Federal Court

Cour fédérale

Date: 20180316

Docket: IMM-3946-17

Citation: 2018 FC 307

Ottawa, Ontario, March 16, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

HARJINDER SINGH WARAICH
GURMEET KAUR WARAICH
ISHWINDER SINGH WARAICH

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 by the Applicants pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*], of a decision made by the Immigration Appeal Division [the IAD] of the Immigration and Refugee Board [the IRB], dated August 4, 2017, wherein the IAD upheld the decisions of visa officers who refused the

Applicants' applications for travel documents because they failed to meet the residency obligations pursuant to section 28 of *IRPA*, and that no humanitarian and compassionate [H&C] grounds warranted special relief.

[2] The case arises in respect of three Indian nationals with Canadian permanent resident status, all with significantly less than 730 days of residence in Canada in the previous five years, as required of all permanent residents by *IRPA*: one spent only 25 days in Canada; the other two spent only 90days. The IAD denied all three the benefit of *IRPA*'s exemption concerning those working offshore for Canadian businesses, and also denied H&C relief.

[3] I am not persuaded the IAD acted unreasonably in either respect; therefore the application for judicial review is dismissed. My reasons follow.

II. Facts

[4] There are three Applicants. Their cases were joined because they are related family members and their cases have issues in common.

[5] The First Applicant is a citizen of India who came to Canada as an international student for studies at Seneca College in 2001 or 2002. He received his Bachelor of Arts in 2006 from York University and later completed a post-graduate finance designation from Seneca College. In November 2008, he became a permanent resident of Canada. In 2009, he started an immigration consulting corporation and in 2010, he returned to India to promote his corporation. He is a member of the Immigration Consultants of Canada Regulatory Council [ICCRC] and the

Canadian Society of Immigration Consultants. He works and resides in India. In the relevant five year period, he had 25 days residence in Canada, well short of the 730 required.

[6] The Second Applicant is the father of the First Applicant and is also a citizen of India. The Second Applicant became a permanent resident of Canada in November 2008. He currently works and resides in India with his wife and the First Applicant. In the relevant five year period, he had 90 days residence in Canada.

[7] The Third Applicant is the wife of the Second Applicant and mother of the First Applicant. She is also a citizen of India and currently resides with her spouse and son in India. She also became a permanent resident of Canada in 2008. She also had only 90 days residence in Canada in the relevant five year period.

[8] In August 2014, the Second and Third Applicants applied for visas to re-enter Canada. A visa officer advised them that they had not complied with their residency obligations pursuant to section 28 of *IRPA*, because during the five-year period immediately preceding their applications for entry to Canada, they had each spent only 90 days in Canada of the 730 days required by *IRPA*.

[9] The Second Applicant claims he met the residency requirements under section 28 of *IRPA* because he was working full-time for his son’s Canadian immigration consulting business while in India. The Third Applicant claims she met the residency requirements because she was

accompanying her permanent resident spouse who was working full-time for a Canadian business while in India.

[10] In March 2015, the First Applicant applied for a travel document to attend his brother's funeral in Canada. The visa officer who refused the application informed him that he lost his permanent resident status because he had not complied with his residency obligations pursuant section 28 of *IRPA*. During the five-year period immediately preceding his application for a travel document, he spent only 25 days in Canada of the 730 days required by *IRPA*.

[11] The Applicants appealed the determinations by the visa officers to the IAD.

III. The Corporations

[12] Wisdom Immigration Consultancy Services [the Canadian Corporation] was incorporated by the First Applicant in Canada in October 2009. The First Applicant is the sole director. The Second Applicant is an employee. The Canadian Corporation executes contracts with Canadian colleges to promote Canadian colleges abroad and sends international students from India to Canada to study. The Applicants claim the Canadian Corporation pays $18,000.00 - $24,000.00 annually to its only two full-time employees – the First and Second Applicants.

[13] Wisdom Migration and Immigration Services Private Limited [the Indian Corporation] was incorporated by the Second and Third Applicants in India in May 2010. They are its sole directors.

[14] The Canadian Corporation has a contract with the Indian Corporation to promote the Canadian Corporation in India.

IV. Issues

[15] The Applicants submit the following issues for determination:

1. Did the IAD err in application of case law with respect to the concept of "ongoing operations" per *Durve v Canada (Citizenship and Immigration),* 2014 FC 874 [*Durve*]?
2. Did the IAD err in its finding of facts?
3. Did the IAD err in exercising discretion on H&C grounds?

[16] In my view, there are two issues for determination:

1. Whether the IAD acted unreasonably in finding the Canadian Corporation is not a Canadian business for the purposes of section 28 of *IRPA* and section 61 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [the *Regulations*]; and
2. Whether the IAD's refusal to grant H&C relief pursuant to paragraph 67(1)(c) of *IRPA* was reasonable.

V. Decision

[17] The two issues before the IAD were whether the Applicants satisfied the requirements of section 28 of *IRPA*; and if not, whether sufficient H&C grounds warranted special relief pursuant to paragraph 67(1)(c) of *IRPA*.

A. *Were the Requirements of section 28 of IRPA and section 61 of the Regulations met?*

[18] The IAD acknowledged that the *Regulations* allow certain exceptions to the requirement that a permanent resident be physically present in Canada for at least 730 days in a five-year period, including for employment outside of Canada, by a Canadian business, on a full-time basis. Another exception allows a permanent resident to accompany a spouse, who is also a permanent resident, who is outside Canada for employment by a Canadian business, on a full-time basis.

[19] The IAD considered the following factors arising out of section 61 of the *Regulations*:

a. **Is the business incorporated in Canada?**

The IAD noted that the Canadian Corporation was incorporated in Canada, and the Indian Corporation was incorporated in India. The IAD concluded that the Indian Corporation is affiliated with the Canadian Corporation because given its contract with the Canadian Corporation, it is under the command and control of the Canadian Corporation. This was not disputed before me.

b. **Does the business have ongoing operations in Canada?**

The IAD concluded that the Canadian Corporation is not a Canadian business with ongoing operations in Canada.

[20] The IAD relied on *Durve* and *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 per Near J, as he then was, to guide its analysis and considered the following:

- **Qualifications in Canada** – The IAD noted the First Applicant's membership of the ICCRC and the Canadian Society of Immigration Consultants.
- **Indian Corporation** – The First Applicant supervises the Indian Corporation, which promotes 14-15 Canadian colleges in India. The Indian Corporation has six employees and conducts three to five seminars per month with prospective students, generating over 100 clients per year. Most business promotion takes place in India. The Applicants plan to open a second office in India.
- **Canadian Corporation** – The address of the Canadian Corporation is the home of the First Applicant's sister, a homemaker in Brampton. The Canadian Corporation pays no rent for the use of office space in the sister's home. The sister is not an employee and is not paid for any services she provides.
    - All other employees of the Canadian Corporation are located in India; there are no employees in Canada.
    - The Second Applicant is the Business Development Officer of the Canadian Corporation and is located in India.
    - The Second Applicant is paid by the Canadian Corporation and his contract stipulates that he will only promote the Canadian business.
    - The Canadian Corporation had no contracts executed with any Canadian colleges prior to the Applicants' return to India in 2010. Since its inception, the Canadian Corporation has conducted seminars in India with Canadian college representatives travelling to India. The majority of both the revenues generated and the expenses incurred take place in India.

- The IAD found that the Canadian Corporation conducted only seven transactions since 2009, which are not enough to keep it viable. The IAD rejected the Applicants' attempt to rely on *Liu v Canada (Citizenship and Immigration)*, 2009 CanLII 84711 (CA IRB) [*Liu*] for the proposition that ongoing operations in Canada are not dependent on a business making a profit or tax contributions. The IAD found that unlike *Liu*, where the panel reasonably found that a start-up company may not be able to provide income for the owner during its initial period of operation, the Canadian Corporation operated in this fashion since it was created. Where a business continues to exist without being economically viable, it is reasonable to assume the business is in existence solely to allow a permanent resident to comply with residency obligations.
- The IAD rejected the Applicants' argument that they export Canadian colleges in India and import student to Canada using the money to maintain operations in both Canada and India, as was the case in *Durve.* The IAD differentiated the Applicants' case because they are not dealing in goods, but in services and rather than periodic absences their absence from Canada was permanent.
- With respect to the First Applicant's ICCRC designation, the IAD found that the designation is not required to conduct business with all colleges. The ICCRC designation is not, in the IAD's view, enough to create a sufficient nexus between the business conducted in India and the Canadian Corporation.

c. **Is the Applicant a full-time employee of the Canadian business or under contract to provide services to the Canadian business?**

Having found that the Canadian Corporation does not have ongoing operations in Canada, the IAD concluded that the Second Applicant is not a full-time employee of a Canadian business or under contract to provide services to a Canadian business.

d. **Was the Applicant accompanying a spouse outside Canada employed by a Canadian business?**

Having found that the Second Applicant is not a full-time employee of a Canadian business outside of Canada, the IAD concluded that the Third Applicant is not accompanying a spouse, who is also a permanent resident, who is outside Canada on employment, on a full-time basis, by a Canadian business.

B. *Humanitarian and Compassionate Grounds Sufficient to Warrant Relief*

[21] The IAD found insufficient H&C grounds to allow the Applicants' appeal.

[22] The IAD found that given the extensive non-compliance with the residency obligation (only 25 days for the First Applicant, and 90 days for the Second and Third Applicants), there was a "high threshold of H&C grounds to meet in order for special relief to be granted."

[23] The IAD noted that the Applicants' reason for leaving Canada was to build their business abroad, a reason that was wholly within their control. The IAD found that given that a large portion of their business is done electronically, the Applicants could have remained in Canada to

conduct their business, travelling to India periodically. The IAD concluded that the Canadian Corporation was incorporated in Canada solely to comply with the residency obligation.

[24] The IAD found that the Applicants have strong ties to India, including property ownership such as the building in which their successful business is located, savings accounts, other family members, and the First Applicant's ex-spouse and child.

[25] With respect to their degree of establishment in Canada, the IAD found the Applicants have minimal economic and social establishment: they own no property and do not have a Canadian address.

[26] Family ties in Canada were granted positive weight because the Applicants have many family members in Canada including the sister to the First Applicant who also has a spouse and two children, and the spouse and two children of the First Applicant's late brother. The IAD found the Second and Third Applicants would suffer some hardship if the appeal were dismissed because they have four grandchildren in Canada and only one in India. However, the IAD concluded this is somewhat counterbalanced because they have one grandchild in India, as well as their son, the First Applicant.

[27] The First Applicant testified that he depends on his ICCRC designation to conduct business and that if he lost the designation, the Canadian Corporation would suffer irreparable harm. However, the IAD concluded that there was no evidence that the Canadian Corporation would cease to operate because the bulk of the Canadian Corporation's business is conducted

with colleges. The First Applicant acknowledged he could hire someone with an ICCRC designation to satisfy any colleges that require such a designation.

[28] With respect to best interest of children [BIOC], the IAD acknowledged the need to be "alert, alive and sensitive" when exercising H&C discretion. The IAD considered the grandchildren, nieces and nephews in Canada, but concluded that the BIOC attracted little weight in favour of special relief because the Applicants do not provide childcare or financial support for the children and the children have no dependency on them.

VI. Standard of Review

[29] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court determined that the standard of review for a visa officer's assessment of an applicant's compliance with the residency obligations under *IRPA* is reasonableness: *Jian v Canada (Citizenship and Immigration),* 2016 FC 523 per Hughes J at para 8. I find that reasonableness is the applicable standard; both parties agree.

[30] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of

> justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[31] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[32] The principles governing a fact situation such as this were established by Justice Kane in *Durve*. There, the Court considered the residency requirements for permanent residents as prescribed by section 28 of *IRPA* and their application to permanent residents who fail to spend the requisite number of days in Canada because they are outside of Canada working for their own business. Because I intend to adopt and apply *Durve* in this case, I extract its relevant considerations, starting at para 110:

> *The relevant considerations*
>
> [110] Mr Durve suggests that a clear and consistent approach is needed to determine how to apply the residency requirements for permanent residents with small or even one person Canadian businesses.
>
> [111] The Board identified several indicia or considerations and did not rule out that one-man operations could fit within section 28. It provided two examples of one-man operations that could satisfy the criteria as a Canadian business and permit the permanent resident to work outside of Canada for that business.

Other analogous examples could be imagined, but as noted by the Board echoing Justice Gauthier in *Durve #1*, compliance with the residency requirements is a factual determination. It is not possible to anticipate all the potential fact scenarios and set out a list of criteria which if met, will lead to compliance with the residency requirement. Some criteria will weigh more heavily than others depending on the nature of the business, the time spent within and outside of Canada and, importantly, the nexus or connection between the work outside Canada and the business in Canada.

[112] Where the business is a one-man operation with no employees in Canada, more focus will be put on the nature of the business in Canada and how the work conducted by the one-man operation or self-employed person relates to the Canadian business.

[113] One of the examples cited by the Board is that of an accountant's business with an established and ongoing operation in Canada contracted to provide services to a Canadian business outside Canada on a temporary basis. This contemplates that the permanent resident conducts business and provides these same services in Canada and that the techniques, business practices, expertise, necessary accreditation or principles applied would be governed by or informed by Canadian practices and would guide the work for the other Canadian business outside Canada. In other words, there is a Canadian "product" being delivered in the form of the services provided by the self-employed or "one-man "operation.

[114] I have set out the indicia or considerations noted by the Board and have elaborated on some, but I note that this is not a checklist. The applicability of these considerations will vary depending on the facts, as will the weight attached to the various considerations.

[115] The basic principles remain that: the onus is on the permanent resident to provide clear and cogent evidence that his business is a Canadian business (an ongoing operation in Canada) and that work done outside Canada is full-time work for the Canadian business; the inquiry is a question of fact to be determined by the nature and the degree of the applicant's business activities in each individual case; and, the focus is on the nature of an applicant's business activities while outside of Canada in relation to the business of his Canadian company.

[116] An ongoing business is a business with continuing activities in Canada. This determination takes into account what

the business actually does within Canada, and how this is demonstrated or documented.

[117] In assessing whether the business is an ongoing operation, the relevant considerations will vary with the nature and size of the business. Where the business is a self-employed person or a very small business, the goods or services, which would include advice, must be identifiable.

[118] The decision maker should consider whether there are any employees (even part-time), associates or contractors in Canada that ensure the business continues to operate in Canada and that services are or could be provided in Canada while the permanent resident is outside Canada conducting business or providing the services of the Canadian business.

[119] The corporation's physical office is a consideration, even in the day and age of the virtual office, and notwithstanding that the business may be able to provide services from elsewhere, including whether there are any employees working from that location (even part- time) and whether any work is done or services provided from that location. The requirement to be "in Canada" involves consideration of the business activities or services carried out in Canada and the link between the business carried on outside Canada with the business in Canada. It is not essential that all work and every business activity or service be carried out in Canada but that a sufficient connection or nexus exists between work done abroad and the ongoing operation of the business in Canada. However, as noted above, some business should be done in Canada and the proportion of business done within Canada and outside of Canada is a relevant consideration.

[120] The nature of business activities outside Canada and how they advance the overall goal of the business in Canada, and their connection or nexus to the Canadian business is a significant consideration. For example, whether the permanent resident has qualifications or accreditations in Canada that are relied on by those he provides services to outside of Canada and whether the permanent resident uses Canadian business principles and practices or rules of his or her profession guided by Canadian standards in his or her work abroad are all relevant to the issue of nexus.

[121] The permanent resident's pattern of travel, residence in Canada and residence outside of Canada (recognizing that the permanent resident may have both) are also relevant considerations.

[122] With respect to assessing whether the permanent resident was employed full-time for the Canadian business, again the nature of the business must provide the context because a self-employed person cannot “assign” him or herself as contemplated by the *Regulations*. Records of the time spent for specific services provided and clients’ businesses will be informative, including time spent for work that is not remunerated and the reason for this.

[123] Unpaid work could qualify as business activities, but it should relate to the ongoing business in Canada. Considerations include whether there is a business plan that forecasts the unpaid or developmental work needed to advance the business with a view to future paid work and the proportion of paid work compared to unpaid work.

[124] The revenue of the business should be considered, including whether the financial statements of the business reflect the described business activities and can be reconciled with invoices. Business records that document how the time was spent by the permanent resident on business abroad would be useful for the decision maker. If the permanent resident’s personal income exceeds the income from the claimed business activities, it will be more difficult to establish that it is full-time work for the Canadian business.

VII. Legislation

***Immigration and Refugee Protection Act*, SC 2001, c 27**	***Loi sur l’immigration et la protection des réfugiés* (LC 2001, ch 27)**
Residency obligation **28** (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	**Obligation de résidence** **28** (1) L’obligation de résidence est applicable à chaque période quinquennale.
Application (2) The following provisions govern the residency obligation under subsection (1):	**Application** (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,
(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,
(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,
(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or
(v) referred to in regulations providing for other means of compliance;
(b) it is sufficient for a permanent resident to demonstrate at examination
(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a

(i) il est effectivement présent au Canada,
(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,
(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(v) il se conforme au mode d'exécution prévu par règlement;
b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

permanent resident;
(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and
(c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.

c) le constat par l’agent que des circonstances d’ordre humanitaire relatives au résident permanent — compte tenu de l’intérêt supérieur de l’enfant directement touché — justifient le maintien du statut rend inopposable l’inobservation de l’obligation précédant le contrôle.

…

…

Non-compliance with Act
41 A person is inadmissible for failing to comply with this Act
(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.

Manquement à la loi
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.

…

…

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,

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(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 warrant special relief in light of all the circumstances of the case.

[Emphasis added.]

67 (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

(a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

(b) il y a eu manquement à un principe de justice naturelle;

(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 l'affaire, la prise de mesures spéciales.

[Soulignements ajoutés.]

***Immigration and Refugee Protection Regulations* (SOR/2002-227)**

Residency Obligation

Canadian business

61 (1) Subject to subsection (2), for the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act and of this section, a Canadian business is

(a) a corporation that is incorporated under the laws of Canada or of a province and that has an ongoing operation in Canada;

(b) an enterprise, other than a corporation described in paragraph (a), that has an ongoing operation in Canada and

(i) that is capable of generating revenue and is carried on in

***Règlement sur l'immigration et la protection des réfugiés* (DORS/2002-227)**

Obligation de residence

Entreprise canadienne

61 (1) Sous réserve du paragraphe (2), pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi et du présent article, constitue une entreprise canadienne :

a) toute société constituée sous le régime du droit fédéral ou provincial et exploitée de façon continue au Canada;

b) toute entreprise non visée à l'alinéa a) qui est exploitée de façon continue au Canada et qui satisfait aux exigences suivantes :

(i) elle est exploitée dans un but lucratif et elle est

anticipation of profit, and	susceptible de produire des recettes,
(ii) in which a majority of voting or ownership interests is held by Canadian citizens, permanent residents, or Canadian businesses as defined in this subsection; or	(ii) la majorité de ses actions avec droit de vote ou titres de participation sont détenus par des citoyens canadiens, des résidents permanents ou des entreprises canadiennes au sens du présent paragraphe;
(c) an organization or enterprise created under the laws of Canada or a province.	c) toute organisation ou entreprise créée sous le régime du droit fédéral ou provincial.
Exclusion	**Exclusion**
(2) For greater certainty, a Canadian business does not include a business that serves primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada.	(2) Il est entendu que l'entreprise dont le but principal est de permettre à un résident permanent de se conformer à l'obligation de résidence tout en résidant à l'extérieur du Canada ne constitue pas une entreprise canadienne.
Employment outside Canada	**Travail hors du Canada**
(3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression employed on a full-time basis by a Canadian business or in the public service of Canada or of a province means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the employment or contract to	(3) Pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi respectivement, les expressions travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale et travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale, à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat d'une entreprise canadienne ou de l'administration publique, fédérale ou provinciale, et est affecté à temps plein, au titre de son emploi ou du contrat de fourniture :
(a) a position outside Canada;	a) soit à un poste à l'extérieur

	du Canada;
(b) an affiliated enterprise outside Canada; or	b) soit à une entreprise affiliée se trouvant à l'extérieur du Canada;
(c) a client of the Canadian business or the public service outside Canada.	c) soit à un client de l'entreprise canadienne ou de l'administration publique se trouvant à l'extérieur du Canada.
Accompanying outside Canada	**Accompagnement hors du Canada**
(4) For the purposes of subparagraphs 28(2)(a)(ii) and (iv) of the Act and this section, a permanent resident is accompanying outside Canada a Canadian citizen or another permanent resident — who is their spouse or common-law partner or, in the case of a child, their parent — on each day that the permanent resident is ordinarily residing with the Canadian citizen or the other permanent resident.	(4) Pour l'application des sous-alinéas 28(2)a)(ii) et (iv) de la Loi et du présent article, le résident permanent accompagne hors du Canada un citoyen canadien ou un résident permanent — qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents — chaque jour où il réside habituellement avec lui.
Compliance	**Conformité**
(5) For the purposes of subparagraph 28(2)(a)(iv) of the Act, a permanent resident complies with the residency obligation as long as the permanent resident they are accompanying complies with their residency obligation.	(5) Pour l'application du sous-alinéa 28(2)a)(iv) de la Loi, le résident permanent se conforme à l'obligation de résidence pourvu que le résident permanent qu'il accompagne se conforme à l'obligation de résidence.
[Emphasis added.]	[Soulignements ajoutés.]

VIII. Analysis

[33] The Applicant has distilled many of the important considerations established by *Durve*, and it is convenient to set those out with the Court's analysis following each:

(a) The onus is on the Applicant to establish that he or she is working full time for a Canadian business and that the work done outside Canada is full time work for the Canadian business. The inquiry is a fact based inquiry which requires the tribunal to consider all of the evidence.

[34] There is no dispute that the First Applicant worked full time for the Canadian business, albeit he did so in India. However, the important feature of this point is that the inquiry that the IAD is obligated to conduct is not limited to one or two points, but rather, to all the relevant evidence and all the considerations. In addition, I note that the inquiry is fact-based.

[35] While the Applicants relied on their memorandum generally, their counsel emphasized two matters at the hearing with respect to this *Durve* factor. First, counsel argued that the First Applicant's ICCRC designation was essential for the First Applicant to carry on his business in India, and that his permanent residence status was required to maintain that designation. Counsel argued that the IAD erred in finding otherwise. Second, the Applicant submitted the IAD acted unreasonably in finding there was no "ongoing operation in Canada" as required by paragraph 61(1)(a) of the *IRPA Regulations*. In this connection, the Applicant's counsel said there was a significant connection between the Indian Corporation and the Canadian Corporation such that there was an ongoing operation in Canada.

[36] It seems to me that these points were properly emphasized in this case. That said, even success on one or both of these issues would not result in a finding that the decision, viewed as a whole - which is the way this Court must approach this matter - is unreasonable. Instead, all the

evidence and the various elements of the decision must be considered; one factor alone does not make the decision as a whole unreasonable.

[37] I am not persuaded that the IAD acted unreasonably in its finding that there was no evidence the ICCRC designation was necessary. The onus was on the Applicants to make their case. The best evidence on this question of fact would have been the contracts with the colleges. However, none of the three contracts put into evidence by the Applicants required the First Applicant to maintain the ICCRC designation. At best, and based on the First Applicant's testimony, only four or five of all of the colleges required the designation, yet this was not supported by the evidence submitted to the IAD.

[38] The Applicants argued that the First Applicant was legally required to maintain the ICCRC designation to comply with section 91 of *IRPA,* which, in effect, requires that those providing paid advice in relation to applications under *IRPA* must be either a lawyer or a member of ICCRC. However, the First Applicant also testified, in effect, that he personally did not need to have the ICCRC designation for the business as a whole to continue, because the Indian Corporation could hire someone else who did hold such designation. However in that case, he testified, he would no longer be the boss; it is obvious that profitability would suffer from his perspective. In my respectful view, however, the IAD's conclusions are defensible in this respect on this record, including the corporate structure adopted by the Applicants.

(b) An ongoing business is one with business activities in Canada. The tribunal must consider the work that the business actually does in Canada and also whether the business outside of Canada has a sufficient connection to Canada.

[39] The *Regulations* require “ongoing operations” in Canada. *Durve* says this requires business activities in Canada. I agree. *IRPA* also requires business activities in Canada, and in as many words.

[40] The only activity in Canada is one incorporated entity and a bank account(s): there are no employees in Canada, only the sister who, from her house, acts as a form of drop box, who works for free, and whom the First Applicant testified was not an employee. This, in my view, is *de minimis* business activity, at best. The bank account is directed by the First Applicant from India, presumably electronically, which hardly constitutes business activity in Canada.

[41] As the IAD found, there is no real business activity in Canada. The IAD concluded the Canadian Corporation is a shell corporation and in my respectful view, that finding is supported by the record. I have no hesitation in finding there was no business activity in Canada. The Canadian Corporation, as the IAD reasonably found, is a non-viable “shell”. The IAD’s finding is reasonable because it is defensible on the facts of this case.

(c) In assessing the business, the size of the business will be a relevant factor. If the business is small or the person is self-employed, the goods or services must be identifiable.

[42] The Indian Corporation is small with six employees; the Canadian Corporation has only two employees, the First and Second Applicants. All employees of the Canadian Corporation live and work entirely in India which does not assist the Applicants.

[43] The service is identifiable, *i.e.*, offering advice in connection with applying for Canadian student visas and identifying candidates for the various colleges concerned. That said, this is a neutral factor in terms of the Applicants' situation.

(d) The requirement that the business be in Canada requires the tribunal to consider the activities carried out in Canada and the link between those activities and the work carried on outside of Canada.

[44] In this connection, the facts count against the Applicants. All business activities of the two affiliated companies, which the IAD reasonably to be under the common command and control of the First Applicant, are carried out in India except for what I consider the *de minimis* services of the sister; notably she is not an employee and frankly appears to do little, if anything, which is, perhaps, why she is not paid. I have already found there are no business activities in Canada; therefore there are no Canadian business activities to link to the business activities in India. Everything is done in India. The IAD came to similar conclusions and in doing so acted in a manner that is defensible on the record.

(e) It is not essential that all the work be in Canada, "but that a sufficient connection or nexus exists between work done abroad and the ongoing operation of the business in Canada."

[45] This factor also counts against the Applicants. First of all, except for the sister's *de minimis* contributions, there is no "ongoing operation in Canada". As noted previously, there is no business activity in Canada. These findings alone support a rejection of this consideration.

[46] The Applicants interpret and attempt to rely on this point differently: they argue that the work in India has a "sufficient connection to business activity in Canada". They note that *Durve*, at para 77, states: "[T]he term 'in Canada' requires that the business activity be conducted in Canada or have a sufficient connection to business activity in Canada." While there is not much in Canada, in effect, the Applicants say that there need not be much because the business activity in India has a "sufficient connection to business activity in Canada." This argument attempts to feed the lack of any business activity in Canada with the business activity in India. While there is business activity in India, the problem with this argument is that, as already found, there is no business activity in Canada to which the Indian activity may connect; there is nothing in Canada that the Indian business activity may feed. The IAD's finding in this regard is reasonable and defensible on the record.

(f) However some business should be done in Canada and the proportion done in Canada as opposed to outside is a factor that can be considered.

[47] This consideration derives from *Durve* at para 119, where Justice Kane stated:

> However, as noted above, some business should be done in Canada and the proportion of business done within Canada and outside of Canada is a relevant consideration.

[48] In my respectful view, this point is a direct and specific qualifier to the previous consideration, namely that there may be ongoing operation in Canada if the foreign business activity has a "sufficient connection to business activity in Canada." This important qualifier counts against the Applicants because this Court has determined that "some business should be done in Canada." Here, no business is done in Canada, there are no ongoing operations in Canada, and there are essentially no business activities in Canada.

[49] It is noteworthy to recall that almost all revenues are generated in India. Canadian revenues are not sufficient to sustain the business; only seven clients came from Canada in eight years, while the India business generated more than 100 clients annually. There is no office in Canada, while there is one office India as well as plans to open a second. There are no employees in Canada while there are six in India. The loss of the Canadian clients would have almost no impact on the business as a whole.

(g) The nature of the business outside of Canada and how it advances the activities in Canada are relevant factors. For example, whether the permanent resident has qualifications or accreditations in Canada that are relied on by those he provides services to outside of Canada is relevant.

[50] With respect, I am unable to see how the business in India advances the business activities in Canada, because as outlined above, there are no activities in Canada to advance. The First Applicant does hold the ICCRC designation, and relies on it to provide services in India; a factor that counts in the Applicants' favour. However, it is not determinative and is only factored with the other considerations.

(h) Travel history is also relevant.

[51] There is little to no travel history to consider in relation to any of the Applicants. The IAD found:

> [T]he [Applicants] operate a good portion of their business electronically. The evidence demonstrates that the [Applicants] could have chosen to remain in Canada to conduct their business, travelling to India periodically on a temporary or short term basis to engage in business development.

[52] The First Applicant did not visit Canada to sign contracts with colleges during the relevant residency period. He did sign contracts with students in India. He entered into contracts with Canadian colleges while in India as well, but did so electronically from India. These are at best neutral considerations. All of which confirms the obvious, that India is the base for the business, not Canada. These considerations count against the Applicants.

(i) A self- employed person can be considered under these provisions.

[53] This is established law per *Durve*, with the important condition that there be Canadian business activities and ongoing operation in Canada. That is not the case here.

IX. Subsection 61(2) of the IRPA Regulations

[54] I need not consider subsection 61(2) of the Regulations, which provides:

Exclusion	**Exclusion**
(2) For greater certainty, a Canadian business does not include a business that serves primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada.	(2) Il est entendu que l’entreprise dont le but principal est de permettre à un résident permanent de se conformer à l’obligation de résidence tout en résidant à l’extérieur du Canada ne constitue pas une entreprise canadienne.

[55] That said, the IAD concluded its analysis by stating: “[T]he Canadian business exists as a formality to demonstrate that there is a Canadian connection.”

X. Humanitarian and compassionate [H&C] submissions

[56] I have reviewed the Applicant's H&C submissions, and am not persuaded they suffer from unreasonableness given the high threshold the Applicants had to surmount as a result of the significant extent of their breach of IRPA's residency requirements: only 25 days residency out of the required 730 days in the case of the First Applicant, and only 90 days in the case of his father and mother. The Applicants have no real establishment in Canada: they live and work in India. They have no dependents in Canada, and their Canadian family may visit them in India. They left Canada some time ago, and while at one time there appear to have planned to return, this never took place. The loss of permanent resident status will cause the First Applicant to lose his ICCRC designation. However, I am not satisfied the IAD acted unreasonably in relying on the evidence of the First Applicant that the Indian Corporation could hire an ICCRC-designated employee if need be.

[57] Moreover, while the loss of the Applicant's permanent residence comes with the loss of his ICCRC designation, that comes about due to decisions made by the First Applicant with eyes wide open. The decision to leave Canada was that of the First Applicant. As noted, it seems he originally had plans to stay, but for his own reasons reversed course and decided to cease residing in Canada. He thus put himself (and his parents) offside *IRPA*'s requirement that permanent residents reside in Canada two years out of five. His decision to stay in India also placed him in the position where to retain his status he had to meet the exception in subsection 28(1).

[58] The First Applicant was an immigration consultant. In the leading case, *Durve*, the applicant, Mr. Durve had greater attachment to Canada than the First Applicant here, but nonetheless had insufficient connection to satisfy the requirements of the same exception, and for the exceptional and discretionary H&C relief. Mr. Durve had 279 days in Canada, while the Applicant had only 25. Mr. Durve went on 25 to 30 trips from Canada to India in the five year period, the First Applicant had none. Mr. Durve had contracted for some advisory and office work in Canada, the First Applicant paid nothing for Canadian services and had no employees or business activity here. Mr. Durve bought two condos in Canada in 2006, taking possession in 2011 (albeit after the five year period ended), the Applicants have nothing at all to claim as a residence in Canada.

[59] In my view, the IAD was alert, alive and sensitive to the best interests of the children, namely their grandchildren, nieces and nephews aged 14, 12, 11 and 7. None of the Applicants provided childcare or financial support for the children, and there was no dependency on the Applicants. The primary caregivers are their biological parents in Canada, and in my view these facts reasonably attract little weight in terms of the discretionary and extraordinary H&C relief requested.

[60] Stepping back, the decisions both with respect to permanent residence and H&C relief fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Therefore, judicial review must be dismissed.

XI. Certified question

[61] Neither party proposed a question of general importance to certify, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that judicial review is dismissed, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3946-17
STYLE OF CAUSE:	HARJINDER SINGH WARAICH, GURMEET KAUR WARAICH, ISHWINDER SINGH WARAICH v THE MINISTER OF IMMIGRATION AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 6, 2018
JUDGMENT AND REASONS:	BROWN J.
DATED:	MARCH 16, 2018

APPEARANCES:

Lorne Waldman	FOR THE APPLICANTS
Ada Mok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman and Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT