Federal Court Cour fédérale

Date: 20160617

Docket: IMM-3336-15

Citation: 2016 FC 682

Ottawa, Ontario, June 17, 2016

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

CONSTANCIO ABARQUEZ

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision dated July 7, 2015, by the Immigration Appeal Division [IAD], which found, pursuant to paragraph 67(1)(c) of the IRPA, that there were sufficient humanitarian and compassionate considerations to warrant special relief from a determination that the Respondent had not complied with his residency obligation and therefore had lost his permanent resident status.

[2] For the reasons set out below, the application for judicial review is dismissed.

I. Background

[3] The Respondent is a seventy (70) year old citizen of the Philippines whose spouse came to Canada in 1989 and obtained a work permit in April 1990 as part of the caregiver program. The Respondent and his three (3) children were successfully sponsored by his spouse and became permanent residents upon their arrival in Canada on July 13, 1996. The Respondent was fifty (50) years old when he came to Canada.

[4] Since 1974, the Respondent has spent his entire career working on ships. Prior to his arrival in Canada in 1996, the Respondent worked as a master mariner and ship captain. Of the view that he could not find similar employment in Canada, the Respondent returned to the Philippines after fifty-nine (59) days in Canada and went to work for his previous employer. The Respondent worked as a master mariner and ship captain until his retirement in 2011.

[5] Over the years, the Respondent saw his family six (6) to seven (7) times when his ship came to port for a day or two in Canada or the United States. The longest period the Respondent stayed in Canada was in October 2000, when he returned for a period of eight (8) months to be with his family. The Respondent's spouse visited the Philippines for two (2) months with their younger daughter and son, who also visited his father once in 2006. The Respondent communicated with his spouse and family by phone from the ship and from the seamen's club whenever the ship was in port.

[6] In anticipation of his retirement in the spring of 2011, the Respondent applied for a travel document in January 2011 to come to Canada. This triggered an investigation into whether he had fulfilled his residency obligation. He admitted that he had not been physically present in Canada during the relevant five-year period, but invoked humanitarian and compassionate considerations to request special relief. On August 4, 2011, a determination was made at the Canadian Embassy in the Philippines that the Respondent had not fulfilled his residency obligation pursuant to section 28 of the IRPA and therefore had lost his permanent resident status.

[7] The Respondent appealed this decision to the IAD. He did not challenge the finding that he had no physical presence during the period of reference but argued that the appeal should be allowed on humanitarian and compassionate grounds.

[8] On July 7, 2015, the IAD concluded that while the determination that the Respondent had lost his permanent resident status was valid in law, there were sufficient humanitarian and compassionate grounds to allow the appeal in light of all the circumstances of the case and taking into account the best interests of any child directly affected by the decision. After providing an overview of the relevant facts, the IAD enumerated a list of non-exhaustive factors that should be considered in determining whether to grant special relief on the basis of humanitarian and compassionate considerations. The IAD cautioned that these factors are not exhaustive and that none are determinative. It noted that an assessment of all the circumstances in any given case may also involve affording lesser or more weight to one factor instead of another, depending on the context. The IAD then commented on the Respondent’s testimony as well as that of his

spouse, son and daughter. The IAD noted that while the Respondent had difficulty remembering details, he was nonetheless generally sincere and credible in his testimony which was provided by telephone, as he was still in the Philippines. The IAD also found the Respondent's spouse, son and daughter to be credible.

[9] The IAD determined that many factors weighed against allowing the appeal. The Respondent did not establish himself in Canada, unlike the rest of his family. Furthermore, he was not physically present in Canada during the relevant five-year period and he had never worked in Canada. The IAD also noted that the Respondent had made no attempt to return to Canada on a permanent basis until he retired.

[10] The IAD found however that the hardship faced by the Respondent and his family due to their ongoing separation for many years was an overriding factor that favoured allowing the appeal. The IAD acknowledged that while one could view this longstanding separation as merely a continuation of the status quo, another view would be that separation becomes more difficult with age. The IAD found this to be the case for the Respondent, who had reached an age where the future becomes more uncertain and he becomes more vulnerable. The IAD observed that except for a few siblings who remain in the Philippines, all of the Respondent's family is in Canada. Each of the family members who testified also spoke of the difficulty of their family's separation and their desire to be together. In addition, the IAD noted that it was in the best interests of the four (4) grandchildren to have contact with the Respondent. Ultimately, the IAD found that the Respondent's case was exactly the type of situation covered by the test established in the decision of *Chirwa v Canada (Minister of Manpower and Immigration),* (1970) 4 IAC 388

(IAB) at paragraph 27, namely that a reasonable person living in a civilized community would want to allow the family to finally be together.

II. Analysis

[11] The sole issue to be decided by this Court is whether the IAD's decision to grant the Respondent's appeal on humanitarian and compassionate grounds is reasonable.

