Federal Court  Cour fédérale

Date: 20170721

Docket: IMM-5223-16

Citation: 2017 FC 714

Toronto, Ontario, July 21, 2017

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

POLO FERNANDO CARRERA GALLARDO

Respondent

JUDGMENT AND REASONS

I. Background

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [Act or IRPA], of an Immigration Appeal Division's [IAD or the Board] November 24, 2016 decision [Decision], finding that while the Respondent failed to meet his residency requirements, his and his family's circumstances merited humanitarian and compassionate [H&C] relief. The IAD overturned a former visa officer's

[Officer] decision to refuse the Respondent permanent residency and confirming his status in Canada as permanent resident. For the reasons explained below, I am dismissing this judicial review.

[2] The Respondent is a citizen from El Salvador, who received permanent resident status in Canada in 1992, but returned to his native country after the completion of his high school studies for family and personal reasons.

[3] On July 17, 2014, he, his wife and two sons applied for a Temporary Resident Visa. They entered Canada on August 26, 2014.

[4] The Respondent then signed a form, waiving his rights of appeal with respect to residency obligation decisions made under section 28 of IRPA, but claims that "he was not advised about his options to put forward humanitarian and compassionate considerations in matters of his appeal" (Respondent's Memorandum of Fact and Law at para 10).

[5] On August 18, 2014, the Officer informed the Respondent by way of letter that he had lost his permanent resident status for not respecting the residency obligations under section 28 of IRPA, and that Humanitarian and Compassionate [H&C] considerations were not sufficient to trigger an exception under the Act.

[6] The Respondent challenged that result before the IAD, which overturned the Officer's decision and found that "the appellant just barely met the burden of establishing that sufficient

humanitarian and compassionate considerations warrant special relief in light of the all of the circumstances of this case" (Decision at para 29). In so doing, the Board placed considerable weight on the Best Interest of the Children [BIOC] and the continued togetherness of the family unit.

II. Analysis

[7] The only issue in my view is whether the IAD's Decision and weighing of the H&C factors is reasonable (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58 [*Khosa*]). In my view, it is.

[8] First, the Applicant's arguments as to the Respondent's knowledge of the legality of the waiver he signed and of his true intentions upon arrival to Canada, suggesting an ulterior motive, are not clearly supported by the evidence and are speculative at best.

[9] Second, as for the misrepresentations, the IAD accepted that certain discrepancies and inconsistencies existed in the Respondent's application. Indeed, the Board considered this and, in my view, did not unreasonably ignore evidence in this regard so as to rebut the presumption that the IAD member reviewed and considered the entirety of the record. This is certainly not a case where the Board ignored or unreasonably assessed crucial evidence, as occurred in *Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204, for example, where some conclusions made and the final outcome decided by the IAD were simply not supported by the evidence. No such error took place here.

[10] Lastly, with respect to the establishment and BIOC analysis: establishment is not the only criterion to be considered within an H&C analysis. If I was to allow this judicial review based on the fact that another other board member may have taken another view of establishment, or may have found the BIOC in this case to be non-deserving of an H&C exception, that would simply be to reweigh the evidence, which is not the role of this Court on judicial review, namely with respect to decisions made by the IAD, an administrative body that is owed deference (*Nekoie v Canada (Citizenship and Immigration)*, 2012 FC 363 at para 40. Certainly, both BIOC and family unity are factors to be considered in H&C cases, and the Board chose to take a broad and liberal interpretation of those issues, weighting them more heavily than others. Indeed, Justice L'Heureux-Dubé wrote at paragraph 67 of *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 65-68:

> Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society. Indications of children's interests as important considerations governing the manner in which H & C powers should be exercised may be found, for example, in the purposes of the Act, in international instruments, and in the guidelines for making H & C decisions published by the Minister herself.

[11] And at paragraph 68, Justice L'Heureux-Dubé reminds that "Parliament also placed a high value on keeping citizens and permanent residents together with their close relatives who are already in Canada". In the current Act, that goal is articulated by virtue of paragraph 3(1)(d), which stipulates that one of the Act's objectives is "to see that families are reunited in Canada".

[12] In sum, given the Board's "power to grant exceptional relief" in H&C cases under paragraph 67(1)(c) of IRPA (see: *Khosa* at para 57), I disagree with the Applicant that the Decision challenges the integrity of Canada's immigration statutory framework as a whole, and

instead am of the view that the Decision need not be disturbed, as the IAD member did not overstep her authority and discretion, and the approach taken and outcome ordered were reasonable in the circumstances.

III. Conclusion

[13] For the reasons discussed above, this judicial review is accordingly dismissed. While the IAD's Decision may be a borderline one (as accepted by the member at paragraph 29 of the Decision), it does fall within the range of possible and acceptable outcomes.

JUDGMENT in IMM-5223-16

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. Counsel presented no questions for certification, nor do any arise.

3. There is no award as to costs.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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