Federal Court  Cour fédérale

Date: 20120727

Docket: IMM-8467-11

Citation: 2012 FC 934

Ottawa, Ontario, July 27, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

NASER BAFKAR, AND
MAHSA MIRSOLTANI, AND
SAMYAR BAFKAR

Applicants

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants (Naser Bafkar and his wife, Mahsa Mirsoltani and their son, Samyar Bafkar) seek judicial review of a decision by the Immigration Appeal Division (IAD) denying an appeal of the determination that they had not complied with the terms and conditions for entry under subsection 27(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The IAD also refused to allow the appeal based on humanitarian and compassionate (H&C) considerations.

I. Background

[2] The Applicants are citizens of Iran. They arrived in Canada on March 27, 2005. Naser (the Principal Applicant) was granted permanent residence status under the Entrepreneurial Program. The Applicants maintain that their letter of acknowledgment from the Canadian Embassy in Damascus, Syria suggested they did not have to meet the residency obligations for three years under section 98 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 as opposed to the two-year timeframe under the previous legislation.

[3] The Principal Applicant incorporated Audio Medical Canada Ltd. (or AMC) in Canada on April 11, 2005. AMC was designed for importing and exporting audiological equipment and hearing aid devices as well as establishing an audiology clinic in Vancouver.

[4] Nevertheless, the Principal Applicant left Canada in June 2005 to return to Iran until November 2006. He claims this was to reach an agreement with business partners, liquidate assets and dissolve the partnership in that country – all of which took longer than expected.

[5] It was not until November 2006 that the Applicant had a single employee working for him on a part-time basis. He insists that international sanctions imposed on Iran led to unexpected difficulties for him in importing technologies to Canada as planned.

[6] In the meantime, the Applicants were also informed by way of a letter from Citizenship and Immigration Canada (CIC) that they had not sent in their mail card to comply with the residency obligations under the old two-year timeframe.

[7] The Principal Applicant was interviewed by an Immigration Officer on December 7, 2007 regarding the terms and conditions he had failed to comply with by the required date. A report was made against the Applicants under subsection 44(1) of the IRPA for his non-compliance.

[8] This Court confirmed in September 2009 that the transitional provisions ensure the two-year deadline under the *Immigration Regulations, 1978* applies to those entrepreneurs who applied prior to the coming into force of the IRPA and the new three-year deadline (*Gjoka v Canada (Minister of Citizenship and Immigration)*, 2009 FC 943, [2009] FCJ no 1160 per Justice Michel Beaudry).

[9] The Minister's delegate prepared a report regarding the Applicant under subsection 44(2) of the IRPA on January 25, 2010 recommending an admissibility hearing be conducted before the Immigration Division (ID). That hearing was adjourned on September 30, 2010 and resumed on November 17, 2010.

[10] The ID issued departure orders under subsections 27(2) and 41(b) of the IRPA, despite their claims that they thought, based on the information provided by CIC, they would not have to file their mail-in cards between 18 and 24 months of landing or fulfill their residency obligations for three years. The Applicants appealed this decision to the IAD.

[11] They received an extension of time to file submissions to the IAD. However, the material filed was not paginated and considered incomplete. The IAD informed the Applicants that they would have time to properly file their submissions closer to the hearing date, which was later agreed upon for October 12, 2011.

[12] On September 21, 2011, the Applicants asked that their hearing before the IAD be postponed as the Principal Applicant "encountered some difficulty in perfecting their removal of the conditions from his Record of Landing on time" and they had to visit Iran "due to the medical emergency of Ms. Mahsa Mirsoltani's father there is no clear prospect when they will return to Canada." There was also a reference to his wife attempting to liquidate assets in Iran and transfer them to Canada.

[13] This request was denied by the Assistant Deputy Chairperson of the IAD as the reasons provided were insufficient, there remained time to finalize disclosure, and he could appear by teleconference if he wished.

[14] On October 3, 2011, the Principal Applicant's doctor provided a medical note stating "this is to certify that the above named patient complains of depressive symptoms and is under treatment by writer." The Principal Applicant claims that as early as 2009 he began to experience mood changes, difficulty concentrating, overwhelming fatigue and various other ailments. He sought treatment from his family doctor for these conditions in March 2011. He was later diagnosed with hypothyroidism and chronic depression. The letter from his doctor served as a basis for yet another request for postponement.

