Federal Court  Cour fédérale

Date: 20210720

Docket: IMM-187-20

Citation: 2021 FC 763

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 20, 2021

Present: The Honourable Madam Justice Walker

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

BRUNO NYENGE MITEYO

Respondent

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration (the Minister) seeks judicial review of an Immigration Appeal Division (IAD) decision rendered on December 18, 2019. The IAD allowed Bruno Miteyo's appeal of a November 2018 departure order that was issued following his failure to comply with his residency obligation under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] Ultimately, Mr. Miteyo did not challenge the legal merits of the decision regarding his breach of the residency obligation. Rather, Mr. Miteyo asked the IAD to consider the humanitarian and compassionate grounds in his case that, in his view, warranted special relief. The IAD agreed with Mr. Miteyo's arguments and set aside the departure order.

[3] For the reasons that follow, the application for judicial review is allowed.

I. Background

[4] Mr. Miteyo is a Congolese citizen. In 2010, he applied for permanent residence under a specific category, that of investor in New Brunswick. Mr. Miteyo fulfilled his investment obligations in accordance with the requirements of the category.

[5] Mr. Miteyo arrived in Canada, accompanied by his wife and three children, and became a permanent resident on July 30, 2012.

[6] Shortly after his arrival, Mr. Miteyo left Canada and, between 2013 and 2018, continued to work in the Congo and was regularly absent from Canada. Mr. Miteyo claims that individuals in New Brunswick essentially approached him to consult and work with them on a part-time basis to help their Canadian business, TM Solutions (2014) Inc. (TM Solutions), obtain mandates in Africa.

[7] On October 29, 2018, an inadmissibility report was issued pursuant to subsection 44(1) of the IRPA due to Mr. Miteyo's failure to comply with his section 28 residency obligation. The departure order was issued on November 1, 2018.

[8] Mr. Miteyo appealed the departure order, and the hearing before the IAD took place on November 15, 2019. The Minister's representative was not present at the hearing but filed written submissions on November 8, 2018, and November 19, 2018.

[9] In its decision, the IAD first addressed Mr. Miteyo's failure to be physically present in Canada for at least 730 days during the five-year period between October 25, 2013, and October 25, 2018 (section 28 of the IRPA). The IAD noted that Mr. Miteyo worked for TM Solutions at various times during his absence and that he sought to avail himself of one of the section 28 exceptions, namely that for permanent residents outside Canada employed on a full-time basis by a Canadian business (subparagraph 28(2)(a)(iii) of the IRPA). As the IAD noted during the hearing, Mr. Miteyo could not rely on this exception and this led him to not challenge the legal validity of the prohibition order.

[10] The IAD therefore considers the extent of Mr. Miteyo's breach of his residency obligation. Mr. Miteyo claimed approximately 600 days, and the Minister claimed between 400 and 500 days, or more specifically, 455 days. The IAD recognizes that even a minimum threshold of approximately 455 days is not a total absence. Accordingly, it constitutes a moderate breach and a negative aspect that Mr. Miteyo must proportionately remedy with other humanitarian and compassionate factors.

[11] The IAD then considered the humanitarian and compassionate grounds identified in the appeal submissions in light of this negative aspect and the criteria set out in the case law (*Bufete Arce v Canada (Citizenship and Immigration)*, 2003 CanLII 54304 (CA IRB)).

[12] The IAD addressed the reasons for Mr. Miteyo's departure and extended absence from Canada; his age and profile; his ties and connections to Canada, including his family in Canada and people who are very close to him. The IAD noted that in November 2019, Mr. Miteyo was 65 years old and could "spend a lot more time here with his wife and his three children, who are all settled in Canada…" and that he would face hardship if he were to return to the Congo. The panel also noted that Mr. Miteyo was working abroad for a Canadian business and for a charity that supported displaced persons. The IAD found that these two factors made his trips to Africa reasonable.

[13] The IAD placed significant weight on Mr. Miteyo's presence in Canada, his work abroad with TM Solutions and his laudable work in Africa, namely humanitarian aid. The panel concluded that Mr. Miteyo discharged his burden of establishing, on a balance of probabilities, that there were sufficient humanitarian and compassionate grounds to allow his appeal.

II. Issues and standard of review

[14] The Minister submits that the IAD made several reviewable errors in its assessment of humanitarian and compassionate grounds. He argues that the panel erred in finding that the reasons Mr. Miteyo presented are sufficient for him to retain his permanent resident status in Canada.

