Federal Court  Cour fédérale

Date: 20120918

Docket: IMM-5930-11

Citation: 2012 FC 1089

Ottawa, Ontario, September 18, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

DAVOOD LOTFI

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Minister of Public Safety and Emergency Preparedness (the Applicant) seeks judicial review of a decision by the Immigration Appeal Division (IAD), dated August 11, 2011, with amended reasons provided on April 3, 2012. The IAD allowed an appeal on humanitarian and compassionate (H&C) grounds under subsection 67(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) and set aside the removal order against the Respondent, Davood Lotfi.

[2] For the following reasons, the application is allowed.

I. Background

[3] The Respondent is a citizen of Iran. He applied for a permanent resident visa to enter Canada as a skilled worker. In his application, he listed his marital status as single. In April 2007, he then married an Iranian woman, but did not advise the visa office in London of this change in status.

[4] In June 2007, the Respondent arrived in Toronto and told the officer at the port of entry (POE) that he was now married. The officer proceeded to prepare a report under section 44 of the IRPA relating to his misrepresentation. An exclusion order was issued that the Respondent subsequently appealed to the IAD.

II. Decision of IAD

[5] The IAD found that the exclusion order was valid in law because the Respondent acknowledged that he failed to declare his spouse and have her examined prior to arriving at the POE contrary to section 41(a) of the IRPA and sections 30(1)(a), and 51(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[6] Regardless, the IAD determined that were sufficient H&C grounds based on the factors identified in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD no 4 and

endorsed by the Supreme Court in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84 to warrant special consideration.

[7] Considering the seriousness of the offence and remorse, the IAD found the Respondent to be a credible witness and accepted that his "hasty marriage at the eleventh hour prior to his immigrating to Canada was the result of his feeling pressure from his wife, her parents and the Iranian government." It was considered understandable that "he would not have wanted his wife to be processed along with him if it was never his intent to bring her to Canada in the first place." The IAD also found that "his straightforwardness by immediately declaring that his status had changed prior to his landing at the airport demonstrates that he did not have the intention to misrepresent himself." The seriousness factor was therefore seen as weighing only minimally against the Respondent while remorse weighed minimally in his favour.

[8] As for the Respondent's length of time in Canada and establishment, the IAD referred to the fact that he had only been in Canada for five years and not able to legally work until January of that year as well as his subsequent work for a company designing architectural drawings. The IAD recognized that as a civil engineer by profession working in a similar capacity, the Respondent had the potential to establish himself in Canada and attributed minimal positive weight to this overall factor.

[9] According to the IAD, the Applicant did not have family members in Canada other than his Canadian girlfriend. The IAD considered this a "meaningful relationship" and there would be some hardship to his girlfriend if he were removed from Canada. The factor weighed minimally in his

favour. It was further noted that there was "no other evidence led with respect to support within the family and within the community, and, therefore, I find that his factor weighs minimally against the appellant."

[10] The IAD identified two hardships associated with his removal, namely his relationship with his current girlfriend and the quality of his life in Iran. It was noted that "[i]n considering the favourable and unfavourable weight delegated to this factor, the overall attribution of weight is neutral."

[11] More generally, the IAD concluded "[i]n weighing all of the factors in this case, I find that the weight of these factors are in favour of allowing the appeal."

III. Issue

[12] The general issue before this Court is the reasonableness of the IAD's decision.

IV. Standard of Review

[13] The standard of review for decisions of the IAD regarding the granting or withholding of relief on H&C grounds is recognized as reasonableness (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paras 58).

[14] Applying this standard, the Court will only intervene where the decision lacks justification, transparency and intelligibility or falls outside a range of possible, acceptable outcomes (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Khosa*, above at para 59).

V. Analysis

[15] In my view, the decision does not demonstrate the required justification, transparency and intelligibility. Although the IAD is entitled to a high degree of discretion in these matters, the Applicant has identified some issues associated with the current findings in light of the evidence under consideration and relevant principles that warrant intervention by this Court.

[16] Of particular concern is the IAD's analysis of the Respondent's intentions at the POE. For clarity, the passage in dispute reads:

> While I do not condone the fact that the appellant did not advise the visa office that he had married prior to coming to Canada, it is understandable in my view that he would not have wanted his wife to be processed along with him if it was never his intent to bring her to Canada in the first place. Furthermore, I find that the appellant's straightforwardness by immediately declaring his status had changed prior to his landing at the airport demonstrates that he did not have the intention to misrepresent himself. I find his behaviour in this regard diminishes the seriousness of non-disclosure. I find, therefore, that the seriousness factors only weighs minimally against the appellant and his remorse weighs minimally in his favour.

[17] The Applicant contends, and I agree, that the IAD's conclusion that the Respondent did not have the intention of misrepresenting himself was unreasonable. The IAD accepted that the Respondent did not want his wife processed because he had no intention of bringing her with him. Yet, the Respondent was required to have her processed and notify the visa officer irrespective of

whether she would be accompanying him. There was a clear misrepresentation in this regard prior to his arrival in Canada.

[18] The IAD suggests that his admission at the POE demonstrated his "straightforwardness" and therefore he did not have the intention of misrepresenting himself. The Respondent argues that this makes sense since he voluntarily disclosed his status at that time. There is, however, no evidence to substantiate the nature of his admission in front of the officer. Despite having previously kept this information from Canadian officials, did he intend to bring this forward on arrival in Canada or did this simply come out in the course of processing his information? The IAD cannot be certain.

[19] Also disconcerting is the apparent paradox created by the IAD in suggesting that he did not intend to misrepresent himself while at the same time acknowledging his remorse. If an individual had no intention of doing anything wrong they cannot also feel badly for what they have done, the IAD simply cannot have it both ways.

[20] Moreover, the IAD does not provide any explanation or evidentiary basis for concluding that the Respondent has demonstrated remorse. It simply states that this factor weighs minimally in his favour at the conclusion of the analysis. The Applicant initially raised this issue as a separate adequacy of reasons argument, however, based on *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 it is recognized that this no longer constitutes a stand alone basis for quashing the decision. That does not mean that the inadequacy of reasons provided on the nature of the Respondent's remorse cannot be considered as part of the reasonableness analysis. Given the lack of factual consideration regarding remorse

and the significance of this finding as balanced against the seriousness of the offence of misrepresentation; the reasons on this matter further call into question the IAD's approach.

[21] Similarly, I share the Applicant's concern over the IAD making a finding based on the Respondent having "the potential to establish himself in Canada." The relevant H&C factor is the actual establishment of the Respondent at the time the IAD is making its determination. In *Ribic*, above, establishment was to be concerned with "the length of time spent in Canada." It is not a forward looking exercise in this context.

[22] I recognized that the IAD is entitled to consider a broad range of factors as part of its analysis (see for example, *Chieu*, above at para 84). However, to suggest that the potential for establishment is a relevant consideration would be incongruous with the legislative scheme. In applying for permanent resident status, the Respondent had to address his prospects for establishment in Canada. He was subsequently found inadmissible as a result of the misrepresentation of his martial status. Formally considering his potential for establishment as part of the H&C could effectively render the inadmissibility finding irrelevant, when that process serves a clearly defined purpose. As the Applicant notes, the Citizenship and Immigration Canada Manual on H&C Grounds expressly recognizes that "[o]fficers should not assess the applicant's potential for establishment as this falls within the scope of admissibility criteria."

[23] The Respondent maintains that the IAD also considered his current level of establishment. While true, this does not save the overall finding related to this factor. The IAD recognized the shortcomings of his actual establishment stating "I do not find the appellant is particularly

established but I recognize that he has not been able to legally work in Canada until January of this year." Based on the IAD's reasons, the Respondent was excused and the factor attributed minimal positive weight on the basis of his potential to establish himself due to his profession. As discussed, the potential for establishment is irrelevant at this stage of the IAD analysis. Therefore, I must consider the finding unreasonable.

[24] Given my conclusion that the IAD erred with respect to two factors in which it accorded minimal positive weight, namely the Respondent's remorse and potential for establishment, the overall conclusion reached that there are sufficient H&C factors to warrant relief cannot stand.

[25] The Respondent insists that the Applicant merely disagrees with the findings of fact reached by the IAD that were reasonably open to it. I must stress, however, that reasonableness requires these findings to be based on the evidence presented, have an internal logic and not rely on irrelevant factors contrary to the IAD's approach in this instance. Some of the central findings of the IAD appear erroneous in light of the evidence and therefore lead me to doubt whether the decision can be considered an acceptable outcome.

VI. Conclusion

[26] Since the decision of the IAD is unreasonable, the application for judicial review is allowed and the matter is remitted back to a differently constituted panel of the IAD for re-determination.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and the matter is remitted back to a differently constituted panel of the Immigration Appeal Division for re-determination.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-5930-11**
STYLE OF CAUSE:	**MPSEP v DAVOOD LOTFI**
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