Federal Court  Cour fédérale

Date: 20171220

Docket: IMM-2939-17

Citation: 2017 FC 1176

Ottawa, Ontario, December 20, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SARA HAMDY NASS FOUDA,
YAHIA HAYTHAM FATHALLA,
HATHAM MOHAMED FATHALLA

Applicants

and

MINISTER OF IMMIGRATION, REFUGEES,
& CITIZENSHIP

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Immigration Appeal Division ("IAD") of the Immigration and Refuge Board of Canada, dated May 31, 2017. The IAD denied the appeal of the Applicants, made pursuant to s 63(3) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") and which was based on humanitarian and

compassionate ("H&C") grounds, concerning the removal order issued against them as a result of their failure to meet the permanent resident obligations of the IRPA.

Background

[2] The Applicants are Hatham Mohamed Fathalla ("Male Applicant"), his wife Sara Hamdy Nass Fouda ("Female Applicant") and their 10 year old son, Yahia Haytham Fathalla ("Minor Applicant"). They are citizens of Egypt. The adult Applicants also have an 8 year old son, Yousef Fathalla, who was born in Canada in 2009 and is a Canadian citizen.

[3] The Male Applicant applied for permanent residence in 2004. He married the Female Applicant in 2006 and the Minor Applicant was born in October 2007. The Female and Minor Applicants were added to the Male Applicant's application which was approved in June 2008. The Applicants traveled to Canada in July 2008 and obtained permanent residence status upon arrival.

[4] In April 2013, the Applicants applied to renew their permanent residence cards. The application contained false information with respect to the Applicants' residency in Canada. As a result, in May and June 2014, respectively, the Male and Female Applicants were each charged with misrepresentation pursuant to s 127 of the IRPA. The charges against the Female Applicant were eventually withdrawn. The Male Applicant entered a guilty plea to the charges against him and was fined $20,000.00.

[5] Because the Applicants failed to meet the residency obligation contained in s 28 of the IRPA, being that they remain in Canada for a minimum of 730 days within a five year period, they were found to be inadmissible pursuant to s 44(2) of the IRPA and removal orders were issued against them on June 4, 2014. Pursuant to s 63(3) of the IRPA, the Applicants appealed to the IAD against the decision to make the removal orders. The Applicants did not dispute the legality of the removal orders, rather, they submitted they should be allowed to remain in Canada on H&C grounds. They appeared before the IAD, which found that the Applicants had not demonstrated sufficient H&C grounds and dismissed their appeals.

Decision Under Review

[6] The IAD heard the appeals of the Male Applicant and of the Female Applicant, who was the designated representative of the Minor Applicant, together. The facts, as described above, were set out and the IAD noted that both the Male and Female Applicants testified at the hearing and that their testimony was credible. The IAD also set out the criteria to be taken into account when considering H&C grounds and stated that these factors are not exhaustive and the weight for each factor varies with the circumstances of the case.

[7] The IAD noted the adult Applicants' testimony was that on July 24, 2008, the family came to Canada with the goal of staying in the country for a few days to look for places to settle. The Female Applicant returned to Canada in September 2009, the Male Applicant joined her a few weeks later and their second son was born during this visit. The Applicants left Canada in October 2009 with their Canadian-born infant son. The IAD noted that the adult Applicants did

not hide the fact that they had come to Canada for the purpose of having their son born here as they believed this would facilitate their settlement and fit in well with their plans.

[8] Further, that the Female and Male Applicants returned to Canada in January and July 2011, respectively, to write exams for their pharmacy qualifications, at this time they remained in Canada for just a few days. The IAD noted the Female Applicant settled permanently in August 2013 and had since remained in Canada with the two children. During this time, the Male Applicant continued to work in the United Arab Emirates ("UAE"), he returned to Canada in February 2017.

[9] The IAD noted the Female and Minor Applicants had approximately 312 days of physical presence in Canada during the 5 year period from May 29, 2008 to May 28, 2014 and that the Male Applicant had approximately 100 days present during that time. The IAD concluded this factor was negative.

[10] The IAD also noted the Male Applicant's claim that he was not able to settle more quickly in Canada because his mother became seriously ill in 2007. An aggressive cancer required her to undergo several surgeries and, eventually, an amputation procedure in 2013. His mother then had problems with her prosthesis and eventually moved to the UAE with her son for rehabilitation. The Male Applicant claimed he had no choice but to continue working in the UAE to pay for his mother's care and to visit her in Egypt, to consult with doctors, and to sponsor her living in the UAE. These costs and the need to financially support his family in Canada starting in 2013 required the Male Applicant to put off coming to Canada and starting

over at the bottom of the ladder while obtaining his equivalencies in pharmacy. Given this, his MBA studies and surgery that he underwent in 2015, the IAD recognized that the Male Applicant's life was stressful and chaotic.

[11] However, the IAD stated that it could not conclude that the Male Applicant returned to Canada to settle at the first reasonable opportunity. He had been in Canada only since February 2017, which was nine years after obtaining permanent residency; he was not tending to his mother's immediate needs in Egypt when he worked in the UAE; and, financially speaking, the IAD did not believe he investigated all possibilities for earning a living in Canada or considered combining his income with the possibility of his wife finding employment. Nor did the IAD accept the Female Applicant's claim that she could not earn her pharmacy credentials in Canada any more quickly due to tending for her two young children. This scenario would have been different had the Male Applicant had been in Canada. Further, the Female Applicant's mother and sister moved to Canada in 2010 and 2012, respectively, and lived in the same building as the Applicants, they could also have provided some support.

[12] In addition, the IAD noted that the Applicants had misrepresented information in their permanent residence materials. In the documents filled out by the Male Applicant, the family claimed to have been living full time in Canada during the past few years and that the Male Applicant was working in Canada. Documents such as telephone and other bills, banking statements, the Minor Applicant's passport which was not up to date and did not disclose travel were submitted, all of which made it look like the family had been living in Canada since 2008. The IAD noted the resultant charges of misrepresentation, the Male Applicant's guilty plea, the

fine levied and paid as well as the Male Applicant's remorse. The IAD stated that it believed that the adult Applicants were sincerely repentant and that the motives behind this poor decision were not all bad.

[13] However, the IAD stated that it could not allow the Applicants to benefit from the positive factors in their file which they acquired through cheating. These included that the Female Applicant has been living in Canada with the children since 2013; her integration into Canadian society through her involvement in the children's school, working and attending university; the children having spent much of their lives in Canada; and, the Male Applicant has, for the past few months that he has been living in Canada, worked doubly hard to get involved in his community. The IAD stated that none of these things would have been possible if the Applicants had not defrauded the system.

[14] The IAD acknowledged that the Applicants emphasized the best interests of the children and that the Applicants have not resided in Egypt for over ten years, and never really practiced their profession as pharmacists there. They had also submitted that the situation in Egypt has deteriorated considerably since they left. Further, that the Female Applicant relied on the presence of her sister and mother in Canada and the fact that she no longer has any immediate family in Egypt.

[15] The IAD recognized that the children, one of whom is Canadian, have spent a good part of their lives in Canada and benefit from frequent contact with their grandmother, aunt, and their aunt's children. The IAD also recognized that the Female Applicant's immediate family is now

in Canada and that she benefits from their support. However, the IAD found that Egypt was not completely foreign to the children because they visited there with their mother for extended periods on a number of occasions. Moreover, the Male Applicant's immediate family are still in Egypt. As such, the best interests of the children were to remain with their parents in whichever country the parents may end up living. While continuing to live in a familiar place with extended family is easier, the IAD found that such comfort was not sufficient to counteract the negative weight of the other factors. The IAD stated that it had no evidence that the security and political situation in Egypt has deteriorated to the point where it would be unreasonable to expect the Applicants to return there to live. In addition, the Male Applicant had completed his MBA which would facilitate his search for employment if the pharmacy field is no longer an option for him.

[16] The IAD concluded that the Applicants had not demonstrated, on a balance of probabilities, that there were sufficient H&C grounds to allow the appeals.

Issues and Standard of Review

[17] Having considered the submissions of the parties, I would frame the issues as follows:

1. Did the IAD's reasons demonstrate a reasonable apprehension of bias?
2. Did the IAD fail to properly consider the best interests of the children?
3. Did the IAD ignore or misconstrue the evidence?

[18] I agree with the parties that questions of bias pertain to procedural fairness and are therefore to be reviewed under the correctness standard, pursuant to which no deference is owed

to the decision-maker (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43 ("*Khosa*"); *Bi v Canada (Citizenship and Immigration)*, 2012 FC 293 at para 12; *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 30). I also agree that the standard of review for IAD decisions pertaining to determination of residency obligations and to H&C considerations is reasonableness (*Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at para 18; *Khosa* at paras 57-59, 64 & 67; *Dandachi v Canada (Citizenship and Immigration)*, 2016 FC 952 at para 13). Analyzing decisions under this standard involves looking at the existence of justification, transparency, and intelligibility such that the decision falls within the range of possible outcomes that are defensible in light of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

Issue 1: Did the IAD's reasons demonstrate a reasonable apprehension of bias?

[19] The Applicants submit the IAD's statement that it could not "allow the [Applicants] to benefit from the positive factors in their file which they acquired through cheating" demonstrates that the IAD considered the misrepresentation to be determinative and, therefore, it was not prepared to allow the appeal regardless of any H&C factors. In that regard, and contrary to the Respondent's position, the Applicants assert the IAD did not limit its consideration of the misrepresentation to the establishment factor, but used it to negate any positive H&C factors. However, even if the misrepresentation fully negated the establishment factor, its effect on the other relevant *Ribic* factors is less clear (*Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 ("*Ribic*")). For example, misrepresentation cannot affect the presence of the Applicants' family members in Canada, adverse country conditions in Egypt or

the best interests of the children analysis, which potentially weigh in the Applicants' favour and should have been analyzed accordingly and not in the shallow manner adopted by the IAD. According to the Applicants, the IRPA clearly allows an applicant to redress wrongdoing through a consideration of H&C factors. Therefore, concluding that the Applicants could not succeed on appeal because of the misrepresentation ignored the purpose of the IRPA in creating an H&C exemption, and, demonstrates attitudinal bias.

[20] The Respondent submits the high threshold for the test for bias (*Liang v Canada (Citizenship and Immigration*), 2011 FC 541 at para 16) has not been met. The Applicants' misrepresentation was relevant and was examined by the IAD in a very specific context, being how it related to the H&C establishment in Canada factor. The circumstances under which the Applicants became established were a valid consideration as they sought to rely on this establishment to exempt them from a statutory requirement, the residency obligation, which they did not meet. Further, H&C considerations do not immunize the Applicants from previous acts. Subsection 28(2)(c) of the IRPA states that the determination to be made is whether the H&C factors "overcome any breach of the residency obligation". This language allows the Applicants to overcome breaching the physical residency requirement of being in Canada for 730 days within a five year period, but does not exempt them from all past actions. Nothing in s 28 prevents the IAD from considering conduct that directly impacts the H&C factors relied upon by the Applicants. The IAD indicated that the misrepresentation was an issue with respect to the factors dealing with establishment in Canada, it did not state that this prevented it from being able to find in the Applicants' favour. Rather, the factor of establishment was considered and weighed differently then it may have been in other circumstances. Here, the IAD considered

establishment alongside other factors, including the best interests of the children, country conditions in Egypt, and the Female Applicant's family presence in Canada, but ultimately found that the positive factors did not overcome the negative factors. Making this finding does not demonstrate bias.

[21] As a starting point, I note that the Supreme Court of Canada in *R v RDS*, [1997] 3 SCR 484 ("*RDS*") adopted the test for the reasonable apprehension of bias as set out by de Grandpré J. in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369:

> [31] … De Grandpré J. stated, at pp. 394-95:
>
> > . . . the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information.... [T]hat test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
> >
> > The grounds for this apprehension must, however, be substantial and I ... refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

[22] The Supreme Court also described bias as denoting a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues (*RDS* at para 105) and stated:

> [106] A similar statement of these principles is found in *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.), in which Watt J. noted at pp. 51-52:

> In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.
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> See also *R. v. Stark*, [1994] O.J. No. 406 (Gen. Div.), at para. 64; *Gushman, supra*, at para. 29.

[23] The onus is on the Applicants to establish that the IAD's actions or reasons demonstrated actual or perceivable bias (*RDS* at para 114) and there is a high threshold to be met in this regard (*Zhu v Canada (Citizenship and Immigration)*, 2013 FC 1139 at para 2; *AB v Canada (Citizenship and Immigration)*, 2016 FC 1385 at para 141).

[24] In this matter, the Applicants rely on a single comment within the written decision to ground their allegation of bias. In my view, it is necessary to place that comment in context within the decision. In that regard, I note that prior to making the impugned comment the IAD set out the non-exhaustive list of factors to be taken into account when assessing H&C considerations in the type of appeal before it, noting that the weight given to each factor depends upon the circumstances of the case. The IAD then considered the number of days of physical presence for the each of the Applicants and the reasons given for the failure to settle more quickly in Canada. It then dealt with the misrepresentation.

[25] Having set out the factual backdrop to the misrepresentation, the IAD stated that it could not allow the Applicants to benefit from the positive factors in their file, which they acquired

through cheating. The IAD stated the Applicants were relying on the fact that the Female Applicant had been living in Canada with the children since 2013; integrated herself by getting involved in the children's school and by working and attending university; the children have spent many years of their life here; and, since the Male Applicant came to Canada he has worked hard to get involved in his community. The IAD stated that none of this would be possible if the Applicants had not defrauded the system. Having dealt with this, the IAD went on to deal with other H&C factors, being the best interests of the children, country conditions in Egypt and the presence of the Female Applicant's family members in Canada.

[26] Given this, I disagree with the Applicants' submission that the impugned comment showed the IAD considered the misrepresentation to be determinative and that it was, therefore, not prepared to allow the appeal from the outset and misapplied the law. That submission is not supported by the IAD's reasons. In my view, the challenged statement pertained only to the H&C factor of establishment and was discrete from the IAD's analysis and consideration of other factors. Ultimately, the IAD's comment speaks to the weight to be given to the establishment factor. And while the IAD could, perhaps, have more clearly expressed itself, the comment does not, in my view, demonstrate bias (see *Bhatia v Canada (Citizenship and Immigration)*, 2017 FC 1000 at para 32). Further, even if the H&C analysis of the other factors was "shallow", as the Applicants assert, this argument goes toward the reasonableness of the decision itself rather than bias and procedural fairness.

[27] The Applicants also submit that s 28 of the IRPA allows an applicant to redress wrongdoing through consideration of the H&C factors, but that the IAD concluded that they

could not succeed on appeal because of the underlying misrepresentation. As I do not agree that the IAD found the appeal could not succeed because of the misrepresentation, I need not address this point.

[28] The Applicants do not assert the existence of any other evidence of bias either in the reasons or during the conduct of the IAD hearing and I am not satisfied they have established bias based on the impugned comment.

Issue 2: Did the IAD fail to properly consider the best interests of the children?

Applicants' Position

[29] The Applicants submit the IAD gave no meaningful consideration to the best interests of the minor children in this matter. They submit that the IAD's analysis ignores the factors listed in Citizenship and Immigration Canada's policy manual which includes the age of the child; level of dependency between the child and the H&C applicant; degree of the child's establishment in Canada; child's links to the country in which the H&C assessment is being considered; conditions of that country and the potential impact on the child; medical issues or special needs the child may have; impact to the child's education; and matters related to the child's gender (*Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 at para 40 ("*Kanthasamy*")). Moreover, while a proper best interests of the child analysis requires the children's interests to be "well identified and defined and examined with a great deal of attention" (*Kanthasamy* at para 39), in this case the IAD's analysis was shallow and insufficient and its conclusion that the best interests of the children lay with being with their parents, in

whichever country they end up living, undermines the importance of the best interests analysis. While the best interests of the child factor is not determinative, it is unique and deserves considerable weight (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 46 ("*Baker*")). Here, the IAD failed to meaningfully consider this factor to account for Canada's H&C tradition and the relevant guidelines (*Baker* at para 75).

[30] The Applicants submit that the phrase 'alert, alive, and sensitive' is not empty language and is essentially a direction to the IAD on how to assess the best interests of the child analysis (*Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at paras 9, 11 and 12 ("*Kolosovs*")) of which the IAD fell short.

[31] According to the Applicants, the IAD failed to identify the actual best interests and then weigh these interests against the negative factors of removing the children from Canada. Further, the IAD's analysis failed to consider that one of the two children affected by the decision is a Canadian citizen, ignoring the Canadian citizen's right to residence in Canada, quality education and healthcare, and right to safety and security. Determining the best interests of the child in this context includes assessing the harm the child would suffer from removing the parent or the child's voluntary departure should the child wish to accompany the parent abroad (*Canada (Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 5 ("*Hawthorne*")).

Respondent's Position

[32] The Respondent submits that while the IAD must be alert, alive, and sensitive to the best interests of a child, it has the discretion to assign weight to this factor within the overall H&C assessment (*Canada (Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 12 ("*Legault*")). In this case, the IAD was alive to the best interests of the children and reviewed the evidence regarding their interests. However, even though the best interests of the children may be a positive factor, this is only one element to consider and it will not always be determinative (*Choudhary v Canada (Citizenship and Immigration)*, 2008 FC 412 at para 35). The IAD did not ignore the best interests of the children, the evidence that was presented was considered and weighed as part of the overall H&C analysis.

Analysis

[33] The consideration of a child's best interests is a highly contextual analysis requiring that decision-maker do more than state that the interests of a child have been taken into account (*Hawthorne* at para 32). Those interests must be well identified, defined and examined with a great deal of attention in light of all of the evidence (*Legault* at paras 12 and 31; *Kolosovs* at paras 9-12) as stated by the Supreme Court of Canada in *Kanthasamy* (at para 39)) (also see *Louisy v Canada (Citizenship and Immigration)*, 2017 FC 254 at para 9 ("*Louisy*")). However, and contrary to the Applicants' suggestion, there is no specific formula or rigid test for the best interests of the child analysis and form should not be elevated over substance when assessing the decision-maker's reasons (*Kanthasamy* at para 35; *Hawthorne* at para 32; *Louisy* at para 9).

[34] In my view, the IAD adequately assessed the best interests of the children by engaging with the *Kanthasamy* factors in light of the evidence before it.

[35] The burden is on an applicant to advance meaningful evidence in support of an analysis of a child's best interests (*Osorio Diaz v Canada (Citizenship and Immigration)*, 2015 FC 373 at para 29 ("*Osorio*"); *Celise v Canada (Citizenship and Immigration)*, 2015 FC 642 at para 35; *Louisy* at para 11 ("*Celise*")). In that regard, it is significant to note that the Applicants in this matter submitted very little documentary evidence to the IAD in support of their claim that the children would be detrimentally impacted by removal to Egypt.

[36] Regardless, at the hearing the IAD canvassed these issues. The IAD asked the Female Applicant about the ages of the children, how they were doing in school and how removal would impact the Applicants. On the latter point, the Female Applicant testified that she had not given this a thought. She then stated that her youngest son is asthmatic, the condition had not been controlled and he had spent time in the hospital. He was now taking Singulare and doing really well on it and taking Ventolin infrequently and only when needed. She testified that these medications are not now available in Egypt or are hard to find due to "the crash of the dollar or something" and that Egypt is polluted. The documentary evidence includes a May 8, 2017 letter from a physician stating that Yousef has asthma, it is well controlled on Singulare and he is prescribed a puffer, but requires it infrequently.

[37] When asked if she had any discussions with the children about the possibility of living in Egypt, she indicated that she had not. She then recounted that when on holiday there for a month

her son saw a banana peel in the elevator and was really upset by this. The Female Applicant stated that she did not know how people could live like that, leaving banana peels in elevators. There were also difficulties in crossing the roads. As to education, her eldest son was achieving academic excellence in Canada and she queried how he would feel if he were relocated elsewhere, noting that it would be a shock for him as he is settled and happy now. She testified that the education system in Egypt was really terrible and she had learned that Egypt was ranked 139th of 150 countries and suggested Googling this. She stated that it was a disaster, whereas in Canada the education system was rewarding. She also testified that Egypt is a difficult place to live and is a dangerous place, there are kidnappings of children who are "sold for $150 or something just to take their organs".

[38] The IAD, in its reasons, looked at the children's links to Canada, noting the beneficial effect of living near the Female Applicant's mother, sister, and her sister's children. The IAD also weighed this benefit with the children's connection to Egypt, which included lengthy visits on vacation and the presence of the Male Applicant's extended family. The IAD also recognized that the children have spent a good part of their lives in Canada.

