Federal Court  Cour fédérale

Date: 20190822

Docket: IMM-3879-18

Citation: 2019 FC 1090

Ottawa, Ontario, August 22, 2019

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

AHMED HASSAN MOHAMED HASSAN

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant challenges a decision rendered on July 24, 2018 by the Immigration Appeal Division [IAD] granting the Respondent a three (3) year stay of the departure order issued against him on December 31, 2016.

[2] The Respondent is a citizen of Egypt. He is a doctor by trade who specializes in internal medicine. He has practised mainly in Saudi Arabia.

[3] On May 27, 2013, he became a permanent resident of Canada, along with his wife and their three (3) daughters. The family stayed in Canada until June 10, 2013, when they returned to Egypt and Saudi Arabia.

[4] The Respondent and his family returned to Canada on July 24, 2016. The Respondent left again on September 19, 2016 and returned on December 30, 2016 to spend two (2) weeks with his family in Canada.

[5] Upon the Respondent's arrival at the port of entry in Canada, an immigration officer issued an inadmissibility report against him, pursuant to subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The report was issued on the grounds that the Respondent had failed to comply with the residency requirements set forth in section 28 of the IRPA. The immigration officer noted that the Respondent: (i) was in possession of a return ticket to Saudi Arabia, scheduled for January 14, 2017; (ii) was only planning to move and establish himself in Canada in the summer of 2017; (iii) had been physically present in Canada for a total of seventy-three (73) days since becoming a permanent resident of Canada; and (iv) would only be able to accumulate an additional five hundred and forty-two (542) days for a total of six hundred and fifteen (615) days if he stayed in Canada until the end of the five (5) year reference period. The immigration officer concluded that the Respondent had not met, nor would he be able to meet, the seven hundred and thirty (730) days statutory residency requirement.

[6] The next day, a Minister's delegate reviewed the immigration officer's report, confirmed the inadmissibility finding and issued a departure order against the Respondent.

[7] The Respondent appealed the departure order to the IAD on January 3, 2017. He did not challenge the legal validity of the departure order, but he asked that the IAD stay his removal because sufficient humanitarian and compassionate [H&C] considerations warranted overcoming his breach of the residency requirement.

[8] While waiting for his appeal to be heard, the Respondent left Canada and continued to work abroad. He returned to Canada on three (3) other occasions for short periods of time, each under twenty (20) days. The Respondent last entered Canada on May 7, 2018.

[9] The IAD heard the Respondent's appeal on June 18, 2018. On July 24, 2018, the IAD stayed the removal order against the Respondent for a period of three (3) years, subject to a number of conditions. One of the conditions requires the Respondent to be physically present in Canada for a minimum of seven hundred and thirty (730) days during the three-year period. The Respondent must also report to the Canada Border Services Agency [CBSA] every six (6) months.

[10] In its reasons, the IAD first concluded that the departure order was valid in law. It then identified some of the relevant factors to be weighed in determining whether there are sufficient H&C considerations to warrant special relief: (1) the degree of non-compliance; (2) the degree of initial and ongoing establishment; (3) the reasons for departure; (4) whether reasonable attempts

were made to return to Canada; (5) family ties to Canada; and (6) hardship for the Respondent and the members of his family. After addressing and weighing each of these factors, the IAD determined that there were sufficient H&C grounds to warrant a stay of removal.

[11] The Applicant now seeks judicial review of the IAD's decision. The Applicant submits that the IAD erred in finding that: (1) prospective and speculative future establishment in Canada is a factor that can serve to overcome non-compliance with the residency obligation; (2) the establishment of family members in Canada can serve to demonstrate the Respondent's establishment in Canada; and (3) the best interest of the children is a paramount factor in the H&C analysis. The Applicant also submits that the IAD failed to consider significant arguments made by the Applicant.

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

II. Analysis

[13] It is well-established that the decision of the IAD to grant or withhold relief based on H&C considerations is discretionary and involves an assessment of facts or mixed fact and law. The IAD's 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*]; *Canada (Public Safety and Emergency Preparedness) v Abderrazak*, 2018 FC 602 at para 16 [*Abderrazak*]; *Canada (Public Safety and Emergency Preparedness) v Abou Antoun*, 2018 FC 540 at para 15 [*Abou Antoun*]; *Canada (Citizenship and Immigration) v*

Hassan, 2017 FC 413 at paras 21-22 [*Hassan*]; *Canada (Public Safety and Emergency Preparedness) v Lotfi*, 2012 FC 1089 at para 13 [*Lofti*]).

[14] Where the reasonableness standard applies, the role of the Court on judicial review is to determine whether the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]). There may be several reasonable outcomes, and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a review court to substitute its own view of a preferable outcome" (*Khosa* at para 59).

A. *The Respondent's Establishment*

(1) Prospective and Speculative Future Establishment

[15] The Applicant submits that the IAD's decision is flawed because it is based on an irrelevant consideration: the Respondent's "potential future establishment" in Canada. To support this argument, the Applicant points to several passages in the IAD's decision. For example, the IAD wrote that the Respondent is "ready to move back immediately to Canada" (para 13) and that he "has stated clearly that he is ready to immediately sever all ties with Saudi Arabia as he said his contract will end in 2018 to be with his family and embark on their lives here together" (para 16). In the Applicant's view, this wording suggests that the Respondent had not actually established himself in Canada, and that he only intended to do so after September 2018, when his contract in Saudi Arabia was scheduled to end.

[16] I agree with the Applicant that the determination of establishment is not a forward-looking exercise. The IAD must simply consider actual establishment at the time of its determination (*Nassif v Canada (Citizenship and Immigration)*, 2018 FC 873 at para 33; *Abderrazak* at para 30; *Abou Antoun* at para 27; *Hassan* at para 24; *Lotfi* at paras 21-23; *Canada (Citizenship and Immigration) v Mukerjee*, 2012 FC 310 at para 7).

[17] However, a review of the IAD's decision, together with the record before it, does not demonstrate that the decision was based on the Respondent's potential future establishment in Canada, nor does it demonstrate that future establishment was a significant factor in the IAD's conclusion to grant the Respondent special relief.

[18] The evidence before the IAD clearly demonstrated that the Respondent had indeed begun to establish himself in Canada. The Respondent testified that he had left his job in Saudi Arabia in April 2018 and that he was not going back, even though his contract ran until September 2018. He also testified that he had sold his car and furniture in Saudi Arabia, and he no longer had a home there. He further explained that he had made inquiries regarding how to practise medicine (or a related profession) in Canada. He also stated that, since his return to Canada, he was attending language training courses.

[19] The documentary evidence corroborated the Respondent's testimony. The CBSA Integrated Customs Enforcement System [ICES] report showed that the Respondent's most recent entry into Canada was on May 7, 2018. A letter dated April 3, 2018 from the Head of

Internal Medicine and Medical Director at the hospital where the Respondent had been working in Saudi Arabia also stated that the Respondent had been employed there until April 3, 2018.

[20] When I read the decision as a whole, I am satisfied that the IAD understood that the Respondent had returned to Canada. I recognize that the IAD's wording in the paragraphs upon which the Applicant relies (paras 13, 16) may lead one to believe that the IAD had formed a view that the Respondent had not yet returned to Canada and only intended to do so at the end of his contract in September 2018. However, the evidence before the IAD demonstrated otherwise. The IAD considered this evidence elsewhere in the decision. At paragraph 12 of its reasons, the IAD acknowledged that the Respondent was back in Canada when it wrote: "hopefully now that her husband is here and the children are a bit older and better adjusted in their new lives, [she can] work as a graphic designer and [become] a contributing member of society".

[21] After considering the evidence, the IAD explicitly concluded that the Respondent had no initial degree of establishment and he was "not himself fully established like his family". Although the IAD considered the Respondent's recent steps to establish himself in Canada and his financial contribution to his family's well-being when analyzing the establishment factor, it did not explicitly state whether the Respondent's degree of establishment in Canada was a positive or a negative factor in the overall H&C analysis. However, the IAD *did* reiterate, when analyzing the hardship factor, that "the degree of non-compliance [was] considerable and there was no strong degree of establishment" (para 15). Considering this statement, I do not agree that the IAD made a positive finding regarding the Respondent's establishment in Canada, nor do I agree that establishment was a significant factor in its decision to stay the Respondent's removal.

I am satisfied that the IAD properly considered the Respondent's establishment and that its assessment was reasonably supported by the evidence.

(2) Establishment of the Respondent's Family

[22] The Applicant also submits that the IAD mischaracterized the facts of this case and erred in equating the establishment of the family with that of the Respondent.

[23] First, the Applicant argues that the IAD erroneously stated that the Respondent's family came back to Canada "[s]hortly after they left" on June 10, 2013, when they were actually abroad for over three (3) years. According to the Applicant, the use of the words "shortly after they left" to characterize the length of this absence is inexplicable. Second, the Applicant argues that the IAD erred in stating that since the Respondent's daughters had arrived in Canada in 2016, he had come to Canada "… more frequently, approximately six times" (para 6). Rather, the evidence demonstrated that the Respondent had returned to Canada four (4) times after his stay from July 24, 2016 to September 19, 2016. Third, the Applicant argues that the IAD erred in minimizing the residency obligation by accepting that the Respondent need only have his family established in Canada and contribute to their financial well-being to maintain his status, even though he continued to live and work abroad. According to the Applicant, the Respondent's situation is highly analogous with the *Abou Antoun* case.

[24] I am not persuaded by these arguments.

[25] First, although the IAD noted that the Respondent's spouse and three (3) daughters returned to Canada "shortly after they left" in May 2013, the IAD correctly identified that they

returned in 2016. The IAD was clearly aware that the Respondent's family was away from Canada from June 10, 2013 to July 24, 2016. Moreover, the number of days the Respondent was physically present in Canada is uncontested, and the IAD reasonably concluded that there was a high degree of non-compliance in this case. In my view, the fact that the IAD used the expression "shortly after they left" does not amount to a reviewable error.

[26] Second, I am also of the view that there is no material difference between concluding that the Respondent returned to Canada "approximately six times" or four (4) times. The IAD made these comments in the context of examining the Respondent's establishment in Canada, and it ultimately concluded that there was no strong initial degree of establishment. The IAD most likely noted that the Respondent had returned to Canada "approximately six times" because the ICES report contains six (6) entries since the Respondent's landing in Canada on May 27, 2013.

[27] Third, I recognize that the IAD considered the Respondent's contributions and sacrifices to establish his family members in Canada, and that his family members were effectively established since 2016. However, the IAD did not state that this was determinative of the Respondent's establishment in Canada. The Applicant is correct in stating that the establishment of family members in Canada cannot be equated to the establishment of the individual applicant. However, in this case, as opposed to the *Abou Antoun* case, it was never the IAD's finding that it was sufficient for the Respondent's family members to be established in Canada. Instead, as previously stated, the IAD explicitly concluded that the Respondent was *not himself* fully established, unlike his family.

(3) Failure to Consider Arguments and Jurisprudence

[28] Finally, the Applicant submits that the IAD failed to consider its arguments and relevant jurisprudence regarding the above-mentioned issues. The Applicant filed summaries of decisions that dealt with these issues at the IAD hearing. None of these cases were canvassed by the IAD. The Applicant argues that the IAD's failure to engage and distinguish the Respondent's case from the factual situations and legal principles set out in *Abou Antoun*, *Lofti* and *Hassan* amounts to a failure to consider evidence.

[29] I disagree.

[30] First, the Applicant has not demonstrated how the analysis of jurisprudence equates to the consideration of evidence.

[31] Second, the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] stands for the proposition that reasons do not need to include all arguments and jurisprudence (*Newfoundland Nurses* at para 16). What matters is whether the reasons allow the reviewing court to understand why the tribunal made its decision and whether the conclusion falls within the range of acceptable outcomes. In this case, I am satisfied that the IAD's reasons do both.

[32] Third, while the IAD did not specifically refer to the decisions by name, the IAD referred to them when it noted that “unlike [in] some similar cases”, the Respondent had stated that he was ready to sever all ties with Saudi Arabia to be with his family and embark on their lives in Canada together (para 16), a factor to be considered “as often times in this type of cases, (sic) the appellants will state that they still need to stay abroad for a few years” (para 13). This wording aligns with the jurisprudence cited by the Applicant, so it was not necessary for the IAD to refer to these cases.

B. *Best Interest of the Children*

[33] The Applicant contends that the IAD erred when it found that the best interest of the children is a “paramount factor” in the H&C analysis. The jurisprudence clearly establishes that the best interest of the children is one factor among others (*Semana v Canada (Citizenship and Immigration),* 2016 FC 1082 at para 28 [*Semana*]). Otherwise, almost all IAD appeals involving children would be granted (*Semana* at para 28). According to the Applicant, the IAD’s analysis in this regard is inconsistent with the principle that H&C relief is an exceptional and extraordinary remedy (*Li v Canada (Citizenship and Immigration),* 2018 FC 187 at paras 25-26). Finally, the Applicant argues that the IAD unreasonably found that the Respondent is “very involved with his children”, as he had been essentially absent from Canada from 2013 to 2018, save for brief visits.

[34] I am not persuaded that the IAD’s use of the word “paramount” was intended to mean that the best interest of the children factor outweighed all other H&C factors. In fact, the IAD clearly stated that the “most important aspect” of the Respondent’s file was the factor regarding

the Respondent's family ties in Canada. Therefore, I cannot infer that the best interest of the children criteria "trumped" other factors for consideration in this H&C application, as Justice Denis Gascon cautioned in *Semana.* I also note that the IAD used the word "paramount" when it referenced the guiding principles set out by the Supreme Court of Canada in *Kanthasamy* v *Canada (Citizenship and Immigration),* 2015 SCC 61 [*Kanthasamy*]. In my view, the IAD's use of this word simply illustrates that the IAD was alive to the notion that the best interest of the children is a significant factor to be considered, as set out in *Kanthasamy*.

[35] Moreover, the Applicant has failed to persuade me that it was unreasonable for the IAD to find that the Respondent is "very involved with his children". The IAD heard testimony from both the Respondent and his wife. It was the IAD's responsibility to consider and weigh the evidence. Upon review of the evidence, I am satisfied that this finding was open to it. While the Applicant would have weighed the evidence differently, it is not this Court's role, on judicial review, to reweigh the evidence in order to come to a different outcome.

III. Conclusion

[36] Given the deference this court owes to the IAD in matters involving H&C considerations and the highly discretionary nature of these decisions, I find that the Applicant has not demonstrated a reviewable error warranting this Court's intervention. The IAD weighed the relevant H&C factors in light of the evidence. It ultimately concluded that the appropriate remedy was to stay the removal order for three (3) years, subject to conditions including a requirement that the Respondent remain in Canada for at least two (2) of those three (3) years. The decision is justified, transparent and intelligible (*Dunsmuir* at para 47).

[37] For all of these reasons, the application for judicial review is dismissed. No questions of general importance were proposed for certification, and I agree that none arise.

JUDGMENT in IMM-3879-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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