Federal Court of Appeal | Cour d'appel fédérale

Date: 20190527

Docket: A-78-18

Citation: 2019 FCA 163

CORAM: **GAUTHIER J.A.**
BOIVIN J.A.
GLEASON J.A.

BETWEEN:

SARABJIT SINGH MOMI

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Vancouver, British Columbia, on March 20, 2019.

Judgment delivered at Ottawa, Ontario, on May 27, 2019.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: GAUTHIER J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] This is an appeal from a judgment rendered by Barnes J. of the Federal Court (Federal Court Judge) dated February 1, 2018 (2018 FC 110). In his judgment, the Federal Court Judge dismissed the application for judicial review of Sarabjit Singh Momi (the appellant) from a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB). The IAD dismissed the appellant's appeal from a refusal to allow a sponsorship

application, which, had it been allowed, would have permitted his parents to be admitted to Canada as permanent residents.

[2] This appeal comes to this Court by way of a certified question. The Federal Court Judge certified the question as follows:

> Does the IAD have the authority on an appeal from a family sponsorship refusal brought under subsection 63(1) of the IRPA [*Immigration and Refugee Protection Act*, S.C. 2001, c. 27] to consider and set aside an earlier refusal of an ARC [authorization to return to Canada] to the sponsored family member?

[3] For the foregoing reasons, I would answer the certified question in the negative and dismiss the appeal without costs.

I. Background

[4] The appellant seeks to sponsor his father, Sukhdev Singh (Mr. Singh), and his mother, Satinder Kaur Momi, who applied for permanent residence. The application process was impeded by the fact that Mr. Singh has a previous Canadian immigration history and he accordingly required an ARC in order for his application for permanent residence to be accepted.

[5] Specifically, Mr. Singh came to Canada in 2000 and claimed refugee status shortly after his arrival.

[6] On December 27, 2001, the IRB refused Mr. Singh's refugee claim. On March 11, 2002, the Federal Court dismissed his application for judicial review of that decision. Mr. Singh subsequently applied for a pre-removal risk assessment (PRRA). On September 30, 2003, this

further application was also denied and he was advised to report to the Vancouver International Airport on October 2, 2003. Mr. Singh failed to appear. On October 10, 2003, the Federal Court denied Mr. Singh a stay pending disposition of his application for leave and for judicial review of his PRRA application.

[7] On October 31, 2003, Mr. Singh was asked to attend an interview, but he again did not appear. On March 30, 2004, a warrant was accordingly issued for his arrest. Mr. Singh contends that he left Canada in November 2003 and lived in the United States for some time before returning to India in 2005.

[8] As for the appellant, he became a permanent resident of Canada in December 2005 and subsequently applied to sponsor his parents. On February 5, 2010, the appellant was advised by the Minister of Citizenship and Immigration (the respondent) that he had met the eligibility requirements to sponsor his parents and that his parents' application for permanent residence would be processed in New Delhi.

[9] On November 27, 2012, Mr. Singh was informed that he needed to apply for an ARC in order for his application for permanent residence to proceed. On March 20, 2014, Mr. Singh and his wife attended an interview in person in New Delhi. A few days later, on March 24, 2014, a Deputy Immigration Program Manager denied Mr. Singh's request for an ARC. On May 26, 2014, as a consequence of this refusal, Mr. Singh was sent a letter informing him that his application for permanent residence was refused on the basis of the ARC refusal. That same

day, the appellant was informed that his father did not meet the requirements for permanent residence under the IRPA and that the family sponsorship application was refused.

[10] On July 4, 2014, the appellant appealed the permanent residence decision to the IAD pursuant to subsection 63(1) of the IRPA. One month later, on August 8, 2014, Mr. Singh filed an application for judicial review of the ARC refusal with the Federal Court.