[39] Although the IAD's best interests of the child analysis was brief, this is not an error when the evidence on the best interests of the child elements is sparse (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 30; *Samad v Canada (Citizenship and Immigration)*, 2015 FC 30 at para 36). In this case, although at the hearing the Female Applicant testified that asthma medication is difficult or cannot be obtained in Egypt, no documentary evidence was provided to support this. Nor to support that the education system in Egypt is terrible and that

child abductions are a risk there. In this regard, the IAD noted that the Applicants had failed to provide evidence that the security or political situation in Egypt deteriorated to the point where returning there was unreasonable.

[40] The Applicants bore the onus of proving such claims with evidence and simply referring to worse general conditions in Egypt is insufficient to meet that onus (*Osorio* at para 29). Similarly, facing removal to a less developed country in the company of competent parents is not alone a sufficient basis for H&C relief (*Celise* at para 33).

[41] Nor do I agree that the IAD failed to recognize that the youngest child was a Canadian citizen. This was acknowledged by the IAD and, as stated in *Hawthorne* (at para 5), a decision-maker can be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with a parent is better off than a child living in Canada without his or her parent. However, the youngest child is 8 years old and therefore dependent upon his parents. The record does not suggest that there was any suggestion of leaving him in Canada with his grandmother and aunt.

[42] Thus, while the Applicants criticize the IAD for its limited best interests of the child analysis, the evidence before the IAD on this issue was extremely limited and the transcript indicates that other factors were explored at the hearing. The IAD considered the ages of the children, their establishment in Canada and links to Egypt, that the youngest has asthma and the children's education. In these circumstances, the analysis was sufficient and the record shows that the IAD was alive, alert, and sensitive to the best interests of the children. Further, given

their young ages, the fact that the IAD found that the children's best interests were best served by remaining with their parents, regardless of whether that was in Canada, Egypt or another country of their parents' choosing, did not minimise the best interests of the children and was not unreasonable.

Issue 3: Did the IAD ignore or misconstrue the evidence?

Applicants' Position

[43] The Applicants submit the IAD erred in finding the Applicants credible and then proceeding to doubt their credibility later in the decision. In particular, the IAD rejected the Female Applicant's explanation for why she could not have obtained her pharmacy credentials more quickly, despite finding her credible, and instead offered speculative alternative explanations. Moreover, the Female Applicant's reasons for the delay included other factors outside of parenting, such as the multiple steps for pharmacy accreditation, the bi-annual offerings for qualifying exams, the strict limit on how many times these exams can be taken, and, her employment and community involvement. It is unclear why the IAD did not consider these reasons to be credible. The Female Applicant's explanation speaks to the Male Applicant's return to Canada at the earliest opportunity and establishment in Canada, thus, the IAD's refusal to accept the explanation or to explain why it refused to do so undermines its analysis of those factors and the H&C assessment overall.

[44] The Applicants also submit that the IAD unreasonably failed to consider the unique circumstances and factors for each of the Applicants. While the appeals were heard together, the

IAD treated them as a single matter. For example, the IAD concluded the Male Applicant did not return to Canada at the first reasonable opportunity, but failed to independently consider whether the Female Applicant and the Minor Applicant did so. The Male Applicant's untimely return, deemed a negative factor, seemingly implicated the Female and Minor Applicants, although they came to Canada three and a half years earlier.

Respondent's Position

[45] The Respondent submits the IAD considered and did not misconstrue or ignore the evidence before it. The finding that the Female Applicant could have established herself in Canada earlier was not a rejection of evidence or a credibility finding. Rather, it was the IAD's finding weighing the evidence, in particular, the evidence of the supports the Female Applicant had in Canada. The IAD was entitled to and did reach a conclusion based on the evidence rather than rejecting evidence as not credible.

[46] As to hearing the applications together and the issuing one decision, the IAD considered the circumstances of each Applicant, including their respective and different days present in Canada short of the statutory requirement, dates of settling in Canada, reasons for not settling earlier and the locations of their family members. The fact the IAD issued one decision for the family, where the appeals were heard together and much of the evidence was the same, is not an error, particularly when the facts specific to each Applicant are noted.

Analysis

[47] In my view, the IAD did not misconstrue or ignore evidence resulting in an erroneous finding of fact nor did it reject the explanations offered by the Applicants on the basis that the Applicants were not credible.

[48] When asked at the hearing, the Female Applicant indicated that as a new mom she had limited time to study, she wrote one exam in January 2011 but was unsuccessful, she successfully rewrote it in 2013, she was doing other exam preparation, worked as a pharmacist assistant from February 2016 to January 2017 and was now preparing for an internship and tutors six hours a week. When asked when she anticipated completing the requirements to be a pharmacist in Canada, she stated hopefully in a year. Other than being a mother, it was not particularly clear from the Female Applicant's testimony why it has taken over six years to get to the stage that she has, aside from failing one exam in 2011 which she testified she had subsequently passed in 2013. For example, while she also testified that her father had been ill, he passed away in 2011.

[49] Her testimony also indicated that she anticipated being supported by her mother. Her reason for not staying in Canada in 2008 when she had permanent residence status was her husband's work commitments and that she wasn't able to settle on her own at that time. In 2009, she came to Canada to give birth but stated that she did not stay because she had small children and had applied for her mother to come to Canada as a visitor but her mother's application had been rejected. When asked if the rejection affected her decision to stay in Canada in 2009, the

Female Applicant stated that it did because her mother could support her with help with two small children in a new country. Her sister came to Canada in 2010, her mother in 2013. She testified that they are very close.

[50] The IAD accepted and considered the Female Applicant's evidence but was simply not persuaded by her explanation as to why she could not have obtained her credentials more quickly, particular given the availability of support from her mother and sister and the fact that, had the Male Applicant settled in Canada sooner, she would also have had his support. In the result, this aspect of her establishment in Canada was not sufficient to ground the H&C claim for special relief.

[51] Nor am I persuaded that the IAD conflated or failed to recognize each of the Applicants' unique circumstances. While the IAD heard the appeals together and did not partition the decision into water-tight sections, its reasons nonetheless address the circumstances of each Applicant. In particular, the IAD notes each Applicant's time spent in and outside of Canada, the location of their respective extended families, their explanations given, and their roles in the prior misrepresentation. It is also clear from the transcript that the IAD inquired into the Female Applicant's reasons for not returning to Canada at the earliest reasonable opportunity.

[52] When appearing before me, the Applicants emphasized that the Female and Minor Applicants did not benefit from the misrepresentation. They submit that the Female Applicant returned to Canada in 2013 utilizing her initial and still valid permanent residence card. She and her husband were not charged with misrepresentation until May and June 2014, respectively,

being ten months later. Thus, if the misrepresentation had been discovered earlier, the Female and Minor Applicant could still have settled and become established in Canada pending an appeal. Only the timeline would have changed. The Applicants submit that they maintained their Canadian permanent residence status, and the rights it confers, until the final determination of their appeal. Therefore, the Female Applicant's establishment in Canada was not a result of "cheating" as the IAD found and it erred when it did not consider her positive establishment factors on that basis.

[53] While I appreciate that the Female Applicant retained her permanent residence status, the fact remains that the misrepresentations were made in April 2013, prior to the expiry of the Applicants' initial permanent residence cards and for the purpose of obtaining an extension of the permanent residence cards. The Female Applicant returned to Canada to settle in August 2013, after the misrepresentation had been made but before her original permanent residence card expired. She knew her existing permanent residence card was about to expire, she knew that she could not meet the residency obligation of s 28 of the IRPA and she knew that an application for an extension had been made based on misrepresentation in that regard.

[54] This Court has held that misrepresentation is a relevant factor when considering a person's degree of establishment as, to do otherwise, would place the immigration cheat on an equal footing with a person who complied with the law. Further, whether the impact of the fraud is to reduce the establishment to zero or to something more is a question for the discretion of the decision-maker based on the particular facts of the matter before them (*Canada (Citizenship and Immigration) v Liu*, 2016 FC 460 at para 29).

[55] Viewed in whole, I am not persuaded that the IAD made reviewable errors or that its decision was unreasonable. Based on the record, it was open to it to conclude, as it did, that on a balance of probabilities, there were insufficient H&C considerations to allow the appeal.

JUDGMENT IN IMM-2939-17

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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