

Federal Court



Cour fédérale

Date: 20130704

Docket: IMM-9378-12

Citation: 2013 FC 749

Ottawa, Ontario, July 4, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

SHAHLAVI, MAJID

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Perfection is not to be expected or demanded by a reviewing Court as to the conduct of an Immigration Appeal Division [IAD] hearing; however, in my view, the conduct of the IAD in this case demands a fresh hearing. Ultimately, the procedure followed by an administrative tribunal must be “fair, reasonable and appropriate in the circumstances.” See *Uniboard Surfaces Inc v Kronotex Fussboden GmbH & Co KG*, 2006 FCA 398 at para 48. Here, all that can be concluded from a full review of the transcript is that the second hearing day lost all semblance of order and procedure and proceeded in near total disarray; with the Panel and both counsel making sporadic

remarks and interjections; with unsworn evidence of the Applicant's daughter being received; with counsel giving evidence; and, apparently because of the disarray, with a witness not being called. No doubt all of the parties, including applicant's counsel, share the blame for the degeneration of the hearing; nevertheless, it is the responsibility of the Panel to control the proceeding and ensure fairness. It is appropriate in the circumstances, and particularly because the best interests of a disabled child hang in the balance, to grant the Applicant a fresh hearing.

[2] Majid Shahlavi is a citizen of Iran. He and his family were granted permanent resident status in Canada in March 2006 under the entrepreneurial program. His family, including his daughter Nahal, initially joined him in Canada for two months starting in March 2006, but they returned to Iran so that Nahal could finish writing her exams for the school year she had commenced there. The family remained in Iran until the fall of 2006 while Mr. Shahlavi says he was making preparations in Canada for his family when, tragically, Nahal was involved in a single car accident in Iran and was seriously injured.

[3] The travel history of Mr. Shahlavi and Nahal after the accident is not clear based on the record in this application; however, what is certain is that both Mr. Shahlavi and Nahal were found by an immigration officer to have breached their residency obligation under subsection 28(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, for having failed to reside in Canada for at least 730 days in the five-year period prior to August 29, 2011. Mr. Shahlavi's wife, Ms. Samsani, was also found by an officer to have breached her residency obligation, but by only less than two weeks, and was successful before the officer in retaining her permanent resident status on humanitarian and compassionate [H&C] grounds.

[4] The Applicant and Nahal appealed the officer's determination to the IAD based on H&C considerations under paragraph 67(1)(c) of the Act. Only Nahal was successful.

[5] The application by Mr. Shahlavi and Nahal was heard over two days. It was stated soon after the hearing commenced that their counsel would be calling Ms. Samsani as a witness and she was excluded from the hearing room. The intention to call her was repeated many times throughout the hearing, the last just a few minutes before the hearing concluded. But she was not called.

[6] I do not accept the Applicant's submission that the Board prevented in any direct manner the calling of Ms. Samsani as a witness. The record shows that despite stating on more than one occasion that he would be calling her as a witness, counsel for the Applicant never actually did so.

[7] However, as I explained to the parties, after seeking their submissions, the Court is very troubled by the way in which the hearing was conducted. On the first day of hearing Mr. Shahlavi testified under oath. His testimony in chief and cross-examination occupies most of the transcript of the first day of hearing which concluded with a discussion of the evidence the Panel required after it noting that "this is a tough case."

[8] The second hearing day began with the tendering of new documentary evidence and another assertion that Ms. Samsani would be called as a witness. In fact, as noted, she was not called, nor was any testimony heard by the Panel that day. Instead, the hearing degenerated into what can only be described as a free-for-all with no structure or direction offered or imposed by the Panel. It is

impossible to read the 23 page transcript of that day's hearing and come away with any understanding of what evidence, if any, was properly before the Board, whether any party truly made submissions on the evidence, and why Ms. Samsani was not called to testify.

[9] It may be, after a fair hearing, that a different Panel will reach the same conclusion as this Panel did; however, because it cannot be said that the Applicant received a fair hearing given the serious deficiencies that have been described, the application must be granted.

[10] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada is set aside, the appeal of the Applicant shall be re-determined by a differently constituted Panel, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9378-12

STYLE OF CAUSE: SHAHLAVI, MAJID v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 27, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** ZINN, J.

DATED: July 4, 2013

APPEARANCES:

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