Federal Court  Cour fédérale

Date: 20140117

Docket: IMM-12678-12

Citation: 2014 FC 58

Ottawa, Ontario, January 17, 2014

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MALAKE EL ASSADI
WALID SANALLAH

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review brought by the applicants of the decision of the Immigration Appeal Division of the Immigration and Refugee Board (the "IAD") made on November 21, 2012, which dismissed the appeal of their removal order under subsection 63(3) of the *Immigration and Refugee Protection Act* (the "Act") for failure to comply with the requirements for permanent residency in Canada.

I. Background

[2] The applicants, Malake El Assadi and her son, Walid Sanallah, came to Canada on January 10, 2005 as permanent residents and remained for only 22 days before returning to the United Arab Emirates ["UAE"]. The applicants returned to Canada in 2009. Between January 10, 2005 and January 10, 2010 the applicants spent only 377 days in Canada and as a result, were deemed to have lost their permanent resident status. The applicants do not contest that they failed to spend the requisite 730 days physically present in Canada over a five year period to retain their status as required by subsection 28(2) of *IRPA*. The applicants, however, submit that the Board's decision that humanitarian and compassionate grounds ["H&C"] do not warrant an exemption from the residency requirement is unreasonable.

[3] Both applicants are stateless Palestinians registered in Lebanon with the United Nations Relief and Works Agency for Palestine Refugees ["UNRWA"]. Mrs. El Assadi has lived in the UAE since 1980. Walid was born in the UAE but is also a stateless UNRWA refugee.

[4] The principal applicant's husband, Mr Sanallah, came to Canada in 2004 with his older son, Khaled. Mr Sanallah has travelled back and forth since then, spending most of his time in the UAE. He is not a party to the proceedings, but was a key witness given that the applicants' claim was largely based on the influence of Mr Sanallah as head of the family who made all the decisions and controlled the finances. He testified at the hearing that he still has his permanent residence in Canada. Khaled, who remained in Canada since 2004 is now a citizen. The family's oldest son, Ahmed, remains in the UAE.

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

II. The Decision under Review

[6] The IAD noted that the applicants' degree of non-compliance with their residency obligation was significant, and therefore, the H&C considerations to overcome the requirements must also be significant.

[7] The IAD considered the "*Ribic*" factors (see *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4), approved by the Supreme Court in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84), which are to be taken into account in determining whether H&C considerations warrant an exemption from compliance with the residency requirements. These factors include: the applicants' initial and subsequent establishment in Canada; their reasons for departure and for remaining abroad; their attachment to Canada; whether there were reasonable attempts made to return to Canada at the earliest possible opportunity; and, the existence of special or particular circumstances.

[8] The IAD concluded that the applicants lacked credibility and that they had failed to meet their burden of proof on a balance of probabilities and that there were insufficient grounds for H&C considerations to warrant the granting of special measures. The Board noted it was "obliged to conclude that they left Canada without just cause and did not return at the earliest possible opportunity." The Board acknowledged that the loss of their status would entail "some hardship", but that it was not a sufficient H&C consideration "in light of all the negative factors".

[9] The IAD assessed the testimony of the applicants and Mr Sanallah, along with their son, Khaled and uncle/brother–in-law, Talal Sanallah, in great detail and in its consideration of the *Ribic* factors.

[10] The IAD made very strong adverse credibility findings against the applicants and Mr Sanallah based on the inconsistency in their testimony, and based on Mr Sanallah's evasive responses.

[11] The IAD rejected the assertion that exceptional circumstances required Mr Sanallah to remain in the UAE. The IAD concluded that he made little, if any effort, to find employment in Canada. Instead, Mr Sanallah chose to travel back and forth to the UAE. Mr Sanallah's testimony regarding his intentions to establish himself in Canada, his need to remain in the UAE because of a loan he had to repay, and his efforts to look for work were found not to be credible. The IAD noted that he had not resigned from his job in the UAE where he was a health inspector, and by his own evidence, did not intend to do so until he could collect his end of service payment in 2012. The IAD found that Mr Sanallah's explanation for remaining employed in the UAE was a personal decision, not a circumstance beyond his control, and not a justification for non-compliance with the residency requirements for the applicants, who remained in the UAE with him until 2009.

