Federal Court  Cour fédérale

Date: 20120605

Docket: IMM-5979-11

Citation: 2012 FC 686

Ottawa, Ontario, June 5, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MINESHKUMAR RAM PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The present case concerns a trier of fact's discretion to grant special relief and its analysis to determine whether such relief was warranted. Justice Simon Noël, in *Iamkhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 355, 386 FTR 297, made the following statement on this Court's role in this regard:

> [47] As stated in *Khosa*, above, at para 57, the IAD's power to grant relief under paragraph 67(1)(*c*) is to be exercised while considering the circumstances of the case, including hardship. This relief is seen to be "exceptional" by the Supreme Court (*Khosa*, above, para 57). Starting from this assertion, the evaluation of

> whether H&C grounds and the circumstances of the case warrant special relief is to be considered in light of the *Ribic* factors, as discussed in *Chieu*, above, *Al Sagban*, above, as well as the other relevant cases from this and other Courts. As noted above, the applicable standard of review for this portion of the application is reasonableness. It is trite to state that the Court's role is not to re-weigh the evidence, but rather to address whether the decision falls within the acceptable outcomes defensible in fact and law (*Dunsmuir*, above, at para 47).

II. Judicial Procedure

[2] This is an application, pursuant to paragraph 72(1) of *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of a decision of the Immigration Appeal Division [IAD], rendered on August 9, 2011, which dismissed the Applicant's appeal of a removal order and declined to grant special relief.

III. Background

[3] The Applicant, Mr. Mineshkumar Ram Patel, is a citizen of India. In 1993, he moved to the U.S. He had a work permit for a period of time, and remained there out of status until 2003.

[4] In 2001, in New York, the Applicant married his first wife who sponsored him to immigrate to Canada. In January, 2003, the Applicant obtained permanent residence status and entered Canada. Approximately two weeks after entering Canada, the Applicant left his first wife. In 2003, the Applicant returned to the U.S.

[5] In September 2004, in the U.S., the Applicant married his second wife during a religious ceremony. Two children were born of this union; a boy, born in 2007 in the U.S., and a girl, born in August 2010 in Canada. His divorce with his first wife was finalized in December 2006.

[6] Between the years 2007 and 2008, the Applicant traveled to Canada several times to visit his brother who had immigrated to Canada.

[7] In February 2008, the Applicant came to Canada for approximately two weeks, wherein, he applied for a new permanent resident card. In order to maintain his permanent residency status, the Applicant stated that he was absent from Canada for 163 days despite the fact he had lived in the U.S. from December 2003 to August 2007.

[8] In August 2007, the Applicant provided false information in his application for Canadian citizenship relating to his absence from Canada.

[9] The Applicant alleges that upon entry to Canada, in May, 2008, he was questioned about his amount of time spent in the U.S. The Applicant provided an accurate set of time periods of residency. The Applicant also alleges the immigration officer told him that no action against him would be taken if he remained in Canada.

[10] In 2008, the Applicant helped his wife enter Canada illegally.

[11] In August 2009, as he attempted to sponsor his second wife to Canada, a report pursuant to section 44 of the *IRPA* was written and removal proceedings were initiated.

IV. Decision under Review

[12] The issue before the IAD was whether the Applicant had proven grounds to warrant special relief since he admitted that the removal order was valid.

[13] Nevertheless, the IAD summarized the Applicant's misrepresentations in order to note the validity of the removal order.

[14] The IAD concluded that the Applicant's misrepresentations were serious and that the Applicant had not demonstrated real remorse even though he had admitted to his misrepresentations in his permanent residency application and in his citizenship application. The IAD found that the Applicant and his wife disrespected the immigration laws of Canada and the U.S.

[15] Analyzing the establishment in Canada and the hardship of removal, the IAD found that the Applicant had been in Canada for a period, short of the necessary three years which weighed against him. Relying on the Applicant's testimony and the documentary evidence, the IAD found the Applicant to be a hard worker who operates a fast food franchise in Barrie. The Applicant has a brother in Canada who is married and also has two children that he visits. The IAD focused on the Applicant's family in India and his activities in Canada to conclude that he will not suffer any hardship should he return to India. The IAD found that the Applicant's wife and his two children speak Gujarati. Assessing the best interests of the Applicant's children, the IAD concluded that, given the fact that they are young and not yet in school, their interests would not be affected by the Applicant's removal.

V. Issue

[16] Is the IAD's decision reasonable?

