Federal Court  Cour fédérale

Date: 20120917

Docket: IMM-5730-11

Citation: 2012 FC 1084

Ottawa, Ontario, September 17, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

DONG SHENG WEI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of a member of the Immigration Appeal Division of the Immigration and Refugee Board (the Board), dated July 28, 2011, wherein the applicant's appeal under subsection 63(4) of the Act was dismissed and a departure order issued pursuant to subsection 69(3) of the Act.

[2] This conclusion was based on the Board's finding that the visa officer's determination that the applicant failed to comply with the residency obligations outlined in the Act and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) was valid in law and that there were insufficient humanitarian and compassionate (H&C) grounds to warrant special relief in this case.

[3] The applicant requests that the Board's decision be quashed and the application be referred back for redetermination by a differently constituted Board.

Background

[4] The applicant, Dong Sheng Wei, is a citizen of China. He became a permanent resident of Canada on May 4, 1999.

[5] Between 1999 and 2004, the applicant was employed by a sea product company and a chicken farm in Vancouver. In August 2004, he was hired by Immunechem Pharmaceuticals Inc. (IPI). IPI was incorporated on November 19, 1996 and is based in Burnaby, British Columbia. It conducts research and development of antibodies as immunological reagents for universities and medical institutions and develops immunoassay kits for food safety inspection agencies. IPI currently has seven employees.

[6] The applicant was hired to represent IPI in China and to find a business partner for it there. The applicant's full time employment contract specified the following terms and conditions:

> 1) Mr. Dongsheng Wei's position in the Company is a business representative in China.
>
> 2) HIS salary is $18,000.00/year. HIS job is to coordinate the research projects between ImmuneChem and the Chinese Governments and Chinese Companies.
>
> 3) The contract will effectively start from Aug. 1, 2004 to Aug. 31, 2010. The contract could be renewed for further period based on HIS performance in China.
>
> 4) All other conditions as per existing Labour Law.

[7] The applicant's salary was paid every three months. Employment deductions and Canadian taxes were deducted from his salary. IPI generally mailed the applicant's pay cheques to his friend's address in Vancouver, who then deposited them in the applicant's Canadian bank account.

[8] The applicant went to China in August 2004 to start looking for a Chinese business partner for IPI. In 2005, he identified the Chinese company, Nanning Zhongjia Immunetech Ltd. (NZIL). IPI contracted NZIL to produce its antibodies and production began in April 2005. As a result, IPI was able to stop production of the antibodies at its Canadian facilities by January 2006, thereby reducing its operating costs and allowing it to focus on research and development and the marketing of its products.

[9] The applicant's work duties included: controlling the antigen vaccines sent to him from IPI in Canada; ensuring the antibodies produced by NZIL met Canadian standard operating procedures; personally delivering or arranging the shipment of antibodies produced in China to IPI in Canada; attending training sessions at IPI's office in Canada; providing a liaison with local government officials in China; and maintaining regular contact with IPI.

[10] IPI eventually grew dissatisfied with NZIL's quality of antibody production. Production therefore stopped between May 2006 and January 2007. During this time, the applicant sought a new Chinese business partner for IPI. His efforts led to Nanning Languang Shengwu Ltd. (NLSL). Production of the antibodies was transferred to NLSL in May 2008.

[11] On May 20, 2009, the applicant applied for a travel document to travel to Canada. A visa officer at the Canadian Embassy in Beijing refused the application on the basis that he had failed to satisfy his residency obligations under subsection 28(2) of the Act. The relevant five year period for this determination was May 21, 2004 to May 21, 2009. During this five year period, the applicant was present in Canada for 116 days.

[12] The applicant appealed the visa officer's decision to the Board. The hearing of the applicant's appeal was held on May 25, 2011.

Board's Decision

[13] The Board issued its decision on July 28, 2011.

[14] The Board noted the applicant's argument that although he had not been physically present in Canada for the requisite time, he had been employed on a full time basis by a Canadian business while outside Canada. That time, combined with the time that he was physically present in Canada, was sufficient to comply with his residency obligation.

