed the Applicant's appeal from the refusal of a visa officer to approve his wife's application for permanent residence, as a member of the family class pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 289 (the "Act") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations").

[2] The Applicant was born in Afghanistan in 1964. He went to Russia in 1989 and attended Military College for five years. He remained in Russia as a refugee until coming to Canada in September as a refugee. He had been selected as a refugee by the UNHCR and Canadian Immigration Officials while residing in Kyrgyzstan.

[3] The Applicant applied for permanent residence in Canada in January 2004. At that time, he was unmarried and his application identified his marital status as such.

[4] In May 2004, the Applicant married Nazanain Hassan Khail, a citizen of Afghanistan, in Pakistan. He did not amend his application for permanent residence and he did not disclose the change in his marital status.

[5] The Applicant landed in Canada in September 2004. He settled in Calgary, Alberta. In February, 2006, he applied to sponsor his wife for permanent residence under the spousal family class. This application was refused by a visa officer on January 15, 2008, on the ground that he had failed to disclose his spouse at the port of entry.

[6] Upon appeal to the IAD, the Applicant testified about his attendance at the Canadian Embassy in Moscow prior to his departure from Kyrgyzstan and his conversation there with an employee named “Gulbara”, about his marriage. He also testified about his arrival in Canada and his initial contact with immigration officials in Canada at the airport where no interpretation facilities were available.

[7] The IAD rejected the Applicant's appeal. It found that he was credible. However, the fact that he had not disclosed his marriage, prior to landing in Canada, meant that his wife was not a member of the family class pursuant to paragraph 117(9)(d) of the Regulations. The conversation between the Applicant and "Gulbara", prior to his departure for Canada, did not give rise to a waiver, pursuant to subsection 117(10) of the Regulations, of the obligation that the Applicant's wife be examined. The IAD found that the evidence supported the visa officer's negative decision relative to the sponsorship application for permanent residence of the Applicant's wife.

[8] The IAD also addressed the issue of procedural fairness and found that no breach of procedural fairness arose from the absence of an interpreter when the Applicant landed in Canada.

[9] In its conclusion, the IAD noted that since the sponsored spouse was not a member of the family class, it was unable to consider the exercise of discretion pursuant to section 65 of the Act, on humanitarian and compassionate grounds. However, the IAD specifically made the following observations about the availability of a remedy pursuant to subsection 25(1) of the Act, that is by means of a humanitarian and compassionate application, as follows:

> [31] Should the appellant wish to pursue a section 25 application, it remains open for him to do so notwithstanding this decision and in addition to any review remedies he may have with respect to the present disposition.

[10] In this application for judicial review, the Applicant advanced submissions about unreasonable findings of fact by the IAD relative to his non-disclosure of his marital status prior to landing in Canada and an alleged breach of natural justice arising from the lack of an interpreter at

the port of entry. Further to the decision of the Supreme Court of Canada in *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, questions of fact and of mixed fact and law are reviewable on the standard of reasonableness. The issue of an alleged breach of procedural fairness is reviewable on the standard of correctness; see *Ha* v. *Canada*, [2004] 3 F.C.R. 195.

[11] The hearing before the IAD was a hearing *de novo*. Although the Tribunal referenced the earlier decision of the visa officer, the reasons of the IAD clearly show that it considered the evidence submitted on a *de novo* basis and made its own credibility findings. I observe that these were positive findings, as opposed to the negative findings that had been made by the visa officer. I also note that the proceedings before the IAD were more comprehensive than the appearance before the visa officer. The positive credibility findings of the IAD, while not binding upon a subsequent decision-maker, will surely carry some persuasive value in the future.

[12] The IAD upheld the refusal of the Applicant's application for permanent residence for his spouse on the grounds that the spouse was ineligible for recognition as a member of the family class because she had not been examined prior to the time when the Applicant became a permanent resident.

[13] Paragraph 117(9)(d) of the Regulations is clear. It provides as follows:

9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes
…	

…

(d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	d) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[14] The Applicant presented arguments about the application of subsection 117(10) of the Regulations to his situation, submitting that the examination of his wife had been "waived".

[15] The IAD did not accept his arguments in this regard. Upon the evidence before it, the IAD determined that waiver had not been established. In my opinion, having regard to the evidence, this finding is reasonable. There is no reviewable error in that regard.

[16] The remaining question is whether the absence of an interpreter at the port of entry gives rise to a breach of procedural fairness, thereby warranting judicial intervention.

[17] The IAD was not persuaded that the lack of an interpreter caused a breach of procedural fairness. Having regard to the evidence about the Applicant's understanding of the process he was following in his application for permanent residence, I am not persuaded that his misunderstanding

of certain questions at the port of entry can be wholly attributed to the absence of an interpreter. I am not persuaded that there was a lack or breach of procedural fairness.

[18] In the result, this application for judicial review is dismissed, no question for certification arising.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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