Federal Court  Cour fédérale

Date: 20210507

Docket: IMM-2799-20

Citation: 2021 FC 412

Ottawa, Ontario, May 7, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

LATIESHA FAISAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Latiesha Faisal is a citizen of Pakistan who is currently studying in the United States. Ms. Faisal's family immigrated to Canada in 2003 when she was two years old. The family returned to Pakistan in 2004 to assist with the care of Ms. Faisal's ill grandfather. The family has resided in Qatar since at least 2008. But for a brief visit in 2006, Ms. Faisal has not spent any time in Canada since 2004.

[2] In February 2019, at age 18, Ms. Faisal applied for a Permanent Resident Travel Document. The travel document was refused. The Visa Officer found she had spent no days in Canada in the proceeding five-year period and did not satisfy the physical presence requirement of at least 730 days during that period. The Visa Officer further found that the circumstances did not justify Ms. Faisal retaining her permanent residence status on humanitarian and compassionate [H&C] grounds.

[3] Ms. Faisal appealed the Officer's conclusion that there were insufficient H&C considerations to justify the granting of relief. She did not challenge the Officer's residency determination.

[4] On June 9, 2020, the Immigration Appeal Division [IAD] refused the appeal. Ms. Faisal now applies for judicial review of the IAD's negative decision pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. She first submits that the Application must be granted as a transcript of the IAD hearing is not available, rendering the judicial review process unfair. She further submits that the IAD's treatment of the evidence was unreasonable, and that the decision unreasonably departs from a prior determination where, in the case of her sister's appeal on similar facts, the IAD held there were sufficient H&C grounds to warrant special relief.

[5] As explained in more detail below, I find that the IAD's treatment and consideration of the evidence was reasonable, that in this instance the differing determinations of the IAD on

similar facts does not undermine the reasonableness of the decision, and that the absence of a transcript does not amount to a breach of natural justice in these particular circumstances.

II. Decision under Review

[6] In denying the appeal, the IAD identified a non-exhaustive list of H&C factors and made finding in respect to each, as follows:

A. **Extent of the non-compliance**: The breach of the residency obligation in this case was absolute requiring a commensurate level of H&C considerations to justify granting relief;

B. **Reasons for departure from Canada and prolonged stay abroad**: As Ms. Faisal left Canada at her parent's behest, this was a neutral factor in considering the issue of special relief;

C. **Appellant's establishment and ties in Canada**: The absence of material or social ties and establishment harmed her case for special relief. Her sister's future plans to come to Canada did not demonstrate ties or establishment in Canada;

D. **Appellant's ties to the foreign country**: Ms. Faisal had stronger ties to Pakistan, Qatar, and the United States than Canada;

E. **Hardship for the Appellant or family if appeal dismissed**: Ms. Faisal had not demonstrated that the challenges faced by women in Pakistan would specifically affect her. The IAD did not accept that Ms. Faisal had not learned Urdu through interactions with her family and found she could likely go to Qatar if she wished or could continue

her studies in the United States. Any hardship she would face in Pakistan did not justify special relief;

F. **Unique or special circumstances**: In addressing special circumstances the IAD declined to follow the reasoning adopted by the IAD in her sister's case (*Faisal v Canada (Minister of Citizenship and Immigration)*, 2019 CanLII 130873 (CA IRB) [*Faisal*]). In *Faisal*¸ as in this case, the decision maker determined the reasons for leaving Canada and remaining abroad were neutral factors, that there was no establishment in Canada, that ties to Pakistan were stronger than ties to Canada, and that there was no evidence to support a conclusion of hardship if permanent residence status were lost (*Faisal* para 27). Relief was granted in *Faisal* on the basis that the "appellant's situation [was] novel and she [was] being asked to answer for decisions over which she had no control." Significant weight was attributed to the sister having been taken from Canada as a minor and to her attempt to return to Canada at her first opportunity (*Faisal* at para 28). The IAD declined to accept the reasoning in *Faisal* because:

    i. In the IAD's view the circumstances were not novel. The IAD cited numerous examples before both the IAD and this Court where a breach of the residency obligation because of a parent's choice to leave Canada was the issue.

    ii. Having found the circumstance neither novel nor unique the IAD focused on whether special circumstances warranted the granting of the exceptional relief sought. The IAD considered whether Ms. Faisal's parents had acted reasonably and in her broader best interests when she

was a minor. The IAD noted that the evidence did not demonstrate that her parents, in particular her father, had acted unreasonably or contrary to her broader best interests when the family left Canada. Instead, the evidence suggested the decisions taken were likely believed to be in her best interests, the IAD noting Ms. Faisal's circumstances including her comfortable family life with her family in Qatar, and her opportunities to pursue a high standard of education.

iii. The IAD found that to hold special relief was warranted on the basis of a single factor, parents having made choices on behalf of their minor children, would rob the IAD of its discretionary jurisdiction on H&C relief.