[12] It is established in law that the IAD's assessment of humanitarian and compassionate considerations for granting special relief from a loss of permanent resident status raises questions of mixed fact and law and is reviewable based upon the standard of review of reasonableness. The IAD's decision involves a high degree of discretion and warrants considerable deference (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 60, [2009] 1 SCR 339 [*Khosa*]; *Nekoie v Canada (Citizenship and Immigration*), 2012 FC 363 at para 15; *Tai v Canada (Citizenship and Immigration*, 2011 FC 248 at para 48). In determining whether a decision is reasonable, the Court is concerned with the "existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]; *Khosa*, at para 59).

[13] The Applicant submits that the IAD's decision to grant special relief is unreasonable on the basis of the following errors which warrant the intervention of this Court:

A. The IAD ignored evidence regarding the reasons for the separation of the Respondent from his family and the best interests of the grandchildren;

B. The IAD ignored evidence regarding the reasons behind the Respondent's absences from Canada;

C. The IAD ignored the importance of the breach of the residency obligation beyond the five-year period preceding the examination.

[14] Specifically, the Applicant argues that in concluding that the family separation amounted to hardship, the IAD failed to consider that the difficulties stemming from the family separation were of the Respondent's own choosing, in that it was the Respondent who chose to work as a sea captain in the Philippines and not to pursue any job openings available to him in Canada. It was also the Respondent who chose to stay in the Philippines instead of coming to Canada to visit his family when he was unemployed or on vacation and who took no measures to alleviate the difficulties caused by the family separation. The Applicant further argues that there was little evidence of any relationship between the Respondent and his grandchildren and simply no evidence to support a conclusion that the separation of the Respondent from his family, including his grandchildren, constituted hardship which would justify granting special humanitarian and compassionate relief. Relying on *Canada (Citizenship and Immigration) v Sidhu*, 2011 FC 1056, the Applicant argues that the IAD could not grant relief to a situation that the Respondent created of his own volition.

[15] With respect to the second error alleged to have been committed by the IAD, the Applicant submits that the IAD's conclusion that the Respondent did not establish himself in Canada solely because of his work as a seaman is contradicted by the evidence. According to the Applicant, although there were several long periods prior to 2011 when the Respondent was either unemployed or on vacation, he did not attempt to return to Canada and the Respondent and his spouse could not provide an explanation for not doing so. The Applicant argues that the IAD should have addressed this inconsistency.

[16] Finally, the Applicant argues that the IAD ignored the importance of the breach of the residency obligation beyond the five-year period preceding the examination and did not consider that the Respondent was completely absent from Canada for approximately fifteen (15) years, except for a period of eight (8) months in 2000-2001. By limiting its assessment to only the five-year period preceding the examination, the IAD failed to correctly apply the IRPA.

[17] The Respondent, who was not present at the hearing but did file written submissions, argued that the IAD's decision to grant special relief based on humanitarian and compassionate considerations was reasonable in the circumstances of the case. The IAD found the Respondent to be credible and honest about his absences throughout the immigration procedures. The Respondent also submits that the IAD took note of the Respondent's explanation that the reason behind his absences was economic in nature. The list of humanitarian and compassionate factors to be considered by the IAD is non-exhaustive and it was open to the IAD to not diminish the importance of these factors even in the presence of a breach of the residency obligation. Given the objective of family reunification in the IRPA, it was reasonable for the IAD to consider this

factor as well as the best interests of the children affected by the decision. The decision to be separated from his family in order to provide for their needs was not one of choice, but a consequence of him providing for the needs. As for the low number of trips to see one another, this was the result of a lack of finances.

[18] With respect, I do not agree with the Applicant's submission that the IAD ignored or misconstrued the evidence regarding the reasons for the family's separation and the Respondent's absences from Canada, or that the IAD ignored the importance of the breach of residency.

[19] It is clear from the IAD's reasons that the IAD considered that the difficulties stemming from the family's separation were of the Respondent's own choosing. In identifying the negative factors which weighed against granting special relief, the IAD noted at paragraph 19 of its decision that the Respondent did not establish himself in Canada, he was not physically present in Canada during the relevant five-year period and he had never worked in Canada. The IAD explicitly noted that the Respondent had made no serious attempt to return to Canada on a permanent basis until he retired. With respect to the Respondent never having worked in Canada, the IAD also indicated at paragraph 8 of its reasons that it was unclear whether the Respondent would have been able to work as a master mariner and sea captain when he first arrived in 1996 had he attempted to do so.

[20] Moreover, the issue of the Respondent's failure to seek employment in Canada was fully canvassed at the hearing before the IAD. The Respondent testified that he did not look for

employment in Canada because he could not find work as a master mariner. As a result, he went back to work for his company in the Philippines to earn a better salary in order to support his family (Certified Tribunal Record [CTR], at 460). The Respondent's spouse also testified before the IAD that the Respondent could have found other employment but the only thing he knew was to work on a ship. She testified that when her husband arrived in Canada, although excited to settle here, he was already fifty (50) years old and he was too old to do lower ranking jobs or to become a labourer on the ships (CTR, at 486). When questioned by the IAD on why the Respondent did not come to Canada when he was unemployed or on vacation, the Respondent's spouse testified that her husband did not come to Canada because he was waiting to be called back to work (CTR, at 502-503).

[21] The IAD did not misconstrue the reasons for the Respondent's absence from Canada or the reasons for the family's separation. While it found the Respondent's failure to make any attempts to establish himself in Canada to be a negative factor which weighed against granting the Respondent special relief, the IAD accepted the Respondent's explanation that the only reason he did not establish himself in Canada was because of his work as a seaman. She found the Respondent and his spouse to be credible and it was open to the IAD to draw such a conclusion.

[22] I am also of the view that the IAD's finding regarding the relationship between the Respondent and his grandchildren and the hardship resulting from the Respondent's separation from his family, including his grandchildren is supported by the evidence. First, with respect to the grandchildren, the Respondent testified that when he came to Canada in 2000, he played with

his grandchildren, did activities with them and gave them money (CTR, at 463, 477, 499). The Respondent's spouse also testified that when the Respondent's ship came to Canada and the United States, she would meet the Respondent and would be accompanied by at least one of her children and sometimes a grandchild (CTR, at 488). She also testified that when she went to visit the Respondent in the Philippines in 2009, she went with one of her daughters and her daughter's son (CTR, at 493). The Respondent's daughter testified to the same effect (CTR, at 511, 516). In addition, the Respondent's daughter testified to the importance of having the grandchildren spend time with the Respondent so that he could talk to them about their culture and traditions (CTR, at 519).

[23] As for the hardship caused by the continued separation of the Respondent from his family, all of the witnesses who appeared before the IAD testified that they had close ties with each other and with the Respondent despite his lengthy absences. They would meet with the Respondent whenever his ship came to Canada and the United States, even if only for a day or two (CTR, at 456-457, 487-488, 511, 515). They visited him in the Philippines (CTR, at 493, 496-498, 511, 516) and they would speak to each other using the ship's satellite phone and whenever the Respondent's ship would come to port (CTR, at 459, 487).

[24] Both the Respondent's son and daughter testified that the Respondent and his spouse were getting old and that they would like to see them be reunited again (CTR, at 512-513, 518). They testified that the Respondent's spouse had health conditions, that she had just undergone hip surgery and that it would be better for her if the Respondent was there to care for her (CTR, at 513, 518). The Respondent's son testified that if the Respondent had to stay in the Philippines,

it would be difficult to see his father again because of the financial consequences of having to travel to the Philippines. He testified that they were not a wealthy family (CTR, at 513). The Respondent's daughter also testified to the same effect (CTR, at 519).

[25] While the Respondent and his family may not have enjoyed the more traditional family setting as a result of the Respondent's occupation which kept him away from his family for long periods of time, the IAD accurately noted that the family has remained close and that the separation is becoming more difficult as a result of the Respondent's age and the uncertainty of his future.

[26] The Applicant places a lot of weight on the words used by the IAD in stating that the Respondent was not physically present in Canada during the relevant five-year period. I do not share the Applicant's view that the IAD limited its assessment to the preceding five-year period and minimized the importance of the breach of his residency obligation. The IAD was well aware that the Respondent had not been physically present in Canada for most of the time since 1996, except for a period of eight (8) months when he returned in 2000. The IAD considered the Respondent's absences from Canada and his overall failure to establish himself here to be negative factors in its assessment of whether to grant special relief. However, it found that since the factors to be considered were not exhaustive and that the circumstances of a case may involve giving lesser or more weight to one consideration over another, in the particular circumstances of the Respondent's case, the hardship to the family outweighed the negative factors, including the importance of the breach.

[27] It is clear from my review of the IAD's decision and of the underlying record that the IAD considered all of the evidence and that it assessed all of the factors it was required to consider. It is important to recall that in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 14-16, [2011] 3 SCR 708, the Supreme Court of Canada enunciated that when a reviewing court examines a decision, it should not substitute its own reasons, but should instead look to the record for the purposes of establishing the reasonableness of the outcome. It is not the role of this Court to reassess the evidence and reweigh the factors or to substitute its own view of the evidence (*Khosa*, at para 61). The Applicant's arguments amount to no more than a disagreement with the IAD's assessment of the evidence and the weight it gave to each factor. In the end, it was up to the IAD to decide how much weight it should assign to the various elements.

[28] For the above reasons, I find the IAD's decision to be reasonable and falling within the range of possible acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, at para 47).

[29] The Applicant did not submit a question for certification and no serious question of general importance arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and no question of general importance is certified.

"Sylvie E. Roussel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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