[11] During the month of September 2014, the respondent communicated to Mr. Singh's lawyer his position that the IAD had jurisdiction to review ARC decisions in the context of sponsorship applications and suggested that Mr. Singh discontinue his application for judicial review. In response, Mr. Singh's lawyer stated that his client was of the view that it was open to him to seek judicial review and therefore did not wish to discontinue the application, suggesting instead that the application be held in abeyance pending determination of the IAD jurisdiction issue. In reply, the respondent asserted that the IAD had jurisdiction, that appeal rights must be exhausted pursuant to subsection 72(2) of the IRPA, and that Mr. Singh could either file a discontinuance or continue with the application. If Mr. Singh chose to continue with the application, the respondent would raise this argument at the leave stage. In the end, Mr. Singh never perfected his application to commence judicial review regarding the refusal of his ARC and it was accordingly dismissed.

[12] On June 25, 2015, at the outset of the initial hearing on the appellant's appeal before the IAD, the respondent changed his position without notice and asserted that the IAD did not have jurisdiction to hear the appeal because it concerned a decision to deny an ARC. The Board

Member (Member Tim Crowhurst) adjourned and requested written submissions on the jurisdiction issue.

[13] On March 29, 2016, the Board Member issued an interlocutory decision, dismissed the respondent's contention and determined that the IAD did have jurisdiction to hear the appeal pursuant to paragraph 67(1)(*c*) of the IRPA (*Momi v. Canada (Citizenship and Immigration),* 2016 CanLII 21933). The appeal was streamlined for regular processing and returned to the scheduling unit for a hearing date.

II. The IAD decision

[14] On September 15, 2016, a Board Member of the IAD (Member Sterling Sunley) heard the appellant's appeal on the merits. He did not consider himself bound by the March 29, 2016 decision rendered by Member Crowhurst and offered the parties an opportunity to make further submissions on the jurisdiction issue.

[15] On July 26, 2017, the IAD rendered its final ruling on the appellant's appeal of the permanent residence decision (*Momi v. Canada (Citizenship and Immigration),* 2017 CanLII 61294 (IAD decision)). On the issue of jurisdiction, the IAD acknowledged from the outset that this issue is not "well settled law" (IAD decision at para. 14). The IAD then delineated its jurisdiction in the following way:

> [18] To sum up on this preliminary matter, I find that the IAD does have the jurisdiction to consider whether the ARC refusal is legally valid. However, that jurisdiction should be limited to determining whether the appellant was required to obtain an ARC and whether the decision made by the visa officer regarding the ARC failed to observe a princip[le] of natural justice.

[16] On the facts of the case, the IAD determined that there was no breach of natural justice.

[17] The IAD considered whether there were sufficient humanitarian and compassionate (H&C) considerations in this case to warrant granting discretionary relief. In this regard, the IAD found that the evidence demonstrated that Mr. Singh was willing "to flout Canada's laws, seemingly without much second thought." (IAD decision at para. 30). The IAD concluded that even though there were some positive factors, including the fact that the appellant would benefit from having his parents in Canada, there was "simply not enough evidence" – *i.e.* there were insufficient H&C considerations – to grant relief under section 67 of the IRPA (IAD decision at para. 37). The IAD therefore dismissed the appellant's appeal.

III. The Federal Court Judge's decision

[18] The appellant sought judicial review of the IAD's decision before the Federal Court. The Federal Court Judge rejected the appellant's contention that an appeal lies to the IAD from a decision to refuse an ARC. He found, however, that the IAD can hear an appeal of a sponsor whose family sponsorship application has been refused. The Federal Court Judge further found that the IAD may grant H&C relief, even if an ARC has been refused (Federal Court Judge's decision at para. 8).

[19] Moreover, the Federal Court Judge found that the IAD could not assess an ARC refusal on its merits. Rather, it could only rule on whether the ARC decision was fairly made and whether there were sufficient H&C considerations to override the absence of an ARC. In a footnote, the Federal Court Judge indicated that he had "reservations" about whether the IAD has

the authority to decide whether ARC decisions are fairly made but added that this issue "is of no legal consequence in this case." (Federal Court Judge's decision at para. 10).

