Federal Court  Cour fédérale

Date: 20130719

Docket: IMM-2989-12

Citation: 2013 FC 804

Ottawa, Ontario, July 19, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MAMTA NARENDRA PATEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under section 72(1) of the *Immigration and Refugee Protection Act* [the *Act*] for judicial review of a decision made by an Immigration Officer [the Officer], at the Consulate General of Canada in Buffalo, New York, on January 30, 2012 which refused to issue a temporary or permanent resident visa to the applicant because the applicant's husband was found to be inadmissible to Canada pursuant to paragraph 36(2)(b) of the *Act*.

[2] The applicant, Mamta Narendra Patel, sought permanent residence in Canada under the economic class as a Quebec-approved investor. The applicant's husband, Kartikbhai Patel, had been convicted of impaired driving in North Carolina in 2009. As a result, the Officer considered whether the offence was equivalent to the offence of driving while impaired by alcohol or drugs under the *Criminal Code of Canada* and determined that it was equivalent. Mr Patel was not eligible for rehabilitation because five years had not yet elapsed since the completion of his sentence, which included probation, community service and a fine. The Officer refused to exempt the applicant on humanitarian and compassionate [H&C] grounds as the applicant had requested and refused to issue the visa.

[3] The applicant made lengthy submissions that the decision was unreasonable and that the Officer was biased. The applicant's submissions can be best summarised as follows: the Officer erred in finding that Mr Patel was inadmissible on grounds of criminality since the offence for which Mr Patel was convicted was not equivalent to the Canadian offence of impaired driving; there was a breach of procedural fairness because the Officer delayed in making the decision for 18 months, exhibited unprofessional conduct and denied counsel for Mr Patel to attend an interview; and, the Officer was biased as evidenced by the delay and her conduct. In addition, the applicant submits that the Certified Tribunal Record [CTR] was incomplete and as a result, the Officer must not have considered all the relevant evidence.

[4] The applicant made several arguments with respect to the inadmissibility finding: that Mr Patel was not driving under the influence of an impairing substance, that he would not have been

convicted of any offence had the incident occurred in Canada, and that the North Carolina [NC] offence he was charged with is not equivalent to an offence in Canada.

Standard of Review

[5] The standard of review for findings of equivalency, which are factual determinations and which attract deference, is that of reasonableness: *Abid v Canada (Minister of Citizenship and Immigration)*, 2011 FC 164, [2011] FCJ No 208 at para 11; *Lu v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1476, [2011] FCJ No 1797 [*Lu*] at para 12.

[6] As noted by Justice Pinard in *Lu:*

> 12 The standard of review applicable to an officer's determination of equivalency is reasonableness (*Abid v. Minister of Citizenship and Immigration*, 2011 FC 164 at paragraph 11 [*Abid*]; *Sayer v. Minister of Citizenship and Immigration*, 2011 FC 144 at paragraph 4 [*Sayer*]). The determination of equivalency is a question of mixed fact and law that attracts deference (*Abid* at paragraph 11 and *Sayer* at paragraph 5). Equivalency is a mixed question because, first, the applicant must prove the foreign law, which becomes a question of fact (*Lakhani v. Minister of Citizenship and Immigration*, 2007 FC 674 at paragraph 22; *Sayer* at paragraph 4). Once the foreign law is established, an officer must assess the relevant facts of the case according to the terms of the foreign law in comparison with the applicable Canadian federal law (*Sayer* at paragraph 5).

[7] The reasonableness standard requires the Court to 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 with respect to the facts and the law: see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*] at para 59.

[8] Issues of procedural fairness are reviewable on a correctness standard: *Khosa*, at para 43.

Did the Officer reasonably find that the offences were equivalent?

[9] The applicant and respondent agree that the test to determine whether the NC offence of driving under the influence is equivalent to the *Criminal Code* offence of impaired driving is that established by the Federal Court of Appeal in *Hill v Minister of Employment and Immigration* [1987] F.C.J. No. 47, 73 NR 315 at para. 16 (FCA) [*Hill*] which can be determined in one of three ways:

> . . . first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences. Two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not. Third, by a combination of one and two.

