Federal Court Cour fédérale

Date: 20150218

Docket: IMM-4313-13

Citation: 2015 FC 209

Ottawa, Ontario, February 18, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

LYUDMYLA KOTELENETS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant (or Ms Kotelenets) seeks judicial review of a decision of the Immigration Appeal Division (IAD) made on May 23, 2013 which dismissed her appeal of the refusal of a visa officer to grant a permanent residence visa to her mother and stepfather who live in Ukraine, and whose visa applications were sponsored by the Applicant as members of the family class.

[2] The visa applications were refused as the Applicant's mother was found to be inadmissible to Canada pursuant to subsection 38(1) of the *Immigration and Refugee Protection Act* (the Act) as a person whose health is likely to cause an excessive demand on Canada's healthcare services.

[3] The Applicant did not challenge this finding of the visa officer before the IAD but rather sought special relief under paragraph 67(1)(c) of the Act which empowers the IAD to grant an appeal where it is satisfied that, at the time the appeal is disposed of, sufficient humanitarian and compassionate considerations, taking into account the best interests of a child directly affected by the visa officer's decision, warrant special relief in light of all the circumstances of the case.

[4] The Applicant claims that the IAD's decision must be set aside on the ground that the IAD breached the rules of procedural fairness by not allowing her to fully present her case. She also claims that the decision is unreasonable as the IAD, in its assessment of the humanitarian and compassionate considerations supporting her appeal, failed to consider her mother's current medical condition.

[5] For the reasons that follow, the judicial review application is granted.

II. The Facts

[6] Ms Kotelenets is a Canadian citizen who immigrated to Canada in 2001 along with her now ex-husband and two children, aged 27 and 25 at the time of the IAD decision. She first applied to sponsor her mother and stepfather, aged 77 and 78 respectively at the time of the IAD

decision, in 2003. The first request was rejected due to the income threshold imposed on Ms Kotelenets in order to be a sponsor. This decision was appealed to the IAD on humanitarian and compassionate grounds and the appeal was allowed in 2009, resulting in the permanent residency visa applications of Ms Kotelenets' parents being further processed.

[7] In the course of the processing of these applications, Ms Kotelenets' mother underwent medical examinations. These examinations revealed that Ms. Kotelenets' mother was suffering from severe aortic valve stenosis requiring valve replacement and specialized care and monitoring both before and after the surgery.

[8] On April 14, 2011, a visa officer determined that Ms. Kotelenets' mother had a health condition which would reasonably be expected to cause excessive demand on healthcare services in Canada and concluded that she was inadmissible to Canada. As an accompanying family member, Ms. Kotelenets' stepfather, given the mother's condition, was also found inadmissible to Canada.

[9] Ms Kotelenets appealed that decision to the IAD, seeking, as indicated above, special relief based on humanitarian and compassionate grounds. This appeal was to – and did – proceed *de novo*.

[10] As permitted by section 37 of the *Immigration Appeal Division Rules* (SOR/2002-230), the Applicant formally notified the IAD that she intended to call four witnesses to testify at the hearing. These witnesses were her two sons, a friend from her church, as well as her mother. In

the case of her mother, she indicated in her witness information notice to the IAD that she wanted her to testify by telephone and that an interpreter in the Russian or Ukrainian languages would be needed. Ms Kotelenets also filed, in support of her appeal, an up-dated medical report indicating that her mother's condition was largely asymptomatic and that she did not need to undergo surgery.

[11] At the hearing of the appeal the Applicant was informed that there was no interpreter available for her mother and that, in any event, she should be able to tell her mother's story herself. As a result, the Applicant's mother did not testify. With respect to the Applicant's other three witnesses, they were told by the IAD to leave the hearing room and that they would be called later. However, none of them testified as the IAD later decided it did not need to hear from them on the basis that they would not add anything to the Applicant's testimony.

[12] It is important to add that Ms Kotelenets was representing herself at the appeal hearing.