III. Issues and Standard of Review

[7] The Application raises the following three issues:

A. Does the absence of a transcript or recording of the IAD hearing prevent the Court from dealing with an issue arising in the application for judicial review?

B. Did the IAD unreasonably consider and assess the evidence relating to the Applicant's departure from Canada, ties to Canada, or hardship in the event status is lost?

C. Did the IAD err by departing from a prior administrative decision rendered on similar facts?

[8] In assessing the first issue, no standard of review applies. Instead, I must consider whether, in the absence of a recording or transcript, I can determine the issues that arise on the Application (*Agbon v Canada (Minister of Citizenship and Immigration)*, 2004 FC 356 at para 3 [*Agbon*]).

[9] The IAD's determinations as they relate to the factors impacting H&C relief and its ultimate conclusions are reviewable on the reasonableness standard (*Yu v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1028 at para 8). A decision is reasonable if it is "based on an internally coherent and rational chain of analysis and… justified in relation to the facts and law" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]). Similarly, whether a decision maker's departure from a prior administrative decision amounts to an error warranting intervention on judicial review is to be considered when assessing whether the decision is reasonable. Where a decision maker departs from longstanding practices or established internal authority, it bears the burden of explaining that departure in its reasons (*Vavilov* at para 131).

IV. Analysis

A. *The absence of a transcript or recording of the IAD hearing does not prevent the Court from dealing with an issue arising in the application for judicial review*

[10] Ms. Faisal argues that in the absence of a transcript I am unable to determine what evidence the IAD relied upon in reaching its conclusion that her parents, in particular her father, likely acted reasonably and in her broader best interests when departing Canada. She further argues that without a recording or transcript she is unable to demonstrate that the evidence before

the IAD was inconsistent with the conclusions it reached on the issues of her establishment and ties in Canada, her ties to foreign countries, and the hardship resulting from a loss of her status.

[11] The mere absence of a transcript or recording of an administrative proceeding is not a breach of natural justice (*Agbon* at para 3). However, where the lack of a transcript or recording raises a serious possibility that an applicant will be deprived of the right to judicially review the decision, then the decision should be quashed (Donald JM Brown and The Honourable John M Evans, *Judicial Review of Administrative Action in Canada*, (Toronto: Thomson Reuters, 2019) (loose-leaf updated 2020, release 4), at topic 10:1700; see also *CUPE, Local 301 v Montréal (Ville)*, [1997] 1 SCR 793 at para 81).

[12] In *Huszar v Canada (Minister of Citizenship and Immigration)*, 2016 FC 284 [*Huzar*] Justice Peter Annis provides a comprehensive overview of the law as it relates to the absence of a transcript or a hearing and the impact on judicial review (paras 17-28). The burden is on an applicant to show that the Court cannot review the impugned decision without a transcript or recording (*Huszar* at para 19 citing *Agbon* at para 3).

[13] Ms. Faisal has not satisfied that burden in this instance. First, I note that although a recording or transcript is not available, the IAD does summarize Ms. Faisal's oral evidence at paras 14 to 22 of the decision (see also para 34). The IAD's evidentiary summary is consistent with the documentary record and is not seriously disputed by Ms. Faisal in the detailed affidavit she has filed in support of this Application. The IAD does identify one inconsistency between Ms. Faisal's testimony and the documentary record relating to whether the family moved from

Pakistan to Qatar in 2006 or in 2008. This factual question is of little relevance to the issues raised on the Application and is addressed by Ms. Faisal in her affidavit.

[14] Ms. Faisal asserts that the recording or transcript is needed because there is no evidence on the record to support the IAD's findings. These findings include the IAD's conclusions that (1) her father's decision to remove her from Canada as a child was in her broader best interests and (2) the hardship she will experience if required to return to Pakistan is not sufficient to warrant relief. This bald assertion is simply not consistent with the reasons. In both instances, the IAD details the evidence it relies upon to support its conclusions. This evidence is readily identifiable in the record before me.

[15] Ms. Faisal has not demonstrated that the absence of a transcript or recording of the IAD hearing raises a serious possibility that she will be deprived of the right to judicial review.

B. *The IAD's treatment and assessment of the evidence was reasonable*

[16] Ms. Faisal argues that the evidence establishes that in 2003, she was opposed to returning to Pakistan with her family and that she left Canada against her will. She submits that in the face of this evidence it was unreasonable for the IAD to assign neutral weight to her reasons for departing Canada. She argues the IAD was required to grapple with this evidence; evidence she submits contradicts the finding that her father acted reasonably and in her broader best interests.

[17] Ms. Faisal further argues that the IAD unreasonably assessed her ties to Canada. She draws attention to evidence that her sister, a permeant resident, intended to land in Canada in

June 2020, and evidence in the record referring to an aunt in Canada. Ms. Faisal submits her sister did in fact enter Canada on June 15, 2020, after the IAD decision issued, and takes the position that this development should be considered in assessing the reasonableness of the IAD's assessment.

[18] Finally, Ms. Faisal submits that, in assessing the hardship factor, the IAD ignored:(1) evidence of her limited ability to communicate in Urdu; (2) the law and order situation in Pakistan; (3) the unsafe environment faced by women in Pakistan; (4) limited job opportunities in Qatar; and (5) uncertainties relating to her father's job in Qatar.

[19] I am unpersuaded by these arguments.

[20] It was reasonably open to the IAD to assign neutral weight to the reasons for Ms. Faisal's departure and absence from Canada. The IAD recognized Ms. Faisal's lack of agency in 2003, but reasonably concluded the decision to have the family depart Canada was one made in Ms. Faisal's broader best interests in 2003. The IAD did grapple with this issue of best interests in considering the special circumstances factor. The IAD details the nature of the best interests assessment it undertook and refers to the evidence it relied upon in support of the conclusion that, in deciding to depart Canada, Ms. Faisal's farther likely believed the decision was in her broader best interests. This decision was not unreasonable and is supported by a chain of analysis that is logical, transparent, and justified.

[21] Assigning neutral weight to the reasons for departure is also consistent with the principle reflected in the jurisprudence that a claim for H&C relief should not be enhanced or undermined simply on the basis of prior parental decisions (*Lai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1359 at para 26; *Canada (Minister of Citizenship and Immigration) v Ma*, 2017 FC 886 at paras 22-23). This approach is also consistent with prior IAD decisions including the decision rendered in the case of Ms. Faisal's sister (*Faisal* at para 16).

[22] In considering ties to Canada, the IAD addressed the submissions made to it on the basis of the circumstances as they existed at that time. The IAD acknowledged Ms. Faisal's evidence that her sister intended to move to Canada but reasonably concluded a planned arrival in Canada did not demonstrate a current tie to Canada. That Ms. Faisal's sister subsequently landed in Canada is new evidence on judicial review. No submissions have been made to suggest this evidence falls within one of the limited exceptions for the acceptance of new evidence on judicial review (*Kharlan v Canada (Minister of Citizenship and Immigration)*, 2016 FC 678 at para 19). I have not taken this factor into account.

[23] The IAD does not address the presence of an aunt in Canada. However, Ms. Faisal did not make submissions to the IAD in respect of an aunt in Canada. There is a reference to an aunt in the written submissions to the IAD, the reference being made in the context of describing a faded memory Ms. Faisal has of a trip to Kingston, Ontario as young child. Specifically the submission states "[s]he also has faded memories of their trip to Kingston to see their aunt (Her mom's friend)…" (Emphasis added). The IAD cannot be faulted for failing to address an issue that does not appear to arise on the evidence and was not raised before it.

[24] Finally, the IAD did not ignore evidence of hardship; it specifically addressed this evidence and Ms. Faisal's circumstances in relation to each of the countries with which she has ties.

[25] Ms. Faisal disagrees with the IAD's assessment of the evidence and the weight it gave to the factors considered. However, neither Ms. Faisal's disagreement nor the possibility of a different reasonable outcome renders the decision unreasonable. The IAD's decision is reasonable and it is supported by a logical, transparent, and justified chain of analysis (*Vavilov* at para 85).

C. *The IAD did not err by departing from a prior administrative decision rendered on similar facts*

[26] An administrative tribunal is expected to assess each claim that comes before it on a case-by-case basis (*Budai v Canada (Minister of Citizenship and Immigration)*, 2021 FC 313 at para 33). In doing so, the tribunal is properly constrained by its previous decisions, but importantly, it is not bound by its previous decisions (*Vavilov* at para 131; *Bakary v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1111 at para 10 [*Bakary*]). A tribunal may depart from one of its previous decisions where it reasonably justifies the departure.

[27] In departing from the prior decision in *Faisal* and reaching a different result in this case, the IAD detailed its rationale for doing so. The IAD disagreed with the conclusion in *Faisal* that the circumstance presented was novel. It detailed why it was of this view and cited jurisprudence from this Court and prior tribunal decisions that were consistent with that view.

[28] The IAD also detailed its rationale for finding that the proper guiding question in assessing the existence of special or exceptional circumstances where a child was impacted by a decision of a parent was “did the parents, at the time they left Canada, act reasonably and in the broader best interests of the appellant when s/he was a minor?”

[29] In considering whether H&C relief is warranted pursuant to section 67 of the IRPA, the IAD has broad discretion. In the absence of a judicially prescribed test for the assessment of individual H&C factors, it is open to a decision maker to determine what factors will be applied, what weight they will be given, and how they will be assessed. Of course, to avoid intervention on judicial review, the decision maker must act in accordance with the guidance and direction detailed in *Vavilov*. I am satisfied the IAD did so.

[30] The IAD’s departure from the prior decision in *Faisal* was reasonably justified, as was its approach to the question of unique and special circumstances.

V. Conclusion

[31] The Application is dismissed. The parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-2799-20

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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