Federal Court  Cour fédérale

Date: 20180122

Docket: IMM-3525-17

Citation: 2018 FC 56

[ENGLISH TRANSLATION]

Montréal, Quebec, January 22, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

GERVAIS NKANAGU

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] This is an application for judicial review under subsection 72(1) of the Immigration and Refugee Protection Act, SC 2001, c. 27 [IRPA] of a decision made on July 19, 2017, by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada. In compliance with paragraph 67(1)(c) of the IRPA, the IAD found that there were sufficient

humanitarian and compassionate considerations to allow the appeal and overcome the respondent's inadmissibility for failing to comply with his residency obligation in order to keep his Canadian permanent resident status.

II. Facts

[2] The respondent is a 58-year-old citizen of Burundi.

[3] Since March 2006, the respondent has worked as a diplomat in Belgium for a regional African organization, the Common Market for Eastern and Southern Africa, also known by the acronym "COMESA".

[4] On July 7, 2012, the respondent arrived in Canada and obtained permanent resident status through the Skilled Worker Program, accompanied by his spouse and his seven children (now between the ages of 12 and 25).

[5] The respondent, his spouse and five of their children then returned to Belgium. During summer 2013, his spouse and his children then moved to Canada, while the respondent stayed in Belgium to work.

[6] Between 2013 and 2017, if we rely on the notebook found in his suitcase following a search at the Montréal airport, the respondent came to visit his family during summer vacations and the winter holiday season.

[7] On December 22, 2016, after undergoing examination at a port of entry at the Montréal airport, a removal order was issued against the respondent by the Canada Border Services Agency [CBSA] on the ground that he had spent 329 days out of 730 in Canada during the five-year period.

[8] Despite numerous efforts, the respondent alleges that he was unable to find a full-time job in Canada in order to meet his family's needs. So, from July 2012 to December 2016, the respondent had returned to Belgium for work. In addition, during his search at the airport, the respondent himself admitted to immigration authorities that he was not in fact in Canada for at least 730 days.

[9] On January 5, 2017, in compliance with subsection 63(3) of the IRPA, the respondent appealed to the IAD from the immigration officer's decision to issue a removal order against him. The respondent did not challenge the finding according to which he was not physically present in Canada for the five-year period in question (from July 7, 2012 to July 7, 2017), but he maintained that his appeal should be allowed on humanitarian and compassionate grounds.

III. Decision

[10] On July 19, 2017, the IAD allowed the respondent's appeal. After listing the criteria that needed to be taken into account when considering humanitarian and compassionate grounds, the IAD strictly reported the circumstances that were specific to the respondent and were not in his favour.

[11] The IAD first found that the respondent's testimony was credible. The IAD then determined that spending around 390 days in Canada over the relevant five-year period "is not much" (IAD's Reasons and Decision, at para 8). The IAD also acknowledged the numerous efforts made by the respondent to try and find a job in Canada. It noted in that regard that the respondent's overqualification hurt his chances when applying for lower-level positions. In addition, the IAD determined that the respondent's case is different than other similar cases in which the family moves to Canada while the father works overseas; in fact, the respondent appeared sincere in his efforts to find a job in Canada. At the same time, it was only after numerous refusals from employers that the respondent turned to his job in Belgium to meet the needs of his seven children. The IAD also noted that the respondent was well established in Canada because he is the owner of a house in Canada, always files his tax returns, and has savings. Lastly, the IAD considered the fact that the respondent is a citizen of Burundi, where at this time, the political situation is very difficult.

IV. Issue

[12] The only issue consists of knowing whether the IAD's decision to allow the respondent's appeal on humanitarian and compassionate grounds was reasonable.

[13] With respect to decisions by the IAD on whether or not to allow the respondent's appeal after considering humanitarian and compassionate grounds that may warrant special relief regarding the loss of permanent resident status, the applicable standard of review is that of reasonableness. The Court must show considerable deference when dealing with the matter, given the IAD's discretionary power in mixed questions of fact and law (Canada (Citizenship

and Immigration) v Abarquez, 2016 FC 682 at para 12 [Abarquez]; Canada (Citizenship and Immigration) v Khosa, 2009 SCC 12 at paras 58-60 [Khosa]).

V. Relevant provisions

[14] Subsection 63(3) of the IRPA applies to this application for judicial review:

Right to appeal removal order	**Droit d'appel : mesure de renvoi**
63 (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.	**63** (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

[15] Paragraph 67(1)(c) of the IRPA is also relevant:

Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
…	[…]
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

VI. Submissions of the parties

A. *Applicant's submissions*

[16] According to the applicant, the IAD's decision is unreasonable. The IAD was able to list the criteria that it had to consider when assessing humanitarian and compassionate grounds; however, it did not specify the weight to give to the various factors that it had to analyze before making its decision. [TRANSLATION] "[T]he IAD did not have to make a selective assessment of the evidence that was favourable to the respondent" (Applicant's Record, Applicant's Memorandum of Points of Argument, at para 65).

[17] According to the applicant, the IAD therefore supposedly based its decision only on two elements, namely the duration of the period spent by the respondent in Canada and the respondent's specific circumstances (that is, the efforts made by the respondent to find a job in Canada). Upon reading the IAD's decision, the applicant finds that it is not possible to understand what tipped the balance in favour of one element over another. On the one hand, the IAD found that 390 of physical presence over five years is [TRANSLATION] "not much" (IAD's Reasons and Decision, at para 8). On the other hand, the IAD determined that the respondent showed good faith in his efforts to find a job in Canada. The applicant then claims that the IAD failed to explain how it weighed those two factors together.

[18] The applicant also submits that the IAD's decision "does not withstand a somewhat probing examination because the findings are extremely rare, are based on poor interpretations and do not follow from the evidence" (Applicant's record, Applicant's Memorandum of Points

of Argument, at para 34; see also *Canada (Citizenship and Immigration) v Wright*, 2015 FC 3 at para 68 [*Wright*]).

[19] The applicant also does not accept the IAD's finding that [TRANSLATION] "the appellant clearly showed that he made numerous efforts to find a job in Canada and submitted the documentary evidence for that purpose" (IAD's Reasons and Decision, at para 9). Considering the fact that the respondent is now 58 years old and will soon reach the age of retirement, the applicant argues that the respondent has not been [TRANSLATION] "actively seeking a job in Canada" (Applicant's Supplementary Memorandum, at para 6). In fact, for 41 of the 60 months (reference period), the applicant submits that the respondent supposedly did not make any efforts to find a job in Canada, as is shown in the documentary evidence.

[20] The applicant further argues that the respondent chose, of his own volition, to live separately from his family ever since 2006, when he received his position as a diplomat. The respondent only saw his family once or twice per year for years, during summer holidays and the winter holiday season. The applicant considers this fact to be contrary to the objectives of the IRPA because "any expectation that [the respondent's] permanent resident status would not have been jeopardized by [his] departure is not realistic" (*Wright*, above, at para 92). The IAD at the least had a duty to confront the respondent with this contrary evidence before finding that he would suffer extreme hardship if he were separated from his family (*Canada (Citizenship and Immigration) v Sidhu*, 2011 FC 1056 at para 50).

[21] The IAD supposedly even erred in its analysis by finding that [TRANSLATION] “having endured numerous rejections, the appellant turned to his job in Belgium” (IAD’s Reasons and Decision, at para 10). That was a poor assessment of the evidence, since the documentary evidence instead reveals that the respondent had already returned to Belgium shortly after receiving his permanent residency in 2012, [TRANSLATION] “before even dealing with what would only be his first rejection in Canada” (Applicant’s Supplementary Memorandum, at para 8).

[22] The applicant recalls that the respondent obtained his permanent residency through the Skilled Workers Program. Therefore, the respondent had to ensure that he was personally able to successfully establish himself in Canada and thus contribute to the economy of the country that welcomed him. Therefore, the IAD supposedly poorly assessed the evidence by not remarking that the respondent prevented himself from finding a job in Canada by spending the majority of his time overseas.

[23] Similarly, the IAD supposedly confused the respondent’s degree of establishment with that of the members of his family by stating that a favourable factor in its decision was that the respondent’s spouse and eldest two had found work. However, the applicant submits that the members of the respondent’s family were able to establish themselves in Canada and obtain permanent resident status due to the respondent’s professional and academic qualifications. Therefore, it is up to the respondent, and not his family, to make efforts to establish himself in Canada as quickly as possible. Consequently, the IAD was wrong to find that the respondent was personally established in Canada on the grounds that he bought a house, filed his tax returns, and

had savings in Canada. The documentary evidence to which the IAD referred explicitly designates the respondent as being a [translation] "non-resident of Canada whose main source of income is from outside of Canada" (Tribunal Record, Notice of Reassessment from the Canada Revenue Agency, at page 175). In that regard, the applicant cites the following excerpt from *Canada (Minister of Citizenship and Immigration) v Samaroo*, 2016 FC 689 in his Supplementary Memorandum:

> [51] At the hearing before the Court, counsel for the Minister insisted on the distinction between passive and active indicia of residence, arguing that Mr. Samaroo had not provided sufficient active indicia of residency. Passive indicia of residence "only shows registration, not attendance" (*Canada (Minister of Citizenship and Immigration) v Qarri*, 2016 FC 113 [*Qarri*] at para 7) and consists of evidence such as health cards, social insurance cards, Canadian income tax returns, bank letters confirming that an account had been opened and leases as well as notices of rent increase (*Canada (Minister of Citizenship and Immigration) v Chved*, [2000] FCJ No 1661 [*Chved*] at paras 7 and 11).

[24] According to the applicant, the IAD also erred by mentioning that [TRANSLATION] "[t]he appellant believes that he can now wait a bit longer before finding a job" (IAD's Reasons and Decision, at para 13). In fact, the Federal Court has already established that the respondent's potential for establishment is not a factor to consider as part of the analysis for humanitarian and compassionate grounds when the person has already been found inadmissible (*Canada (Public Safety and Emergency Preparedness) v Lotfi*, 2012 FC 1089 at para 22).

[25] With respect to the test regarding the hardship or upheaval that would be caused by the respondent's removal to either Belgium or Burundi, the applicant submits that the IAD failed to analyze the difficulties related to being separated from his family, which is currently living in

Canada. In that regard, the applicant indicates that the IAD completely ignored the evidence on record for the following reasons:

- On December 22, 2016, during his interview with a CBSA officer, the respondent clearly declared that he did not fear for his life.
- During his interview with the minister's delegate, the respondent replied to the question about fear for his safety that he wanted to be able to stay with his family in Canada.
- In the form filled out by the respondent for his humanitarian and compassionate considerations application, the respondent never mentioned a risk of persecution or fear. The only impact that he indicated if he had to return to his country of origin is: [TRANSLATION] "Separation from my family".

[26] The applicant notes that a risk or fear of returning to Burundi was not mentioned in any way before the hearing was held and the IAD erred by relying on [TRANSLATION] "pure conjecture" (Applicant's Supplementary Memorandum, at para 11). The IAD's decision must "base its decision on reasonable inferences drawn from the evidence before it. The 'tribunal of fact cannot resort to speculative and conjectural conclusions'" (*Canada (Citizenship and Immigration) v Gharanejad-Dashkesen*, 2008 FC 92 at para 12). In addition, if separation from his family is so problematic for the respondent, the applicant argues that the family only had to establish itself in Belgium and not in Canada.

[27] Lastly, the applicant argues that this Court must intervene in this case because the IAD failed to consider evidence on record that contradicts the reasons for the decision (*Canada (Minister of Citizenship and Immigration) v Tefera*, 2017 FC 204 at para 31).

B. *Respondent's submissions*

[28] The respondent instead maintains that the IAD made a reasonable decision because several items of evidence on record were considered. Essentially, the respondent argues that the applicant made a [TRANSLATION] "poor interpretation" of the IAD's decision (Respondent's Memorandum, at para 20).

[29] Unlike what the applicant alleges, the respondent submits that the IAD analyzed more than two factors when making a decision. According to the respondent, it is clear that the IAD considered why the respondent had left Canada, the efforts made to return here, and why he remained outside of Canada.

[30] The respondent also highlighted that the IAD did not confuse the respondent's establishment in Canada with that of his family. In fact, in its decision, the IAD determined that the respondent had personally bought a house, filed his tax returns, and kept his savings in Canada.

[31] The respondent is also not of the view that he himself chose to work in Belgium. In fact, he mentions that *Wright*, which is cited by the applicant in his memorandum, is separate from his case. Considering his age, the respondent instead submits that it was difficult for him to find a job in Canada and that is why he had no other choice but to return to Belgium and work there. In *Abarquez*, above, the respondent, who was 50 years old and originally from the Philippines when he arrived in Canada, was hardly in Canada during the five-year period because he returned to

work for his former employer in the Philippines as a ship's captain and commanding officer. The Court dismissed the application for judicial review.

[32] Lastly, the respondent alleges that the respondent appears to be dissecting the IAD's decision. It is not the role of this Court to reassess the evidence or to substitute the IAD's view of the evidence with its own (*Abarquez*, above, at para 27).

VII. Analysis

[33] For the following reasons, the application for judicial review is dismissed.