[13] On May 23, 2013, the IAD rejected Ms Kotelenets' appeal on the ground that special relief under paragraph 67(1)(c) of the Act could not be granted solely on the basis of family separation, that the evidence of potential hardship resulting from the rejection of the permanent residency visa applications of Ms Kotelenets' parents was not very compelling and that, when weighed against the future demand on Canada's healthcare services, it had no option but to conclude that the Applicant had not established that special relief was warranted.

III. **The Lateness of the Filing of the Applicant's Judicial Review Application**

[14] The Applicant filed her Application for Leave and Judicial Review on June 25, 2013, which is 25 days following receipt of the IAD's decision. As her parents live overseas, she though, incorrectly, that her deadline for the filing of the said Application with the Court was 30 days. Her deadline for doing so was in fact 15 days as her case arose in Canada, as provided for by paragraph 72(2)(b) of the Act. As a result, she sought an extension of time to file her Application for Leave and Judicial Review.

[15] The Respondent claims that this request should be denied and the Applicant's judicial review application dismissed accordingly. I disagree.

[16] The proper test to extend timelines has been articulated by the Federal Court of Appeal in *Canada (Attorney General) v Hennelly*, 244 NR 399; 167 FTR 158. This test is whether the party seeking the extension has demonstrated (i) a continuing intention to pursue his or her application; (ii) that the said application has some merit; (iii) that no prejudice to the other party arises from the delay being sought, and (iv) that a reasonable explanation for the delay exists (*Hennelly*, above at para 3). Regarding this fourth criteria, the Federal Court Appeal stated that any determination as to whether a reasonable explanation exists will turn on the facts of each particular case (*Hennelly*, at para 4).

[17] First, there is no doubt that Ms Kotelenets has shown a continuing intention to pursue her Application for Leave and Judicial Review. She explained, in her application materials, that she

took some time to find a lawyer to represent her and that on the date she met her current counsel, June 25, 2013, she immediately instructed her to challenge the IAD's decision. The Application for Leave and Judicial Review was filed the same day. Second, as leave was subsequently granted, it is clear that the said application has some merit. Third, there is no evidence of any prejudice to the Respondent arising from the delay being sought.

[18] There is, in my view, a reasonable explanation for the delay. Ms Kotelenets, who, at that time was self-represented, made an honest mistake in believing that her delay to proceed with judicial review of the IAD's decision was 30 days as she thought, given that her parents live in Ukraine, that her case was a matter arising outside Canada as contemplated by paragraph 72(2)(b) of the Act. In these circumstances, I would give her the benefit of the doubt and accept the explanation given for the delay.

[19] In any event, the case law makes it clear that the underlying consideration when weighing the factors set out in *Hennelly*, above, is that justice must be done between the parties, which could mean that in certain circumstances, an extension of time will still be granted even if one of the four factors is not satisfied (*Canada (Minister of Human Resources Development) v Hogervost*, 2007 FCA 41, at para 32; *Strungmann v Canada (Citizenship and Immigration)*, 2011 FC 1229, at para 9).

[20] I am satisfied that this is a case where justice must be done between the parties and the extension of time sought by the Applicant for the filing of her Application for Leave and Judicial Review ought to be granted.

IV. Issues and Standard of Review

[21] This matter raises the following issues:

a. Did the IAD breach the duty of procedural fairness owed to the Applicant?

b. Is the IAD's finding that special relief under paragraph 67(1)(c) of the Act is not warranted in all of the circumstances of this case unreasonable?

[22] Given my answer to the first question, there will be no need to consider the second issue.

[23] As is well established, issues of procedural fairness are to be reviewed on a standard of correctness. This means that the Court owes no deference to the IAD in respect of such issues (*Dunsmuir*, above, at para 50, *Sapru v Canada (Citizenship and Immigration)*, 2011 FCA 35, [2012] 4 FCR 3, at paragraphs 25-27; *Canada (Public Safety and Emergency Preparedness) v Martinez-Brito*, 2012 FC 438, [2013] 4 FCR 471 at para 15; *Sidhu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 515, 409 FTR 58 at para 38).

