Federal Court  Cour fédérale

Date: 20200331

Docket: IMM-4958-19

Citation: 2020 FC 458

Ottawa, Ontario, March 31, 2020

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

JOSE ROMAN WYSOZKI

Applicant

And

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision by the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board of Canada. The IAD concluded that the removal order made against the Applicant was valid and that there were insufficient humanitarian and compassionate ("H&C") considerations to warrant special relief pursuant to s 67(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA").

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

Background

[3] The Applicant, Jose Roman Wysozki, is a citizen of Germany. He became a permanent resident of Canada in 1983, when he was 17 years old, together with his immediate family members. In Canada, he attended high school for one year and then university for another year before returning to Germany. He then studied in Germany and elsewhere in Europe. He worked in Germany for his family's business, of which he is now the CEO. His primary residence is in Hamburg where he resides with his common law wife and their 10 children. One of his children is a citizen of Canada; the others have no status in Canada.

[4] Over the years since he left Canada as a teenager, the Applicant has travelled back and forth from Germany to Canada many times. When he was entering Canada in October 2016, an immigration officer informed the Applicant of his residency obligations under IRPA. The Applicant subsequently applied for a permanent resident card in November 2016. On May 1, 2018, an interview was conducted to determine if he met his residency obligation. A delegate for the Minister of Public Safety and Emergency Preparedness found that the Applicant failed to comply with the residency requirement found in s 28 of IRPA and a removal order was issued on May 1, 2018.

[5] The Applicant appealed the removal order to the IAD. Before the IAD, he did not challenge the validity of the removal order, but submitted that sufficient H&C considerations

existed to warrant special relief. In a decision dated July 19, 2019, the IAD dismissed the Applicant's appeal. That decision is the subject of this judicial review.

Decision under review

[6] The IAD first addressed a preliminary matter. It noted that at the June 11, 2019 hearing the Applicant was self-represented. He gave testimony and his friend testified over the phone. At the conclusion of the hearing, the IAD reserved its decision. On June 16, 2019, the Applicant requested a new hearing claiming that he had not been allowed to use documents he had prepared for the hearing; he was not allowed to use written notes he prepared just before the hearing; the Minister's counsel repeatedly interrupted his testimony, which prevented him from developing his train of thought; the IAD also repeatedly interfered, which also prevented him from developing his train of thought; and, he was not given any indication before the hearing that his testimony needed to be memorized and that he could not refer to notes.

[7] The IAD dismissed the Applicant's request for a new hearing. The IAD explained that the Applicant was asked to testify without his personal notes and the documents he had laid out in front of him because the IAD is required to evaluate the Applicant's credibility. Further, he had submitted 229 pages of documentary evidence as well as written submissions before the hearing, he was questioned by the Minister's counsel and by the IAD, and he was invited to add elements relevant to the assessment required of the IAD. The IAD noted that the hearing was not complex. It was held over 3 hours, which allowed the Applicant sufficient time to testify and make submissions, and the Applicant made final oral submissions after hearing the Minister's Counsel's submissions.

[8] The IAD then began its analysis of the issue before it by noting that although the Applicant had not met his residency requirement under s 28 of IRPA the IAD retained discretionary jurisdiction to allow the Applicant's appeal on H&C grounds. In exercising that discretion, the IAD was guided by various factors and the weight to be given to each factor varied depending on the specific circumstances of each case. The IAD considered the following factors:

i. The extent of non-compliance with the residency obligation

[9] The IAD noted that the relevant period examined by the immigration officer was the five-year period prior to the Applicant's application for a permanent resident card, in which he had declared 192 days of physical presence in Canada. However, because the interview could not be held until May 2018, the Applicant was then given the benefit of the five-year period preceding the interview, being from May 1, 2013 to May 1, 2018. During that period, he had a maximum of 479 days in Canada. The Applicant therefore had a deficit of 254 days for the minimum required 730 days in a five-year period. The IAD concluded that the extent of the Applicant's non-compliance was significant and did not weigh favourably for relief. The IAD stated that the Applicant would have to establish a high degree of H&C considerations to counterbalance his non-compliance.

ii. The reasons for the Applicant's departure and stay abroad, and reasonable attempts made by him to return to Canada at the first opportunity