[15] This request was also denied by the Assistant Deputy Chairperson of the IAD. She noted that there was no "medical information indicating that either the appellant's condition and/ or his medication regime prevents his full participation in the schedule hearing." It was also suggested that "[p]rocedural accommodations may be requested at the time of the hearing in light of the appellant's concerns, for example, appropriate break periods may be had and/or the proceedings carry-over to a second date so as to accommodate the appellant's situation."

[16] One day before the scheduled hearing, the Applicants sought to file additional documents since they had missed the disclosure deadline due to the Principal Applicant's "lack of ability (Mentally unbalanced)." They also indicated that two witnesses would be called, the Principal Applicant's wife and his business partner.

[17] On the date of the hearing, however, it appears that they intended to call three witnesses. Counsel again asked for a postponement based on the Principal Applicant's situation and difficulty in producing necessary documents. Thereafter, counsel acknowledged that the Principal Applicant was ready to proceed. The Principal Applicant's wife was able to testify in the time allotted but the other two witnesses were not able to do so. All parties made final submissions to the IAD member.

[18] Their appeal was denied by the IAD on October 27, 2011.

II. Decision under Review

[19] The IAD considered the legal validity of the departure orders in light of the Applicant's belief that the terms and conditions under the current Regulations applied to them based on the forms attached to their immigration visas. It was nonetheless found that they "did not meet the onus on them to show that the decision appealed is wrong in law or fact or mixed law and fact." The IAD relied on the determination in *Gjoka*, above that the transitional provisions ensure those who applied under the former legislation and regulations comply with the previous terms and conditions. The Applicants had not met their respective obligations under subsection 27(2) and were consequently inadmissible under subsection 41(b) of the IRPA.

[20] As for providing discretionary relief to the Applicants based on H&C considerations, the IAD considered the relevant factors identified in *Ribic v Canada (Minister of Citizenship and Immigration)*, [1985] IADD no 4.

[21] The IAD noted that the Principal Applicant admitted his failure to comply with the terms and conditions of sending the mail-in card. This breach was also considered serious based on the evidence as to his business activities in Canada. The IAD stated:

> Though the appellant claimed the employee helped the principal appellant to set up his business, and she worked for AMC as a manager assistant, she was unaware how much money was transferred from Iran for investing in the business, and she did not know if the principal appellant entered into a contractual agreement with any company or business in Canada or whether AMC has any customers at present. There is limited documentary evidence to prove of physical premises for the principal appellant's business in Canada, including utility's documents (hydro, telephone, copier contracts, etc.). I find inadequate the documentary evidence of AMC's assets

> and investment in its operation. The principal appellant provided limited proof of AMC's ongoing business activities (invoices, contracts with customers, etc.). It was never adequately explained what the principal appellant's role in the company was, and no proof of income and bank statements were provided.

[22] The IAD also found there were no reasons beyond the Principal Applicant's control preventing him from fulfilling his terms and conditions, as there was no credible documentation to support that he spent that time in Iran disposing of all of his financial assets and he had a number of years to prepare for setting up his business in Canada. It was "never adequately explained why the principal appellant left Canada in 2005 and why he continued to be outside of Canada, particularly where there is lengthy stay abroad." The IAD also found the testimony of the Principal Applicant's wife claiming she was not aware of any assets in Iran evasive.

[23] The IAD recognized that the Applicant's strongest ties were to Iran in terms of business and family members. There was no evidence of the degree of hardship that would be caused to the Applicants despite his wife's recent work and involvement in school activities and the Principal Applicant's business plans. There was limited documentary evidence of community support available to them.

[24] As for the Principal Applicant's son, his primary ties were to school but his entire extended family resides in Iran. The IAD concluded: "Based on the evidence before me, it is in the best interest of the minor appellant to be cared [for] by both parents and have his extended family members involved in his life. There is no evidence before me [that] the best interests of the minor appellant [are] directly affected by this decision."

[25] The IAD concluded that the Applicants had not made out a sufficient case for granting discretionary relief.

III. Issues

[26] The following issues arise in this application:

(a) Did the IAD fail to observe the principles of natural justice or procedural fairness?

(b) Did the IAD discriminate against the Principal Applicant based on the prohibited ground of disability?

