Federal Court  Cour fédérale

Date: 20190219

Docket: IMM-2499-18

Citation: 2019 FC 204

Ottawa, Ontario, February 19, 2019

PRESENT: The Honourable Mr. Justice Bell

Docket: IMM-2499-18

BETWEEN:

SHERIF MOHAMED YOUNES

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT WITH REASONS

I. Nature of the Matter

[1] The Applicant, his spouse and four (4) children, all citizens of Egypt, became permanent residents of Canada on October 1, 2010. Subject to exceptions discussed below, subparagraph 28(2)(*a*)(i) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] requires a permanent resident to be physically present in Canada for a total of at least 730 days every five

(5) years. There are two (2) exceptions to the 730-day physical presence requirement. The first is found in subparagraph 28(2)(*a*)(iii) of the IRPA. That provision permits a permanent resident to meet the residency requirements while being outside Canada, if the permanent resident is "employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province". The Canadian business exception is limited in its application by section 61 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulation]. Specifically, subsection 61(2) provides that 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." The second exception to the physical presence requirement is found in paragraph 28(2)(*c*) of the *IRPA.* That provision permits an officer to disregard the breach based upon humanitarian and compassionate considerations.

[2] On August 10, 2015, the Applicant and his family submitted applications to renew their permanent resident status. The Applicant's spouse and their four (4) children obtained renewals; the Applicant did not. An Immigration Officer concluded that the Applicant failed to meet the residency requirements and issued a Removal Order. The Applicant appealed to the Immigration Appeal Division [IAD]. The IAD concluded that the Applicant's employment outside of Canada did not meet the exemption under subparagraph 28(2)(*a*)(iii) of the *IRPA* and section 61 of the Regulation. Furthermore, the IAD concluded that the Applicant failed to prove, on a balance of probabilities, that there were sufficient humanitarian and compassionate considerations to warrant special relief.

[3] The Applicant seeks judicial review of the IAD decision, pursuant to subsection 72(1) of the *IRPA.* For the reasons set out below, I dismiss the application for judicial review.

II. Proceedings before the IAD

[4] The evidence before the IAD disclosed that shortly after landing in Canada, the Applicant and his family returned to Egypt for a period of approximately two (2) years and then returned to Canada in 2012. On September 13, 2013, the Applicant founded a company, Middle East American Development Fund Corporation [MEAD] which was incorporated under the *Canadian Business Corporations Act*, R.S.C., 1985, c. C-44. The Applicant, a lawyer and international business advisor deposed that his company provides "international strategic and business advice to internationally oriented entities […] [makes] introductions for strategic purposes and […] arrange the requisite corporate and governmental approvals needed for proposed projects to succeed". Due to the nature of his purported employment, the Applicant says he frequently travels outside Canada as an employee of MEAD.

[5] Before the IAD, the Applicant contended the immigration officer erred in failing to count his days abroad while employed by a Canadian business. He claimed the benefit of the exemption under subparagraph 28(2)(*a*)(iii) of the *IRPA.* Applying the exemption, he claimed 915 days of physical presence in Canada.

[6] The IAD examined the applicable law and considered the Applicant's submissions pertaining to his business. The IAD noted some inconsistency between the Applicant's submissions and the Statement of Business or Professional Activities. Indeed, the Statement of

Business or Professional Activities indicates “Sherif Younes” instead of “MEAD” as the company’s name. The document also indicates a gross income of $4,000 in 2015, whereas the Applicant stated that the company earned $169,000 in 2014-2015, and $60,000 in 2015-2016.

[7] The IAD concluded that the Applicant was not employed by a Canadian company on a full-time basis, as required by subparagraph 28(2)(*a*)(iii) of the *IRPA*. Given the lack of credible evidence pertaining to MEAD’s income, operations and activities, the IAD concluded MEAD was incorporated in Canada primarily to allow the Applicant to comply with the residency requirements. Given the IAD’s decision that none of the Applicant’s time outside of Canada counts toward his residency, he was left with only 68 days of physical presence in Canada, instead of the required 730 days.

[8] Alternatively, the Applicant contended there were sufficient humanitarian and compassionate grounds to allow special relief under paragraph 28(2)(*c*) of the *IRPA*. The IAD considered the applicable legislation and jurisprudence and the circumstances of the Applicant and his family to conclude he was more connected and established in Egypt than in Canada. The IAD observed that while the Applicant owns a home in Oakville, Ontario, where his spouse and children reside, he has no other family in Canada. In Egypt, where he last was in October 2017, he owns a villa, a summer home, a residential home and has the companionship of other family members. It is also noteworthy that he is a member of the Egyptian Parliament.

[9] Absent expressing that he will miss his spouse and children, the IAD found that the Applicant failed to prove that humanitarian and compassionate grounds would prevent his return

to Egypt. The IAD considered the best interest of the children. Given the Applicant's infrequent visits to Canada and the ability of his family to travel to Egypt, and him to Canada, the IAD concluded there was no evidence of hardship warranting special relief on humanitarian and compassionate grounds. In reaching its conclusion on the issue of humanitarian and compassionate considerations, the IAD observed that given the minimal days the Applicant was physically present in Canada over the five-year period, he faced an elevated evidentiary burden in order to engage the humanitarian and compassionate exemption.

III. Relevant Provisions

[10] The relevant provisions of the IRPA and the Regulation are set out in the Appendix attached to these Reasons.

IV. Analysis

A. *Residency Requirement*

[11] At the close of oral submissions, I advised the parties that I considered the IAD decision to be reasonable as it relates to the issue of physical presence in Canada and the application of the exemption under subparagraph 28(2)(*a*)(iii) of the *IRPA.* It is trite law that questions of mixed fact and law attract deference (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 51, 53 and 164) [*Dunsmuir*]. Furthermore, where a tribunal interprets its home statute or regulations, its decision will attract the reasonableness standard of review (*Dunsmuir* at para. 54). The IAD's decision regarding the purpose of the incorporation of MEAD, the nature of the work performed and the application of subsection 61(3) of the Regulations all call for

deference; hence, the application of the reasonableness standard of review: see, *Bi v. Canada (Citizenship and Immigration)*, 2012 FC 293 at para. 12, 4 FCR 277; *Canada (Citizenship and Immigration) v. He*, 2018 FC 457, at para. 18; *Canada (Citizenship and Immigration) v. Jiang*, 2011 FC 349, at paras 28-31).

[12] When determining what constitutes a "Canadian business", indicia such as: (a) records of the time spent for services provided; (b) the revenue of the business; and (c) business records that document how the time was spent by the permanent resident on business abroad should be considered (*Durve v. Canada (Citizenship and Immigration)*, [2015] 3 FCR 537, 2014 FC 874, at paras 122-124 [*Durve*]; *Waraich v. Canada (Citizenship and Immigration)*, 2018 FC 307, at para. 32). These factors and others were considered by the IAD. The Applicant contests the weight assigned by the IAD to the evidence adduced by him. It is not the role of the Court on judicial review to re-weigh the evidence (*Sharma v. Canada (Attorney General)*, 2018 FCA 48, at para. 13; *Kiraly v. Canada (Attorney General)*, 2015 FCA 66, at para. 10).

[13] The Applicant contends the fact patterns in *Jiang*, *Bi* and *Durve* differ from those in the present case. I agree; however, I disagree with the Applicant's assertion that reference to those authorities led the IAD to an unreasonable outcome. The general principles established in those cases are relevant to the present analysis. The IAD did not act unreasonably in relying upon that jurisprudence.

B. *Humanitarian and Compassionate Considerations*

[14] In order to benefit from the humanitarian and compassionate exemption, an Applicant must demonstrate his or her entitlement on balance of probabilities. Proof on a balance of probabilities is an evidentiary burden. The Applicant contends that when considering whether humanitarian and compassionate relief was appropriate in this case, the IAD imposed a higher evidentiary threshold than required. This, according to the Applicant, results in an unreasonable decision. The Applicant contends the following excerpt from the IAD decision demonstrates it unreasonably applied an incorrect evidentiary burden:

> "After considering all the evidence, the panel is satisfied that the decision of the immigration officer dated August 3, 2016, is legally valid. Since the appellant has not capably shown that he meets the residency obligation pursuant to subparagraph 28(2)(a)(iii) where the physical presence in Canada for at least 730 days remains the standard; the more days the appellant needs to meet the residency obligations, that being 662 days, the higher degree of evidence would be required with respect to consideration on humanitarian and compassionate grounds or special relief."
>
> [My emphasis]

[15] The Applicant contends that the application of a sliding scale threshold proof of humanitarian and compassionate grounds is unreasonable. He cites *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 and *Kanthasamy v. Canada (Citizenship and Immigration), [2015] 3 SCR 909, 2015 SCC 61*. The Respondent asserts that it is a matter of common sense that the weaker the evidence related to physical presence, the stronger the evidence required to establish, on a balance of probabilities, that the humanitarian and compassionate exemption applies. I agree. The evidence required by an Applicant who has physically been present in Canada for 68 days in five (5) years is no doubt greater than that for someone who has been with his family for 700 days and is able to lead evidence of his attendance at student-teacher meetings, participation in recreational activities with his spouse and

children, participation in religious activities with his family and other family outings, to name a few. The best interests of the children in having a parent present in their life, to name but one factor that figures in the humanitarian and compassionate analysis is easier to establish if there is evidence of that parent's physical presence over the previous five (5) years. I see nothing unreasonable about a decision maker observing that the absence of physical presence militates in favour of increased evidence, both qualitative and quantitative, in order to meet the evidentiary burden of proof on a balance of probabilities. In my view, such an approach is consistent with the application of the *Baker* criteria.

[16] The Applicant says that if he is deported to Egypt, his wife and younger children will go with him to Egypt. He says this factor was not thoroughly and sufficiently considered by the IAD in considering the best interests of the children. He contrasts this potential return to Egypt with the fact that his spouse and children are well established in Canada, they have applied for Canadian citizenship, the children do not have roots in Egypt, and that the family will somehow be harmed if they return to Egypt. The Applicant submitted letters from his children to the IAD expressing their sentiments.

[17] These assertions by the Applicant are without merit. Canadian authorities are not going to require any Canadian citizen or permanent resident to leave the country. The Applicant's assertion the children will accompany him to Egypt is pure speculation. I fail to appreciate how his life or his family's life will change in any material way by his removal to Egypt. He will still be able to visit them in Canada. They will be able to visit him at his villa in Egypt, his summer home in Egypt or his permanent home in Egypt.

[18] The IAD reasonably concluded, in assessing humanitarian and compassionate grounds, including the best interests of the children, that the Applicant is more established in Egypt than in Canada, that the children are permanent residents of Canada, and that the family will continue to live, in large measure, as they currently do. Again, the Court's task is not to re-weigh the evidence. I am of the view the decision of the IAD on the issue of the humanitarian and compassionate exemption is justified, transparent and intelligible, and falls within the range of possible, acceptable outcomes.

V. Conclusion

[19] For the foregoing reasons, the within application for judicial review is dismissed.

JUDGMENT in IMM-2499-18

THIS COURT'S JUDGMENT is that the within application for judicial review is dismissed. No question is certified for consideration by the Federal Court of Appeal.

"B. Richard Bell"
Judge

ANNEX A

***IMMIGRATION AND REFUGEE PROTECTION ACT*, S.C. 2001, c.27**	***LOI SUR L'IMMIGRATION ET LA PROTECTION DES RÉFUGIÉS*, L.C. 2001, ch. 27**
Residence obligation	**Obligation de résidence**
28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	**28 (1)** L'obligation de résidence est applicable à chaque période quinquennale.
Application	**Application**
(2) The following provisions govern the residency obligation under subsection (1):	**(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) physical present in Canada,	**(i)** il est effectivement présent au Canada;
[…]	[…]
(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,	**(iii)** il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
[…]	[…]
(c) a determination by an officer that humanitarian and compassionate	**c)** le constat par l'agent que des circonstances d'ordre humanitaire

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.

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.

Immigration and Refugee Protection Regulations, **SOR/2002-227**

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

Residency Obligation

Obligation de résidence

Canadian Business

Entreprise canadienne

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

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

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

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

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

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

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

(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.

Exclusion

(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

(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

Travail hors du Canada

(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

the employment or contract to	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 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.

FEDERAL COURT

SOLICITORS OF RECORD

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