[10] The IAD noted that the Applicant became a permanent resident when he was 17 years old. He attended high school in New Brunswick for his senior year and the University of New

Brunswick for one year. He then returned to Germany. He studied there and elsewhere in Europe, and then worked for his family company, of which is now the CEO. His main residence is in Hamburg where he resides with his common law wife and their 10 children. The IAD noted that the Applicant contended that he had been visiting Canada all of these years, while maintaining his work and family in Germany, and was not aware of his residency obligation until October 2016. This was why he had not complied with the requirements of s 28 of the IRPA. The IAD found that the Applicant was pleading ignorance of the law. He had argued that he could not have inquired about something that he simply saw no reason to question. The IAD did not accept this reason as compelling and stated it was a well-established principle, in matters such as this, that ignorance of the law cannot justify the failure to comply with the requirements of the IRPA. And, although the Applicant was informed of his residency obligation in 2016, the Applicant had maintained his same pattern of visiting Canada without accumulating enough days by the time of his interview on May 1, 2018. The IAD concluded that the Applicant made a deliberate choice to reside mainly in Germany where his family is well established, and chose to be absent from Canada during the relevant period. His reason for being in breach of the residency requirements did not weigh favourably for special relief.

iii. Initial and continuing degree of establishment in Canada

[11] The IAD noted that the Applicant owns four apartments in Halifax, which he acquired between July 2016 and January 2019. He also bought a piece of land in 2017. He has never worked in Canada. He owns 50 percent of the shares in a Canadian company. He works for his Germany company and wants to develop into the US market, claiming that he needs to do so from Canada. However, the IAD found that the Applicant's potential establishment or future

plans were not relevant to his degree of establishment. The IAD found that the Applicant did provide evidence of community involvement and social integration. Although the evidence established that the Applicant is much more established in Germany than in Canada, the IAD recognized that the Applicant had some degree of establishment in Canada, and that this weighed positively in his favour.

iv. Family ties to Canada and hardship to the Applicant and his family if he loses his permanent residence

[12] The IAD noted that the Applicant has two sisters in Canada. The rest of his immediate family live in Germany. Most importantly, his common-law partner of 25 years lives in Germany. Only one of his ten children, six of whom are minors, is a Canadian citizen. The IAD found that the Applicant's family ties are overwhelmingly more important in Germany, and gave this factor little positive weight. As to hardship, the Applicant testified he developed a sense of place in Canada. The IAD found that the Applicant made a conscious choice to maintain his main base in Germany where he is established with his family. Further, there was nothing to suggest the Applicant would be prevented from visiting Canada should he be unsuccessful in obtaining special relief. The IAD recognized that there would be some emotional hardship arising from losing status that the Applicant claimed to be attached to and did not want to lose, but it was not persuaded the Applicant would suffer undue hardship. Although no arguments were made as to the best interests of the children affected, the IAD noted that the Applicant's minor children live in Germany under the care of the Applicant and his common-law partner. The IAD found there was no evidence to suggest their best interests would be jeopardized by not allowing the appeal.

[13] In conclusion, the IAD found that the removal order was valid, and having weighed the evidence and balanced the factors, that there were insufficient H&C considerations to warrant special relief in the circumstances of the case.

Issues and standard of review

[14] In my view, there is a preliminary issue, raised by the Respondent, and two issues to be addressed in this application for judicial review:

> Preliminary Issue: Are the challenged paragraphs, and related exhibits, of the Applicant's affidavit filed in support of this application for judicial review admissible?
>
> Issue One: Did the IAD breach the duty of procedural fairness owed to the Applicant?
>
> Issue Two: Was the IAD's decision reasonable?

[15] Questions of procedural fairness are reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[16] As to the IAD's decision on the merits, there is a presumption that reasonableness is the applicable standard whenever a Court reviews an administrative decision (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16 ("*Vavilov*")). As set out by the Supreme Court of Canada in *Vavilov*, that presumption can be rebutted in two types of situations (at para 17). The parties do not suggest that the matter falls within either of those situations, and I find that it does not. Accordingly, the presumptive reasonableness standard of review applies.

[17] A review for reasonableness means that:

> 99 A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.
>
> (*Vavilov* at para 99)

Preliminary Issue: Are the challenged paragraphs, and related exhibits, of the Applicant's affidavit filed in support of this application for judicial review admissible?