[12] The IAD rejected the applicants' claim that cultural constraints prevented them from staying in Canada without Mr Sanallah or returning to Canada from the UAE without him. While Mrs El Assadi indicated that she had wanted to stay in Canada in 2005 but tradition required her to obey her husband, the IAD noted inconsistencies in her testimony particularly since she did return in

2009. The evidence about whether Mr Sanallah was opposed to or in agreement with that decision conflicted and the IAD did not accept the explanation that the applicants were encouraged to return to Canada by a friend who lived here.

[13] The IAD also considered Walid's claim that it was out of his control to remain in Canada in 2005 because he was a minor. Extensive testimony was considered from his father and uncle regarding why he could not have remained in Canada with his uncle and attend school. The IAD concluded that Mr Sanallah had refused to permit him to remain in Canada. The IAD also referred to the Federal Court's finding that parental decisions should not enhance claims for relief where applicants are minors at the time they obtained their permanent resident status (*Lai v Canada (Minister of Citizenship and Immigration Canada)*, 2006 FC 1359, [2006] FCJ No 1698).

[14] The IAD considered the applicants' efforts to establish themselves since their return in 2009, including Walid's employment and enrolment in a pre-nursing program at Algonquin College, and Mrs El Assadi's enrolment in English classes and volunteer activities and characterised this as "too little too late".

[15] The IAD acknowledged that the applicants have family residing in Canada and that Walid and Khaled would support Mrs El Assadi. The IAD, however, found that the family was more established in the UAE than in Canada and their dislocation had been voluntary and self-imposed.

[16] The IAD did not accept the applicants' submission that they were now unable to obtain UAE resident status. The IAD found Mrs El Assadi's testimony not credible because she first stated

that their residencies were cancelled automatically then said, as confirmed by Walid, that Mr Sanallah had cancelled them in retaliation for them leaving the UAE. The IAD also found Mr Sanallah's testimony that Walid would be unable to resume his residency in the UAE to be not credible, observing that his brother Ahmed resides and works in the UAE.

[17] The IAD also found that the applicants' ignorance of their own residency obligations in Canada did not justify non-compliance.

[18] The IAD acknowledged that the applicants were stateless Palestinians. The IAD extensively questioned the applicants about their past travels to Lebanon, the family that remained there and their living arrangements.

[19] The IAD noted that the applicants would face hardship in the event that they would return to Lebanon, but noted that they had returned to Lebanon in the past and stayed for months with family. The IAD found that the loss of their permanent resident status in Canada would result in some hardship but that this hardship was not sufficient to outweigh all the negative factors in this case.

III. Standard of review

[20] It is well-settled that the standard of review for decisions of the IAD is reasonableness. In *Shaath v Canada (Minister of Citizenship and Immigration)*, 2009 FC 731, [2010] 3 FCR 117, Justice Lemieux discussed the Supreme Court's decision, *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, with respect to a stateless Palestinian who, like the applicants, appealed a departure order issued due to failure to comply with the residency obligation.

Justice Lemieux considered subsection 63(4) of the Act which provides that the IAD must be satisfied that sufficient H&C considerations warrant special relief in order to allow an appeal:

> [53] For the reasons that follow, I am of the view this judicial review application must be dismissed. *Khosa* makes it clear where reasonableness standard applies, it requires deference and reviewing courts are not allowed to substitute their own appreciation of the appropriate solution but rather must determine if the outcome falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law".
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> [54] Justice Binnie pointed out in *Khosa*, that paragraph 67(1)(c) of IRPA which applies here, provides a power to grant "exceptional relief and calls for a fact-dependent and policy driven assessment".
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> […]
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> [56] Returning to *Khosa*, Justice Binnie concluded the IAD's decision fell within the range of outcomes reasonably open to it, a view which he said was predicated on the role and function of the IAD, as well as the fact Mr. Khosa did not contest the validity of the removal order made against him but only "sought the exceptional and discretionary relief that is available only if the IAD itself is satisfied that "sufficient humanitarian and compassionate considerations warrant special relief.""
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> [57] Justice Binnie made another point in his conclusion. It does not matter whether the judge agrees with a particular IAD decision or not. That is beside the point as the decision was entrusted by Parliament to the IAD.

[21] This Court has confirmed that deference is owed to decisions of the IAD concerning findings of fact or of credibility, including where H&C considerations are taken into account for failure to meet residency requirements. In *Digilov v Canada (Minister of Citizenship and Immigration)*, 2010 FC 615, [2010] FCJ No 743, Justice Boivin noted that "[t]he IAD is in the best position to assess the lack of explanations given by the applicant. It is not the role of this Court, in the case at bar, to substitute its judgment for the findings of fact made by the IAD concerning the applicant's credibility." (at para 23). Justice Boivin cited *Sanichara v Canada (Minister of*

Citizenship and Immigraton), 2005 FC 1015, [2005] FCJ No 1272, at para 20 where Justice Beaudry noted:

> The IAD, in a hearing *de novo*, is entitled to determine the plausibility and credibility of the testimony and other evidence before it. The weight to be assigned to that evidence is also a matter for the IAD to determine. As long as the conclusions and inferences drawn by the IAD are reasonably open to it on the record, there is no basis for interfering with its decision. Where an oral hearing has been held, more deference is accorded to the credibility findings.

[22] In this case, the applicants contest only the determination that there are insufficient H&C grounds to exempt them from the residency requirements, which they admit they have not met.

[23] The applicants submit that the decision was not reasonable, primarily because the IAD did not give sufficient consideration to the hardship they would face upon return to Lebanon as stateless refugees or to their establishment in Canada since 2009.

[24] The issue is whether the IAD's findings and overall decision that there were insufficient H&C grounds to overcome the applicants' failure to meet the residency requirement were reasonable. It is not for the Court to re-weigh the factors and re-balance the positive and negative factors to determine if H&C grounds justify an exemption.

[25] A high degree of deference is owed given that the IAD held an oral hearing in which the applicants testified, along with Mr Sanallah, Talal Sanallah and Khaled Sanallah. Their counsel and the Minister's counsel questioned them carefully as did the IAD. This provided many opportunities to clarify the inconsistencies in their evidence and the vague answers of Mr Sanallah.

IV. The Issues

[26] The applicants have raised three issues: first, that the IAD erred in ignoring the evidence, particularly the voluminous documentary evidence of the conditions of stateless Palestinians in assessing the hardship the applicants would endure if returned; second, that the Board microscopically analysed the evidence and the testimony of the applicants and the witnesses to support a view that H&C considerations were not justified and in doing so, misstated some of the testimony; and third, that the IAD made findings, particularly regarding the applicants' ability to return to the UAE, without any evidence.

Did the IAD err in ignoring evidence, particularly evidence of the situation of stateless Palestinians in Lebanon?

[27] The applicants submit that the IAD ignored voluminous documentary evidence regarding the situation for Palestinians in Lebanon which described: the terrible living conditions in refugee camps; Palestinians' exclusion from state services; their risk of arbitrary detention; and, restrictions on their mobility, residency and citizenship

[28] The applicants argue that the IAD's brief reference to "some hardship" highlights that it failed to consider the evidence that supports the applicants' claims and contradicts the IAD's own findings and is a reviewable error (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 at para 17) [*Cepeda-Gutierrez*].

[29] The respondent submits that the IAD reasonably found that the applicants were not credible, and as a result, they did not discharge their burden of demonstrating sufficient H&C grounds to warrant an exemption. Moreover, even if the applicants had been found to be credible, the IAD's

analysis of the *Ribic* factors establishes that the applicants had not satisfied the criteria to warrant an exemption.

[30] The respondent submits that the IAD did consider the hardship of returning to Lebanon, although not in great detail, and found that this hardship was insufficient given that the applicants travelled there previously and have close family there.

The IAD did not ignore evidence

[31] The IAD did not ignore the documentary evidence, although the IAD did appear to focus more on the testimony of the applicants and witnesses.

[32] The IAD considered all the evidence and how it addressed the *Ribic* factors.

[33] The IAD noted the evidence of establishment in Canada since 2009 including Walid's language courses and enrolment in college as well as Mrs El Assadi's enrolment in English courses, a computer programme and a course to facilitate integration. The IAD also recognized that the applicants had family members in Canada, as well as in Lebanon and the UAE.