[15] The Board acknowledged the testimony of the applicant and of IPI's president on the reason for hiring the applicant (namely, his connections and networks in China) and that he had been hired specifically to work in China. The Board noted that the applicant was not hired to work in Canada and there was no position for him in Canada should the position in China cease.

[16] The Board accepted that IPI is a Canadian business as defined in paragraph 61(1)(a) of the Regulations. It also found that there was sufficient evidence that the applicant was employed on a full time basis, rather than on a temporary basis and that although he was hired in Canada, his position only existed in China. Thus, the Board found that the applicant was hired for a local position in China. It therefore found that there was no assignment within the meaning of the Regulations. As such, the applicant's employment did not meet the requirements of subsection 61(3) of the Regulations and the time that he was employed in China did not count towards the fulfillment of his residence obligation. The Board therefore concluded that the refusal to issue a travel document to the applicant was valid in law.

[17] The Board noted that although it found that the visa officer's decision was reasonable, it retained the discretion to allow the applicant's appeal on H&C grounds taking into account the best interests of a child directly affected by the decision. After canvassing relevant H&C considerations, the Board noted that the applicant had some initial establishment in Canada from his time and employment in Vancouver before commencing work with IPI in August 2004. However, between May 21, 2004 and May 21, 2009, the applicant had only been in Canada 116 days. His sole asset in Canada was a bank account. The Board also noted that the applicant married a Chinese citizen in 2010, currently lives in China with his wife and owns a residence in China.

[18] The Board then noted that the applicant has an adult daughter in Canada. As he has been living abroad for several years, the Board found little evidence that there would be any hardship to her from the loss of his permanent residence status. The Board observed that there was no minor child whose best interests required consideration. Therefore, the Board found that there were no unique or special circumstances in this case.

[19] For these reasons, the Board concluded that the visa officer's determination of the contravention of the residency obligation was valid in law and that there were no sufficient H&C considerations warranting special relief. The Board therefore dismissed the appeal and issued a departure order.

Issues

[20] The applicant submits the following points at issue:

1. The Board erred in law by its interpretation of subparagraph 28(2)(a)(iii) of the Act and subsection 61(3) of the Regulations in concluding that the applicant had not been assigned by IPI to work abroad in China because there was no position for him in Canada and therefore he could not count the time that he was employed by IPI towards the fulfillment of his residency obligation.

2. The Board erred in law by unreasonably exercising its discretion under paragraph 67(1)(c) of the Act in dismissing the applicant's appeal on H&C grounds by ignoring relevant evidence concerning the best interest of the applicant's daughter and the favourable evidence before it about the applicant's contribution to the Canadian business.

[21] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in its finding that the applicant had failed to comply with the Act's residency obligations?

3. Did the Board err in its exercise of discretion on H&C grounds?

Applicant's Written Submissions

[22] The applicant raises two issues on this application. First, the applicant submits that the Board erred in its interpretation of subparagraph 28(2)(a)(iii) of the Act and subsection 61(3) of the Regulations. Second, the applicant submits that the Board erred in its exercise of discretion under paragraph 67(1)(c) of the Act.

[23] The applicant submits that the first issue pertains to the Board's interpretation of its own statute and therefore attracts a standard of review of reasonableness. The second issue, which pertains to the Board's exercise of its discretion, is also reviewable on a standard of review of reasonableness.

[24] On the first point, the applicant submits that his physical presence in Canada, together with his time spent working full time on behalf of IPI in China, if recognized as meeting the requirements under subparagraph 28(2)(a)(iii) of the Act and paragraph 61(1)(a) and subsection 61(3) of the Regulations, would be sufficient to meet his residency obligations under the Act.

[25] The applicant notes that subsection 61(1) of the Regulations sets out what a Canadian business is and the Board accepted that IPI meets this definition. Subsection 61(2) of the Regulations excludes any business that serves primarily to allow a permanent resident to comply with its residency obligations. The applicant notes that there was no suggestion in the Board's decision that IPI fell within the parameters of this latter provision.

