Federal Court  Cour fédérale

Date: 20180628

Docket: IMM-4701-17

Citation: 2018 FC 666

Ottawa, Ontario, June 28, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SULAIMAN SADRUDDIN MEGHJANI
JASMINE SULAIMAN MEGHJANI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants, Mr. Sulaiman Sadruddin Meghjani and his wife, Mrs. Jasmine Sulaiman Meghjani, are originally from India. Upon leaving India, they became permanent residents (PR) of both Canada and the United Kingdom (UK). They are now British citizens holding British passports.

[2] The Canadian legislation contains a residency obligation stating, with some exceptions, a PR must be physically present in Canada for 730 days in any 5 year period (*Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] at s 28(1) and (2)). In this case, during the relevant 5 year time period (May 30, 2010 to May 29, 2015), the male Applicant was in Canada for a total of 12 days and the female Applicant for a total of 30 days.

[3] The Applicants were subsequently denied Canadian PR travel documents by a visa officer in Bangalore, India. They appealed that decision asking for humanitarian and compassionate (H&C) relief, but on October 19, 2017, the Immigration and Refugee Board of Canada, Immigration Appeal Division (IAD) dismissed their appeal. The IAD's decision to dismiss the appeal is the subject of this judicial review.

[4] I will dismiss this application for judicial review for the following reasons.

II. Background

[5] The Applicants were born in India and moved to the UK in 2005. They have two daughters, 17 year old Al Nameera and 12 year old Aamira. The children's PR status is not disputed.

[6] The family applied for Canadian PR under the skilled workers class. Shortly after PR was granted on March 16, 2009, the family landed in Canada on March 23, 2009, and then returned to the UK on March 31, 2009. The family says they returned to the UK so they could plan their transition to Canada, wait for the school year to finish and wrap up their business. The

Applicants' statutory declaration provided for the appeal to the IAD says they planned on moving to Canada in either August or September of 2009.

[7] Instead, in September of 2009, the family became PRs of the UK. They visited Canada again in July 2010 and say they fully intended to live in Canada and put their children in Canadian schools that fall. During that visit, Mrs. Meghjani was present in Canada for 30 days and Mr. Meghjani for 12 days.

[8] During this time the Applicants were actively sponsoring family members to the UK, including Mrs. Meghjani's brother and mother, as well as Mr. Meghjani's cousin. In April of 2012, Mrs. Meghjani says she and her mother returned to India so that her mother, who was ill, could receive care from doctors who knew her and live in better weather. In July of 2013, her husband and children returned to India as well.

[9] While in India on May 28, 2015, the Applicants applied for Canadian PR travel documents because their PR cards had expired. They asked for H&C consideration as they had not met the statutory residency obligation. On June 18, 2015, a visa officer with Citizenship and Immigration Canada refused their application saying they failed to meet the residency obligations in section 28 of the IRPA and H&C factors were not warranted in this case. The Applicants appealed that decision to the IAD under s 63(4) of the IRPA.

[10] On February 1, 2016, Mrs. Meghjani's mother passed away, and on July 19, 2016, (after the academic year finished), the family came to Canada. Because Canada and the UK allow

citizens to travel visa-free between the two countries, they were able to enter Canada using their UK passports.

[11] On October 19, 2017, the IAD issued its decision to dismiss the appeal. The Applicants applied to the Federal Court for judicial review of that decision on November 6, 2017.

III. Issues

[12] The issues presented by the Applicants are:

A. Did the IAD err by failing to consider establishment that post-dated the removal order?
B. Did the IAD err in its analysis of the reasons for the Applicants' departure and stay abroad?
C. Did the IAD err in its analysis of whether the Applicants returned at the first opportunity?
D. Did the IAD err in its Best Interest of the Child (BIOC) analysis?

IV. Analysis

[13] The relevant provisions are attached as Annex A.

Standard of Review

[14] The Supreme Court of Canada characterizes section 67(1)(c) of the IRPA as "a power to grant exceptional relief." Decisions made under this section are reviewed for reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-59).

[15] For issues of fettering discretion, the correctness standard of review applies (*Ghaddar v Canada (Minister of Citizenship and Immigration)*, 2014 FC 727 at para 15).

A. *Establishment Post Dating the Removal Order*

[16] The Applicants' submissions are that the decision maker fettered its discretion and did not consider their establishment which occurred after they were issued their removal order.

[17] The evidence of establishment between their return on July 19, 2016 and their IAD hearing on June 27, 2017, includes:

i. a property purchase;
ii. a $140,000 donation to the Aga Khan Foundation of Canada;
iii. establishment of their own charity;
iv. the children volunteered, the eldest child was accepted at Waterloo University (and received a $7500 scholarship to attend University of Toronto);
v. they revived their Canadian company Telco Global Ltd;
vi. petitioned the Members of Parliament to pass a new Canadian law;
vii. Mrs. Meghjani offers her teaching services for free to the community;
viii. her husband became a private security guard;
ix. discussions to bring a lengthy list of business opportunities to bring to Canada;
x. the family advised the Canada Pension Plan Investment Board that they were investing money in a company that the Applicants' allege was cheating them.

[18] Relying on Justice Zinn's decision *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813 at paragraph 35, the Applicants argue that that post-removal order establishment was not considered but should have been:

> 35 In my view, the answers to these questions show that it is entirely irrelevant whether the persons knew he or she was subject to a removal when they took steps to establish themselves and their family in Canada…The proper question is not what knowledge they had when they took these steps, but what were the steps they took, were they done legally, and what will the impact be if they must leave them behind.

[19] The Applicants also submit that the factors in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) (such as the length of time in Canada; degree of establishment; impact of removal; hardship of removal; as well as the family and community support available), should be applied to both pre and post-removal order time periods.

[20] I agree with the Applicants that post-removal order establishment is to be considered. However, in this case the IAD did consider the pre and post-removal order establishment factors, and did not fetter discretion. Rather, as occurred in *Iamkhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 355, where it was found the belatedness of the establishment meant it would be given little weight, the IAD considered the relevant evidence and weighed it but gave it little weight, finding it was "too little, too late."

[21] The Applicants have cited to a plethora of case law which they say illustrates it is an error to dismiss establishment for no reason other it took place post-departure: *Tefera; Canada (Minister of Citizenship and Immigration) v Wright*, 2015 FC 3 at para 91; *Santiago* at paras 45-46; *Koonjoo v Canada*, 2011 FC 1211; *Iamkhong v Canada (Minister of Citizenship and*

Immigration), 2011 FC 355; *Strachan v Canada (Citizenship and Immigration)*, 2012 FC 984 at para 24; *Nekoie* at para 32. In contrast, the Respondent cites to paragraphs of these decisions which state the IAD has discretion over the weight to give each factor and this weight will depend on the circumstances (see *Nekoie* at para 33; *Iamkhong* at para 42).

[22] This Court has previously explained that timing of establishment is one factor that may be considered (*Shahnawaz v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1126 at para 24). I agree with the Respondent that, in this case, the argument is over the weight given to the establishment factors.

[23] A review of the entire decision illustrates the IAD considered all the establishment factors, including any establishment when the Applicants were physically present in Canada for 30 and 12 days respectively. The IAD considered the time they lived and sponsored family members to the UK, in addition to the post-removal order establishment that occurred during the months before the IAD hearing when the Applicants had moved to Canada. As is apparent from the reasons, the recent establishment was given little weight.

[24] This Court will not reweigh the evidence on judicial review and I cannot find the decision is unreasonable on this point as the IAD considered the entire period of establishment, which includes the post-removal order establishment.

B. *Reasons for Departure from Canada*

[25] The Applicants argued the IAD used circular and unintelligible reasoning to find that the motivation for returning to India (caring for a sick mother and keeping the family together) was both an honourable and positive consideration but also a negative.

[26] The Applicants submit that circular reasoning double-counts their absence against them, and is comparable to the situation in *Tao v Canada (Citizenship and Immigration)*, 2014 FC 912 at paragraph 28, where this Court held that circular reasoning is unreasonable:

> 28 Rather than weighing the positive and negative factors relating to Mr. Tao's application, the Minister's Delegate employed circular reasoning to conclude that Mr. Tao should not be entitled to H&C relief because he is inadmissible to Canada under paragraph 37(1)(a) of IRPA. This renders this aspect of the Minister's Delegate's decision unreasonable, with the result that the application for judicial review will be granted, in part.

[27] In this case, the IAD's decision is not circular and is unlike *Tao*. The IAD explains that the negative weight is a result of the Applicants choosing to pursue PR in the UK and then return to India. But it also recognized the fact that the family wanted to take care of the grandmother and keep the family together as a positive factor. This is unlike *Tao*, where the decision was unreasonable for not recognizing that H&C relief is available even if an applicant is criminally inadmissible. In this case the different factors were considered, and while some are positive, others are negative. In the end, even though there were positive factors those were weighed against the negative factors and a conclusion was reached by the decision maker. I do not agree with the Applicants' argument that the decision is circular.

C. *Applicants' argument: return at first opportunity*

[28] The Applicants argue the IAD's decision is unintelligible because it says that it accepted the grandmother needed their care, but then found they did not return to Canada at the first opportunity because they waited until after her death.

[29] This is much the same argument as above and I would apply the same findings. The IAD's reasons did find that the female Applicant's desire to care for her ill mother was a positive that mitigates against the negative factor of her residing in India and not Canada. However, as the Respondent argued, the decision must be read as a whole. The relevant period was May 30, 2010 to May 29, 2015, during which time (October of 2010) the family sponsored the female Applicant's mother to the UK, so the IAD was not unreasonable to say the family had earlier opportunities to return to Canada. Reading the decision as a whole, I cannot find that the IAD is unintelligible.

D. *Applicants' argument: BIOC*

[30] In their argument, the Applicants acknowledged the IAD found the BIOC is a positive factor. They correctly submit that even if the BIOC is positive, an improper analysis could affect the entire decision (*Santiago v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 91 at para 50).

[31] In this case, the Applicants submit that the IAD failed to take into account the context of their child's personal circumstances and was not being alert, alive, and sensitive to the BIOC as

required by *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at paragraphs 23-27, 35-39. In particular, the Applicants say the IAD's BIOC analysis contains several errors, such as failing to consider the impact of moving to the UK on their daughter, and that the IAD grossly understated evidence of the youngest daughter's suicide attempts in 2015 and 2016, the fact she still sleeps with her mother out of fear of abandonment, that she locks herself away when separated from her parents, and that she is too insecure to go to the bathroom alone. During the hearing, the Applicants' confirmed that no medical report was filed in respect of these issues.

[32] The Applicants also argued the IAD did not refer to contradictory evidence, and therefore this Court should find both that the evidence has been ignored and that an erroneous finding of fact was made (*Ivanov v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1055 at para 23; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at para 15 (FCTD); *Maqsood v Canada (Minister of Citizenship and Immigration)* (1999), 176 FTR 149 at para 18 (FCTD)).

[33] In regards to arguments the IAD ignored and understated the evidence, the Applicants highlight the IAD merely found that the youngest daughter found it "difficult" when her family was separated which is an understatement when considering the issues she was dealing with. This does not rebut the presumption that the evidence was considered, and the IAD references the daughter's testimony in its reasons, which further demonstrates the daughter's evidence was considered.

[34] At the hearing it was confirmed that the Applicants' arguments now being presented were not all presented to the decision maker. Although the decision maker must be alert, alive, and sensitive to the BIOC, the onus is on the Applicants' to submit evidence (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 8). In this case, the Applicants' did not provide evidence about the impact that relocating to the UK would have on the daughter, nor any medical evidence. The decision maker cannot be faulted for not being alert, alive, and sensitive to issues that were not raised before it.

[35] No questions were presented for certification and none arose.

JUDGMENT in IMM-4701-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. No question is certified.

"Glennys L. McVeigh"
Judge

ANNEX A

Immigration and Refugee Protection Act, SC 2001, c 27

Residency obligation

28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.

Application

(2) The following provisions govern the residency obligation under subsection (1):

(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

(i) physically present in 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,

(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,

(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

(v) referred to in regulations providing for other means of compliance;

(b) it is sufficient for a permanent resident to demonstrate at examination

(i) if they have been a permanent resident for less than five years, that they will be

Obligation de résidence

28 (1) L'obligation de résidence est applicable à chaque période quinquennale.

Application

(2) Les dispositions suivantes régissent l'obligation de résidence :

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) il est effectivement présent au Canada,

(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) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(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

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.

publique fédérale ou provinciale,

(v) il se conforme au mode d'exécution prévu par règlement;

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;

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.

DIVISION 7

Right of Appeal

Competent jurisdiction

62 The Immigration Appeal Division is the competent Division of the Board with respect to appeals under this Division.

Right to appeal — visa refusal of family class

63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal

SECTION 7

Droit d'appel

Juridiction compétente

62 La Section d'appel de l'immigration est la section de la Commission qui connaît de l'appel visé à la présente section.

Droit d'appel : visa

63 (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de

Division against a decision not to issue the foreign national a permanent resident visa.

délivrer le visa de résident permanent.

Right to appeal — visa and removal order

(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

Droit d'appel : mesure de renvoi

(2) Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

Right to appeal removal order

(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal order against them made under subsection 44(2) or made at an admissibility hearing.

Droit d'appel : mesure de renvoi

(3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise en vertu du paragraphe 44(2) ou prise à l'enquête.

Right of appeal — residency obligation

(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.

Droit d'appel : obligation de résidence

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

Right of appeal — Minister

(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.

Droit d'appel du ministre

(5) Le ministre peut interjeter appel de la décision de la Section de l'immigration rendue dans le cadre de l'enquête.

Appeal allowed

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

Fondement de l'appel

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 special relief in light of all the circumstances of the case.

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 mesures spéciales

Effect

(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.

Effet

(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.

FEDERAL COURT

SOLICITORS OF RECORD

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