Federal Court  Cour fédérale

Date: 20181211

Docket: IMM-2125-18

Citation: 2018 FC 1250

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Montréal, Quebec, December 11, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

LUIS HERNANDO SANCHEZ ZAPATA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicant is a citizen of Columbia whose application for permanent residence was accepted in March 2010. On July 8, 2010, he arrived in Canada to confirm his permanent residence status but only stayed in Canada for two weeks, after which he returned to his country. On April 9, 2015, the applicant returned to Canada and an immigration officer issued a departure

order under paragraph 41(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] In this case, the departure order was issued because the applicant failed to respect the residency obligation provided in section 28 of the Act, which requires all permanent residents to be present in Canada for at least 730 days during each five year period. On April 28, 2015, the applicant filed an appeal with the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada. On April 19, 2018, the IAD found that there were insufficient humanitarian and compassionate considerations to justify the exercise of its discretionary power under paragraph 67(1)(c) of the Act. The IAD dismissed the applicant's appeal, hence this application for judicial review.

[3] It is the standard of reasonableness that applies here (*Dandachi v Canada (Citizenship and Immigration)*, 2016 FC 952 at para 13). As explained below, there are no grounds for an intervention since the dismissal of the appeal constitutes an acceptable outcome, in light of the applicable principles and the evidence on the record.

[4] It is important to remember that the factors that are relevant to the exercise of the discretion granted to the IAD are set out in the decision rendered in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) [*Ribic*], as rephrased in *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at paras 2632, regarding the appellant's failure to respect the residency obligation. These factors were adopted by the Supreme Court in

Chieu v Canada (Minister of Citizenship and Immigration), [2002] 1 SCR 84. Even though this list is not exhaustive, these factors are the following:

(a) the extent of the non-compliance with the residency obligation;

(b) the reasons for the departure and stay abroad;

(c) the degree of establishment in Canada, initially and at the time of hearing;

(d) family ties to Canada;

(e) whether the appellant attempted to return to Canada at the first opportunity;

(f) hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;

(g) hardship to the appellant if removed from or refused admission to Canada; and

(h) other unique or special circumstances that merit special relief.

[5] In this case, the applicant acknowledges that the duration of his presence in Canada was extremely deficient during the relevant period and that the departure order was legally justified. Indeed, during the reference period, from July 8, 2010, to July 8, 2015, the applicant was only present in Canada for 106 days. This was therefore a very significant breach of the residency requirement.

[6] The reasons for his departure and stay abroad were simple. Initially, the applicant decided to continue taking diplomatic training courses in Columbia until December 2010. Subsequently,

in February 2011, he started working with the Columbian Ministry of Foreign Affairs [the Ministry] until his resignation in October 2012. In the meantime, he got married in March 2012 and chose to start a soap shop with his spouse. In September 2012, the applicant's aunt, his mother's only sister, died. In December 2012, the applicant decided to help his mother obtain her civil service pension in Columbia. Thanks to his assistance, the pension was awarded in October 2014. During this time, the applicant continued to work at the soap shop until February 2015 and then as a translator. He waited until April 2015 to return to Canada, because he was not prepared for the winter and believed that that it would be easier to find employment during the summer. After the departure order was issued, the applicant did not return to Columbia. The applicant has no family in Canada. Nonetheless, the applicant has become well established in Canada since April 2015. Several friends and colleagues are supporting his application. While holding various jobs and volunteering at the same time, he has also pursued graduate studies. In order to pay for part of his studies, the applicant obtained a $13,000 loan. He also obtained an academic scholarship for $6,000 while participating in an entrepreneurship competition, in which his group developed a snow removal device. The plan is to market the project in early 2020.

[7] The fact that the decision under review is clear and intelligible and that the IAD considered each of the relevant factors is not in dispute. In short, what the applicant is disputing is the weight which was attributed to some of these factors.

[8] On the one hand, the IAD noted a "very significant" breach by the applicant: he was in Canada for only 106 of the required 730 days. That said, the IAD remarked that the applicant had

left Canada to complete his studies and work for the Ministry in Columbia. It concluded that the applicant could have moved back to Canada in October 2012 after he resigned from the Ministry. The applicant also failed to provide compelling evidence that his presence was necessary to support his mother, following the death of his aunt, or to assist with the difficulties she encountered in trying to obtain her pension; this had been a personal choice. Therefore, he did not attempt to return to Canada at the first opportunity and his reasons for remaining in Columbia do not constitute a positive factor. The IAD also noted that the applicant's initial stay of 15 days, before the departure order was issue, was minimal. Nevertheless, the IAD acknowledged that his degree of establishment, after the departure order was issue, is a positive factor in the analysis, noting the applicant's many accomplishments and relationships since his return to Canada. The IAD further noted that the applicant does not have any family in Canada, but that he has a girlfriend. On the other hand, the IAD concluded that the applicant failed to demonstrate that hardship and difficulties would be caused by the loss of his status. Moreover, despite the applicant's establishment, which was "significant on the whole", the applicant failed to demonstrate sufficient humanitarian and compassionate grounds for the IAD to exercise its discretionary power. Furthermore, the IAD did not believe that the burden placed on the Canadian immigration system constitutes a humanitarian consideration.

[9] The applicant has a very different interpretation of the evidence and believes that the IAD should have given more weight to the establishment criterion and the hardships which the applicant would experience if he were required to return to Columbia at this point. He reproached the IAD for trivializing his mother's situation, as his mother had been sick and depressed and had needed his support. It is clear that the applicant made up for his breach of the

residency obligation with three years of uninterrupted residency since the departure order was issue. Even though the IAD mentioned his participation in an entrepreneurship competition, it failed to consider the significance of the project in question and did not attribute sufficient weight to the applicant's academic success. With respect to inconvenience, the applicant contends that the IAD failed to consider his academic compromises; the fact that he had to abandon his social network; his substantial student loan debts and the difficulties that he would face in Columbia, an unstable country. Lastly, the IAD erred in deciding that the burden placed on the immigration system by the applicant's having to apply for a new visa is not a humanitarian consideration.

[10] The respondent submits that the IAD conducted a reasonable assessment of all the relevant factors and analyzed all the evidence in order to determine whether there were sufficient humanitarian or compassionate considerations to warrant special relief. Indeed, the applicant is inviting the Court to conduct a *de novo* review of the evidence before the IAD, which is not the Court's role in the context of a judicial review. The Court should not intervene based solely on the fact that the applicant is dissatisfied with the manner in which the IAD assessed the evidence on the record.

[11] I agree with the respondent. The only issue in dispute is to determine whether the assessment of the evidence on the record was reasonable, because it is clear that the IAD did not neglect to consider any of the relevant factors. In this case, it was not unreasonable for the IAD to conclude that the applicant did not return to Canada at the first opportunity to do so. The period between October 2012 and October 2014 is problematic. Even though the IAD found the

applicant to be credible, it was not unreasonable to conclude that the decision to remain in Columbia for an extended period of time had more to do with a personal choice, rather than being due to circumstances beyond the applicant's control. Furthermore, the applicant himself acknowledged that he had been ready to return to Canada as of October 29, 2014, when his mother had received her pension. Once again, his decision to remain in Columbia from late October 2014 until early April 2015 was a personal choice: he had wanted to prepare for the winter and apply for jobs in the spring and summer because that was more convenient. There is no information on the record that would allow the Court to conclude that the IAD committed a reviewable error in terms of the weight attributed to each factor and the respective weighting of each factor in the final outcome.

[12] I also cannot subscribe to the applicant's general claim that the IAD failed to consider the evidence on the record or the applicant's main arguments. In the summary of the facts in this case, the IAD did in fact take the applicant's testimony into account:

> [20] The appellant maintains that returning to Colombia would be a traumatic experience since he has employment and friends in Canada, and a girlfriend since October 2017. He noted that he also has debts. His parents are in Colombia, but his mother always encouraged him to settle in Canada.

[13] Even though his degree of establishment is a positive factor, this factor is not sufficient in and of itself to warrant special relief based on humanitarian and compassionate considerations; indeed, establishment is just one factor which the IAD must take into consideration in exercising its discretion in the context of a residency appeal (*Gill v Canada (Citizenship and Immigration)*, 2018 FC 649 at para 30; *Gao v Canada (Citizenship and Immigration)*, 2018 FC 1001 at para 19).

[14] It is also true that the IAD considered the inconvenience that the loss of permanent residence status would cause the applicant, even though the latter has no family in Canada. However, the applicant was vague on this subject, and the information provided in his testimony could also apply to anyone who was able to remain in Canada after a departure order was issued:

> **[**TRANSLATION**]**
>
> **Counsel for the applicant:** If you had to return to Columbia, what consequences and difficulties would you experience if you had had to return today?
>
> **A:** For me, it would really be dramatic. It would be like taking my life away from me because I have a job here, I have plans. I am currently completing my studies. I have a girlfriend, I have friends. I have my apartment, which I have furnished. I have debts that I need to pay off. So, that's it. In fact, in Columbia, my friends have left. Of course, I have my mother and father, but apart from them, I have nothing over there.

[15] In its analysis, the IAD stated that it was "aware that any loss of status causes hardship and dislocation. However, [it had to] determine, in light of all the circumstances, whether the hardship and dislocation caused by the loss [justified] the granting of special relief". It proceeded to reject the applicant's argument concerning the "administrative difficulties" for the federal government and concluded that the applicant "did not demonstrate that hardship and dislocation would be caused by the loss of his status".

[16] The fact that the decision will have the inevitable consequence of increasing the volume of files to be processed by Canadian immigration authorities is not in and of itself a humanitarian and compassionate consideration. I am aware of the fact that the analysis of humanitarian and compassionate considerations under paragraph 67(1)(c) of the Act not only calls for a fact-dependent, but also a policy-driven assessment (*Canada (Public Safety and Emergency*

Preparedness) v Abou Antoun, 2018 FC 540 at para 21; *Shaath v Canada (Citizenship and Immigration)*, 2009 FC 731 at para 42; *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 57). However, the administrative inconvenience of re-applying for a visa is obviously an inherent consequence of each decision in which the IAD exercises its discretion not to grant special relief. I do not believe that it could constitute an independent ground for review of a decision by the IAD.

[17] Even though the IAD's reasons could have been better substantiated on the issue of inconvenience, it is important to read the decision in its entirety. Ultimately, the reasons provided make it possible to understand why the appeal was dismissed. Even if another decision maker may have a different opinion, the actual outcome falls within a range of possible acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47).

[18] For these reasons, the application for judicial review is dismissed. No question of general importance was raised by the parties.

JUDGMENT in docket IMM-2125-18

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

"Luc Martineau"
Judge

Certified true translation
This 10th day of January 2019.

Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2125-18
STYLE OF CAUSE:	LUIS HERNANDO SANCHEZ ZAPATA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 3, 2018
JUDGMENT AND REASONS:	MARTINEAU J.
DATED:	DECEMBER XX, 2018

APPEARANCES:

Nancy Cristina Muñoz Ramirez	FOR THE APPLICANT
Caroline Doyon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Roa Services Juridiques	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT