Federal Court Cour fédérale

Date: 20170426

Docket: IMM-4778-16

Citation: 2017 FC 413

Montréal, Quebec, April 26, 2017

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

BASIM HASSAN

Defendant

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration [the Minister] challenges the October 28, 2016 decision of the Immigration Appeal Division [IAD] which stayed for a period of two years the removal order issued against Mr. Basim Hassan, pursuant to subsection 68(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Although Mr. Hassan filed a notice of appearance, he did not file a respondent's record and, on April 20, 2017, served and filed a notice of discontinuance. On April 21, 2017, the Minister, as the applicant, confirmed his intention to pursue the application and to obtain a judgment from the Court.

[3] The matter is decided in the absence of the parties and on reviewing the record and the written representations. Having reviewed said record and representations, the Court is convinced that the decision under challenge is unreasonable. Hence, for the reasons exposed hereinafter, the application shall be granted.

I. Factual background

[4] On July 19, 2007, Mr. Hassan, a citizen of Iraq and surgeon by profession, his dependant wife and four children arrived in Canada as permanent residents. Upon arrival, Mr. Hassan stayed in Canada for four weeks, and in fact, between 2007 and 2012, Mr. Hassan spent between 30 and 60 days per year in Canada, working notably in Malaysia and in Oman.

[5] On June 26, 2012, upon Mr. Hassan's arrival at a Canadian port of entry, an immigration officer issued an inadmissibility report against him, pursuant to subsection 44(1) of the IRPA. The report was issued based on Mr. Hassan's failure to comply with the residency requirements set forth in section 28 of the IRPA, as it was found that he had not resided in Canada for the required minimum of 730 days in the preceding five-year period.

[6] On the same day, a Minister's delegate reviewed the immigration officer's report, confirmed Mr. Hassan's inadmissibility and issued a removal order against Mr. Hassan, pursuant to subsection 44(2) of IRPA.

[7] Mr. Hassan appealed the Minister's delegate's decision before the IAD pursuant to subsection 63(3) of the IRPA. Mr. Hassan did not contest the legal validity of the decision pertaining to his inadmissibility, but asked that his removal be stayed, contending that sufficient humanitarian and compassionate considerations warranted special relief in his case as per subsection 68(1) of the IRPA.

[8] Mr. Hassan raised four (4) humanitarian and compassionate considerations, (1) the best interest of his children; (2) the situation in Iraq, his country of origin; (3) his degree of settlement in Canada; and (4) his attempts to return to Canada at the earliest opportunity.

[9] While waiting for his appeal to be heard by the IAD, Mr. Hassan left Canada and continued to work abroad.

[10] On October 28, 2016, the IAD stayed the removal order against Mr. Hassan for a period of two years, while imposing certain conditions, decision under review in these proceedings.

II. Decision under review

[11] The IAD found that (1) the Minister's delegate's decision was valid in law; and (2) because of the important degree of non-compliance to section 28 of the IRPA, Mr. Hassan was required to show a significant degree of humanitarian and compassionate considerations.

[12] With regards to these humanitarian and compassionate considerations, the IAD did find that Mr. Hassan's Iraqi passport made it harder for him to travel and that there would be some hardship if Mr. Hassan had to return to Iraq due to the country's conditions.

[13] However, to the contrary, the IAD did not place a great amount of weight on the best interest of the children, as the family had become accustomed to living apart since 2007. Moreover, the IAD found that the following factors were not favorable to Mr. Hassan's situation: (1) Mr. Hassan did not establish himself in Canada when he first arrived, and his ongoing establishment had been minimal; (2) from the family's perspective, there would not be a considerable amount of hardship if Mr. Hassan's appeal was dismissed as he would still be able to visit; (3) he had returned to Iraq a few times, was even able to sell property there, and held visas allowing him to sejourn in several other countries; (4) Mr. Hassan's reasons for leaving Canada constituted a negative factor in the appeal as it was entirely his personal choice to live abroad; (5) if his appeal was refused, Mr. Hassan's potential hardship would be partly mitigated by several factors.

[14] Despite having evaluated each consideration and reached the aforementioned conclusions, unfavorable to Mr. Hassan, the IAD nonetheless concluded that Mr. Hassan's

appeal could go either way, that the IAD could justify a decision one way or another, and that in these circumstances, it was better to err on the side of caution.

[15] Despite its earlier findings, the IAD noted that (1) there are still minor children affected by this decision, (2) Mr. Hassan is an Iraqi citizen; (3) he made attempts to find employment in Canada; (4) he supported his family in Canada; (5) he showed that he was to be in Canada by purchasing a home and automobiles; (6) should he lose his job, this could leave him in limbo and danger; and (7) a two-year stay would provide Mr. Hassan with the opportunity to wind down his employment and other issues abroad and settle on a full-time basis with his Canadian family.

III. Position of the Minister

[16] The Minister submits that (1) the IAD erred by failing to support its decision with intelligible and adequate reasons as it is inherently contradictory with its own findings and analysis; (2) the IAD erred and exceeded its jurisdiction in importing irrelevant criteria not envisaged by the IRPA or Parliament in the exercise of its discretion to grant Mr. Hassan a stay of removal.

[17] The Minister more precisely submits that (a) although the IAD found very few positive humanitarian and compassionate considerations to counterbalance Mr. Hassan's significant degree of non-compliance with his residency obligation, it nonetheless concluded that said considerations warranted special relief; (b) the IAD imported criteria not envisaged by the IRPA or Parliament in the exercise of its discretion and, in granting a stay to Mr. Hassan, in effect declared that the holder of a permanent resident status need only to have their family established

in Canada in order to be assured that they will not lose this status, although they continue to live and work abroad; and (c) the IAD exceeded its jurisdiction in granting a stay to Mr. Hassan based on his potential future establishment in Canada.

[18] The Minister submits that, when exercising its discretionary power under section 68 of the IRPA, the IAD must take into account (1) the best interests of any child directly affected by the decision; (2) the initial degree of establishment and ties to Canada; (3) family in Canada and hardship imposed on them if the appeal was refused; (4) hardship for the respondent if the appeal was refused; (5) reasons for leaving Canada and efforts to come back (*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paras 40, 77).

[19] The Minister contends that "the IAD cannot conclude that the main relevant factors it should take into account in the exercise of its discretionary power weighed as either negative or partly mitigated against [Mr. Hassan], and then proceed to conclude that they were somehow overcome by some of the few positive considerations that the tribunal had previously discarded or deemed insufficient to be weighed as positive factors in support of the appeal, especially in light of its statement that the Respondent needed to show a significant degree of H&C grounds to counterbalance his breach of the residence obligation" (Minister's Memorandum of Arguments at para 44).

[20] The Minister moreover submits that in considering the fact that (1) Mr. Hassan contributed to his family's establishment and acquired possessions in Canada, and (2) Mr. Hassan's potential future establishment in Canada with his family, the IAD considered irrelevant

factors that go against the IRPA. The IAD thus minimized the residency obligation and granted more importance to future establishment instead of actual establishment (*Canada (Minister of Public Safety and Emergency Preparedness) v Lotfi*, 2012 FC 1089 at paras 21-23 [*Lotfi*]).

IV. Analysis

[21] The Court sides with the Minister in that the IAD's decision must be reviewed against the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]).

[22] The Court is cognizant of the deference owed to the IAD due to "its expertise and special position as trier of fact" (*Santhakumaran v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1166 at para 15; *Khosa* at paras 25, 58), and that a decision will be reasonable if it is supported by reasons that can withstand a somewhat probing examination (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 63; *Canada (Minister of Citizenship and Immigration) v Wright*, 2015 FC 3 at para 69).

[23] However, the Court notes that "where there are contradictory statements and inconsistent findings or when there is no real evidence to support a decision, that decision is unreasonable" (*Canada (Minister of Citizenship and Immigration) v Salem*, 2010 FC 38 at para 8).

[24] With regards to the potential future establishment of Mr. Hassan, this Court stated, although in a different situation, that a relevant humanitarian and compassionate factor is the actual establishment at the time the IAD makes its determination, which is "not a forward

looking exercise" (at para 21), since formally considering potential for establishment as relevant "would be incongruous with the legislative scheme" and "could effectively render the inadmissibility finding irrelevant" (*Lofti* at para 22).

[25] In sum, the Court concludes that the IAD's decision is unreasonable as it is indeed inherently contradictory. Particularly as (1) its conclusion is incompatible with its initial finding that a significant degree of humanitarian and compassionate consideration is required given Mr. Hassan's important degree of non-compliance with section 28 of the IRPA; and (2) it relies on Mr. Hassan's potential future establishment instead of his actual establishment, a criteria that is not contemplated in the IRPA or by Parliament.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is granted. The matter is remitted back to a differently constituted panel of the Immigration Appeal Division for re-determination.

2. There are no questions for certification.

3. No costs will be issued.

"Martine St-Louis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4778-16
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v BASIM HASSAN

APPLICATION FOR JUDICIAL REVIEW CONSIDERED AT MONTRÉAL, QUEBEC IN THE ABSENCE OF THE PARTIES AND ON REVIEWING THE RECORD AND THE WRITTEN REPRESENTATION.

REASONS FOR JUDGMENT AND JUDGMENT:	ST-LOUIS J.
DATED:	APRIL 26, 2017

APPEARANCES:

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