Federal Court  Cour fédérale

Date: 20171103

Docket: IMM-1693-17

Citation: 2017 FC 995

Ottawa, Ontario, November 3, 2017

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

NAHEED SALAHUDDIN SOHAIL

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The respondent, Ms. Naheed Salhuddin Sohail, is originally from Pakistan. In 2001, Ms. Sohail and her husband, Mr. Sohail Obaidullah Ahmed, arrived in Canada as permanent residents. They both obtained their Canadian citizenship in 2005. In June 2010, Ms. Sohail and her husband initiated proceedings with the Canadian immigration authorities in order to adopt

Mr. Zabih-Ur-Rehman Bilal, who is Ms. Sohail's nephew and resides in Karachi, Pakistan. Mr. Bilal was 13 years old at the time. Ms. Sohail and her husband thus sought to sponsor Mr. Bilal's application for permanent residence in Canada as a member of the "family class".

[2] In February 2013, an immigration officer [Officer] of the High Commission of Canada in Islamabad, Pakistan denied Mr. Bilal's application [Officer Decision]. The Officer was not satisfied that Mr. Bilal had developed a parent-child relationship with Ms. Sohail and her husband, and found that the conditions prescribed by the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and paragraph 117(1)(g) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] were not met. Ms. Sohail appealed the Officer Decision. In March 2017, the Immigration Appeal Division [IAD] of the Immigration and Refugee Board granted her appeal, reversed the Officer Decision and determined that the adoption of Mr. Bilal was genuine and not primarily for immigration purposes [IAD Decision].

[3] The Minister of Citizenship and Immigration [Minister] now seeks judicial review of the IAD Decision. The Minister argues that the IAD erred in determining that the intended adoption of Mr. Bilal was not entered into primarily for the purpose of acquiring a status or privilege under the IRPA. The Minister contends that the IAD Decision is unreasonable and should be quashed and remitted to a differently-constituted panel for redetermination.

[4] The only issue raised by the Minister is whether the IAD Decision is unreasonable. On her part, Ms. Sohail also brings up the preliminary issue of whether the Court should consider an affidavit submitted by the Minister in support of the application for judicial review. This

affidavit is signed by Ms. Zofia Przybytkowski, who acted as the Minister's counsel before the IAD, and contains the notes she prepared for the IAD hearing as well as those taken during the hearing [Przybytkowski Affidavit].

[5] For the reasons that follow, the Minister's application for judicial review will be dismissed. I am not convinced that the IAD Decision falls outside the range of possible and acceptable outcomes defensible in respect of the facts and law. I instead find that the evidence before the IAD reasonably supports its decision, and that the reasons adequately explain how the IAD concluded that the intended adoption of Mr. Bilal was not entered into primarily for the purpose of acquiring a status or privilege under the IRPA. I see no ground upon which the Court should intervene. Furthermore, I agree with Ms. Sohail that the Przybytkowski Affidavit filed by the Minister is not admissible, and it has not been considered by the Court in the context of this judicial review.

II. Background

A. *The Appeal Decision*

[6] The IAD prefaced its decision by noting that, since the Officer Decision, it was determined and acknowledged that Mr. Bilal had not yet been adopted. As such, the IAD focused solely on the issue of whether the adoption process had been entered into primarily for the purpose of acquiring any status or privilege under the IRPA.

[7] The IAD concluded that Ms. Sohail had discharged her burden of demonstrating that, on a balance of probabilities, she intended to adopt Mr. Bilal in Canada in order to obtain legal recognition of a factual situation "born out of love" which already existed, namely that Mr. Bilal is considered, behaves and will continue to behave as Ms. Sohail's son.

[8] The IAD largely based its analysis on the testimony given at the hearing. According to the IAD's rendition of the testimony of Ms. Sohail and her husband, the intimate bond between them and their nephew was formed when Mr. Bilal was born. The IAD noted Ms. Sohail's emotional recollection that, in the early hours of the child's life, her sister told her he was now hers, and that her sister has continued to express such desire ever since. The IAD added that, though it may seem curious for Ms. Sohail's sister and her husband to give away their first child, a boy, Ms. Sohail provided a reasonable answer to the effect that it was her emotional bond with the child that ultimately prevailed. The IAD further described how Ms. Sohail deftly explained that the child spent most weekends and holidays with her and her immediate family; that Ms. Sohail and her husband had custody of Mr. Bilal in Pakistan; that they continued to provide for his financial needs; that they communicated every day; and that Mr. Bilal, now 20 years of age, consulted Ms. Sohail and her husband in all major decisions concerning him.

[9] The IAD further acknowledged that, even though Ms. Sohail could have submitted more documents to establish the existence of frequent contacts with Mr. Bilal and the expenses being covered for him, her testimony (and that of her husband) remained a credible way to establish the factors necessary to determine a parent-child relationship. The considerable perseverance required during the long and complex adoption process spanning several years, which included

participation in a home study and the issuance of a letter of “no objection” from the Ontario authorities, was further corroboration of Ms. Sohail’s and her husband’s commitment to Mr. Bilal.

[10] The IAD then addressed the main concern expressed by the Officer following the initial interview, namely the importance for Mr. Bilal of coming to Canada in order to complete his studies. In response to this concern, the IAD first stated that the Officer’s depiction of Mr. Bilal’s responses at the initial interview was truncated by a poor perception of the situation, which was not one where an adoption had already occurred and where the bonds with the biological parents had been severed. The IAD further related how, in a location like Karachi where safety remained precarious, it was somewhat normal for those who cared for the well-being of a child to emphasize the dangers to which he may be subjected by staying there. The IAD also gave credence to what Ms. Sohail and her husband viewed as the paradox of this matter, namely the fact that Ms. Sohail began the steps to adopt Mr. Bilal while she was in Canada in order to have him come to the country. According to the IAD, it could not be any other way because Ms. Sohail and her husband did not need to undertake the adoption process if the child were to stay in Pakistan. The IAD underlined that Ms. Sohail and her husband already had custody of Mr. Bilal in Pakistan and that adoption, as the concept is considered in Canada, was illegal there. Thus, said the IAD, refusing sponsorship by claiming that the sole purpose of the process was to acquire a privilege under the IRPA equated to circular reasoning and distorted the objectives of paragraph 117(1)(g) of the Regulations.

[11] Lastly, regarding the ongoing contact between Mr. Bilal and his biological parents, the IAD noted Mr. Bilal's candid response in respect to his intention to continue to communicate with them once he arrives in Canada, and concluded that this did not constitute a breach of the sponsorship opportunity provided by the Regulations or an attack on the "integrity of the system". For the IAD, it seemed normal for Mr. Bilal not to completely sever ties with those with whom, because of the duration of the adoption process, he had to live for a large part of his life and who are still part of the family.

B. ***The standard of review***

[12] This Court has consistently held that decisions of the IAD, as an expert tribunal, must be assessed according to the standard of reasonableness and are owed a high degree of deference (*Truong v Canada (Citizenship and Immigration)*, 2017 FC 422 at para 20; *Nguyen v Canada (Citizenship and Immigration)*, 2016 FC 1207 at para 11). More specifically, matters relating to adoption in the context of immigration beckon an analysis on the reasonableness standard given their factually-intensive nature (*Alvarado Dubkov v Canada (Citizenship and Immigration)*, 2014 FC 679 at para 6). Furthermore, the issues on the present application relate to the IAD's interpretation and application of the IRPA, one of its home statutes. As the Supreme Court repeatedly stated in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*] and its progeny, when an administrative tribunal interprets or applies its home statute, there is a presumption that the standard of review applicable to its decision is reasonableness (*Alberta Teachers* at paras 39 and 41; *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 at para 35; *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 at para 32).

[13] When reviewing a decision according to the reasonableness standard, this Court must focus its analysis on "the existence of justification, transparency and intelligibility within the decision-making process"; the IAD's findings should not be disturbed as long as 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 [*Dunsmuir*] at para 47). In conducting a reasonableness review of factual findings, it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at para 99). Under a reasonableness standard, as long as the process and outcome fit comfortably with the principles detailed above, a reviewing court must not substitute the decision-maker's findings and conclusion for its own view of a preferable outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at para 17).

III. Analysis

A. *The Przybytkowski Affidavit is not admissible*

[14] I will first deal with the preliminary issue raised by Ms. Sohail.

[15] In support of its application, the Minister has filed an affidavit and accompanying documents, consisting notably of notes prepared by the Minister's counsel for argument and submissions before the IAD, as well as post-hearing summaries penned by counsel. Ms. Sohail submits that this new evidence is inadmissible before the Court. Ms. Sohail pleads that, if the Minister sought to shed light on what transpired at the IAD hearing, a transcript or audio

recording of the hearing should instead have been submitted. On its part, the Minister claims that the Przybytkowski Affidavit provides helpful background information on the circumstances in which the IAD Decision was taken. Relying on *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*AUCC*] and *Agnaou v Canada (Attorney General)*, 2014 FC 850, the Minister contends that the affidavit falls within the accepted exceptions to the general rule that, in judicial review proceedings, evidence is restricted to materials that were before the administrative decision-maker.

[16] I do not agree with the Minister and find that the Przybytkowski Affidavit cannot be admitted by the Court.

[17] The submission of affidavits proffering additional information or facts in the context of applications for judicial review has been met with caution by the courts. The case law has clearly established that a judicial review application strictly relates to the decision under review and that the record before the reviewing court must be that which was before the administrative tribunal (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 [*Bernard*] at paras 13-28; *Sedighi v Canada (Citizenship and Immigration)*, 2013 FC 445 at para 14; *Mahouri v Canada (Citizenship and Immigration)*, 2013 FC 244 at para 14). The general rule is that a reviewing court should not receive extrinsic evidence going beyond the tribunal record and the decision itself (*Bernard* at para 18; *Bekker v Canada*, 2004 FCA 186 at para 11; *Leslie v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 119 at para 4). In other words, the task of a reviewing court is to determine whether the administrative decision-maker erred in deciding as it did based on the documents it received and the oral evidence it heard (*Sosiak v Canada (Attorney General)*, 2003

FCA 205 at para 14; *Gitxsan Treaty Society v Hospital Employees' Union*, [2000] 1 FCR 135 (FCA) at para 15).

[18] Exceptions to this general rule are limited. In *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 7, the Federal Court of Appeal, citing the words of Mr. Justice Stratas in *AUCC*, outlined that the recognized exceptions to this general prohibition "tend to facilitate or advance the role of the judicial review court without offending the role of the administrative decision-maker" (*AUCC* at para 20). These exceptions include: (i) an affidavit providing general background assisting in understanding the issues relevant to the judicial review; (ii) an affidavit necessary to bring evidence on procedural defects or a breach of procedural fairness; and (iii) an affidavit highlighting the complete absence of evidence before the administrative decision-maker (*AUCC* at para 20).

[19] The Minister contends that the Przybytkowski Affidavit falls primarily within the "background information" exception as well as into the "no evidence" one by analogy. I disagree. The "background information" exception has a narrow scope. In *Delios v Canada (Attorney General)*, 2015 FCA 117 [*Delios*], Mr. Justice Stratas summarized it as follows (*Delios* at para 45):

> [45] The "general background" exception applies to non-argumentative orienting statements that assist the reviewing court in understanding the history and nature of the case that was before the administrative decision-maker. In judicial reviews of complex administrative decisions where there is procedural and factual complexity and a record comprised of hundreds or thousands of documents, reviewing courts find it useful to receive an affidavit that briefly reviews in a neutral and uncontroversial way the procedures that took place below and the categories of evidence that the parties placed before the administrator. As long as the

> affidavit does not engage in spin or advocacy – that is the role of the memorandum of fact and law – it is admissible as an exception to the general rule.

[20] In my view, no matter the angle from which they are looked at, counsel's notes detailing her experience of the IAD hearing do not constitute background information that might assist the Court in understanding the relevant issues before the IAD. Though the Minister claims that the Przybytkowski Affidavit simply aims to demonstrate the topics raised by counsel at the IAD hearing, it essentially engages in advocacy and merely serves to re-argue the facts and the Minister's theory of the case. If the purpose of the affidavit was to aid the Court by depicting grave errors of procedure, fact or law committed by the IAD at the hearing or subsequent decision, then the Minister could and should have submitted an unedited hearing transcript or recording; summaries penned by counsel cannot be held to be an accurate depiction of what occurred in the hearing. If the goal was rather to prove an unreasonable assessment by the IAD, then the memorandum of argument is the means of achieving it, with the support of legal principles backed by jurisprudence and appropriate references to the record before the IAD.