[10] The CAIPS notes, which constitute the reasons of the Officer, demonstrate that the Officer considered the wording of the two offences and the test in *Hill*:

> [. . .] in order to convict a person of a DWI in the State of NC, the prosecutor must prove to the court beyond a reasonable doubt that the suspect was appreciably impaired. Despite the fact that PI unable to substantiate alcohol level, he was indeed found guilty of driving while impaired. He was found guilty under 20-138.1, Impaired Driving:
>
> > "(a) Offense. – A person commits the offense of impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State:
> > (1) While under the influence of an impairing substance; or

> (2) After having consumed sufficient alcohol that he has, at any relevant time after the driving, an alcohol concentration of 0.08 or more. The results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration; or (…)
>
> The Canadian equivalent of this conviction is s. 253 of the Cdn Criminal Code:
>
> (1) Every one commits an offence who operates a motor vehicle … whether it is in motion or not,
> (a) while the person's ability to operate the vehicle, vessel, aircraft or railway equipment is impaired by alcohol or a drug; or
> (b) having consumed alcohol in such a quantity that the concentration in the person's blood exceeds eighty milligrams of alcohol in one hundred millilitres of blood.
>
> Punishment:
>
> 255. (1) Every one who commits an offence under section 253 or 254 is guilty of an indictable offence or an offence punishable on summary conviction and is liable,
> b) where the offence is prosecuted by indictment, to imprisonment for a term not exceeding five years …
>
> This renders PI in admissible as per A36(2)(b) of IRPA. I spoke to IPM about this case, who agreed that indeed PI is criminally inadmissible.

[11] The applicant submits that the North Carolina [NC] offence and the *Criminal Code* offence are not equivalent because the NC offence refers to an "impairing substance" which could be broader than alcohol or a drug, whereas the *Criminal Code* offence refers to impairment by alcohol or drug. In addition, the applicant argues that the NC offence refers to driving, whereas the *Criminal Code* offence refers to operation of or care and control of a motor vehicle.

[12] I do not agree with the applicant. The NC offence, when read in the context of the related provisions governing impaired driving, which is how any statute must be read, confirms that

impairment by alcohol or drugs is contemplated. The applicant's argument that a person could be impaired by caffeine, lactose intolerance, or due to lack of sleep is not supported by any evidence or by common knowledge, and does not lead to the conclusion that the offences are not equivalent. A lack of sleep is not an impairing substance (it is not a substance at all); caffeine is a drug; and lactose intolerance is not known to impair the ability to drive.

[13] Similarly, while the word "driving" and "operation" or "care and control" are not identical, they convey the same conduct. Mr Patel was stopped while driving his vehicle. Had this occurred in Canada, his driving would constitute operation of the vehicle.

[14] The offences are very similar, although not identically worded. The jurisprudence has clearly established that equivalent offences do not need to be identical. It would be unrealistic to expect even like-minded legislators in different states and countries to use identical language in their statutes.

[15] In *Li v Canada (Minister of Citizenship and Immigration)*, 1996 FCJ 1060, the Court of Appeal confirmed at para 19 that offences need not be identical in assessing equivalency, and whether a conviction would result in one country and not the other is irrelevant:

> *I believe that it would be most consistent with the purposes of the statute, and not inconsistent with the jurisprudence of this Court, to conclude that what equivalence of offences requires is essentially the similarity of definition of offences. A definition is similar if it involves similar criteria for establishing that an offence has occurred, whether those criteria are manifested in elements (in the narrow sense) or defences in the two sets of laws. In my view, the definition of an offence involves the elements and defences particular to that offence, or perhaps to that class of offences. For the purpose of subparagraph 19(2) (a.1) (i) of the Immigration Act it is not*

> *necessary to compare all the general principles of criminal responsibility in the two systems: what is being examined is the comparability of offences, not the comparability of possible convictions in the two countries.*

[16] Although Mr Patel's conviction in NC was classified as a misdemeanour, and the lowest possible punishment was imposed because it was a first conviction, the equivalent offence in Canada is a hybrid offence which could be punished, on indictment, by a maximum of five years imprisonment. As a result, paragraph 36(2)(b) of the *Act*, which provides that a conviction "outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament…", results in inadmissibility.