[18] The Respondent submits that paragraphs 4-26 and 34-40, as well as Exhibits A to J and R to W of the Applicant's affidavit sworn on September 26, 2019, and paragraphs 5 and 6, as well as Exhibits 2 to 4 of the Applicant's affidavit sworn on January 20, 2020, are not admissible as the content of those paragraphs does not fit into any of the exceptions to the general rule that the evidentiary record on judicial review is limited to the record before the decision-maker (*Sharma v Canada (Attorney General)*, 2018 FCA 48 at paras 8-9 ("*Sharma*")). This is the total extent of the submission, which was also not addressed by counsel for the Respondent when appearing before me at the application for judicial review.

[19] The Applicant made no submissions in response to this issue, either by way of written representations or by submissions of his counsel when appearing before me at the application for judicial review.

[20] The jurisprudence is clear that, as a general rule, the evidentiary record before a Court on judicial review is restricted to the evidentiary record that was before the decision-maker. Evidence that was not before the decision-maker and that goes to the merits of the matter is, with certain limited exceptions, not admissible. The recognized exceptions are an affidavit that: provides general background in circumstances where that information might assist the Court in understanding the issues relevant to the judicial review, but does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker; brings to the attention of the reviewing Court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker so that the Court can fulfill its role of reviewing for procedural unfairness; or, highlights the complete absence of evidence before the administrative decision-maker when it made a particular finding. (*Association of Universities and Colleges of Canada v Canadian Copyrights Licensing Agency*, 2012 FCA 22 ("*Assn of Universities and Colleges*" at para 20.; also see *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 19-25; and *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 45).

[21] In the absence of any substantive argument by the Respondent, as well as any objection to the challenge to the admissibility by the Applicant, I am disinclined to discuss this issue at length. Although the Respondent argues that the challenged paragraphs and exhibits were not before the decision-maker, upon review of the affidavits, I note that most of the factual content of the challenged paragraphs is already contained, in one form or another, in the certified tribunal record ("record"). And, to the extent that the challenged paragraphs and exhibits comprise argument or attempt to supplement the record that was before the IAD, I have not taken them into consideration.

Issue One: Did the IAD breach the duty of procedural fairness owed to the Applicant?

Applicant's position

[22] The Applicant submits that he was constrained in his ability to present his case because he was not allowed to use a list of key words during his testimony and because he was asked to put away any documents he had, including his previously disclosed book of exhibits. Further, because the IAD and the Minister's counsel repeatedly interrupted him, pointing out that his submissions were not relevant, and that this hindered him from laying out his testimony in the manner he had prepared. The Applicant also submits that the presence of the Minister's counsel at his Alternative Dispute Resolution ("ADR") and then her representation of the Minister at his IAD hearing was improper and breached s 20(4) of the *Immigration Appeal Division Rules*, SOR/2002-230 ("IAD Rules").

Respondent's position

[23] The Respondent submits that the hearing was procedurally fair. In that regard, the Court must ask itself whether the Applicant was able to fully and fairly present his case (*Vavilov* at para 127; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 at para 28 ("*Baker*")). The Respondent also submits that the content of the duty of farness is variable, flexible and context specific (*Vavilov* at para 58), and that the IAD's choice of proceedings is to be afforded deference (*Law v Canada (Citizenship and Immigration)*, 2007 FC 1006 at paras 12-19).

[24] The Respondent submits that the transcript of the hearing before the IAD reveals that the Applicant had the opportunity to refer to the appeal record and his documentary exhibits while testifying and he did so many times. Similarly, that the IAD was sensitive to the fact that the Applicant was self-represented.

[25] The Respondent submits that the IAD did not breach procedural fairness by not allowing the Applicant to rely on his notes, which were not part of the record. The IAD may place limits on the rights of parties to adduce evidence and to make submissions so long as it does so in a principled way (*Kotelenets v Canada (Citizenship and Immigration)*, 2015 FC 209 at para 30 ("*Kotelenets*")). That was the circumstance in this matter. Moreover, the Applicant waived his right to complain when he agreed to set his notes aside, failed to object at any point during the hearing, and did not seek to have them admitted when offered an opportunity to do so. The Respondent also submits that the IAD did not breach procedural fairness by interrupting the Applicant. The IAD occasionally interjected to clarify the Applicant's testimony and ask him to focus on relevant matters. Such interruptions were not breaches of procedural fairness (*Mahmoud v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1308 at para 10 ("*Mahmoud*"); *Yari v Canada (Citizenship and Immigration)*, 2016 FC 652 at para 45 ("*Yari*")). The interjections were not constant interruptions or gross interference (*Lawal v Canada (Citizenship and Immigration)*, 2008 FC 861 at para 36 ("*Lawal*"); *Kumar v Canada (Minister of Employment and Immigration)*, [1988] 2 FC 14, [1987] FCJ No 1015 (FCA) (QL/Lexis) ("*Kumar*")).