[21] Moreover, this Court has previously held that notes by counsel should be disregarded by reviewing courts, as they do not form part of the record on which the initial decision was made (*El-Hajj v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1737 at para 7). In addition, personal notes cannot be accepted as a means of filling evidentiary gaps and cannot serve as a substitute for a voice recording or verbatim record of testimony (*Goodman v Canada (Minister Citizenship and Immigration)*, [2000] FCJ No 342 (FC) at para 87). At the hearing before this Court, counsel for the Minister indicated that she was not aware of any decision

where counsel's notes have been accepted as proper affidavit evidence under the "background information" exception. Neither am I.

[22] As to the Minister's claim that the Przybytkowski Affidavit belonged to the "no evidence" exception by analogy, the Minister was unable to provide any support for that proposition. Quite the contrary, there is no indication whatsoever that the IAD decided any portion of this case on a complete lack of evidence.

[23] The Przybytkowski Affidavit therefore does not fit with any of the clearly established exceptions for admitting extrinsic, additional materials upon judicial review. The affidavit simply flags a number of evidentiary factors that were argued by counsel for the Minister during proceedings before the IAD, and not ultimately retained by the decision-maker. I thus conclude that the Minister's affidavit is inadmissible, and it has not been considered for the purpose of this judgment.

B. ***The IAD Decision is reasonable***

[24] Turning to the merits of the judicial review, the Minister argues that it was unreasonable for the IAD to conclude that the intended adoption of Mr. Bilal was not being entered into primarily for immigration purposes. In particular, the Minister singles out three key topics for which evidence was allegedly ignored or misconstrued by the IAD. First, the Minister claims that the IAD erred in assessing the nature and extent of the relationship between Ms. Sohail and Mr. Bilal. Second, the Minister submits that the IAD erred by minimizing the importance of the true reasons for which Mr. Bilal desired to live in Canada, namely to study and obtain a better

education. Third, the Minister contends that the IAD misinterpreted the ties between Mr. Bilal and his biological parents. The Minister further pleads that, in reaching its decision, the IAD erroneously considered humanitarian and compassionate [H&C] grounds in contravention of section 65 of the IRPA barring it from doing so.

[25] I am not persuaded that any of the alleged errors identified by the Minister justify the intervention of the Court or allow me to conclude that the IAD Decision does not fall within the range of possible, acceptable outcomes. In my view, the Minister has failed to present any convincing evidence or argument to support its allegations that the IAD made erroneous findings of fact or disregarded evidence available to it. In fact, at the hearing before this Court, counsel for the Minister acknowledged that the IAD did not omit to consider any particular piece of evidence.

[26] Even though the Minister may have concerns about the IAD's conclusions, it is clear that the IAD did not ignore the evidence singled by the Minister. The IAD was aware of the circumstances in which Mr. Bilal had been "given" to Ms. Sohail by her sister at the time of his birth. The IAD was also mindful of the fact that Mr. Bilal continued to live with his biological parents, save for weekends and holidays spent with Ms. Sohail and her family. The IAD also referred to the fact that the adoption would offer a better future for Mr. Bilal and would give him the opportunity to obtain an education in Canada. The IAD further noted the safety concerns in Pakistan and Mr. Bilal's continued contact with his biological parents. In sum, every detail with which the Minister takes issue was considered by the IAD. But, having reviewed the totality of the evidence, the IAD concluded that a bond had been established between Ms. Sohail and Mr.

Bilal, and that the factual situation before it did not have the attributes of an adoption entered into primarily for immigration purposes. I would add that the Minister has failed to provide any probing example to support its allegation that the IAD improperly considered H&C grounds in reaching its decision.

[27] The Minister essentially signals portions of the evidence cited by the IAD which could have been interpreted in its favour and points to the IAD "minimizing" the importance of many factors which, in the eyes of the Minister, called for a different conclusion. The arguments put forward by the Minister simply express its disagreement with the IAD's assessment of the evidence and ask the Court to prefer its own alternative reading to that of the IAD. In doing so, the Minister is inviting the Court to reweigh the evidence before the IAD and to substitute itself for the decision-maker. Unfortunately for the Minister, this is not an appeal but a judicial review. In conducting a reasonableness review of factual findings, it is not the role of the Court to reassess the relative importance given by the decision-maker to any relevant factor or piece of evidence.

[28] Even if I were left with doubt regarding some factual determinations made by the IAD, my role in a judicial review is not to make the findings that I might have made had I been in the shoes of the IAD. Rather, it is to determine whether the determinations of the IAD were reasonable and fall within the range of possible, acceptable outcomes (*Dunsmuir* at para 47). Needless to say, these principles governing how reviewing courts ought to approach judicial reviews are the same for all applicants, and they are no different when the Minister happens to be in that position.

[29] Many questions that come before administrative tribunals such as the IAD do not lend themselves to one specific, particular result. Instead, they often give rise to a number of possible, reasonable conclusions. But reasonableness is a deferential standard and tribunals "have a margin of appreciation within the range of acceptable and rational solutions" (*Dunsmuir* at para 47; *Newfoundland Nurses* at para 13). In this case, the IAD heard from Ms. Sohail and her husband directly at the hearing and it reviewed the evidence before reaching the conclusion that the adoption of Mr. Bilal was not primarily for acquiring status or privilege under the IRPA. I am satisfied that the testimonies of Ms. Sohail and her husband could reasonably support the existence of the emotional bond with Mr. Bilal noted by the IAD. I do not have to decide whether another interpretation might have been possible. It suffices to conclude that the reasoning process of the IAD is not flawed and flows from the evidence.

[30] A recurring theme in the jurisprudence respecting citizenship matters such as applications for spousal or adoption sponsorship is that each case is fact-specific and must be determined on its own merits. In the case of Ms. Sohail, the IAD did not ignore the evidence. It rather found it sufficient to demonstrate that the adoption of Mr. Bilal was not primarily for immigration purposes. I accept that the provisions dealing with immigration sponsorship by family members in the IRPA and the Regulations reflect both the objective of family reunification, and the intention of the legislator to prevent adoptions made for immigration purposes. In order for nephews and nieces who are not orphans (as is the case for Mr. Bilal) to qualify as members of the family class through adoption, the applicants must demonstrate that the primary purpose of their intended adoption is not gaining immigration advantages. The burden lied with Ms. Sohail and the IAD, as an expert tribunal, was satisfied that she had met it on a balance of probabilities.

[31] It is also well recognized that a decision-maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 36; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). The Minister did not give any example of evidence that was not assessed by the IAD, or of evidence that squarely contradicted the findings made by the decision-maker (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) [*Cepeda-Gutierrez*] at para 17). Moreover, a failure to mention a particular piece of evidence or to address each issue and every argument that a party raises does not mean that it was ignored or that there was a reviewable error (*Newfoundland Nurses* at para 16). It is only when an administrative tribunal is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9-10; *Cepeda-Gutierrez* at paras 16-17). This is not the case here.

[32] The IAD is a specialized expert body with a broad mandate to decide complex immigration and citizenship matters and, as such, it is owed a high degree of deference. This is particularly true on issues like the genuineness of an adoption, as these are highly factual determinations at the heart of the IAD's expertise and functions.

[33] Reasons are to be read as a whole, in conjunction with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53; *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at para 3). A judicial review is not a "line-by-line

treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). The Court should instead approach the reasons with a view to "understanding, not to puzzling over every possible inconsistency, ambiguity or infelicity of expression" (*Canada (Minister of Citizenship and Immigration) v Ragupathy*, 2006 FCA 151 at para 15). When read as a whole, the IAD Decision shows that the panel properly assessed all the necessary factors and provided an analysis of the evidence presented. The intervention of this Court is not warranted.

IV. Conclusion

[34] For the reasons set forth above, this application for judicial review is dismissed. Although the Minister might have preferred a different decision, I am satisfied that the IAD considered all the evidence before it and adequately explained why the contemplated adoption of Mr. Bilal was not primarily for immigration purposes. The IAD Decision is reasonable and provides sufficient reasons. It is intelligible, defensible and supported by the evidence, and I find that it meets the standard of reasonableness. The concerns voiced by the Minister were all before the IAD, they were not ignored and were all dealt with and considered; but they were just not retained by the IAD.

[35] Neither party has proposed a question of general importance to certify. I agree there is none.

JUDGMENT in IMM-1693-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed, without costs.

2. No question of general importance is certified.

"Denis Gascon"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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