Federal Court  Cour fédérale

Date: 20160610

Docket: IMM-5729-15

Citation: 2016 FC 652

Ottawa, Ontario, June 10, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MOHAMMAD YARI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

JUDGMENT AND REASONS

[1] The applicant, Mohammad Yari, seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Protection Board dated November 10, 2015, which refused the applicant's appeal of the decision of the Deputy Program Manager (Program Manager) at the Canadian Embassy in Ankara. The decision letter from the Program Manager dated December 20, 2013 states that the applicant did not meet the residency

requirement for permanent residence under section 28 of the Act and that humanitarian and compassionate [H&C] considerations did not justify the retention of his permanent resident status.

[2] The applicant now argues that the IAD breached its duty of procedural fairness in the conduct of the appeal. The applicant submits that it was apparent that that he did not understand the nature of the proceedings, had not received the record of the decision maker, and did not know what was expected of him or the case he had to meet.

[3] For the reasons that follow, the application is dismissed. The IAD did not breach its duty of procedural fairness and made a reasonable decision.

I. Background

[4] The applicant is a citizen of Iran. He arrived in Canada on July 21, 2004, was granted refugee status and became a permanent resident in June 2007. However, he returned to Iran on several occasions and for extended periods.

[5] The applicant received a detailed letter from the Program Manager at the Canadian Embassy in Turkey, notifying him that he did not meet the statutory residency requirements and that there were insufficient H&C grounds to grant relief to retain his permanent resident status. The letter included information regarding how to appeal the decision and attached an additional document regarding the appeal process and possible grounds for appeal.

[6] The applicant filed a Notice of Appeal to the IAD dated January 15, 2014 which provided two addresses for the applicant: one in Canada and one in Iran. The heading of the notice form is "Notice of Appeal - Residency Obligation Appeal".

[7] On February 17, 2014, the IAD sent a letter to the applicant at the address in Iran and at the address in Canada providing additional information about the appeal and about an application for a travel document if necessary to return to Canada for the appeal. The letter also clearly states that the Minister's counsel must provide the record to the applicant or his counsel within 120 days of the filing of the Notice of Appeal. The letter provides a toll free phone number for further information and a link to the relevant website for further information about the appeal process.

[8] On April 2, 2015, the IAD sent a "Notice to Appear: Residency Obligation Appeal" to the applicant at both the Canadian address and the Iranian address, which indicated that the hearing would be held on July 20, 2015. That hearing was subsequently postponed at the request of the respondent. A second "Notice to Appear: Residency Obligation Appeal" was sent to the applicant, which indicated that the hearing would be held on November 10, 2015 and the location of the hearing.

[9] The applicant attended the hearing in person and without counsel on November 10, 2015.

[10] The IAD considered whether the Program Manager had erred and whether the applicant met the residency requirement under section 28 of the Act, which requires that a permanent

resident be present in Canada for 730 days within the relevant five year period and whether discretionary relief was warranted under section 65 and paragraph 67(1)(c) of the Act.

II. The Decision Under Review

[11] The IAD refused the applicant's appeal and refused discretionary relief in an oral decision delivered at the conclusion of the hearing, which was transcribed.

[12] The decision notes, as does the transcript of the hearing, that the IAD member, among other information, explained: the available grounds for appeal; that the applicant had been issued a one-year permanent residence card because he had launched an appeal of the December 2013 decision; and, the type of H&C grounds that could be considered pursuant to paragraph 67(1)(c) of the Act regarding discretionary relief.

[13] The IAD noted that the applicant did not file any documentary evidence or call any witnesses in support of his appeal.

[14] The IAD found that based on the applicant's handwritten documents, he had spent at most 656 days in Canada during the relevant five-year period, which was June 10, 2008 to June 10, 2013. The IAD referred to the GCMS notes which indicate that the Program Manager calculated that the applicant had been in Canada for only 449 days during that same period, based on the documents provided to the Program Manager.

[15] The IAD found that there was no evidence to find that the Program Manager erred in his calculations. The applicant did not file any additional material for the purpose of the *de novo* hearing before the IAD. Therefore, the IAD found that the applicant had not discharged his onus to provide clear, cogent, and convincing evidence that he had spent anything but 449 days in Canada during the relevant period. The IAD added that the nature and degree of his non-compliance with the residency requirements was significant.

