Federal Court  Cour fédérale

Date: 20100113

Docket: IMM-2367-09

Citation: 2010 FC 38

Ottawa, Ontario, January 13, 2010

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

AYED SALEM ABED SALEM

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a straightforward judicial review in which the issue is whether the Immigration Appeal Division (IAD) was reasonable in its decision to allow an appeal of a Visa Officer's determination that the Respondent had not met the permanent resident's physical presence in Canada requirement.

The sole ground on which the IAD overturned the Visa Officer is its conclusion that there were sufficient H&C grounds to justify special relief.

II. FACTS

[2] The Respondent is a citizen of Jordan and resides in Dubai.

[3] In August 2002 the Respondent came to Canada with his family. His evidence is that one of his children became ill on the flight to Canada and that upon arrival the child was taken to the hospital. The evidence is that the hospital bill was $10,000 for the child's treatment and that in order to pay off the debt, the Respondent returned to Jordan to work. That debt was paid off in 18 months.

[4] There is no dispute that the Respondent does not meet the test of 730 days in Canada over the immediately preceding five years. In fact, the Respondent has only spent 308 days in Canada since August 2002 to April 2009.

[5] The IAD found a number of factors supporting an H&C finding to overturn the Visa Officer's decision. The conclusion reached by the IAD is important; it reads:

> The visa officer's determination of the appellant's contravention of the residency obligation is legally valid. However, taking into account the best interests of a child directly affected by the decision, there are sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case.

III. ANALYSIS

A. *Standard of Review*

[6] In the usual course a decision such as the IAD's is entitled to a deference because of the highly discretionary nature of the IAD's finding and its superior position to assess credibility (see *Dunsmuir v. New Brunswick*, 2008 SCC 9 and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12).

[7] Indeed, as held in *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 (decided before *Dunsmuir* and *Khosa*, above), findings on credibility should only be overturned if they are perverse, capricious and made without regard for the facts.

[8] However, where there are contradictory statements and inconsistent findings or when there is no real evidence to support a decision, that decision is unreasonable (see *Canada (Public Safety and Emergency Preparedness) v. Udo*, 2009 FC 239). It is important to note that in the *Udo* decision, the Court criticized the decision maker for inserting "boiler plate" language about the best interest of the children when there were no children involved.

[9] Given the standard of review and recognizing the role of the IAD in this discretionary decision, the Court would be reluctant to interfere except for the fact that the decision is unreasonable, inconsistent and made without regard to the evidence or the lack thereof.

B. *Reasonableness of the Decision*

[10] The IAD's decision is unreasonable for the following reasons:

a. The IAD acknowledged that the Respondent did not put before it documentary evidence of his efforts to find work, including applications, rejection letters, etc. – the usual evidence one would reasonably expect – and yet the IAD concluded as an H&C factor that the Respondent could not find work in Canada. The IAD's conclusion is inconsistent with the absence of any corroborating or other evidence of attempts to secure work.

b. The IAD seemed to accept the Respondent's evidence that he had changed employer because there was an opportunity to move to Montreal yet there was not one piece of evidence from the employer. This issue was raised for the first time at the IAD hearing when the Respondent obviously knew he should have had evidence to support his contention. The Respondent says he now has a letter from the employer but it was never before the IAD.

c. The IAD appeared to place significant weight as a mitigating factor that the Respondent had to leave Canada within days of arrival to pay off hospital debt. However, that debt was paid off in approximately 2004 and could hardly be a relevant or compelling factor in 2009 when the IAD heard the appeal.

d. The IAD concluded that the "best interests of the children" justified the extraordinary relief yet there was no supporting evidence on this point as required by *Owusu v. Canada (Minister of Citizenship and Immigration),* 2004 FCA 38. The only reference to the children was under the IAD's consideration of "Initial and

> Continuing Establishment in Canada". The specific issue of the "best interest of the children" was never advanced nor analyzed.

[11] Therefore, the IAD's decision is unreasonable in these circumstances. Permanent resident status is not an expedited visitor's visa process and is not a status to be lightly given away.

IV. CONCLUSION

[12] For these reasons, the judicial review will be granted, and the IAD's decision quashed. The Applicant requested that the matter be referred back for a new decision by a differently constituted panel. The Court will accede to this request and the Court will expect that the Respondent will put forward a better case with real corroborating evidence where it can be properly tested.

[13] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is granted, the IAD's decision is quashed, and the matter is to be referred back for a new decision by a differently constituted panel.

"Michael L. Phelan"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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