[26] The applicant submits that the Board erred in its interpretation of the word "assigned" in subsection 61(3) of the Regulations. In finding that this provision required the applicant to return to a position with IPI in Canada at the end of his assignment in China, the Board went beyond the scope of subsection 61(3) of the Regulations and Citizenship and Immigration Canada's ENF 23: Loss of Permanent Resident Status (ENF 23) policy. The Board was required to analyze and explain its reasons for disregarding the evidence that directly contradicted its finding. In failing to do so, the applicant submits that the Board erred in law.

[27] The applicant notes that he was hired on a year-by-year basis by IPI for a position in China while he was in Canada. As his position was subject to annual renewal, his employment was temporary. The applicant submits that the Board's finding that his employment was not temporary was made without regard to the evidence before it. Nevertheless, the applicant submits that there is nothing in subparagraph 28(2)(a)(iii) of the Act requiring that a permanent residence's full time employment outside Canada and on behalf of a Canadian business be of a temporary nature.

[28] Further, the applicant submits that it is not a requirement of subsection 61(3) of the Regulations that a position be available in Canada for him at the conclusion of his assignment in China. Similarly, no such requirement is specified in the ENF 23 policy.

[29] The applicant also highlights several connecting factors between him and IPI. For example, the applicant dealt directly with IPI to obtain the antigen vaccine from Canada. The applicant was responsible for protecting IPI's intellectual property, supervising the production of antibodies by the Chinese company, shipping antibodies produced in China to IPI in Canada, reporting on his activities to IPI and receiving training in Canada. The applicant also paid taxes in Canada on his Canadian income. Further, the applicant notes that IPI controlled the assignment from its head office in Canada. In summary, the evidence indicated that the applicant met all the requirements of subparagraph 28(2)(a)(iii) of the Act and subsection 61(3) of the Regulations and he should therefore have been entitled to count the time employed in China for IPI towards the fulfillment of his residency obligation.

[30] Turning to the H&C considerations, the applicant submits that that Board erred by not considering the best interests of his daughter in Canada. In addition, the applicant's work in China has allowed IPI to focus on research and development and the marketing of its technology in Canada. This has benefited health and research institutions in Canada. The applicant has thus contributed to the Canadian economy through his involvement in IPI's success and through his payment of income taxes. By ignoring these factors, the applicant submits that the Board erred in law in exercising its discretion under paragraph 67(1)(c) of the Act.

Respondent's Written Submissions

[31] The respondent agrees with the applicant that the appropriate standard of review of the issues raised on this application is reasonableness.

[32] The respondent submits that contrary to the applicant's contention that he was hired on a temporary basis requiring annual contract renewal, the term of the applicant's employment contract was from August 1, 2004 to August 31, 2010. Further, this contract did not provide any indication that the applicant would work in Canada once it expired. In support, the respondent highlights the contract clause that specifies further renewal is based on performance in China. In addition, IPI's letter of reference refers to the applicant as the "business representative in China" and is silent on opportunities for the applicant to return to work in Canada.

[33] Turning to the Board's H&C considerations, the respondent submits that the Board reasonably found that the applicant's degree of establishment was not strong in Canada. The respondent notes that the applicant has an established life in China and has spent little time in Canada over the past five years. Further, although the applicant has an adult daughter living in Canada, he did not indicate any children on his "Application for a Travel Document".

[34] With regards to the applicant's submission regarding his daughter, the respondent notes that there is no information in the applicant's record on the age of this granddaughter. Further, there is no mention in his daughter's letter of support of the relationship that the applicant has with his granddaughter. The respondent submits that the applicant bears the onus of providing evidence of

attachment to his granddaughter. In this case, there was no evidence before the Board that a minor child would be impacted by the Board's decision not to exercise its discretion in the applicant's favour.

[35] The respondent submits that the Board's reasons for its decision are adequate on both issues raised by the applicant.

