Federal Court  Cour fédérale

Date: 20161116

Docket: IMM-4023-15

Citation: 2016 FC 1277

Ottawa, Ontario, November 16, 2016

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

IHAB A. HOSNY GHALI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this application, the Applicant [Mr. Ghali] seeks to set aside a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada, which was rendered on August 10, 2015 [Decision]. The IAD dismissed Mr. Ghali's appeal from a Departure Order made against him on December 10, 2012 under s 41(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] as a result of the finding that he did not meet the

residency requirement under s 28 of the *IRPA*. A permanent resident is required by s 28 to be physically present in Canada for at least 730 days in a five-year period.

[2] Mr. Ghali is a citizen of Egypt. He was born December 15, 1968, and has been married to his wife since 2001. At the time of the hearing they had two sons, aged 13 and 10. Their eldest son is autistic. Much of the hearing before the IAD was concerned with humanitarian and compassionate arguments made by Mr. Ghali with respect to the need for his autistic son to receive schooling in Canada rather than in Egypt. I have not addressed this part of the Decision as the employment issue is determinative.

[3] At the age of twelve, Mr. Ghali lived in Canada for about three years with his parents then returned to Egypt with them. In 1991, at the age of twenty-three, he returned to Canada and opened a pizza parlour business. The business failed and he left Canada in about 1994. Mr. Ghali worked in Egypt for an Egyptian company involved in the dairy business until 2009. In December 2009, he entered Canada to start to work for a company now called Agropur, formerly M. Larivee International Inc., based out of Montréal. At that time he also applied for a Permanent Resident card, a health card and a driver's license. He left Canada after a few weeks. He returned in March 2010 and left in June 2010.

[4] On December 10, 2012 Mr. Ghali arrived at the airport in Montréal at which time an inadmissibility report was written and the Departure Order was issued against him. The grounds for inadmissibility were that Mr. Ghali was in breach of his residency obligations under s 28 of the *IRPA*.

[5] The IAD on appeal accepted that Mr. Ghali was in Canada for 344 days. However, as he was not present in Canada for the requisite 730 days between December 10, 2007 and December 10, 2012, he was found to be inadmissible as a permanent resident.

[6] Mr. Ghali admits he was not physically present in Canada for the required number of days. However, he says that he was employed on a full-time basis by a Canadian business as permitted by sub-paragraph 28(2)(a)(iii) of the *IRPA* and the IAD wrongly interpreted the *IRPA* and subs 61(3) of the *Immigration and Refugee Protection Regulations* [*IRPA Regs*].

[7] One area of apparent concern to the IAD was that Mr. Ghali also has his own business in Egypt selling dairy machines and filtration units for cheese making companies. Mr. Ghali testified that his income came equally from his Agropur commissions and his own freelance work. He also testified that 60% of his time was spent on Agropur work and 40% on his own business.

[8] The IAD determined that mathematically the work hours claimed by Mr. Ghali did not add up. According to the IAD, Mr. Ghali's testimony was that he worked 13 hours a day for Agropur. Applying the 60/40 allocation of time, the IAD calculated this would leave Mr. Ghali with only 20 minutes for sleep and other activities in a 24 hour day. Based on the implausibility of this testimony being correct, the IAD concluded that Mr. Ghali could not have been working full-time hours for Agropur. In so doing, the IAD ignored credible, independent evidence. The IAD also rejected the Applicant's testimony about the number of hours worked for Agropur while relying on the same testimony it implicitly found non-credible to find that the Applicant worked full-time on his side business and therefore could not also have worked full-time for Agropur. These were critical errors more fully discussed below.

[9] As set out in the following reasons, the IAD either misapprehended or misapplied the evidence concerning whether Mr. Ghali worked full-time for Agropur. As a result, the application is allowed and the matter is to be returned to the IAD for re-determination by a different panel.

[10] For ease of reference, the applicable sections of the *IRPA* and the *IRPA Regs* referred to in these reasons are contained in the Annex attached.

II. **Issues and Standard of Review**

[11] The determinative issue is whether the IAD erred in the interpretation of subparagraph 28(2)(a)(iii) of the *IRPA* or the application of it to Mr. Ghali's work for Agropur. The IAD analyzed this in two parts: (1) was Mr. Ghali an employee of Agropur or under a contract to provide services; (2) did Mr. Ghali work full-time for Agropur?

[12] This analysis involved a question of mixed fact and law which is reviewable on the standard of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 [*Dunsmuir*].

[13] The Decision is reasonable if the findings made by the IAD come within the range of possible, acceptable outcomes that are defensible on the facts and law and the process in arriving at the outcome was justified, intelligible and transparent: *Dunsmuir* at para 47.

III. **Relevant Statutory Provisions**

[14] Two sections of the *IRPA* and two sections of the *IRPA Regs* apply to these facts. Paragraph 41(b) of the *IRPA* provides that a permanent resident is inadmissible if they fail to comply with sub-paragraph 28(2)(a)(iii). That sub-paragraph provides that a permanent resident complies with the residency obligation if, on at least 730 days in the five year period, they are:

> outside Canada employed on a full-time basis by a Canadian business

[15] In the *IRPA Regs*, subs 61(3) sets out the definition of the expression "employed on a full-time basis by a Canadian business" as being:

> an employee of, or under contract to provide services to, a Canadian business . . . and is assigned on a full-time basis as a term of employment or contract to a position outside Canada

[16] The *IRPA Regs* establish in subs 61(3) that when calculating the number of qualifying days, any days occurring after a report is prepared on the ground that the permanent resident has failed to comply with the residency obligation under subsection 44(1) of the *IRPA* are not included. In Mr. Ghali's case the cut-off date is December 10, 2012.

IV. **Argument and Analysis**

[17] The IAD found that Mr. Ghali worked for Agropur and accepted it was a Canadian business. The IAD did not accept that Mr. Ghali was employed by Agropur. It found that Mr. Ghali was a contractor. It also found that regardless of how his work for Agropur was characterized, it was not full-time.

[18] Mr. Ghali notes he was under contract to provide services and that falls within subsection 61(3) of the *IRPA Regs* even though he is not an employee. He also says the IAD either misunderstood or mischaracterized his evidence as to hours of work and wrongly gave little or no weight to other supporting evidence he offered including letters from his employer.

[19] The Minister essentially set out and supported the findings by the IAD, saying that given the evidence, the Decision is reasonable and is owed deference.

A. *Was Mr. Ghali an Employee of Agropur?*

[20] To qualify as being "employed on a full-time basis by a Canadian business," subs 61(3) of the *IRPA Regs* requires that Mr. Ghali be under contract to provide services to a Canadian business and be assigned on a full-time basis as a term of the employment or contract to a position outside Canada.

[21] The IAD was concerned that there was no written commercial agreement contract, but only a letter from the employer dated December 19, 2012, confirming the arrangement. Mr. Ghali's testimony was that he obtained the contract in Montreal in December 2009 after sending a number of resumes to companies in Canada. There was also evidence that Mr. Ghali had a dedicated work space in Montréal. He filed several letters from people with whom he worked in Montreal in which they referred to him as their "co-worker" and "colleague". The IAD did not address the co-worker letters but with respect to the December 19, 2012 letter it concluded that "the letter indicates [he] was not a full time employee, but rather a commercial agent under contract".

[22] Mr. Ghali's employer also sent a letter dated April 2, 2015 in which he tried to clarify Mr. Ghali's position with the company. He used words connoting employment such as Mr. Ghali "first starting working for" Agropur in 2009 and that he was "hired to develop trade relationships in Egypt". He refers to Mr. Ghali as a "very valued member of our team" and notes that Mr. Ghali "has expressed a desire to work primarily out of Canada and reduce his overseas work obligations." He confirms that Mr. Ghali is paid on a commission basis and that he is expected to respond to client inquiries at all hours of the day or night as he deals with clients all over the world.

[23] The IAD found Mr. Ghali was "a contractor" but it did not explain what was meant by that term or why it did not fall within ss.61(3) of the *IRPA Regs* that employment outside of Canada for a Canadian business can be under a contract for services. Without that analysis, the conclusion at paragraph 26 of the Decision that Mr. Ghali worked "under a commercial agent agreement to develop trade relationships with Egypt and the Middle East" and that indicates "he was not a full-time employee, but a commercial agent under contract" is neither intelligible nor transparent. Alternatively, to the extent that the IAD interpreted "under contract to provide services to" as synonymous with "is an employee of," the IAD's interpretation of the statute is unreasonable. The Governor in Council's decision to allow permanent residents to work outside of Canada "under contract to provide services" should not be treated as mere surplusage: *R v Proulx*, [2000] 1 SCR 61 at para 28.

[24] The more critical issue however is whether Mr. Ghali worked full-time for Agropur.

B. *Was Mr. Ghali Employed on a Full-Time Basis by Agropur?*

(1) Mr. Ghali's Testimony

[25] Mr. Ghali testified extensively about his work arrangement with Agropur. When he was asked by the IAD if he was still working for Agropur and whether it was full-time he said "Full-time. Well, full-time means… I mean, I don't know what… what's the meaning of full-time, maybe it's more than full-time. It's on commission basis." He also testified the job was 24/7 given different time zones.

[26] When Mr. Ghali was asked by the IAD to quantify the income he received from each of his two jobs he said it was 50/50. The follow-up questions by the IAD focussed on how much

time was spent at each job. As this is a critical part of the analysis by the IAD it is reproduced in full:

> **MEMBER:** But on the average. On the average. You said the income is 50/50, the time spent is…
>
> **APPELLANT:** Time spent is…
>
> **MEMBER:** … over a year?
>
> . . .
>
> **APPELLANT:** How may days I'm spending on this job? How many hours?
>
> **MEMBER:** On the average year or month or week, do you spent… what percent of the time you spent on freelance, what percent of the time you spent on Agripur job?
>
> **APPELLANT:** I would say 60 percent on Agripur and 40 percent at the other job.
>
> **MEMBER:** Got it.
>
> [CTR page 499, lines 20 - 25; page 499, line 49 to page 500, line 10. Misspellings in original. My emphasis.]

[27] Mr. Ghali's counsel then asked him how many hours a week he works on Agropur business. The answer was not less than 13 hours for Agropur per day. The IAD then quizzed Mr. Ghali about what it perceived to be a mathematical impossibility:

> **MEMBER:** Then when do you sleep, eat, see your children and do your free . . . and maybe your wife and do freelance work?
>
> **APPELLANT:** In between. In between. I'm working from home so, like, I'm . . . yeah. When I'm in Canada, I'm doing it from . . . from the office or from home. When I'm Egypt, I'm just doing it from home. In between, like, I'm there. I see them all the time.
>
> **MEMBER:** Okay. I don't… Alright. Mathematically if you spend 60% of your time on Agripur and it's thirteen hours a day, by my calculation you have approximately twenty minutes for sleeping, eating and senior family.

> **APPELLANT:** Okay.
>
> **MEMBER:** Just doing the math.
>
> **APPELLANT:** Twenty-four hours, I still have…
>
> **MEMBER:** Well . . .
>
> **APPELLANT:** . . . nine hours to do whatever I…
>
> [CTR page 500, lines 29 – 48]

[28] The conclusion of the IAD, to which this interchange contributed, is at paragraph 28 of the Decision:

> [28] From the above, it is clear that he does not work full time for Agropur. He is not a full-time employee or any type of employee, but a contractor. Further, it is evident that his work for Agropur, however characterized, is not full-time. It is not believable that he works more than thirteen hours a day for Agropur, and if this is 60% of his work day, then about another ten hours per day for his own business. When this mathematical issue was pointed out to him, and he was asked when he ate or slept if he works almost 24 hours a day at his two jobs, he added that he also makes time to see his family. It is clear that the appellant does not work full time for Agropur.

[29] The IAD is correct that it is implausible that Mr. Ghali would be working for twenty-three hours a day. Its conclusion that Mr. Ghali must therefore be working less than full-time hours is, however, unreasonable. For one thing, the IAD's highly technical approach ignored all possible alternatives to explain Mr. Ghali's testimony. As someone who worked irregular hours, his estimates might have been somewhat off. Alternatively, he may have been working for Agropur three days a week and his personal business two days a week, with the thirteen hours referring to how long he worked on days he worked for Agropur. This interpretation is buttressed by Mr. Ghali's belief that he still had nine hours a day for leisure activities. It is obvious Mr. Ghali did not believe he was testifying that he worked twenty-three hours a day. Mr. Ghali's

evidence in this area was ambiguous, and the IAD chose to apply the most unfavourable possible interpretation.

[30] That alone may not have been fatal to the IAD's decision. An administrative tribunal is entitled to use the implausibility of testimony to draw a negative credibility finding. But on making that finding, it must treat the testimony consistently and cannot choose to ignore independent and credible evidence that corroborates that testimony.

[31] Mr. Ghali's testimony was not the only evidence that he worked full-time hours for Agropur. The evidence also included a letter dated April 2, 2015, from Agropur which stated that Mr. Ghali "has always worked well over full time hours on behalf of Agropur." During the hearing, the IAD said about this letter that it would "probably be given a lot of weight" and "it could be strong evidence for them, them being Mr. Ghali and his counsel": CTR page 585, line 21 and page 586, lines 49-50. However, once the IAD decided the hours of work claimed by Mr. Ghali were mathematically impossible, it appears that finding tainted all the other evidence.

[32] The IAD's analysis contains multiple errors. For one thing, Mr. Ghali's evidence is treated inconsistently: his testimony that he worked full-time hours for Agropur was not accepted, but his testimony about his personal business was relied on to conclude that he could not also be working full-time for Agropur.

[33] Furthermore, the IAD used its earlier implausibility finding to reject the evidence from Mr. Ghali's employer. It is not clear whether this finding was made because the IAD considered Mr. Ghali to be non-credible or because it independently found the employer's evidence to be implausible. If the former is true, then the IAD failed to properly deal with the employer's

evidence. A finding that one piece of evidence is unreliable does not allow a decision-maker to reject independent, credible evidence in support of the same claim: *Canada (Citizenship and Immigration) v Sellan*, 2008 FCA 381 at para 3; *Dhaliwal v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 157 at paras 85-86.

[34] On the other hand, the wording of the IAD's decision indicates that its implausibility finding extended not just to Mr. Ghali's claim of working thirteen hours a day for Agropur, but to the entire idea that Mr. Ghali could possibly work two full-time jobs at once. In rejecting the letter from Mr. Ghali's employer, the IAD says that it is "not believable that [Mr. Ghali] could work full time for Agropur, approaching full time for his own business, and also eat, sleep see his family, etc."

[35] There is no definition of full-time basis that applies to the relevant provisions of the *IRPA* or the *IRPA Regs*. The IAD did not attempt to define what qualifies as full-time. I note, however, that in the Skilled Workers division of the *IRPA Regs*, "full time work means at least 30 hours of work over a period of one week.": *IRPA Regs*, subs 73(1) as amended by *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2012-274. This applies to all assessments of full-time work under the Skilled Workers Program, including whether a job offer in Canada is full-time and whether to grant points for prior work experience in assessing an applicant's economic suitability to Canada. Previously, full-time work was defined as at least 37.5 hours a week but that was revised as of January 2, 2013: *IRPA Regs*, subs 80(7) as originally promulgated.

[36] Under either definition, it is clearly possible for someone to work 60-75 hours per week and still have time to eat and sleep. In some occupations, such a work load may not even be

considered all that uncommon. The IAD had no reason to believe that Agropur was lying or misinformed about the number of hours Mr. Ghali worked, which meant it was inappropriate and unreasonable to reject its independent evidence on the basis that it was implausible for someone to work two full-time jobs.

[37] Finally, the letter was discounted on the basis that "it did not say Mr. Ghali worked full-time for Agropur, just that he works well over full-time hours". In my view, working full-time hours and working full-time is a distinction without a difference. The IAD has given no intelligible justification as to why working full-time hours does not meet the *IRPA Regs* requirement to work full-time.

V. **Conclusion**

[38] The IAD first went astray when it determined that if Mr. Ghali works 60% of the time for Agropur and 40% of the time for his own business, he was working 23 hours a day and would have no time at all for his family. That finding, which amounted to a finding that Mr. Ghali was not credible, then tainted all the other evidence leading the IAD to ignore corroborative evidence and discount any possibility Mr. Ghali worked two full-time jobs.

[39] The IAD set out the relevant legislative provisions in the Decision but never tied their findings back to the legislation. For example, why is it that the finding that Mr. Ghali was a contractor does not fall within the phrase "under contract to provide services" in subs 61(3) of the *IRPA Regs*? There is no explanation by the IAD.

[40] The Decision cannot be said to fall within the range of possible, acceptable outcomes defensible on the facts and law. The facts have been misapprehended and the law does not

appear to have been considered. As a result, the Decision does not meet the *Dunsmuir* criteria and it will be set aside.

[41] For all the reasons noted, the application is granted. The matter will be returned to another panel of the IAD for re-determination.

[42] Neither party suggested a question for certification and none exists on these facts.

[43] The Respondent has noted the correct Minister is the Minister of Citizenship and Immigration and the style of cause is hereby amended accordingly.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed.
2. The matter is returned to the Immigration Appeal Division to be re-determined by a different panel.
3. No serious question of general importance arises on these facts.

"E. Susan Elliott"
Judge

ANNEX

Non-compliance with Act

41 A person is inadmissible for failing to comply with this Act

. . .

(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

Residency obligation

28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.

(2) The following provisions govern the residency obligation under subsection (1):

(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are

. . .

(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,

Employment outside Canada

61 (3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression employed on a full-time basis by a Canadian business or in the public service of Canada or of a province means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the

Manquement à la loi

41 S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

Obligation de résidence

28 (1) L'obligation de résidence est applicable à chaque période quinquennale.

(2) Les dispositions suivantes régissent l'obligation de résidence :

a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas:

. . .

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

Travail hors du Canada

61 (3) Pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi respectivement, les expressions travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale et travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale, à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat d'une entreprise canadienne ou de

employment or contract to

(a) a position outside Canada;

(b) an affiliated enterprise outside Canada; or

(c) a client of the Canadian business or the public service outside Canada.

l'administration publique, fédérale ou provinciale, et est affecté à temps plein, au titre de son emploi ou du contrat de fourniture :

a) soit à un poste à l'extérieur du Canada;

b) soit à une entreprise affiliée se trouvant à l'extérieur du Canada;

c) soit à un client de l'entreprise canadienne ou de l'administration publique se trouvant à l'extérieur du Canada.

Calculation – residency obligation

62 (1) Subject to subsection (2), the calculation of days under paragraph 28(2)(a) of the Act in respect of a permanent resident does not include any day after

(a) a report is prepared under subsection 44(1) of the Act on the ground that the permanent resident has failed to comply with the residency obligation; or

(b) a decision is made outside of Canada that the permanent resident has failed to comply with the residency obligation.

Calcul : obligation de résidence

62 (1) Sous réserve du paragraphe (2), le calcul des jours aux termes de l'alinéa 28(2)a) de la Loi ne peut tenir compte des jours qui suivent :

a) soit le rapport établi par l'agent en vertu du paragraphe 44(1) de la Loi pour le motif que le résident permanent ne s'est pas conformé à l'obligation de résidence;

b) soit le constat hors du Canada du manquement à l'obligation de résidence.

FEDERAL COURT

SOLICITORS OF RECORD

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