Federal Court  Cour fédérale

Date: 20240501

Docket: IMM-2724-23

Citation: 2024 FC 666

Ottawa, Ontario, May 1, 2024

PRESENT: Madam Justice Pallotta

BETWEEN:

STEVE ABEDALAHAD BALEEYOOS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The applicant, Steve Abedalahad Baleeyoos, seeks judicial review of an Immigration Appeal Division (IAD) decision dated January 25, 2023 and amended on February 6, 2023. The IAD overturned an Immigration Division (ID) decision and found Mr. Baleeyoos inadmissible to Canada pursuant to paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for having been convicted of an offence outside Canada that, if committed in

Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years.

[2] Mr. Baleeyoos is a citizen of Iraq who entered Canada in December 2017 and claimed refugee protection. Mr. Baleeyoos was referred to the ID for an admissibility hearing on the basis that a German court found him guilty of contravening laws against smuggling of foreigners. He was convicted in absentia in 2016 and ordered to pay a fine. Human smuggling is an offence in Canada under section 117 of the *IRPA* and carries a maximum term of imprisonment of at least 10 years.

[3] Mr. Baleeyoos concedes that he transported three Syrian nationals—his wife's uncle and two of the uncle's friends or neighbours—from Austria into Germany knowing that they did not have the necessary documents to enter Germany. The three passengers were from the same village and had travelled by land from Greece to Austria.

[4] The ID was not satisfied there were reasonable grounds to believe that Mr. Baleeyoos is inadmissible to Canada pursuant to paragraph 36(1)(b) of the *IRPA*, as it found he had not been convicted of a German offence that was equivalent to the Canadian offence of human smuggling. Specifically, while the statutory offences were equivalent, Canadian law recognizes a defence to section 117 of the *IRPA* for those providing humanitarian aid to asylum seekers. The ID found that the passengers Mr. Baleeyoos transported were asylum seekers, the humanitarian aid defence would have been available to him if he had committed the same act in Canada, and the defence was not available in Germany.

[5] The IAD allowed the respondent's appeal and found that Mr. Baleeyoos is inadmissible to Canada. The IAD agreed with the ID that the German and Canadian statutory offences were substantially the same, and therefore the determinative issue was whether any relevant defences would have been available in Canada and not in Germany. The IAD reviewed five potential defences—the Canadian defences of mutual aid, family member aid, and humanitarian aid, and the German defences of family member aid and necessity as justification—and found that none of these defences was available to Mr. Baleeyoos. The IAD considered it unnecessary to conduct an element-by-element comparison of the Canadian and German defences. The fact that Mr. Baleeyoos would not have been able to rely on any of the three Canadian defences meant that the Canadian and German offences, including any defences, were equivalent.

[6] Mr. Baleeyoos argues the IAD erred in analyzing the relevant defences, rendering the decision unreasonable. Specifically, Mr. Baleeyoos submits the IAD: (i) was wrong that the Canadian family member aid defence did not apply when he believed he was providing aid to his extended family; (ii) mistakenly found it unnecessary to assess all four elements of the Canadian humanitarian aid defence and erred in finding that the passengers were not asylum seekers; and (iii) erred in comparing the Canadian humanitarian aid defence with the German defence of necessity as justification when these defences are not equivalent. Mr. Baleeyoos also alleges the IAD breached procedural fairness by not providing an opportunity to give further testimony to respond to the IAD's concerns.

II. **Issues and Standards of Review**

[7] The issues on this application are whether the IAD's decision is unreasonable or procedurally unfair for the reasons alleged above.

[8] The applicable standards of review are not in dispute. The merits of the IAD's decision are reviewed on the reasonableness standard of review. This is a deferential but robust form of review that considers whether the decision, including the reasoning process and the outcome, is transparent, intelligible, and justified: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 13, 99 [*Vavilov*]. Allegations of procedural unfairness are reviewed on a standard that is akin to correctness: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible, and context-specific: *Vavilov* at para 77, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 22-23, 174 DLR (4th) 193 [*Baker*], among other cases. The central question is whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54. Here, the procedural fairness issue relates to whether Mr. Baleeyoos had a meaningful opportunity to present his case and have it fully and fairly considered: *Baker* at para 32.

