Federal Court  Cour fédérale

Date: 20171102

Docket: IMM-2057-17

Citation: 2017 FC 985

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, November 2, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MAHA AL-FARRAN
ABDEL-KADER CHAHBAZ
MAHMOUD CHAHBAZ (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision rendered on April 24, 2017, by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board under

subsection 63(3) of the IRPA. In that decision, the IAD dismissed the appeal of a removal order issued against the applicants on November 30, 2013, for failing to comply with the residency obligation.

II. Facts

[2] The female applicant, Maha Al-Farran, is 50 years old and a citizen of Lebanon. She is married and has three children. Her two sons, aged 19 and 18, are the two other applicants in this application. They are also citizens of Lebanon.

[3] The applicant's youngest daughter, age 10, was born in Canada in 2007.

[4] On June 17, 2002, the applicants became permanent residents of Canada, but they remained in Canada for only two or three months because the applicant and her husband had difficulty finding suitable employment.

[5] The applicant's husband, age 56, is also a citizen of Lebanon. He is currently working as an engineer in Saudi Arabia. He financially supports the applicants, since Ms. Al-Farran is unemployed in Canada.

[6] The husband reportedly also obtained permanent resident status in Canada and appealed his case before the IAD. The husband is not an applicant in this application for judicial review.

[7] The applicant alleges that, in 2004, after all the family members had returned to Lebanon as a result of their financial difficulties, her husband was diagnosed with multiple sclerosis. That is apparently the reason the family did not return to Canada.

[8] While she was living in Lebanon, the applicant worked at a hospital from 2005 to 2012.

[9] After landing in 2002, the applicant did not return to Canada until five years later, in 2007, to give birth to her daughter. She remained in Canada only for approximately one and a half months, at which time the applicant returned to Lebanon. She explains that her husband did not want to leave his ill father alone in Lebanon. However, during that same period, the husband worked Monday to Friday from 8 a.m. to 4 p.m. at a hospital in Lebanon.

[10] On December 28, 2008, the applicants returned to Canada. The applicant stayed in Canada for approximately 135 days, while her sons remained in Canada for approximately 176 days. Alleging that they had exhausted all their financial resources in Canada, the applicants returned to live in Lebanon.

[11] On November 30, 2013, removal orders were issued against the applicants upon their return to Canada because they had failed to comply with the residency obligation. They had not been physically present in Canada for at least 730 days during the five-year reference period, from November 30, 2008, to November 30, 2013.

[12] Since November 2013, the family has been settled in Canada. However, the applicant reportedly returned to Lebanon in March 2017 for eight days to consult a new doctor with her husband. The children attend school in Canada. In the hope of finding a suitable job, the applicant, who was a midwife in Lebanon, decided to register for an equivalency program in November 2016 to become a nurse. As for the husband, he decided to remain in Saudi Arabia to provide financial support to his family. Since 2014, the couple has also owned a house in Canada and owns three cars.

[13] The applicants appealed the removal orders issued against them before the IAD, admitting, however, that they had failed to comply with the residency obligation. They asked the IAD to allow their appeal on humanitarian and compassionate grounds.

[14] The applicant alleged that she had been unable to settle in Canada earlier with her children, essentially because of: 1) her husband's multiple sclerosis; 2) her sick father-in-law (deceased in 2013); and 3) financial reasons.

[15] The applicant explained to the IAD that she feared the bombings in Lebanon, which is why she decided to leave Lebanon with her children in November 2013 to attempt living in Canada again.

[16] During the hearing before the IAD, the applicants had the opportunity to testify. The female applicant's testimony was the longest. She reportedly changed her testimony after contradicting herself several times regarding her husband's departure to Saudi Arabia, the

applicants' arrival in Canada in November 2013 and the reasons for which she decided to work in Lebanon in 2005.

III. Decision

[17] On April 24, 2017, the IAD dismissed the applicants' appeal on the grounds that they had failed to establish that there were sufficient humanitarian and compassionate considerations to justify maintaining their permanent resident status. The IAD considered the following factors in its assessment of the evidence regarding the applicants' situation (IAD's Reasons and Decision, page 4):

a) the extent of the non-compliance with the residency obligation;

b) the reasons for the appellants' departure from Canada;

c) the reasons for their continued or lengthy stay abroad;

d) whether they made reasonable attempts to return to Canada at the first opportunity;

e) the initial and continuing degree of establishment in Canada;

f) family ties to Canada and whether they are sponsorable;

g) the hardship and dislocation that would be caused to the appellants and their family in Canada if they were to be removed to their country of nationality;

h) the best interests of the child directly affected by the decision; and

i) whether there are unique or special circumstances warranting special relief.

[18] The IAD found, among other things, that the applicant had failed to adequately explain how the reasons for which she and her children left Canada were beyond their control. The

applicant also failed to provide evidence of her attempts to seek employment. The applicants waited over 11 years to settle in Canada. The IAD found that the applicants' situation is similar to that experienced by a large number of immigrants after they arrive in Canada: lack of family support and the need to obtain equivalencies in order to find employment.