[15] The parties recognize that the IAD's assessment of humanitarian and compassionate grounds involves a high degree of discretion and that the Court must review the impugned decision on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 [*Vavilov*]). None of the circumstances justifying a deviation from this presumption apply in this case.

[16] When the reasonableness standard applies, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100). A reasonableness review must focus on the decision made by the decision maker, including the reasoning process and the outcome (*Vavilov* at para 83). A reasonable decision is one that is "based on an internally coherent and rational chain of analysis" that is justified in relation to the relevant facts and law (*Vavilov* at para 85). Such a decision is entitled to some deference from the reviewing court.

III. Analysis

[17] The Minister notes that Mr. Miteyo chose to be absent from Canada for extended periods to continue his work in the Congo. He did not comply with his residency obligation and did not even establish the extent of his non-compliance. The Minister argues that the IAD's analysis is not very transparent or intelligible. The Minister submits that the panel considered irrelevant factors while failing to consider highly relevant factors.

[18] For his part, Mr. Miteyo alleges that the Minister did not fairly present the factual situation in his memorandum. He also responded to each of the Minister's arguments on the merits of the decision.

The effect of the Minister's absence from the hearing

[19] Mr. Miteyo first alleges that, after not being present at the hearing, the Minister is now attempting to remedy the absence of his representative. Mr. Miteyo emphasizes that this application for judicial review is a capricious procedure. In his view, the Minister is attempting to remedy this absence [TRANSLATION] "so that this honourable Court will substitute its analysis for that of the IAD."

[20] I cannot agree with this argument. The Minister's decision not to appear at the hearing does not deprive him of his right to file an application for judicial review with the Court and to challenge the IAD's decision. His written submissions to the IAD seeking dismissal of the appeal clearly indicate his opposition to Mr. Miteyo's arguments that there are sufficient humanitarian and compassionate grounds for special relief. The Minister's application for judicial review is not capricious due to his absence from the hearing.

[21] I find that the Minister has maintained his right to challenge the IAD's decision.

The extent of non-compliance with the residency obligation

[22] The Minister submits that the IAD erred in speculating as to the number of days that Mr. Miteyo was physically present in Canada. Conversely, Mr. Miteyo is of the opinion that the IAD was prudent in using the lower number of days (455 days) put forward by the Minister.

[23] In my view, the IAD did not commit a reviewable error by using the Minister's estimate of approximately 455 days as the minimum threshold. The panel's conclusion that this figure does not constitute a total absence from Canada on the part of Mr. Miteyo and that [TRANSLATION] "essentially, it was an average non-compliance" is not unreasonable in light of the evidence. While it is difficult to understand why Mr. Miteyo cannot calculate the number of days he spent in Canada despite his numerous trips during the five-year period, the important conclusion is the average non-compliance and not the exact number of days of the non-compliance.

Reviewable errors

[24] I will now address the Minister's additional arguments.

[25] Having carefully considered the arguments of both parties, the evidence on record and the IAD's reasons, I find that the panel made the following reviewable errors:

1. The IAD did not intelligibly consider the reason Mr. Miteyo left Canada so soon after he arrived and became a permanent resident. Between July 30, 2012, the date he arrived in Canada, and December 24, 2012, the evidence shows that Mr. Miteyo entered Canada twice (October 19, 2012, and December 24, 2012). In its decision, however, the IAD failed to consider why he left Canada the first few times. The panel referred to Mr. Miteyo's work in Africa during the five-year period. However, its analysis does not indicate whether the first two trips were business trips for his employers.

2. The IAD accepted that Mr. Miteyo thought he was meeting his residency obligation because he was associated with TM Solutions on a part-time basis. The IAD noted that Mr. Miteyo had several undertakings in Canada, which the panel did not identify, and that:

> 10 … some of the reasons for his departure and his lengthy stay abroad are reasonable, on a balance of probabilities, given the fact that he believed he was complying with his residency obligation by being associated with a Canadian business….

Ignorance of the law is no excuse (*Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at para 28). I agree with the Minister that the IAD's conclusion that some of the reasons for Mr. Miteyo's departure and extended time abroad "are reasonable…given the fact that he believed he was complying with his residency obligation by being associated with a Canadian business…" is itself a reviewable error. The case law confirms that keeping a job outside of Canada is contrary to the objectives of the IRPA (*Canada (Public Safety and Emergency Preparedness) v Abderrazak*, 2018 FC 602 at para 24). The fact the IAD appears to excuse or minimize Mr. Miteyo's failure to meet his residency obligation without relying on such circumstances is problematic.

