Federal Court  Cour fédérale

Date: 20180524

Docket: IMM-5076-17

Citation: 2018 FC 540

Montréal, Quebec, May 24, 2018

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

RAYMOUND SAAD ABOU ANTOUN

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On April 11, 2014, a departure order was issued by an immigration officer against the Respondent because of his failure to comply with the residency obligation set out in section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The Respondent appealed the removal order to the Immigration Appeal Division [IAD] of the Immigration and Refugee Board. He did not challenge the legal validity of the departure order. Rather, the issue before the

IAD was whether the Respondent had established sufficient humanitarian and compassionate [H&C] considerations to overcome the breach of the residency requirement. The Respondent's appeal was allowed by the IAD on November 9, 2017.

[2] This is an application for judicial review by the Minister of Public Safety and Emergency Preparedness [Minister] of the IAD's decision pursuant to subsection 72(1) of the Act. The Respondent did not file any appearance. At the hearing, counsel for the Minister produced a letter dated May 8, 2018 from the Respondent which was noted.

[3] For the following reasons, I conclude that the decision of the IAD is unreasonable as it is based on a flawed assessment of the H&C factors to be considered. The application is accordingly granted and the matter is referred back to the IAD for redetermination in accordance with these reasons.

II. Background Facts

[4] The following facts are taken from the IAD's decision.

[5] The Respondent, Raymound Saad Abou Antoun, is a 58-year-old citizen of Lebanon. He was born in Lebanon and lived there until the 1980s when he moved to Bulgaria to complete his civil engineering degree. Since 1990, he has worked as an engineer in Abu Dhabi.

[6] Mr. Abou Antoun obtained his permanent residence under the skilled worker program and immigrated to Canada with his wife and his three children in July 2010. He stayed briefly in Canada and then returned to work in Abu Dhabi.

[7] Mr. Abou Antoun returned to Canada in 2011 for approximately one month to purchase a house. His family established itself in Canada in 2012. Since that time Mr. Abou Antoun has continued to work in Abu Dhabi. He visits his family between three and six weeks each year.

[8] Mr. Abou Antoun's wife and two of his children are now Canadian citizens.

[9] On April 11, 2014, upon his return to Canada at Pierre-Elliot Trudeau Airport, Mr. Abou Antoun was referred for questioning by an immigration officer. It was determined that during the relevant five-year period, Mr. Abou Antoun had failed to meet the residency obligation under section 28 of the Act. He was physically present in Canada 163 days during the relevant period, rather than the minimum 730 days.

[10] Immediately following the examination, the immigration officer issued an inadmissibility report pursuant to subsection 44(1) of the Act against Mr. Abou Antoun for failing to comply with his residency obligation. A Minister's delegate reviewed the immigration officer's recommendation and determined that a departure order should be issued against Mr. Abou Antoun for failing to comply with his residency obligation pursuant to section 28 of the Act.

[11] On April 14, 2014, Mr. Abou Antoun appealed the Minister's delegate's decision to the IAD. He did not contest the legal validity of the departure order and instead based his appeal on H&C considerations.

III. The IAD decision

[12] On November 9, 2017, the IAD granted Mr. Abou Antoun's appeal after concluding that H&C considerations warranted special relief in light of all the circumstances of his case pursuant to section 67 of the Act. The IAD found that the breach of his residency obligation was very serious. It noted, however, strong positive factors that militated in favour of Mr. Abou Antoun, such as the presence of his wife and children, the very strong family bond the family had established, the important efforts Mr. Abou Antoun had made to find employment, and his continued financial establishment in Canada. The IAD concluded that in light of all the circumstances, there were sufficient H&C considerations to warrant special relief. The appeal was therefore allowed and the removal order set aside.

[13] The Minister commenced the present application on November 28, 2017 seeking to quash the IAD's decision.

IV. Issue to be Determined

[14] The only issue to be determined is whether the IAD committed a reviewable error by concluding that Mr. Abou Antoun had demonstrated sufficient H&C considerations to justify the retention of his permanent resident status.

V. Standard of Review

[15] The Minister acknowledges, and I agree, the standard of review of the IAD's decision is reasonableness: *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339, 2009 SCC 12 at para 58. Where, as here, the reasonableness standard applies, it requires deference. It is well established that the factual conclusions and the IAD's assessment of H&C considerations involve a high degree of discretion. Reviewing courts ought not to reweigh the evidence or substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190, at para 47).

VI. Analysis

A. *Legislative Scheme*

[16] Before embarking on an analysis of the alleged errors by the IAD, it is important to consider the legislative scheme within which H&C decisions are made, including an examination of the breadth of the IAD's discretion to stay a removal order.

[17] In order to maintain their status, a permanent resident must comply with a residency obligation. According to section 28 of the Act, a permanent resident must be physically present in Canada for at least 730 days (2 years) in every 5-year period. Because of Mr. Abou Antoun's failure to meet that mandatory residence requirement, a departure order was issued against him by virtue of section 41 of the Act.

[18] Under subsection 63(3) of the Act, Mr. Abou Antoun had the right to appeal the departure order against him before the IAD. However, in order for the IAD to grant the appeal, it had to be satisfied, as set out in subsection 67(1)(c), that "sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case".

[19] The powers of the IAD concerning removal orders are highly discretionary. It remains that the discretion is exceptional and should not be exercised routinely or lightly. As explained in *Chieu v Canada (Minister of Citizenship and Immigration*), 2002 SCC 3 at para 57:

> Second, in appeals under the I.A.D.'s discretionary jurisdiction, the onus has always been on the individual facing removal to establish why he or she should be allowed to remain in Canada. If the onus is not met, the default position is removal. Non-citizens do not have a right to enter or remain in Canada: *Chiarelli*, supra, at p. 733, per Sopinka J. See also *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 189, per Wilson J.; *Kindler v. Canada (Minister of Justice)*, 1991 CanLII 78 (SCC), [1991] 2 S.C.R. 779, at p. 834, per La Forest J.; and *Dehghani v. Canada (Minister of Employment and Immigration)*, 1993 CanLII 128 (SCC), [1993] 1 S.C.R. 1053, at p. 1070. In general, immigration is a privilege not a right, although refugees are protected by the guarantees provided by the 1951 *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6, entered into force April 22, 1954, entered into force for Canada September 2, 1969 (the "*1951 Geneva Convention*"), and the *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force October 4, 1967, entered into force in Canada June 4, 1969.[…]

[20] In *Ambat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 292 [*Ambat*], this Court listed the factors applied by the IAD in determining whether there were sufficient H&C considerations to warrant special relief, at para 27:

(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.

[21] Moreover, subsection 67(1)(c) not only calls for a fact-dependent, but also a policy-driven assessment by the IAD: *Shaath v Canada (Minister of Citizenship and Immigration),* 2009 FC 731 at para 42.

B. *Whether the IAD's Decision is Unreasonable*

[22] The Minister submits that the IAD's decision in the case at bar is both unreasonable and based on a flawed assessment of the H&C factors to be considered. I agree.

[23] The IAD's task was to look to all the circumstances of the case in order to determine whether sufficient H&C considerations existed to warrant relief from a removal order, but failed to do so. It focusses instead on Mr. Abou Antoun's family circumstances to the exclusion of other relevant and significant factors that militate against him.

[24] The IAD recognizes that its discretion was bounded by appropriate, although non-exhaustive, considerations that have been established by prior decision makers of the IAD, as set

out in *Ambat*. However, at paragraph 7 of its decision, the IAD appears to limit its analysis to certain considerations that favour Mr. Abou Antoun, citing "the appellant's initial and continuing degree of establishment in Canada, his reasons for his departure from Canada, the reasons for a continued length of stay abroad, ties to Canada in terms of family, whether reasonable attempts to return to Canada were made at the first opportunity, and generally, whether there are any unique or special circumstances." No mention is made of the objectives of the Act.

[25] The IAD places great weight on two factors. At pages 4 and 5 of the decision, it reviews Mr. Abou Antoun's degree of establishment in Canada. It then considers the hardship that would be caused to Mr. Abou Antoun if he was deported to Lebanon at page 6.

(1) Establishment in Canada

[26] The IAD notes that Mr. Abou Antoun's residency obligation is very serious and that he does not have significant establishment in Canada. It further concludes that he does not have professional or community establishment. Notwithstanding these findings, the IAD determines that "on the whole [...] he is established to some degree and this is a positive factor". This finding is based on Mr. Abou Antoun's strong family bond, the steps he claims to have taken to find employment in Canada, and his alleged financial establishment. However, one does not attain establishment in Canada by osmosis. One has to earn it.

[27] The IAD in effect minimizes the residency obligation by accepting that a permanent resident need only have his family established in Canada and contribute financially in order to maintain his status, even though he continues living and working abroad with no immediate or

long-term prospect of returning to Canada. This clearly goes against the objectives of the Act, one of which is to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligation for new immigrants and Canadian society: s. 3(1)(e).

[28] Mr. Abou Antoun's conduct is clearly not in compliance with his residency obligation. Moreover, it is not in keeping with the skilled worker immigration class under which he obtained his permanent residence.

[29] If the residency requirements under section 28 are to have any meaning, the IAD cannot exercise its discretionary jurisdiction by disregarding the objectives of the Act and Parliament's intention, which provide for direct consequences for the violation of section 28 requirements that cannot be remedied easily and without thorough balancing of the proper factors.

[30] The IAD found that Mr. Abou Antoun had provided evidence of his unrelenting efforts to find employment in the construction sector in Canada, but without success, and that his absence from Canada to support his family is in part reasonably explained. However, Mr. Abou Antoun appears to have limited his searches to jobs in his field of civil engineering. There is no evidence that he followed the necessary courses to obtain equivalencies or pursue studies to be able to improve his marketability in the Canadian workforce.

[31] When immigrating to a new country, difficulties in finding employment are to be expected, and the IAD's view that the fact that Mr. Abou Antoun sent money from his work

abroad to his family in Canada and contributed to their establishment, cannot serve as an exception to the residency obligation.

(2) Hardship

[32] The Minister submits that the IAD also erred in concluding that hardship would be caused to Mr. Abou Antoun if the appeal was dismissed. I agree that this finding was not open to the IAD in light of the clear admission by Mr. Abou Antoun that neither he nor his family would not suffer undue hardship if the removal order stayed in place. He testified he will continue taking steps to be reunited with his family and will ask his wife to sponsor him. In the interim, he will continue residing in Abu Dhabi, staying in daily contact, and supporting his family.

[33] In spite of this finding, the IAD nonetheless concluded, on the basis of the testimony of Mr. Abou Antoun's son and daughter, that there is proof of family emotional hardship in the instant case. The IAD's decision regarding hardship is unreasonable as it is inherently contradictory with its own findings and analysis.

[34] The IAD also concluded that the best interests of Mr. Abou Antoun's minor child will be served if the appeal is allowed. This conclusion is not supported by any evidence and is unreasonable.

[35] Mr. Abou Antoun has chosen to live apart from his children for much of the period of consideration, by his choice. Although this arrangement may impact his relationship with his children, there is no evidence of serious hardship warranting special H&C relief. In fact, by all

accounts, Mr. Abou Antoun's children have successfully integrated in Canada and have adjusted to the family's chosen living arrangements.

VII. Conclusion

[36] The standard of review applicable is reasonableness. The IAD's decision does not survive judicial scrutiny under that standard because it gave cursory treatment to the relevant considerations for granting H&C relief. The IAD's conclusion that there were sufficient grounds to exercise its discretion in favour of Mr. Abou Antoun was clearly unreasonable in light of the record before it. Decisions of the IAD are entitled to deference, but deference ends where unreasonableness begins.

JUDGMENT in Court File IMM-5076-17

THIS COURT'S JUDGMENT is that:

1. The application is granted.

2. The decision of the Immigration Appeal Division of the Immigration and Refugee Board dated November 9, 2017 is quashed and set aside.

3. The matter is remitted to the Immigration Appeal Division for redetermination by a different panel.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5076-17
STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v RAYMOUND SAAD ABOU ANTOUN
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 24, 2018
JUDGMENT AND REASONS:	LAFRENIÈRE J.
DATED:	MAY 24, 2018

APPEARANCES:

Michel Pépin	FOR THE APPLICANT

SOLICITORS OF RECORD:

Attorney General of Canada Montréal, Quebec	FOR THE APPLICANT