Federal Court Cour fédérale

Date: 20211001

Docket: IMM-73-20

Citation: 2021 FC 1019

Ottawa, Ontario, October 1, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

MOJTABA FAYAZI
MEHRNOOSH ATTAR
MEHRNAZ FAYAZI
MAHBOD FAYAZI

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mojtaba Fayazi, his wife Mehrnoosh Attar, their daughter Mehrnaz Fayazi and their son Mahbod Fayazi are citizens of Iran who became permanent residents of Canada in March 2013. In October 2018 the applicants applied for Permanent Resident Travel Documents (PRTD) to enter Canada, as their permanent resident cards had expired. A visa officer refused the PRTD

applications because the applicants had not been physically present in Canada for at least 730 days (i.e. two years) in the preceding five-year period, and therefore, they did not meet the "residency obligation" requirement pursuant to section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The applicants appealed the officer's decision to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada. They argued that the IAD should allow the appeal under section 67 of the *IRPA* on the basis that compelling humanitarian and compassionate (H&C) considerations warrant special relief from the residency obligation requirement. The IAD concluded that H&C considerations were insufficient to warrant special relief, and dismissed the appeal. On this application for judicial review, the applicants seek to overturn the IAD's decision.

[3] The applicants submit that judicial intervention is warranted for two reasons.

[4] First, they submit the IAD breached procedural fairness. According to the applicants, the IAD demonstrated bias by exhibiting a state of mind that was predisposed to a particular result or that was closed with regard to particular issues, spurred in part by factual errors and misinterpretations of the evidence. These included findings that the applicants had falsely claimed Ms. Attar was prohibited from leaving Iran due to her involvement in two legal proceedings, which undermined their credibility, and that the applicants had no desire to return to Canada except to facilitate the daughter's university education and benefit from lower university tuition fees for permanent residents. The applicants contend the IAD failed to objectively weigh

the relevant H&C factors, which included serious events that, due to their lengthy and overlapping nature, forced the applicants to remain in Iran until 2018.

[5] Second, the applicants submit the IAD's decision is unreasonable. In this regard, they contend that the IAD misconstrued the evidence so as to justify the result, disregarded or discounted the positive H&C factors in their favour, and that the IAD's reasons exhibit unfounded generalizations and findings that are based on an absurd premise.

[6] For the reasons below, I find the applicants have not established that the IAD breached procedural fairness or that the IAD's decision is unreasonable. Accordingly, this application for judicial review is dismissed.

II. **Preliminary Issues**

[7] The application for leave and judicial review (ALJR) in this matter was filed late. The delay in filing (about four business days) was due to communication difficulties and delays in retaining and consulting with legal counsel. Although the applicants requested an extension of time, and their application record included evidence and written submissions explaining why an extension ought to be granted, the order granting leave does not explicitly address the request for an extension of time.

[8] The applicants ask that I consider their request and grant the extension of time. The respondent does not oppose the request.

[9] Prior to the hearing in this matter, I issued a direction asking the parties to address whether it would be open for me to find that the leave judge implicitly granted the extension of time by granting leave, if I were satisfied that this was in fact the case based on the record.

[10] The respondent submits that an order extending the time for filing an ALJR should be explicit, and I should not infer that the leave order implicitly granted the applicants' request. The respondent relies on Rule 6(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [*CIR Rules*], *Huot v Canada (Minister of Citizenship and Immigration)*, 2010 FC 973 at paragraphs 11-12 [*Huot*], and *Singh v Canada (Minister of Citizenship and Immigration)*, 2021 FC 93 at paragraph 16 [*Singh*].

[11] The applicants are not aware of a decision that squarely addresses whether a hearing judge is prohibited from finding that the leave judge implicitly granted an extension of time by granting leave. However, they submit that a practice has developed in proceedings where the leave order is silent on an extension, and the judge hearing the judicial review application will consider the extension request independently and make the determination. The applicants ask that I do so in this case.

[12] In view of the parties' positions, and since I am satisfied that I have the jurisdiction to do so, I have considered the applicants' evidence and submissions regarding the requested extension of time. I am satisfied that the applicants meet the test set out in *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846, 244 NR 399 (FCA). An extension of time to file the ALJR is hereby granted, *nunc pro tunc*.

[13] Although nothing turns on it given my ruling, I am not convinced that the respondent's position is correct. Certainly, the fact that leave was granted in this case would not be determinative of whether the extension of time was also granted: *Huot* at para 12. However, in my view, the cases presented by the respondent do not state that an extension request must be explicit in every case, or that a leave order that is silent regarding an extension request can only mean the leave judge overlooked it. In the leading case of *Deng Estate v Canada (Minister of Citizenship & Immigration)*, 2009 FCA 59 [*Deng Estate*], the Federal Court of Appeal noted (at paragraph 15) that the hearing judge "made a finding of fact" that the leave judge had overlooked the extension request, which suggests it should be open to a hearing judge to make a finding of fact that the leave judge did not overlook an extension request, and the extension was implicitly granted by the order granting leave—provided, of course, that it is reasonable to make such a finding based on the record.

[14] Furthermore, if a leave order must address an extension explicitly in every case, it seems to me that an extension request should rarely be decided by the hearing judge, as the appropriate recourse would be for the party requesting or opposing an extension of time to seek reconsideration of the leave order on grounds that a matter that should have been dealt with was overlooked or accidentally omitted: Rule 397 of the *Federal Courts Rules*, SOR/98-106 [*FC Rules*]. This would be consistent with Rule 6(2) of the *CIR Rules*, which states that a request to extend the time for filing and serving an application for leave shall be determined at the same time, and on the same materials, as the application for leave. Similarly, this Court has held (albeit in a unique circumstance where the leave judge deferred the extension decision to the hearing judge) that a judge who has a leave application and an extension request before him or

her "must decide them at the same time, as clearly directed by the legislator. It is inconsistent with Parliament's intention that a justice grant the leave application but defer the decision on the extension request to the justice who hears the application on its merits": *Singh* at para 16.

[15] As a second preliminary issue, I note that the proper name for the respondent is the Minister of Citizenship and Immigration, not the Minister of Immigration, Refugees and Citizenship. While the parties did not raise this preliminary issue during oral submissions, I am satisfied that the style of cause for this proceeding should be amended to correctly name the Minister of Citizenship and Immigration as the respondent: Rule 5 of the *CIR Rules*; *IRPA*, s 4(1); Rule 76 of the *FC Rules*.

III. **Issues and Standard of Review**

[16] The issues on this application for judicial review are:

(1) Did the IAD breach procedural fairness by exhibiting a state of mind that was predisposed to a particular result or that was closed with regard to particular issues?

(2) Is the IAD's decision unreasonable because the IAD misapprehended evidence and its reasons lacked internal logic?

[17] The procedural fairness issue is reviewable on a standard that is akin to correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible, and context-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*]. A court assessing a

procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

[18] The second issue, whether the IAD's decision is reasonable, is determined according to the guidance on how to conduct a reasonableness review in *Vavilov*. Reasonableness is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The reviewing court does not ask what decision it would have made, attempt to ascertain the range of possible conclusions, conduct a new analysis, or seek to determine the correct solution to the problem: *Vavilov* at para 83. Instead, the reviewing court must focus on the decision actually made, and consider whether the decision as a whole is transparent, intelligible and justified: *Vavilov* at paras 15 and 83. In this regard, it is not enough for the outcome of a decision to be *justifiable*; the decision must be *justified* by the decision maker, by way of the reasons: *Vavilov* at para 86. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

[19] The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

IV. **Analysis**

A. *Did the IAD breach procedural fairness by exhibiting a state of mind that was predisposed to a particular result or that was closed with regard to particular issues?*

[20] The applicants submit the IAD approached their appeal with a mind that was predisposed to a negative result or that was closed with regard to particular issues: *Fouda v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1176 at para 22, citing *R v RDS*, [1997] 3 SCR 484,

151 DLR (4th) 193 [*R v RDS*]. The applicants surmise that the following unfounded credibility findings may have tainted the IAD's approach: that the applicants' credibility was undermined by their claim that Ms. Attar was prohibited from leaving Iran when this was not the case, and that the applicants' motives were financial.