[16] The IAD then considered whether to grant discretionary relief on H&C grounds, pursuant to paragraph 67(1)(c) of the Act.

[17] The IAD found that the applicant was not credible, noting several inconsistencies in his testimony, including about: his ability to leave and enter Iran, which was contradicted by his passport stamps showing he travelled elsewhere during the time periods when he alleged he was unable to leave Iran; his tax returns in Canada for periods when he was apparently in Iran and unable to leave; and, the date of his mother's death, which he had offered as an explanation for his inability to return to Canada.

[18] The IAD found that the applicant had provided no evidence or testimony regarding employment in Canada or of a bank account and no evidence regarding his relationship with his wife and daughter in Canada.

[19] The IAD noted that, despite obtaining refugee status, the applicant chose to return to Iran, continues to live there, and visits his family in Canada infrequently. The IAD found that neither hardship nor other H&C factors had been established.

[20] Shortly after the IAD member began to read the oral decision, the applicant sought to make additional comments, did not cease to do so when he was advised the hearing was over, and was ejected for shouting and walking around the room.

III. The Issues

[21] The applicant's primary argument is that the IAD breached its duty of procedural fairness and that a new hearing is required. With respect to the reasonableness of the decision, the applicant submits that although he did not meet the requirements for 730 days in Canada during the relevant period, if he had been given an opportunity to provide evidence, the IAD could have found H&C grounds upon which to grant discretionary relief.

IV. The Standard of Review

[22] An issue of procedural fairness is reviewed on the correctness standard (*Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

[23] Questions of fact and mixed fact and law are reviewed on the reasonableness standard. To determine whether a decision is reasonable, the Court focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers

"whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Deference is owed to the decision maker and the Court will not re-weigh the evidence.

A. *Did the IAD breach its duty of procedural fairness to the applicant?*

[24] The applicant argues that the IAD breached its duty of procedural fairness as demonstrated by the conduct of the hearing. The applicant notes that he relied on an interpreter, had no legal counsel, and did not receive the record of the decision of the Program Manager.

[25] The applicant argues that it was apparent to the IAD that he did not understand the nature of the appeal or its formality, the legal issues, that he was required to provide evidence, or that he could have had witnesses provide testimony. As a result, the IAD should have adjourned the hearing.

[26] The applicant acknowledges that the record was mailed to him, as established by the respondent, but attests that he did not receive the record. He submits that the IAD should not have proceeded knowing that he did not have the record as he did not know the case he had to meet. The applicant adds that the summary of the record provided to him at the hearing by the IAD was not sufficient to permit him to respond.

[27] The applicant argues that the IAD member interrupted his testimony and showed impatience to the extent that the hearing brings the administration of justice into disrepute.

[28] The applicant also submits that he did not know the proceeding was an appeal. He points to excerpts in the transcript where he expressed his confusion about what the process was about and where the IAD member cautioned him to stop speaking, cut off his answers, and redirected the questions.

[29] The applicant adds that his removal from the hearing room during the reading of the IAD's decision was unwarranted and impaired his ability to respond as he had more to say.

B. *The IAD did not breach its duty of procedural fairness*

[30] The duty of procedural fairness is "flexible and variable" (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 23-28, 174 DLR (4th) 193 [*Baker*]). In *Baker*, Justice L'Heureux-Dubé emphasized that the content of the duty must be determined in the specific context of each case and with regard to the context of the particular statute and the rights affected. Procedural fairness is based on the principle that individuals affected by decisions should have the opportunity to present their case and to have decisions affecting their rights and interests made in a fair, impartial, and open process "appropriate to the statutory, institutional, and social context of the decision" (at para 28).

[31] Whether the IAD breached procedural fairness depends on the scope of the duty in the context of the appeal of the decision at issue and the facts.

[32] As the respondent notes, the IAD is not required to act as legal counsel for a person who has chosen to represent himself (*Thompson v Canada (Minister of Public Safety and Emergency*

Preparedness), 2015 FC 808 at para 15, [2015] FCJ No 857 (QL) [*Thompson*]; *Wagg v Canada*, 2003 FCA 303 at paras 25, 31, [2004] 1 FCR 206 [*Wagg*]).

[33] In the present case, the transcript of the hearing demonstrates that the IAD member carefully explained to the applicant that the IAD could not provide legal advice, but did in fact explain the process, the applicable law, the potential grounds for appeal, the type of H&C factors that could be considered, and how the hearing would unfold.