[17] The Federal Court of Appeal confirmed in *Abrasssart v Canada* (*Minister of Citizenship and Immigration)*, 2001 FCJ No12 at para 15 that a hybrid offence, which could be prosecuted by indictment, would constitute an indictable offence.

[18] The applicant's submissions that Mr Patel was not in fact impaired and that he attempted to blow into the breathalyser machine but the machine would not record a reading and that he was convicted without any proof is simply without merit. The record includes the affidavit of the arresting officer who described indicia of impairment including erratic driving, red glassy eyes and a strong odour of alcohol. Although the arresting officer's documents indicate that Mr Patel did attempt to blow and that no readings were registered (only air blanks), Mr Patel was not charged with refusal to blow. Mr Patel was charged with driving under the influence and was convicted of that offence. The documentary evidence considered by the Officer which was in the CTR and in the applicant's record includes reference to the legal requirements for a conviction in North Carolina

which requires proof beyond a reasonable doubt of impairment. The applicant's submission that Mr Patel was convicted without any proof is not supported by the explanation of the law or by any of the documents which confirm the charge imposed, the conviction, and the sentence.

[19] The applicant's submission that Mr Patel pursued an appeal of his alleged improper conviction but abandoned it due to the delays in the appeal court does not change the fact that he was convicted of an offence which is equivalent to an offence in Canada, and which is regarded as a serious offence in both countries.

[20] The Officer assessed the two provisions, properly applied the test established in *Hill* and reasonably concluded that they were equivalent offences.

Did the delay in rendering a decision amount to a breach of procedural fairness?

[21] The applicant submits that the Officer's over 18 month delay in making a decision is unwarranted and also submits that this delay demonstrates that the Officer's "mind was made up that she was going to find the inadmissibility and was at a loss to find any legal reason for doing so."

[22] I do not agree that the delay was excessive in the circumstances, given that Mr Patel's own conduct contributed significantly to the delay. The applicant did not disclose her husband's conviction in the initial application. The Officer was made aware of the conviction several months later by a FBI criminal records check. The Officer then requested that Mr Patel attend an interview to discuss the conviction. The CAIPS notes dated June 3, 2010 indicate that the Officer determined

that "In order to proceed, an interview is warranted to discuss circumstances of arrest & conviction." The December 2, 2010 entry refers to the interview and indicates that the Officer asked Mr Patel to describe the events surrounding his arrest and conviction, however, Mr Patel did not have any documentation to substantiate any of his statements. The Officer again requested documentation: "In order to proceed, I require all court documents." An amended background declaration was submitted by the applicant in February 2011, promising that details would follow. On July 11, 2011 the Officer sent another request which acknowledged receipt of some documents on May 31, 2011, and requested the criminal docket ("In order to proceed, I require the Criminal Docket"). This was provided by the applicant on September 15, 2011. In addition, the Officer sought details of "other charges" which were noted on the computer printout of the Court docket.

[23] The CAIPS notes of January 24, 2012 indicate that the Officer considered all the documents which were provided over the course of many months, the submissions and the statutes:

> I have taken into consideration all of PI's submissions, including the State of NC Impaired Driving-Judgment, court records, Determination of Sentencing Factors, proof of completion of community service work, Magistrate's Order, Affidavit of Mike Hearp, opinion of Cecil Rotenberg, PI's Affidavit, as well as the FBI record check and a copy of the statute under which he was convicted.

[24] The Officer's delay in rendering a decision was due to the need to ensure that she had all the required information and could assess the details of Mr Patel's NC conviction and conduct the assessment of equivalency. In such circumstances, the delay, much of which can be attributed to the applicant's own conduct in not providing the necessary documents in a timely manner, cannot constitute a breach of procedural fairness.

Did the Officer's conduct amount to a breach of procedural fairness?

[25] The applicant submits that the Officer was rude to Mr Patel and his counsel and failed to permit counsel to attend one of the interviews of Mr Patel.

[26] The allegations of rudeness, which refer to the Officer's demands for documents and her admonishment of Mr Patel for his failure to provide the documents, would not constitute any breach of procedural fairness.

[27] The alleged exclusion of counsel for Mr Patel from his interview has not resulted in a breach of procedural fairness given that the purpose of the interview was to discuss Mr Patel's conviction and to review the necessary court documents that Mr Patel failed to bring. Generally, there would be no interview at all. Mr Patel and his counsel had opportunities to and did make additional submissions with respect to the circumstances of the offence and its equivalency to the Canadian offence which the Officer considered. Moreover, a breach of procedural fairness, does not necessarily result in the quashing of the decision (*Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCJ 491, para 67; *Mobil Oil Canada Ltd v Canada Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, at 228.

Do missing documents in the CTR render the decision unreasonable?

[28] The applicant raised an additional ground of review noting that the CTR was incomplete and as a result, it should be presumed that the Officer failed to take into account relevant evidence submitted.

[29] The respondent concedes that the CTR does not include all the documents that the applicant submitted to the Officer. However, the Officer received and considered all the documents and referred to them in the CAIPS notes. These documents have been provided via the applicant's record. As a result, a proper review of the decision is possible.

[30] I agree with the respondent that it is clear from the entries in the CAIPS notes that the Officer had all the documents, including those now not part of the CTR. Although the possible explanation that the missing documents may be due to the closure of the Buffalo Consulate and the transfer of the files is troubling, the documents in question are included in the applicant's record and are available to the Court to permit judicial review.

[31] In *Bolanos v Canada* (*Minister of Citizenship and Immigration)*, 2011 FC 388, [2011] FCJ No 497, Justice Russell dealt with a similar situation and noted that an incomplete record is not necessarily grounds to set aside a decision, particularly where the decision-maker considered the material in question and the material is available to the Court. At para 52, he wrote that:

> [52] All in all, I cannot accept that the gaps in the CTR reveal that the RPD did not look at all of the documentation submitted or at the written submissions of counsel. Hence, in my view, the RPD's Decision is before the Court because the Applicant has reproduced the gaps in the CTR as part of her record. This means that I can review and assess the documentation and information that was before the RPD when this Decision was made. Justice Barbara Reed in *Parveen v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 103, 1 Imm. L.R. (3d) 205 at paragraph 9 pointed out that "an incomplete record alone could be grounds, in some circumstances, for setting aside a decision under review." While this Court has subsequently cited and followed Justice Reed on this point – see, for example, the decision of Justice Elizabeth Heneghan in *MacDonald v Canada (Attorney General)*, 2007 FC 809 – the circumstances of the present case do not give rise to a problem because the record shows that the RPD did consider all of the

> Applicant's PIF amendments and counsel's submissions, and the missing pages from the CTR are before the Court in the Applicant's record.

[32] Similarly, in *Clarke v Canada* (*Minister of Citizenship and Immigration*), 2009 FC 357, [2009] FCJ No 441, Justice Phelan noted at para 17 that "[w]hile an incomplete record may be a basis for a breach of procedural fairness; that is not always so, especially where there was no actual unfairness, as is the case here."

Did the Officer unreasonably refuse the H&C request?

[33] The applicant's H&C submissions anticipated a possible finding of inadmissibility and disputed that finding with the same assertions: that Mr Patel had not consumed alcohol; that the arresting officer charged Mr Patel as a "face saving measure"; and that the North Carolina offence of driving under the influence was not equivalent to an offence in Canada as it had a much wider application in that it captured impairment by substances other than alcohol or drugs.

[34] The applicant submitted that she had been approved as an investor, had made an investment of $400,000, and if the application were refused, she would suffer disappointment due to her investment of money, time and effort. She noted that Canada would be denied the benefit of this investment and the future economic success of the applicant and her family who proposed to settle in Canada. In addition, the applicant submitted that she and Mr Patel have a strong and positive profile in their community, the applicant has no criminal record, and that Mr Patel received a letter of commendation from the Parole Commission (upon completion of his sentence).

[35] The applicant submits that the Officer's refusal of the H&C exemption was not reasonable and that the submissions were not considered. The applicant referred to *Abid v Canada (Minister of Citizenship and Immigration)*, 2011 FC 164, [2011] FCJ No 208 [*Abid*], where Justice Snider considered whether H&C submissions had been adequately considered and noted at para 36:

> [36] The Respondent correctly points out that Officers considering H&C requests are only obliged to consider factors commensurate with the submissions presented to them (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635 at para 8). However, the question in this case is whether the Officer, faced with representations, had due regard for the submissions that were made. In my view, he did not.

[36] Justice Snider found on the facts of *Abid* that the Officer made errors including that he failed to consider that the applicant had four children rather than two when considering the best interests of the children and failed to consider that the applicant's criminal conviction was 17 years earlier.

[37] In the present case, the Officer did not make factual errors in assessing the H&C factors and in refusing the H&C based on the nature of the submissions made by the applicant.

[38] Although the Officer does not provide detailed reasons for refusing the H&C request, the refusal letter and the CAIPS notes indicate that the Officer considered these submissions.

[39] In my view, the record permits the Court "…to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes…" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 at para 16).

[40] As noted by the respondent, in order to obtain a visa in the entrepreneurial category, applicants are required to make a financial investment and this cannot also be considered as a factor for an H&C exemption.

[41] Given that the applicant was applying from outside of Canada and the applicant did not raise hardship to her or her family, other than related to their investment, and their disappointment, the Officer's finding that there were no H&C grounds to justify an exemption is reasonable.

Did the Officer demonstrate bias?

[42] The applicant argues that there was a reasonable apprehension that the Officer was biased and that a reasonably informed person would so conclude based on the Officer's conduct and the delay in reaching a decision. The applicant alleges that the delay demonstrates that the Officer's "mind was made up that she was going to find the inadmissibility and was at a loss to find any legal reason for doing so."

[43] With respect to the allegations of bias, the applicant and respondent agree that the test for bias is that set out by Justice de Grandpré, writing in dissent, in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at p 394:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . [T]hat test is "what would an informed person, viewing the matter realistically and practically -- and having thought the matter through -- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[44] As stated in *R v RDS*, [1997] 3 SCR 484, [1997] SCJ No 84 by Justices L' Heureux- Dubé and McLachlin, referring to the above noted test:

> 113 Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

[45] The same principle applies to allegations of bias against other decision-makers; allegations of bias are serious and should be made with caution.

[46] In the present case, there is no evidence on the record to suggest that an informed person would have a reasonable apprehension of bias; i.e., that the Officer would not decide fairly or that the Officer pre-judged the application. The applicant's contention that the delay in rendering a decision was because the Officer had made up her mind but could not find reasons to justify her decision is completely without merit. As noted above, the delay in rendering a decision was, to a great extent, due to Mr Patel's conduct in first not disclosing his conviction and then not providing the documentation requested and required under section 16 of the *Act*. The Officer's CAIPS notes indicate that several requests for information were made, and the dates the information was received. There is no indication of bias; the Officer considered the evidence as it was provided and focused on the test to determine whether the offences were equivalent.

Proposed Certified Question

[47] The applicant proposed a multi-part question for certification that basically asserts and expands on the very arguments made before the Court and questions the findings which can be summarized as follows: that Mr Patel was not driving under the influence of alcohol; that he was convicted without proof and based on a presumption arising from his failure to blow into the breathalyzer; that this evidence would not result in a conviction in Canada; that Mr Patel abandoned his appeal after two years because the "Crown" (sic) did not address the appeal; that the *Hill* test should not be interpreted to keep people who are not guilty out of Canada; and, that there is justification for a Humanitarian and Compassionate exemption pursuant to section 25.1 of the *Act*.

[48] The proposed question for certification does not meet the test established by the Federal Court of Appeal in *Liyanagamage v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1637, 51 ACWS (3d) 910. The proposed question is particular to the facts of the case from the perspective of the applicant and does not raise issues of broad significance or general application.

[49] The proposed question is based on the applicant's own view of her husband's conduct which resulted in his conviction for driving under the influence and her own view of the North Carolina law and the Canadian law. As I have found, the Officer reasonably found that Mr Patel was convicted of the offence of driving under the influence which is equivalent to the offence of impaired driving. The certified question proposed or some aspect or variation of that question can not revisit this determination.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2989-12
STYLE OF CAUSE:	MAMTA NARENDRA PATEL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 31, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	KANE J.
DATED:	July 19, 2013

APPEARANCES:

Cecil L. Rotenberg	FOR THE APPLICANT
Ildiko Erdie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CECIL L. ROTENBERG, Q.C. Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
WILLIAM F. PENTNEY Deputy Attorney General of Canada,	FOR THE RESPONDENT