Federal Court Cour fédérale

Date: 20161103

Docket: IMM-57-16

Citation: 2016 FC 1221

Ottawa, Ontario, November 3, 2016

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

FATMABIBI SABIRAHMED PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

[1] The applicant, Ms. Fatmabibi Sabirahmed Patel, requests judicial review of a decision made on December 9, 2015 by the Immigration Appeal Division of the Immigration and Refugee Board (IAD), wherein the IAD dismissed her appeal brought on humanitarian and compassionate (H&C) grounds from the refusal of her father's application for permanent residence which she had sponsored.

I. BACKGROUND

[2] Ms. Patel, originally from India, has been in Canada since 2003 and a citizen since 2011. She married Ashraf Koya (a co-signer of the sponsorship undertaking) in March 2002. They have three children together, all born in Canada, ages 11, 10 and 15.

[3] In 2004, the applicant applied to sponsor her parents but her application was refused. In February 2008, she submitted a second sponsorship application. The application included her father, her mother, and her three brothers aged 32, 27 and 23. Other family members in India, including the applicant's paternal grandparents and aunts residing with the family, were not included.

[4] The applicant's father is engaged in business in India and has assets which could be converted and brought to Canada. Her mother runs the household. The brothers are students and not otherwise employed. As full-time students they would qualify for sponsorship as dependents. The applicant, her husband and their children, communicate with her family in India approximately once a week by telephone. The applicant last visited India in October 2008 with her husband and two children. Her parents have not seen her third child who was born after that trip and has never been to India. The applicant's family has never applied for visitor visas and neither of the parents has been to Canada.

[5] On October 28, 2013, the applicant's second sponsorship application was formally refused by a visa officer for not meeting the minimum necessary income (MNI) requirements

under the Low-Income Cut-Offs (LICO) Guidelines. In December 2013, the applicant appealed the refusal of the visa officer to the IAD.

[6] In January 2014, while the applicant's appeal was pending, an amendment was made to subparagraph 133(1)(j)(i) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (IRPR). The change affected the calculation of the income required to sponsor a parent or grandparent. The income threshold required for a sponsorship application under the family class was increased.

[7] Prior to January 1, 2014, subparagraph 133(1)(j)(i) required the sponsor (and co-signer, if any) to have a total income that is at least equal to the minimum income for only the year preceding the date of filing of the sponsorship application. As it reads now, subparagraph 133(1)(j)(i) requires that the sponsor (and co-signer, if any) have a total income that is at least equal to the minimum necessary income, plus 30%, for the three years preceding the date of filing of the sponsorship application.

[8] On September 16, 2014, the IAD wrote to the applicant notifying her of this change and asking her to submit additional documents to prove her income. Her then counsel replied on October 29, 2014 to provide supporting documentation. The IAD hearing took place on November 27, 2015. The applicant was represented at that hearing by the same counsel. At the hearing, the applicant, through her counsel, did not contest the validity of the visa officer's decision. The only issue before the IAD was whether, considering the best interests of the children of the applicant and other factors, there were sufficient H&C considerations to warrant

special relief under paragraph 67(1)(c) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (IRPA).

II. DECISION UNDER REVIEW:

[9] The IAD applied the current version of subparagraph 133(1)(j)(i) of the IRPR in its assessment of the applicant's appeal. The IAD determined that the higher threshold for the exercise of special relief applied to the appeal because the obstacle to admissibility had not been overcome by the applicant at the time of the hearing: *Chirwa v Canada (Minister of Citizenship and Immigration),* [1970] IABD No 1; *Canada (Minister of Citizenship and Immigration) v Dang,* [2001] 1 FC 321 (TD).

[10] In reaching its determination on the availability of special relief, the IAD considered the applicant's family size unit and co-signer, her financial position and sponsorship MNI impediment under the current subparagraph 133(1)(j)(i), and any hardship resulting from the circumstances of having family in Canada and elsewhere. There was an agreement amongst the parties that the family size unit for the purposes of the sponsorship undertaking under appeal was 10 members.

[11] The IAD considered the applicant's current financial position including her and her co-signer's income under the amended MNI requirement, as well as her other assets and future financial opportunities. The IAD noted that despite having a consistent income for the last three years, the applicant and her co-signer have not reached the threshold amount for any year under the amended MNI requirements.

[12] Finally, the IAD considered the best interests of the children, and the hardships faced by the applicant and her family in India. The IAD noted that very little evidence or supporting documentation was provided about the closeness of the applicant's children to their maternal grandparents and uncles in India. The IAD stated that it gave substantial weight to the circumstances and presumed interests of the applicant's children, but found that it was a neutral factor in the circumstances. The IAD also found that there was no evidence of hardship to the applicant's father or his family in India.

[13] The IAD concluded that physical separation alone is not a compelling factor and that there was insufficient evidence about undue hardship or disproportionate hardship or any unusual and serious circumstances to permit the imposing of special relief.

III. ISSUES:

[14] Having considered the parties' submissions, I would phrase the issues as follows:

A. What is the standard of review?

B. Did the IAD apply the wrong version of subparagraph 133(1)(j)(i) of the *IRPR*?

C. Was the IAD unreasonable in applying its H&C discretion?

IV. RELEVANT LEGISLATION

[15] The relevant provisions of the IRPR read as follows:

Requirements for sponsor	**Exigences : répondant**
133 (1) A sponsorship application shall only be	**133 (1)** L'agent n'accorde la demande de parrainage que sur

approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor

preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :

…

…

(j) if the sponsor resides

(j) dans le cas où il réside :

(i) in a province other than a province referred to in paragraph 131(b),

(i) dans une province autre qu'une province visée à l'alinéa 131b) :

(A) has a total income that is at least equal to the minimum necessary income, if the sponsorship application was filed in respect of a foreign national other than a foreign national referred to in clause (B), or

(A) a un revenu total au moins égal à son revenu vital minimum, s'il a déposé une demande de parrainage à l'égard d'un étranger autre que l'un des étrangers visés à la division (B),

(B) has a total income that is at least equal to the minimum necessary income, plus 30%, for each of the three consecutive taxation years immediately preceding the date of filing of the sponsorship application, if the sponsorship application was filed in respect of a foreign national who is

(B) a un revenu total au moins égal à son revenu vital minimum, majoré de 30 %, pour chacune des trois années d'imposition consécutives précédant la date de dépôt de la demande de parrainage, s'il a déposé une demande de parrainage à l'égard de l'un des étrangers suivants :

(I) the sponsor's mother or father,

(I) l'un de ses parents,

(II) the mother or father of the sponsor's mother or father, or

(II) le parent de l'un ou l'autre de ses parents,

(III) an accompanying family member of the foreign national described in subclause (I) or (II),

(III) un membre de la famille qui accompagne l'étranger visé aux subdivisions (I) ou

… (II),…

V. ANALYSIS

A. *Standard of review*

[16] The applicant submits that the standard of correctness applies to questions of law and breach of fairness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 50. She argues that the determination of the applicable legislation to be relied on at the appeal and the impact of this on the panel's exercise of its discretion attracts the standard of correctness. The applicant submits that the remaining issue involving the application of the IAD's H&C discretion attracts a reasonableness standard: *Hara v Canada (Minister of Citizenship and Immigration)*, 2009 FC 263, [2009] FCJ No 371 at para 20.

[17] The respondent submits that the IAD's findings of fact and its interpretation and application of the law in its home statute, in which it has expertise, is subject to the standard of reasonableness: *Dunsmuir* at para 54; *Canada (Citizenship and Immigration) v Khosa,* 2009 SCC 12, [2009] SCJ No 12 at para 44; *Gill v Canada (Minister of Citizenship and Immigration),* 2012 FC 1522. [2012] FCJ No 1643 at para 18.

[18] In the present matter, as the choice of which version of subparagraph 133(1)(j)(i) applies to the IAD's determination of appeals of decisions that were made prior to January 1, 2014 engages fairness concerns, I agree with the applicant that in this context, it attracts a correctness standard. I note that a similar conclusion was reached by Chief Justice Crampton in *Gill,* above,

at para 18. Although, as he noted, reasonableness should generally apply where the tribunal was interpreting its home statute. See also *Burton v Canada (Minister of Citizenship and Immigration),* 2016 FC 345, [2016] FCJ No 308 at para 14.

[19] The IAD's decision to withhold special relief was based on an assessment of the facts of the file. Therefore, the IAD's assessment of the evidence and exercise of H&C discretion attracts a reasonableness standard: *Khosa,* above, at para 58. As the Supreme Court held in *Khosa,* at paragraph 59, "it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence".

(1) Did the IAD apply the wrong version of subparagraph 133(1)(j)(i) of the IRPR?

[20] As a preliminary matter, the respondent submits that the applicant is estopped from raising this issue on judicial review because she failed to do so before the IAD when she first had the opportunity. The IAD had advised the applicant, before her hearing, of the change to subparagraph 133(1)(j)(i). Specifically, she was told that the current version of that paragraph would apply to her case, and that the IAD sought further documentation from her considering the changes. She provided additional information, through counsel, and did not dispute that the new regulation should apply to her case. It was not disputed before the IAD that she did not meet the income requirements when the initial decision was made by the visa officer. The applicant brought her appeal solely on H&C considerations.

[21] The applicant contends that she is not barred from raising the issue now as the IAD was obliged to apply the correct law whether or not she objected at the IAD hearing. In the circumstances, and considering that the question raises fairness considerations, I am not prepared to find that the applicant is estopped from relying on the argument. That does not mean, however, that I believe it should succeed.

[22] The applicant's position that the former version of the paragraph should apply is primarily based on temporal factors. The old paragraph was operative at the time that the applicant filed her sponsorship application in 2008, when it was refused in October 2013, and when the appeal to the IAD was filed in December 2013. Had the appeal been decided at that time, the old regulation would have applied to her application. The decision to apply the new regulation constituted an error of law, she argues.

[23] The applicant contends that the IAD's application of the new regulation on appeal amounts to retrospective application of the law. Her substantive, not procedural rights, were affected, she argues, as the application concerned family reunification and engaged significant human interests: *R v Dineley*, 2012 SCC 58, [2012] SCJ No 58 at para 10; see also *R v Howard Smith Paper Mills*, [1957] SCR 403. Those substantive rights were acquired, accrued or accruing when the paragraph was amended. This negatively affected the IAD's exercise of equitable discretion because it wrongly applied the higher threshold for exercising its discretion under *Chirwa*, above, rather than the lower threshold found in *Jugpall v Canada (Minister of Employment and Immigration)*, [1999] LADD No 600.

[24] In support of her position, the applicant relies on a number of older decisions from this Court. Only two dealt with an IAD appeal: *Canada (Minister of Employment and Immigration) v Lidder*, [1992] 2 FC 621, [1992] FCJ No 212 (CA); *Canada (Minister of Citizenship and Immigration) v Nikolova*, [1995] FCJ No 1337. Both of these decisions are, in my view, distinguishable on their facts.

[25] In *Lidder,* above, there was no amendment to a law or regulation. At the moment of filing, the applicant was a few months too old to meet the family class definition. The Federal Court of Appeal found that it is not the date of the sponsorship application but the filing date of the application for landing which is relevant in determining whether a person is a member of the family class. In *Nikolova*, above, while there was a single reference to an amended immigration regulation, the determinative issue was the relevant date for determining the applicant's age. Relying on the decision in *Lidder,* Justice Wetston held that the relevant date upon which the applicant's age is to be assessed is the date of his sponsored application for permanent residence. Neither judgment is of assistance to the applicant but may have been if the issue before the IAD had been whether the father's dependents met the limitations respecting age.

[26] I am also satisfied that other decisions cited by the applicant are distinguishable from the present matter. *Hirbod v Canada (Minister of Citizenship and Immigration),* [1998] FCJ No 447 was a Convention refugee case. The wording of the amended Regulations made it clear that the new class definition was not intended to apply to pre-May 1997 applications where the applicant had completed all steps required of him. *Choi v Canada (Minister of Employment and Immigration),* [1992] 1 FC 763, [1992] FCJ 1275 did not involve a change in law or regulation

but rather a departmental policy regarding the "lock-in" date of the occupational demand factor. *Henry v Canada (Minister of Employment and Immigration),* [1988] FCJ No 181 did not involve a *de novo* IAD appeal. The application concerned the decision of a manager who reversed the recommendation of an immigration officer that an H&C exemption applied to the applicant. Finally, *Wong v Canada (Minister of Employment and Immigration),* [1986] FCJ No 129 involved a visa officer's decision regarding the age of the dependant at the time the sponsorship application was filed.

[27] In a more recent decision, *Elahi v Canada (Minister of Citizenship and Immigration)* 2011 FC 858, [2011] FCJ No 1068, the regulation regarding spousal sponsorships was changed between the date of the IAD decision and the judicial review application before me. I found reviewable error in the IAD decision on an unrelated issue and ordered that it be re-determined on the basis of the law as it had been when the IAD decision was rendered. *Elahi* is distinguishable from the present matter because the IAD had made a final decision before the regulation was changed.

[28] In deciding to return the matter for reconsideration under the law as it was when it was dealt with by the IAD, I cited *McDoom v Minister of Manpower and Immigration,* [1978] 1 FC 323 for the principle that a person cannot be prejudiced by giving retroactive effect to new and additional requirements in a regulation. Again, this was cited in the determination of the remedy in *Elahi,* not on the merits of the application.

[29] *McDoom,* concerned a change in the regulations governing the admission to Canada of dependent children between the time the applicant nominated her sons for permanent residence and the dates on which they were both examined for landing. Mr. Justice Walsh found that the applicant had an accrued right to have her son's nominations considered under the regulations as they read when she first applied, as well as accrued obligations to provide for their support.

[30] The underlying question in this matter is whether by the act of filing an application to sponsor her father, the applicant acquired rights which attract the presumption in *Gustavson Drilling, (1964) Ltd v Canada (MNR),* [1977] 1 SCR 271 at p 282, and were operative at the time her appeal was considered by the IAD.

[31] A similar question was dealt with in the spousal sponsorship context by Chief Justice Crampton in *Gill,* above, and by Justice MacDonald in *Burton,* above. In *Gill,* Chief Justice Crampton found, at paragraphs 39 and 40, that the sponsor did not have an accruing or accrued right to have her sponsorship application determined according to the law that was in place when she filed her notice of appeal. This was because persons who make such applications have no accrued or accruing rights until all of the conditions precedent to the exercise of the right they hope to obtain under the application have been fulfilled.

[32] Chief Justice Crampton was guided by the Supreme Court's definition of what it means for a right to be "acquired", "accrued" or "accruing" in *R v Puskas; R v Chatwell,* [1998] 1 SCR 1207, [1998] SCJ No 51, at para 14:

> In our view, there are numerous reasons for deciding that the ability to appeal as of right to this Court is only "acquired,"

> “accrued” or “accruing” when the court of appeal renders its judgment. The first is a common-sense understanding of what it means to “acquire” a right or have it “accrue” to you. A right can only be said to have been “acquired” when the right-holder can actually exercise it. The term “accrue” is simply a passive way of stating the same concept (a person “acquires” a right; a right “accrues” to a person). Similarly, something can only be said to be “accruing” if its eventual accrual is certain, and not conditional on future events (Scott v. College of Physicians and Surgeons of Saskatchewan (1992), 95 D.L.R. (4th) 706 (Sask. C.A.), at p. 719). In other words, a right cannot accrue, be acquired, or be accruing until all conditions precedent to the exercise of the right have been fulfilled.

[33] Chief Justice Crampton found that no substantive rights accrued until all the conditions precedent to the exercise of the right had been fulfilled: *Gill,* at para 40. Until a final decision has been made on the application, the applicant simply has potential future rights that remain to be determined. There are no rights that may be retroactively or retrospectively affected by a change in the test applicable to sponsorship applications. To the extent that *McDoom* stood for the contrary position, Chief Justice Crampton respectfully declined to follow it referring to the significantly different legislative regime under which it was decided. Another factor that contributed to the outcome was that the IAD’s hearings are *de novo* in nature: *Gill*, at para 43.

[34] Counsel for the applicant invites me to find that the Chief Justice, and Justice MacDonald in *Burton,* erred in their analyses and decline to follow their judgments. While I am not bound by their decisions, in the interests of judicial comity I should not differ from their conclusions unless (a) subsequent decisions have affected the validity of the impugned judgment; (b) it has been demonstrated that some biding authority in case law and relevant statute was not considered; or (c) the judgment itself was unconsidered i.e., given where exigencies required an immediate

decision: *Alfred v. Canada (Minister of Citizenship and Immigration),* 2005 FC 1134, [2005] FCJ No 1391 at para 15. None of those considerations apply in this instance.

[35] The applicant has not established that she had an accrued right to have her application determined on the basis of the regulation as it read at the time she submitted it or when it was considered by the visa officer. There had been no final decision granting her rights on the basis of the law as it previously read. At best, she had a right of appeal which was to be determined on the basis of the law as it was when it was heard and her application was considered *de novo*.

[36] In a post hearing submission, counsel for the applicant cited the judgments in *Canada (Minister of Employment and Immigration) v Lyle* [1979] F.C.J. No. 511 and [1982] 2 FCR 821. The *Lyle* judgments dealt with an appeal challenging the legality of a deportation order issued under the *1952 Immigration Act.* The appeal came before the IAD after the 1976 legislation which replaced the 1952 Act was brought into effect. The Federal Court of Appeal initially determined that the law to be applied was that in effect when the decision was made, not that in force at the time the appeal was heard. In its 1982 decision, the Court of Appeal reversed itself and concluded that the applicable law was the 1976 statute.

[37] This jurisprudence does not assist the applicant. The legal validity of the visa officer's refusal, made under the pre-January 1, 2014 regulations, was not in dispute before the IAD. This is not a case of retroactive application of the law to a decision made earlier. The appeal was not an appeal on the record before the visa officer. Rather, in exercising its equitable jurisdiction

under paragraph 67(1)(c) of the IRPA, the IAD was considering new humanitarian and compassionate grounds which the IAD assessed as the tribunal of first instance.

[38] I am satisfied that there are no grounds on which I could find that the IAD erred in applying the version of the IRPR that was in force at the time of its decision.

(2) Was the IAD unreasonable in applying its H&C discretion?

[39] As noted above, the applicant submits that the IAD erred in its exercise of equitable discretion because it wrongly applied the higher threshold under *Chirwa,* above. As a result, she argues, the IAD did not properly consider several positive factors, including: (i) the fact that the applicant's father has funds to bring with him to Canada to assist in the family's settlement; (ii) the fact that the applicant's brothers are educated young adults who would work in Canada; and (iii) the fact that the applicant has extended family members from both sides of the family established in Canada.

[40] Further, the applicant submits that the IAD applied the wrong test in its exercise of humanitarian and compassionate discretion. Specifically, she submits that the test is not undue or disproportionate hardship or unusual circumstances but H&C grounds that had to be established. Rather than consider family reunification as a positive factor, the IAD focused on the family's establishment in India in finding that separation was not a compelling factor.

[41] The respondent contends that the IAD did consider the father's assets in India but noted that there was no evidence that he planned to divest himself of those assets and transfer them to

Canada. The brothers' circumstances were considered but the IAD was not prepared to speculate about their employment prospects in Canada when the applicant did not provide evidence of concrete settlement plans. None of the three brothers has an employment history. As they are all mature adults, they have remained in school in order to qualify as dependents pending resolution of the sponsorship application.

[42] The IAD did not, as the applicant argues, misapply the H&C test. The Supreme Court in *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61, [2015] SCJ No 61 did not change the test or eliminate the guideline of "unusual and undeserved or disproportionate hardship". Rather, the Court held that the guideline should be "treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1)" of the IRPA: *Kanthasamy,* above, at para 33.

[43] That said, the IAD's analysis of the best interests of the applicant's children was not extensive. The Supreme Court stated that decision makers must do more than simply state that the interests of a child have been considered. They must be "identified and defined" and examined with "a great deal of attention", "in light of the evidence": *Kanthasamy,* at para 39. Here, the IAD might have done better in examining the children's interests had it not been limited by the scant evidence before it. Given that the tribunal did not have much to work with, the Court will not interfere with its decision on this basis.

[44] In reaching its conclusion on the H&C considerations, the IAD considered the applicant's establishment in Canada, her ties to her parents and brothers in India, her current financial

situation as well as her father's financial situation in India, her children's relationship with her family in India and the underlying goal of family reunification. The decision to not grant special relief under paragraph 67(1) of the IRPA was within the range of possible acceptable outcomes defensible on the facts and the law. For that reason, this Court will not interfere with the IAD's decision.

VI. CERTIFIED QUESTION

[45] The applicant requested and was provided time after the hearing to propose questions for certification. The respondent was given time to reply. In a letter to the Court dated October 11, 2016, counsel for the applicant asked that the Court consider certifying a question along these lines:

> In an appeal coming before the Immigration Appeal Division, after regulatory changes to the financial requirements for sponsoring parents and grandparents took effect on January 1, 2014, do the revised regulations apply or do the regulations apply which were in place when the sponsorship application was commenced, considered and refused.

[46] The respondent submits that the Court should not certify this question as it is raised in a vacuum without regard to the facts of this case. The applicant did not put the issue she has raised with the Court before the IAD. The IAD was denied an opportunity to address any impact the change in regulation might have on its own jurisprudence. Accordingly, the Federal Court of Appeal would not have the benefit of the IAD's views on the temporal application of the current minimum necessary income provisions on a humanitarian and compassionate application.

[47] The principles for certifying a question under section 74 of the IRPA were reiterated by the Federal Court of Appeal in *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 FCR 290. To be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance: *Zang,* above, at para 9. Additionally, a serious question of general importance arises from the issues in the case and not from the judge's reasons: *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 FCR 129 at para 29. The fact that the Court has addressed an issue in its reasons is not a sufficient basis upon which to certify a question.

[48] In the present matter, the determinative issue that was argued before the IAD, and is dispositive of this application for judicial review, is whether there were sufficient humanitarian and compassionate reasons to grant relief notwithstanding the applicant’s failure to meet the MNI. The question of whether the IAD should have applied the former regulations or the current version was not contested before it. In any event, that question was settled by this Court in *Gill*, above, and that decision has been consistently followed in other cases. The law in this area is not unsettled. Accordingly, the Court sees no reason for certifying the proposed question.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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