[26] Finally, the Respondent submits that the Minister's counsel's presence and comments did not lead to a breach of procedural fairness. Rule 20(4) of the IAD Rules precludes the disclosure of information given during the ADR process. The Minister's counsel did not do so at the IAD hearing. And, as the IAD Rules are silent on the issue of whether counsel from an ADR can also be counsel at the hearing, the IAD has the discretion to regulate its own procedure. The IAD's choice to permit the Minister's counsel to represent the Respondent before the IAD after learning that she had been present at the ADR did not render the proceeding unfair. Nor did the Applicant raise this as a concern at the hearing or in his letter sent to the IAD five days later, which amounts to an implied waiver.

Analysis

[27] As stated by the Supreme Court of Canada in *Vavilov*, "[t]he principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: Baker, at para. 28" (*Vavilov* at para 127). Thus, the question that I must determine in the matter is whether the Applicant was afforded that opportunity.

[28] The Applicant submits that he was denied procedural fairness because the IAD required him to put away his notes, and documents that he had previously submitted, when it commenced the hearing.

[29] The notes that the Applicant refers to are found as an exhibit "O" to his affidavit sworn on September 26, 2019. This is a one-page list of dates and other information, which he describes as "key words" and an aide-mémoir.

[30] The right to make one's case is subject to reasonable limitations, but those limitations, when they are the result of the exercise of discretion, are to be made and applied in a principled way (*Kotelenets* at para 30). Here, the IAD offered a principled rationale for not letting the Applicant rely on his notes. Specifically, that the IAD needed to assess the Applicant's credibility. The IAD explained this to the Applicant at the hearing and he expressed no concerns with the request. In my view, it was open to the IAD when assessing the credibility of the Applicant's testimony to preclude the use of such notes, which were intended as self-generated prompts, and which document was not found within the materials previously filed by the Applicant in support of his hearing before the IAD. Further, and significantly, the Applicant does not indicate any testimony that he was unable to give as a result of not having access to the list of "key words".

[31] And, although the Applicant claims that he was also prevented from accessing the documents he had filed with the IAD, his appeal record, this is not supported by a review of the transcript of the hearing. For example, when asked about his calculation of his residency in Canada, the Applicant referred to the appeal record and provided a page reference. When answering questions about the purchase of his four condominiums, the Applicant referred the IAD to the deeds by page reference to his submissions. Similarly, when answering questions about his land purchase, the Applicant said, "I'll just look it up really quick". He found the deed

and referred the IAD to the relevant pages of his submissions. Accordingly, I do not accept the Applicant's submission that during the hearing he was prevented by the IAD from accessing the documentation that he had submitted in support of his appeal.

[32] In sum, I am not persuaded that the IAD's decision not to let the Applicant use his list of key words prevented the Applicant from fully or fairly presenting his case. The hearing exceeded three hours in length and the transcript demonstrates that the IAD canvassed the relevant factors and the evidence with the Applicant, prompted him to clarify his evidence, and asked him on multiple occasions if he had anything that he wished to add. In short, the IAD provided the Applicant with ample opportunities to meaningfully present his case.

[33] The Applicant also submits that repeated interruptions by the Minister's counsel and the IAD amounted to a breach of procedural fairness. Further, that the pointing out that his submissions were not relevant by the IAD and counsel for the Minister was intimidating to him as a self-represented litigant and hindered him from laying out his testimony in the manner he had prepared.