V. Analysis

[24] As the Respondent correctly points out, the IAD has sole jurisdiction to hear and determine all questions of law and fact and is required by the Act to deal with all proceedings before it informally and as quickly as circumstances permit. Accordingly, the Respondent

claims that it is open to the IAD to exercise control on its own procedure, including the decision not to hear witnesses in a given case.

[25] However, according to subsection 162(2) of the Act, these broad powers need to be exercised "as the circumstances and the conditions of fairness and natural justice permit". They also have to be exercised in accordance with the Rules, adopted under section 161 of the Act, governing the functioning of the IAD.

[26] Here, by denying the self-represented Applicant the opportunity to provide the evidence of <u>any</u> of the four witnesses she had formally notified the IAD of her intention to call, as she was expected and required to do under the *Immigration Appeal Division Rules*, the IAD just went too far in controlling its own hearing process.

[27] Seeking to have four witnesses testify was not an excessive demand given the nature of the relief sought in this case. The flexible nature of the procedure before the IAD is aimed at the effectiveness of the entire process, not as a means to trump the right to a fair hearing (*Wang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 531, 312 FTR 312). Here, the decision of the IAD not to hear any of Ms Kotelenets' witnesses took away any possibility for her to strengthen her claim for humanitarian and compassionate relief.

[28] I agree with Ms Kotelenets that while she was indeed capable of telling her own story, the IAD failed to recognise that different witnesses could bring their own perspective to the humanitarian and compassionate issues at hand. Her mother, for instance, whose medical

condition was the cause of the Canadian authorities' refusal to allow her (and Ms Kotelenets stepfather) into Canada, could have explained in her own words her current medical situation in light of the up-dated medial report filed by Ms Kotelenets**.** Furthermore**,** she could have provided her own perspective on the hardship caused by the separation with her daughter and grand-children living in Canada. As for Ms Kotelenets' two sons, they too could have brought to the case their own perspective on the importance of having their grand-parents in Canada and on their relationship with them since their childhood. In a humanitarian and compassionate considerations analysis, which turns on the balancing of a certain number of factors, it is hard to imagine that none of these three witnesses could have added something relevant to that analysis.

[29] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada reinforced that the concept of procedural fairness "is eminently variable and its content is to be decided in the specific context of each case" (*Baker*, at para 21). It emphasized that in determining what is the content of the duty of fairness in a given set of circumstances, consideration shall be given to the underlying notion "that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence <u>fully</u> and have them considered by the decision-maker" (*Baker*, at para 22, my emphasis).

[30] As stated by my colleague Justice Robert Barnes in *Wang*, above, at para 15, the right to make one's case is subject to reasonable limitations but those limitations, when they are the result of the exercise of discretion, are to be made and applied in a principled way:

> Nevertheless, it is well understood that the exercise of discretion by a decision-maker to refuse to hear evidence on behalf of an interested party must be carried out in a principled way even where a party has not observed a non-mandatory procedural prerequisite. These points are duly noted by David J. Mullan in his text Administrative Law (Toronto: Irwin Law, 2001), where, at page 291, he discussed the elements of proper decision-making in this context of procedural fairness:
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>> Administrative tribunals and agencies have control over the conduct of their proceedings and this includes the ability to place limits on the right of parties to adduce evidence and to make submissions in support of their position. Without such authority, decision makers would be in the thrall of anyone anxious to disrupt the timely operation of the administrative process. Nonetheless, the exercise of these powers is conditioned by a number of considerations. Generally, it will depend on an appropriate judgment by a tribunal that further evidence or submissions should not be permitted on the basis of inadmissibility, irrelevance, or repetition. An erroneous assessment on any of these bases can lead to a reviewable denial of procedural fairness.
>>
>> Far more controversial, however, is the extent of the entitlement of tribunals to limit participatory rights simply by reference to considerations of efficiency and the need for the expeditious carrying out of the statutory mandate. <u>Indeed, even in the common situation where the relevant legislation provides that a tribunal is to proceed expeditiously, courts have been reluctant to allow this a basis for denying the right to call witnesses who may add something of relevance to the matter under consideration.</u> There is also precedent condemning a policy of confining hearings to a set length at least when it can be established that rigid adherence to the policy in the particular case would potentially affect the normal natural justice entitlements of a participant. (Emphasis in original)

[31] Here, the Applicant had complied with the requirements of the *Immigration Appeal Division Rules* by providing the IAD in due time with her witness information along with a brief statement of the purpose and substance of the witnesses testimony and by requesting an interpreter for her mother's testimony. According to these *Rules*, it is where an appellant fails to provide witness information in due time that the IAD is expressly empowered to decide whether to allow a witness to testify.

[32] In such context, Ms Kotelenets was entitled to expect that she would be in a position to fully present her case to the IAD. This is not what happened. Being a self-represented party in an immigration law context, Ms Kotelenets was entitled to some – if not every possible – leeway to present her case. In such cases, the duty of procedural fairness may actually be more onerous because self-represented parties cannot rely on counsel to protect their interests (*Nemeth v Minister of Citizenship and Immigration*, 2003 FCT 590, 233 FTR 301, at para 13; *Law v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1006, at paras 15-19; *Kamtasingh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 45).

[33] Although she had done everything that was required of her in that proceeding, she was not afforded any leeway by the IAD. A reading of the transcript of the hearing shows that Ms Kotelenets seemed defenceless vis-à-vis the IAD's inquiry as to whether there was really a need for her to call witnesses. One could say that she was totally taken by surprise. In my view, this contributed to the IAD crossing the line in respect of the duty of procedural fairness it owed to Ms Kotelenets.

[34] Finally, although one could argue, as does the Respondent, that the evidence provided by Ms Kotelenets was sufficient to dispose of her appeal, the fact the evidence from the witnesses she wanted to call might not assist her case is not a valid reason for refusing to hear it (*Timpauer v Air Canada,* [1986] 1 FC 453). To dismiss witnesses solely based on the fact that the IAD believed the Applicant's testimony is an error in the qualification of the central issue of the case. The IAD rightly pointed to the factors which were to be considered in a special relief case. Notably, they included, in this case, the relationship between the Applicant and her mother, the reasons for sponsorship, the situation of both the Applicant and her mother, the existence of dependency between the two, and the hardship the family would suffer by not being reunited. Therefore, when assessing humanitarian and compassionate considerations that would allow for special relief, the IAD must consider the evidence provided on the above factors. It is clear, in my view, that some of the witnesses Ms Kotelenets wished to call could have offered evidence or additional concerns and facts relevant to the assessment the IAD had to make.

[35] In refusing to hear any of the four witnesses, the IAD denied the Applicant her "day in court", did not pay enough attention to the fact she was self-represented and had complied with the procedures available to her under the Rules governing the calling of witnesses, and thus prevented her from presenting her case fully and in its entirety. As my colleague Justice Barnes said in *Kamtasingh*, above, "this is a situation where the duty to allow [the applicant] to fully present his case was sacrificed for the desire for administrative efficiency. That is not a permissible trade-off" (see also S*ingh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, [1985] SCJ No. 11 (QL) (SCC) at para. 70). In my view, this is what happened in the present case.

[36] For these reasons, I find that the IAD breached the duty of procedural fairness owed to Ms Kotelenets. A new hearing before a different member of the IAD is therefore warranted.

[37] No question of general importance has been proposed by the parties. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the IAD so that a new hearing may be held before a differently constituted panel. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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