Analysis and Decision

[36] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[37] The parties agree that assessments of interpretations of residency obligations made pursuant to subparagraph 28(2)(a)(iii) of the Act and subsection 61(3) of the Regulations are reviewable on a standard of reasonableness (see *Canada (Minister of Citizenship and Immigration) v Jiang*, 2011 FC 349, [2011] FCJ No 560 at paragraphs 29 to 31).

[38] Similarly, decision makers' determinations on H&C grounds generally attract a standard of review of reasonableness. In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009]

1 SCR 339, Mr. Justice Binnie confirmed that the appropriate standard of review of an Immigration Appeal Division's decision under paragraph 67(1)(c) of the Act is reasonableness (at paragraph 58).

[39] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Khosa* above, at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[40] **Issue 2**

Did the Board err in its finding that the applicant had failed to comply with the Act's residency obligations?

Under subsection 28(1) of the Act, permanent residents must comply with residency obligations. Pursuant to paragraph 28(2)(a) of the Act, the residency obligation is 730 days for every five year period.

[41] In this case, the applicant was granted permanent residence status on May 5, 1999. His residency in the first five year period was not in dispute. At issue was whether he met the required 730 days residency obligation in the second five year period; namely, between May 21, 2004 and May 21, 2009. During that time, the applicant was physically present in Canada for 116 days.

[42] However, the applicant submits that as he was employed by a Canadian business in China, he falls within the scope of subparagraph 28(2)(a)(iii) of the Act which allows permanent residents to accumulate days of residence abroad if certain conditions are met.

[43] Section 61 of the Regulations governs what constitutes a Canadian business. In this case, the Board's acceptance of IPI as a Canadian business was not in dispute.

[44] Subsection 61(3) of the Regulations expands on the expression "employed on a full-time basis by a Canadian business or in the public service of Canada or of a province", as stated in subparagraph 28(2)(a)(iii) of the Act.

[45] As indicated, this provision describes the concept of working outside Canada and adds the concept of an assignment which is absent from subparagraph 28(2)(a)(iii) of the Act (see *Jiang* above, at paragraph 42).

[46] Additional guidance is provided in ENF 23. On employment outside Canada, this policy states:

> **6.5. Employment outside Canada**
>
> The Regulations enable permanent residents to comply with the residency obligation while working abroad, provided that:
>
> - they are under contract to, or are full-time employees of, a Canadian business or in the public service, where the assignment is controlled from the head office of a Canadian business or public institution in Canada; and

- they are assigned on a full-time basis, as a term of their employment or contract, to a position outside Canada with that business, an affiliated enterprise or a client.

[47] To date, little jurisprudence has developed on the concept of assignment in subsection 61(3) of the Regulations; however it was discussed in *Jiang* above. In that case, the applicant had been in Canada only 66 days during the relevant five year period and had been working on several fixed term contracts for Investissement Québec in China for 679 days during the same period. The IAD found that the applicant was assigned on a full time basis with Investissement Québec in China and thereby met the requirement under subsection 61(3) of the Regulations (see *Jiang* above, at paragraph 10).

[48] In rendering its determination, the IAD held that the word "assigned", as used in subsection 61(3) of the Regulations, could only be interpreted in the ordinary and grammatical meaning of "appointed, designated or intended for" (see *Jiang* above, at paragraph 45). The Court found that the IAD erred because it rejected, without explaining why, definitions of the word "assigned" that implied a movement from one position to another (see *Jiang* above, at paragraph 47). Moreover, the Court highlighted that there was no documentary evidence of a commitment by the employer to reintegrate the applicant, within a specified timeframe, to a position at Investissement Québec in Montréal following her temporary stay in China (see *Jiang* above, at paragraph 49).