VI. Relevant Legislative Provisions

[17] The following legislative provisions of the *IRPA* are relevant:

Obligation — answer truthfully	**Obligation du demandeur**
16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.	**16.** (1) L'auteur d'une demande au titre de la présente loi doit répondre véridiquement aux questions qui lui sont posées lors du contrôle, donner les renseignements et tous éléments de preuve pertinents et présenter les visa et documents requis.
Misrepresentation	**Fausses déclarations**
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40.** (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(*a*) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	*a*) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
(*b*) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	*b*) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;

(*c*) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the foreign national; or

c) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile;

(*d*) on ceasing to be a citizen under paragraph 10(1)(*a*) of the *Citizenship Act*, in the circumstances set out in subsection 10(2) of that Act.

d) la perte de la citoyenneté au titre de l'alinéa 10(1)*a*) de la *Loi sur la citoyenneté* dans le cas visé au paragraphe 10(2) de cette loi.

Appeal allowed

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

Fondement de l'appel

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

(*b*) a principle of natural justice has not been observed; or

b) il y a eu manquement à un principe de justice naturelle;

(*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.

[18] The following legislative provisions of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, are relevant:

Examination — permanent residents	**Contrôle : résident permanent**
51. A foreign national who holds a permanent resident visa and is seeking to become a permanent resident must, at the time of their examination,	51. L'étranger titulaire d'un visa de résident permanent qui cherche à devenir un résident permanent doit, lors du contrôle:
(*a*) inform the officer if	*a*) le cas échéant, faire part à l'agent de ce qui suit :
(i) the foreign national has become a spouse or common-law partner or has ceased to be a spouse, common-law partner or conjugal partner after the visa was issued, or	(i) il est devenu un époux ou conjoint de fait ou il a cessé d'être un époux, un conjoint de fait ou un partenaire conjugal après la délivrance du visa,
(ii) material facts relevant to the issuance of the visa have changed since the visa was issued or were not divulged when it was issued; and	(ii) tout fait important influant sur la délivrance du visa qui a changé depuis la délivrance ou n'a pas été révélé au moment de celle-ci;
(*b*) establish that they and their family members, whether accompanying or not, meet the requirements of the Act and these Regulations.	*b*) établir que lui et les membres de sa famille, qu'ils l'accompagnent ou non, satisfont aux exigences de la Loi et du présent règlement.

VII. Position of the Parties

[19] The Applicant submits that the IAD erred in law when it found that the removal order was issued partly on the basis of misrepresentations in the Applicant's citizenship application as subsection 40(1)(*a*) is limited to misrepresentations under the *IRPA* only.

[20] The applicant argues that the misrepresentations in respect of his permanent residency card application to remain in Canada, as opposed to entering Canada, cannot be the basis of a removal order.

[21] The Applicant submits that the IAD erred in law by upholding a removal that was issued despite the Applicant's legitimate expectation that no report would be issued as was promised by an immigration officer at the port of entry in 2008.

[22] The Applicant submits that the IAD's decision to decline to grant special relief is unreasonable. In support of this assertion, the Applicant argues that the IAD discounted the compelling factors.

[23] In response, the Respondent submits that the Applicant's arguments relating to the validity of the removal order should not be addressed given the fact that he conceded, during his appeal hearing, that his removal order was valid.

[24] Nevertheless, the Respondent argues that the misrepresentations made by the Applicant on his citizenship application can be considered as previous immigration matters when deciding whether to grant special relief.

[25] The Respondent submits that the IAD reasonably weighed the evidence to conclude that there were no reasons to justify granting special relief.

VII. Analysis

[26] The Supreme Court of Canada stated, in *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, that a high degree of deference is warranted when the Court reviews an IAD decision:

> [58] The respondent raised no issue of practice or procedure. He accepted that the removal order had been validly made against him pursuant to s. 36(1) of the *IRPA*. His attack was simply a frontal challenge to the IAD's refusal to grant him a "discretionary privilege". The IAD decision to withhold relief was based on an assessment of the facts of the file. The IAD had the advantage of conducting the hearings and assessing the evidence presented, including the evidence of the respondent himself. IAD members have considerable expertise in determining appeals under the *IRPA*. Those factors, considered altogether, clearly point to the application of a reasonableness standard of review. There are no considerations that might lead to a different result. Nor is there anything in s. 18.1(4) that would conflict with the adoption of a "reasonableness" standard of review in s. 67(1)(*c*) cases. I conclude, accordingly, that "reasonableness" is the appropriate standard of review. [Emphasis added].

[27] This Court must draw attention to the fact that the Applicant did not challenge the validity of the removal order. In fact, his appeal to the IAD was based solely on humanitarian and compassionate [H&C] considerations. A reading of the transcript demonstrates unequivocally that the validity of the removal order was not an issue before the IAD as admitted by the Applicant's counsel at the beginning of the IAD's hearing (Tribunal Record [TR] at p 223). More important, is the fact that the Applicant admitted several times during the hearing to having made misrepresentations:

> **CLAIMANT:** So…because I do not want to lose the Canadian life status and I was so much love with my wife and kids that I do not want to leave them also, so I did lie and I am like so sorry for that, like for PR and citizenship application as well also. At the airport, like I did admit that both of them that I did lie for those, like I did not stay into Canada, when the officer stopped me and (inaudible) that is I just told everything true that is…about both application.
>
> …

> **MINISTER'S COUNSEL:** You also mentioned putting down false resident (inaudible) in your citizenship application.
>
> **CLAIMANT:** Yes.
>
> …
>
> **MINISTER'S COUNSEL:** Well, why should you be able to apply for citizenship without having lived in Canada; spent any meaningful time in Canada.
>
> **CLAIMANT:** Yeah, I know, that is the reason I did (inaudible) and I am sorry for it; that is… I did made a false on that one, citizenship and PR application.

(TR at pp 223-224).

[28] The IAD only summarized the misrepresentations that were admitted by the Applicant to note the validity of the removal order before analyzing whether special relief was warranted. The Applicant now raises several arguments requesting this Court to question the validity of the removal order. Justice Yves de Montigny, in *Jones v Canada (Minister of Citizenship and Immigration)*, 2011 FC 84, 383 FTR 98, made the following statement concerning new arguments:

> [22] Furthermore, it appears that this argument advanced before the Court was not made to the IAD on the motion to reopen. In his reopening motion materials the Applicant set out a variety of facts which he felt warranted him being granted a reopening, but he admitted that he himself was fault in not informing the IAD of his change of address. He now changes tack and tries to blame the IAD for his predicament. In raising this new argument on the requirements of natural justice in the circumstances of his case, the Applicant is supplementing the record that was before the IAD and is attempting to convert the underlying challenge (to the refusal to reopen the appeal) into a challenge to the original abandonment decision. <u>This is not permitted in the context of this application for judicial review of the decision not to reopen his appeal. It is well established that the reasonableness of a tribunal's decision must be assessed on the basis of the arguments that were put to that tribunal. The member could not have erred in failing to find that natural justice was breached for the reasons given by the Applicant when the argument which allegedly supports such a finding was not put to the IAD</u>. [Emphasis added]

(Reference is also made to *Guajardo-Espinoza v Canada (Minister of Employment and Immigration)*, [1993] FCJ no 797 (QL/Lexis) (FCA)).

[29] In the present case, this Court concludes that the validity of the order was not disputed before the IAD and cannot be addressed now before this Court in the context of a judicial review. It appears from a reading of the decision that the IAD based its conclusion on the validity of the removal order on the Applicant's own numerous admissions during his hearing.

[30] In any event, the fact that the IAD referred to the misrepresentations made by the Applicant on his citizenship application, which, indeed, were not made under the *IRPA*, does not affect the removal order's validity which is based on misrepresentation under the *IRPA*. Indeed, the IAD could take into account misrepresentations concerning citizenship in its independent analysis in determining the sufficiency of the H&C considerations (*Khosa*, above, at para 57).

[31] In this regard, the IAD considered the factors established, in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL/Lexis), and confirmed, in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84, in determining whether to exercise its discretion by granting special relief. In such regard, this Court cannot simply re-weigh the evidence already examined by the IAD (*Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 277).

[32] With respect to the seriousness of the Applicant's misrepresentations, the Applicant argues that the fact that an immigration officer at the port of entry in May 2008 said the Applicant would

not be removed as long as he remained in Canada demonstrates that his misrepresentations were not serious. This Court must reject this argument. The IAD addressed this argument and did not consider it an extenuating factor; the IAD instead relied on the subsequent conduct of the Applicant. Indeed, the Applicant later helped his second wife enter Canada illegally.

[33] In respect to the Applicant's establishment in Canada, the Applicant essentially argues that the IAD did not consider his economic establishment in North America, where he has lived since 1993. It is clear that the IAD considered the economic situation of the Applicant (IAD Decision at para 22-24). The Applicant has not demonstrated that the IAD's conclusion was unreasonable or that it had been made without regard to the evidence submitted.

[34] Finally, concerning the best interests of the Applicant's children, the IAD took into account their best interests when it found that they would not be affected by their father's removal.

VI. Conclusion

[35] The IAD has provided numerous reasons to support its conclusion that "although some humanitarian and compassionate grounds do exists, in all the circumstances of this case, they are insufficient for the panel to find in the appellant's favour" (IAD Decision at para 32).

[36] Consequently, the decision of the IAD is reasonable.

[37] For all of the above reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed.

No question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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