Federal Court  Cour fédérale

Date: 20200630

Docket: IMM-3858-19

Citation: 2020 FC 739

Ottawa, Ontario, June 30, 2020

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

NOOR MOHAMMAD AREFIAN
JANET MAHDJOURI SIAHKAL

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants are citizens of Iran and became permanent residents of Canada in August 2012, along with their two children, a son aged 18 and a daughter who was 13 as of the date of the decision under review in June 2019. The Applicants both have medical qualifications and had indicated an intention to seek approval to practice in Canada.

[2] The Applicants' permanent residence cards expired in October 2017 while they were in Iran. They then applied to renew their permanent residence visas and were requested to provide further documentation in January 2018. They did so in June 2018, requesting travel documents and relief on Humanitarian and Compassionate (H&C) grounds. The travel documents were provided and the Applicants entered Canada in October 2018 with their children who were enrolled in school.

[3] Subsection 28(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*] mandates that a permanent resident comply with a residency obligation with respect to every five-year period. The relevant 5-year reference period is from July 7, 2013 to July 7, 2018. The Applicants had been in Canada a total of 73 days and 82 days respectively, out of the statutorily required 730 days (approximately 24-months) in the relevant 5-year period. An Immigration Officer therefore found that the residency requirement was breached by the Applicants. The Applicants appealed this decision to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board.

[4] On June 3, 2019, the IAD dismissed the appeal. Despite noting a number of positive H&C factors in the application, including the best interests of the child (BIOC), those factors were found to be insufficient to overcome the Applicants' significant breach of the residency obligation to justify special relief.

[5] This case is somewhat different from other matters involving breaches of residency by family groups in that the Immigration Officer made no finding regarding the children's status.

The IAD decision does not therefore apply directly to the children. They continue to enjoy permanent residence status in Canada although, obviously, they will be affected by the outcome of their parents' case.

[6] For the reasons that follow, this application for judicial review will be dismissed.

II. **Decision under review**

[7] The IAD member identified the factors considered, acknowledging that the list is not exhaustive and the weight to be assigned to each factor varies according to the circumstances of the case:

- The extent of non-compliance with the residency obligation;
- The reasons for the appellant's departure from Canada;
- Reasons for the lengthy stay abroad;
- Ties to the foreign country;
- The appellant's degree of establishment in Canada;
- Whether the appellant or their family would suffer hardship if the appeal is dismissed;
- Whether there are unique or special circumstances present in the case, and;
- The best interests of any children directly affected by the decision.

[8] These factors were set out in *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at paragraph 27. The weighing of the facts and the relevant evidence is within the discretion

of the IAD. The Court should not interfere with those decisions regardless of whether it agrees with the results: *Bello v Canada (Citizenship and Immigration)*, 2014 FC 745 [*Bello*] at para 42.

[9] The extent of the non-compliance was found to be an "extremely significant" breach of the residency obligation that "requires commensurate H&C considerations to allow the appeal". The reasons for the Applicants' departure from Canada and prolonged stay in Iran related to their mothers' health problems. The IAD found their desire to care for their parents to be commendable but stated that the evidence regarding the mothers' illnesses is "very brief and does not offer much detail on the nature of the illnesses, care needs and the role of the appellants in providing that care".

[10] The Applicants retain significant ties to Iran including family, an apartment, and employment as doctors for which they are on three year leaves of absence from February 2018. Accordingly, this factor did not weigh in the Applicants' favour.

[11] The IAD noted that the Applicants had acquired a condominium and a car and had transferred their savings to Canada. While the IAD found that the Applicants had no social contributions worth noting, some members of their extended family are in Canada. Overall, their material establishment and family connections in Canada were found to be positive.

[12] The Applicants had made conscious and voluntary decisions to continue living in Iran rather than settle in Canada. The son was now an adult and could make his own decisions as to where he preferred to live. He would not be required to return with his parents to Iran and could,

if necessary, live with his aunt in Canada. Should he return to Iran he could be required to meet a military service obligation. Overall, hardship to the family and the son in particular was not considered to be a significant factor by the IAD.

[13] Consideration of the BIOC focused on the 13-year-old daughter. The Applicants explained that they did not want to take her back with them if they had to return to Iran. She was well-adjusted to Canada and risked facing discrimination in Iran as a female. She also stood to lose her permanent resident status in Canada if she were to return with her parents. The IAD recognized that it was not a realistic proposition for her to remain in Canada if her parents had to leave. But if she did remain, the family separation would engage her best interests as well.

III. **Issues**

[14] The Applicants do not dispute the breach of the residency requirement. They contend that the IAD erred by incorrectly understanding key evidence that they presented in support of their H&C application.

[15] The Respondent objects to fresh evidence presented by the Applicants that was not before the IAD decision-maker. At the hearing, the Applicants accepted that the further evidence in their affidavits before the Court was inadmissible. They also conceded that the children had also failed to meet their residency obligations, but noted that no findings had been made in that respect by the Immigration Officer at the first instance.

[16] In my view, the sole issue for this Court to determine is whether the IAD decision was reasonable with particular regard to whether the Member was alert, alive and sensitive to the best interests of the Applicants' daughter.

IV. **Relevant legislation**

[17] Section 28 of the IRPA outlines the statutory framework governing residency obligations:

Residency 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) physically present in Canada,	**(i)** il est effectivement présent au 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,	**(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) 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.

(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

(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) referred to in regulations providing for other means of compliance;

(v) il se conforme au mode d'exécution prévu par règlement;

(b) it is sufficient for a permanent resident to demonstrate at examination

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;

(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 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.