[49] Mr. Justice Richard Boivin provided the following explanation of the word "assignment" (see *Jiang* above, at paragraph 52):

> […] The word assignment in the context of permanent resident status interpreted in light of the Act and Regulations necessarily implies a

> connecting factor to the employer located in Canada. The word "assigned" in subsection 61(3) of the Regulations means that an individual who is assigned to a position outside Canada on a temporary basis and who maintains a connection to a Canadian business or to the public service of Canada or of a province, may therefore return to Canada. […]

[50] Based on the review of the IAD's decision, Mr. Justice Boivin concluded:

> 53 The clarification added by Parliament to subsection 61(3) of the Regulations creates an equilibrium between the obligation imposed on the permanent resident to accumulate the required number of days under the Act while recognizing that there may be opportunities for permanent residents to work abroad.
>
> 54 Consequently, the Court is of the opinion that, in light of the evidence in the record, the panel's finding that permanent residents holding full-time positions outside Canada with an eligible Canadian company can accumulate days that would enable them to comply with the residency obligation set out in section 28 of the Act, is unreasonable.

[51] At the hearing, both parties also provided submissions on the recent case of *Bi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 293, [2012] FCJ No 366. In that case, the applicant went to China approximately one month after acquiring Canadian permanent residence status. In China, the applicant was initially unemployed. However, after approximately 16 months, he found employment as an assistant general manager with a Canadian business. When he later applied for travel documents, an immigration officer determined that he had failed to satisfy his residency obligation. In reviewing the officer's decision, Mr. Justice Simon Noël considered existing jurisprudence and found that *Jiang* above, indicated the following (at paragraph 15):

> […] Clearly, the Court was opposed to an employee accumulating days towards meeting their residency requirement simply by being hired on a full-time basis outside of Canada by a Canadian business. Instead, it was this Court's view that the permanent resident must be

> assigned temporarily, maintain a connection with his or her employer, and to continue working for his or her employer in Canada following the assignment. [emphasis added]

[52] Later, Mr. Justice Noël reiterated at paragraph 21:

> It was this Court's view in *Jiang* that to have time spent outside of Canada count toward the residency requirement, the permanent resident must be assigned temporarily, must maintain a connection with his employer, and must return to work for it in Canada following the assignment. [emphasis added]

[53] Thus, the decisions in *Jiang* above, and *Bi* above, indicate that the concept of assignment in subsection 61(3) of the Regulations requires that the employee return to work for his or her employer in Canada following the assignment.

[54] In this case, the Board acknowledged the applicant's evidence indicating that he was hired by a Canadian business in Canada to work for them full time in China. The Board noted that the applicant was not hired to work in Canada and there was no position for him in Canada should the position in China cease. The Board therefore concluded that the applicant was hired for a local job in China and thus there was no assignment as per the Regulations.

[55] The applicant submits that the Board exceeded the scope of subsection 61(3) of the Regulations and the ENF 23 policy by requiring that he return to a position with IPI in Canada at the end of his assignment in China. The applicant submits that the Board erred in finding that his employment was full time; as his position was subject to annual renewal, it was temporary rather than full time. Further, there were several connecting factors between the applicant and IPI as

evidenced by his work duties, his payment of taxes and other employment deductions in accordance with Canadian law and the fact that IPI controlled his assignment from its head office in Canada.

[56] Conversely, the respondent submits that as the applicant's employment contract was from August 1, 2004 to August 31, 2010, it was full time; not temporary. The respondent also highlights the lack of provision in the contract for the applicant working in Canada after its expiry.

[57] A review of the applicant's employment contract indicates that his employment was indeed full time, extending over a set period of six years:

> The contract will effectively start from Aug. 1, 2004 to Aug. 31, 2010. The contract could be renewed for further period based on HIS performance in China.

[58] Renewal after the six year period is contingent on the applicant's performance in China.

[59] Although the location of his employment was in China, the applicant was initially contacted and retained by the Canadian business in Canada. At the hearing, the applicant testified that he maintained regular contact with the President of IPI in Canada. He also visited Canada on a yearly basis during which time he brought antibody shipments with him to IPI and also received training from IPI. This evidence therefore supports the existence of the requisite connecting factor.

[60] However, the Board's decision was ultimately based on the lack of a job available for the applicant to return to in Canada. Based on the existing jurisprudence from this Court on this issue, I

find that the Board came to a reasonable decision in finding that there was no assignment as required by the Act and the Regulations.

[61] **Issue 3**

Did the Board err in its exercise of discretion on H&C grounds?

Where there is a breach of the residency obligation, the Board is empowered under paragraph 28(2)(c) of the Act to make a determination that H&C 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.

[62] In its decision, the Board noted that the applicant has an adult daughter in Canada. However, as the applicant has been living in China for the last several years, the Board found little evidence of any hardship to his daughter from the loss of his permanent resident status. The Board also noted that there was no minor child whose best interests required consideration in this appeal.

[63] At the outset, it is necessary to clarify some confusion that arose in the Board's decision and in the parties' submissions on the applicant's daughter.

[64] The issue of the applicant's daughter received little attention at the hearing. The main discussion provided the following:

> Q: … When were you married for the first time?
>
> A: I married for the first time in 1987.
>
> Q: When were you divorced from your first wife?

A: 1995.

Q: How many children did you have from your first marriage?

A: Not during the marriage, but after the marriage and a daughter was born.

Q: All right. Where is that daughter right now?

A: She got married and she is now in Canada.

Q: Is the daughter married?

A: No, I mean the mother of the daughter.

A: All right. So the mother of the daughter remarried and she's now in Canada?

A: That's right.

[65] In the applicant's application record, there are two copies of an application for a travel document. Both are dated May 18, 2009.

[66] The entries on the first application for a travel document are handwritten and it has been stamped with a receipt date of May 20, 2009. On that form, there is no mention of the applicant's daughter. In the visa officer's CAIPS notes, the visa officer notes that no H&C grounds were raised in the application.

[67] Conversely, the second application for a travel document is typed and does not have a receipt stamp. On this form, "Daughter in Canada" is listed as one of several H&C grounds (the other listed grounds are establishment in Canada, building up Canadian company and support from

community). In the accompanying family composition and details of education/employment form, the applicant's daughter is listed, with date of birth indicated as February 16, 1999.

[68] This second form was included in the appellant's brief of documents that the applicant filed with the Immigration and Refugee Board Registrar on May 5, 2011, twenty days before the hearing date.

[69] No explanation was provided for the different information contained on the two forms. However, at the hearing, in response to a question on why the applicant did not disclose his daughter in his application for a travel document, the applicant explained that as his ex-wife (second-wife) had custody over their daughter he thought that he should be considered as not having a daughter.

[70] In addition, a letter, translated from Chinese to English and written by the applicant's daughter Amy Wei, was also included in the documents before the Board at the hearing. This letter stated:

> Since I know my father has returned back from China to Canada by his employer, I am very happy for his return.
>
> Every time my father comes back, he will take me out to some nice restaurants for lunch or dinner. Also, he will bring me to downtown for shopping and buy me nice clothing. He sometimes will even take me to play land!
>
> A few days ago, he has brought me to see an apartment that he is interested to purchase as he would like to buy one for me. I decide to study hard in school for thanking him.
>
> As my father specially likes the living environment in Canada, and he thinks that the education environment here is very good as well,

> so I will study as hard as I can and hopefully I can enter into UBC, and able to work for the Canadian government.

[71] The confusion continued through the parties' submissions in this application. In the applicant's first memorandum of law and argument, reference was made to his daughter and granddaughter living in Canada. The respondent responded by highlighting the lack of information on the record about the applicant's granddaughter. However, in the applicant's further memorandum of law and argument, he clarified that he does not have a granddaughter as his daughter is still only a minor child. This daughter resides in Canada with her mother (the applicant's second wife).

[72] As indicated, the existence of the applicant's daughter raised significant confusion in this case. However, as both the second application for a travel document with information on the applicant's minor daughter and a letter from her were before the Board well ahead of the hearing, I find that the Board erred when it discussed an adult daughter in its decision and explicitly stated that "there is no minor child whose best interests require consideration in this appeal". In so doing, the Board ignored important contrary evidence and made an unreasonable decision that was not justifiable or intelligible based on the evidence before it. As such, I would allow this application and return it for redetermination by a differently constituted Board.

[73] The respondent did not wish to propose a serious question of general importance for my consideration for certification. The applicant proposed the following questions:

> 1. Whether the word "assigned" in subsection 61(3) of the Regulations means that an individual who is assigned to a position outside Canada must have a position for him to return to in Canada with the Canadian business or to the public service of Canada or of a province on the completion of his assignment abroad?

> 2. Whether the word "assigned" in subsection 61(3) of the Regulations means that an individual who is assigned to a position outside Canada must maintain a connection to the Canadian business or to the public service of Canada or of a province during his assignment abroad such as carrying out instructions from the Canadian business, being directly paid by the Canadian business in Canada, traveling back to the Canadian business for training or in the course of employment even if there is no position to return to in Canada?
>
> 3. Whether the word "assigned" in subsection 61(3) of the Regulations requires that an individual be assigned to a position outside Canada on a temporary basis?

[74] I am not prepared to certify these questions as they would not be dispositive of the appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to a differently constituted panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

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.
(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.

63. (4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.

63. (4) Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.

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 observed; or

b) il y a eu manquement à un principe de justice 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

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

special relief in light of all the circumstances of the case.	mesures spéciales.
(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.	(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.
69. (3) If the Immigration Appeal Division dismisses an appeal made under subsection 63(4) and the permanent resident is in Canada, it shall make a removal order.	69. (3) Si elle rejette l'appel formé au titre du paragraphe 63(4), la section prend une mesure de renvoi contre le résident permanent en cause qui se trouve au Canada.
72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

Immigration and Refugee Protection Regulations, SOR/2002-227

61. (1) Subject to subsection (2), for the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act and of this section, a Canadian business is	61. (1) Sous réserve du paragraphe (2), pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi et du présent article, constitue une entreprise canadienne :
(a) a corporation that is incorporated under the laws of Canada or of a province and that has an ongoing operation in Canada;	a) toute société constituée sous le régime du droit fédéral ou provincial et exploitée de façon continue au Canada;
(b) an enterprise, other than a corporation described in paragraph (a), that has an ongoing operation in Canada and	b) toute entreprise non visée à l'alinéa a) qui est exploitée de façon continue au Canada et qui satisfait aux exigences suivantes :
(i) that is capable of generating revenue and is carried on in anticipation of profit, and	(i) elle est exploitée dans un but lucratif et elle est susceptible de produire des recettes,
(ii) in which a majority of voting or ownership interests is held by Canadian citizens, permanent residents, or Canadian	(ii) la majorité de ses actions avec droit de vote ou titres de participation sont détenus par des citoyens canadiens, des résidents

businesses as defined in this subsection; or

permanents ou des entreprises canadiennes au sens du présent paragraphe;

(c) an organization or enterprise created under the laws of Canada or a province.

c) toute organisation ou entreprise créée sous le régime du droit fédéral ou provincial.

(2) For greater certainty, a Canadian business does not include a business that serves primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada.

(2) Il est entendu que l'entreprise dont le but principal est de permettre à un résident permanent de se conformer à l'obligation de résidence tout en résidant à l'extérieur du Canada ne constitue pas une entreprise canadienne.

(3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression "employed on a full-time basis by a Canadian business or in the public service of Canada or of a province" means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the employment or contract to

(3) Pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi respectivement, les expressions « travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale » et « travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale », à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat d'une entreprise canadienne ou de l'administration publique, fédérale ou provinciale, et est affecté à temps plein, au titre de son emploi ou du contrat de fourniture :

(a) a position outside Canada;

a) soit à un poste à l'extérieur du Canada;

(b) an affiliated enterprise outside Canada; or

b) soit à une entreprise affiliée se trouvant à l'extérieur du Canada;

(c) a client of the Canadian business or the public service outside Canada.

c) soit à un client de l'entreprise canadienne ou de l'administration publique se trouvant à l'extérieur du Canada.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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