Federal Court  Cour fédérale

Date: 20191203

Docket: IMM-6153-18

Citation: 2019 FC 1547

Ottawa, Ontario, December 3, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ALI MOHAMAD DIRIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ali Mohammad Dirir (the "Applicant"), applied for an authorization to return to Canada ("ARC") under subsection 52(1) of *Immigration and Refugee Protection Act*, SC 2001, c 27 (*"IRPA"*) on January 7, 2017 to visit his aunt who is a Canadian citizen. A deportation order was issued against him in 2010 for misrepresentation after it was discovered that he had made a

refugee claim in Canada, obtained permanent residence status, and received Canadian citizenship under a different name and while having status as a permanent resident and then as a citizen in the United States of America ("USA").

[2] The Migration Program Manager in New York ("Program Manager") denied the ARC application on June 14, 2018. The Applicant now applies for judicial review of the decision, arguing that the decision was unreasonable primarily on the allegation that the Program Manager failed to consider the interests of the Applicant's elderly aunt by finding that the ARC application would have "no benefits to Canada".

[3] For the reasons that follow, this application for judicial review is dismissed. The Program Manager made a reasonable decision based on the evidence in front of them.

II. **Facts**

A. *Applicant*

[4] The Applicant is a 59-year-old individual, born in Somalia. He became an American citizen on November 2, 1995. He lives in Massachusetts with his three children, Baydan, Yusuf-Hanad, and Dirir. They are all college or university students between the ages of 23 and 26.

[5] The Applicant has worked as a taxi driver in Massachusetts since 2008 and has volunteered with a youth leadership organization for the past 15 years. He completed a program in Business Administration in 1989 at the University of Massachusetts in Boston.

[6] The Applicant's aunt, Asha Ali Farah, is approximately 91 years old. She is a Canadian citizen and lives in Ottawa. The Applicant and his children are his aunt's only living relatives.

[7] When the Applicant and his family lived in Canada, Ms. Farah lived with them and helped raise the children. When they moved to the USA and a deportation order was eventually issued against the Applicant, Ms. Farah continued to call to check in on the children multiple times a day.

[8] The Applicant wishes to visit his aunt to support her as she has a number of health issues. The Applicant considers Ms. Farah to be his *de facto* mother as she raised him after his mother died when he was one month old. He seeks a chance to return to Canada to visit his aunt, as it may be his last time to see her.

[9] Ms. Farah visited the family in Boston in May 2014 and again from September to November in 2015. She is not fit to travel anymore. A doctor's note for Ms. Farah states that she suffers from high blood pressure, severe arthritis, acid reflux, and asthma. The note says that she will require increasing assistance and that the Applicant may need to see her regularly when necessary.

[10] Baydan, the Applicant's daughter, visited Ms. Farah in Canada twice following surgeries on her knee and back. However, Baydan and her siblings are currently unable to visit Ms. Farah while attending school and working.

B. *The Applicant's Immigration History*

[11] In 1991, the Applicant made a refugee claim in Montreal under the name Mohamed Abdi Ali. He obtained permanent residence status in 1992 and Canadian citizenship in 2004. It was then discovered in 2004 through fingerprint matching that the Applicant had previously been granted permanent residence and then citizenship in the United States under a different name, Ali Mohamad Dirir.

[12] The Applicant renounced his Canadian citizenship in 2005. In 2007, the Ottawa Refugee Protection Division allowed the application to vacate his refugee protection. On April 19, 2010, a deportation order was issued against the Applicant for misrepresentation following the preparation of an inadmissibility report under section 44 of the *IRPA*.

[13] It is unclear when exactly the Applicant left Canada for the USA, but the materials submitted with his application indicate that he left sometime between 2004 and 2008.

C. *ARC Decision*

[14] The Applicant had applied for an ARC in order visit Ms. Farah in Canada. His application stated that he planned to visit her for two weeks in February 2017. The application included statutory declarations from two of his children, Baydan and Dirir, as well as a letter from Ms. Farah, a doctor's note for Ms. Farah, the Applicant's financial information, and letters from his employer and from the organization with which he volunteers. The Applicant had previously sought an ARC to visit his aunt, but those applications were also refused.

[15] In assessing the application, the Program Manager considered a number of factors, which correspond to the factors listed in the Immigration, Refugees and Citizenship Canada ("IRCC") Operation Manual, Overseas Processing, "OP 1 Procedures" ("OP 1") for assessing ARC applications:

1. The severity of the IRPA violation that led to the removal.

2. The applicant's history of cooperation with IRCC:

    - Are there any previous immigration warrants?

    - Did the applicant fail to appear for any hearing or removal?

    - Did the applicant pay for the removal costs?

    - Was the applicant removed under escort?

3. The reasons for the applicant's request to return to Canada:

    - Do compelling or exceptional circumstances exist?

    - Are there alternative options available to the applicant that would not necessitate returning to Canada?

    - Are there factors that make the applicant's presence in Canada compelling (e.g., family ties, job qualifications, economic contribution, temporary attendance at an event)?

    - Are there children directly implicated in the application whose best interests should be considered?

    - Can the applicant support him or herself financially?

    - How much time has passed since the infraction that led to the removal order?

    - How long does the applicant intend to stay in Canada?

    - Are there tangible or intangible benefits that may accrue to Canada or the person concerned?

[16] The Program Manager first considered the severity of the Applicant's *IRPA* violation. The Program Manager reviewed how the Applicant had made a refugee claim, obtained permanent residency, and gained citizenship in Canada under a false name while having permanent resident status in the USA in 1987 and then citizenship by 1995. The Program Manager noted that it was believed that the Applicant had renounced his citizenship in 2005 because he was aware of the investigation into his misrepresentation.

[17] Regarding the Applicant's cooperation with IRCC, the Program Manager stated that the Applicant had not failed to appear for any hearing or removal, had paid the costs of his removal, had no criminal activity, and did not have to be removed under escort.

[18] The Program Manager then assessed the Applicant's reasons to return to Canada. The Program Manager described that the Applicant was seeking to return to Canada to visit his aunt and noted the Applicant claimed that his aunt had raised him and was his *de facto* mother. In considering whether the Applicant had compelling and exceptional circumstances for being granted an ARC, the Program Manager stated that the aunt was not fit to travel due to memory loss, and knee and kidney problems. The Program Manager noted that Ms. Farah was able to visit in 2016 for three months, but that it had been difficult and likely her last visit to the USA.

[19] The Program Manager appeared to accept there were no alternative options for the Applicant because his aunt could not visit him in Boston due to her ill health. The Program Manager characterized the Applicant's reunification with his aunt in declining health as "a positive factor that bears some weight."

[20] The Program Manager then found that there were no best interests of the child concerns nor concerns about the Applicant's ability to financially support himself. The Program Manager noted that the Applicant indicated that the stay would be temporary, but that his aunt's health concerns could motivate a longer stay.

[21] The last factor considered by the Program Manager was whether there were tangible or intangible benefits that may accrue to Canada or the person concerned. The Program Manager concluded that the Applicant would benefit from the opportunity to visit his aunt and "unhindered access to Canada", but that there were "no benefits to Canada."

[22] The Program Manager characterized the Applicant's immigration history as a "record of contempt" for Canada's immigration laws that was a significant negative factor in the assessment. The Applicant may have continued in his misrepresentation if his false identity and status in the USA had not been revealed. The Program Manager concluded that the Applicant's reasons for seeking entry to Canada were not sufficiently compelling to warrant the issuance of an ARC.

III. **Issue and Standard of Review**

[23] The issue is whether the Program Manager's decision to deny the Applicant's ARC application was reasonable.

[24] The standard of review for an ARC decision is reasonableness (*Umlani v Canada (Citizenship and Immigration)*, 2008 FC 1373 at para 23 [*Umlani*]; *Sahakyan v Canada (Minister*

of Citizenship and Immigration), 2004 FC 1542 at para 34 [*Sahakyan*]). An ARC decision is fact-driven and highly discretionary with few requirements for detailed reasons or justification, but the decision still must be non-arbitrary and defensible with regard to the facts and law (*Umlani* at paras 60-61).