[21] The applicants submit that the IAD never put its concerns to them at the IAD hearing, and mischaracterized Mr. Fayazi's testimony regarding the ability to leave Iran while legal proceedings were ongoing. This led to an improper inference that Mr. Fayazi was caught in a lie. According to the applicants, the IAD wrongly stated that Mr. Fayazi had testified that his wife was "prohibited from leaving the country" due to a legal proceeding involving her work as a physician, and that "under questioning [Mr. Fayazi] admitted that his wife was permitted to leave the country" as long as she was available to attend court. Similarly, the IAD incorrectly stated that Mr. Fayazi had provided "initial testimony" that Ms. Attar was required to stay in Iran for a legal proceeding related to a serious motor vehicle accident, and "he then testified that she was permitted to leave the country but had to be able to return on a few days notice, similar to the situation for the litigation over the medical issue". The applicants submit there was no "initial testimony" that Ms. Attar was required to stay in Iran, and at no time did Mr. Fayazi testify that his wife was legally prohibited from leaving the country. They submit the IAD's inaccurate perception of inconsistent testimony led to the negative credibility finding. Furthermore, they allege that the IAD failed to appreciate the notice period for appearing in court was unpredictable, ranging from one to fifteen days.

[22] In addition, the applicants submit the IAD made absurd findings about their intentions, which is demonstrated by the IAD's "global determination that the [applicants'] motives were financial and they had no desire to return to Canada". The IAD's statements that the applicants were motivated by a desire to facilitate the daughter's education, that they were not otherwise interested in coming to Canada because Ms. Attar's father remained very unwell, and that Mr. Fayazi was "not actually interested in relocating to Canada", lacked an evidentiary basis and ignored evidence to the contrary. Also, according to the applicants, the IAD made inconsistent findings that, on the one hand, caring for an ill relative can be a legitimate reason for not meeting the residency obligation, but on the other hand, it is the sort of circumstance envisioned by a residency requirement that allows permanent residents to be outside of Canada for three out of five years, and a reason why Ms. Attar has no intention of coming to Canada (despite evidence that the father's health had deteriorated to a point where she could do nothing more for him). The IAD also misstated Mr. Fayazi's testimony regarding the applicants' visit to Canada in 2013 to "land" and receive their permanent resident cards. The IAD stated that the family came to Canada "for a new year holiday", and concluded that "the fact that the landing trip was described as a holiday speaks volumes as to the [applicants'] limited intentions to settle in Canada at that time". In fact, Mr. Fayazi testified that the family came "during a New Year holiday", and they were supposed to go back to Iran "after this period of holiday" so the daughter could complete the school year. The applicants also took steps to settle in Canada at that time, by opening bank accounts and obtaining social insurance numbers.

[23] Finally, the applicants state that the IAD ignored the timeline of events, as each event was lengthy and overlapping so as to cover the period of absence.

[24] The applicants assert that the IAD's treatment of the evidence goes beyond erroneous findings or a shallow analysis, crossing the line to demonstrable bias. They allege the decision "neither discloses the existence of an open mind, nor an objective weighing of the case free from pre-determined conclusions".

[25] The respondent counters that the presumption a decision maker will carry out their oath of office and act fairly and impartially can only be displaced with cogent evidence demonstrating something the decision maker has done to give rise to a reasonable apprehension of bias (*R v RDS* at paras 112-113, 116-117, 158) and the applicants have not displaced this presumption. Rather, the applicants' position rests on allegedly erroneous findings (which the respondent disputes) and an attempt to read something into the IAD's decision that is not there.

[26] The respondent submits the IAD's decision does not demonstrate a pre-determined conclusion or a "means to an end" approach. The jurisprudence outlines eight non-exhaustive factors for the IAD to consider in a residency obligation appeal that is based on H&C grounds, and the IAD in this case reached a conclusion after addressing each of these factors. Thus, the IAD did not make a "global determination" that the applicants' motives were financial and they had no desire to return to Canada; rather, the IAD's "global determination" was its conclusion that, in light of all the circumstances, there were insufficient H&C considerations to warrant special relief. According to the respondent, the applicants have not met the high threshold required to demonstrate a reasonable apprehension of bias.

[27] I agree with the respondent. I am not satisfied that the IAD exhibited bias, and furthermore, I am not satisfied that the IAD's decision is unreasonable based on the alleged errors above.

[28] In the five-year period preceding the PRTD applications, Mr. Fayazi had been physically present in Canada for 22 days. Ms. Attar and the children had been physically present in Canada for 13 days. The IAD noted that the applicants fell significantly short of the *IRPA* requirement to be physically present in Canada for at least 720 days, describing it as an "egregious breach" of the residency requirement.

[29] The applicants' position was that the IAD should grant special relief because of compelling H&C considerations that prevented them from complying with the physical presence requirement, namely, two legal proceedings against Ms. Attar, and caring for an ailing relative. In essence, the applicants' position was that Ms. Attar could not leave Iran until 2018 because of these events, and the rest of the family could not leave Iran because Ms. Attar needed their support.

[30] With respect to the allegedly unfounded credibility concerns, the inconsistency that undermined Mr. Fayazi's credibility was that his testimony at the hearing was inconsistent with earlier evidence about the work-related legal proceeding, in a letter filed in support of the PRTD applications. This letter stated "the process of investigation and issuance of legal verdict for this complaint took more than 29 months of our time and according to our lawyer advice and Iranian law we weren't able to leave the country for a very long time." At the hearing, under

questioning from the respondent's counsel, Mr. Fayazi testified that Ms. Attar was permitted to leave the country but was required to attend court when necessary. Furthermore, with respect to the motor vehicle accident, Mr. Fayazi did provide "initial testimony" at the hearing that even after the work-related legal proceeding was resolved, they "couldn't come back…to Canada" because of Ms. Attar's father and the motor vehicle accident. Later, under questioning from the respondent's counsel, Mr. Fayazi testified that the procedure for the motor vehicle litigation was similar to the work-related litigation, in that Ms. Attar was required to attend at a police station or the court when necessary.

[31] While it is true that Mr. Fayazi did not use the precise words "prohibited from leaving the country" in his testimony before the IAD, I am not persuaded that the IAD's summary of his testimony was inaccurate. The applicants' position was that they were unable to come to Canada for almost five full years due to circumstances beyond their control. Indeed, that remains the applicants' position, and in their memorandum before this Court, the applicants argue that they were "stuck in Iran for an indeterminate amount of time due to circumstances outside of their control". In my view, the IAD's use of the word "prohibited" was meant to convey the applicants' position. The IAD considered the evidence, noting for example: (i) Mr. Fayazi was unclear as to the number of court appearances that Ms. Attar actually made, (ii) the family travelled to Canada for 13 days soon after the car accident and made no mention of the car accident in their PRTD applications, (iii) there was no suggestion that the family could not afford airfare to Iran, and (iv) it was unclear why the family could not have returned to Canada to settle here, with Ms. Attar travelling to Iran as needed. The applicants' evidence does not establish that unpredictable notice periods made it impossible to leave Iran, or that it was impossible to

make plans based on the anticipated timing of steps in the litigation that would require Ms. Attar's presence. As the respondent notes, it appears that only two of the documents in the record are summonses, giving fifteen days' notice and three days' notice to appear.

[32] I am not persuaded that the IAD provided inconsistent reasons or unreasonably analyzed the evidence regarding Ms. Attar's father's illness. The IAD's point was that the applicants could have made arrangements to settle in Canada, while making frequent trips to Iran to care for the father, as permitted by the *IRPA*.

[33] The IAD did not ignore the lengthy and overlapping nature of the legal proceedings and a decline in the health of Ms. Attar's father. The IAD was aware of these points but nonetheless found that the nature of the applicants' obligations in Iran did not excuse a near total breach of their residency obligation in Canada. The IAD reasonably found that the possibility of leaving Iran was not outside of the applicants' control, but rather, they had made a choice, and the choice was inconsistent with retaining permanent resident status in Canada.

[34] With respect to the IAD's statements about the applicants' motives, these statements must be read in the context of the IAD's decision. Regardless of whether the applicants' visit to "land" in Canada in 2013 was "for" or "during" a New Year holiday, I see no error in the IAD's conclusion that the applicants had "limited intentions to settle in Canada at that time". The other statements about motive were made in the context of analyzing allegations that the applicants would suffer hardship if the appeal were denied. The applicants argued that the daughter would suffer hardship because she does not want to attend university in Iran for a number of reasons.

The IAD noted that the daughter was asked what she would do if the appeal were dismissed. She responded that she would come to Canada on her own to study, but then stated that her family could not afford the steep tuition fees for an international student. The IAD considered the applicants' financial situation and did not accept that international tuition fees are beyond their means. The applicants also argued they would suffer hardship due to the deteriorating political and economic situation in Iran, and Mr. Fayazi and Ms. Attar would have better working conditions as physicians in Canada. Given its concerns with credibility, the lack of evidence regarding conditions in Iran and their effect on the applicants, and the fact that Mr. Fayazi did not work in Canada after passing a qualifying medical exam in 2015, the IAD found there would be little hardship if the appeal were dismissed.

[35] After weighing the evidence and considering the H&C factors as outlined in the jurisprudence, the IAD dismissed the appeal based on insufficient H&C considerations to warrant special relief from the *IRPA* requirements. The IAD wrote that it remained unclear whether the applicants "have any intention of coming to settle permanently at this juncture or not", and it appeared that the motivation for attempting to return to Canada "at the current time" was primarily for the daughter's education. In my view, the IAD's statements about the applicants motives are not unreasonable and do not demonstrate a reasonable apprehension of bias.

[36] In conclusion, the applicants have failed to demonstrate that the IAD's mind was not perfectly open to conviction, and was instead predisposed. I am not satisfied that the IAD's reasons demonstrate a lack of impartiality or reasonable apprehension of bias.

B. *Is the IAD's decision unreasonable because the IAD misapprehended evidence and its reasons lacked internal logic?*

[37] Apart from the alleged breach of procedural fairness, the applicants allege that the errors raised above render the IAD's decision unreasonable. The applicants contend that the IAD misconstrued the evidence so as to justify the result, and that the IAD's reasons exhibit unfounded generalizations and findings that are based on an absurd premise. I disagree, for the reasons I have already explained, above.

[38] In addition, the applicants allege the IAD unreasonably focused on their establishment in Iran as a negative factor. They submit the IAD failed to acknowledge that they were required to maintain jobs in Iran in order to support themselves while they attended to litigation and provided care for Ms. Attar's father. They submit the IAD failed to consider that individuals may have strong ties to a country, but nevertheless leave that country to pursue a life elsewhere.

[39] The IAD considered the following non-exhaustive list of factors to assess whether H&C grounds warrant special relief from the residency obligation requirement of the *IRPA* (*Ambat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 292 at para 27 [*Ambat*]):

> i) the extent of the non-compliance with the residency obligation;
>
> ii) the reasons for the departure and stay abroad;
>
> iii) the degree of establishment in Canada, initially and at the time of hearing;
>
> iv) family ties to Canada;
>
> v) whether attempts to return to Canada were made at the first opportunity;

> vi) hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;
>
> vii) hardship to the appellant if removed from or refused admission to Canada; and
>
> viii) whether there are other unique or special circumstances that merit special relief.

[40] As part of its analysis, the IAD reasonably assessed the applicants' establishment, noting that they do not own property in Canada and have never worked in the country despite having obtained permanent resident status in the skilled worker category. The IAD was aware that the applicants had opened bank accounts and obtained social insurance cards, but in contrast to their negligible establishment in Canada, the IAD found the applicants were well-established in Iran. The IAD noted that they remained employed in Iran, owned a home, and Ms. Attar also owned a business. I find no reviewable error regarding the IAD's consideration of the third *Ambat* factor, the applicants' degree of establishment.

[41] Finally, the applicants state that the IAD's analysis of the various H&C factors lacks internal logic and intelligibility, and the IAD disregarded or discounted the positive H&C factors in their favour. The IAD considered some factors to be "positive" or "neutral", but in the overall weighing of the factors, stated that the applicants "have no positive factors in this case, and there are numerous negative factors" and that there were "no factors in this case which [the IAD] can weigh in the [applicants'] favour".

[42] I disagree that the IAD weighed the *Ambat* factors in a manner that was illogical or unintelligible, or that it disregarded positive factors. Although the IAD used the same word—factor—to describe each *Ambat* factor as well as what might be described as a "sub-factor" or a

"consideration" under one of the *Ambat* factors, there is no failure of logic or unintelligibility as a result. The positive or neutral "factors" referred to in the IAD's decision are clearly sub-factors or considerations. In contrast to some of these sub-factors or considerations which were found to be positive or neutral, the IAD found each *Ambat* factor to be negative.

V. **Conclusion**

[43] The applicants have not established a reasonable apprehension of bias, or that the IAD's decision is unreasonable. This application for judicial review is dismissed.

[44] Neither party proposed a question for certification. In my view, there is no question to certify.

JUDGMENT in IMM-73-20

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Minister of Citizenship and Immigration as the proper respondent.
2. This application for judicial review is dismissed.
3. There is no question for certification.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-73-20
STYLE OF CAUSE:	MOJTABA FAYAZI, MEHRNOOSH ATTAR, MEHRNAZ FAYAZI, MAHBOD FAYAZI v MINISTER OF CITIZENSHIP AND IMMIGRATION
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