Federal Court  Cour fédérale

Date: 20180622

Docket: IMM-3871-17

Citation: 2018 FC 649

Ottawa, Ontario, June 22, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

KERANJIT KAUR GILL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] Mrs. Keranjit Kaur Gill is a Malaysian citizen who came to Canada in 2001with her husband, her daughter Pravina (presently 29 years old), her son Mandeep (presently 27 years old) and her daughter Aveena (presently 25 years old). Their refugee claim was granted in 2003 and they all became permanent residents in 2006.

[2] During the summer of 2006, as they no longer feared for their lives in Malaysia, the family visited their country for two months.

[3] In 2008, Aveena, who was then 15 years old, suffered from several mental health issues. She had become suicidal as a result of being bullied in school. After a short period of living in foster care in Canada, she was sent back to Malaysia until her mental state improved.

[4] Pravina returned to Malaysia in 2009 and Mrs. Gill's husband returned in 2010. Neither came back to Canada. Mandeep, on the other hand, never went back to Malaysia and is still a permanent resident in Canada.

[5] Mrs. Gill left for Malaysia on October 24, 2011, in order to care for her father who had a heart attack in August 2011 and who is diabetic.

[6] In April 2016, Mrs. Gill and Aveena's attempts to come back to Canada were challenged by immigrations officers. Mrs. Gill was examined upon arrival at the Vancouver airport and a departure order was issued against her. The officer determined that she failed to meet the residency obligation for the five-year period from April 2011 to April 2016, pursuant to section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. She had only 181 days of physical presence in Canada out of the 730 days of the statutory residency requirement. Aveena was refused a permanent resident travel document, as the immigration officer in Singapore found that she too did not meet the residency requirement.

[7] They both appealed these decisions before the Immigration Appeal Division [IAD] and their appeals were heard jointly.

[8] The IAD granted Aveena's appeal but dismissed Mrs. Gill's. It is that negative decision that is presently under review before me.

[9] Mrs. Gill does not challenge the validity or legality of the departure order issued against her but rather argues, as she did before the IAD, that her appeal should have been granted on humanitarian and compassionate [H&C] grounds.

II. Issue and Standard of Review

[10] This application for judicial review raises a single question:

> *Did the IAD make a reviewable error in refusing to exercise its discretion and grant the Applicant's appeal based on H&C grounds?*

[11] The IAD's assessment of whether H&C relief should be granted to overcome the requirements of the residency obligation is a question of mixed fact and law and is reviewable on the standard of reasonableness. The IAD's decision involves a high degree of discretion and warrants considerable deference (*Ahmad v Canada (Citizenship and Immigration)*, 2017 FC 923 at para 18).

[12] So long as the process fits comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable

outcome (*Samad v Canada (Citizenship and Immigration)*, 2015 FC 30 at para 29; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

III. Analysis

[13] The Applicant argues that the IAD erred in its application of the factors to be considered when exercising equitable jurisdiction within the context of a residency appeal, as confirmed by this Court in *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292. The *Ambat* factors are:

1. The extent of the non-compliance with the residency obligation;
2. The reasons for the departure and stay abroad;
3. The degree of establishment in Canada, initially and at the time of hearing;
4. Family ties to Canada;
5. Whether attempts to return to Canada were made at the first opportunity;
6. Hardship and dislocation to family members in Canada if the Applicant is removed from or refused admission to Canada;
7. Hardship to the Applicant if removed from or refused admission to Canada; and
8. Whether there are other unique or special circumstances that merit special relief.

A. *IAD's finding as to the Applicant's reasons for departure and staying abroad*

[14] According to the Applicant, the IAD's conclusion that she went back to Malaysia in 2011 to care for her sick father is inconsistent with one excerpt from her testimony. At one point, the Applicant was asked which of her reasons for staying in Malaysia was more important to her, her

father or her daughter. The Applicant replied: “My child more important for me …. And, of course, my father too”.

[15] With respect, the IAD had ample reasons to find that the Applicant went to Malaysia and stayed in Malaysia for such a long period to care for her sick father.

[16] First, Aveena went back to Malaysia in 2008, at the age of 15, without the Applicant. In 2010-11, she was studying in India and was therefore absent when the Applicant returned in 2011. When the Applicant was in Malaysia, Aveena did not reside with her parents for the majority of the five-year period, but rather resided with a friend in Kuala Lumpur.

[17] Second, the Applicant went back to Malaysia in 2011, approximately two months after her father had a heart attack. This sequence of events certainly confirms the IAD’s conclusion that the Applicant returned to Malaysia to take care of her sick father.

[18] Third, the Applicant testified that when Aveena was sent back to Malaysia in 2008, the initial intent was to have her stay there until she could take care of herself, which was expected to be for a year or so. She added that the only reason that they stayed for an unexpectedly long period was because of her father’s condition.

[19] Fourth, Aveena testified that shortly after arriving in Malaysia, her desire was to come back to Canada. Although she acknowledged that she might not have been quite ready to come back at that time and to regain the independence that she had in Canada, had she not lost her

permanent residence card, she would probably have taken a plane back to Canada. Her appeal to the IAD was in fact allowed on this basis.

[20] Considering all of the evidence, even if inconsistent at times, it was open to the IAD to conclude that the main reason for the Applicant's departure and long stay in Malaysia was her father's health.

B. *IAD's finding as to the Applicant's reason for coming back to Canada*

[21] The Applicant also takes issue with the IAD's scepticism about the Applicant's need to have stayed in Malaysia for nearly five years in order to either take care of her father or because Aveena's mental state required that she stay, as well as the IAD's scepticism about the Applicant's reasons for returning to Canada when she did.

[22] As regards the Applicant's father, the evidence shows that his health condition is the reason why the Applicant's husband went back to Malaysia in 2010. The Applicant's husband therefore took care of her father from 2010 to 2011 and has been taking care of him since 2016. Although the Applicant testified that her husband was not qualified to inject her father with insulin or to verify his blood glucose level, it was reasonable for the IAD to find that the evidence shows that he did in fact do so for a period of time before the Applicant arrived in Malaysia and has been doing so since she departed. In a letter issued by Dr. Baker just a few months before the Applicant came back to Canada, he stated of the Applicant's father: "His diabetes on the other hand is poorly controlled and on his last visit there was an additional diabetic medication which was ordered". It was reasonable for the IAD to conclude that the

Applicant was not the only person capable of caring for her sick father and that she failed to adduce sufficient evidence that she personally needed to stay for such a long period.

[23] As regards Aveena, it was also reasonable for the IAD to find that the Applicant's presence in Malaysia for so many years was not required, as the Applicant did not see the need to accompany her daughter to Malaysia when she was 15. Furthermore, when the Applicant left Canada for Malaysia, Aveena was 18 and studying in India.

[24] In my view, the IAD's conclusions regarding the length of the Applicant's stay in Malaysia and her reason for coming back to Canada are reasonable.

C. *IAD's finding as to the Applicant's establishment in Canada*

[25] The Applicant finally takes issue with the fact that when it considered her establishment in Canada, the IAD failed to consider the period from 2001 to 2011 and only focused on the one-year period between her return and her IAD appeal hearing.

[26] It is true that in that section of the decision, which runs from paragraphs 26 to 30, the IAD only refers to the current status of the Applicant in Canada. It refers to her current employment, community and volunteer implications, savings, property (or lack thereof) and family ties.

[27] However, earlier in the decision, the IAD acknowledged the Applicant's previous history in Canada and at paragraph 20, it considered that:

> … At the time of her departure from Canada on October 24, 2011, her husband and two daughter [sic] had already returned to Malaysia leaving her and her son in Canada. From what the Panel sees in considering the evidence, is that the appellant has more of her immediate family in Malaysia and returned there to be with them as their Convention refugee fear no longer exists and that in Malaysia it could have been a better environment for the appellant, Aveena Kaur Gill, to convalesce due to her fragile mental state and diagnosis of Attention Deficit Disorder.

[28] Decision-makers are presumed to have considered all of the evidence before them and are not obliged to refer to all of the evidence in their reasons for decision (*Florea v Canada (Minister of Employment and Immigration)*,[1993] FCJ No 598 (QL) at para 1 (CA)). The IAD is therefore deemed to have considered the documentary evidence found at pages 229-265 of the Certified Tribunal Record which shows that from 2001 to 2011, the Applicant had several jobs and that in 2009, she trained as a licensed practical nurse, although she never worked in that field.

[29] Two final points on this finding: first, the Court has reviewed this documentary evidence and finds that it does not contradict the IAD's conclusion on the issue of establishment.

[30] Second, this Court has held that an applicant's degree of establishment in Canada, even where an applicant has spent lengthy periods of time in Canada, is not sufficient in and of itself to justify allowing an appeal or granting an application based on H&C grounds (*Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 35). This holding is reinforced in this case by the fact that establishment is just one of eight *Ambat* factors to be considered in the exercise of equitable jurisdiction in the context of a residency appeal.

IV. Conclusion

[31] For these reasons, the Applicant's application for judicial review is dismissed. The parties have suggested no question of general importance for certification and none arises from this case.

JUDGMENT in IMM-3871-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. The style of cause is amended to replace the "Minister of Immigration, Refugees and Citizenship" with the "Minister of Citizenship and Immigration";

3. No question of general importance is certified.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3871-17
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