Federal Court  Cour fédérale

Date: 20190503

Docket: IMM-3975-18

Citation: 2019 FC 576

Toronto, Ontario, May 3, 2019

PRESENT: Mr. Justice Diner

BETWEEN:

THE MINISTER OF IMMIGRATION AND CITIZENSHIP

Applicant

and

ABRAHAM SEWONET ABATNEH

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This application judicially reviews a decision of the Immigration Appeal Division [IAD] which allowed Mr. Abatneh's appeal on humanitarian and compassionate [H&C] grounds, overcoming the refusal of Mr. Abatneh's sponsorship of his mother for permanent residence. For the reasons that follow, this application for judicial review is allowed.

[2] Mr. Abatneh has been a permanent resident of Canada since 2003. While he was permanent resident living in Ottawa, he applied to sponsor his mother from Ethiopia under the family class in February 2009. Since then, he has become a Canadian citizen and has primarily lived abroad with his wife who works for the federal government outside Canada. While abroad, Mr. Abatneh worked with several non-governmental organizations [NGOs]. In December 2012, the officer refused his sponsorship application, finding that he did not meet the requirements as a sponsor under paragraph 130(1)(b) of the *Immigration and Refugee Protection Regulations* SOR/2002-227 [Regulations]. The mother's application for permanent residence having been denied, Mr. Abatneh appealed to the IAD, which granted his appeal on H&C grounds, noting the couple's strong ties to Canada and Ms. Abatneh's work for Canada.

II. Analysis

[3] The sole issue to be answered is whether the IAD's decision to consider H&C considerations was reasonable. IAD interpretation of its home statute is subject to a reasonableness standard (*Sendwa v Canada (Citizenship and Immigration)*, 2018 FC 569 at para 40). Section 65 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] sets out when the IAD may consider H&C considerations:

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their	65. Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité

sponsor is a sponsor within the meaning of the regulations.	réglementaire.
[Emphasis added]	[Je souligne]

[4] Section 130 of the Regulations defines "sponsor":

130 (1) Subject to subsections (2) and (3), a sponsor, for the purpose of sponsoring a foreign national who makes an application for a permanent resident visa as a member of the family class or an application to remain in Canada as a member of the spouse or common-law partner in Canada class under subsection 13(1) of the Act, must be a Canadian citizen or permanent resident who	130 (1) Sous réserve des paragraphes (2) et (3), a qualité de répondant pour le parrainage d'un étranger qui présente une demande de visa de résident permanent au titre de la catégorie du regroupement familial ou une demande de séjour au Canada au titre de la catégorie des époux ou conjoints de fait au Canada aux termes du paragraphe 13(1) de la Loi, le citoyen canadien ou résident permanent qui, à la fois :
[…]	[…]
(b) resides in Canada; and	b) réside au Canada;

[5] The Applicant submits that the IAD is specifically precluded by section 65 of IRPA from considering H&C considerations because (i) Mr. Abatneh is not a sponsor within the meaning of section 130 of the Regulations and (ii) the IAD did not have the jurisdiction to consider H&C grounds.

[6] The Applicant also notes, and Mr. Abatneh agrees, that the IAD did not expressly conclude that he does not reside in Canada – a factor required by paragraph 130(1)(b) of the Regulations. Yet the Applicant asserts that it can be assumed the IAD concluded Mr. Abatneh

does not reside in Canada, given that it (i) applied the factors enumerated in *Gao v Canada (Citizenship and Immigration)*, 2011 CanLII 48092 (CA IRB); and (ii) noted the legislator did not specify an exception in paragraph 130(1)(b) of the Regulations like it did in section 28 of IRPA – which allows permanent residents to meet their residency obligation if they are accompanying a spouse who works abroad for the Canadian government or a Canadian entity. Mr. Abatneh argues that the IAD allowed the appeal after reasonably basing its conclusion on his residence abroad.

[7] In my view, the IAD first had to answer whether Mr. Abatneh "resides in Canada" under paragraph 130(1)(b) of the Regulations. Only after making that determination could it have met section 65 of IRPA and proceeded to consider H&C grounds.

[8] Both parties agree, and I concur, that the IAD made no express finding as to Mr. Abatneh's residence. However, it appears the IAD made an implicit finding that Mr. Abatneh does not reside in Canada, given that it went on to consider the H&C grounds.

[9] Without having pronounced on Mr. Abatneh's residence, the IAD relied on *Iao v Canada (Citizenship and Immigration)*, 2013 FC 1253 to consider H&C factors. However, I find the IAD had no jurisdiction to do so. I agree with the Applicant's argument that the IAD misconstrued this Court's finding in *Iao* to justify the availability of H&C grounds in allowing the appeal. In *Iao*, the Chief Justice upheld a finding made by the IAD that it was precluded by section 65 of IRPA from assessing H&C considerations after explicitly finding that Ms. Iao did not reside in Canada as required by paragraph 130(1)(b) of the Regulations (at paras 45–46).

[10] For this reason, I find that the IAD's analysis of the H&C considerations was unreasonable. To undertake an H&C analysis, it should have first determined that Mr. Abatneh met the definition of a sponsor under the dual operation of IRPA's section 65 and paragraph 130(1)(b) of the Regulations. Indeed, if it had found that Mr. Abatneh was not a sponsor within the meaning of the Regulations, it had no jurisdiction to continue to an H&C analysis.

[11] While the IAD is to be afforded deference when undertaking its duty to interpret its home statute, its failure to make a finding on this question renders its decision unintelligible, as it failed in that duty.

[12] In closing, I would like to make a few observations. Mr. Abatneh represented himself before the Federal Court. He did an exemplary job of doing so – certainly as good as many lawyers that come before this Court. However, as explained to him during the hearing, neither he nor any counsel could have changed the underlying decision which was fundamentally flawed both in its interpretation of the statute (as explained above), and the jurisprudence relied on to interpret the law (*Iao*).

[13] The Applicant made clear to Mr. Abatneh that this was both a very unusual and sympathetic case, and mentioned it was difficult for the Applicant to be taking a position that effectively goes against an employee of the Government of Canada. However, Applicant's counsel explained that the law has to apply to all individuals equally, including Mr. Abatneh and his spouse. She observed that while the legislator has deemed it appropriate to make certain

exemptions from the residency obligation in the context of both permanent residency and citizenship applications, the legislator chose not to apply such an exemption in the context of a sponsorship application made by a permanent resident of Canada. Unfortunately, Mr. Abatneh was only a permanent resident at the time of his sponsorship application, even though he had become a Canadian citizen by the time of his IAD appeal, as was acknowledged by the panel in its decision.

[14] Thus, the Court empathises with Mr. Abatneh. He appears to lead an exemplary life as an immigrant to Canada, and now a Canadian citizen, having supported his wife in her role as a foreign service officer in the immigration area, where she has served both in Canada and abroad in difficult postings, performing valuable service abroad on behalf of Canada. Mr. Abatneh has accompanied her in the postings and helped raise their three children, all the while doing important international work for NGOs.

[15] That said, the Court's role in judicial review is to review the decision below. In doing so, it became apparent that the legal analysis was flawed, and thus the decision cannot stand and will be sent back for redetermination.

III. Conclusion

[16] The application for judicial review is allowed. The decision of the IAD is set aside and the matter is remitted for redetermination by a different panel member. On redetermination, the IAD must make a clear finding on Mr. Abatneh's place of residence.

JUDGMENT in IMM-3975-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.

2. The decision is set aside, and the matter is remitted to the IAD for redetermination by a different panel member.

3. No questions for certification were argued, and none arise.

4. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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