Federal Court  Cour fédérale

Date: 20131008

Docket: IMM-11342-12

Citation: 2013 FC 1012

Ottawa, Ontario, October 8, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

HANAN FOUZI AHM EL ATTAR

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] In this application for judicial review, the Minister of Public Safety and Emergency Preparedness seeks to set aside the decision of the Immigration Appeal Division of the Immigration and Refugee Board [the IAD or the Division] rendered orally on August 22, 2012 and reduced to writing on October 16, 2012.

[2] In its decision, the IAD concluded that Ms. El Attar met the residency requirements imposed by section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act]

and set aside the initial determination of the immigration officer to the opposite effect. Section 28 of IRPA provides that, unless an exception pertains, a permanent resident must be present in Canada for 730 days in each five year period. In applying this requirement, the Division concluded as follows:

> Based on the record submitted, the Panel does not find it credible that the [respondent] was only in Canada for 211 days in the five-year period. The Panel agrees for the calculation made by the [respondent's] counsel that the [respondent] was in Canada for 660 days, which is within the allowable 720 days stipulated by the [IRPA].

[3] The parties concur that the standard of review applicable to the assessment of the decision is reasonableness. I agree as the IAD was engaged in interpreting and applying its constituent statute to the facts before it (which exercise normally attracts the reasonableness standard of review) and moreover, the jurisprudence has satisfactorily settles that the reasonableness standard applies to review of decisions such as the present (see e.g. *Bi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 293 at para 12, 215 ACWS (3d) 486 and *Mirza v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 725 at para 5, 230 ACWS (3d) 224).

[4] The applicant argues that the Division's decision is unreasonable because it contravenes the unambiguous requirements of section 28 of the IRPA in holding that 660 days' presence in Canada meets the requirements of section 28 of the Act.

[5] The respondent, while conceding that the Division's reasons contain an obvious error, asserts that the decision should nonetheless be maintained as there was ample evidence before the IAD from which it could conclude that the applicant had in fact been present in Canada for the

requisite 730 day period in the relevant five-year time frame. The respondent filed with its Memorandum an Appendix that she submits summarises that evidence, which she argues demonstrates that she satisfied the residency requirements in the Act.

[6] In both its Reply Memorandum and in its oral submissions, the applicant argued that the Appendix to the respondent's submissions was inadmissible because it constitutes new evidence, which is generally not admissible on a judicial review application. During the hearing, I provided a ruling on this point and held that the Appendix in question was not evidence but, rather, merely a document prepared by the respondent's counsel as an aide to his argument and, accordingly, held that it was properly before me. I also ruled, however, that it was open to the applicant to argue that the Appendix did not accurately reflect the time the respondent spent in Canada. The applicant made precisely such an argument and asserted that the evidence did not demonstrate that the respondent met the residency requirements in the IRPA.

[7] I need not determine whether or not these requirements were met, as the flawed reasoning in the decision, of itself, necessitates its being set aside.

[8] As elucidated by the Supreme Court of Canada in its seminal decision in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 [*Dunsmuir*], the reasonableness standard of review requires that a decision be justified, transparent and intelligible and that the result reached fall within the range of acceptable outcomes which are defensible in light of the facts and applicable law. A reasonableness review, therefore, requires assessment both of the reasoning process undertaken by

the tribunal and of the outcome reached. As stated by Justices Bastarache and LeBel, writing for the majority of the Supreme Court of Canada, in *Dunsmuir* at para 47:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[9] The analysis of the quality of a tribunal's reasoning and of the reasonableness of the result are not to be conducted separately. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 [*Newfoundland Nurses*], the Supreme Court stressed that both aspects of a decision – reasoning and result – must be considered together under the reasonableness standard. As Justice Abella, writing for the Court, stated at paras 14 and 15 of that decision:

> […] I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision or as advocating that a reviewing court undertake two discrete analyses – one for the reasons and a separate one for the result […] It is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.
>
> […]
>
> [C]ourts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> [Citations omitted.]

[10] Thus, a reasonable result will not save a decision that is devoid of adequate reasons where there is a duty to give reasons and where the reasons cannot be augmented by regard to the record.

[11] Both the Supreme Court and several appellate courts have indicated that the reasons given by a tribunal, when read in context, must allow the reviewing court (and the affected parties) to understand why the decision was made. In *Newfoundland Nurses* at para 16, Justice Abella put the matter the following way:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion […] In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the solution is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[12] The Federal Court of Appeal has likewise recently confirmed that to be adequate reasons must allow the reviewing court to "understand why the [tribunal] made [the] decision and then to determine whether the [tribunal's] conclusion was within the range of acceptable outcomes" (*Lebon v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 132 at para 18, 433 NR 310). Other appellate courts have also delineated a similar test (see e.g., *United States of America v Johnstone*, 2013 BCCA 2 at paras 56-57, 104 WCB (2d) 1196; *Canadian Property Holdings Inc v The Assessor for the City of Winnipeg*, 2012 MBCA 118 at para 12, 288 Man R (2d) 66; *2127423 Manitoba Ltd v Unicity Taxi Ltd*, 2012 MBCA 75 at para 47, 280 Man R (2d) 292; *Creelman v Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2012 NSCA 26 at para 29,

314 NSR (2d) 245; and *Guild Contracting Specialties (2005) Inc v Nova Scotia (Occupational Health and Safety Appeal Panel)*, 2012 NSCA 94 at para 26, 321 NSR (2d) 95).

[13] Here, the reasons of the IAD do not allow the parties or this Court to appreciate why the decision was made, and, indeed, the decision directly contradicts the requirements of the IRPA that the IAD was called upon to apply. This case is therefore different from *Earl v Canada (Minister of Citizenship & Immigration)*, 2011 FC 312, 200 ACWS (3d) 212, *Christopher v Canada (Minister of Citizenship & Immigration)*, 2004 FC 1128, and *Dunova v Canada (Minister of Citizenship & Immigration)*, 2010 FC 438, 367 FTR 89 (Eng), relied on by the respondent. Here, the IAD did not simply make an error on a peripheral point or fail to address a point or an argument. Rather, the Division's reasoning on the central point in issue – namely how many days the respondent needed to have been in Canada to retain her permanent resident status – contradicts the requirements of section 28 of the IRPA. Given this contradiction, there is simply no way of knowing how the Division reached its conclusion even if the record supports the conclusion.

[14] I agree with the applicant Minister that where, as here, an administrative tribunal provides an unreasonable interpretation of its constituent statute, the decision must be set aside even if there are facts in the record which might have supported the same conclusion under a correct interpretation of the statute. Were it otherwise, as counsel for the applicant convincingly argues, this Court would end up usurping the function of administrative tribunals and be tasked with making *de novo* determinations based on the record, which is outside the scope of the requisite inquiry on an application for judicial review. In short, where a tribunal gives unreasonable reasons, it is not for the Court to ignore them and conduct its own analysis. The invitation of the Supreme Court to

reviewing courts to look to supplement the reasons before subverting them (*Dunsmuir* at para 48; *Newfoundland Nurses* at paras 12, 15) does not go so far. Indeed, as Justice Rothstein noted in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654, "[t]he direction that courts are to give respectful attention to the reasons 'which could be offered in support of a decision' is not a 'carte blanche' to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result" (at para 54). Rather, where, as here, the reasons offered are unreasonable because they violate a clear statutory requirement, the decision must be set aside even if the ultimate disposition of the file might well be defensible based on the record.

[15] This application for judicial review will accordingly be allowed. Neither party submitted a question for certification under section 74 of the IRPA and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed;
2. The Immigration Appeal Division's decision signed October 16, 2012 is set aside;
3. The matter is remitted back to the Immigration Appeal Division for re-determination by a different member;
4. No question of general importance is certified under section 74 of the IRPA; and
5. There is no order as to costs.

"Mary J.L. Gleason"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11342-12
STYLE OF CAUSE:	*The Minister of Public Safety and Emergency Preparedness v Hanan Fouzi Ahm El Attar*
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	August 28, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	GLEASON J.
DATED:	October 8, 2013

APPEARANCES:

Gretchen Timmins	FOR THE APPLICANT
David Chalk	FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
David Chalk BCF, LLP Montréal, Quebec Toronto, Ontario	FOR THE RESPONDENT