Federal Court Cour fédérale

Date: 20190312

Docket: IMM-3367-18

Citation: 2019 FC 299

Ottawa, Ontario, March 12, 2019

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ADEOLA MICHAEL ABIODUN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of a Member [the Member] of the Immigration Appeal Division [the IAD] who dismissed the Applicant's appeal of his removal order. As a result of the IAD's refusal, the Applicant lost his permanent resident status in Canada.

[2] For the reasons that follow, the application is dismissed.

II. Background

[3] The Applicant has been a permanent resident of Canada for almost 10 years. The Applicant was issued a removal order on the basis that he obtained his permanent residence based on a misrepresentation. The Applicant was found to have misrepresented the timing of when his spousal relationship ended.

[4] The Applicant did not dispute the legal validity of the removal order, however, he appealed the removal order to the IAD and asked for special relief based on humanitarian and compassionate [H&C] reasons, namely, based on his high level of establishment in Canada, including 13 years of residency as a property owner with full-time employment and numerous community connections.

[5] The Applicant also asked for special relief to remain in Canada based on the best interests of his two children, aged 5 and 3 years old, who lived in England with the Applicant's wife. The Applicant had filed a sponsorship application to allow them to join him in Canada. The Applicant's children have never lived in Nigeria, which is the only country where the Applicant and his family could live together if the Applicant was not allowed to remain in Canada as a permanent resident.

[6] The IAD concluded that, taking into account the best interest of the Applicant’s children, sufficient H&C considerations did not exist to justify granting special relief. The IAD thereby dismissed the appeal.

III. Issues

[7] The Applicant raises the following issues in the application:

1. Was the Applicant denied procedural fairness due to the negligence of his former representative?
2. Was the IAD's H&C assessment based on the *Ribic* factors unreasonable (*Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 [*Ribic*])?

[8] I find that the second alleged issue requires the Court to determine whether the IAD made an error in finding that the Applicant did not express remorse regarding his misrepresentation of the timing of when his spousal relationship ended and the fact that he had obtained his permanent residence based on a misrepresentation.

IV. Standard of Review

[9] A correctness standard of review applies to the Applicant's allegations that his former counsel was incompetent, as this issue "goes to the Applicant's right to fully present his case, which is an issue of procedural fairness" (*Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 27).

[10] A reasonableness standard applies to the issue of whether the IAD made an error in a finding of fact relating to credibility. In *Odia v Canada (Citizenship and Immigration),* 2018 FC 363 at para 6 my colleague Justice Boswell established that credibility finding should not be overturned except "in the clearest case of error", citing the decision of *Njeri v Canada (Citizenship and Immigration),* 2009 FC 291 at para 11. The Court is not to reweigh the

evidence. As such, if there is any evidence to support the finding of fact, no reviewable error has occurred.

V. Analysis

A. *Negligence of the Applicant's Representative*

[11] The IAD Member found that "the lack of corroborating evidence in support of the best interest of the child to be particularly damaging to the appellant's appeal" [emphasis added]. The Applicant's representative before the IAD did not submit any documents to establish the best interests of the children, which the Applicant argues is a significant factor for the IAD to consider when deciding whether to grant relief.

[12] The IAD Member found that "the failure to adduce the best evidence touches virtually every aspect of this appeal". The Applicant argues that his representative did not meet the basic standard of competency in his representation before the IAD, as he failed to submit key documents regarding the children's interest that could have changed the ultimate decision.

[13] In order to establish that the incompetence of one's counsel resulted in a breach of procedural fairness, the onus is on an applicant to establish the following tripartite test:

> 1) The representative's alleged acts or who to omissions constituted incompetence;
>
> 2) There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and,
>
> 3) The representative was given notice and a reasonable opportunity to respond.

> *Yang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1189 at para 16; *Guadron v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1092 at para 11; *Pathinathar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1225 at para 25.

[14] If the Applicant cannot meet the prejudice component of the test, it is undesirable for the Court to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct; the latter is best left to the profession's regulating body: *R v GDB*, 2000 SCC 22 at para 29; *Shirvan v Canada (Citizenship and Immigration)*, 2005 FC 1509 at para 26.