[34] Although the IAD has a duty to ensure that its hearings are fair, this does not demand that the hearing be perfect (*Thompson* at paras 12-13; *Cyril v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1106 at para 14, [2015] FCJ No 1124 (QL); *Wagg* at para 36).

[35] In *Li v Canada (Minister of Citizenship and Immigration)*, 2015 FC 927, [2015] FCJ No 925 (QL), Justice Russell provided a useful summary of the relevant jurisprudence and noted:

> [37] My review of the case law suggests that a hearing is fair so long as the applicant understands the nature of the proceeding and is prepared to represent him or herself. For self-represented litigants, this may include an obligation on the Board to explain the process to an applicant and to clarify the nature of the decision being made. The consequences of the decision and the complexity of the matter can have an impact in determining whether a hearing is fair.

[36] The IAD fulfilled its obligation to ensure that the applicant understood the nature of the proceedings and the consequences of the decision.

[37] I do not accept the applicant's assertion that he did not know the case he had to meet. As noted above, he received the decision letter of the Program Manager which set out the reasons for the determination that he had not complied with his residence requirements and included specific information about his right to appeal the decision and how to do so. The applicant chose to file a Notice of Appeal, despite his later statement that he did not understand that the proceedings were an appeal. He cannot now claim that he was not aware that the proceeding before the IAD was an appeal given that he launched that very process.

[38] The applicant also received two notices of hearing which highlight in the title that it is a "Residency Obligation Appeal". In addition, the letter dated February 17, 2014 advised the applicant that he would receive the record within 120 days of his Notice of Appeal as this was a precondition to the appeal proceeding. Therefore, he was clearly advised that the process was an appeal, which he had initiated, and was on notice that the record would be provided. Given this notice, he could have inquired at any time about the record which he attests he did not receive.

[39] Despite that he chose not to seek legal advice, the information provided to the applicant, including the decision letter and the two notices of the hearing, was sufficient to advise him of the issues on the appeal and of the case he had to meet – i.e., to demonstrate that he met the residency obligation and any relevant H&C factors.

[40] The respondent demonstrated that it had sent the record to the applicant as required by the Rules. Although the applicant now attests that he did not receive the record, his testimony before the IAD was that he may have received the record. At the hearing, he stated that he did

not "have [the record] here." He acknowledged that "perhaps [he] was served." Even if the record was not received by the applicant, he had received other notifications well in advance and he was also shown the record at the hearing.

[41] The record includes the information the applicant had provided to the Program Manager, the decision, and the letters referred to above, which the applicant does not deny receiving. The only part of the record that the applicant would not have seen before the hearing and which did not emanate from him, is the GCMS notes, which reiterate requests for documents to show his time spent in Canada and in Iran and the calculations of those time periods.

[42] With respect to the applicant's submission that it was apparent that he did not know what was going on and that the IAD should have offered an adjournment, the transcript demonstrates that the IAD member specifically asked the applicant at the outset of the hearing, after the member provided an overview, if he "wish[ed] to pursue this appeal today" and he responded "Yes".

[43] The IAD was not required to offer an adjournment based on the applicant's comments that he did not know what an appeal was or because he named a possible witness during the hearing, without any indication what the witness would offer and who was not present. The IAD noted the many letters sent to the applicant explaining the process, that the applicant had access to the internet to learn about the process and that he could have sought legal advice.

[44] I agree that the applicant had sufficient information and ample time to further inform himself about the appeal hearing by referring to the website or the toll free phone number.

[45] The allegations that the IAD member interrupted the applicant's testimony and was impatient are not borne out by a review of the transcript in its entirety. The IAD member did caution the applicant to stop speaking to permit the interpreter to keep pace and repeatedly attempted to clarify the questions so the applicant would respond to the question rather than provide other irrelevant information. Even if the applicant perceived the IAD member to be impatient, this does not constitute a breach of procedural fairness.

[46] The IAD has the discretion to regulate its own procedure where the *Immigration Appeal Division Rules*, SOR/2002-230 [the Rules] are silent. In *Rezaei v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1259, [2003] 3 FCR 421 (FCTD) Justice Beaudry found that:

> [48] It clearly makes intuitive sense that a tribunal such as the IRB or any of its constituent divisions ought to be able to regulate its own procedure. It ought also to regulate the privilege of appearing before the tribunal to represent a claimant.

[47] Removing the applicant from the hearing room was not procedurally unfair as it did not deny him the opportunity to participate in his appeal. At the time of his removal, he had already given his testimony and made final submissions to the IAD; the hearing was over. If the IAD had reserved its decision and issued a written decision, no issue would arise. He would have been sent a written copy of the decision. The IAD chose to deliver an oral decision, advised the

applicant that this was occurring, and advised him that the hearing was, at that point, concluded. He was cautioned to refrain from interrupting.

[48] With respect to the applicant's allegation that the IAD should have accepted his business card as evidence to establish that he was employed, it was open to the IAD to not accept such last minute evidence that did not comply with the Rules. Moreover, I fail to see how a business card could establish employment during the period in question in the face of the evidence, including the stamps on the applicant's passport, which demonstrate he was not in Canada.

[49] I find that in the specific circumstances of this case, the IAD did not breach its duty of procedural fairness to the applicant.

[50] With respect to the applicant's reliance on *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44 [*Cardinal*], for the principle that any breach of procedural fairness demands that a new hearing be held, in my view, that is an overstatement of the principle.

[51] In a more recent decision of the Federal Court of Appeal, *Renaud v Canada (Attorney General)*, 2013 FCA 266, 425 FTR 48, the Court of Appeal noted that procedural irregularities do not necessarily require that the decision be quashed and a new hearing ordered;

> [4] […] With regard to procedural fairness, it has been held in the case law that an unfair hearing could render a decision invalid, regardless of the possible outcome of the dispute *(Gale v. Canada (Treasury Board)*, 2004 FCA 13, 2004 FCA. 13, at para. 12; and *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, at p. 493).
>
> [5] However, there is an important exception to this principle: where a particular decision on the merits was inevitable, it is

> possible to uphold the decision in spite of everything; see in this *regard Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board,* [1994] 1 S.C.R. 202 at pp. 228, 229. . . .

[52] In *Gale v Canada* (*Treasury Board*), 2004 FCA 13 at para 12, 316 NR 395, the Court of Appeal referred to the principle in *Cardinal* relied on by the applicant, "that a denial of a right to a fair hearing always renders a decision invalid, whether or not it appears to a reviewing court that a fair hearing would have likely resulted in a different decision." The Federal Court of Appeal went on to note:

> [13] We acknowledge that a court may exercise its discretion not to grant a remedy for a breach of procedural fairness where the result is inevitable (See *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202 at 228-29). That is not the case here. In this case, the adjudication turns on credibility and we cannot say the result is inevitable one way or the other.

[53] Although I have not found that there was any breach of procedural fairness in this case, in circumstances where there is such a breach, the issue becomes whether the result would be inevitable.

[54] Procedural fairness is a cornerstone of our justice system, but as noted above, the duty of procedural fairness varies with the context. The rights to know the case to be met and to have an opportunity to respond are minimum requirements. In the present case, even if the applicant did not receive the record, he was amply advised and knew the issues he had to address in his appeal. He launched that appeal and he attended the appeal hearing. He addressed the issues regarding his time spent in Canada and Iran and the IAD found his answers inconsistent. He was advised of the nature of H&C submissions and he made brief submissions indicating that he had a wife and

child in Canada but provided no further information about their relationship. The same conclusions regarding insufficient H&C grounds had been noted in the 2013 decision letter. It would have been difficult to show establishment in Canada in the face of evidence that the applicant was only in Canada for 449 days within the five year period.

C. *The Decision of the IAD is reasonable*

[55] The IAD reasonably found that the applicant had spent no more than 449 days in Canada during the relevant five year period. This was supported by the passport stamps from other countries and appears not to be contested by the applicant. This period falls far short of the required 730 days. The IAD's finding that the applicant lacked credibility was reasonable based on his inconsistent answers and failure to provide a reasonable explanation for the inconsistencies. The IAD also reasonably found that he had failed to show economic or family establishment in Canada or any evidence of other H&C considerations. Although the applicant stated he had a wife and daughter in Canada, given his long absences from Canada, the IAD reasonably found that there was no evidence of the nature of the family relationship.

JUDGMENT

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

No costs are awarded. No question is certified.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5729-15
STYLE OF CAUSE:	MOHAMMAD YARI v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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APPEARANCES:

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