[34] The IAD found that the applicants did not intend to establish themselves in Canada when they arrived for several reasons. Mr Sanallah did not make any real efforts to find employment and had not resigned from his job in the UAE and planned to remain employed in the UAE for several years so he could collect an end of service payment. The applicants failed to provide a satisfactory explanation for their departure 22 days after arriving, noting that it was either for financial reasons

or because living with their uncle and his family was too crowded. The applicants also failed to provide a satisfactory explanation for not returning to Canada earlier, saying that Mr Sanallah would not agree, but had ultimately arrived in 2009 apparently without his agreement. In addition, the applicants had travelled from the UAE to Lebanon on three occasions, albeit for reasons related to family illness, and had remained for months. The IAD considered the applicants' establishment or attachment to Canada and found that it was "too little, too late", referring to the fact that these efforts only occurred after 2009 when they returned and realised that their status was in jeopardy. The IAD found that the applicants had greater attachment to the UAE where they lived since 1980 and where they returned after 22 days in Canada. The IAD also found that Mr Sanallah's testimony that they could not work in the UAE or regain residency was not credible.

[35] The applicants' establishment in Canada since 2009, four years after they were granted permanent resident status, was reasonably found to be "too little, too late" – in other words, these efforts did not overcome the negative factors and were insufficient to warrant an exemption.

[36] I do not agree that the IAD ignored the documentary evidence on the situation for stateless Palestinians. The IAD did not specifically refer to these documents but did acknowledge that the applicants were stateless Palestinians. The record reveals that their counsel and the IAD member questioned the applicants about their connection to and experiences in Lebanon, including about their remaining family there, their family's living situation, whether they lived in or near the refugee camp, where the applicants stayed when they visited and about their experiences and conditions more generally, as well as about their experience in the UAE since 1980.

[37] The IAD need not mention each piece of evidence and is presumed to have considered all the evidence presented.

[38] The applicants, however, argue that the IAD erred in not referring to the contradictory evidence.

[39] In *Cepeda-Gutierrez*, Justice Evans, as he then was, held:

> [16] On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (*Medina v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, *Hassan v. Canada (Minister of Employment and Immigration)* (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
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> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[40] In this case the IAD's finding was not contradictory to the documentary evidence referred to by the applicants. The IAD found that there would be "some hardship". The applicants argue that the hardship would be far greater than "some" and it should have been given more weight in the consideration of the H&C grounds. This would call for a re-weighing of the evidence, which is not the role of the Court. It was open to the IAD to assess the weight of the evidence of hardship in the event the applicants returned to Lebanon and then to determine that this hardship was not sufficient to outweigh all the other negative factors identified by the IAD.

[41] In addition, the IAD found that the applicants' testimony and particularly that of Mr Sanallah, that they could not return to the UAE, was not credible. The IAD concluded that the applicants had a greater attachment to the UAE where they had lived most of their lives, although the IAD acknowledged that "in the event" they returned to Lebanon, there would be some hardship.

Did the IAD err by microscopically analyzing the evidence without regard to the totality of the evidence?

[42] The applicants submit that their detailed testimony was microscopically or selectively analyzed for inconsistencies and that the IAD made findings, including credibility findings, which were not supported by or which misstated that testimony.

[43] For example, the applicants submit that there was no inconsistency in their evidence that they could not remain in Canada in 2005 and live with their uncle for financial reasons and because of over crowding due to his large family. The IAD also misstated the facts about why they were able to return in 2009 despite Mr Sanallah's lack of agreement for them to do so.

The IAD did not microscopically analyse the evidence nor did it misstate the evidence

[44] The IAD carefully—but not microscopically—analysed the applicants' evidence. The IAD made very pointed and strong adverse credibility findings which were reasonably open to the IAD to make given that it had the benefit of hearing the oral testimony, and had questioned the applicants extensively. The IAD supported its credibility findings with specific references to the contradictions and inconsistencies in the applicants' own accounts and between their accounts and those of Mr Sanallah and Talal Sanallah.

[45] The IAD's conclusion that the applicants and Mr Sanallah were not credible was based on several inconsistencies and contradictions, including: Mr Sanallah's stated intention to stay in Canada despite failing to resign from his job in the UAE; his testimony that he was unable to find work, as contrasted with his brother's testimony that he could have had a job as a janitor; Walid's claim that he wanted to stay in Canada in 2005 and the inconsistent testimony of his uncle and father about the lack of agreement to permit his uncle to be his guardian.

[46] The IAD also reasonably found that Mrs El Assadi was not credible with respect to why she was unable to stay in Canada or return at an earlier date but could come on her own in 2009. The IAD observed that while she initially stated that she had to obey her husband, she returned without her husband's consent. The IAD did not accept the explanation that a friend had encouraged her to come in 2009 or that Mr Sanallah had agreed that the friend could help pay for their tickets. The testimony of Mr Sanallah, Mrs El Assadi and Walid differed on this issue. The IAD also found her testimony inconsistent regarding the cancellation of their UAE residencies .

[47] With respect to the applicants' submission that the IAD should not have regarded Mr Sanallah's desire to wait for his end of service payment as a negative factor, but rather as a positive factor because this demonstrated that he did not want his family to rely on social assistance in Canada, such an approach would be contradictory to the purpose of the residency requirements. It was reasonable for the IAD to consider this to be a negative factor; it demonstrated that there was no or little intention to establish the family in Canada in 2005 since Mr Sanallah would not receive his end of service payment until 2012.

Did the IAD err by making findings of fact without any evidence before it?

[48] The applicants submit that the IAD erred in concluding that the applicants could obtain temporary resident permits for the UAE despite the absence of evidence and the contradictory oral evidence of Mr Sanallah.

[49] The applicants also submit that the decision should have focused on their return to Lebanon—which the IAD considered only minimally—rather than on whether they could return to the UAE.

[50] The applicants also submit that the IAD erred in referring to Mr Sanallah as if he were an applicant. For example, the IAD stated that, "Mr. Sanallah has not demonstrated, on a balance of probabilities, that exceptional circumstances beyond his control obliged him to leave Canada and remain in UAE".

The Board did not err in making findings in the absence of evidence

[51] Although Mr Sanallah was not an applicant, the applicants' submissions that they should be exempt from the requirements to retain their permanent resident status repeatedly relied on Mr Sanallah's role as head of the family and decision maker, who basically controlled their ability to remain in or return to Canada. He was, therefore, a key witness to support their claim of H&C grounds. The IAD reasonably found that his testimony in several respects was not credible. The transcript supports these findings as his evidence was vague, inconsistent and he avoided many of the questions posed.

[52] The IAD did not err in concluding that there was no evidence to corroborate the claim that the applicants could not resume their residency in the UAE. The applicants had the burden of demonstrating that sufficient H&C considerations existed to warrant an exemption from the residency requirements of the *Act*. This included demonstrating that they were exposed to hardship on the basis that they were ineligible for UAE residency and would be forced to return to Lebanon. The only evidence before the IAD was the oral testimony of the applicants and Mr Sanallah. The IAD found inconsistencies in their testimony about how the applicants lost their residency and whether they would be able to reapply. Mrs El Assadi initially said their residency was automatically cancelled after six months away but revised her testimony saying that her husband had cancelled it in retaliation after they left in 2009.

[53] The applicants only gave vague answers to questions about their ability to reapply for the permits. Mr Sanallah's explanation of the visa process in the UAE and why Walid would be unable to obtain a resident permit was also evasive and based exclusively on his own unsupported

experiences and was not believed. The IAD reasonably found that the applicants and Mr Sanallah attempted to mislead the IAD regarding their right to return to the UAE.

[54] The IAD did not err in considering the applicants'return to the UAE, and not to Lebanon. Mrs El Assadi had lived in the UAE since 1980 with her husband and sons and Walid had been born and spent most of his life there. The Board was aware that the applicants were stateless and may be returned to Lebanon: it held that they would experience "some hardship" if that occurred, but it was outweighed by other factors.

[55] Although the applicants take the position that the IAD should have given positive weight to Mr Sanallah's testimony that he has now learned from his mistakes, that his family should have remained in Canada but that he thought he was doing the 'right thing' by remaining in the UAE where he could work and repay his debts before coming to Canada, and that these mistakes should not negatively impact the applicants' status, this awareness unfortunately comes too late to benefit the applicants. Moreover, this reiterates some explanations that the IAD found not to be credible. It is incumbent on newcomers to Canada to know their obligations and their rights. Although the applicants may have been quite dependant on Mr Sanallah for the decisions which affected them, they had a responsibility to satisfy the residency requirement and because they could not do so, they had the burden to establish that there were exceptional circumstances to overcome those requirements. The IAD reasonably found that they did not do so.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board made on November 21, 2012 is dismissed.

2. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Silvia Valdman	FOR THE APPLICANTS
Helene Robertson	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Valdman Law Professional Corporation Ottawa, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENTS