Federal Court  Cour fédérale

**Date: 20190801**

**Docket: IMM-3554-18**

**Citation: 2019 FC 1029**

**Ottawa, Ontario, August 1, 2019**

**PRESENT: Mr. Justice A. Diner**

**BETWEEN:**

**MUHAMMAD ARSHAD KHAN ET AL**

**Applicants**

**and**

**MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

## JUDGMENT AND REASONS

[1] This application judicially reviews Departure Orders made against the Applicants by a delegate of the Minister of Public Safety and Emergency Preparedness [the Minister's Delegate] on May 24, 2016, on the basis that the Applicants failed to comply with the residency requirements under s. 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicants contend that their rights to procedural fairness were breached. The Court finds otherwise.

## I. Background

[2] The Applicants, a family from Pakistan, became permanent residents of Canada on March 31, 2010. They left Canada shortly afterwards – on April 27, 2010 – returning to Pakistan. The family returned to Canada on February 26, 2015 – over four years later. Upon their arrival back at the airport in Canada, the Principal Applicant was questioned by a Canada Border Services Agency [CBSA] officer [the Officer] regarding the family's residency obligations [Examination]. The Principal Applicant informed the Officer that the family had been outside of Canada "tidying up affairs" in Pakistan since April 27, 2010.

[3] The Officer's notes state that he informed the Principal Applicant that because the family had spent less than one month in Canada in the past five years, it was physically impossible for them to meet their residency obligations. The Officer told the family that as permanent residents, they were free to depart if they wanted to, but suggested that they remain and complete the IMM 5511 Questionnaire for Permanent Residents [Questionnaire]. The Applicants chose not to remain or to complete the Questionnaire. Before leaving, they confirmed with the Officer that their address on file was correct and also provided a telephone number.

[4] The Respondent takes the position that the Officer informed the Applicants that he would write up section 44(1) reports [Reports] against the family, and that a Minister's Delegate would be in touch with the Applicants by mail and/or telephone to arrange for an interview regarding their permanent residence status.

[5] However, the Principal Applicant, in his affidavit, states that "we were permitted to enter Canada as permanent residents knowing that someone may contact me by mail or phone, should they require further information" [his emphasis]. In any event, shortly after the Examination, the Officer issued Reports against the Applicants, signed *in absentia* (i.e. without the Applicants present).

[6] The Applicants moved in August 2015, approximately 6 months after re-entering Canada. The Applicants did not notify any immigration authorities of this change of address and phone number. The Principal Applicant notes that the Officer did not impose any conditions to update their contact information.

[7] The evidence before the Court, including an affidavit from the Minister's Delegate, is that she made several attempts on behalf of CBSA to contact the Applicants to arrange for an interview. This would have provided an opportunity for the family to submit more information and any humanitarian and compassionate [H&C] submissions in response to the Reports.

[8] The Minister's Delegate has attested that she sent letters by regular mail to the Applicants, at the address provided, in both the spring and the fall of 2015. There are no copies of these two letters in the file. However, there is a copy of a letter sent by registered mail to the Applicants, dated November 23, 2015, to the address on file, which they had confirmed at the Examination, inviting them to attend an interview scheduled for December 10, 2015. While the record shows that this letter was delivered successfully to the address on file, the Applicants state they never received it, and they never attended this first scheduled interview.

[9] A second interview request letter was sent on February 21, 2016, also by registered mail, to the address on file. The Respondent has provided a copy of a Canada Post delivery confirmation showing that this letter was also successfully delivered to the intended address. The Minister's Delegate further attested that she attempted to phone the Applicants at the number they provided.

[10] In light of the various unsuccessful attempts to contact the Applicants, on May 24, 2016, the Minister's Delegate reviewed their file *in absentia*, as the Officer had done. She issued departure orders against them. The Minister's Delegate conveyed this decision in a letter dated May 24, 2016 [Decision], which was sent to the address on file. The letter informed the Applicants that the Minister's Delegate determined that they had not complied with the residency obligation under section 28 of *IRPA* and set out their right of appeal. The Applicants state that they did not receive this letter.

[11] In April 2017, the Principal Applicant submitted applications to renew the family's Permanent Residence cards online. On October 30, 2017, he received an email advising that his family had lost their Permanent Residence status and a removal order was in force against them. On November 30, 2017, the Principal Applicant met with a CBSA officer, who confirmed this information.

## II. Decision under review

[12] The Minister's Delegate issued Departure Orders with her Decision, determining that the Applicants had not complied with *IRPA*'s residency obligation to remain in Canada for at least

730 days in the five-year period in question (31 March 2010 to 26 February 2015). The Minister's Delegate added that she was unable to exercise discretion in reviewing the H&C considerations connected to the Applicants' personal circumstances since they failed to report for an interview.

## III. Issues and Standard of Review

[13] The sole issue under review is whether the Respondent breached procedural fairness by failing to provide the Applicants proper notice of the s. 44 report process and by issuing the departure orders *in absentia*. The correctness standard of review applies to issues of procedural fairness. In determining whether procedural fairness was respected, the key question is whether the applicant knew the case to meet and had a full and fair chance to respond (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54). I must, in short, be satisfied that the procedure was fair having regard to all of the circumstances.

## IV. Parties' Positions

[14] The Applicants submit that the Respondent failed to provide them with proper notice of the s. 44 process. They argue that the Officer failed to follow CBSA procedures in issuing the s. 44 report as outlined in *ENF 5: Writing 44(1) Reports.* They also argue that the Minister's Delegate breached their right to procedural fairness, in that she denied them an opportunity to participate in the proceedings, and/or to explain their extenuating/H&C circumstances, an opportunity which they contend has still has not been provided to them.

[15] The Applicants point out that if the Officer had placed reporting conditions on them, or if he had given the family a copy of the Reports – or any written direction – at the time of re-entry, they would then have had a positive duty to follow up with the Respondent. However, the Applicants argue that this was not the case.

[16] The Applicants claim that the procedures that the Officer undertook were deficient. The Applicants argue that they neither understood the s. 44 process, nor its consequences of a potential loss of status. They assert that the Officer should have made them stay at the airport while he completed the Reports, if he indeed knew he was going to issue them. The Applicants would then have received the Reports, and they would have understood the consequences and next steps.

[17] In addition, the Applicants claim that the Minister's Delegate abdicated her responsibilities by failing to undertake any genuine efforts to contact or locate them, and indeed waited nine months for her first attempt to do so. This, they claim, constituted undue delay. When they had not heard anything for six months, the Applicants state that they assumed no further action was being taken.

[18] The Applicants also maintain that the Minister's Delegate should have ensured that they duly received her letters, rather than "blindly" mailing them out. They also argue the Minister's Delegate should have ensured that her calls were answered, rather than simply trying to phone them without leaving any message. In short, simply sending off letters, even if by registered

mail, and trying to call without reaching anyone, did not constitute genuine attempts to contact them.

[19] The Respondent counters that there was no breach of procedural fairness. Rather, the Respondent posits that her officials took every opportunity to attempt to keep the Applicants apprised of the process, starting from the initial re-entry into Canada on February 26, 2015, through to various steps of the Minister's Delegate to set and reset the interview, through her phone calls and letters, including registered mail (twice), to the Applicants' last known address.

[20] In short, the Respondent contends that CBSA took all reasonable steps, consistent with its own procedures, to notify the Applicants and to provide them with an opportunity to respond. The Respondent argues that in the circumstances, the Applicants were given every opportunity to participate in the proceedings related to the s. 44 process.

[21] As for the information that the Applicants state they were not able to submit regarding extenuating circumstances that required them to return Pakistan, the Respondent notes that this information could have been – but was never – placed before the Officer, or anyone else at CBSA. It should therefore not be considered on judicial review.

## V. Analysis

[22] I begin by noting three principles regarding procedural fairness with respect to s. 44 decisions.

[23] First, while Applicants must be given the opportunity to make submissions and know the case against them (see also specifically in the s. 44 context, *Huang v Canada*, 2015 FC 28 at paras 84, 86; *Apolinario v Canada*, 2016 FC 1287 at para 38 [*Apolinario*]), there is a low degree of procedural fairness and participation in the issuance of s. 44 inadmissibility reports and s. 44(2) decisions (*Sharma v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at para 22 [*Sharma*]; *Canada (Minister of Public Safety and Emergency Preparedness) v Cha*, 2006 FCA 126 at para 52).

[24] Second, officers also have limited discretion when it comes to deciding whether or not to issue s. 44 reports. The duty of fairness does not require the transmission of an inadmissibility report before the Minister's Delegate's s. 44(2) review (see *Sharma* at para 52; *Hernandez v Canada*, 2005 FC 429 at para 72). ENF5, the relevant policy manual at the time of the Decision, only required that:

> Wherever possible, an officer who writes a report must also provide a copy of that report to the person concerned. The officer must make all reasonable efforts to locate this person, and all steps and actions taken to do so should be clearly indicated on the person's file. [Emphasis added]

[25] Third, while the Minister's Delegate has discretion to consider extenuating factors relating to H&C grounds, s/he has no obligation to do so (*Apolinario* at para. 44, *Melendez v Canada*, 2016 FC 1363 at para 34; *Kidd v Canada*, 2016 FC 1044 at paras 33-34).

[26] In this case, no breach of procedural fairness transpired under any of these three principles, or on any other basis. In fact, the evidence demonstrates that both the Officer and the Minister's Delegate acted fairly and reasonably in making their decisions.

*The Applicants' Actions*

[27] The Applicants were made aware upon their arrival in Canada on February 26, 2015 that they did not meet their *IRPA* residency obligation. Indeed, in the nearly five years since they first landed, they spent less than 30 days in Canada, having spent the intervening years in their native Pakistan.

[28] Regarding the 2015 Examination, the parties disagree about the exact words used, namely whether the Officer advised the Applicants that someone "would" or "may" be in touch with them. The Principal Applicant states in his affidavit: "Apparently in November 2015, CBSA started to try and contact me about issuing removal orders against me and my family, 9 months after we entered Canada". The Principal Applicant notes that his family moved from his sister's home in August 2015 because she sold it. The Applicants argue that based on their understanding of the Officer's comments at the Examination that CBSA "may" (rather than "would") be contacting them, they assumed CBSA had decided not to pursue anything further in their residency determination given the "significant" passage of time.

[29] Clearly, the parties disagree about the exact words used at the Examination. Ultimately, however, this is a distinction without a difference because it does not affect the conclusion that the process was fair. Whichever word the Officer in fact used, he clearly flagged the Applicants' non-compliance with *IRPA*'s residency requirements with them in his presence. Thus, to the extent that they were unaware of their non-compliance before their re-entry to Canada, the Officer confronted them with it. They were also asked for their current address and contact

information, which they never updated after their move. Failing to have provided their new contact information, they should have at minimum inquired into the status of their residency over the next 2.5 years.

[30] Apt in these circumstances is the trite and well-trodden adage that ignorance of the law is no excuse (see, for instance, *Clark v Ontario (Attorney General)*, 2019 ONCA 311 at para 33). Even had the Applicants not realized upon re-entry that less than 30 days residency in Canada would leave them well short of the 730 days required by *IRPA*'s subparagraph 28(2)(a)(i), they were asked if they wished to relinquish their status voluntarily and advised to complete the Questionnaire during the Examination. They knew then and there that they had a residency problem.

[31] The case law cited with the three principles above establishes a relaxed duty of fairness for subsection 44(1) and 44(2) decisions. Here, the Applicants were nonetheless given the opportunity to know the case against them, to be heard, and to make submissions. The Officer provided a clear explanation of the legal issue at the airport Examination. The Minister's Delegate later attempted to contact the Applicants on several occasions, and delayed her Decision for about 15 months. Failure to complete the Questionnaire, update their contacts, and/or provide extenuating H&C factors, lies squarely with the Applicants.

[32] Rather than proffering any information at the Examination – including why they stayed out of Canada almost the entire duration of their residency – the Applicants instead chose to leave the interview. This went against the Officer's recommendation, as did leaving without

completing the Questionnaire, of which Question #19 asked to provide "any H&C considerations that would justify the retention of your permanent resident status and overcome any breach of your residence obligation," including "relating to the best interests of any child."

[33] Once on notice, and having decided not to update the authorities, the Applicants became the authors of their own destiny. Had they wished to provide further input, they had ample opportunity to do so, including outlining any extenuating H&C factors that they felt might have impacted the ultimate decision.

[34] Finally, it should be noted that in order to facilitate the two-way transfer of information between the parties in these matters, which clearly is important to both sides in ensuring a fair process, case law has established that applicants have the onus to provide updated contact information, not the reverse. For correspondence sent "to an address (e-mail or otherwise) that has been provided by an applicant which has not been revoked or revised and where there has been no indication received that the communication may have failed, the risk of non-delivery rests with the applicant and not with the respondent" (*Kaur v Canada (Citizenship and Immigration)*, 2009 FC 935 at para 12). Once having proven that a letter was duly sent, an immigration officer does not have to ensure that each letter is received or opened by the Applicant (*Khan v Canada (Citizenship and Immigration)*, 2015 FC 503 at para 14; *Yang v Canada (Citizenship and Immigration)*, 2008 FC 124 at para 14).

[35] While *Kaur*, *Khan*, and *Yang* all arose in the context of permanent residency applications before visa officers, where none of those three applicants had yet obtained their status, here the

Applicants were Canadian permanent residents. In other words, they had more at stake and more to lose, having already obtained their status. Nonetheless, I find that the same principles of communication apply, given that the Applicants were made aware of the need for their contact information by the Officer. Failing to provide this updated information therefore subjected the Applicants to the risk of *in absentia* proceedings.

*The Officer's Actions*

[36] As mentioned above, the Applicants also claim that the Officer acted unfairly by failing to (i) place a reporting condition on them (to update their address) and (ii) force them to remain in Secondary until he had written up his s. 44(1) Report so he could provide it to them and ensure they understood the consequences.

[37] Neither argument can succeed. There is no requirement in the Act or policy that conditions should be imposed to require reporting of address changes. Rather, such a condition is an optional tool for officers in appropriate circumstances. The Applicants cannot claim to have been taken by surprise by the issuance of the s. 44(1) reports, given the Officer's request for their address so they could be reached.

[38] Further, there is no merit to the contention that the Officer should have kept them in Secondary until he completed his s. 44(1) report. Section 19(2) of the *IRPA* provides that "an officer shall allow a permanent resident to enter Canada if satisfied following an examination on their entry that they have that status." Once the Officer had determined that these were

permanent residents returning to Canada, against whom no final determination of a loss of residency had been made, who stated that they wished to terminate the Examination, and who provided contact information, they were free to leave.

*The Minister's Delegate's Actions*

[39] The Minister's Delegate took various steps to try to reach the Applicants before making her Decision to issue s. 44(2) departure orders. All efforts to contact them – including rescheduling the interview time – were unsuccessful. She made every reasonable effort to attempt to contact the Applicants to allow them to participate in the process. These attempts were only unsuccessful due to the Applicants' own failure to update their contact information.

[40] In light of these circumstances, it cannot be said that the Applicants were prevented from a full and fair chance to respond to the case against them. The onus still lay with the Applicants to facilitate contact, and to provide any input regarding H&C factors or extenuating circumstances.

[41] Finally, as the Respondent points out – in response to the Applicants' argument that they have never had the opportunity to make their H&C case – this does not accord with the Court's reasons in *Khan v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 66.

## VI. Certified question

[42] The Applicants propose that the following question should be certified:

> Are permanent residents who have failed to meet the 730 days residency requirement pursuant to section 28 of *IRPA*, obligated to update their contact information or somehow report themselves to the Respondent, absent any written information or direction from the Respondent?

[43] To qualify for certification, a question must transcend the parties' interest and be dispositive of the appeal (*Zazai v Canada (MCI),* 2004 FCA 89 at paras 11-12). The law raised in this case with respect to procedural fairness has been clearly established. Furthermore, the issues raised by the Applicants are highly fact-specific – namely what transpired during the Examination and what occurred in the 15 months that followed. Therefore, this case turns on the application of particular facts to well-established law. Accordingly, no serious question of general importance arises.

## VII. Conclusion

[44] This application for judicial review is dismissed. No question for certification arises.

**JUDGMENT in IMM-3554-18**

**THIS COURT'S JUDGMENT is that**:

1. This application for judicial review is dismissed.
2. No question will be certified.
3. There is no award of costs.

"A. Diner"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-3554-18 |
| **STYLE OF CAUSE:** | MUHAMMAD ARSHAD KHAN ET AL v. MPSEP |
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**APPEARANCES:**

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|---|---|
| Nancy Lam | FOR THE APPLICANTS |
| Laoura Christodoulides | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Nancy Lam | FOR THE APPLICANT |
| NL Immigration Law | |
| Laoura Christodoulides | FOR THE RESPONDENT |
| Department of Justice | |