III. **Analysis**

A. *Was the IAD's decision unreasonable?*

(1) Family member aid defence

[9] Mr. Baleeyoos submits the IAD erred in finding this defence was not available on the basis that two of the passengers were not related to him. Mr. Baleeyoos argues that the concept

of family is interpreted differently in different cultures and he believed the two passengers were part of his extended family because of their close association with his wife's uncle. Furthermore, he argues that the relevant jurisprudence, such as *R v Christhurajah*, 2019 BCCA 210 [*Christhurajah*] and *R v Rajaratnam*, 2019 BCCA 209 [*Rajaratnam*], do not specifically state that all individuals in a group being taken to a country must be family members for the defence to apply.

[10] The respondent states there is no evidence that Mr. Baleeyoos has a family relationship with two of the three passengers. He did not testify that he believed the passengers were extended family and the extended family argument was not made to the IAD. The new argument should not be entertained on judicial review: *Klos v Canada (Attorney General)*, 2023 FCA 205 at para 8. Furthermore, the respondent submits that the family member aid defence is narrow. In *Rajaratnam* (at paragraphs 198-204), the family member aid defence is described as serving the specific purpose of allowing a family member, who is not an asylum seeker, to aid another family member in coming to Canada from a country where they are in danger. The respondent contends the defence was not intended to permit those charged with smuggling multiple people to have a defence on the basis that one person in the group was a family member.

[11] Mr. Baleeyoos has not established that the IAD erred in analyzing the family member aid defence.

[12] Mr. Baleeyoos did not raise the extended family argument before the IAD, nor has he pointed to evidence that demonstrates he considered two of the passengers to be extended family.

In fact, the IAD noted that Mr. Baleeyoos was asked whether the two passengers were related to him at a Canada Border Services Agency (CBSA) interview and he responded that they were neighbours of his wife's uncle. He later recounted telling the German police, "these other two are not my family, but this guy [the uncle] is my family".

[13] I am not persuaded that the IAD's determination on the family member aid defence was contrary to the jurisprudence. The IAD's point was that the family member aid defence did not extend to two of Mr. Baleeyoos' three passengers who were not his family. The defence is distinct from the defences of mutual or humanitarian aid, and specific to family members: *Rajaratnam* at para 204. I would add that in *Christhurajah*, the British Columbia Court of Appeal noted that all but one of the passengers Mr. Christhurajah had transported by boat to Canada were not related to him and he could "only avail himself of the family aid defence in respect of family members": *Christhurajah* at para 143.

(2) Humanitarian aid defence

[14] The Canadian humanitarian aid defence has four elements (*Rajaratnam* at paragraph 275):

i. the accused must act for the purpose of providing humanitarian aid, and not for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime;

ii. the accused must provide aid in order to save the life or alleviate the suffering of an asylum seeker, which is a person from another state who intends to seek refuge in Canada from persecution or physical harm;

iii. the aid must be humanitarian, a question to be determined by the trier of fact in accordance with the principles of impartiality, neutrality, and independence; and

iv. the accused must reasonably believe that the person assisted is an asylum seeker.

[15] Mr. Baleeyoos submits the IAD erred by focussing on elements (ii) and (iv). He argues that a full evaluation of all four elements of the defence was required. By considering only two elements, the IAD may have overlooked crucial information that may have affected the decision.

[16] In addition, Mr. Baleeyoos submits the IAD erred in its analysis of elements (ii) and (iv), as it was wrong to find that the passengers were not asylum seekers. Mr. Baleeyoos argues there were reasonable grounds to believe that the passengers were asylum seekers entering Germany to seek protection. The uncle was fleeing persecution in Syria and his primary purpose was to seek protection in Germany. Another passenger had refugee identity papers from Greece and had been determined by Greek authorities to be a person seeking refuge to avoid persecution or physical harm.

[17] The respondent submits Mr. Baleeyoos was required to meet all four elements to demonstrate that the defence was applicable to his situation because the humanitarian aid defence is explicitly conjunctive. Since he failed to meet two elements of the defence, there was

no need for the IAD to continue its analysis. The respondent contends that Mr. Baleeyoos disagrees with the IAD's weighing of evidence, but has not identified a reviewable error. It was the IAD's role to assess and weigh the evidence and this Court must defer to reasonable findings.

[18] I am not persuaded of a reviewable error in the IAD's assessment of the humanitarian aid defence.

[19] As the respondent correctly points out, the elements of the humanitarian aid defence are conjunctive and Mr. Baleeyoos has not explained what information the IAD overlooked that would have affected the decision. Having found that Mr. Baleeyoos did not meet elements (ii) and (iv), the IAD was not required to assess the remaining elements.

[20] With respect to element (ii), the IAD considered the available evidence and found there was no evidence of how Mr. Baleeyoos intended to save the life or alleviate the suffering of any of the three passengers. The passengers had travelled on their own by land through different countries in Europe to arrive in Austria without Mr. Baleeyoos' help, and one already had refugee identity papers. Mr. Baleeyoos picked up the three passengers at a hotel to drive them across the German border because they did not have enough money for bus tickets. With respect to element (iv), the IAD found there was little evidence to support a reasonable belief that the three passengers were intending to seek refugee status in Germany or elsewhere. Mr. Baleeyoos' evidence was that he knew his wife's uncle was driving across the German border to be closer to family and he knew that another passenger already had refugee identity papers in Greece. It was open to the IAD to make these findings based on the evidentiary record, and Mr. Baleeyoos has

not established a reviewable error with the IAD's conclusion that he did not meet elements (ii) and (iv) of the humanitarian aid defence.

(3) Comparing non-equivalent defences

[21] Mr. Baleeyoos submits the IAD erred in comparing the Canadian humanitarian aid defence with the German defence of necessity as justification when an element-by-element comparison demonstrates that they are not equivalent, and the German defence is stricter. Mr. Baleeyoos also states that the IAD failed to consider material facts and misconstrued the evidence.

[22] In my view, Mr. Baleeyoos misinterprets the IAD's reasons. The IAD conducted separate analyses for each defence, based on the Canadian or German laws, and found that they did not apply to Mr. Baleeyoos' case.

[23] As noted above, the IAD considered it unnecessary to conduct an element-by-element comparison of the Canadian and German defences. The fact that Mr. Baleeyoos would not have been able to rely on any of the three Canadian defences meant that the Canadian and German offences, including any defences, were equivalent. Mr. Baleeyoos has not identified an error with this approach.

B. *Did the IAD satisfy the requirements of procedural fairness?*

[24] Mr. Baleeyoos submits the IAD should have provided an opportunity to give further testimony to respond to its concerns. Relying on *Sy v Canada (Minister of Citizenship and*

Immigration), 2002 FCT 905 at paras 12-13, [2002] FCJ No 1179 [*Sy*], he argues the IAD was required to interview him to clear up any ambiguities.

[25] The respondent submits, and I agree, that the IAD was not required to hold a hearing. Paragraph 175(1)(c) of the *IRPA* states the IAD is entitled to base its decision on evidence adduced in the proceedings that it considered credible or trustworthy: *Canada (Public Safety and Emergency Preparedness) v Keto*, 2020 FC 467 at para 42. There was sufficient evidence in the record, which included evidence from Mr. Baleeyoos' CBSA interviews and his testimony at the ID hearing, for the IAD to decide the appeal without further testimony.

[26] In my view, *Sy* does not assist Mr. Baleeyoos. In that case, the person who initially screened Mr. Sy's application was of the view that he should be interviewed, and the Court found that the visa officer's "summary dismissal" of the application to be unreasonable.

IV. **Conclusion**

[27] Mr. Baleeyoos has not established the IAD's decision was unreasonable or procedurally unfair. Accordingly, the application is dismissed.

[28] At the hearing of this matter, the respondent's counsel stated that the Minister of Citizenship and Immigration should be named as the sole respondent in this proceeding. However, counsel did not explain why this would be the case when it was the Minister of Public Safety and Emergency Preparedness who participated in the appeal to the IAD. The application

for leave and judicial review named the Minister of Public Safety and Emergency Preparedness and I am not satisfied that a change should be made to the style of cause.

[29] The parties did not propose a question for certification and none arises.

JUDGMENT IN IMM-2724-23

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

2. There is no question to certify.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2724-23
STYLE OF CAUSE:	STEVE ABEDALAHAD BALEEYOOS v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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