Federal Court Cour fédérale

Date: 20100608

Docket: IMM-5745-09

Citation: 2010 FC 615

Ottawa, Ontario, June 8, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

IGOR DIGILOV

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] This is an application for judicial review of the decision by the Immigration Appeal Division of the Immigration and Refugee Board (IAD), dated September 15, 2009, to dismiss the appeal of Igor Digilov (the applicant) of a removal order made under section 45 of the *Immigration and Refugee Protection Act*, R.S. 2001, c. 27 (Act), because he is a person described in paragraph 40(1)(*a*) of the Act, that is, a person who directly or indirectly misrepresented or withheld material facts relating to a relevant matter that induces or could induce an error in the administration of the Act.

Factual background

[2] The applicant, a citizen of Israel and Russia, has been a permanent resident in Canada since July 26, 2004. The applicant, who is 52 years old, has been married three times. In 1993, he married the woman with whom he had two children. They divorced in 1994. In 1995, the applicant left Russia to emigrate to Israel.

[3] In 2003, the applicant married a Russian citizen who had claimed refugee protection in Canada. He subsequently submitted an application for permanent residence sponsored by his second wife. In his permanent residence application, the applicant failed to mention his two children.

[4] In May 2005, the applicant and his second wife divorced. In November 2005, he remarried his first wife when she came to Canada with their two children on visitor visas (tourists).

[5] On February 6, 2006, his wife and children, born in 1994 and 2002, filed an application for permanent residence in Canada.

[6] On September 20, 2007, a report was submitted under subsection 44(1) of the Act, which stated that the applicant had failed to report the existence of his two children in his application for permanent residence and that he had contracted a marriage of convenience for the sole purpose of obtaining permanent residence in Canada.

Impugned decision

[7] On January 17, 2008, the Immigration Division issued a removal order against the applicant after concluding that he was inadmissible for misrepresentation under paragraph 40(1)(*a*) of the Act.

[8] The applicant appealed this decision to the IAD. The applicant did not challenge the validity of the removal measure, but sought a stay based on humanitarian and compassionate considerations under paragraph 67(1)(*c*) of the Act.

[9] The IAD found that the applicant's testimony was neither credible nor compelling because he was unable to explain why he had divorced his second wife after such a short time and why he had provided an incorrect address in Israel on his permanent residence application.

[10] The IAD also determined that the fact that the applicant's children were born out of wedlock, that the applicant's name did not appear on their birth certificates and that their names did not appear on his passport did not diminish their legal status as his children. The panel therefore found that, taking into account the best interests of the children, the humanitarian and compassionate considerations raised by the applicant did not warrant special relief and dismissed the applicant's appeal.

Relevant legislative provisions

[11] Subsection 40(1) and sections 67 and 68 of the *Immigration and Refugee Protection Act* read as follows:

Misrepresentation	Fausses déclarations
40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation	**40.** (1) Emportent interdiction de territoire pour fausses déclarations les faits suivants :
(*a*) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;	*a*) directement ou indirectement, faire une présentation erronée sur un fait important quant à un objet pertinent, ou une réticence sur ce fait, ce qui entraîne ou risque d'entraîner une erreur dans l'application de la présente loi;
(*b*) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;	*b*) être ou avoir été parrainé par un répondant dont il a été statué qu'il est interdit de territoire pour fausses déclarations;
(*c*) on a final determination to vacate a decision to allow the claim for refugee protection by the permanent resident or the foreign national; or	*c*) l'annulation en dernier ressort de la décision ayant accueilli la demande d'asile;
(*d*) on ceasing to be a citizen under paragraph 10(1)(*a*) of the *Citizenship Act*, in the circumstances set out in subsection 10(2) of that Act.	*d*) la perte de la citoyenneté au titre de l'alinéa 10(1)*a*) de la *Loi sur la citoyenneté* dans le cas visé au paragraphe 10(2) de cette loi.
(2) The following provisions govern subsection (1):	(2) Les dispositions suivantes s'appliquent au paragraphe (1):
(*a*) the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the	*a*) l'interdiction de territoire court pour les deux ans suivant la décision la constatant en dernier ressort, si le résident permanent ou l'étranger n'est

case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced; and

pas au pays, ou suivant l'exécution de la mesure de renvoi;

(*b*) paragraph (1)(*b*) does not apply unless the Minister is satisfied that the facts of the case justify the inadmissibility.

b) l'alinéa (1)*b*) ne s'applique que si le ministre est convaincu que les faits en cause justifient l'interdiction.

<u>Appeal allowed</u>

<u>Fondement de l'appel</u>

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

(*b*) a principle of natural justice has not been observed; or

(*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.

…

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un principe de justice naturelle;

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.

[…]

<u>Removal order stayed</u>

68. (1) To stay a removal order,

<u>Sursis</u>

68. (1) Il est sursis à la mesure

the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case. …	de renvoi sur preuve qu'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. […]

<u>Issue</u>

[12] The only issue is whether the IAD erred in its assessment of the applicant's credibility and the best interests of the children directly affected by the decision by determining that there were insufficient humanitarian and compassionate considerations that warranted special relief.

<u>Standard of review</u>

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada determined that the findings of a tribunal concerning the credibility of an applicant are reviewed on a standard of reasonableness (paras. 55, 57, 62 and 64). The Court also found that "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness" (para. 51).

[14] Moreover, the case law of this Court has established that questions of fact or questions of mixed fact and law from the IAD should be reviewed on a reasonableness standard: *Bodine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 848, [2008] F.C.J. No. 1069, at para.

17; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 378, [2010] F.C.J. No. 426, at paras. 12 and 13.

[15] It should also be noted that in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 66, the Supreme Court of Canada recognized that, under section 67 of the Act, the IAD has broad discretion in assessing the humanitarian and compassionate considerations raised in an appeal of a removal order:

> Parliament intended the I.A.D. to have a broad discretion to allow permanent residents facing removal to remain in Canada if it would be equitable to do so. This is apparent from the open-ended wording of s. 70(1)(*b*), which does not enumerate any specific factors to be considered by the I.A.D. when exercising its discretion under this provision. The ability to quash or stay removal orders based on ameliorating or compassionate factors was granted to the I.A.D. partially as a result of the removal of the domicile provisions from the Act in 1977. The object of s. 70(1)(*b*) is to give the I.A.D. the discretion to determine whether a permanent resident should be removed from Canada….

[16] Moreover, in *Canada v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 57, the Court upheld this principle, adding:

> … Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(*c*) calls for a fact-dependent and policy-driven assessment by the IAD itself. As noted in *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, at p. 380, a removal order
>
>> establishes that, in the absence of some special privilege existing, [an individual subject to a lawful removal order] has no right whatever to remain in Canada. <u>[An individual appealing a lawful removal order] does not, therefore, attempt to assert a right, but, rather, attempts to</u>

> obtain a discretionary privilege. [Emphasis added in the original.]

[17] Consequently, the Court will intervene only if the decision rendered by the IAD does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, para. 47).

Analysis

[18] In the case at bar, the applicant did not challenge the validity of the removal order. Instead, he sought to have the IAD take humanitarian and compassionate considerations into account.

[19] The IAD did not find the appellant's testimony credible or compelling. In arriving at this conclusion, the IAD took into account (1) the circumstances surrounding the applicant's arrival and the lack of explanations about (2) his marriage in 2003 to a Russian citizen who had claimed refugee protection in Canada; (3) his divorce in 2005; (4) his remarriage to his first wife six months after the divorce; (5) the fact that he had provided an incorrect address in his permanent residence application; and (6) the failure to mention in his permanent residence application that he was the father of two children.

[20] The IAD stated the following:

> [10] The Panel did not find the Appellant's testimony credible or compelling. The Appellant was not forthcoming and did not show any remorse. He was unable to explain why he divorced his second wife, who sponsored him to come to Canada, after a relatively short marriage. He admitted that he provided the incorrect address in Israel on his application for permanent residence in Canada and was unable

> to explain to the Panel why he had done so. Based on his testimony, the Appellant knew that he had two children when he signed his application for permanent residence in 2003. The fact that his children were born out of wedlock, that his name did not appear on their birth certificates, that the children did not live with him or were not included on his Russian or Israeli passports does not diminish their legal status as his children. The Appellant acknowledged paternity, both in his testimony at the hearing as well as in his earlier testimony under oath before the Immigration Division. The Appellant signed the permanent resident application form, leaving part C, "names of family members outside Canada" blank.

[21] In reading the IAD's decision, the Court finds it difficult to see how this finding that the applicant lacked credibility is unreasonable. When it comes to questions of credibility and assessment of the evidence, it is well established that under paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S. 1985, c. F-7, the Court will intervene only if the tribunal based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it (*Aguebor v. Canada (Minister of Employment and Immigration)*, (1993), 160 N.R. 315 (F.C.A.), 42 A.C.W.S. (3d) 886).

[22] As Justice Beaudry pointed out in *Sanichara v. Canada (Minister of Citizenship and Immigraton)*, 2005 FC 1015, [2005] F.C.J. No.1272, at para 20:

> The IAD, in a hearing *de novo*, is entitled to determine the plausibility and credibility of the testimony and other evidence before it. The weight to be assigned to that evidence is also a matter for the IAD to determine. As long as the conclusions and inferences drawn by the IAD are reasonably open to it on the record, there is no basis for interfering with its decision. Where an oral hearing has been held, more deference is accorded to the credibility findings.

[23] The IAD is in the best position to assess the lack of explanations given by the applicant. It is not the role of this Court, in the case at bar, to substitute its judgment for the findings of fact made by the IAD concerning the applicant's credibility.

[24] With regards to the humanitarian and compassionate considerations raised by the applicant concerning his children's situation, the Court is of the opinion that the IAD properly assessed the factor of the children's best interests as developed in the case law. It is settled law that the children's best interests constitute only one factor to be weighed along with others.

[25] Recently, in *Kisana et al v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] F.C.J. No. 713, at paras. 24 and 37, the Federal Court of Appeal reiterated the established principle developed by the courts in immigration law that the best interests of a child, unlike in family law, is not the predominant factor:

> 24. Thus, an applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result. It will more often than not be in the best interests of the child to reside with his or her parents in Canada, but this is but one factor that must be weighed together with all other relevant factors. It is not for the courts to reweigh the factors considered by an H&C officer. On the other hand, an officer is required to examine the best interests of the child "with care" and weigh them against other factors. Mere mention that the best interests of the child has been considered will not be sufficient (*Legault, supra*, at paragraphs 11 and 13).
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> 37. …The consideration of a child's best interests in an immigration context does not readily lend itself to a family law analysis where the true issues are those of custody and access to children. Contrary to family law cases where "the best interests of the children" are, it goes without saying, the determining factor, it is not so in immigration

> cases, where the issue is, as in the case before us, whether a child should be exempted from the requirements of the *Act* and its *Regulations* and allowed to become a permanent resident. As Décary J.A. made clear in his Reasons for the majority in *Hawthorne, supra*, the principle which this Court enunciated in *Legault supra*, is that although the best interests of a child are an important factor, they are not determinative of the issue before the officer.

[26] In the case before us, it should be mentioned that the children have no status in Canada because they are not permanent residents. They grew up in Israel with their mother and have been in Canada for five years. They have a good knowledge of Hebrew, which is the language used in schools in Israel. Moreover, the applicant stated that, in the event that the deportation order is upheld, he would take his children with him to Israel (transcripts p. 120). In reading the decision, the Court is of the opinion that the IAD considered the consequences for the children, that it took the children's best interests into account in light of the case law in immigration matters and that it analyzed and weighed the evidence in the record appropriately. The applicant failed to demonstrate that the IAD made a reviewable error.

[27] At the hearing before this Court, counsel argued the relevance of the IAD not having specifically mentioned the letter from the Centre de santé et de services sociaux Cavendish dated June 26, 2009 (Tribunal Record, p. 93). First, the Court points out that the IAD is presumed to have taken all of the evidence into account (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35 (F.C.T.D.), 83 A.C.W.S. (3d) 264; *Hassan v. Canada (Minister of Employment and Immigration) (F.C.A.),* [1992] F.C.J. No. 946, 147 N.R. 317; *Litke v. Canada (Minister of Human Resources and Social Development)*, 2008 FCA 366, [2008] F.C.J. No. 1782). The letter in question was filed late in evidence at the IAD hearing held on July 14, 2009

(transcript at pp. 105-107). It is therefore clear that the IAD was aware of the letter and therefore it must be presumed that it was taken into consideration. Second, the applicant's arguments did not satisfy this Court, in light of all the evidence in the record, that an explicit reference to this letter would have changed or influenced the outcome in any way.

[28] Finally, and as counsel for the respondent rightly pointed out, even if the removal order were set aside, the applicant could not sponsor his children by reason of paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations* because at the time of his application for permanent residence, he was not accompanied by his children.

[29] The Court is therefore of the opinion that the IAD's decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*). The IAD's finding is not unreasonable and is not a reviewable error.

[30] For all these reasons, the Court finds that the application for judicial review must be dismissed. No question was proposed for certification and this matter does not contain any.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Richard Boivin"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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