Federal Court  Cour fédérale

Date: 20180125

Docket: IMM-3497-17

Citation: 2018 FC 80

Ottawa, Ontario, January 25, 2018

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

MOLLAH ALAHI-UI ISLAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a citizen of Bangladesh. He came to Canada in June 2008 after being sponsored by his wife. The Applicant separated from his wife in September 2008 and returned to Bangladesh in October 2008.

[2] The Applicant came back to Canada on October 29, 2009 after having been informed that his first wife wanted to divorce. They filed a joint application for divorce in April 2010. The Applicant returned to Bangladesh the same month and remarried in September 2011. The Applicant and his new wife had a son in October 2012.

[3] Upon the Applicant's return to Canada in December 2012, a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] was prepared. The Officer found the Applicant to be inadmissible under paragraph 41(*b*) of the IRPA for failing to comply with the residency obligations of section 28 of the IRPA. The Officer noted that the Applicant had only been physically present in Canada for 280 days and even if he remained in Canada for the rest of the reference period, he could only attain 460 days of presence during the period from June 23, 2008 to June 23, 2013. The Officer also determined that the Applicant had not raised sufficient humanitarian considerations to justify the retention of his permanent resident status as per paragraph 28(2)(*c*) of the IRPA. The same day, the Minister's Delegate confirmed the report and issued a departure order against the Applicant pursuant to subsection 44(2) of the IRPA on the same grounds.

[4] The Applicant exercised his right to appeal the removal order before the Immigration Appeal Division [IAD]. He did not challenge the legal validity of the removal order but instead argued that the appeal should be allowed on humanitarian and compassionate [H&C] grounds. After hearing from the Applicant on January 31, 2017 and June 7, 2017, the IAD dismissed the appeal on July 19, 2017.

[5] The Applicant seeks judicial review of the IAD's decision. The Applicant raises two (2) issues: (1) that the IAD erred by reassessing his first marriage and using the analysis to negate the Applicant's credibility in the context of the Applicant's appeal; and (2) that the IAD erred in misconstruing the Applicant's testimony and evidence when it determined that there were insufficient H&C factors to justify special relief.

[6] For the reasons that follow, I have concluded that this Court's intervention is not warranted.

II. Analysis

[7] It is well-established that the decision of the IAD to grant or to withhold relief based on H&C considerations is discretionary and involves an assessment of facts or mixed fact and law. Its findings are to be reviewed on the standard of reasonableness and are subject to considerable deference by this Court (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-58 [*Khosa*]; *Gazi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 993 at para 17 [*Gazi*]; *Samad v Canada (Citizenship and Immigration)*, 2015 FC 30 at para 20 [*Samad*]).

[8] In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision-making process, and whether the decision falls within a range of possible, acceptable outcomes which are defensible in light of the facts and law. It is not open to a reviewing court to reweigh the evidence before the IAD or to

substitute its view of a preferred outcome (*Khosa* at para 59; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Samad* at para 21).

[9] The Applicant submits that the IAD erred in finding that his first marriage was one of convenience as this relationship was already analyzed and deemed to be a genuine relationship. This error, according to the Applicant, negated his credibility and his statements of events pertaining to his appeal, namely the reasons for his departure from Canada and the reasons for his stay in Bangladesh. As these elements are at the foundation of the Applicant's appeal, any matter negating the Applicant's credibility and statement of facts would clearly affect the IAD's final decision.

[10] I disagree with the Applicant's submission.

[11] It is well established that hearings at the IAD are held *de novo* and the IAD must consider the whole case, including any new evidence put before it (*Gazi* at para 21; *Massey v Canada (Citizenship and Immigration)*, 2017 FC 798 at para 22).

[12] The IAD clearly indicated that the appeal did not aim to evaluate if the Applicant had entered a *bona fide* marriage with his first wife. However, in assessing the factors which guide the IAD in the exercise of its discretion on H&C considerations, and in particular the factor which examines the reasons for the Applicant's departure and stay abroad, the IAD noted that it had concerns regarding the Applicant's credibility and version of events.

[13] It was the Applicant's evidence that when he arrived to live in Canada in June 2008, his wife mistreated him so badly that he left in September the same year. He stated that she was fine for a week and then started asking him to sell his land and properties in Bangladesh to bring her money. She blamed him for her daughters' mistakes and forced him to do house cleaning. She would also wake him in the middle of the night asking him for money. Finally, she was also unfaithful.

[14] The IAD considered the Applicant's claims about his first wife not to be credible. In assessing the evidence, the IAD also inferred, on the basis of the following observations, that the marriage was one of convenience for him to obtain permanent resident status in Canada: (1) the Applicant had known his first wife for twenty (20) years before marrying her as she was married to his deceased brother; (2) while the Applicant married his first wife in July 2003, the sponsorship application was refused twice and the process took five (5) years, during which the Applicant's wife visited him twice; (3) the Applicant left his wife three (3) months after landing in Canada; (4) the Applicant and his wife both agreed to a divorce a few months after the separation and filed a joint application; and (5) the Applicant remarried shortly after his divorce.

[15] On the basis of the evidence before it, it was reasonable for the IAD to find that the Applicant's explanations were not credible, including the evidence regarding his first marriage. Moreover, I find upon review of the decision that this issue was not determinative in the IAD's overall assessment.

[16] The Applicant also submits that the IAD misconstrued his testimony and evidence in assessing a number of H&C factors. The Applicant first takes issue with the IAD's assessment of the explanations for his absence from Canada. The Applicant argues that the IAD failed to consider his personal circumstances and cultural background. He contends that it was reasonable for him to return to his family in Bangladesh after the devastating failure of his first marriage and that it was his duty, as his mother's only remaining son, to take care of her.

[17] I am not persuaded by the Applicant's argument.

[18] The Applicant's cultural background was extensively discussed during the hearing and the IAD is presumed to have considered it. I also note that the IAD acknowledges in its reasons the Applicant's explanation that he is his mother's only remaining son. I also consider that the Applicant's cultural background argument does not explain all of the Applicant's absences from Canada. The Applicant testified that when he returned to Bangladesh in April 2010, his sister had been caring for his mother while he was in Canada. Additionally, when the Applicant left for Canada, his sister and cousin looked after his mother. Given the evidence that others in the Applicant's family had cared for the Applicant's mother, it was reasonably open to the IAD to find that the Applicant had not demonstrated that his presence was required in Bangladesh to look after his mother. I also note from the Applicant's testimony that he returned to Bangladesh, not to care for his mother, but because he was distressed by the failure of his first marriage. He then returned to marry after his family arranged a marriage to help him overcome his distress.

[19] The Applicant also argues that the IAD erred in comparing his establishment in Bangladesh and in Canada. In doing so, the IAD ignored evidence demonstrating his employment at the same company in Canada for the past four (4) years, his considerable participation in his community, by volunteering at his mosque or helping his friends.

[20] While it is true that the IAD does not mention the Applicant's participation in the community, the IAD is presumed to have considered all of the evidence in reaching its decision (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL) (FCA)). Moreover, the adequacy of reasons is not a stand-alone basis to quash a decision (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 12, 14, 16, 20).

[21] The IAD considered that the Applicant has been working in Canada since August 2013. It also considered that the Applicant does not own property in Canada and that the Applicant has lived with his sister since returning to Canada in 2012. Overall, the IAD assessed the Applicant's establishment in Canada to be a neutral factor. I find this conclusion to be reasonable in light of the evidence adduced by the Applicant.

[22] The Applicant also complains that the IAD erred in failing to properly assess his child's best interests. The Applicant explains that it was always his intention to return to Canada and sponsor his second wife and son given the better general quality of life in this country. The Applicant alleges that the IAD failed to assess the child's long-term interests with regard to the benefits of living in Canada compared to the life he would lead in Bangladesh. The Applicant

submits that the interests of the child were not well identified and defined by the IAD, which was not “alert, alive and sensitive” to these interests.

[23] The onus was on the Applicant to adduce evidence before the IAD of the child’s best interests (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8). In addition, the IAD did not have to determine that it was in the child’s best interests to live in Canada (*Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 5). The Applicant did not adduce any evidence before the IAD of the child’s best interests or evidence of the child’s personal circumstances in Bangladesh with the exception that he was living with his mother who was working as an assistant education officer for the government of Bangladesh for the last twelve (12) years. The IAD cannot be blamed for the Applicant’s failure to adduce evidence regarding the child’s best interests. Moreover, it is also well-established that although the best interests of the child is an important factor that must be given “substantial weight” (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75), it cannot be the only factor considered and eclipse all others.

[24] Finally, the Applicant takes issue with the IAD’s conclusions pertaining to hardship, alleging that the IAD did not give enough weight to the psychological report evaluating his mental state. The IAD indicated that it gave the report little weight as it did not mention that the reasons for the Applicant’s mental situation originated from his situation with his first wife. The Applicant argues that the IAD’s statement is not pertinent to the hardship assessment. Rather, the IAD should have concentrated on the fact that the psychologist’s expert evaluation of the

Applicant's mental state was not only based on facts related by the Applicant himself, but also on medical expertise through different tests conducted by the expert herself.

[25] Given that the Applicant's first wife was the cause of the Applicant's mental distress, which in turn was responsible for the Applicant's long absence from Canada, it was not unreasonable for the IAD to expect that the initial cause of the Applicant's mental situation would have been mentioned in the report. I also note that the IAD's finding regarding the medical report was not determinative as the IAD was equally concerned by the contradiction in the Applicant's assertion that he could not return to Bangladesh because of his mental situation when in fact, he had returned to Bangladesh in October 2008 and April 2010 to be with his family after experiencing emotional distress because of his failed marriage.

[26] The Applicant argues that there is no inconsistency between the two situations. According to the Applicant, he had no establishment in Canada in 2008 in contrast to today. I am not persuaded by the Applicant's argument. The IAD reasonably found that the Applicant was more established in Bangladesh than in Canada. While the Applicant lives with his sister in Canada and has been employed since 2013, the rest of his family members remain in Bangladesh, including his wife and son. Notwithstanding the issue of inconsistency, the IAD considered the Applicant's mental situation but ultimately found that the Applicant had not filed documentary evidence on medical conditions in Bangladesh nor had he demonstrated that he would not have access to medical treatment there.

[27] To conclude, I have considered the evidence on the record, the IAD's findings and the submissions of both the Applicant and the Respondent. While the Applicant may disagree with the IAD's overall assessment of the evidence and the weight the IAD has given to each H&C factor, it is not open to this Court to reweigh the evidence and attribute a different level of weight to the relevant H&C factors in this application (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 24).

[28] For all of the above reasons, I find that the Officer's decision is reasonable as it falls within the range of possible, acceptable outcomes based on the facts and law (*Dunsmuir* at para 47). As a result, the application for judicial review is dismissed.

[29] No question of general importance has been proposed by the parties. None will be certified.

JUDGMENT in IMM-3497-17

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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