[15] Accordingly, the analysis should commence with the prejudice component. In addition, if no prejudice or incompetence is found, I find that there is no basis to challenge the reasonableness of the analysis of the *Ribic* factors. Inasmuch as I conclude that the Applicant has not demonstrated any prejudice flowing from the alleged incompetence of his counsel, there is no need to carry out any further analysis, and none is performed.

[16] Substantial prejudice must be shown to flow from or in consequence of the actions of incompetent counsel. The Applicant must also establish that there is a reasonable probability that the result would have been different, but for the incompetence of the representative (*Jeffrey v Canada (Citizenship and Immigration)*, 2006 FC 605 at para 9).

B. *Alleged Fact-finding Error*

[17] The IAD found that the Applicant’s lack of expressed remorse weighed against any positive establishment that he had in Canada. The Applicant argues that in making this finding, the IAD failed to refer to the Applicant’s oral testimony during the hearing in which he apologized to the Member for his conduct and expressed remorse. The Applicant argues that the hearing testimony evidence before the IAD demonstrates that the Applicant expressed remorse over his actions, and as such the IAD's finding, which ultimately tainted the positive evidence showing his establishment in Canada is unreasonable.

[18] The IAD’s conclusion on this matter is found at paragraph 16 of the reasons, which reads as follows:

> [16] In the panel’s questions, I gave the appellant the opportunity to express remorse for the misrepresentation that he had previously conceded to before me. The appellant expressed no remorse. Instead he started to revert to his previous testimony and position that the date of separation was erroneous, the fault of his previous paralegal. This return to a discredited explanation, and no expression of remorse whatsoever, is another aggravating factor in my consideration to which I give considerable weight in the circumstances.

[19] The evidence indicates that while the Applicant originally expressed remorse, ultimately he persisted with the view that the date of separation was erroneous, in effect not admitting any error on his part. There was evidence to support the IAD’s conclusions, such that no fact-finding error has been established.

C. *Best Interests of the Children*

[20] The Applicant encloses new documents attached to his affidavit related to the best interests of his children that he claims ought to have been introduced by his counsel. They include the birth records of the children, photographs of the Applicant with his children; proof of travel to the UK; letters from friends and family (including the Applicant's wife) describing the hardship due to their separation; and proof of financial transfers for the children's school fees.

[21] The Applicant submits that the enclosed new documents confirm that both his spouse and children are experiencing hardship from their long-term separation. I disagree. The evidence indicates that his children, who have never lived in Canada and were residing in the United Kingdom [UK], were doing well in school with no difficulties described that could begin to suggest that the present situation living in the UK is one of hardship.

[22] Moreover, the Applicant's wife is a pediatrician working on a temporary visa in the UK. It is difficult to conceive how children who are doing well in every sense and who are being parented by a pediatrician living in the UK could be considered to be in a situation of hardship. No doubt the fact that the Applicant's spouse is a pediatrician accounts in some large measure for the well-being of the children. It is generally recognized that the familial environment is the most important correlative factor that determines the well-being and success of children.

[23] The argument is made that they will suffer hardship in Nigeria on the basis that this is the only country they can move to together. This argument is not substantiated and is speculative.

The Applicant has submitted no evidence which could lead the Court to assume that should the Applicant's family wish to apply for permanent residency in the UK that they would not be welcomed, and would eventually be able to sponsor the Applicant for permanent residency in that country, or other countries given the high demand for trained physicians.

[24] Even were they to live in Nigeria, the mother being a pediatrician, combined with the obvious financial assets and talents of the Applicant and corroborated by the supporting documentation do not suggest that the family could not return to their native country and reside comfortably in areas considered to be internal flight havens. As for the absence of documentation relating to the circumstances in Nigeria, they are well known to decision-makers in immigration matters, given the large number of Nigerian refugee claimants who immigrate to Canada.

[25] The reality is that without documentation indicating that the best interests of the children is a significant hardship factor, no argument can reasonably be advanced that the IAD erred in its assessment and application of the *Ribic* H&C factors. The new evidence provided in the Applicant is insufficient to demonstrate that his children would suffer hardship should he be removed from Canada.

VI. Conclusion

[26] Accordingly, the application is dismissed. No questions are certified for appeal.

JUDGMENT in IMM-3367-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question is certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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