(c) Were the IAD's conclusions reasonable in light of the evidence presented?

IV. Standard of Review

[27] Matters of natural justice and procedural fairness demand the correctness standard (see *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43).

[28] In reviewing a decision of the IAD to deny an appeal, however, the appropriate standard is reasonableness (see *Khosa*, above at paras 53, 58). This implies that the Court will only intervene

absent justification, transparency and intelligibility or an acceptable outcome defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

V. Analysis

[29] The Applicants submit that they were denied natural justice or procedural fairness in not being given a full opportunity to be heard by the IAD. They insist that the IAD was made aware of the Principal Applicant's medical condition and that it prevented him from providing disclosure of all documents necessary for the appeal, but refused to grant an adjournment.

[30] This argument does not prove convincing in light of the record before the IAD. Contrary to the Applicants' submissions, the IAD did not have complete knowledge of the Principal Applicant's medical conditions. It was not until the second request for a postponement on October 3, 2011 that the IAD was given any indication of a medical condition. The doctor's note simply indicated that the Principal Applicant suffered from "depressive symptoms." The Assistant Deputy Chairperson indicated that this information did not demonstrate that he was prevented from fully participating in the hearing and that accommodations could be requested at the time of the hearing. One day before the hearing, the Applicants requested another adjournment claiming the disclosure date was missed due to "lack of ability (Mentally unbalanced)." No further explanation as to the nature of his condition was provided.

[31] The Applicants rely on a report from a family physician dated December 12, 2011 referring to the "negative impact on the patient's global cognitive function" of his medical conditions.

Regardless, this report was not before the IAD at the hearing or prior to a final determination being issued in this matter. The IAD cannot be faulted for failing to consider whether that information would have affected its refusal to grant an adjournment. I also note that the Applicant had already been given considerable time to provide documentary disclosure.

[32] It is further contended that the Applicants were denied a full opportunity to participate in the hearing because two witnesses were unable to testify and closing submissions could not be completed. Once again, this position is not supported by the record from the IAD. The only reference to witnesses came one day prior to the hearing. At that time, only two were mentioned. During the hearing, the Applicants put forward three witnesses. The Principal Applicant's wife was permitted to testify under the circumstances. There was an issue as to timing to accommodate the other witnesses. The IAD proceeded to hear final submissions. There is no indication that Applicants' counsel was unable to complete submissions at that time. Viewed in this context, the Applicants have not demonstrated that the IAD's approach amounts to a breach of procedural fairness.

[33] In addition, I am not prepared to assess the Applicants' arguments that the IAD discriminated against them in the conduct of the hearing due to the Principal Applicant's physical and mentality disability. I agree with the Respondent that an application for judicial review of an IAD decision to this Court is not the appropriate forum for that argument. Complaints under the *Canadian Human Rights Act*, RSC 1985, c H-6 (CHRA) should proceed before the Canadian Human Rights Commission (see for example the comments in *Lodge v Canada (Minister of Employment and Immigration)*, [1979] 1 FC 775, [1979] FCJ no 10 at para 22 (CA)). There are

also valid reasons to question whether the CHRA would even be applicable to this instance (see for example *Watkin v Canada (Attorney General)*, 2008 FCA 170, [2008] FCJ no 710 at para 31).

[34] As for the final issue presented, the Applicants take the position that the IAD's decision was unreasonable having regard to the new and additional documents as well as the Principal Applicants' medical condition. With respect, there is no merit to this argument. This application for judicial review proceeds solely on the record before the IAD.

[35] Other concerns raised by the Applicants relate strictly to the weighing of the evidence based on the relevant factors by the IAD – a matter beyond the scope of this Court's role on judicial review. For example, the Applicants insist that that the seriousness of the offence leading to their removal order is extremely low given the issues in forms attached to the relevant documents. However, the IAD considered other aspects of the evidence before assigning weight as it did in this case. With regard to other factors, the Applicants simply indicate disagreement with the IAD's assessment.

[36] As a consequence, the Applicants have failed to demonstrate that the IAD's denial of relief on H&C grounds lacked justification, transparency or intelligibility or represented an unacceptable outcome in light of the facts and law (*Dunsmuir*, above).

VI. Conclusion

[37] For these reasons, the application for judicial review is dismissed.

JUDGMENT

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

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-8467-11**
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