IV. **Analysis**

[25] The Applicant submits that the Program Manager's decision was unreasonable because the Program Manager concluded that the granting of the ARC had "no benefits to Canada", a finding that was central to the Program Manager's decision. In doing so, the Program Manager did not consider the interests of Ms. Farah, a Canadian citizen.

[26] The Applicant states that despite the discretionary nature of an ARC, a decision-maker is obliged to consider relevant factors and special circumstances (*Sahakyan* at para 35; *Akbari v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1421 at paras 11-13 [*Akbari*]).

[27] The Applicant characterizes his ARC application as first and foremost about the health of his aunt. According to the Applicant, the issuance of the ARC is the only way for Ms. Farah to get help from the Applicant. He argues that the benefit of the ARC to Ms. Farah as a Canadian citizen was a patently relevant factor that the Program Manager failed to consider, as shown by the Program Manager's conclusions that there were "no benefits to Canada" in granting the ARC. The Program Manager did not discuss how Ms. Farah would be affected by the decision. The interests of Canada include the interests of its citizens, especially elderly and vulnerable citizens who seek access to care and support from their family. The Applicant also argues that

finding there were “no benefits to Canada” was a “perverse” finding made without regard to the evidence, because of the evidence of Ms. Farah’s ill health and need for support as a Canadian citizen.

[28] The Respondent argues the Program Manager’s reasons demonstrate that the Program Manager considered the relevant circumstances, including the positive factor of the Applicant’s reunification with his aunt, and found that it was outweighed by the severity of his *IRPA* violations. The Respondent notes that the Program Manager’s reasons and decision must be read as a whole when assessing the reasonableness of the decision (*Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-15).

[29] The Respondent submits that ARCs are not routinely granted, and the Applicant must show compelling reasons to justify granting an exception to the permanent bar on the Applicant’s entry to Canada as a result of his violation of Canadian immigration laws. The factors set out in the non-binding OP 1 guidelines help indicate what constitutes a reasonable exercise of the Program Manager’s discretion (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 72-74). The OP 1 guidelines, as cited by Justice Shore in *Parra Andujo v Canada (Citizenship and Immigration)*, 2011 FC 731 at paras 1 and 26, emphasize that the purpose of subsection 52(1) of the *IRPA* is to denounce non-compliance with Canada’s immigration laws. Therefore granting an ARC requires that the Applicant demonstrate that his compelling reasons to return to Canada outweigh the circumstances that led to his deportation order.

[30] The Respondent argues that although the application could have been of benefit to Ms. Farah, it was reasonable for the Program Manager to conclude that there were no benefits to Canada as a whole. The Applicant is arguing for the Court to adopt a specific definition of the phrase "benefits that may accrue to Canada" in a guideline, which is not the type of analysis appropriate for a deferential standard of review. The Respondent states that it was open to the Program Manager to find that the Applicant's misrepresentation under Canadian immigration laws outweighed the benefits to Ms. Farah and the Applicant.

[31] I agree with the Respondent that the Program Manager's decision was reasonable. Although the Applicant has characterized the issue with the Program Manager's reasoning either as a failure to consider a relevant factor or a perverse finding not based on the evidence, the main issue is whether the Program Manager reasonably considered the interests of the Applicant's aunt in the ARC application. The impact of the ARC decision on Ms. Farah as the Applicant's elderly and ill relative is clearly a relevant factor for determining whether there are compelling reasons for granting an ARC.

[32] I note that the Applicant has not taken issue with the Program Manager's characterization of the *IRPA* violations that led to his deportation order. Although the Applicant states that he is sorry for his past actions, he does not deny that he received permanent resident status as a refugee and Canadian citizenship under a false identity, while having permanent resident status and subsequent citizenship status in the USA. Given that the Applicant has not provided any more information on how or why the misrepresentation occurred, I accept the Program Manager's conclusion that these violations were relatively serious. The Applicant's

misrepresentation throughout his refugee claim and citizenship process is more severe than in a case such as *Khakh v Canada (Citizenship and Immigration),* 2008 FC 710 [*Khakh*] where the only violation of *IRPA* was the failure to leave Canada on time. I note, however, that the Applicant's misrepresentation is less serious than other grounds leading to a deportation order such as serious criminality or human rights violations, where the security and safety of Canadians may be at risk if an ARC was granted.

[33] As stated by the Court in *Akbari* at para 11, an ARC application is not to be considered a "mini humanitarian and compassionate application." The Program Manager was not required under the *IRPA* to make any specific factual considerations (*Quintero Pacheco v Canada (Citizenship and Immigration),* 2010 FC 347 at para 47). However, an ARC decision must still be based on all the circumstances of the case and the underlying objectives of the *IRPA* (*Khakh* at para 26).

[34] In this case, it is helpful to consider how the factors in Part 6.2 of the OP 1 guidelines are set out since the Applicant's primary argument is based on the interpretation of one of these factors. There are three main considerations for ARC applications under OP 1: 1) the severity of *IRPA* violations; 2) the Applicant's cooperation with the IRCC; and 3) the reasons for the Applicant's request to return. Under each of these considerations, there are proposed questions to guide the Program Manager's assessment. According to Part 6.1 of the OP 1, the Program Manager is then expected to weigh the reasons for the Applicant's request to return against the circumstances leading to the removal order.

[35] The fact that the Program Manager found that there were no tangible and intangible benefits to Canada when considering one of the 16 questions set out in OP 1 does not mean that the Program Manager did not consider Ms. Farah's interests elsewhere in the reasons. In the Global Case Management System ("GCMS") notes, the Program Manager had already found that "[r]eunification with his aunt and her declining health is a positive factor that bears some weight." The Program Manager had noted the inability of Ms. Farah to visit the Applicant due to her health and age, as well as the important role Ms. Farah had played in the Applicant's early life. The Program Manager's finding that there were "no benefits to Canada" is not a conclusion regarding the Applicant's reasons for returning to Canada overall. In the context of the guidelines, it was reasonable for the Program Manager to consider "benefits to Canada" as referring to the broader benefits to the country, given that the Program Manager had already considered the positive impact of granting the ARC on Ms. Farah.

[36] The Applicant appears to suggest that the Court should assess the Program Manager's interpretation of the words "benefit to Canada" in the guidelines. However, it is not an error of law to misinterpret or misapply guidelines which are not legally binding (*Canada (Citizenship and Immigration) v Thamotharem*, 2007 FCA 198 at para 59). It would be improper for the Court to weigh in on the interpretation of terms in a non-binding guideline in the same way it might assess the interpretation of a statute. Instead, the question is whether the Program Manager's reasons as a whole when read together with the outcome fall within the range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[37] In addition, the Applicant has overstated the role the Applicant could play for Ms. Farah. Although visiting his ailing relative could give both the Applicant and his aunt significant comfort, the Applicant was applying for a temporary resident visa for a two-week trip. The Applicant appears to be arguing that the Program Manager should have considered the Applicant's value to Ms. Farah as a possible caregiver and support system. Given that the Applicant only applied to stay in Canada for two weeks, the Applicant would not have been able to provide continuing support to Ms. Farah in her day-to-day life if the ARC had been granted. It was therefore reasonable for the Program Manager to consider the value of allowing the Applicant to temporarily reunite and visit with Ms. Farah given her health condition, but not to further delve into the possibility of the Applicant being a long-term caregiver to Ms. Farah.

V. **Certified Question**

[38] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[39] This application for judicial review is dismissed. The Program Manager's decision to refuse the Applicant's ARC application is reasonable. The Program Manager weighed the Applicant's reason for visiting his ailing and elderly aunt in Canada against his previous violations of *IRPA* and found that the Applicant's reason to return did not sufficiently outweigh the reason for the issuance of the deportation order. The decision is reasonable and does not warrant this Court's intervention.

JUDGMENT IN IMM-6153-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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