[18] Section 67 of the IRPA is relevant to this matter, as it turns on an analysis of H&C factors:

Appeal allowed	**Exactitude des renseignements**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(a) the decision appealed is wrong in law or fact or mixed law and fact;	**a)** la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been	**b)** il y a eu manquement à un principe de justice

observed; or	naturelle;
(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.	**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.

V. **Standard of review**

[19] There is no controversy that the standard of review in the present matter is reasonableness: *Samad v Canada (Citizenship and Immigration)*, 2015 FC 30 at para 20, *Bello*, above, at para 26.

[20] Subparagraph 67(1)(c) of the *IRPA* is characterized by the Supreme Court of Canada as a power to grant exceptional relief (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57–58).

[21] In assessing on the basis of reasonableness, it must be determined that the decision was justified, transparent, and intelligible, and this applies not only to the outcome but the reasoning process (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 86-87). As the Supreme Court articulated in *Vavilov* at para 86," an otherwise reasonable outcome also cannot stand if it was reached on an improper basis", and at para 96 "[e]ven if the outcome of the decision could be reasonable under different circumstances, it is not open to a

reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome". As quoted by the Applicants, *Vavilov* at para 128 states that a "decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it".

VI. **Analysis**

[22] The Applicants submit that the IAD made factual errors in considering the evidence. These included incorrectly noting that the Applicants did not write a 2013 qualifying medical exam in Canada and concluding, erroneously, that their reason for seeking leave for absences from work in Iran was that they would have the option of returning to their positions there. The IAD erred in stating that they had applied for renewal of their permanent resident cards in January 2018 when the actual date was in September 2017. Further, the IAD erred in stating that the Applicants testified that their son would return to Iran. The errors cast doubt, the Applicants submit, on the accuracy of the IAD's overall assessment.

[23] In *Vavilov,* at para 100, the Supreme Court held that "any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable".

[24] In my view, none of the factual errors attributed to the IAD are sufficiently central or significant to render the decision unreasonable. The IAD was satisfied that the Applicants intended to practice medicine in Canada and needed to keep their practice certificates active in Iran so as to qualify in Canada. They had made establishment decisions including the purchase of a home, transfer of their assets and enrollment of their children in school. And the IAD concluded that it was more likely that the son would remain in Canada. The error as to the date of application for the renewal and travel documents was not material. The Applicants would still have been in serious breach of the residency requirement in September 2017 and had, in any event, submitted additional material in January 2018.

[25] As noted above, the most significant issue is whether the decision is unreasonable for failing to properly conduct the best interests analysis. It is well established that children may experience greater hardship than adults faced with a comparable situation: *Kanthasamy v Canada (Minister of Citizenship and Immigration),* 2015 SCC 61 at para 41 [*Kanthasamy*]. In this instance, while the son is now an adult, he is still dependent upon his parents. But he could choose to remain in Canada which the IAD acknowledged. There was nothing unreasonable in that conclusion in my view.

[26] Both parents had made it clear in their testimony that they would not force their daughter to return to Iran because she was doing well in Canada. Despite her own success as a professional woman in Iran, the female Applicant was concerned about the potential discrimination and harassment that her daughter could face in Iran as a young woman. However,

the female Applicant is herself an example of the availability of education and employment for women in Iran.

[27] The IAD acknowledged that Canada would be a better place for the daughter while also implying that her previous experiences in Iran would make reintegration there with her parents not very difficult. The Member did note that if she were to be taken back to Iran, it would affect her ability to comply with the residency requirement. It was not a realistic proposition, the IAD noted, for her to remain here while her parents returned to Iran. Most of her life has been spent in Iran. She had been in Canada for only a few months before the family returned to Iran and eight months following the Immigration Officer's determination. It is ultimately up to the parents, the IAD concluded, to determine what is in her best interests - to remain in Canada with her extended family to preserve her status and to take advantage of the educational opportunities, or to accompany her parents.

[28] Unfortunately, some hardship is inevitable in any immigration proceeding where individuals are at risk of losing status in Canada because of a failure to comply with the requirements of our legislation. While the circumstances evoke sympathy, this is not a case where I can find that the interests of the child were minimized or insufficiently considered. The IAD Member identified, and examined them in light of all of the evidence: *Kanthasamy*, above at para 39. The outcome is not what the Applicants had hoped for but that does not make the decision unreasonable.

VII. **Conclusions**

[29] I am satisfied the IAD engaged with the humanitarian and compassionate considerations raised by the Applicants with sufficient sensitivity and alertness, and that its decision bears the hallmarks of reasonableness. There were certainly some H&C factors that weighed in the Applicants' favour, the predicament faced by the daughter if her parents return to Iran being principal among them.

[30] The IAD decision maker was not blind or indifferent to these facts, but found that special relief was not warranted in the circumstances. It was incumbent on the IAD to assess this matter in light of the Applicants' significant breach of the statutorily prescribed residency requirements under section 28 of the IRPA. Though there were some minor factual errors made by the IAD, taken as a whole its decision reflected appropriate consideration of the salient facets of this case and there is no compelling reason for this Court to intervene. Accordingly, this application for judicial review is dismissed.

[31] No serious questions of general importance were proposed, and none will be certified.

JUDGEMENT IN IMM-3858-19

THIS COURT'S JUDGMENT is that:

1) The Application for judicial review of the IAD decision of June 3, 2019 is dismissed; and

2) No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3858-19
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