Federal Court  Cour fédérale

Date: 20220923

Docket: IMM-4209-21

Citation: 2022 FC 1324

Ottawa, Ontario, September 23, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

MUFUTA MÉDARD MUBENGAYI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Mufuta Médard Mubengayi, seeks judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada dated June 2, 2021, upholding a visa officer's determination that he had not complied with the residency obligation for permanent residents under section 28 of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [IRPA]. The IAD found that there were insufficient humanitarian and compassionate [H&C] considerations to warrant relief [Decision].

[2] Subsection 28(1) of IRPA mandates that a permanent resident comply with the residency requirements with respect to every five-year period. Out of the statutorily required 730 days, or two years, in the relevant period, the Applicant estimates he spent approximately 513 days in Canada during the five-year period.

[3] A shortfall in the number of days required is not necessarily fatal to a claim as paragraph 28(2)(c) of IRPA provides that H&C considerations can be weighed to determine whether such factors justify the retention of permanent resident status. Before the IAD, the Applicant did not contest the visa officer's decision as to his failure to comply with the residency obligation. Rather, the Applicant submitted that his appeal ought to be allowed on the basis of H&C considerations—notably, his establishment and his family in Canada including his eight grandchildren.

[4] The Applicant submits that the IAD (i) erred by minimizing or failing to take into account the evidence submitted as to the Applicant's family in Canada; (ii) failed to take into account Canada's obligations under international conventions with respect to the protection of the family unit; (iii) failed to reasonably consider the best interests of the Applicant's grandchildren; (iv) erred in its consideration of the hardship that may be suffered should the Applicant, as a protected person under the Convention, lose his permanent resident status; and

(v) unreasonably dealt with the H&C considerations, including the impact of the COVID-19 pandemic.

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

II. Issue and Standard of Review

[6] While the Applicant raises numerous issues, I reformulate them as follows: Did the IAD unreasonably conclude that the H&C considerations did not overcome the Applicant's failure to meet his residency requirement?

[7] The applicable standard of review is that of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85).

[8] It is the Applicant, the party challenging the Decision, who bears the onus of demonstrating that the Decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[9] The focus must be on the decision actually made, including the justification offered for it, and not the conclusion the court itself would have reached in the administrative decision maker's place. The standard of reasonableness is rooted in the principle of judicial restraint and deference, and requires reviewing courts to show respect for the distinct role that Parliament has chosen to confer on administrative decision makers rather than on courts (*Vavilov* at paras 13, 46, 75). A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125).

III. Preliminary Point – New Evidence

[10] In the context of this application for judicial review, the Applicant has submitted a lengthy affidavit, along with three exhibits. The majority of the material in the affidavit and the letter of support from the Applicant's son (Exhibit A) were not before the IAD. The general rule is that evidentiary record before this Court on judicial review of an administrative decision is restricted to the evidentiary record that was before the administrative decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]). While there are exceptions to the general rule (*Access Copyright* at para 20), I do not find that they apply in the present case. As such, the new material in the affidavit and the Exhibit A are not admissible and I have not taken them into account. On the other hand, Exhibit B (documents submitted in support of the Applicant's appeal to the IAD) and Exhibit C (documents submitted in post-hearing submissions to the IAD) are admissible and have been taken into account in rendering this decision.

IV. Analysis

[11] This matter turns on whether the IAD's treatment of the H&C considerations raised by the Applicant was reasonable. Broadly speaking, H&C considerations are facts, established by evidence, that would excite in a reasonable person in a civilized community the desire to relieve the misfortunes of another provided these misfortunes warrant the granting of special relief from the otherwise applicable provisions of the IRPA (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13, 21).

[12] The IRPA, by way of paragraph 28(2)(c), permits the weighing of H&C considerations to justify the retention of permanent resident status. The IRPA therefore allows a breach of the residency obligation to be overcome – but this relief is exceptional and discretionary (*Parikh v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 13 at para 38; *Canada (Public Safety and Emergency Preparedness) v Nizami*, 2016 FC 1177 at para 16). Pursuant to paragraph 67(1)(c) of the IRPA, in order to grant an appeal of a removal order, the IAD must be satisfied that sufficient H&C considerations warrant special relief. This remedy is discretionary and acts as a "… safety valve available for exceptional cases" (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15).

[13] When determining whether there are sufficient H&C considerations warranting special relief in light of all the circumstances of the case, the IAD may, in addition to the "best interests of a child" [BIOC] factor prescribed by paragraphs 28(2)(c) and 67(1)(c) of the IRPA, take into consideration various factors. The well-recognized factors in cases of appeals by permanent

residents who have failed to comply with the residency requirement are set out in this Court's jurisprudence, including in *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 [*Ambat*] (see also *Samad v Canada (Citizenship and Immigration)*, 2015 FC 30; *Behl v Canada (Citizenship and Immigration)*, 2018 FC 1255). The factors listed in *Ambat* are:

> (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 admissions to Canada; and
> (viii) whether there are other unique or special circumstances that merit special relief.

[14] The above list is not exhaustive and the weight granted to each H&C factor will vary depending on the particular circumstances of each case. I note that the jurisprudence of this Court instructs that the assessment of each of these factors is left to the discretion of the IAD, and the Court should not interfere in the IAD's weighting of those factors (*Bermudez Anampa v Canada (Citizenship and Immigration)*, 2019 FC 20 at para 24; *Wopara v Canada (Citizenship and Immigration)*, 2021 FC 352 at para 20 [*Wopara*]).

[15] In the Decision, the IAD addressed and weighed the factors that are relevant to the Applicant's circumstances, namely: (i) the establishment of the Applicant; (ii) the reasons for his departure from Canada and his attempts to return; (iii) the Applicant's family in Canada; (iv) the BIOC; and (v) the hardship to the Applicant if his appeal is not granted.

[16] In considering this application for judicial review, I will focus on the issues that arise from arguments made by the parties. As an overarching and general point, however, I find that the Applicant's arguments amount to a request for this Court to reweigh the evidence, which is not this Court's role on judicial review (*Vavilov* at para 125). The IAD has considerable expertise in hearing and determining appeals under the IRPA, and as such this Court is required to accord the IAD a high degree of deference (*Wopara* at para 20 and the cases cited therein). I note that the IAD applied the correct test by assessing the factors enumerated in the jurisprudence, and I find the Decision to be transparent, intelligible and justified (*Vavilov* at para 15). Ultimately, the Applicant is expressing disagreement with the IAD's analysis of the evidence before it and the weight attributed to that evidence in the exercise of its discretion and expertise.

A. *Establishment*

[17] Turning to the question of establishment, the Applicant is a citizen of the Democratic Republic of the Congo. He arrived in Canada in 2000, was granted refugee status, and then became a permanent resident in 2002. He remained on social assistance from 2000 through 2012. In 2013, the Applicant founded a company whose commercial operations are concentrated in the Republic of the Congo [Congo]. The IAD canvassed the fact that the Applicant had a practice of being away from Canada for long periods of time since he obtained his permanent residence status, provided examples, and noted that in 2019 he spent 24 days in Canada. The IAD further noted that there was a thin evidentiary record as to the Applicant's life in Canada, but accepted that he had social activities in Canada and that Canada was the centre of his family life. The IAD further noted that the Applicant did not involve himself in the Canadian job market or take

continuing education, save for a gemology course in 2005. Consequently, the IAD gave some positive weight to his establishment.

[18] During the hearing of this judicial review, the Applicant pled that he was the caregiver to his children and thus could not work for those initial twelve years. There is no reference to the Applicant acting as a caregiver in the materials submitted to the IAD. As such, this argument will not be entertained. Moreover, even if it were to have been entertained, there is no evidence in the record before the IAD that he was involved in childcare or duties in the home. Accordingly, the IAD cannot be faulted for not considering a point that was not contained in the record before it.

[19] Having considered the evidence before the IAD, I am not persuaded that its analysis on establishment is unreasonable.

B. *The Reasons for the Applicant's Departure and Stay Abroad and Whether Attempts Were Made to Return at the First Opportunity*

[20] Before the IAD, the Applicant plead that he had no choice but to start his own business, registered in Canada, but whose operations are based in the Congo because he could not find a job here. The IAD found that the Applicant was industrious, expressed himself very well in French, and thus it was surprising that he could not find work for thirteen years and as a result needed to be absent for extended periods of time in the Congo. The IAD found the Applicant to not be credible on the basis that his declared revenues varied between $18,000 - $25,000 per year once he started his company in 2013, and yet he acquired a residence in 2017 valued at $303,000. His wife's revenue ranged from $3,000 to $6,000 depending on the year. The IAD

found that a minimum wage job in Canada pays the equivalent to what the Applicant alleged he earned, without having to spend an extended time abroad. The IAD found that to support his lifestyle, the Applicant earned more than he was declaring.

[21] Following the hearing before the IAD, the Applicant filed further submissions with an updated version of the Applicant's travel history to the Congo and a copy of his mortgage. In the further submissions, the Applicant emphasized that if it were not for the COVID-19 pandemic he would have returned in April 2020 as planned and would have respected his residency obligations.

[22] The IAD considered the Applicant's submission, but found that it was not ultimately because travel became more difficult by reason of the COVID-19 pandemic that the Applicant had failed to adhere to his residency obligations. The IAD instead focused on the history of his periods of absence from Canada, his credibility, and determined that the Applicant had prioritized his professional activities and revenue sources abroad, and thus gave these factors negative weight.

[23] During the hearing of this judicial review, the Applicant pled that it was impossible for him to return in April 2020 as planned due to the pandemic. In the Applicant's view, the pandemic ought to have been considered by the IAD as a case of force majeure. The Applicant submits that he took the first flight out in December 2020, and requests that the Court take judicial notice of there being no flights from the Congo to Canada during the period between

April 2020 and December 2020. Alternatively, the Applicant pleads that his argument that it was impossible to return is based on “common sense”.

[24] The Respondent objects to the Applicant’s submissions as to his efforts to return. The Respondent submits that this was never put before the IAD, nor was there any evidence of this in the record. The Respondent argues that this Court should not take judicial notice or use common sense to find that it was impossible to return because there were no flights. In contrast, the Respondent submits that in fact 25% of flights were returning from the Congo, and as such if the Court is to take judicial notice, it should take judicial notice of the fact that the Applicant could well have returned earlier. It was for the Applicant to raise the issue of his efforts to return earlier or the impossibility of doing so before the IAD, and adduce evidence in support.

[25] I agree with the Respondent that the IAD cannot be faulted for not addressing the issue of the Applicant’s efforts to return earlier or the impossibility of doing so, if this issue was not submitted to the IAD. The Applicant submitted to the IAD, in his letter dated May 28, 2021, that he would have returned in April 2020 if it were not for the pandemic but provides no further information. The IAD addressed the point the Applicant raised. Ultimately, the burden remains on the Applicant to make arguments before the IAD and adduce supporting evidence. It is not for the IAD to presume and it is certainly not for this Court to take judicial notice of a fact that is in dispute between the parties.

[26] I am not persuaded that the IAD’s findings are unreasonable, given the arguments and the evidentiary record before it. The Applicant argues that this issue ought to have been dealt with in

more detail. While the IAD could have provided more details, I note that the reasons for a decision need not be perfect or even exhaustive. They need only be understandable and justified. The standard of reasonableness is not the degree of perfection of the decision, but rather its reasonableness (*Vavilov* au para 91).

C. *Family in Canada*

[27] When the Applicant came to Canada, he was reunited with his first wife, who has since passed, and an extended family. His second wife, his adult children, and his eight grandchildren live in Canada. In total, 51 members of his extended family live in Canada.

[28] The IAD noted that the Applicant has a large family in Canada comprised of 51 members. The IAD noted that his family members have, however, for several years been used to living in Canada without him during his long periods of absence. The IAD nevertheless gave this factor positive weight.

[29] The Applicant submits that the IAD minimized this factor and the Decision runs counter to family unity as found in a number of international instruments and the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. The Respondent submits, relying on *Begum v Canada (Citizenship and Immigration)*, 2018 FCA 181, that the courts have consistently declined to recognize a right to family unity or family reunification under the *Charter* and that Canadians have no *Charter* right to demand that the Canadian government not impose on their relatives the penalties for violating Canadian immigration laws.

[30] Having reviewed the record, I am not persuaded that the IAD erred. The IAD gave this factor positive weight and accounted for the Applicant's large number of family members present in Canada. As noted above, this Court is required to accord the IAD a high degree of deference (*Wopara* at para 20) and, absent exceptional circumstances, to refrain from reweighing the evidence (*Vavilov* at para 125). No such exceptional circumstances apply to the present case.

D. *The Best Interests of the Children*

[31] In the present case, the children at issue are the Applicant's grandchildren. The IAD granted the factor some positive weight, but noted that the grandchildren live with their parents and they, like the rest of the Applicant's family, are habituated to living without him for long periods of time.

[32] The Applicant's arguments mirror those above made with respect to his family. In addition, he submits that the IAD was not alert, alive and sensitive to the interests of the children as it is in the clear interests of the children to have their grandparents in their lives.

[33] The Respondent highlights that the BIOC is not the determinative factor when considering H&C factors, and submits that in any event, there was no evidence before the IAD as to the specific role the Applicant played in their lives such as whether he cared for them, took them to school, helped them with homework, nor were there any letters from the grandchildren in the record. As such, the IAD cannot be faulted for its analysis.

[34] I agree with the Respondent. The IAD's analysis is reasonable in light of the record before it. While I have sympathy for the Applicant, there is very little information about his relationship with the grandchildren in the evidentiary record. I further agree with the Respondent that it is for the Applicant to file a transcript of the IAD hearing, or at the very least, pinpoint the relevant parts of the recording. General statements that the IAD did not account for evidence filed by the Applicant when conducting its BIOC analysis, without specific reference to what evidence, are insufficient to demonstrate that the IAD's analysis is unreasonable.

E. *The Hardship in the Event that the Appeal is Dismissed*

[35] The IAD noted that the Applicant is a protected person who will not be removed from Canada. The IAD considered that as he may remain here, be close to his family, request a work permit and receive medical care, this factor did not weigh in favour of granting the appeal on H&C grounds.

[36] The Applicant states that to lose his permanent resident status would place him in a precarious and uncertain position. The Applicant submits that he will have difficulty obtaining certain socioeconomic services, such as financing. He argues that the IAD erred by not taking these administrative difficulties into account in the Decision.

[37] The Respondent submits that the Applicant has not met his burden of demonstrating that the Decision in this respect is unreasonable.

[38] I disagree with the Applicant. The IAD did indeed refer specifically to the Applicant's arguments that the loss of his permanent resident status would cause him a number of administrative difficulties, but ultimately disagreed and found that (i) the focus ought to be on the hardship caused by removal; and (ii) even if it erred in that focus, the hardship suffered by the Applicant while remaining here did not weigh in favour of granting the appeal. The Applicant has failed to persuade me that this analysis is unreasonable.

V. Conclusion

[39] The assessment of H&C factors is a fact-specific exercise of discretion which warrants considerable deference from a reviewing court. It was incumbent on the Applicant to demonstrate that the Decision is unreasonable, which he has not done. The Decision, when read as a whole, meets the standard of reasonableness set out in *Vavilov*. It is based on internally coherent reasons that are justified in light of the facts and the applicable law. Accordingly, this application for judicial review is dismissed.

[40] No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-4209-21

THIS COURT'S JUDGMENT is that:

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

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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