[34] There are circumstances in which interventions may be found to interfere with an applicant's ability to present their case. As stated by this Court in *Mahmoud*,

> [10] … intrusive and intimidating interventions by a Board member may be found to interfere with an applicant's ability to present his case. (*Kumar v. Canada (Minister of Employment and Immigration)*, [1988] 2 F.C. 14). However, if the interruptions are made for the purpose of clarifying testimony or an issue, they will not raise a reasonable apprehension of bias, even if the manner of questioning or interruption is "energetic". (*Ithibu v. Canada*

> *(Minister of Citizenship and Immigration*, 2001 FCT 288 (CanLII), [2001] F.C.J. No. 499).

[35] In *Kumar*, the Federal Court of Appeal found that the decision-maker's conduct of the hearing, which included statements such as "[t]his is one of the most ridiculous cases I have ever heard in my life" and, in response to a summary of the applicant's political views, "Who cares?", was intrusive and that the intimidating character of the interventions interfered significantly with the applicant's presentation of his case by his counsel (*Kumar* at paras 4, 8).

[36] The IAD in this matter did intervene on several occasions to point out to the Applicant that he had already provided testimony on the same point on several occasions. The IAD also asked questions that were clearly intended to elicit evidence pertaining to the H&C factors, to clarify the Applicant's testimony, and to focus it. The IAD noted that the Applicant liked to go into great detail, and in that regard that he was very transparent, which was a good thing. However, it advised him that it was important to focus on the most relevant and important matters given that the hearing was not complex and the matter could be addressed within a half a day. The Applicant's propensity to provide irrelevant detail in his testimony is demonstrated, for example, in his answer the IAD's question of whether he wished to add anything further about his establishment in Canada. The Applicant's response included that he did research while he was in Canada. When asked what sort of research, the Applicant recited at length details concerning his father's efforts to start a business in Canada in 1980, including problems hiring a particular plant manager. At this point counsel for the Minister and the IAD interrupted him in an effort to refocus him on the question of what research he claimed that he did while in Canada.

He ultimately provided an unfocused response that included the statement that he researched what kind of company he would need in Canada.

[37] I appreciate that as a self-represented litigant, the hearing process was unfamiliar territory for the Applicant. It is also apparent that the Applicant wished to present his case in a specific way. However, the transcript illustrates that much of the information he wished to convey was not relevant to the issue before the IAD, which was whether there were sufficient H&C factors to warrant exceptional relief. Further, the transcript shows that his testimony lacked focus and was prone to unnecessary and unhelpful detail. The transcript also illustrates that the IAD intervened in an appropriate manner and for appropriate purposes and afforded the Applicant every opportunity to provide relevant evidence (see *Mahmoud* at paras 10-11). This is not a situation where constant interruptions or gross interference with the orderly presentation of the applicant's case resulted in a breach of procedural fairness (*Lawal* at para 36; *Kumar* at para 8).

[38] And, while the Applicant may have found it disconcerting to be redirected, seeking to have an applicant respond to the question asked rather than provide other irrelevant information is not a breach of procedural fairness (*Yari* at para 45). Further, the IAD's approach was patient and respectful; it was not intrusive or intimidating. In that regard, I note that the Applicant is highly educated and the CEO of his own clearly successful business. I am not persuaded that he was intimidated by the IAD's interventions. He was, however, unhappy that he was not permitted to dictate the conduct of the hearing, which hearing had been postponed to allow him to retain counsel although he subsequently declined to do so.

[39] As to interventions by counsel for the Minister, while I would agree that counsel was, on occasion, short, and could have chosen her words with greater care, her comments ultimately redirected the Applicant to more relevant issues or suggested that he provide the additional detail as part his submissions at the end of the hearing.

[40] In sum, I find that the interventions by the IAD and counsel for the Minister did not prevent the Applicant from fully and fairly presenting his case.

[41] Finally, the Applicant submits that the presence of counsel for Minister at the ADR and at the IAD hearing breached Rule 20(4) of the IAD Rules. Rule 20(4) states, "[a]ny information, statement or document that any person gives in an alternative dispute resolution process is confidential. It must not be disclosed later in the appeal". The Applicant submits that the statement by counsel for the Minister that she "knows what the Applicant was told at the ADR" is a violation of that rule. I disagree. Counsel for the Minister did not disclose what the Applicant was told, and therefore she did not violate Rule 20(4). Moreover, when the Applicant raised the ADR, the IAD advised him that whatever happened at the ADR was of no relevance to the IAD's decision and cautioned him that it did not want to hear what happened at the ADR. Accordingly, there is also no concern that the ADR improperly influenced the IAD decision.

