Federal Court  Cour fédérale

Date: 20190530

Docket: IMM-5796-18

Citation: 2019 FC 758

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, May 30, 2019

PRESENT: Justice Roy

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

KHADRA GHERRAS

Respondent

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration is bringing an application for judicial review of a decision of the Immigration Appeal Division [the IAD], pursuant to section 72 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [Act].

[2] The application for judicial review essentially relies on what the Minister considers to be a breach of procedural fairness. Indeed, after what appears to me to be more of a misunderstanding than a decision to deny the Minister of his right to be heard, the Immigration Appeal Division allowed Ms. Gherras' application on humanitarian and compassionate grounds. In my view, the misunderstanding is sufficient to remit the matter to a differently constituted Immigration Appeal Division.

I. Facts

[3] It appears that Ms. Gherras already obtained permanent resident status in Canada. She is an Algerian national with what appears to be some sort of residence status in France.

[4] A visa officer at the Canadian Embassy in Paris refused Ms. Gherras a travel document on August 5, 2015. The reason for the refusal was that Ms. Gherras had not resided in Canada for the minimum number of days required to maintain her permanent resident status. Indeed, a permanent resident must be present in Canada for a minimum of two years (730 days) in the five-year period immediately prior to his or her application for a travel document. It is not disputed that Ms. Gherras had not been present for a period of 730 days in the preceding five-year period. From the moment she obtained permanent residence in Canada in October 2009, she allegedly stayed for approximatively four months prior to returning to France for a medical follow-up. Ms. Gherras has children in Canada and France.

[5] The respondent is now eighty-three years old and suffers from heart problems. Thus, she received a "pacemaker" in 2009 and she was hospitalized in Toulouse, France, in November

2014 for the implantation of a right ventricular pacing lead. Other health problems were also reported (gallbladder and thyroid). However, between June 19, 2010, and June 18, 2015, the respondent had zero days of residence in Canada. She was not even close. Hence, the visa officer in Paris readily denied her issuance of the travel document. However, the officer considered humanitarian and compassionate grounds to conclude that the loss of permanent resident status would not cause any hardship to the respondent. Despite this, she decided to file an appeal with the Immigration Appeal Division.

[6] It would be appropriate to recount the events that eventually led to a so-called peremptory hearing on October 4, 2018, as it is therein that lies the breach of procedural fairness complained of by the applicant.

[7] It was on September 8, 2015, that the respondent filed her Notice of Appeal to the Appeal Division. It was not until February 14, 2018, that the Registrar of the Immigration Appeal Division convened the parties to a scheduling conference, as provided for in the IAD Rules. Said conference was set for June 19, 2018.

[8] One of the respondent’s sons brought an application to postpone the hearing on June 7, 2018, because the respondent was hospitalized in Algeria for a period that was then considered to be indeterminate. The Minister’s representative did not object to the postponement, noting, however, that no medical certificate was submitted in support of such an application.

[9] The application for a postponement was dismissed on June 11, 2018.

[10] Nevertheless, on June 19, 2018, the member allowed the application for a postponement at the hearing. On July 27, 2018, said postponement was followed by the scheduling of the hearing on October 5, 2018. The scheduling of the hearing was set peremptorily, which generally means that no subsequent postponement will be tolerated. Until then, there was no indication that witnesses other than the respondent would be heard at the hearing.

[11] On September 18, 2018, the Minister's representative filed written submissions and indicated that she would not be attending the hearing of October 5. However, she reserved the right to attend in these terms:

> [TRANSLATION]
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> 27. We wish to inform the panel that our written recommendation is based on the documentary evidence on file. The Minister reminds the appellant that she is required to submit a copy of any document she intends to use at the hearing. The Minister may be present in the hearing room if new facts justify it.

[12] Two days prior to the hearing of October 5, Laurent Gryner provided the IAD with information to the effect that he was now representing the respondent. Furthermore, he was simultaneously seeking a postponement, indicating that if the postponement were to be denied, he would not be able to intervene in the hearing of October 5. The Minister's representative objected within an hour of the application for a postponement. Said application for a postponement was denied on October 4, 2018. The matter should have proceeded as of the morning of October 5.

[13] But this did not put an end to the events of October 4. At 3:15 p.m., the respondent announced for the very first time that four witnesses would be heard at the next day's hearing.

All these witnesses were members of the respondent's immediate family. In addition, less than 30 minutes later, it was announced that an immigration counsel, Abdellatif Hamdouny, was the respondent's new counsel. The list of witnesses was never reached to the Minister's representative. Sent in the mid-afternoon of the day before the hearing, it was forwarded to the representative's office but she was not there. Nor did she become aware of it the morning of October 5, so despite the last-minute developments, the Minister did not attend the hearing of October 5.

[14] It should be noted here for better insight that Rule 37 of the Immigration Appeal Division Rules, SOR/2002-230, provides for a time limit of 20 days to inform the parties and the administrative tribunal of the calling of witnesses. It is worth reproducing in full the text of Rule 37:

Providing witness information	**Transmission des renseignements concernant les témoins**
37 (1) If a party wants to call a witness, the party must provide in writing to the other party and the Division the following witness information:	**37 (1**) Pour faire comparaître un témoin, la partie transmet par écrit à l'autre partie à la Section les renseignements suivants :
(a) the witness's contact information	**a)** les coordonnées du témoin;
(b) the time needed for the witness's testimony;	**b)** la durée du témoignage;
(c) the party's relationship to the witness;	**c)** le lien entre le témoin et la partie;
(d) whether the party wants the witness to testify by videoconference or telephone;	**d)** le fait qu'elle veut faire comparaître le témoin par vidéoconférence ou par

and	téléphone, le cas échéant;
(e) in the case of an expert witness, a report signed by the expert witness giving their qualifications and summarizing their evidence.	**e)** dans le cas du témoin expert, un rapport, signé par lui, indiquant ses compétences et résumant son témoignage.
Proof that document was provided	**Preuve de transmission**
(2) The witness information must be provided to the Division together with a written statement of how and when it was provided to the other party.	**2)** En même temps que la partie transmet à la Section les renseignements concernant les témoins, elle lui transmet une déclaration écrite indiquant à quel moment et de quelle façon elle a transmis ces renseignements à l'autre partie.
Time limit	**Délai**
(3) Documents provided under this rule must be received by their recipients no later than 20 days before the hearing.	**(3)** Les documents transmis selon la présente règle doivent être reçus par leurs destinataires au plus tard vingt jours avant l'audience**.**
Failure to provide witness information	**Omission de transmettre les renseignements**
(4) If a party does not provide the witness information as required under this rule, the witness may not testify at the hearing unless the Division allows the witness to testify.	**(4)** La partie qui ne transmet pas les renseignements concernant les témoins selon la présente règle ne peut faire comparaître son témoin à l'audience, sauf autorisation de la Section**.**

[15] The 20-day time limit required by the Rules is such that the list of witnesses and the information that must be provided be received "no later than" September 17, 2018. Thus, the Minister's representative, when she advised that she would not be present on October 5, 2018,

may have thought that there were no witnesses in this matter as the time frame allotted by the Rules had already passed. In any event, the representative did not attend on October 5, 2018.

II. The decision of the Immigration Appeal Division

[16] The IAD had no difficulty concluding that the conditions for maintaining permanent residence were not met. The focus is thus on the humanitarian and compassionate considerations.

[17] The evidence of October 5 in this regard would not come from the respondent, but rather from the testimony of a son residing in Quebec and another son residing in France and who testified by telephone while his mom was by his side. It is in my view an important element to highlight because the only evidence before the IAD came from individuals whose testimony was only announced 18 hours prior to the hearing and when the Minister's representative was not present. These are certainly new facts that could have required the Minister to be represented at the hearing. But this was not the case.

[18] The IAD notes in its decision that the respondent's sons provided her with ongoing support despite their personal obligations in Canada to help their mother during the period under review. They testified with respect to their mother's truly difficult and critical situation over the years that are part of the five-year period.

[19] But, the difficulty here is that the only evidence provided regarding the respondent's health situation comes from the testimony of the two sons. However, the Minister's representative argued in her written submissions that there was no documentary evidence

justifying health problems between 2009 and 2014. That is to say that it is on the observations of the respondent's sons alone that the IAD concluded that the health problems were significantly sufficient for the respondent not to come to Canada in any way during the five-year period. The IAD wrote the following at paragraphs 20 and 21 of its decision:

> [20] I am of the opinion that, for the entire five-year period under review, the appellant's health problems were major and her medical condition was critical, and I consider these to be sufficiently significant factors to justify the full extent of the non-compliance with the residency obligation. I find that it would have been unreasonable, in these circumstances, to ask the appellant, an elderly person who trusted her medical team, to leave the country where she was receiving treatment in order to start being monitored in Canada by doctors who did not know her.
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> [21] Considering her critical health condition and the advice of doctors who warned her not to travel, I am of the opinion that the evidence presented suffices to explain the appellant's entire absence from Canada for the duration of the five-year period. This is a factor that weighs in favour of granting special relief and to which the panel gives significant and probative weight in analyzing humanitarian and compassionate considerations.

[20] It is not clear from merely reading the decision how the situation would have been critical throughout the entire period. We are told of a series of operations and medical follow-ups and periods of hospitalization continued over the five-year period. Details are missing. The witnesses indicated that the respondent was unable to travel. It appears that the "pacemaker" was eventually replaced and that the respondent underwent surgery for her gallbladder and to have her thyroid removed.

[21] This is not an attempt to challenge the medical diagnoses. Indeed, there does not appear to be any on file. The issue is that the only evidence the IAD seems to have relied upon is that of

the two appropriate witnesses whose quality of testimony could not be tested as one of the parties to the proceedings was not present.

[22] Indeed, the IAD challenged the observations of the Minister's representative who stated in her written submissions that the respondent had left Canada to live in France where her children live. The IAD rather considered that her return to France was for health reasons primarily on the basis of the testimony of one son residing in Canada and another living in France. More specifically, the IAD clearly indicated that the documentary evidence was superseded by the testimony heard on October 5. Paragraphs 30 and 33 of the decision state as follows:

> [30] Now, with respect to allegation 5 in which counsel for the Minister states that she did not have any health problems after her pacemaker was implanted in 2009, again, this remark is based on the documentary evidence.
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> [33] Again, regarding the medical follow-up in allegation 8, counsel for the Minister assumes that the appellant's health did not require anything other than regular medical follow up; this is not what the panel heard today, so I cannot accept that argument.

III. Standard of review and analysis

[23] The sole question is whether the rule that the parties have the right to participate in the decision-making process was complied with. That is one of the most fundamental rules of fairness (see *Judicial Review of Administrative Action in Canada*, by Donald Brown and John Evans, Thomson Reuters, loose-leaf, Chapter 10). Said participation shall include the cross-examinations of the witnesses in cases where the facts are in dispute or the testimonies conflict

with other evidence (*Innisfil Township v Vespra Township*, [1981] 2 SCR 145). I see no reason why the right to participation in a decision-making process should not apply to the Minister.

[24] The specific rule in issue here is the right of a party to be heard: *audi alteram partem*. This rule of procedural fairness requires the intervention of the Court in cases where a breach has occurred. In such matters, it is undisputed that that the standard of review is correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 1, [2009] 1 SCR 339, para 43; *Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, para 79).

[25] This implies that the reviewing court accords no deference to the administrative tribunal and must make the appropriate decision in the circumstances.

[26] In this case, the rule relating to the calling of witnesses is clear. The notice of intention to call witnesses must be received by the opposing party no later than 20 days before the hearing. Here, these witnesses are crucial because they contradict the documentary evidence that was available at the time in the file and relied upon by the Minister. Clearly, said evidence cannot be challenged if the party does not appear in Court. An attempt was made to place blame on the Minister's representative, who was not in her office when the list of witnesses was provided. This is unduly harsh. Conversely, an attempt was made to blame the Immigration Appeal Division, who, on the morning of the hearing, was content to note the indication by the Minister's representative some 17 days before that she would not be attending. It does not appear that any particular effort was made to reach her other than being satisfied with the announced absence, especially since the circumstances had changed considerably on October 4. However, as

indicated earlier, after a series of events, the matter had been scheduled on a peremptory basis for October 5, 2018. Among these events were the difficulties reaching the respondent anywhere in France or Algeria. Everyone was present on October 5, other than, of course, the Minister's representative, who had announced her absence. Communication with the respondent was finally established. Presumably, the member wanted this case to go forward. Unfortunately, this resulted in a breach of the rules of procedural fairness because the conditions had changed considerably, the notice of intention to call witnesses was not provided in a timely manner and the announced absence was on the basis that the known circumstances on September 18 would not change. They had changed considerably.

[27] There are reasons for the 20-day rule. It avoids surprises and ensures adequate preparation for hearings that are of great significance to the persons involved. This rule has been applied in the past by the Immigration Appeal Division. Counsel for the appellant cited three decisions where the 20-day time limit had not been respected, which resulted in the inability to testify (*Komaeihaghighatdel v Canada (Citizenship and Immigration)*, 2011 CanLII 58185; *Khazraeiesfahanimofrad v Canada (Public Safety and Emergency Preparedness)*, 2014 CanLII 93670; *Price v Canada (Citizenship and Immigration)*, 2010 CanLII 92829). However, this rule is not in any way exceptional. It is common (but the notice period will vary).

[28] It is certainly true that the rule is not absolute. The exercise of discretionary power is required to relieve a party of his or her obligation to respect the 20-day time limit. In this case, there is no indication I was able to find in the transcripts of the various hearings that the IAD chose to apply its discretionary power. I add that if that had been the case, it would have been

necessary to explain how the discretionary power should be applied in the circumstances, when the list of witnesses was only provided the day before at the end of the day, choosing not to attempt to reach the Minister's representative who strongly indicated that it could have chosen to appear if the circumstances she had knowledge of on September 18, 2018, were to change. It is also likely that the discretion is exercised only after having heard the parties' submissions. There is nothing more draconian than what occurred on the eve of the hearing when it was indicated that witnesses would be heard and subsequently determined that said witnesses supplemented the evidence then available.

[29] As a result, it can only be concluded that there was a breach of the most fundamental rules of procedural fairness, that is, that of appearing before an administrative tribunal to be heard. In this case, this breach deprived the Minister of his ability to challenge the new testimonial evidence that appeared to have contradicted the documentary evidence on file.

[30] Accordingly, the application for judicial must be allowed. The parties agree that there is no serious question of general importance to be certified. I agree.

JUDGMENT in Docket IMM-5796-18

THE COURT'S JUDGMENT is that

1. The application for judicial review is allowed; the matter is remitted to a differently constituted panel of the Immigration Appeal Division for a rehearing of the appeal.

2. No serious question of general importance is certified.

"Yvan Roy"
Justice

Certified true translation
This 13th day of June, 2019

Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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