

Federal Court



Cour fédérale

**Date: 20170123**

**Docket: IMM-2560-16**

**Citation: 2017 FC 82**

**Toronto, Ontario, January 23, 2017**

**PRESENT: The Honourable Madam Justice Simpson**

**BETWEEN:**

**SEEMA ALIA, JAMILA ALIA, SANAD ALIA,  
MOHAMMED ALIA AND JIANA ALIA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicants have applied for judicial review of a Decision of the Immigration Appeal Division [IAD] dated May 27, 2016 [the Decision] upholding a visa Officer's [the Officer] finding that the Applicants are inadmissible because they failed to comply with their residency obligations as permanent residents pursuant to section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. This application is brought pursuant to subsection 72(1) of the IRPA.

[2] The Applicants are a mother, three adult children and one minor child. Seema Alia is 46 years old. Her sons Sanad and Mohammed are 21 and 14 years old, and her daughters Jiana and Jamila are 25 and 27. The Applicants hold passports issued by the Palestinian Authority. The Applicants were landed as Canadian permanent residents [PRs] on July 11, 2007. The father of the family is Walid Alia. He holds a permanent residence card which is valid until December 2017. He is therefore not a party to these proceedings. However, he was a witness before the IAD.

I. The Officer's decision

[3] The Canadian Embassy in Tel Aviv received the Applicants' applications for travel documents on September 23, 2013. Pursuant to section 28 of the IRPA, the Applicants were required to be physically present for 730 days in the five years prior to that date. The Officer concluded that they had been present for only 302 days. The Officer found the Applicants to be inadmissible pursuant to subsection 41(b) of the IRPA.

II. The IAD

[4] Before the IAD the Applicants acknowledged that they did not meet the residency requirements, but argued that H&C considerations warranted special relief pursuant to subsection 67(1)(c) of the IRPA.

[5] The IAD had credibility concerns and found that the Applicants sought equitable relief with “unclean hands.” The IAD concluded that neither H&C factors nor the best interests of the minor son warranted relief.

[6] The Applicants’ evidence about their presence in Canada was inconsistent. They all incorrectly stated in their Applications for a Travel Document [the Applications] that they had been present for 629 of the 730 days required. At the IAD hearing, Seema repeated what had been said in the Application. In particular, she testified that they were continuously in Canada between July 2011 and August 2012. However, this was untrue. Photos showed her on the Allenby Bridge between Jordan and the West Bank during that period. Her evidence was also inconsistent with her husband’s testimony. Walid said his family was outside Canada for only part of this time, from October 2011 until January 2012. He said that his wife had been “confused” when providing her inconsistent testimony.

[7] Turning to the H&C considerations, Seema Alia testified that the family returned to the West Bank in 2007 due to problems settling in Canada and difficulties with the children’s education. She also testified that in 2010, her husband’s medical problems in the West Bank were the primary reason that they failed to meet their residency obligations. The Member found that this testimony was inconsistent with the medical evidence which showed that Walid was only ill for three months. He had a stroke in August 2010 and later had heart problems. However, he was discharged from hospital in October 2010. No evidence was provided about arrangements to return to Canada in 2010 before the stroke or after Walid’s discharge in October.

[8] Seema Alia testified that in August 2012, the family returned to the West Bank for a vacation. Several of their PR cards expired just after they left but they did not apply for Permanent Resident Travel Documents [PRTD] until September 2013. Jamila said she left Canada in August 2012 for a ‘change of scenery’ even though her PR card had not yet been renewed.

[9] The IAD concluded that the evidence “did not reflect a strong desire to settle or even be in Canada.” Walid purchased a business in the West Bank in 2008 after he became a permanent resident. His business and home in the West Bank were never sold, and he did not provide evidence of job searches in Canada. Jamila is now married and has a child in the West Bank. She said she took ESL classes in Canada between October 2011 and August 2012, but this was also untrue because she was photographed on the Allenby Bridge during that period. Jiana works in the West Bank and did not try to find work in Canada. Sanad and Mohammed are in university and high school in the West Bank.

[10] The IAD concluded that the Applicants left Canada after they were given status in 2007 and did not return in 2008, 2009, or 2010. It also concluded that they had not explained their failure to return to Canada as early as possible, and had not made efforts to establish a life in Canada.

[11] The “degree of establishment” factor was treated as negative because the Applicants have no assets in Canada but have a home and a business in the West Bank. They are working or are in school in the West Bank.

[12] The Applicants have no family ties in Canada so this factor was treated as negative.

[13] Mohammed, the minor son, appeared to be thriving in the West Bank. Therefore the 'best interests of the child' factor did not warrant relief.

[14] Lastly, the Applicants failed to establish that they would face personal hardship due to conditions in the West Bank. Jamila said she was less free in the West Bank but she chose to vacation there. The Applicants travelled frequently to Israel and Jordan and Walid was being treated in an Israeli hospital.

### III. The Transcript

[15] The two day hearing, which was conducted by telephone, lasted seven hours. Five hours of the transcript is missing. Seema, Jamila, Mohammed, and Walid Alia testified but only the following evidence is available:

- Day 1: Seema Alia was questioned by her counsel and the Minister's counsel [the Seema Evidence].
- Day 2: The end of Walid Alia's examination in chief is recorded [the Walid Evidence].

[16] The Seema Evidence includes questioning about the period when she says she was in Canada but was photographed on the bridge to Jordan. It also covers her evidence about the extent of Walid's illness and why the family did not return to Canada in 2010.

[17] The Walid Evidence covers his explanation that his wife was “confused”. He also describes his extended illness in 2010 but he had no supporting documents. He was questioned about why the family did not renew their permanent residence cards before they left Canada in August 2012.

[18] Finally he testified about why he sold his Canadian home in January 2013 and later, in September of that year, applied for travel documents.

[19] In my view the available transcript provides evidence about the IAD’s most serious credibility concerns which involved Seema’s statements of her whereabouts and the family failure to return in 2010.

#### IV. Issues

- i. Is there a breach of the rules of Natural Justice by reason of the missing transcript?
- ii. Was there a material error of fact which makes the Decision unreasonable?

#### V. Standard of Review

[20] The IAD’s decisions about whether to grant H&C relief are reviewed on a reasonableness standard. Matters of procedural fairness are reviewed on a correctness standard.

#### *Issue I: Discussion and Conclusions*

[21] In *Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 SCR 793 at para 81, the Supreme Court of Canada said:

In the absence of a statutory right to a recording, courts must determine whether the record before it allows it to properly dispose of the application for appeal or review. If so, the absence of a transcript will not violate the rules of natural justice. Where the statute does mandate a recording, however, natural justice may require a transcript. As such a recording need not be perfect to ensure the fairness of the proceedings, defects or gaps in the transcript must be shown to raise a “serious possibility” of the denial of a ground of appeal or review before a new hearing will be ordered. These principles ensure the fairness of the administrative decision-making process while recognizing the need for flexibility in applying these concepts in the administrative context.

[22] Section 174 of the IRPA says that the IAD is a court of record but does not speak of transcripts. I was not referred to any statutes which require a transcript and there was no case law presented which says that a court of record must transcribe its proceedings. As well the IAD Rules do not require a transcript. Nevertheless, even if a transcript was mandated, the Supreme Court has said that natural justice does not necessarily require a transcript. The issue is whether the Applicants have shown that there is a serious possibility that a ground of judicial review cannot be presented without the transcript.

[23] The Applicants have provided no material to indicate what grounds for judicial review cannot be pursued because a transcript is unavailable. They raise no issues with the IAD’s findings of fact which require reference to the missing transcript. They do not allege that testimony was overlooked or misunderstood. Their submission is a general one. They simply say that, because credibility was at issue, the lack of a transcript automatically breaches the rules of natural justice. They do not identify specific credibility findings that are unreasonable.

[24] In these circumstances the Applicants have not shown a serious possibility that a ground for judicial review cannot be pursued.

*Issue II: Was There a Material Error of Fact Which Makes the Decision Unreasonable?*

[25] The Applicant submits that the IAD made a factual error [the Error] at paragraph 14 of the Decision, when the Member stated: “When the principal appellant’s husband, Walid Alia, was questioned he confirmed the family absence from Canada from October 2011 until July 2012.” In fact, the available transcript shows that Walid testified that they were absent until January 2012 and were in Canada from January to August 2012 when they left for a vacation in the West Bank.

[26] The first question is whether the IAD misunderstood the facts or simply made a typographical error. Given Walid’s clear evidence and the fact that these dates were at issue by reason of Seema’s inconsistent evidence, it is reasonable to conclude that the IAD understood that the family was in Canada from January to August 2012.

[27] However, assuming it was a substantive error the question is whether it is material. The Applicant says that the Error shows that the IAD failed to appreciate that the Applicants tried again to settle in Canada and purchased a home in the first half of 2012. They say that this was a material fact which would have resulted in a positive outcome.

[28] I have not been persuaded. The IAD correctly noted that in August 2012 all the Applicants left Canada for the West Bank for vacation without bothering to check to ensure that



they would be entitled to return. This fact together with their degree of establishment in the West Bank, their untruthful Applications and testimony, and their failure to establish in Canada means in my view that the Error would not have affected the Decision.

VI. Certification

[29] No question was posed for certification.

VII. Conclusion

[30] For all these reasons, I have concluded that the Decision is reasonable. Accordingly their application for judicial review will be dismissed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** this application for judicial review is hereby dismissed.

"Sandra J. Simpson"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2560-16

**STYLE OF CAUSE:** SEEMA ALIA, JAMILA ALIA, SANAD ALIA,  
MOHAMMED ALIA AND JIANA ALIA v THE  
MINISTER OF CITIZENSHIP, AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 17, 2017

**JUDGMENT AND REASONS:** SIMPSON J.

**DATED:** JANUARY 23, 2017

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