[42] The Applicant also submits that the presence of counsel for the Minister at the ADR and her attendance as counsel for the Minister at the hearing was improper and was in violation of IAD Rule 20(4). His suggestion appears to be that counsel may have been privy to confidential information at the ADR, which may have affected her conduct of the hearing on behalf of the

Minister. Accordingly, that she should not have been counsel for the Minister at the IAD hearing. The Applicant does not cite any authority in support of his position. And, confidentiality pursuant to Rule 20(4) is maintained as long as parties do not disclose contents of an ADR. I have already found that counsel for the Minister did not disclose any information from the ADR at the IAD hearing. The mere fact of her presence at the ADR is not disclosure or a breach of Rule 20(4).

[43] I also have difficulty with the idea that counsel for a party who attends at or acts for that party at an alternate dispute resolution process would then be precluded from representing that same client at a subsequent hearing of the matter before an administrative decision-maker or a court. This would require clients to retain and instruct one counsel for the dispute resolution process, and if it were not successful, to subsequently retain and instruct new counsel for the hearing. This seems onerous, and given the confidentiality requirement of Rule 20(4) and similar rules applicable in other venues, unnecessary. Given this, and in the absence of any suggestion as to how procedural fairness was actually breached by the presence of counsel for the Minister at the ADR and her attendance as counsel for the Minister at the IAD hearing, this argument cannot succeed.

[44] In conclusion, the IAD did not breach procedural fairness.

ISSUE TWO: Was the IAD's decision reasonable?

Applicant's position

[45] The Applicant submits that the IAD made an error of law and an error of fact. The IAD's factual error was to find that the Applicant maintained the same pattern of visiting Canada and returning to Germany without accumulating enough days when he was examined on May 1, 2018. However, the evidence established that the Applicant did change his pattern as demonstrated by the fact that he actually exceeded the required physical presence by the time of the IAD hearing on June 11, 2019. The Applicant submits this factual error affected the IAD's exercise of its discretionary authority because one of the factors that the IAD was required to address was his "degree of establishment in Canada, initially and at the time of the hearing" (*Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at para 27 ("*Ambat*")). The IAD erred by failing to consider the Applicant's establishment at the time of the hearing.

[46] As to the error of law, the Applicant submits that he genuinely but mistakenly believed he could travel in and out of Canada without any problems as a permanent resident. The Applicant argues that the IAD did not understand that he was not pleading "ignorance of the law". He was only pleading a genuine, but mistaken belief.

Respondent's position

[47] The Respondent points out that the Applicant did not meet his residency requirement as of May 18, 2019. The fact that the Applicant subsequently increased his proportion of time spent in Canada after October 2016, when he learned of the residency obligation, does not render the IAD's observation as to his overall pattern inaccurate. Further, the transcript illustrates that the pattern to which the IAD was referring was not just the Applicant's time spent in Canada, but rather to the Applicant's long-standing practice of continuing to live in Germany while only

making temporary visits to Canada. And, the IAD did consider the Applicant's degree of establishment at the time of the hearing.

[48] The Respondent acknowledges that the Applicant did not characterise his position as being one of ignorance of the law, however, that is the essence of his position. The Respondent submits that it would have been an error of law for the IAD to consider the Applicant's explanation without also noting that ignorance of the law is not an excuse (*Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at paras 27-28 ("*Tefera*")). And, while an "honest, but mistaken belief" about a relevant fact may be a factor supporting H&C relief, mistaken belief about one's legal obligations is not. There is an important distinction between reliance on ignorance of the law and reliance on a mistake of fact, such as ignorance of one's legal status (*Canada (Citizenship and Immigration) v Ma*, 2017 FC 886 at para 25 ("*Ma*")).

Analysis

[49] In his assertion of an error of fact, the Applicant has somewhat conflated his residency requirement under s 28 of IRPA with the H&C grounds the IAD may consider. Section 28(2)(b)(ii) of IRPA states that a permanent resident meets their residency requirement, "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". That residency requirement is 730 days in the five-year period. The five-year period for the Applicant was five years preceding his examination on May 1, 2018; that is, May 1, 2013 to May 1, 2018. The Applicant agreed at his IAD hearing that he did not meet the residency requirement for that five-year period. This is not at issue.