[19] The IAD considered that a return to Lebanon, although difficult, would not cause the applicants undue hardship or dislocation. As a result, it found that the applicants were unable to establish, on the balance of probabilities and given the best interests of the three children, that there were humanitarian and compassionate considerations to warrant special relief.

IV. Issues

[20] The Court rephrases the issues raised by the applicant as follows:

1. Did the IAD breach procedural fairness by deciding the applicants' case without combining it with the father's case?
2. Was the IAD's decision reasonable in light of the best interests of the children and all the evidence?

[21] The standard of review that applies to IAD decisions is reasonableness. The Court must show great deference when reviewing such a case, given the IAD's discretion and its considerable expertise (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at paragraphs 58 and 60 [*Khosa*]). As for the issue of procedural fairness, there is no need to apply any standard of review because it need only be established whether or not the hearing before the

IAD was fair (*Haniff v. Canada (Citizenship and Immigration)*, 2012 FC 919 at paragraph 13 [*Haniff*]).

[22] The applicants' arguments generally relate to the weight that the IAD decided to give to the evidence on record. However, it is not for this Court to reassess the evidence in this application for judicial review (*Tai v. Canada (Citizenship and Immigration)*, 2011 FC 248 at paragraphs 49–50 [*Tai*]). Furthermore, this Court cannot substitute its own appreciation of the appropriate solution for that which was determined by the IAD (*Khosa*, above, at paragraph 59).

V. Relevant provisions

[23] The following provisions of the IRPA are relevant:

Residency obligation	**Obligation de résidence**
…	[…]
Application	**Application**
28 (2) The following provisions govern the residency obligation under subsection (1):	**28** (2) Les dispositions suivantes régissent l'obligation de résidence :
(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are	a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) physically present in Canada,	(i) il est effectivement présent au Canada,
Non-compliance with Act	**Manquement à la loi**
41 A person is inadmissible for failing to comply with this Act	**41** S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte

ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and

(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

Loss of Status and Removal

Perte de statut et renvoi

Report on Inadmissibility

Constat de l'interdiction de territoire

Preparation of report

Rapport d'interdiction de territoire

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

Suivi

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except,

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il

in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	peut alors prendre une mesure de renvoi.
Loss of Status	**Perte du statut**
Permanent resident	**Résident permanent**
46 (1) A person loses permanent resident status	**46** (1) Emportent perte du statut de résident permanent les faits suivants :
…	[…]
(b) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28;	b) la confirmation en dernier ressort du constat, hors du Canada, de manquement à l'obligation de résidence;
Right to appeal removal order	**Droit d'appel : mesure de renvoi**
63 (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.	**63** (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.
Appeal allowed	**Fondement de l'appel**
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	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

warrant special relief in light of all the circumstances of the case.	l'affaire, la prise de mesures spéciales.
Dismissal	**Rejet de l'appel**
69 (1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.	**69** (1) L'appel est rejeté s'il n'y est pas fait droit ou si le sursis n'est pas prononcé.

VI. Analysis

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

A. *Did the IAD breach procedural fairness by deciding the applicants' case without combining it with the father's case?*

[25] The applicant submits that the IAD breached procedural fairness because it should have attached her husband's case to the appeal. The applicant does not understand why the IAD continued the hearing even though it apparently said itself that the cases of family members are usually combined. The applicant adds that her husband's absence from the hearing resulted in his illness not being considered in the assessment of the best interests of the three children.

[26] On the contrary, the respondent submits that it was up to the applicants, and to their experienced counsel, to raise these concerns at the hearing. Issues of procedural fairness must be raised at the earliest opportunity. The applicant should not have waited for a negative decision on her case to complain that the IAD had breached procedural fairness. As a result, the applicant's failure to "object at the hearing amounts to an implied waiver of any perceived breach of procedural fairness or natural justice that may have occurred" (*Sayeed v. Canada (Citizenship*

and Immigration), 2008 FC 567 at paragraph 23; *Kamara v. Canada (Citizenship and Immigration)*, 2007 FC 448 at paragraph 26).

[27] The Court agrees with the respondent in finding that the applicant was responsible for raising any breach of procedural fairness at the earliest opportunity (*Haniff*, above, at paragraph 15). Furthermore, the Court is not satisfied that the IAD breached its duty of procedural fairness. Specifically, the applicant failed to establish how combining her case with her husband's would have had a considerable impact on the IAD's decision. To that end, the Supreme Court of Canada quoted a relevant passage by Professor Wade in *Administrative Law*, 6th edition, 1988 (*Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202):

> A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless. [Emphasis of the Court]

B. *Was the IAD's decision reasonable in light of the best interests of the children and all the evidence?*

[28] The IAD rendered its decision by applying the "*Ribic* factors" from *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] IABD No. 4 (QL), and later approved by the Supreme Court in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paragraphs 40–41.

[29] The applicants submit that the IAD's decision contains no individualized analysis of the children's best interests. The IAD did not call the applicant's youngest daughter to testify, even

though she was directly affected by the case. The IAD member should have considered the fact that it is not the children's fault that they depend on their parents and that their parents were unable to settle in Canada. The IAD should not have speculated that the youngest child, a Canadian citizen, could return to Canada when she is 18 years old and that both sons could also come to study in Canada with study permits.

[30] The respondent, however, argues that the IAD considered the interests of each of the children, including the situation of the youngest daughter. The respondent notes that, while the best interests of the child must be a factor in humanitarian and compassionate considerations, this factor alone is not determinative of the appeal. Furthermore, the respondent finds that the applicants are seeking this Court's intervention in the hope of having the evidence reassessed. However, the IAD did not ignore evidence in the applicants' case and exercised its discretion by conducting a reasonable analysis.

[31] The Court is also satisfied that the applicant is seeking a reassessment of the evidence. It is not for the Court to reassess the evidence submitted before the IAD in the context of this application for judicial review. "[T]his is the sort of factual dispute which should be resolved by the IAD" (*Khosa*, above, at paragraph 64). "The weight to be accorded to any particular factor will vary according to the particular circumstances of a case…" (*Tai*, above, at paragraph 47). For example, the IAD noted that the applicants' presence in Canada represented approximately 18% and 24% of the total requirement of 730 days. The IAD considered this to be a serious breach and a negative factor.

[32] The applicant nonetheless criticizes the IAD for a number of issues regarding its decision that are worth mentioning below.

[33] First, the applicant submits that, in assessing non-compliance with the residency obligation, the IAD was required to consider her husband's multiple sclerosis, as well as her father-in-law's illness (now deceased). The Court notes, however, that the IAD did consider her husband's medical condition (IAD Reasons and Decision, at paragraph 12). Moreover, the IAD considered her father-in-law's condition in its analysis, even though the applicant submitted no evidence in this regard (IAD Reasons and Decision, at paragraph 13):

> Although there is no documentary evidence concerning her father-in-law's health, I do not doubt that he had health issues. However, I consider that the female appellant did not provide a satisfactory explanation as to why she needed to be there. [Emphasis of the Court]

[34] Second, the Court does not agree with the applicant's argument that the IAD failed to consider the possibility of the children being separated from their father. Whether the applicants live in Lebanon or in Canada, the family is already separated. In fact, it is the father himself who decided to leave the family in 2013 to work in Saudi Arabia (IAD Reasons and Decision, at paragraph 28):

> Moreover, I note that the female appellant and her spouse have chosen to separate the family since 2013. Her husband decided to accept a job in Saudi Arabia and to reap the benefits of this position. [Emphasis of the Court]

[35] Third, the applicant alleges that the children depend solely and financially on their father. However, it appears from the facts on record that the applicant's sons worked while pursuing

their studies to support themselves. Furthermore, one of the sons even stated in his affidavit that he had received a student loan.

[36] Fourth, the Court finds that the IAD paid particular attention to the best interests of the youngest daughter. In fact, the IAD found that it was in her best interests to be with her parents, given her young age. Also, because she is a Canadian citizen, she can still return to Canada once she reaches the age of majority. The IAD also noted that the youngest daughter, who is now 10 years old, lived in Lebanon for six years and would therefore have no difficulty adapting to Lebanon.

[37] Lastly, the applicant alleges that the IAD erred in deciding that she contradicted herself on her reason for returning to live in Canada with her children in 2013. The Court is satisfied, however, that the IAD's decision was reasonable (IAD Reasons and Decision, at paragraph 28):

> I am aware that there are problems in Lebanon, but I also note that the appellants chose to return there entirely of their own free will on several occasions. They cannot now use the difficult conditions in that country to indicate that they cannot return there. They waited 11 years before leaving Lebanon. .. [Emphasis of the Court]

[38] The Court agrees with the respondent that the IAD examined all the evidence on record. Before finding that there were not sufficient humanitarian and compassionate considerations to warrant special relief, the IAD conducted an in-depth analysis, taking into account the *Ribic* factors. The IAD then exercised its discretion by weighing the positive and negative factors with respect to the applicants' situation. "The IAD is presumed to have considered all of the evidence before it and had sufficient reasons to support its conclusions" (*Tai*, above, at paragraph 74). The applicant failed to prove otherwise.

[39] For these reasons, the Court is convinced that the IAD made a reasonable decision. The IAD's 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 paragraph 47).

VII. Conclusion

[40] This application for judicial review is dismissed.

JUDGMENT in IMM-2057-17

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

There is no question of importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
This 20th day of November 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2057-17
STYLE OF CAUSE:	MAHA AL-FARRAN, ABDEL-KADER CHAHBAZ, MAHMOUD CHAHBAZ (MINOR) v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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