Federal Court  Cour fédérale

Date: 20200608

Docket: IMM-5223-19

Citation: 2020 FC 673

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, June 8, 2020

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

THIERNO NDIR

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Minister of Citizenship and Immigration (the Minister) is seeking judicial review of a decision by the Immigration Appeal Division (IAD) dated July 3, 2019, that allowed Thierno Ndir's appeal.

[2] The IAD concluded that the decision by an officer of the Canada Border Services Agency (CBSA) to issue a removal order against Mr. Ndir was legally valid and that Mr. Ndir met the onus of proof to warrant discretionary relief. Therefore, on the basis of the evidence before it and on a balance of probabilities, the IAD concluded that there were humanitarian and compassionate considerations that warranted special relief, in light of all the circumstances of the case.

[3] The IAD therefore set aside the removal order and found that Mr. Ndir had not lost his permanent resident status.

[4] For the reasons below, the application for judicial review will be allowed.

II. Relevant facts

[5] Mr. Ndir is a citizen of Senegal. On December 8, 2005, he arrived in Canada with his spouse and children and, since Mr. Ndir had been selected as a member of the investor class, they were granted permanent resident status in Canada. Permanent resident cards were issued, and Mr. Ndir's card was valid until December 14, 2010.

[6] Computerized notes in the Global Case Management System (GCMS) show that Mr. Ndir was asked in 2011 to report to the offices of Citizenship and Immigration Canada (CIC) in Canada on April 26, 2011, to receive his new permanent resident card. The computerized notes also show that, on April 15, 2011, Mr. Ndir applied to the Canadian authorities in Dakar for a travel document to return to Canada to collect his new permanent resident card. He received

the travel document and completed the procedure to obtain his new card. The computerized notes indicate that Mr. Ndir was in Senegal because his father had died, and a death certificate was filed as part of verifying his status.

[7] On April 11, 2017, the CIC denied the application for citizenship that Mr. Ndir had submitted in 2011 because he had misrepresented himself. The CIC relied on paragraph 22(1)(e.1) of the *Citizenship Act*, RSC 1985, c C-29 (Certified Tribunal Record at pp 74–79).

[8] On September 23, 2017, Mr. Ndir arrived from Senegal at the Canadian port of entry at the Montréal-Trudeau Airport. He was then interviewed by a CBSA officer to determine whether he met the residency obligation under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Immigration Act).

[9] The officer observed from the computerized notes in the system that Mr. Ndir had left Canada for Senegal in September 2016, reportedly going and staying there because of the illness and death of his father and the subsequent settling of the estate. The officer noted that Mr. Ndir filed a death certificate indicating that the date of death was December 5, 2016, and an estate document indicating that the estate of the late El Hadji Médoune Ndir (the father) was settled on Saturday, October 7, 2006, and that the death occurred on Saturday, May 2, 2017. The officer noticed that the dates did not agree and that Mr. Ndir had referred to his father's death in 2011 in a permanent residence determination. She also noted that Mr. Ndir's application for citizenship had been denied for misrepresentation.

[10] Giving him the benefit of the doubt, the officer calculated that Mr. Ndir had been in Canada for 717 days during the five-year reference period from September 23, 2012, to September 23, 2017. She noted that Mr. Ndir's family was in Canada, that Mr. Ndir had been retired since 2007, that he had never worked in Canada and that the exemptions under the Immigration Act did not apply. Finally, she did not consider humanitarian and compassionate grounds because Mr. Ndir had provided a death certificate that, she believed, was fraudulent.

[11] On that same day, September 23, 2017, the officer signed a report under subsection 44(1) of the Immigration Act and declared Mr. Ndir inadmissible under section 41 of the Immigration Act, for failing to meet the residency obligation. On the same day, the Minister's delegate issued a removal order, in the form of a departure order, against Mr. Ndir.

[12] Mr. Ndir appealed to the IAD from this removal order, as provided under section 63 of the Immigration Act.

III. IAD decision

[13] On December 20, 2017, counsel for Mr. Ndir filed written submissions and accompanying documents with the IAD. Mr. Ndir disputed the CBSA officer's calculation of the number of days spent in Canada and the calculation of the five-year period, and presented humanitarian and compassionate considerations regarding the factors in *Bufete Arce v Canada (Citizenship and Immigration*), 2003 CanLII 54304 (CA IRB) on June 16, 2013. He discussed the reasons for Mr. Ndir's departure from Canada, the reasons for his extended stay abroad, his

degree of establishment in Canada initially and subsequently, his family ties to Canada, and the hardship and dislocation to both him and his family members in Canada if he were to lose his residence. Mr. Ndir relied primarily on his parents' illness to justify his trips to Senegal, and the presence and work of his spouse, their children and their grandchildren to demonstrate his establishment in Canada.

[14] Regarding the alleged misrepresentation, Mr. Ndir told the IAD that his father's death certificate did indeed show the date of death as December 5, 2016, but that there were errors in the estate document, in particular that his father died on May 2, 2017, and that the estate was settled on October 7, 2006. He argued before the IAD that the estate document was merely a draft and that May 2, 2017, was the date on which the distribution of the estate was discussed. Allegedly, some statements in the document were still being disputed by some members of the family. As for the allegation that he had reported his father's death twice, Mr. Ndir submitted that it was rather his father's younger brother who died in 2011, whom he referred to as his father, according to his custom. Lastly, regarding the denied application for citizenship, Mr. Ndir submitted that he had not prepared the application and was not notified of this fact, and he acknowledged that it may have contained errors.

[15] The IAD found that Mr. Ndir had spent 629 days in Canada during the reference period. It confirmed that Mr. Ndir was not disputing the legal validity of the removal order and that he was therefore basing his appeal on the discretionary or special relief powers of the IAD.

[16] Accordingly, the IAD considered credibility issues and humanitarian and compassionate grounds. The IAD noted three allegations by the Minister relating to Mr. Ndir's credibility. First, the IAD noted that the death certificate and estate documents did show different dates, but it found Mr. Ndir's explanation that the estate document was poorly written to be plausible. The IAD was therefore satisfied that Mr. Ndir's father died on December 5, 2016, and that Mr. Ndir stayed in Senegal to arrange for his father's funeral and the settlement of the estate.

[17] Second, the IAD accepted Mr. Ndir's explanation and acknowledged that Mr. Ndir may have identified his father's brother as his father in his 2011 application, despite a lack of documentary evidence to that effect

[18] Third, the IAD stated that it did not find Mr. Ndir to be credible regarding the denial of his citizenship application for misrepresentation. The IAD was of the opinion that, even if Mr. Ndir had lied in his citizenship application, it must consider whether there were humanitarian and compassionate considerations in favour of allowing his appeal.

[19] Regarding humanitarian and compassionate considerations, the IAD began by stating that being approximately 100 days short is a significant breach. It then reviewed (1) the reasons for leaving Canada and staying abroad, namely the death of Mr. Ndir's father, concluding that this weighed slightly in Mr. Ndir's favour; (2) credibility issues, on which the IAD did not state a clear position; (3) the best interests of the grandchildren in Canada, which weighed heavily in Mr. Ndir's favour; (4) the fact that Mr. Ndir was retired and that his children were well established in Canada, drawing no negative inference from Mr. Ndir's lack of employment in

Canada; (5) the potential repatriation of proceeds from the sale of an asset in Senegal, finding that Mr. Ndir was well established, which weighed in favour of granting discretionary relief; and (6) its view that Mr. Ndir could return to Senegal and live there but that his immediate family was in Canada and he had an active role in the lives of his children, which weighed slightly in Mr. Ndir's favour.

[20] The IAD found that the CBSA officer's decision to issue a removal order against Mr. Ndir was legally valid and that Mr. Ndir had met the onus of proof to warrant discretionary relief.

IV. Parties' arguments

[21] The Minister submits that the decision is reviewable on a reasonableness standard and that the decision is unreasonable in respect of the facts and the law.

[22] In essence, the Minister submits that the IAD erred (1) in accepting Mr. Ndir's simplistic explanations for the inconsistencies in his documents and earlier statements, without supporting its reasoning and without objective evidence; (2) in taking Mr. Ndir at his word about the inconsistencies in the documents while finding that he is not credible because his citizenship application was denied for misrepresentation; (3) in analyzing the evidence in isolation and in a cursory manner without considering the context; (4) in disregarding credibility issues in its assessment of humanitarian and compassionate considerations (*Canada (Citizenship and Immigration) v Liu*, 2016 FC 460; *Canada (Public Safety and Emergency Preparedness) v*

Nizami, 2016 FC 1177; *Li v Canada (Citizenship and Immigration)*, 2018 FC 187); (5) in considering irrelevant factors such as the fact that the family is well established in Canada (*Canada (Public Safety and Emergency Preparedness) v Abou Antoun*, 2018 FC 540 at paras 26–29) and that Mr. Ndir is intending to sell an asset in Senegal and repatriate the proceeds to Canada, which is forward looking (*Canada (Public Safety and Emergency Preparedness) v Lotfi*, 2012 FC 1089 at paras 21–23; *Nassif v Canada (Citizenship and Immigration)*, 2018 FC 873 at para 33).

[23] Lastly, the Minister submits that, to be reasonable, the findings and overall conclusion must withstand a somewhat probing examination (*Canada (Citizenship and Immigration) v Wright*, 2015 FC 3). The Minister further states that permanent resident status is not a status to be lightly given away. Allowing an appeal for humanitarian and compassionate considerations is an exceptional relief (*Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204).

[24] Mr. Ndir replies that the IAD decision is reasonable. He reiterates his explanations for the inconsistencies and submits that the IAD heard the testimony, considered the explanations and reviewed the documents, and that the onus is on it to draw the necessary conclusions.

[25] Mr. Ndir submits that the decisions on which the Minister relies, *Canada (Citizenship and Immigration) v Liu*, 2016 FC 460; *Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1177; and *Li v Canada (Citizenship and Immigration)*, 2018 FC 187, do not apply in this case because the IAD considered earlier misrepresentations and drew its conclusions following an adversarial debate. He further states that *Canada (Minister of Public Safety and*

Emergency Preparedness) v Antoun, 2018 FC 540, differs from this case in that Mr. Antoun never intended to immigrate but merely intended to settle his family.