[20] Finally, the Federal Court Judge determined that there was no error in the IAD's H&C analysis that warranted intervention and dismissed the appellant's application for judicial review. He concluded by certifying the question stated above.

IV. Analysis

A. *Standard of review*

[21] The role of this Court in an appeal from a decision of the Federal Court on an application for judicial review is to "step into the shoes" of the Federal Court (*Agraira v. Canada (Public Safety and Emergency Preparedness*), 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47). In cases like these where an administrative body is interpreting its home statute, the standard of review is presumed to be reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 30 and 34; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293 at para. 22).

B. *Was the IAD's interpretation of its jurisdiction with respect to an ARC refusal reasonable?*

[22] In interpreting the scope of its jurisdiction, the IAD determined that it did not extend to considering an ARC refusal on its merits. However, the IAD accepted that it had jurisdiction to

determine "whether the appellant was required to obtain an ARC and whether the decision made by the visa officer regarding the ARC failed to observe a princip[le] of natural justice." (IAD decision at para. 18).

[23] In order to consider the reasonableness of the IAD's decision regarding its jurisdiction, subsections 63(1) and 67(1) of the IRPA are pertinent and read as follows:

Right to appeal — visa refusal of family class	**Droit d'appel : visa**
63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	**63 (1)** Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.
Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	**a)** la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	**b)** il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	**c)** sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[24] On its face, the language of subsections 63(1) and 67(1) of the IRPA does not confer upon the IAD the ability to consider the merits of an ARC refusal. Subsection 63(1), which grants a right of appeal in the context of a sponsorship application, specifically provides for an appeal "against a decision not to issue the foreign national a permanent resident visa". This provision is expressly limited to an appeal before the IAD with regard to the permanent residence decision, not with regard to the ARC decision. This is further supported by paragraph 67(1)(*a*) which stipulates that the IAD can allow an appeal if "the decision appealed" – *i.e.* the permanent residence decision – is wrong in law or fact or mixed fact and law.

[25] The reality is that a permanent residence decision is distinct from an ARC refusal. The former is made by a visa officer, whereas the latter is made by a different official, in this case the Deputy Immigration Program Manager located in New Delhi. The evidentiary record and considerations upon which a permanent residence decision and an ARC refusal are reached are also different. The appellant's attempt to fold the ARC refusal at issue into the distinct permanent residence decision with a view to benefiting from a right of appeal conferred by the IRPA cannot succeed. Rather, as concluded by the Federal Court Judge, "[t]he only basis to challenge such a decision [ARC refusal] lies in [the Federal] Court on judicial review." (Federal Court Judge's decision at para. 8). It was thus reasonable for the IAD to conclude that it did not have jurisdiction to consider the merits of the ARC refusal.

[26] It was also reasonable for the IAD to conclude that notwithstanding its inability to consider the merits of an ARC refusal, it could allow the appeal of the permanent residence decision if sufficient H&C considerations were at play. This determination is in accordance with

this Court's previous decision in *Canada (Solicitor General) v. Kainth* (1994), 170 N.R. 367, 81 F.T.R. 318 (F.C.A.). It is also consistent with the wording of paragraph 67(1)(*c*) of the IRPA, which allows the IAD to allow an appeal from a negative permanent residence decision where sufficient H&C considerations warrant "special relief in light of all the circumstances of the case." There is no limiting language in the text of paragraph 67(1)(*c*) to suggest that this "special relief" cannot be granted in cases involving an underlying ARC refusal. On the contrary, the wording of the provision is broad and calls for a consideration of "all the circumstances of the case." The IAD therefore, while foreclosed from considering the merits of an ARC decision, can allow an appeal from the permanent residence decision, notwithstanding an ARC refusal, if, considering all the circumstances, discretionary "special relief" is warranted. As such, it is difficult to agree with the appellant's assertion that the IAD appeal is "illusory".