[50] I would also observe that while the Applicant seemingly challenges the IAD's statement that since October 2016 "the Appellant maintained the same pattern of visiting Canada and returning to Germany without accumulating enough days in Canada when he was examined on May 1, 2018", in the context of the IAD's analysis of the establishment factor, that finding was actually made when the IAD was considering the reasons for the Applicant's departure from Canada and his reasonable attempts to return at the first opportunity.

[51] In any event, I see no factual error in the IAD's statement. The IAD was correct that, as of May 1, 2018, the Applicant had not accumulated the required number of days. Even if he increased the number of days he spent in Canada after October 2016, the pattern as of May 1, 2018 remained the same, as he did not accumulate sufficient days to meet his residency requirement. Moreover, upon review of the transcript, I agree with the Respondent that the IAD was concerned with the Applicant's travel pattern of visiting Canada and then returning to his main base in Germany without accumulating the days required to meet his residency requirement. In this way, his pattern was unaltered.

[52] I also do not agree with the Applicant that, "the IAD made a factual error by not finding that the Applicant met his obligation at the time of the hearing". As noted above, the relevant residency period was May 1, 2013 to May 1, 2018. That period was applied by the IAD in determining the number of days that the Applicant was physically present in Canada, that is, whether he met his residency obligation. While the Applicant is correct in stating that the degree of establishment in Canada, initially and at the time of the hearing, is an H&C factor that the IAD can consider (*Ambat* at para 27), in my view, the IAD did not err by failing to specifically

state the Applicant's number of days of residency at the time of the hearing as an aspect of the establishment factor. Further, the IAD in its establishment assessment noted that the Applicant acquired four apartments in Halifax between July 2016 and January 2019, thereby demonstrating that it considered events that occurred after May 1, 2018.

[53] More significantly, the IAD concluded that the Applicant's degree of establishment was a positive factor. Therefore, in essence, the Applicant is arguing that in its overall assessment of the H&C factors, the IAD should have placed more weight on that positive factor. However, this Court cannot interfere on the basis that an applicant thinks more weight should be given to factors which favour his case (*McCurvie v Canada (Citizenship and Immigration)*, 2013 FC 681 at para 71).

[54] As to the alleged error of law, the Applicant testified that when he arrived in Canada when he was 17 years old, he was told that the only difference between a landed immigrant and a Canadian citizen was that he could not vote or be elected. Further, that this was his "assumption, so [he] genuinely believed [he] could just be travelling, leaving, coming, whenever [he] pleased". And, because he was not challenged, his belief was strengthened: "I was basically made to believe everything was the way I thought it was". Following an exchange with counsel for the Minister, the Applicant stated that he was not claiming ignorance of the law: "See, if I didn't know, I would have made sure to find out how it is. But I genuinely believed that that's how it was."

[55] In short, he claims that he held a mistaken but genuine belief that he could enter and leave Canada as he pleased, that he was unaware of any residency requirements until October 2016, and that the IAD erred in finding that he was pleading ignorance of the law.

[56] The IAD did state that the Applicant was pleading ignorance of the law. It then set out the Applicant's testimony on this point and found that it is a well established principle on matters such as this that ignorance of the law cannot justify a failure to comply with the requirements of the IRPA.

[57] However, I agree with the Respondent that even if the Applicant characterized his error as a genuine, but mistaken belief, in essence, he was pleading ignorance of the law.

[58] In *Tefera*, the respondents came to Canada in 2008 and became permanent residents. They stayed in Canada for six weeks and then returned to Ethiopia. In 2012, they returned to Canada. As they could not meet the residency requirements, they sought H&C relief, which the IAD granted. The Minister sought judicial review of the IAD's decision, which Justice Gascon granted.

[59] Justice Gascon held:

> [27] First, I find that the IAD erroneously accepted ignorance of the law as an excuse for the Tefera family's failure to fulfill their residency obligation, citing the *Zamzam* case. The IAD relied on such an error to conclude that the Tefera family could not have returned to Canada before August 2012, because they did not have their permanent resident cards, and it considered this as a factor tilting the weighing exercise in favour of the Tefera family's appeals. Not only was the IAD not bound by that *Zamzam* case (as

> it was a decision originating from the IAD itself) but in that decision, the IAD had found that the appellant was "ultimately responsible for following the advice of the consultant he hired", and that the delay in returning was caused by a combination of incorrect advice and health issues. The *Zamzam* case could therefore not be reasonably used, in my view, to allow the IAD to permit people who received bad advice or who did not inquire about their rights to overcome a breach of their residency requirements.
>
> [28] In addition, it is a well-known principle that, unless very particular circumstances exist, "ignorance of the law is no excuse" for not complying with IRPA obligations (*Taylor v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 349 at para 93; *Charles v Canada (Citizenship and Immigration)*, 2013 FC 25 at para 26; *Williams v Canada (Minister of Citizenship and Immigration)*, 2005 FC 697 at para 10). It was therefore erroneous for the IAD to accept that it was reasonable for Mr. Tefera to have relied on some incorrect advice while completely omitting to mention that "ignorance of the law is no excuse". Similarly, "poor legal representation" is not a valid excuse for failures to comply with the IRPA (*Cornejo Arteaga v Canada (Citizenship and Immigration)*, 2010 FC 868…at para 17; *Mutti v Canada (Minister of Citizenship and Immigration)*, 2006 FC 97 at para 4).

[60] Although the Applicant referenced a decision of the IAD, which held that a mistake of the applicant therein regarding his permanent residency obligations was honest and did not weigh heavily against his H&C request, IAD decisions are not binding on this Court. Further, as *Tefera* illustrates, ignorance of the law cannot excuse a failure to meet the residency obligation. Here, the Applicant chose to make no inquiry, between 1980 and October 2016, as to the residency or other requirements of Canada's immigration laws. In effect, his position is that he was ignorant of the law because he saw no reason to make any inquiry to confirm the assumption that he made, when he was 17 years old, as to the state of the law.

[61] This Court has previously held that it is irrelevant that an applicant was allowed to enter Canada as a permanent resident; permanent residents have the obligation to comply with their residency requirements under the IRPA (*Abedin v Canada (Citizenship and Immigration)*, 2012 FC 1197 at para 12). In that regard, it is of note that s 41(b) of the IRPA states that a permanent resident is inadmissible for failing to comply with their s 28 residency requirements.

[62] And, in *Jankovic v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1482, Justice Russel stated:

> [53] The Applicant does not deny that he was excluded from his Father's 1992 application. The Father alleges, rather, that he was not aware of the consequences of that exclusion. But the Father is presumed to be aware of the rules and legislation governing applications which he submits. The legislation is publically available and the onus is on the individual applicant to ensure that they comply with the legislative requirements and are aware of the consequences of their choices. No one misled the Father at the material time or prevented him from seeking advice about the implications of his choices. There was no procedural unfairness and the Respondent was under no obligation to advise the Father about future consequences. In addition, the Father has stated categorically that the son was in his Mother's custody at the time and had no intention of immigrating to Canada."

[63] Thus, while before the IAD the Applicant characterized his error as a genuine, but mistaken belief, he was in essence pleading ignorance of the law. And, in any event, applicants cannot rely on their mistaken believe of the state of the law or their lack of knowledge of the law to justify non-compliance with the requirements of the IRPA, except in very exceptional circumstances.

[64] Here, in its H&C analysis, when considering the reason the Applicant gave for failing to comply with s 28, the IAD noted the Applicant's argument that he could not have inquired about something that he simply saw no reason to question, but the IAD found that it could not accept that reasoning as compelling. That finding was not unreasonable and, in my view, in these circumstances, the IAD did not commit a reviewable error.

[65] In conclusion, the IAD did not breach the duty of procedural fairness owed to the Applicant. Nor did it err in fact or law. Its decision was reasonable.

JUDGMENT IN IMM-4958-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

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

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4958-19
STYLE OF CAUSE:	JOSE ROMAN WYSOZKI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	MARCH 12, 2020
JUDGMENT AND REASONS	STRICKLAND J.
DATED:	MARCH 31, 2020

APPEARANCES:

Godfred Chongatera	FOR THE APPLICANT
Amy Smeltzer	FOR THE RESPONDENT

SOLICITORS OF RECORD:

McCarthy Chongatera Kuszelewski Law LLP Halifax, Nova Scotia	FOR THE APPLICANT
Department of Justice, Attorney General of Canada Halifax, Nova Scotia	FOR THE RESPONDENT