[26] Mr. Ndir submits that the Tribunal's conclusions reasonably flow from its careful analysis of the evidence and that they are the obvious conclusions in the circumstances.

V. Analysis

[27] I agree with the parties that the IAD decision should be reviewed on a standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (*Vavilov*). The focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome (at para 83). The courts are, as a general rule, to refrain from deciding the issue themselves (at para 83); they must instead examine the reasons provided with respectful attention and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion (at para 84).

[28] It is useful here to consider the statutory regime governing IAD decisions on humanitarian and compassionate grounds and to examine the scope of the IAD's decision. For example, under section 28 of the Immigration Act, a permanent resident meets the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are physically present in Canada. Other situations are provided for, but they do not apply in this case.

[29] Where there is a breach, an officer may determine that humanitarian and compassionate considerations relating to the permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status, and this overcomes any breach of the residency obligation prior to the determination. If the officer does not make this humanitarian and compassionate determination, the permanent resident is declared inadmissible under section 41 of the Immigration Act, their permanent resident status is lost, and a removal order is issued.

[30] Under section 63 of the Immigration Act, a person may appeal to the IAD against a decision to make a removal order against them. Paragraph 67(1)(c) states that, to allow an appeal, the IAD must be satisfied that, at the time that the appeal is disposed of, 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.

[31] The powers of the IAD concerning removal orders are highly discretionary; however, the discretion is exceptional and should not be exercised routinely or lightly (*Canada (Minister of Public Safety and Emergency Preparedness) v Antoun*, 2018 FC 540 at para 19).

[32] I am also aware that it is well established that "credibility determinations, which lie within 'the heartland of the discretion of triers of fact', are entitled to considerable deference upon judicial review and cannot be overturned unless they are perverse, capricious or made without regard to the evidence" (*Siad v Canada (Secretary of State)*, [1997] 1 FC 608 (CA)). Moreover, the administrative decision maker has "the benefit not only of seeing and hearing the

witnesses, but also of . . . expertise" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC) at para 14).

[33] Therefore, the reviewing court must ask whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

[34] In this case, I am persuaded that the IAD decision does not bear those hallmarks.

[35] First, the IAD accepted Mr. Ndir's explanations for the inconsistencies in his documents and earlier statements without supporting its reasoning and without objective evidence. The IAD received no objective evidence in support of the cultural practice described. Moreover, the estate document, on its face, does not appear to be a draft version, since it was signed by four of the five parties, provides clear details on the amounts allocated to the widow and to each family, confirms that the amounts were distributed immediately and confirms that all parties were satisfied. In addition, counsel for Mr. Ndir described the document as a [TRANSLATION] "court document" and not as a draft version at the hearing before the IAD. Lastly, at the hearing before the IAD, Mr. Ndir was unable to give a reason for not filing the final version of the document, even though he stated that he had returned to Senegal twice since September 2017.

[36] It is even more difficult to understand how readily the IAD accepted Mr. Ndir's explanations without evidence in the context of this case, given that the IAD agreed that

Mr. Ndir's citizenship application had been refused for misrepresentation and that it found Mr. Ndir's explanations in that regard to be not credible.

[37] This Court has repeatedly stated that misrepresentation is a relevant factor in the assessment of establishment factors: "To do otherwise is to place the immigration cheat on an equal footing with the person who has complied with the law" (*Canada (Citizenship and Immigration) v Liu*, 2016 FC 460). In this case, however, the IAD virtually ignored the credibility issues related to the citizenship application in its assessment of humanitarian and compassionate considerations. It noted them but did not support its reasoning or explain the impact on its analysis (*Canada (Public Safety and Emergency Preparedness) v Nizami*, 2016 FC 1177; *Li v Canada (Citizenship and Immigration)*, 2018 FC 187).

[38] Finally, the IAD considered irrelevant factors such as the fact that the family is well established in Canada (*Canada (Public Safety and Emergency Preparedness) v Antoun*, 2018 FC 540 at paras 26–29), and the intention to sell an asset in Senegal and repatriate the proceeds of the sale to Canada, which is forward looking (*Canada (Public Safety and Emergency Preparedness) v Lotfi*, 2012 FC 1089 at paras 21–23; *Nassif v Canada (Citizenship and Immigration)*, 2018 FC 873 at para 33).

[39] I agree with Mr. Ndir that this Court owes a high degree of deference to the IAD's assessment of the evidence and the humanitarian and compassionate factors. In this case, however, I find that the Court's intervention is warranted because the IAD erred by considering irrelevant factors to be favourable, by failing to take past misrepresentation into account in the

assessment of humanitarian and compassionate considerations, and by making credibility findings arbitrarily and without supporting its reasoning.

[40] The application for judicial review will be allowed.

JUDGMENT in IMM-5223-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.

2. The matter is referred back to the IAD for redetermination.

3. No question is certified.

"Martine St-Louis"
Judge

Certified true translation
This 2nd day of July 2020.

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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