Federal Court  Cour fédérale

Date: 20180307

Docket: IMM-3708-17

Citation: 2018 FC 267

Ottawa, Ontario, March 7, 2018

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

TRICEIA LEIGH CLARKE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (the IAD) of the Immigration and Refugee Board, dismissing Triceia Leigh Clarke's (the Applicant) residency obligation appeal. The Applicant had not met the residency requirement, having only established 147 days of residency in Canada during the relevant period, far less than the 730 days required by s. 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and the IAD concluded that she had not established sufficient humanitarian and compassionate (H&C) considerations to warrant a favourable decision pursuant to s. 28(2)(c) of *IRPA*.

[2] For the reasons that follow, this application for judicial review is allowed.

I. Background

[3] The Applicant is a 34 year old citizen of Jamaica and single mother of a 10 year old Canadian-born child.

[4] The Applicant obtained permanent residence to Canada in 2008, being included on her mother's application for landing. The relevant period for assessing residency was from June 2, 2009 to June 4, 2014. During this period, the Applicant was present for 147 of the requisite 730 days, spending much of her time in Jamaica. The Applicant states that she was there to care for various members of her family who had fallen ill, including her grandfather (who died in 2009), grandmother (who died in 2014) and her father, who was diagnosed with throat cancer in 2011. The Applicant states that she was her father's primary caregiver during surgery and radiotherapy, and that since his condition had improved by 2014 she felt comfortable leaving him to return to Canada.

[5] On June 4, 2014, she applied for a travel document to return to Canada, as at that point her permanent residence card had expired. However, because she did not meet the residence requirement, her application was refused, and she appealed that refusal to the IAD.

[6] At the IAD hearing, the Applicant represented herself. She presented some documents and gave evidence. The Respondent was represented by counsel, who cross-examined the Applicant and made final submissions. The IAD member concluded that the Applicant had not

established sufficient H&C grounds to warrant excusing her extended absences from Canada during the relevant period for determining residency, and dismissed her appeal.

II. Issues and Standard of Review

[7] The sole issue in this case is whether there was a breach of procedural fairness arising from the IAD hearing.

[8] Questions of procedural fairness are to be reviewed under the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 44. A breach of procedural fairness will generally void the hearing and the resulting decision, unless the failing is remedied prior to the close of the hearing or the result is a foregone conclusion, for example because a binding legal rule dictates only one outcome: *Singh Dhaliwal v Canada (Citizenship and Immigration)*, 2011 FC 201 at paras 25-26 [*Singh Dhaliwal*].

III. Analysis

[9] The Applicant argues that she was denied procedural fairness in two ways. First, once it became clear during the hearing that she was not in a position to present her case in an adequate fashion, the IAD member did not advise her that she could seek an adjournment to retain counsel or to give herself time to prepare properly. Second, at the end of the hearing, despite her statements that she understood that she had not provided the evidence that was necessary to substantiate key elements of her claim, the member did not inform her that she could file documents after the close of the hearing, as provided for in the IRB Rules.

[10] The requirements of procedural fairness depend on the nature of the process, including the type of hearing, the nature of the interests affected by the outcome, and the statutory framework (*Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817). In regard to self-represented claimants in immigration matters before the IAD, I would adopt the following guidance from Justice Henry Brown in *Thompson v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 808:

> [12] Self-represented claimants are not always or necessarily entitled to a higher degree of procedural fairness: *Martinez Samayoa v Canada (Minister of Citizenship and Immigration)*, 2012 FC 441 at para 6 [*Martinez*]; *Turton v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1244; *Adams v Minister of Citizenship and Immigration*, 2007 FC 529 at paras 24-25; *Agri v Canada (Citizenship and Immigration)*, 2007 FC 349 at paras 11-12. However, while the IAD is to be shown much deference in its choice of procedure, and while it is not obligated to act as counsel for unrepresented parties, it nevertheless has a duty to ensure a fair hearing, and the content of such procedural rights is context-dependent and is to be determined on a case-by-case basis: *Singh Dhaliwal v Canada (Minister of Citizenship and Immigration)*, 2011 FC 201 at paras 13-14; *Martinez* at para 7; *Kamtasingh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 45 at paras 9-10, 13; *Law v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1006 at para 14-19; *Nemeth v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 590 at para 13.
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> [13] The content of the Applicant's right to a fair hearing includes the opportunity to present his views and evidence fully and have them considered by the IAD: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 22; *Wang v Canada (Minister of Citizenship and Immigration)*, 2007 FC 531 at paras 13-15, 19.

[11] Applying this to the facts of this case, a number of considerations militate both for and against the position of the Applicant. The IAD member did ask the Applicant at the outset of the hearing whether she was prepared to proceed without legal counsel, and she had every reason to

accept the Applicant's statement that she was ready. The Applicant is a literate adult, whose first language is English. She completed the form necessary to launch her appeal, which clearly indicated that she had the right to retain counsel, so she had been informed in advance of the hearing that she could be represented by counsel. Some of the key indicia from prior cases which should signal a greater caution in proceeding without legal counsel to represent an applicant, including mental illness, substance addiction, or low literacy, were not present here (see, for example: *Hillary v Canada (Citizenship and Immigration)*, 2011 FCA 51; *Mallette v Canada (Citizenship and Immigration)*, 2005 FC 1400; *Cervenakova v Canada (Citizenship and Immigration)*, 2012 FC 525; *Conseillant v Canada (Citizenship and Immigration)*, 2007 FC 49; *Rogers v Canada (Citizenship and Immigration)*, 2009 FC 26 at paras 43-44). I find that the IAD member committed no error in not pursuing the question of legal representation in more depth at the outset.

[12] In addition, the IAD member explained the way that the proceeding would unfold, as well as the basic legal framework that applies in relation to an analysis of H&C considerations in a residency appeal, often summarized as the *Ribic* factors (*Ribic v Canada (Employment and Immigration)*, [1985] IABD No 4 (QL) (Imm App Bd). This was also a commendable attempt to ensure that the Applicant had appropriate assistance in understanding how to present her case.

[13] However, as the hearing unfolded it became evident that the Applicant had not understood the nature of the legal proceeding before the IAD; she did not arrange for any witnesses to testify, nor did she obtain witness statements. She produced very little written information, and several key elements of her evidence were not substantiated by any oral or written evidence. During the proceeding, the Applicant stated on several occasions that she could have provided more information, and that she was not prepared:

> I do recognize that I could have provided more evidence now but that is after the fact and I apologize for that on my behalf. Not having a counsel, not being able to afford a counsel. I guess a counsel would have been more prepared than I am today. I wasn't sure if you would have, like if you could put in my Mom's name and see her status, I just wasn't sure what would have been at the (inaudible) and I could have been more prepared in terms of that, in terms of providing her permanent residence status or providing a letter from my brother and his wife.
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> …
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> Looking back now I could have provided much more evidence. I just didn't understand the process, but it seems certain documents were needed because I know like for example my mom is a permanent resident. I'm not lying about that but I do understand you have, now I understand you have those actual documents in front of you to, to, you know recognize it. And in terms of the crime rate or the political climate in Jamaica, I do, now I understand that you actually have to have documentation in terms of it to factor that in but it is the case and why I could not come back as earlier as I would like after the crime as it affected me, I just didn't have the money. And then the plane ticket, I understand why you (inaudible) with my son. So I really hope that you are able to consider my case on the humanitarian and compassionate ground and (inaudible) my son is Canadian citizen and I have been trying to make it happen here within approximately the last three years. Thank you very much.

[14] By way of explanation, the Applicant says that she thought this would be an informal proceeding, an interview or a conversation, and she expected to be able to simply explain the reasons for her absences. What she encountered was a more formal, adversarial proceeding, for which she was simply not prepared. She indicated that she could not afford a lawyer, and was not aware that legal aid might provide one for her. The IAD member did not advise her of this, despite becoming aware that the Applicant was unemployed and in receipt of Ontario Works funding – an indication that her income level likely meant that she might be eligible for legal aid funding.

[15] The Respondent notes, correctly, that in the decision the IAD member finds the Applicant to be a credible witness and accepts much of her testimony on key points, despite the absence of corroborating evidence. That, however, is not the point. A core element of our conception of justice is that both sides to a dispute have an opportunity to put their "best case forward" before a fair and impartial decision-maker. A denial of that is not remedied by a decision which finds some points in favour of the disadvantaged party. A breach of procedural fairness voids the entire proceeding: *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643 [*Cardinal*]; *Singh Dhaliwal*.

[16] Furthermore, I find that on several key questions the IAD member finds that the absence of corroborating evidence is a factor that weighs against her H&C claim; this underlines the point that the absence of counsel or an adequate opportunity for the Applicant to prepare her case was not immaterial to the result. For example, on the key question of why the Applicant felt compelled to be in Jamaica to assist her father during his cancer treatment, the member states:

> (19) Accepting that her father was ill, what was less clear from her testimony was what role the appellant played in his care and why this prevented her return to Canada and so I do not find this sufficiently explained why she failed to meet her residency requirements.

[17] In relation to the support available to the Applicant and her Canadian-born son, the decision states:

> (28) No statements were provided from the appellant's family members in Canada, nor did any of her family come to testify as witnesses in support of her appeal. When asked about this at the hearing, the self-represented appellant stated that she did not know that she could provide written statements from her family and noted that she was not as prepared as she could have been as she did not know the process well.

[18] In respect of the considerations relating to the best interests of her Canadian-born child, a question arose concerning the immigration status of the Applicant's mother, as the evidence indicated that she had resided both in Canada and in Jamaica at various times. On this point the decision states the following:

> (40) The appellant has not provided any supporting evidence of her mother's status or residence in Canada, her mother was not in attendance at the hearing, nor did she provide a statement in support of the appeal. The appellant, who as previously noted is self-represented, explained that she was not previously aware that she could provide written statements and did not know to provide evidence of her mother's status. I find that the situation of the appellant's mother is not clear, and it is similarly not clear whether her assistance would be available to the appellant in Jamaica in the future.

[19] Similarly, at the close of the hearing the Applicant stated that she realized that she should have brought forward more evidence. However, the IAD member did not advise her that she could file more material after the close of the hearing, as permitted under the IRB Rules. This compounds the denial of procedural fairness for the Applicant, because she relied on her oral statements and the few documents she submitted, while stating that she could have provided more information. However, the Applicant was never advised that she could, in fact, supplement her evidence with further material, and she was obviously not aware of that. In the particular circumstances of this case, I find that this is a contributing factor to the denial of procedural fairness to the Applicant.

[20] As stated by the Supreme Court in *Cardinal* at para 23: "It is not for a court to deny that right [to procedural fairness] and sense of justice on the basis of speculation as to what the result might have been had there been a [fair] hearing." On this point, I wish to underline that my

decision turns on my findings on procedural fairness. Nothing in these reasons should be taken as a comment on the result that was reached in the decision here, nor on what may follow from any future hearing. As noted by the Respondent, the Applicant was absent for much of the time required to establish residency in Canada, and the onus will remain on her to establish sufficient H&C considerations to fall within the exceptional circumstances provided for by s. 28(2)(c) of *IRPA*.

[21] For the reasons stated above, I am granting this application for judicial review. This matter is remitted to the IAD for consideration by a different panel. No serious issue of general importance was raised by the parties, and none arises in this case.

JUDGMENT in IMM-3708-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the file is remitted to the IAD for consideration by a different panel.

2. There is no serious question of general importance to be certified.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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