Federal Court  Cour fédérale

Date: 20120201

Docket: IMM-3732-11

Citation: 2012 FC 123

Ottawa, Ontario, February 1, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

SUMAIYA ZAKIRHUSEN MOTALA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This decision arises from an application for judicial review of a May 12, 2011 decision by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB). In that decision, the IAD dismissed the applicant's appeal of a visa officer's decision refusing the applicant's request to sponsor ten other family members. For the reasons that follow, the application is dismissed. A question is certified under section 74 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

Background

[2] Under the regime established by Division 3 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) (*Regulations*), a Canadian who wishes to sponsor family members to come to Canada must establish that they have the financial capacity to support their family members on arrival into Canada. Section 133(1)(*j*)(i) addresses this by requiring evidence of income:

133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	**133.** (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
…	
(*j*) if the sponsor resides	*j*) dans le cas où il réside :
(i) in a province other than a province referred to in paragraph 131(*b*), has a total income that is at least equal to the minimum necessary income, …	(i) dans une province autre qu'une province visée à l'alinéa 131*b*), a eu un revenu total au moins égal à son revenu vital minimum,…

[3] Minimum necessary income (MNI) is a prescribed term. The amount or threshold, previously known as the low income cut-off or by its acronym, LICO, is established by reference to various economic and social indicators and varies on a regional basis. The MNI is not in issue. What is in issue is how the applicant's income is established in order to determine whether the MNI has been met. In this regard, the *Regulations* provide, with limited exception, that the Notice of Assessment is to be determinative:

134. (1) For the purpose of subparagraph 133(1)(*j*)(i), the total income of the sponsor shall be determined in accordance with the following rules:	**134.** (1) Pour l'application du sous-alinéa 133(1)*j*)(i), le revenu total du répondant est déterminé selon les règles suivantes :
(*a*) the sponsor's income shall be calculated on the basis of the last notice of assessment, or an equivalent document, issued by the Minister of National Revenue in respect of the most recent taxation year preceding the date of filing of the sponsorship application;	*a*) le calcul du revenu se fait sur la base du dernier avis de cotisation qui lui a été délivré par le ministre du Revenu national avant la date de dépôt de la demande de parrainage, à l'égard de l'année d'imposition la plus récente, ou tout document équivalent délivré par celui-ci;
(*b*) if the sponsor produces a document referred to in paragraph (*a*), the sponsor's income is the income earned as reported in that document less the amounts referred to in subparagraphs (*c*)(i) to (v);	*b*) si le répondant produit un document visé à l'alinéa *a*), son revenu équivaut à la différence entre la somme indiquée sur ce document et les sommes visées aux sous-alinéas *c*)(i) à (v);

[4] The *Regulations* also provide that the period of time used for determining whether the MNI has been met is the 12-month period preceding the date of the application. This is known as the "lock in period". In this case, the application for sponsorship was in 2005; hence, the section 134 lock in period was the 2004-2005 taxation year. The applicant's application failed as her income ($40,274) as reflected on the Notice of Assessment, fell far short of the MNI of $63 591.

[5] Four years later, however, the applicant's financial circumstances had apparently changed. The sponsor's husband and co-signor on the application now had a much higher income. They appealed the decision of the visa officer to the IAD, citing a change in circumstances.

[6] It is not disputed that, as of the hearing before the IAD in 2011, the sponsor and her co-signor husband had submitted Notices of Assessment which established that, as of 2010, they met the MNI requirement for sponsorship. This combined income was comprised, in part, of the co-signor's employment income of $65,000 and the sponsor's self-employment income of some $17,655.

[7] The IAD found, correctly, that as of October 12, 2005, being the date the application was filed, and the lock in date, the applicant did not meet the MNI requirement and in consequence sustained the decision of the visa officer. This, however, did not end the matter, as the IAD also had discretion to grant relief given the change in circumstances.

[8] In assessing the change in circumstances, and whether it ought to grant discretionary relief, the IAD had concerns as to whether the applicant's income from self-employment as reported in the 2010 Notice of Assessment was genuine. It found that the applicant's self-earned income *could* have been over-reported in 2010 for the purposes of the sponsorship application and therefore deducted the income from self-employment from the total. Thus, when $17,655 was deducted from the claimed combined income of $79,398, the applicant fell below the MNI to support ten people.

[9] The IAD also noted that the income levels reported were inconsistent with the fact that the applicant and her husband lived in subsidized housing. It also noted that the applicant had failed to produce income and expense reports in support of her baby-sitting business, even though twice requested.

Why this finding mattered

[10] The factual foundation on which the IAD assessed the case -specifically, its finding that the applicant's income fell below the MNI - was critical as it determined whether, in the exercise of its discretion, the more stringent test for humanitarian and compassionate relief or the more lenient test expressed in the IAD decision of *Jugpall v Canada (Minister of Citizenship and Immigration)*, [1999] IADD No 600 would apply to the applicant.

[11] Under this more lenient test, if the applicant's income in 2011 exceeded the MNI, the IAD would consider whether there were positive factors, independent of financial circumstances, to warrant "special relief" and which would support the conclusion that it would be unfair to require the applicant to recommence the entire sponsorship application process from the beginning. If however, the applicant did not meet the MNI in 2011, then the more stringent test applicable to humanitarian and compassionate consideration - whether there was undeserved or disproportionate hardship - would apply. This fork in the road, as it may be described, does not arise from any legislative requirement, but rather as a consequence of the IAD jurisprudence**;** *Jugpall*; *Chirwa v Canada (Minister of Citizenship and Immigration)*, [1970] IABD No 1.

Summary of Positions

[12] The argument is clearly joined - the applicant contends that the IAD had no jurisdiction to go behind the Notice of Assessment in considering which of the two tests should be applied. The applicant contends that the regulatory scheme supports this argument. By virtue of section 134 of the *Regulations*, the Notices of Assessment are "deemed to be income" for the purposes of the initial determination, and, hence, there should be symmetry between the two stages of the process.

Whatever the scope of the IAD jurisdiction, it does not extend to disregarding the Notice of Assessment as proof of income, and the IAD was bound by the express language of the *Regulations*, which made the Notice of Assessment dispositive, to apply the more lenient test.

[13] The respondent advances a policy-based argument, noting the mischief that might befall the sponsorship system if the IAD were, as the respondent characterized it, to "blindly accept" the Notice of Assessment as proof of income. Income generated through self-employment can be inflated by deferring expenses and income from one year to another. I note, however, that the *Regulations* "blindly accept", again, to use the respondent's language, the Notice of Assessment on the initial application and make no distinction between income generated through employment or self-employment. I also note that the mischief cited by the respondent would be equally at issue on the initial application. The respondent contended that the application forms, required by the respondent to be completed, draw a distinction between the two forms of income. However, forms developed by the government in the administration of the *Act* do not constitute a legally acceptable basis for interpreting the *Regulations*.

[14] Blind acceptance or not, the primacy accorded to Notices of Assessment was a considered policy choice of the Minister and Governor in Council in enacting the *Regulations* in question. It is thus difficult to impugn the use of the Notice of Assessment for the determination of "the income earned" in section 134(1)(c) which provides:

134. (1) For the purpose of subparagraph 133(1)(*j*)(i), the total income of the sponsor shall be determined in accordance with the following rules:	**134.** (1) Pour l'application du sous-alinéa 133(1)*j*)(i), le revenu total du répondant est déterminé selon les règles suivantes :
	…

…

(*c*) if the sponsor does not produce a document referred to in paragraph (*a*), or if the sponsor's income as calculated under paragraph (*b*) is less than their minimum necessary income, the sponsor's Canadian income for the 12-month period preceding the date of filing of the sponsorship application is the income earned by the sponsor not including…	*c*) si le répondant ne produit pas de document visé à l'alinéa *a*) ou si son revenu calculé conformément à l'alinéa *b*) est inférieur à son revenu vital minimum, son revenu correspond à l'ensemble de ses revenus canadiens gagnés au cours des douze mois précédant la date du dépôt de la demande de parrainage, exclusion faite de ce qui suit : …
[Emphasis added]	[Notre soulignement]

[15] There is a real and legitimate concern that self-employment income can be over reported though tax planning, with the result that, at the time of the hearing before the IAD, a Notice of Assessment that exceeds the threshold can be generated. It is for that reason that the IAD in *Jugpall*, noted, that in considering "the test for financial solvency under the amended Regulations" it expressed a need for a track record of meeting the MNI. In other words, the concern is mitigated by the requirement that the applicant demonstrate a pattern of meeting the MNI year over year since the lock in date.

Analysis

[16] It is in this context that the narrow question arises as to whether the IAD erred in law when it rejected the applicant's self-reported income as it appeared on the 2010 Notice of Assessment. The applicant contends that the IAD erred by importing additional requirements into the income calculation, over and above those required by section 134(1) of the *Regulations* and, in effect, going behind the Notice of Assessment and discounting the reported amounts. If the MNI was surpassed,

the application would be assessed under more favourable criteria. Hardship, as defined in the jurisprudence, need not be established when the ground of inadmissibility had been overcome.

[17] The *Regulations* do not prescribe different criteria for the assessment of MNI at different stages of the process. As Justice Robert Barnes observed in *Chahal v Canada (Citizenship and Immigration)*, 2007 FC 953, at paras 5 and 11:

> Although the income calculation rules require the decision-maker to rely initially upon a sponsor's last Notice of Assessment (or equivalent document) for the most recent taxation year, that is not the case where such a document is not produced or where the document discloses insufficient income to meet the minimum threshold. In such circumstances, the decision-maker is directed to calculate "the sponsor's Canadian income for the 12-month period preceding the date of filing of the sponsorship application". This contemplates an assessment of actual income earned where the period in question spans a portion of two tax years. It is at least implicit in this statutory language that such a calculation can be performed using any reliable financial information produced by the sponsor. This could, of course, include Notices of Assessment or their equivalent but it need not be limited to such evidence. Any other interpretation would defeat the drafter's stated intention of providing for situations where Notices of Assessment are not available or produced. This might also include evidence showing that income was not evenly earned in a given tax year.
>
> The applicable legislation does not dictate how such a calculation ought to be performed. Given the stated preference in section 134(1) of the Regulations for using Notices of Assessment (or their equivalent) from the Canada Revenue Agency (CRA) to calculate the minimum income level of a sponsor, it is not necessarily unreasonable to carry out the calculation solely from those source documents.
>
> [Emphasis added]

[18] I adopt Justice Barnes' position. Section 134(1) neither prescribes nor prohibits an inquiry into the veracity of the data in the documents supplied pursuant to section 134(1). In my view

however, the authority to do so arises from the basic jurisdiction of the IAD to grant special or discretionary relief.

[19] The jurisdiction of the IAD is provided for by section 67(2) of the *IRPA*:

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 :
….	....
(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.	(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

[20] The IAD is conducting a *de novo* appeal from the visa officer's decision, and to the extent that it exercises a discretion to grant special relief from the consequences of the visa officer's decision that the applicant has failed to meet the MNI, it has the jurisdiction to require proof and consider all the issues and subject areas materially relevant to the exercise of that discretion: see, for example, albeit in a different context, *Canada (Citizenship and Immigration) v Peirovdinnabi*, 2010 FCA 267.

[21] This discretion in the IAD must be exercised in accordance with legally relevant considerations. In this context, requiring proof of actual income would be consistent with the object

and purpose of the *Regulations* in question. In *Dang v Canada (Minister of Citizenship and Immigration)* [2000] FCJ No 1187 at para 61 Justice Eleanor Dawson (now of the Court of Appeal) observed that, in the exercise of its discretion it was appropriate for the IAD to look at the factors which underlay the claim of changed circumstances. Of the 17 factors listed, four are apposite here:

> […]
>
> (ii) The exercise of the Appeal Division's statutory discretion was a function of the context created by the determination of inadmissibility;
>
> […]
>
> (vi) Changed circumstances are relevant to an appeal under paragraph 77(3)(b) of the Act, and in the Appeal Division's view it was all the more important to be able to look at changed circumstances when exercising its equitable jurisdiction in cases where consideration of those changed circumstances was prohibited when determining the legal validity of a visa officer's refusal;
>
> (vii) Changed financial circumstances must be assessed in a manner consistent with the amendments to the Regulations and could not serve to undermine those amendments;
>
> […]
>
> (xv) The Appeal Division stressed that the fact that an appellant might achieve the required degree of solvency by the time the case reached the appeal stage did not automatically entitle the appellant to success before the Appeal Division;
>
> […]

[22] To conclude, the IAD has, as a consequence of its discretionary power to consider whether the grounds of inadmissibility had been overcome and hence whether special relief should be granted, the authority to require evidence corroborative of the income reported in the Notice of Assessment. The IAD is permitted to question the accuracy and veracity of certain financial documents submitted in support of sponsorship applications and to assign relative and proportionate

evidentiary weight to them. I would observe, in closing, that this interpretation of the scope of the IAD jurisdiction is consistent with the objective of the *Regulations* as a whole, which are designed to ensure that those sponsored to come to Canada can in fact be provided for, and that the integrity of the sponsorship provisions of the *IRPA* is not eroded through inaccurate statements of income, whether deliberate or accidental.

Second ground of review – error in the exercise of discretion

[23] In respect of the second issue, the applicant argues that the IAD erred in its application of the *Jugpall* test in determining whether humanitarian and compassionate grounds warranted special relief. In *Jugpall*, the IAD held as follows at paragraph 43:

> 1. Do the current circumstances of the appellant indicate that the test for financial solvency under the amended Regulations is met as of the date of the hearing? This includes determining whether the appellant has a track record of meeting the Low Income Cut-Off criteria in the 12 months preceding the date of hearing.
>
> 2. If the answer to the first question is in the affirmative, are there any other positive factors which warrant the granting of special relief? Are there negative factors which weigh against the granting of special relief? A lesser standard than that required by Chirwa may be sufficient to justify granting special relief.
>
> 3. If the answer to the first question is negative, are there nonetheless sufficient compassionate or humanitarian considerations to warrant the granting of special relief, in accordance with the test in Chirwa, given that the appellant can not in substance meet the requirements of the Act? The number and nature of those factors will vary, depending upon the extent to which the appellant fails to meet the requirements of the Act.

[24] The applicant argues that where the current circumstances reveal that the obstacle to admissibility has now been overcome, the application of the more stringent criteria of humanitarian

and compassionate relief is unreasonable. The applicant submits that the evidence demonstrated that the applicant now met the MNI, and thus the obstacle to admissibility had been overcome.

[25] This submission is contingent on the argument that the IAD erred in its application of section 134(1) of the *Regulations* and had no jurisdiction to discount the income amount reported on the 2010 Notice of Assessment, an argument which I have already rejected. Second, it presupposes that the applicant did indeed overcome the obstacle to inadmissibility, a presupposition which also falls away based on the conclusion that the IAD did not err in requiring evidence in support of the substance of the applicant's financial position.

[26] Counsel for the respondent proposed a question for certification. Following receipt of submissions on the issue, I certify the following question pursuant to section 74 of the *IRPA*:

> Is the Appeal Division of the Immigration and Refugee Board of Canada, in hearing an appeal from a decision of a Visa Officer dismissing an application to sponsor family members, bound to accept as conclusive the income as reported in the applicant's Notice of Assessment, by Regulation 134 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227)?

[27] The proposed question arises from the issues in the case, and not by virtue of the reasons: *Varela v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 FCR 129. Secondly, the question is of general importance and the answer would be dispositive of the appeal.

[28] The application for judicial review is dismissed.

JUDGMENT

[29] **THIS COURT'S JUDGMENT is that** the application for judicial review be and is hereby dismissed. Counsel have proposed a question for certification and I certify the following question pursuant to section 74 of the *IRPA*:

> Is the Appeal Division of the Immigration and Refugee Board of Canada, in hearing an appeal from a decision of a Visa Officer dismissing an application to sponsor family members, bound to accept as conclusive the income as reported in the applicant's Notice of Assessment, by Regulation 134 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227)?

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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