3. The IAD continues its analysis on this point, noting that "[m]ore importantly," Mr. Miteyo's work helped TM Solutions obtain revenues abroad, and Mr. Miteyo contributed to work in various charitable organizations in Africa. I agree with Mr. Miteyo's argument that the IAD's analysis is nuanced. Despite the nuance, the panel's explanations of the relevance of TM Solutions' foreign revenue are

not justified. The IAD goes on to note that this revenue contributed to the Canadian economy. The panel relied on the fact that Mr. Miteyo's work outside Canada generated revenue abroad that was repatriated to Canada by his Canadian employer. The panel characterized his work outside Canada as a positive factor because "this was also clearly beneficial to the Canadian economy." Unfortunately, there is no evidence in the record that TM Solutions' revenue was repatriated to Canada.

The IAD's assumption that part-time employment with a Canadian business was beneficial to the Canadian economy without any evidence is a reviewable error. Further, this assumption is a departure from subparagraph 28(2)(a)(iii) of the IRPA. Pursuant to that subparagraph, only full-time employment for a Canadian business is an exception to the requirement that a permanent resident be present in Canada for at least 730 days during a five-year period. If, by attempting to turn a negative factor into a positive factor, such part-time employment is presumed to have been beneficial to the Canadian economy, the requirements of the subparagraph have no actual application.

4. An important element of the IAD's analysis of Mr. Miteyo's establishment in Canada is the fact that at age 65, Mr. Miteyo "can spend a lot more time" with his family in Canada over the next few years. The case law indicates that the panel erred in considering Mr. Miteyo's potential future establishment (*Canada (Citizenship and Immigration) v Hassan*, 2017 FC 413 at para 24):

> [24] …formally considering potential for establishment as relevant "would be incongruous with the legislative scheme" and "could effectively render the inadmissibility finding irrelevant"….

Intent does not demonstrate actual establishment.

Furthermore, the IAD does not intelligibly consider Mr. Miteyo's establishment in Canada and his integration into Canadian society in light of other fiscal and financial factors. For example, as positive factors in support of his integration, the panel refers to Mr. Miteyo's regular contact with Canadians during his absences; his ownership of land on which he pays annual property taxes and maintenance fees; and his compliance with the initial requirements of the entrepreneurial program in New Brunswick. These factors do not require Mr. Miteyo to be present in Canada, and the IAD provides no explanation of how these factors are relevant to actual establishment in Canada.

IV. Summary and conclusion

[26] I am mindful that the IAD concluded that Mr. Miteyo's testimony was "very spontaneous, direct, detailed and delivered without hesitation." It follows that there are no issues of credibility in this case and that the facts are well established. Likewise, Mr. Miteyo's charitable work in Africa was undoubtedly commendable. Further, the assessment of the importance of Mr. Miteyo's family in Canada is detailed, and the IAD did not err in this regard.

[27] Yet the Minister makes no submissions as to the facts or Mr. Miteyo's testimony. His arguments focus on the IAD's conclusions, which provide no explanations, and on its consideration of irrelevant factors in its assessment of humanitarian and compassionate grounds, including potential future establishment and the supposed benefits of Mr. Miteyo's work with a Canadian business.

[28] I find that the Minister's arguments are well founded. The decision lacks the characteristics of a reasonable assessment of several criteria relevant to the consideration of humanitarian and compassionate grounds in an appeal to the IAD under subsection 63(4) and paragraph 67(1)(c) of the IRPA. While the IAD's exercise of its powers is highly discretionary, the panel must consider the relevant factors in a transparent and intelligible manner. For the reasons stated above, the Minister's application for judicial review is allowed.

[29] The parties have not proposed any questions for certification, and I agree that there are none.

JUDGMENT in IMM-187-20

THE COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The Immigration Appeal Division's decision dated December 18, 2019, is set aside.

3. The matter is referred back to the Immigration Appeal Division for reconsideration by a differently constituted panel.

4. No question of general importance is certified.

"Elizabeth Walker"
Judge

Certified true translation
This 30th day of July 2021.

Elizabeth Tan, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-187-20
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v. BRUNO NYENGE MITEYO
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