Federal Court Cour fédérale

Date: 20200422

Docket: IMM-5511-18

Citation: 2020 FC 543

Ottawa, Ontario, April 22, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HANYING LUO
HUIMIN ZHOU

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of the Immigration Appeal Division ("IAD"), wherein the IAD overturned the visa officer's decision that the Respondents had not met their residency obligations. The IAD found that the Respondents were compliant with their obligations for permanent residency as prescribed under section 28 of the *Immigration and Refugee Protection*

Act, SC 2001, c 27 ("*IRPA*") and subsection 61(3) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*").

[2] Section 28 of the *IRPA* requires a Canadian permanent resident to be physically present in Canada for at least 730 days in the five-year period immediately prior to their application. However, the Respondents were only present in Canada for 78 days during the relevant period, as the Principal Respondent is a full-time employee of a Canadian company working in China.

[3] By decision dated October 25, 2018, the IAD found that the Respondents were in compliance with both subsection 28(2)(a)(iii) of the *IRPA* and subsection 61(3) of the *IRPR*, which allow compliance with the residency rules when the permanent resident works on a full-time basis for a Canadian business outside of Canada.

[4] The Applicant seeks to bring a judicial review of the IAD's decision. The Applicant submits that previous jurisprudence on subsection 61(3) of the *IRPR* has established that a worker employed by a Canadian company working outside of Canada is required to produce documentary evidence, which demonstrates that the employer is committed to reintegrating the employee back into the Canada-based parent company upon their return. Given that the Respondents failed to submit such evidence, the Applicant submits that the IAD ignored or misconstrued the evidence before it.

[5] For the following reasons, I find that the IAD's decision is unreasonable. This application for judicial review is allowed.

II. **Facts**

[6] Mr. Hanying Luo (the "Principal Respondent") and his wife Ms. Huimin Zhou (the "Associate Respondent") (collectively, the "Respondents") live in China. The Principal Respondent has worked as a customer care manager for Canada Optimal Nature Inc. ("CON Inc.") since April 1, 2013. CON Inc. is a Canadian company that exports ginseng and other health products grown or produced in Canada to China. CON Inc. was incorporated in Ontario, and as of 2017, they employed 32 individuals. The company is owned by the Respondents' former son-in-law.

[7] The Principal Respondent's work included destroying CON Inc.'s products that were returned by customers in China who had purchased the company's products from Canada. The Principal Respondent destroyed the products in order to avoid Health Canada regulations, and prevent the products from being returned to Canada. The Principal Respondent's offer of employment stated that he would be required to work 40 hours a week, and did not list a termination date. The contract did not indicate that the Principal Respondent would be returning to a position with the parent company in Canada.

[8] In the five-year period preceding the Respondents' travel application dated September 27, 2017, the Respondents had only spent 78 days physically present in Canada.

[9] On January 18, 2018, a visa officer determined that the Respondents had failed to comply with the requirements as set out in subsection 28(2)(iii) of the *IRPA*, i.e. to have a minimum of

730 days of residency in the preceding five-year period outside of Canada employed on a full-time basis by a Canadian business. The visa officer also found that the Principal Respondent did not comply with subsection 61(3) of the *IRPR*, as he had failed to file any evidence that his work in China was temporary and that he would have a position with the parent company when he returned to Canada.

[10] The Respondents appealed the visa officer's decision to the IAD, and a hearing was held on October 19, 2018. The Principal Respondent testified by phone from China, and his employer testified by telephone from Canada.

[11] At the IAD hearing, the Principal Respondent testified that he had last worked more than a month ago; that he had worked around 100 days in the last year; and that he averaged between 60 and 70 days of work in the preceding years. The Principal Respondent also testified that he planned to continue working in China until his employer no longer needed him, at which point the Respondents planned to return to Canada to live with their daughter.

[12] At the hearing, the Minister's counsel noted that his questioning would be brief as it was rather clear that the Principal Respondent was not working full-time and that his employment in China was not a temporary assignment.

[13] The employer testified that he considered the Principal Respondent to be employed on a full-time basis, and equated the situation to an IT employee who is kept on standby on a full-time basis even if their work may not be needed for a full 40 hours a week. The employer also

testified that he considered the position in China to be ongoing, and that he had never discussed plans for the Principal Respondent to return to Canada or to continue working in China. The employer was unaware that the Principal Respondent had been trying to retain his permanent residency so that he could return to Canada in the future.

[14] Before the IAD, the Applicant submitted that the Principal Respondent's work in China met neither the full-time nor the assignment requirements set out in subsection 61(3) of the *IRPR*.

[15] However, the IAD found that the Principal Respondent complied with the residency obligations of a permanent resident by virtue of being an employee of a Canadian business on assignment in China.

III. **Relevant Provisions**

[16] Subsections 28(1) and 28(2) of the *IRPA* read as follows:

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

(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

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

(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:
>
> […]

[…]

(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,

[…]

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

[…]

[17] Subsection 61(3) of the *IRPR* reads as follows:

61 (3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression "employed on a full-time basis by a Canadian business or in the public service of Canada or of a province" means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the employment or contract to:

(a) a position outside Canada;

(b) an affiliated enterprise outside Canada; or

(c) a client of the Canadian business or the public service outside Canada.

[…]

61 (3) Pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi respectivement, les expressions « travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale » et « travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale », à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat d'une entreprise canadienne ou de l'administration publique, fédérale ou provinciale, et est affecté à temps plein, au titre de son emploi ou du contrat de fourniture:

a) soit à un poste à l'extérieur du Canada;

b) soit à une entreprise affiliée se trouvant à l'extérieur du Canada;

c) soit à un client de l'entreprise canadienne ou de l'administration publique se trouvant à l'extérieur du Canada.

[…]

IV. **Issue and Standard of Review**

[18] The sole issue on this judicial review is whether the IAD ignored or misconstrued the evidence before it with regard to the “assignment” of the Principal Respondent pursuant to the requirements under subsection 61(3) of the *IRPR*, and in particular whether his employer intended the Principal Respondent to return to the parent company in Canada after his assignment in China.

[19] Prior to the Supreme Court’s recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the standard of review on the IAD’s assessment and interpretation of residency obligations pursuant to the *IRPA* and the *IRPR* is reasonableness: *He v Canada (Citizenship and Immigration)*, 2018 FC 457 (CanLII) [*He*] at para 18; *Wei v Canada (Citizenship and Immigration)*, 2012 FC 1084 (CanLII) [*Wei*] at para 37; *Canada (Citizenship and Immigration) v Jiang*, 2011 FC 349 (CanLII) [*Jiang*] at paras 29-31. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[20] As noted by the majority in *Vavilov*, “a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker,” (*Vavilov* at para 85). Furthermore, “the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency,” (*Vavilov* at para 100).

V. **Analysis**

[21] The Applicant submits that the Principal Respondent bears the burden of submitting clear and cogent evidence that he was employed outside of Canada pursuant to subsection 61(3) of the *IRPR*. The Applicant submits that the Principal Respondent failed to present any such documentary evidence (*Durve v Canada (Citizenship and Immigration)*, 2014 FC 874 (CanLII) at para 66).

[22] The Applicant argues that the IAD unreasonably shifted this burden from the Respondents onto the Minister. Regarding the requirements of “assignment”, the Applicant submits that the IAD erred by failing to follow the established jurisprudence. Specifically, the Applicant submits that the IAD erred by stating there was no evidence that the Principal Respondent’s employer planned to employ the Principal Respondent when he returned from China, but subsequently concluding that the employer’s favourable testimony regarding his employee’s work was sufficient to meet the requirements of subsection 63(1) of the *IRPR*. The Applicant points out that the employer testified that he had never discussed any plans for the Principal Respondent to return to Canada.

[23] The Respondents submit that the IAD’s reasons were reasonable and that “there were not enough obstacles in the overall evidence” to find that the Respondents were non-compliant with their permanent residency obligations. The Respondents further submit that, based on the evidence, it was reasonable for the IAD to conclude that there would be a position for the Principal Respondent in Canada when he returned. Specifically, the Respondents point to the

employer's letter and testimony about the Principal Respondent's reliability and trustworthiness as a strong basis for the IAD to infer that there would be an opportunity for the Principal Respondent upon his return to Canada.

[24] In my view, the IAD erred by ignoring or misconstruing the evidence before it with regard to the "assignment" of the Principal Respondent. In previous jurisprudence, this Court has repeatedly found that the term "assigned" in subsection 61(3) of the *IRPR* requires that two elements be fulfilled:

a) The employee works full-time on a temporary basis outside of Canada; and

b) The employee will continue to work for their employer in Canada once they complete their overseas assignment.

[25] Although this second element of the test is admittedly not apparent upon a plain reading of the provision, the Court has analysed subsection 61(3) of the *IRPR* several times—and has consistently concluded that in order to maintain permanent residency, an employee must return to Canada when they complete their overseas assignment. This Court's decision in *He* at paragraph 25, which references several other cases, including *Wei*, *Jiang*, and *Bi v Canada (Citizenship and Immigration)*, 2012 FC 293 (CanLII), is unequivocal on this point (emphasis added):

> In *Wei v Canada (Citizenship and Immigration)*, 2012 FC 1084 at para 53 [*Wei*], Justice O'Keefe held that *Jiang* and *Bi* "indicate that the concept of assignment in subsection 61(3) of the Regulations requires that the employee return to work for his or her employer

> in Canada following the assignment." He went on to hold that it was reasonable for the IAD to conclude that there was no "assignment" as required by s 61(3) of the *Regulations* because there was no job available for the applicant to return to in Canada. See *Wei*, above, at para 60. And in *Xi v Canada (Citizenship and Immigration)*, 2013 FC 796 [*Xi*], the IAD found that the applicant failed to show that his assignment was temporary. The IAD noted that his employment contract did not indicate that the employment outside Canada would be temporary; nor was there an indication that there was a position to promote him to in Canada. Justice Shore held that "[t]he question at issue under subsection 61(3) is the temporary character of the principal Applicant's employment outside Canada" and that it was reasonable for the IAD to conclude that the applicant was not "assigned" to his position.

[26] The case law also provides clarity that interpreting subsection 61(3) of the *IRPR* in such a way takes into account Parliament's overall intention to allow permanent residents to accumulate days in Canada while they work overseas for a Canadian company. As this Court wrote in *Baraily v Canada (Citizenship and Immigration)*, 2014 FC 460 (CanLII) [*Baraily*] at para 25:

> The Court disagrees with the Applicants' assertion that subsection 61(3) of the *Regulations* allows permanent residents to accumulate days towards meeting their residency requirement simply by being hired on a full-time basis by a Canadian business outside of Canada. To accept such an interpretation of subsection 61(3) would be inconsistent with the objective set forth in paragraph 3(1)(e) of the *IRPA* "to promote the successful integration of permanent residents into Canada". It would hardly promote "successful integration" of permanent residents into Canada if the *IRPA* exempted immigrants from having to establish themselves in Canada on the sole basis that they work for a Canadian company abroad. Clearly, Parliament's intent in imposing the 5-year residency obligation was to prevent these types of situations. This intent is further evidenced by the addition of subsection 61(2) in the *Regulations*, which excludes businesses that serve primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada from the definition of a "Canadian Business" under subsection 61(1). The Applicants' interpretation would also arguably be inconsistent with the objective set forth in paragraph 3(1)(a) of the *IRPA* "to permit

> Canada to pursue the maximum social, cultural and economic benefits of immigration".

[27] As such, I am not persuaded by the Respondents' submission that it was reasonable for the IAD to conclude that there would be a position for the Principal Respondent in Canada when he returned. The evidence on the record does not indicate the employer's intentions to reintegrate the Principal Respondent into its Canadian operations, nor is it apparent that the Principal Respondent's work would be necessary in Canada, given the specific nature of his stated duties in China, i.e. destroying returned products in China to meet Canadian regulations and to avoid shipping products back to Canada.

[28] The jurisprudence establishes that there must be more than a mere "possibility" or "some assurances" that an employee will be reintegrated into Canadian-based operations in order to meet the criteria set out in subsection 61(3) of the *IRPA* (*He* at paras 39-40; *Baraily* at paras 26-27). As the Court indicates in *Baraily* at para 28, an individual's choice to work for a company that requires them to work exclusively outside of Canada may result in developing admittedly weak ties to Canada, which are insufficient to meet the requirements of the *IRPA* and puts the individual at risk of failing to meet the permanent residency requirements. The Court reiterates this position in *Wei* as well (See *Wei* at paras 58-60).

[29] Therefore, in my view, the IAD erred by drawing inferences from the evidence to establish that the Principal Respondent satisfied the requirements of permanent residency under subsection 61(3) of the *IRPR*. Such inferences were insufficient. I disagree with the Respondents' submission that the nature of the assignment is "only but one consideration in the

totality of the evidence" in the IAD's consideration of the evidence. The jurisprudence is clear that evidence concerning the employer's intentions—to provide a continuing employment opportunity once the employee returns to Canada—is a key element in assessing permanent residency for individuals who work abroad. Although the Respondents may have held true intentions of returning back to Canada after a period of working abroad, unfortunately there is no such evidence on record.

[30] Therefore, I find that the IAD's decision is unreasonable.

VI. **Certified Question**

[31] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[32] The IAD misconstrued the evidence with regard to the "assignment" of the Principal Respondent pursuant to the requirements under subsection 61(3) of the *IRPR*. There was insufficient evidence to indicate that the Principal Respondent's employer planned to continue employing the Principal Respondent upon his return to Canada.

[33] The IAD's decision is unreasonable. This application for judicial review is allowed.

JUDGMENT in IMM-5511-18

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter is to be returned for redetermination by a different decision-maker.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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