[34] "The IAD is presumed to have considered all of the evidence before it and had sufficient reasons to support its conclusions" (*Tai v Canada (Citizenship and Immigration*), 2011 FC 248 at para 74). In this case, the IAD weighed all the evidence on record and its reasons, brief as they may be, do not contradict the evidence submitted by the respondent. It fell to the applicant to show how the IAD's decision would have been different were it not for the errors that the IAD allegedly made.

> [TRANSLATION]
>
> [7] The panel reviewed the case law that establishes the tests that must be taken into account when considering humanitarian and compassionate grounds in this type of appeal. The list of tests is not comprehensive and the weight given to each one varies under the circumstances. Those tests can be summarized as follows:
>
> - The amount of time spent by the appellant in Canada and his degree of establishment before his departure;

> - The ties that the appellant continues to maintain in Canada, including the members of his family;
>
> - The reasons given by the appellant for leaving Canada, the efforts made to return, and why he remained outside of Canada;
>
> - The appellant's specific circumstances during his stay outside of Canada;
>
> - The efforts made by the appellant to return to Canada at the first reasonable opportunity;
>
> - The hardship and upheaval that the appellant's removal or inadmissibility would cause;
>
> - The best interests of children who are affected.
>
> (IAD's Reasons for the Decision, at para 7).

[35] In addition, as was highlighted by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, 3 SCR 708, in order to determine the reasonableness of the decision:

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[36] The Court finds that it was reasonable for the IAD to make its decision, in accordance with the evidence that was available on record. According to the evidence on record, including the respondent's fully credible testimony before the IAD, the Court finds that upon his arrival in

Canada, the respondent made efforts to obtain educational equivalence. The respondent also did not delay in looking for a job in more than one professional field. In that regard, the IAD noted the respondent's overqualification reportedly hurt his chances when applying for lower-level positions. Despite the fact that the father of the family had to work overseas to feed his seven children in Canada, it is also possible to note in the facts that the respondent was searching for a job by applying online for various positions. The respondent made his efforts without being unemployed, in light of his age, his family's situation, and the fact that he could not reside in Belgium due to his status related to his diplomatic position, for which the contract will end in December 2019. The respondent would therefore be obliged to deal with the perils of a return to Burundi with his family.

[37] The Court also find that the respondent showed a degree of establishment, as was also noted by the IAD in its decision. In fact, the IAD gave favourable weight to the respondent's degree of establishment because he kept all the savings that he earned from Belgium (around $78,000) in Canada, he has had a mortgage since 2014, has a bank account, files his tax returns, and has been the owner of a house since June 2015, for which the purchasing price was around $478,000.

[38] The Court finds that the IAD was also able to explain why the respondent's situation was unique according to the facts and the evidence on record.

> [TRANSLATION]
>
> In my view, it is mainly what distinguishes the appellant's case from some similar cases in which the family moves to Canada, while the father figure continues to work overseas. In this case, I understand that the appellant, who has dealt with numerous rejections, turned to his job in Belgium to meet the needs of his

> seven children, while the Canadian job market was not accommodating.
>
> (IAD's Decision, at para 10.)

[39] In this case, the IAD chose to give greater weight to the factors that were in the respondent's favour (that is, the respondent's numerous efforts to find a job in Canada), yet without mentioning the factors that were not in the respondent's favour. "In the end, it was up to the IAD to decide how much weight it should assign to the various elements" (*Abarquez*, above, at para 27). It was then open to the IAD to allow the respondent's appeal by preferring to have the reasons for the decision follow from positive factors in light of all of the circumstances of the matter. "*Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn" (*Komolafe v Canada (Citizenship and Immigration*), 2013 FC 431 at para 11).

[40] The Court recalls that it is not the function of this Court to reassess the evidence, reweigh the factors or substitute its own interpretation of the evidence (*Khosa*, above, at para 61). As a result, the IAD's decision is reasonable and "falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para 47).

VIII. Conclusion

[41] For the above reasons, the application for judicial review is dismissed.

JUDGMENT in IMM-3525-17

THE COURT ORDERS that the application for judicial review be dismissed. There is no question of importance to certify.

OBITER

During the five-year period in question, the respondent was indeed separated from his family, but his bond, his love of his spouse and his seven children gave him the motivation to work in Belgium, far from them, in order to meet their needs and hope that his children could have a better life than before, considering that, according to the evidence, the respondent did not want to be unemployed and become a burden for his family and for the state. From 2012 to 2017, this father of the family did not spend either a summer or a Christmas without the company of his loved ones in Canada. Soon, the respondent will reach the age of retirement and awaits the day when he will finally be reunited with his family.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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