[27] Finally, as part of its decision, the IAD also found that it had jurisdiction to consider whether there was a breach of natural justice with regard to the ARC refusal. As noted earlier, the Federal Court Judge expressed reservations about this aspect of the IAD's decision but did not further address it because the issue was of no legal consequence in this case. While this is indeed inconsequential, it should be noted that to the extent that the IAD does not have jurisdiction over the merits of an ARC refusal, it likewise cannot have jurisdiction over the question of whether an ARC refusal was determined in breach of principles of natural justice.

[28] To conclude otherwise overlooks, as noted earlier, the fact that a sponsorship application and an ARC application lead to two distinct decisions for which the IRPA contemplates two distinct mechanisms for review. It follows that the language of subsection 63(1) of the IRPA

granting an appeal of a permanent residence decision as part of a sponsorship application cannot on the one hand be used to consider the fairness of an ARC refusal but, on the other hand, be used to bar consideration of its merits. The proper mechanism to challenge the issue of natural justice as well as the merits of an ARC refusal is through judicial review at the Federal Court. Hence, it was unreasonable for the IAD to conclude that it had jurisdiction to consider whether there was a breach of natural justice with regard to the ARC refusal at issue. That being said, the IAD's finding on the natural justice issue is not dispositive of the present case and does not affect the outcome of the appeal.

C. *Was the IAD's conclusion that there were insufficient H&C considerations to override the ARC refusal reasonable?*

[29] This issue was not explicitly raised in the appellant's memorandum of fact and law but was argued by the appellant at the hearing. In essence, the appellant argued that the IAD erred in its H&C analysis by failing to appropriately balance the relevant factors. The appellant further contended that the IAD conferred undue weight to Mr. Singh's negative immigration history, despite other factors favouring the special relief sought.

[30] Upon reviewing the IAD decision, it is clear that the IAD was alive to the facts and fully considered the various circumstances of this case. Given the deference that must be afforded to administrative decision makers in what is in essence a factual inquiry, and given that it is not the role of this Court to reweigh the evidence, I see no basis to interfere with the IAD's decision in this regard.

D. *Procedural conduct*

[31] Although this point was not pressed by the appellant, it should be noted that it was unbecoming of the respondent to refuse Mr. Singh's lawyer's proposal that Mr. Singh's judicial review application in respect of the ARC refusal be held in abeyance pending the IAD's decision on jurisdiction. It was also inappropriate to suggest that Mr. Singh discontinue his judicial review application of the ARC refusal on the basis that the IAD had jurisdiction and to subsequently argue the opposite, without notice, before the IAD. Counsel for the respondent offered no convincing explanation at the hearing for this course of action, which leaves much to be desired.

V. Conclusion

[32] I would answer the certified question as follows:

Question: Does the IAD have the authority on an appeal from a family sponsorship refusal brought under subsection 63(1) of the IRPA to consider and set aside an earlier refusal of an ARC to the sponsored family member?

Answer: No.

[33] For these reasons, I would dismiss the appeal without costs.

"Richard Boivin"
J.A.

"I agree
Johanne Gauthier J.A."

"I agree
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM A JUDGMENT OF BARNES J. OF THE FEDERAL COURT (2018 FC 110), DATED FEBRUARY 1, 2018, DOCKET NO. IMM-3648-17.

DOCKET:	A-78-18
STYLE OF CAUSE:	SARABJIT SINGH MOMI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	MARCH 20, 2019
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	GAUTHIER J.A. GLEASON J.A.
DATED:	MAY 27, 2019

APPEARANCES:

Pawan Joshi Deepak Gautam	FOR THE APPELLANT
Cheryl D. Mitchell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Joshi, Lawyers Surrey, British Columbia	FOR THE APPELLANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT