Federal Court  Cour fédérale

Date: 20170629

Docket: IMM-236-17

Citation: 2017 FC 639

Toronto, Ontario, June 29, 2017

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MUHAMMAD FAWAD ALAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of decision by a member of the Immigration Appeal Division [IAD], dated December 19, 2016, denying the Applicant's sponsorship appeal. Specifically, the IAD dismissed the Applicant's appeal, brought under s. 63(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], from a refusal by an immigration officer at the High Commission of Canada in London to issue permanent resident

visas to the Applicant's mother and her accompanying dependants. The officer had refused the visas because the Applicant did not meet the minimum necessary income requirement prescribed by the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [IRPR].

[1] As explained in greater detail below, this application is allowed, because I find the IAD's decision to be unreasonable in its treatment of the evidence surrounding the income of the Applicant's wife and her willingness to contribute to the support of the Applicant's family.

II. Background

[2] The Applicant, Mr. Muhammad Fawad Alam, is a 34 year old naturalized Canadian Citizen. He came to Canada from Pakistan in September 2003 as a student and studied at the University of Toronto for four years, obtaining a Bachelor of Science in biological chemistry in June 2007. Mr. Alam worked at Patheon Inc. for almost five years and has worked at Apotex as a research scientist since August 2012.

[3] Mr. Alam applied in May 2009 to sponsor his parents and siblings, including two brothers and one sister, aged 24, 21, and 18 years, for immigration to Canada. His sister has since married and has been removed from the sponsorship application, and his father died in April 2013. Mr. Alam submits that, since his father's death, he has been financially supporting his mother and siblings in Pakistan. He says that he returns to Pakistan almost every year to visit them, that they speak by telephone almost every day, and that he worries for their safety in Pakistan. Mr. Alam also submits that, although his father had been successful enough in business

to enable his children to pursue post-secondary studies, he left the family with no inheritance, as the assets of his business were lost in a fraud case.

[4] On September 11, 2013, Citizenship and Immigration Canada [CIC] wrote to Mr. Alam, advising that he was not an eligible sponsor, because he did not meet the minimum necessary income requirements prescribed by the IRPR. Documentation accompanying CIC's correspondence identified that Mr. Alam's income for the twelve months preceding his sponsorship application in May 2009 ($42,787.777) was short of the Minimum Necessary Income [MNI] required for a family of five persons ($45, 662) by $2,874.33. On June 20, 2014, an immigration officer at the High Commission of Canada in London issued a decision refusing the Applicant's family members' applications for permanent residence.

[5] Mr. Alam appealed this decision on July 9, 2014. He did not dispute before the IAD the legal validity of the visa officer's refusal but rather sought special relief under s. 67(1)(c) of IRPA based on humanitarian and compassionate [H&C] grounds. On February 20, 2015, Mr. Alam married Mariam Riaz and sponsored her for permanent residence in Canada. A hearing of the appeal took place on December 1, 2016. Both Mr. Alam and his wife attended, but only Mr. Alam testified.

[6] On December 19, 2016, the IAD dismissed the appeal, finding that the immigration officer's decision was valid in law and that sufficient H&C considerations warranting special relief in light of all the circumstances did not exist in this case. This is the decision that is the subject of the within application for judicial review. In support of this application, Mr. Alam and

his wife have filed affidavits in which they deposed that, during the hearing, the IAD member asked them if Mr. Alam's brothers in Pakistan worked part time at a shawarma stand. They describe being disturbed by this question, which they considered to demonstrate racism on the part of the member. Their affidavits also note that the CD ROM of the hearing does not contain a full audio recording of the proceeding, and it appears to be common ground between the parties that the Applicant's counsel's oral submissions, following the conclusion of testimony at the hearing, are missing from the recording.

III. Issues

[7] The Applicant articulates the issues for the Court's consideration as follows:

A. Do the inappropriate comments of the IAD taint the appearance of natural justice and procedural fairness?

B. Does the fact that the audio recording of the December 1, 2016 hearing is incomplete constitute a breach of natural justice and procedural fairness?

C. Did the IAD commit other reviewable errors in its assessment of the H&C case presented by the Applicant?

IV. Analysis

[8] My decision to allow this application for judicial review turns on the third issue raised by the Applicant. The Respondent submits, and I concur, that whether the IAD committed a reviewable error in its assessment of the H&C case submitted by the Applicant is reviewable on

a standard of reasonableness (see *Wang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 705).

[9] The Applicant raises a number of concerns with the IAD's analysis of the evidence and arguments he submitted in his request for H&C relief. The point upon which my decision turns is the IAD's treatment of evidence surrounding the income of the Applicant's wife and her willingness to contribute to the support of the Applicant's family.

[10] As noted in the IAD's decision, the income requirements prescribed by the IRPR were changed by regulations that came into force on January 1, 2014, establishing a threshold of MNI plus 30% for the previous three years (see s. 133(1)(j)(B) of the IRPR). The IAD's decision sets out this threshold for the three years prior to the appeal, culminating in a figure of $75,174 for 2016. The decision also reflects the total income disclosed by the evidence for each of those years, indicating the year to date [YTD] figure for 2016 to be $64,647. The applicable footnote indicates this figure to be taken from a document submitted by Mr. Alam which calculates his total household income as of November 11, 2016 to be $64,647. Other documents in the Certified Tribunal Record indicate this figure to be the sum of $57,515 earned by Mr. Alam and $7,132 earned by his wife, Ms. Riaz.

[11] While the 2016 YTD figure of $64,647 is less than the $75,174 threshold for 2016, it appears that the Applicant was arguing that projecting the household income to the end of 2016 would result in a figure of over $78,000, which exceeds the threshold. As noted by the IAD, the Applicant's counsel argued that this income mitigates the legal impediment to Mr. Alam's

eligibility to sponsor his family. However, the IAD disagreed with this submission. The IAD noted that Ms. Riaz was a silent observer at the hearing, it having inquired whether she would testify and having been informed that she would not. The IAD noted that it did not have any evidence from her, *viva voce* or by way of affidavit, with respect to her willingness to contribute to support the immigration of her in-laws, much less her views on the prospects of sharing a home with her in-laws about whom she knows very little. The IAD found that it was not able to give any weight to what it described as Mr. Alam's bald assertions of his wife's support. It therefore found that the degree of legal impediment to his eligibility to sponsor his family remained significant.

[12] The Respondent emphasizes the deference due to the IAD under the reasonableness standard and argues that this finding is within the range of acceptable outcomes. The Respondent submits that the onus was on the Applicant to provide the best evidence in support of the H&C considerations he wished to have taken into account, and that there was no evidence of Ms. Riaz's consent to the inclusion of her income to support Mr. Alam's family.

[13] The difficulty with this position is that there was evidence before the IAD of Ms. Riaz's willingness to support Mr. Alam's family and her enthusiasm for their immigration to Canada. I appreciate that this evidence was provided by Mr. Alam, not by Ms. Riaz. However, the long-established principle applicable in immigration matters is that an applicant's sworn testimony is presumed to be true unless there is reason to doubt its truthfulness (see *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302, at para 5 (FCA)). The IAD gave no reason for doubting Mr. Alam's testimony. Moreover, this testimony was given in Ms. Riaz's

presence, the evidence was that she is fluent in the English language, and the transcript of the hearing does not demonstrate the IAD raising any concern with Mr. Alam about the credibility of his testimony as to his wife's enthusiasm and support.

[14] I therefore find this aspect of the IAD's decision to be unreasonable and consider it to undermine the reasonableness of the decision as a whole. In so concluding, I am expressing no opinion on the weight that should be afforded, in conducting an H&C analysis, to the evidence that the Applicant's combined household income exceeded the minimum income requirement in 2016. Rather, I note that this appears to have been a significant consideration underlying the IAD's negative decision, as it is the one element, of many considered by the IAD, that it characterized as an "aggravating" or negative factor. Therefore, the unreasonable analysis of this element renders the decision unreasonable.

[15] Having concluded on this basis that this application for judicial review should be allowed, it is unnecessary for the Court to consider most of the other arguments raised by the Applicant. However, I do wish to address the issue surrounding the IAD's question about Mr. Alam's brothers in Pakistan working at a shawarma shop, particularly as Mr. Alam is seeking costs on this judicial review and his position that costs are appropriate is based at least in part on this issue.

[16] The Respondent argues that the impugned question was not inappropriate, as it arose in the context of a legitimate line of inquiry, exploring the extent to which Mr. Alam's brothers would be able to contribute to family expenses upon immigrating to Canada and whether they

had any employment history. Mr. Alam testified that they would support themselves and contribute towards the household, although they had not yet worked in Pakistan during school breaks other than occasionally tutoring neighbours' children. He stated that they had not yet had a "proper job", following which the IAD posed the impugned question, "Right, they haven't gone to work in a shwarma shop for example". Mr. Alam replied that they had not, but they had worked in giving tuition, and one had recently started as a teacher's assistant at his university.

[17] In their affidavits filed in this application for judicial review, in support of the Applicant's arguments on this issue, Mr. Alam and Ms. Riaz state that they were highly offended by the question whether Mr. Alam's brothers in Pakistan worked at a shwarma stand. They explained that Mr. Alam, Ms. Riaz and Mr. Alam's brothers are all highly educated, and none of them has ever worked at a shwarma stand.

[18] I agree with the Respondent that the IAD's line of inquiry was appropriate. However, the concern is not with the line of inquiry, but rather with the language that was used to pursue it. In argument, the Respondent's counsel acknowledged that referring to a shwarma shop was not a good example but submitted that the question could just as easily have been framed as whether Mr. Alam's brothers had worked part-time at McDonald's. However, it was not framed in that manner, and I consider it understandable that Mr. Alam and Ms. Riaz found the comment reflective of a stereotype and culturally insensitive and that they were offended by it. The Applicant refers to the Member's Code of Conduct, applicable to the work of the Immigration and Refugee Board [IRB], as based on the IRB's dedication to values including cultural

sensitivity. The language used in this particular question by the IAD is not consistent with this value.

[19] The Applicant did not submit any jurisprudence to guide the Court in considering whether this issue would warrant setting aside the IAD's decision. The Respondent submits, and I concur, that the appropriate analysis is to consider whether the language used by the IAD gives rise to a reasonable apprehension of bias. In *Lawal v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 861, at paragraph 40, Justice de Montigny described the test for apprehension of bias as follows:

> [40] The test for bias in an independent adjudicative tribunal, such as the IRB, is whether a reasonable person, being reasonably informed of the facts and viewing the matter realistically and practically and having thought it through, would think it more likely than not that the tribunal is biased: see *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369 at pp. 394-395; *Ahumada v. Canada (Minister of Citizenship and Immigration),* 2001 FCA 97, at para.19, [2001] 3 F.C. 605. The grounds for apprehension of bias must be substantial.

[20] A high burden rests on an applicant who seeks to establish either bias or an apprehension of bias (see *Rodriguez Zambrano v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 481; *Jackson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1098). In *Santos v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1476 [*Santos*], an applicant for refugee protection alleged childhood sexual abuse by relatives and, in the course of the hearing, the Refugee Protection Board member inquired whether the applicant was homosexual and expressed the view that children sexually abused by male relatives do not suffer abuse or persecution if they are homosexual. At paragraph 25 of *Santos*, Justice Kelen described the member's view as gravely prejudicial in the context of a refugee claim based on sexual abuse

and concluded that there was considerable doubt as to the member's ability to decide the case fairly.

[21] Returning to the case at hand, while the language used by the IAD in the impugned question was inappropriate, my conclusion is that it does not meet the high burden necessary to satisfy the test for a reasonable apprehension of bias. Unlike in *Santos*, the inappropriate comment was isolated, and it does not bear directly upon the determination the decision-maker was required to make. Therefore, I would not have allowed this application for judicial review based solely on this issue. However, as explained above, I have found the decision itself to be unreasonable and will therefore set aside the IAD's decision and return the matter, to a different member of the IAD, for redetermination.

V. Costs

[22] The day before the hearing of this application for judicial review, the Applicant's counsel advised the Court and the Respondent of his intention to seek costs in this application. As a consequence of Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, costs are not awarded in immigration matters unless the Court so orders for special reasons. At the hearing of this application, the Applicant's counsel submitted that the errors alleged by the Applicant, and in particular the "shwarma shop" question, in combination with the length of time and series of events that had passed since the filing of the Applicant's sponsorship application in 2009, constituted such special circumstances.

[23] The reviewable error that I have identified, on the basis of which the judicial review is being allowed, relates to the IAD's consideration of the evidence before it, giving rise to an unreasonable decision. This does not constitute special circumstances of the sort that would warrant an award of costs. While Mr. Alam is understandably frustrated with the time that has passed while pursuing his sponsorship application, the matter before the Court relates to the process before the IAD, which commenced with the filing of a notice of appeal on July 9, 2014 and culminated in the December 19, 2016 decision that is under review. There is no evidence before me to suggest that this is an unusual or untoward period of time for the completion of the IAD process.

[24] Having found no special circumstances to support an award of costs, none are awarded.

[25] The parties were consulted, and neither proposed any question for certification for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, and the matter is remitted to a different member of the Immigration Appeal Division for redetermination.

2. No costs are awarded.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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