Federal Court Cour fédérale

Date: 20150424

Docket: IMM-3985-14

Citation: 2015 FC 530

Ottawa, Ontario, April 24, 2015

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MOHAMED KARSHE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Mohamed Karshe (the Applicant) has brought an application for judicial review pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the IRPA) of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Board).

The Board rejected the Applicant's appeal of a decision by a visa officer to refuse his application to sponsor his son Awil Mohamed Dubad Karshe, a citizen of Somalia.

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] The Applicant is a Canadian citizen who first arrived in Canada as a refugee claimant from Somalia in 1991. Refugee status was granted and the Applicant obtained permanent resident status in 1992. At that time, the law did not permit Convention refugees to include their dependents living outside of Canada in an application for permanent residence. Consequently, once he became a permanent resident of Canada the Applicant sponsored his wife and their four children. The Applicant signed an undertaking as part of the sponsorship application. Sponsorship undertakings include a promise by the sponsor that the person who is sponsored and his or her family members will not apply for social assistance for a certain period of time, in this case ten years. If sponsored persons receive social assistance during the prescribed period, then the sponsor is deemed to have defaulted on the undertaking.

[4] When the Applicant applied to sponsor his wife and four children, he was in receipt of social assistance. At that time, being in receipt of social assistance did not prevent an applicant from sponsoring family members. The application was approved, and the three eldest children, Abdillahi (then 12), Hibaq (then 10) and Saeed (then 7), immigrated to Canada in March, 1994. However, the Applicant's wife decided to remain in Somalia with the Applicant's youngest son, Awil (then 3). The Applicant and his wife eventually separated and divorced.

[5] After arriving in Canada, the Applicant's children all received social assistance for various periods of time (between four and seven years). The Applicant also remained on social assistance until 2004, when he was declared unable to work and began to receive disability benefits. For a period of approximately 10 years, which began shortly after the Applicant's arrival in Canada, the Applicant's blind uncle lived with him until his death in 2002 or 2003. Accordingly, during this period the Applicant was a single parent who was also responsible for the care of an elderly and disabled relative.

[6] For several years, the Applicant had no contact with his youngest son. To this day he has never met Awil, who is now 25 years old. In 2009, Awil left his mother's home in Somalia and moved to Addis Ababa, Ethiopia. Awil then got in touch with the Applicant, and they have maintained regular contact ever since. The Applicant provides financial support to Awil by sending him money each month.

[7] In July, 2009, the Applicant began the process to sponsor Awil to Canada. On September 23, 2010, a visa officer refused Awil's application for a permanent resident visa because of the Applicant's default on his previous undertaking. This determination was based on s 133(1)(*g*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which provides as follows:

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 :

[…]	[…]
(*g*) subject to paragraph 137(*c*), is not in default of	*g*) sous réserve de l'alinéa 137c), n'a pas manqué :
(i) any sponsorship undertaking,	(i) soit à un engagement de parrainage,
[…]	[…]

[8] The Applicant appealed the visa officer's decision to the Board. The Applicant acknowledged before the Board that the visa officer's determination was correct in law, but he invoked humanitarian and compassionate grounds in support of his request for special relief.

[9] The Board considered numerous factors in determining whether to grant relief on humanitarian and compassionate grounds. Negative factors included the following: the Applicant had never looked for a job in Canada, even before he was declared unable to work; he had incorrectly stated in his sponsorship application for Awil that the people he had previously sponsored and their family members had not received social assistance during the period of the undertaking; one of his sons had been in receipt of Ontario social assistance for a year after moving to Edmonton, Alberta for work; the Applicant and his children had never attempted to remedy the default on the undertaking by reimbursing the debt, even though the three children were working; the Applicant's daughter testified that she had been told by the Applicant that he didn't owe money to anyone; and in all likelihood, Awil would also end up in receipt of social assistance if he came to Canada.

[10] The Board also observed that there was no evidence to show that it was necessary for Awil to leave his mother's home in Somalia and move to Ethiopia where he is not allowed to work, and no affidavit evidence that Awil's brothers would support him financially if he came to Canada. The Board considered the family reunification objective of the IRPA, but found that the Applicant and his son had never met in person and had only limited contact in the past few years. The Board held that the family reunification objective had to be balanced with the financial objectives of the IRPA. The Board also considered the possible hardship faced by Awil, but found that this was insufficient to overcome the negative considerations against granting relief on humanitarian and compassionate grounds. The Board therefore dismissed the Applicant's appeal.

III. Issues

[11] This application for judicial review raises the following issues:

A. Whether the Board's decision was reasonable in light of the evidence adduced and the family reunification objective of the IRPA; and

B. Whether the Board breached the principles of procedural fairness by denying the Applicant a reasonable opportunity to respond to its concerns.

IV. Analysis

[12] The Board's evaluation of the evidence in light of the objectives of the IRPA is subject to review by this Court against the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]). The standard of correctness applies to the question of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*]).

[13] The power to grant special relief on humanitarian and compassionate grounds is found in s 67(1)(c) 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 :
[…]	[…]
(*c*) other than in the case of an appeal by the Minister, 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.	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[14] The special relief contemplated by s 67(1)(c) is discretionary in nature. In *Khosa*, which concerned an appeal to the Board of a removal order, Justice Binnie wrote:

> [57] In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(*c*) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(*c*) requires the IAD to be "satisfied that, at the time that the appeal is disposed of … sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(*c*) calls for a fact-dependent and policy-driven assessment by the IAD itself.

A. *Whether the Board's decision was reasonable in light of the evidence adduced and the family reunification objective of the IRPA*

[15] The Applicant takes issue with the Board's conclusion that he had "chosen" not to work and had "chosen" not to repay his sponsorship debt. The Applicant says that for all practical purposes, this was not a choice but a necessity. The Applicant argues that he provided a reasonable explanation for his inability work: he did not speak the language when he came to Canada and so he went to school; while he was in school, his blind uncle came to live with him; taking care of his blind uncle, and later his three children, was a full-time occupation; and around 1997, he became ill and was unable to work – well before he was recognized as disabled in 2004. In the absence of negative credibility findings, it was unreasonable for the Board to reject the Applicant's testimony about his inability to work. In addition, the Board's comment that the Applicant took "full advantage of the system" betrayed a stereotypical attitude and an assumption that recipients of social assistance are lazy.

[16] The Applicant also says that it was unreasonable for the Board to conclude that Awil had chosen to move to Ethiopia, and was therefore responsible for any hardship he might face in that country. According to the Applicant, Awil's prospects in Somalia were poor as well and he

should not be faulted for seeking opportunities in Ethiopia, even though he has no status in that country and risks arrest.

[17] Finally, the Applicant argues that the Board misconstrued his point regarding family reunification. Since the coming into force of the IRPA, refugees can include their family members abroad in their application for permanent residence and no longer need to sponsor them. The Board failed to take into consideration the family reunification objective of the IRPA, and the unique challenges faced by refugees in this regard. Sponsorship applications by refugees should not be impeded by the financial objectives of the IRPA.

[18] The Respondent defends the Board's decision as reasonable. Even though the Board did not reject the Applicant's credibility, it was entitled to view his evidence through the lens of common sense and rationality. Many single care-givers do manage to find work. In addition, even if the Applicant was sick before he became eligible for disability benefits, there were still a number of years before the Applicant was diagnosed during which he simply did not seek employment. It was therefore open to the Board to conclude that the Applicant had chosen not to work. In addition, the evidence demonstrated that neither the Applicant nor his three sponsored children felt that there was any debt owing, despite the default on the undertaking.

[19] The Respondent argues that the Board properly considered the possibility of hardship. The Board acknowledged the circumstances faced by Awil in Ethiopia, but it was reasonable for the Board to find that Awil had the option of returning to live with his family in Somalia where he has the right to work.

[20] The Respondent maintains that the Board gave due consideration to the Applicant's argument concerning the family reunification objective of the IRPA. Current rules regarding the family reunification of refugees are not retroactive and do not apply in this case. The Applicant is a Canadian citizen and is subject to the same sponsorship obligations as any other potential sponsor. It was reasonable for the Board to consider both the family reunification and financial objectives of the IRPA, and to conclude that the family reunification objective did not justify special relief in these circumstances.

[21] I agree with the Respondent. Despite the capable arguments of counsel for the Applicant, in my view the Board's decision was reasonable. While the Board could have reached a different conclusion regarding the Applicant's ability to work, its finding that the Applicant did not seek meaningful employment when he had the opportunity to do so is supported by the evidence. The Board's comment regarding the Applicant's taking "full advantage of the system" did not betray stereotypical thinking, but reflected the specific actions of the Applicant and his children. This included his daughter's testimony that the Applicant did not consider himself to owe money to anyone, the lack of any effort by the three working children to repay the debt, the Applicant's incorrect statement on his sponsorship application that he had never defaulted on a sponsorship undertaking, and the fact that one of the Applicant's sons continued to receive Ontario social assistance while he was employed in Edmonton, Alberta.

[22] The Board's assessment of the hardship faced by Awil in Ethiopia was also reasonable. The Board noted the absence of any evidence that it was necessary for him to leave his mother's home in Somalia, a country where he can work legally. The Board also considered the

difficulties that Awil could encounter if he returned Somalia. The Board's conclusion that the hardship faced by Awil was insufficient to overcome the considerations against granting special relief was a legitimate exercise of its discretion. It is not the role of this Court to re-weigh the factors considered by the Board, whose decision attracts a high degree of deference (*Khosa* at paras 60-62).

[23] The same may be said of the Board's assessment of the objective of family reunification. The Board properly considered the objective of family reunification and the financial objectives of the IRPA. The Board's conclusion that potential hardship and family reunification were not sufficient to overcome the considerations against granting special relief falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47).

B. *Whether the Board breached the principles of procedural fairness by denying the Applicant a reasonable opportunity to respond to its concerns*

[24] The Applicant complains that the Board reached its conclusion that the Applicant "could have chosen to work part-time, even from home" without asking the Applicant if this would have been possible. According to the Applicant, natural justice required the Board to put this suggestion to him and give him an opportunity to respond (*Sheikh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 176 at para 10).

[25] I disagree that the possibility of the Applicant working part-time or from home was a separate concern that should have been put to the Applicant. The Board was clearly preoccupied

by the fact that the Applicant had made no attempt to secure paid employment, and this concern was directly put to him during the hearing. The Board's finding that the Applicant had not explored opportunities for part-time work or working from home was encompassed by its broader finding that the Applicant had made no effort to work during the period before he was declared disabled. The Applicant was given a reasonable opportunity to respond to this concern, and there was no breach of procedural fairness.

[26] The Application for judicial review is therefore dismissed. Neither party proposed a certified question for appeal, and none arises here.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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