Federal Court  Cour fédérale

Date: 20190401

Docket: IMM-3842-18

Citation: 2019 FC 395

Ottawa, Ontario, April 1, 2019

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ABDULRAHMAN MOHMED ALHARBI (A.K.A. ABDULRAHMAN MOHMMED ALHARBI)

Respondent

JUDGMENT AND REASONS

[1] Abdulrahman Mohmed Alharbi is a citizen of Saudi Arabia who was a permanent resident of Canada. Dr. Alharbi trained as an intervention cardiologist in Canada. After he completed his education, he returned to Saudi Arabia where he continues to live and work. Dr. Alharbi's wife and children have remained in Canada.

[2] To maintain one's status as a permanent resident of Canada, individuals are required to be physically present in Canada for 730 days in every five-year period. Failure to do so renders the individual inadmissible to Canada. It is admitted that, at best, Dr. Alharbi was physically present in Canada for approximately 320 days in the five years prior to May 2, 2017, the date on which he applied for a Permanent Resident Travel Document.

[3] As a result, a visa officer found that Dr. Alharbi was inadmissible to Canada. The officer further found that there were insufficient humanitarian and compassionate considerations to overcome his non-compliance with the requirements of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[4] Dr. Alharbi appealed the visa officer's decision to the Immigration Appeal Division of the Immigration and Refugee Board. The Minister provided written submissions opposing the appeal, but did not appear at the hearing. The appeal was successful, with the presiding member finding that the H&C considerations that Dr. Alharbi had identified were sufficient to overcome his inadmissibility to Canada.

I. The IAD's Decision

[5] The IAD commenced its analysis by observing that Dr. Alharbi faced a high threshold for demonstrating that he was entitled to H&C relief, given his extensive non-compliance with the residency requirements of *IRPA*. It then identified and weighed a number of factors in assessing whether there were sufficient H&C considerations present in Dr. Alharbi's case to warrant the granting of relief. These factors included the reasons for Dr. Alharbi's departure from Canada and his prolonged stay abroad, his ties to Saudi Arabia, the extent of his ties to and establishment

in Canada, the hardship that would result if the appeal were not allowed, and the best interests of Dr. Alharbi's children.

[6] The IAD found as a fact that Dr. Alharbi had been compelled to return to Saudi Arabia because he was unable to find work in his field in Canada. According to the IAD, it was reasonable for Dr. Alharbi "to have initially left Canada for the purpose of finding employment", and that this favored the granting of the appeal.

[7] The IAD then examined the other H&C factors cited by Dr. Alharbi, finding that certain of these factors slightly favored the granting of relief and that others were "slightly negative". At the end of the day, the IAD was, however, satisfied that the best interests of Dr. Alharbi's children "strongly favour[ed]" the granting of the appeal, and on this basis, it concluded that he had discharged the onus on him to establish sufficient H&C grounds for relief.

II. The Minister's Application for Judicial Review

[8] The Minister seeks judicial review of the IAD's decision, asserting that the Board erred in failing to deal with evidence that contradicted Dr. Alharbi's claim that he had been compelled to return to Saudi Arabia because of his inability to find work in Canada as an intervention cardiologist.

[9] The Minister had provided the IAD with written submissions opposing the granting of the appeal. Included with the Minister's submissions was a letter that appears to have been written by Dr. Alharbi in 2017 in which he stated that he had returned to live in Saudi Arabia because his mother was ill. Importantly, however, Dr. Alharbi also cited a second reason for his return to Saudi Arabia in this letter. He explained that he had been required to return to that country

because his education had been sponsored by the Saudi Ministry of Health, and that he was required to work in Saudi Arabia for the same number of years as he had received sponsorship for his studies in Canada.

[10] In his written submissions to the IAD, the Minister stated that Dr. Alharbi would have been aware of the terms of his sponsorship at the time that he became a permanent resident of Canada, and that he could not now rely on this requirement to bolster his appeal. According to the Minister, Dr. Alharbi "made the personal choice to become a permanent resident when he knew that he could not reside here permanently", and that "he must be held to the consequences of those choices".

[11] As noted earlier, the IAD found as a fact that Dr. Alharbi had been compelled to return to Saudi Arabia because he was unable to find work in his field in Canada. While the IAD stated in its reasons that it had taken all of the circumstances of the case into consideration, including the submissions of both Dr. Alharbi and the Minister, it made no mention of Dr. Alharbi's 2017 letter. The IAD also provided no explanation for why it preferred the evidence given by Dr. Alharbi at his hearing as to why he returned to Saudi Arabia over the claim in his letter that he was required to do so by the terms of his sponsorship agreement.

III. Analysis

[12] Dr. Alharbi notes that the IAD specifically stated that it had taken the Minister's submissions into account in arriving at its decision, submitting that the Minister's application essentially involves a request that this Court reweigh the evidence that was before the IAD to come to a different conclusion.

[13] If the Minister was concerned about a potential inconsistency in his evidence, Dr. Alharbi says that the Minister had the opportunity to attend the IAD hearing and cross-examine him on the issue of concern. However, the Minister elected not to do so in this case. Having failed to challenge his evidence on this issue, Dr. Alharbi says that the Minister cannot now ask this Court to intervene based on what he says is an irrelevant consideration.

[14] Administrative decision-makers are presumed to have considered all of the evidence before them, and they are not required to refer to each piece of evidence in their reasons: *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317, 145 F.T.R. 289 (F.C.A.); *Florea v Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 at para.1, 1993 CarswellNat 3984 (F.C.A).

[15] The Supreme Court of Canada has, moreover, made it clear that decision-makers are not required to discuss all of the arguments, evidence, statutory provisions, jurisprudence or other details raised in a particular case, nor are they required to make explicit findings with respect to each constituent element of a case, however subordinate, leading to its final conclusion: *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para. 16, [2011] 3 S.C.R. 708.

[16] That said, the more important the evidence that is not specifically mentioned and analyzed in a tribunal's reasons, the more willing a court may be to infer that it made an erroneous finding of fact without regard to the evidence: see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35 at paras.14-17, [1998] F.C.J. No. 1425.

[17] A review of the IAD's reasons demonstrates that its decision was clearly a close call, that there were some factors that operated in Dr. Alharbi's favour, and others operating against him. At the end of the day, two factors appear to have carried the day: the fact that Dr. Alharbi was compelled to return to Saudi Arabia because of his inability to find work in Canada, which "favor[ed] the appeal" according to the IAD, and the best interests of his children, which "strongly favor[ed]" it.

[18] The best interests of Dr. Alharbi's children were unquestionably an important consideration – one that is not affected by the content of Dr. Alharbi's 2017 letter. The same cannot be said of the reasons for Dr. Alharbi's return to Saudi Arabia.

[19] The IAD was clearly satisfied that it was reasonable for Dr. Alharbi to have left Canada because of his inability to find work in this country. When coupled with the best interests of Dr. Alharbi's children, this factor led to the IAD's decision to allow Dr. Alharbi's appeal.

[20] It is not at all clear, however, that the IAD would have come to the same decision had it accepted the assertion contained in Dr. Alharbi's 2017 letter that it was a condition of the sponsorship of his education in Canada that he return to work in Saudi Arabia after completing his education. Nor do we know if or why the IAD did not accept the explanation for his return to Saudi Arabia offered by Dr. Alharbi in his 2017 letter. As a result, the IAD's decision lacks the justification, transparency and intelligibility required of a reasonable decision. Consequently, the Minister's application is granted.

IV. Costs

[21] Dr. Alharbi seeks his costs of this application, submitting that the Minister has put him to significant and unnecessary expense for having to defend what he says is a meritless application.

[22] Costs are not ordinarily awarded in immigration proceedings in this Court. Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 provides that "No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders".

[23] The threshold for establishing the existence of "special reasons" is high, and each case will turn on its own particular circumstances: *Ibrahim v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1342 at para. 8, [2007] F.C.J. No. 1734.

[24] This Court has found special reasons to exist where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith: see *Manivannan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1392, [2008] F.C.J. No. 1754, at para. 51. "Special reasons" have also been found to exist where there is conduct that unnecessarily or unreasonably prolongs the proceedings: see, for example, *John Doe v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 535, [2006] F.C.J. No. 674; and *Johnson v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262, [2005] F.C.J. No. 1523, at para. 26; *Qin v. Canada (Minister of Citizenship and Immigration)*, 225 F.T.R. at para. 34.

[25] The mere fact that the Minister seeks judicial review of a decision made in the immigration context is not a sufficient reason for an award of costs. Moreover, contrary to

Dr. Alharbi's contention, I have found there to be merit in the Minister's application for judicial review. Dr. Alharbi has also not identified any unfair, oppressive or improper conduct on the part of the Minister, nor has he suggested that the Minister's conduct has been actuated by bad faith.

[26] In these circumstances, I have not been persuaded that there are "special reasons" in this case that would justify an award of costs in Dr. Alharbi's favour.

V. Conclusion

[27] For these reasons, the application for judicial review is allowed, without costs. I agree with the parties that the case is fact-specific and that it does not raise a question that is suitable for certification.

JUDGMENT IN IMM-3842-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, without costs; and

2. The matter is remitted to a differently constituted panel of the IAD for re-determination.

"Anne L. Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3842-18
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APPEARANCES:

Christopher Crighton	FOR THE APPLICANT
Howard Eisenberg	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
Eisenberg & Young LLP Barristers and Solicitors Hamilton, Ontario	FOR THE RESPONDENT