Federal Court  Cour fédérale

Date: 20160129

Docket: IMM-7336-14

Citation: 2016 FC 106

Ottawa, Ontario, January 29, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

KHALED NAZEM EL HUSSEINI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

UPON an application for judicial review brought by the Applicant of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada rendered October 9, 2014, wherein it dismissed the Applicant's appeal of his departure order, which was issued on December 15, 2012, due to his failure to fulfil the residency requirements for permanent residents, as set out in paragraph 28(2)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA];

AND UPON noting that the correct spelling of the Applicant's family name is "El Husseini," not "El Hussaini," and considering that it is in the best interest of the administration of justice to amend the style of cause accordingly;

AND AFTER reviewing the Certified Tribunal Record [CTR] and considering all the material submitted by the parties and their written and oral submissions, including the case law referred to at the hearing;

AND UPON determining that this application for judicial review should be allowed for the following reasons:

[1] The Applicant is a citizen of Syria. Although born and raised in Egypt for most of his life, he was denied Egyptian citizenship. His wife is an Egyptian national, as are his three (3) children. They arrived in Canada on July 15, 2008, and became permanent residents on August 6, 2008. The Applicant's three (3) children have since become Canadian citizens.

[2] On December 15, 2012, upon re-entering Canada by plane, the Applicant was questioned by a Canada Border Service Agency [CBSA] officer regarding his residency obligations. The same day, the CBSA officer issued an inadmissibility report under subsection 44(1) of the IRPA on the basis that the Applicant failed to comply with the 730 days residency obligation under section 28 of the IRPA. The Minister's delegate subsequently reviewed the inadmissibility report and issued a departure order against the Applicant the same day. The Applicant appealed this decision to the IAD, arguing that the decision was not valid in law, and in the alternative, the

IAD should grant his appeal on the basis of humanitarian and compassionate [H&C] considerations pursuant to paragraph 67(1)(*c*) of the IRPA.

[3] The IAD found that on a balance of probabilities, the Applicant did not demonstrate that he was physically present in Canada for the required 730 days during the relevant period. It also found that there were insufficient H&C considerations to warrant special relief.

[4] This application for judicial review raises two questions: 1) whether the IAD erred in finding that the departure order was valid in law because the Applicant failed to meet the residency obligations under paragraph 28(2)(*a*) of the IRPA; and, 2) whether the IAD misapprehended evidence in concluding that the Applicant's situation did not warrant H&C relief pursuant to paragraph 67(1)(*c*) of the IRPA.

[5] The first question involves the interpretation and application by the IAD of its home statute to the facts before it. As such, it is reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*]; *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association,* 2011 SCC 61 at para 34, [2011] 3 SCR 654; *Canada (Public Safety and Emergency Preparedness) v El Attar*, 2013 FC 1012 at para 3). Reasonableness requires that a decision falls within a range of possible, acceptable outcomes which are defensible in respect to the facts and law, in order for a decision to remain undisturbed (*Dunsmuir*, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339 [*Khosa*]).

[6] The Applicant alleges that the IAD erred in its calculation of his residency in Canada as it did not consider the full five (5) year period from August 2008 to August 2013, only calculating up until the removal order of December 15, 2012. In my view, the IAD correctly found that it could not consider the period after December 15, 2012, for the purposes of its calculation. Subsection 62(1) of *Immigration and Refugee Protection Regulations,* SOR/2002-227 clearly states that an officer must not calculate any day after "a report is prepared under subsection 44(1) of the [IRPA] on the ground that the permanent resident has failed to comply with the residency obligation". Since such a report was issued on December 15, 2012, the IAD could only consider the days prior to December 15, 2012, in its calculation.

[7] Even if the IAD had erred in its interpretation of the relevant period, I am nonetheless of the view that the IAD's decision on this issue was reasonable. The IAD concluded that the Applicant did not comply with his residency obligations under the IRPA. In reaching its conclusion, the IAD highlighted the absence of documentary evidence which could establish the Applicant's day-to-day existence in Canada, such as a personal cellular telephone bill, a health club membership, a pharmacy prescription, a driver's license, or a dentist appointment. It also found that the bank account statements provided by the Applicant did not offer conclusive evidence of personal presence in Canada given the Applicant's testimony that his son and wife had access to those accounts. The IAD found in fact that the evidence supported the opposite conclusion. The IAD underlined a number of contradictions in the Applicant's file in relation to the date of his entries and exits to Canada, his employment abroad and his lack of knowledge of the area where he resided in Canada. The IAD also noted an earlier statement made by the Applicant's wife, when questioned regarding her residency in Canada, that she had been living

outside of Canada with her husband in order to work to pay for her children's university studies. The IAD determined that all of these factors undermined the Applicant's credibility and that it was more likely than not that he worked abroad during the period he alleged to be in Canada. The IAD indicated that the loss of the Applicant's previous passport made it impossible to calculate the exact number of days he had resided in Canada. As a result, the IAD concluded that the departure order was founded in law.

[8] It is not the role of this Court to reassess and reweigh the evidence before the IAD and this Court cannot substitute its own appreciation of the evidence with that of the IAD. Moreover, credibility is an extremely fact-based assessment to which this Court must afford deference. In my view, in the absence of any conclusive evidence demonstrating the exact number of days the Applicant had resided in Canada, the IAD's conclusion with respect to the Applicant's failure to comply with his residency obligations is reasonable and falls within the range of possible outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at para 47; *Khosa*, at para 59).

[9] The second question to be decided, namely the IAD's assessment of H&C considerations, involves a high level of discretion and is reviewable on a standard of reasonableness (*Khosa*, at paras 57-58; *Nekoie v Canada (Citizenship and Immigration)*, 2012 FC 363 at para 15 [*Nekoie*]).

[10] The Applicant alleges that the IAD breached procedural fairness in extending its credibility findings on residency to the H&C considerations. He argues that the IAD should have conducted a separate credibility evaluation for the H&C considerations. It is well established that

assessments of credibility involve fact-heavy analyses that warrant considerable deference and are reviewable on a standard of reasonableness (*Singh v Canada (Citizenship and Immigration),* 2013 FC 295, at paras 25-26). In my view, the Applicant's allegation does not raise a question of a breach of procedural fairness, but rather concerns the reasonableness of the IAD's assessment of the Applicant's credibility with regards to H&C considerations. Moreover, the IAD's reasons clearly demonstrate that it made two (2) separate analyses: one for the residency requirements and the other, for the H&C factors. The reference in the decision to negative factors relates not only to the Applicant's credibility, but also to the absence of evidence to support the H&C factors and the IAD's finding that the Applicant's contribution to Canadian society has been minimal. Therefore there has been no breach of procedural fairness.

[11] The Applicant also alleges that the IAD erred in its analysis of the establishment factor and in particular, in finding that only establishment before the departure order was relevant. I do not agree. The IAD found that the Applicant submitted little evidence of his establishment prior to the issuance of the departure order. In reaching its conclusion, the IAD considered the Applicant's lack of knowledge regarding his community, the low income declared in the Applicant's tax returns and the absence of employment in Canada prior to 2013. The IAD did acknowledge that the Applicant had started a business in Canada after the issuance of the departure order. It found, however, that while relevant, establishment subsequent to the issuance of a removal order carried less weight than establishment prior thereto. Moreover, the IAD noted that the evidence adduced by the Applicant showed little business activity. The IAD's findings are evidence-based and I see no reason to interfere with the IAD's conclusion on this point. The Applicant submits in his memorandum that the IAD indicated that in order to be successful in his

appeal, the Applicant should have paid more income taxes in Canada and that the link between low income and establishment is absurd. I disagree. Employment in Canada is demonstrative of establishment in Canada. Low income indicates that the Applicant has not worked in Canada.

[12] Regarding the H&C factor relating to the reasons for departure and stay abroad, the Applicant argued that the IAD ignored evidence demonstrating that the Applicant had left Canada in September 2010 to care for his ill father in Egypt and to attend to the sale of the family property in Egypt. In its decision, the IAD indicated that there was a lack of evidence establishing his father's illness or general health. The IAD noted that the Applicant had a sister as well as a mother who resided in the same area as the Applicant's father and that he had not demonstrated that his physical presence was imperative to care for his father especially for the length of time for which he was absent from Canada. The IAD also found that the Applicant had not established that he personally had to handle the sale of the family property over such lengthy periods. Having reviewed the CTR, I am of the view that the IAD incorrectly stated that the Applicant had failed to provide evidence to establish the illness of the Applicant's father or his general state of health. Two (2) doctors' certificates attesting to the illness of the Applicant's father were in fact tendered into evidence. The IAD either ignored this evidence or failed to provide any analysis as to why it was not being considered. The failure to do so undermines the reasonableness of the decision.

[13] The Applicant also takes objection with the IAD's conclusion with regards to the hardship factor in the event of removal. In disposing of this factor, the IAD considered that removal to Syria did present hardship for the Applicant given the current country conditions in

Syria, but noted and considered that there is currently an ‘administrative stay of removal’ to Syria. The IAD further indicated that in the event such stay was to be lifted in the future, the Applicant had not demonstrated that he could not avail himself of the pre-removal risk assessment [PRRA] procedure prior to removal. The Applicant argued that the IAD failed to exercise its jurisdiction by relying on the fact that there was an administrative stay of removal to Syria. The Respondent argued that the IAD’s statement had to be considered in the proper context and that is, that the Applicant would necessarily be offered a PRRA by CBSA at the time of removal, at which time a comprehensive risk analysis would be conducted.

[14] In my view, the IAD had the obligation to consider the potential hardship that would be faced by the Applicant if removed to Syria despite the presence of an administrative deferral of removals to Syria. The case law has clearly established that the mere presence of a temporary suspension of removals does not mean that an application on H&C considerations will automatically lead to a particular outcome, whether positive or negative (*Alcin v Canada (Citizenship and Immigration)*, 2013 FC 1242 at para 55; *Likale v Canada (Citizenship and Immigration)*, 2015 FC 43 at para 40). Given the similar nature of an administrative deferral of removals and a temporary suspension of removals, it is my view that the same principle can be applied to this case and that the IAD’s failure to assess the Applicant’s alleged particular circumstances of hardship constitutes a reviewable error. In testimony, the Applicant stated that he has not lived in Syria and that there is no one in his immediate family still residing in Egypt. He also described the situation in Syria and indicated that there is no place for him to live and no chance of finding employment in his field of expertise. All of his relatives have fled Syria and with respect to the family homes in Syria, one house was levelled by bombing and the other is

occupied by other Syrian families (CTR at 1107, 1008). Throughout the Applicant's testimony on this issue, both the IAD and the Minister's counsel repeatedly stated that it was not necessary to go into details regarding the situation in Syria because of the existence of the stay. Counsel for the Applicant had to insist with the IAD that the Applicant wanted to speak of his personal situation of foreign hardship for the purpose of establishing that he had sufficient H&C considerations to warrant remaining in Canada. In the absence of any analysis by the IAD regarding the Applicant's personal circumstances of hardship, it is not possible to determine whether the IAD fettered its discretion by unduly relying on the existence of the administrative deferral of removals to Syria in denying the Applicant his request for H&C considerations.

[15] Furthermore, the IAD's suggestion that the Applicant can substitute an analysis of foreign hardship in his appeal for a PRRA at a later date is incorrect and constitutes a reviewable error since the burden of proof and nature of analysis in a PRRA is completely different from a hardship analysis pursuant to paragraph 67(1)(*c*) of the IRPA. Under a PRRA, an applicant must demonstrate a fear of persecution, a danger of torture, or a risk to their life or of cruel and unusual punishment. A PRRA is not a legal substitute for an analysis of foreign hardship in an H&C evaluation pursuant to paragraph 67(1)(*c*) of the IRPA.

[16] In summary, I find that this aspect of the decision lacks the necessary justification, transparency and intelligibility. The IAD's failure to address the Applicant's foreign hardship in its evaluation of H&C considerations, and its reliance on the Applicant's ability to apply for a PRRA once the administrative deferral of removals is lifted, constitutes a reviewable error. For these reasons, the application for judicial review will accordingly be allowed.

[17] Neither party submitted a question for certification nor does one arise.

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name "Khaled Nazem El Husseini" as the Applicant, not "Khaled Nazem El Hussaini";

2. The application for judicial review is allowed;

3. The Immigration Appeal Division's decision dated October 9, 2014, is set aside;

4. The matter is remitted back to the Immigration Appeal Division for re-determination by a different member;

5. No question is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7336-14
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