Federal Court Cour fédérale

Date: 20201104

Docket: IMM-3631-19

Citation: 2020 FC 1028

Ottawa, Ontario, November 4, 2020

PRESENT: Mr. Justice McHaffie

BETWEEN:

JING YU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Jing Yu came to Canada in 2007 as a permanent resident under the skilled worker program. As a permanent resident, she had an obligation under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], to be physically present in Canada for 730 days in every five-year period. Ms. Yu had complied with that residency obligation in 2012 when she applied for Canadian citizenship. However, when she was invited to attend a hearing with a citizenship judge in 2016, she had been living in China for almost five years, having returned there in 2011

to care for her father, who had suffered a stroke. She was therefore found inadmissible to Canada under paragraph 41(*b*) of the *IRPA* for non-compliance with the residency requirement and was ordered removed from Canada. As a result of this removal order, her citizenship application was refused in accordance with paragraph 5(1)(*f*) of the *IRPA*.

[2] Ms. Yu appealed the removal order to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board and raised humanitarian and compassionate (H&C) grounds. On this application for judicial review, Ms. Yu argues that the IAD's dismissal of her appeal was unreasonable.

[3] I conclude that the IAD's decision was reasonable. Contrary to Ms. Yu's submission, the IAD did not limit its consideration to her non-compliance with the residency obligation to the exclusion of other factors. Rather, the IAD reasonably considered the various factors relevant to determining residency obligation appeals on H&C grounds, and the evidence and arguments put forward by Ms. Yu. While Ms. Yu raised a number of considerations that supported her application, this does not mean that the IAD was obliged to accept that those factors outweighed the considerable shortfall in compliance with the residency obligation. In particular, while the length of time it took to process Ms. Yu's citizenship application certainly affected her situation and her compliance with the residency obligation, I do not accept Ms. Yu's contention that it was an abuse of power or was otherwise unlawful. Nor was it unreasonable for the IAD not to accept the processing delay as a significant H&C consideration in favour of Ms. Yu's appeal.

[4] As to Ms. Yu's other arguments, I do not find that the IAD's reasons demonstrate a lack of the sensitivity and compassion needed for a proper H&C assessment. I also do not agree with Ms. Yu that the minor errors she pointed to in the decision affected the result or rendered the decision as a whole unreliable or unreasonable.

[5] The application for judicial review is therefore dismissed.

II. Issues and Standard of Review

[6] The primary issue on this application for judicial review is whether the IAD erred in refusing Ms. Yu's appeal of her removal order on H&C grounds. Ms. Yu raises a number of challenges to the IAD's decision, which collectively raise the following three questions:

A. Did the H&C officer fail to appropriately assess the relevant facts and H&C factors, and effectively ignore all of the factors except her non-compliance with the residency obligation?

B. Did the IAD's decision show a lack of sympathy or sensitivity and therefore fail to apply the requisite approach to H&C assessments?

C. Do certain errors in the decision show the IAD's assessment to be not credible or unreasonable?

[7] At the hearing of this application for judicial review, Ms. Yu also argued she was denied procedural fairness by not receiving a hearing before a citizenship judge in order to show compliance with the residency requirement. However, this argument does not speak to the reasonableness or fairness of the IAD's decision and amounts to a challenge to the refusal of her

citizenship application rather than her appeal of the removal order. Ms. Yu brought a separate application for leave and judicial review of the refusal of her citizenship application, in respect of which leave to appeal was denied by this Court: Court File No T-1299-16 (October 18, 2016). This argument is therefore not properly before the Court on this application and will not be considered further.

[8] The IAD's determinations on H&C assessments are reviewable on the reasonableness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25. When conducting reasonableness review, the Court begins its inquiry by examining the reasons given by an administrative decision maker with "respectful attention" and seeking to understand the reasoning process they followed: *Vavilov* at para 84. The Court must assess whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision: *Vavilov* at paras 87, 99. The factual constraints include the evidence before the decision maker, which must be reasonably reviewed and considered: *Vavilov* at paras 125–126. The legal constraints include the governing statutory scheme and binding precedent that interprets it: *Vavilov* at paras 108–114.

[9] A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the administrative setting, the record before the decision maker, and the submissions of the parties: *Vavilov* at paras 81, 85, 91, 94–96, 99, 127–128. For the reasons below, I conclude that the IAD's decision meets this standard.

III. Analysis

A. *The IAD Gave Proper Consideration to all Relevant Facts and Factors*

[10] To allow an appeal or stay a removal order on H&C grounds, the IAD must be satisfied that "sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case": *IRPA*, ss 67(1)(*c*), 68(1). In making this assessment, the IAD must consider the best interests of any child directly affected by the decision (BIOC), and generally considers the non-exhaustive list of factors set out in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) at para 14. In the context of residency obligation appeals, these factors were reformulated and restated in *Ambat v Canada (Citizenship and Immigration)*, 2010 CanLII 80733 (CA IRB) at para 38, aff'd 2011 FC 292 at para 27. The factors as identified in *Ambat* are:

> (i) the extent of the non-compliance with the residency obligation;
>
> (ii) the reasons for the departure and stay abroad;
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> (iii) the degree of establishment in Canada, initially and at the time of hearing;
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> (iv) family ties to Canada;
>
> (v) whether attempts to return to Canada were made at the first opportunity;
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> (vi) hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;
>
> (vii) hardship to the appellant if removed from or refused admissions to Canada; and
>
> (viii) whether there are other unique or special circumstances that merit special relief.

[11] As Justice Southcott noted recently in *Shaheen*, the use of these factors does not detract from the general principles set out in *Kanthasamy* regarding the granting of H&C relief: *Shaheen v Canada (Citizenship and Immigration)*, 2019 FC 1328 at paras 28–30; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13–15. These general principles recognize that H&C relief functions to mitigate the rigidity of the law in an appropriate case, but is not designed to create an alternative immigration scheme: *Kanthasamy* at paras 15, 23.

[12] The IAD in the present case set out the list of factors enunciated in *Ambat*. It recognized that the list was non-exhaustive, and that the final "unique or special circumstances" factor could include consideration of "any other relevant factual circumstances."

[13] I agree with Ms. Yu that the assessment of these factors must go beyond simply citing them, and must involve duly and reasonably considering the relevant factors and assessing the weight to be given to them in the particular case. However, in my view, the IAD conducted such an analysis. Ms. Yu argues that the IAD only gave real weight to the first factor, the extent of non-compliance. She argues that the remaining factors all speak in her favour and should have outweighed the first. For the reasons that follow, I disagree.

[14] Ms. Yu's request for relief based on H&C considerations arose from the fact that she had not complied with the residency obligations imposed on all permanent residents by section 28 of the *IRPA*. That section requires permanent residents to be physically present in Canada for 730 days in each five-year period (with certain qualifications and exceptions not relevant here):

Residency obligation	**Obligation de résidence**
28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	**28 (1)** L’obligation de résidence est applicable à chaque période quinquennale.
Application	**Application**
(2) The following provisions govern the residency obligation under subsection (1):	**(2)** Les dispositions suivantes régissent l’obligation de résidence :
(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	**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) physically present in Canada,	**(i)** il est effectivement présent au Canada,
[…]	[…]
(b) it is sufficient for a permanent resident to demonstrate at examination […] **(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;	**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;
[Emphasis added; irrelevant sub-paragraphs omitted]	[Je souligne; dispositions non-pertinentes omises.]

[15] The residency assessment was undertaken after Ms. Yu returned to Canada for her hearing with a citizenship judge in May 2016. Ms. Yu does not dispute that during the relevant five-year period from May 2011 to May 2016, she was in Canada for a total of approximately 146 days, a significant shortfall on the 730-day requirement.

[16] The inclusion of the “extent of the non-compliance with the residency obligation” as a factor in the H&C assessment recognizes that, as a general rule, the greater the non-compliance, the more this factor will tend to weigh against granting H&C relief, and the more compelling other H&C factors will need to be to warrant H&C relief. The IAD has the discretion to weigh each factor depending on the circumstances, and this Court’s role is not to engage in a reweighing of the factors: *Ambat (FC)* at para 32; *Vavilov* at para 125.

[17] The IAD considered the reasons that Ms. Yu presented for her departure and stay abroad, namely her return to China to care for her father, who had suffered a stroke. The reason Ms. Yu remained in China for nearly five years was in part that she was unaware of her continuing obligation to meet the residency requirement. The IAD considered these reasons jointly, assessing the circumstances of her father’s health and the extent to which his illness required Ms. Yu to be outside Canada. The IAD found that her father was no longer critically ill, and that Ms. Yu’s presence was not a matter of necessity.

[18] There is no question that caring for ailing or elderly family members is an important role that can be a material H&C consideration in assessing whether relief ought to be granted from the residency obligation. However, as with any H&C factor, the specific circumstances of the

applicant, including the nature of the caring responsibility and the extent to which it necessitated or explained the shortfall in the residency obligation, must be evaluated. The IAD's assessment that Ms. Yu's "desire to spend time with her parents is understandable after her father's stroke, but the length of her stay is not justified in the circumstances," was a reasonable one in the circumstances. Ms. Yu's arguments about the IAD's characterizations of her role and that of other family members amount to asking this Court to interfere with factual findings by the IAD that were supported by the record. This is not the Court's role on judicial review: *Vavilov* at para 125.

[19] The IAD also noted that Ms. Yu had made little effort to return to Canada to comply with her residency obligation. It was reasonable for the IAD to conclude that Ms. Yu's misunderstanding of the residency obligation did not mitigate her absence. This Court has on a number of occasions reiterated that it is incumbent on applicants to know their obligations and rights under the *IRPA*, including in respect of the residency obligation: *El Assadi v Canada (Citizenship and Immigration)*, 2014 FC 58 at para 55; *Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at paras 27–28.

[20] Contrary to Ms. Yu's submissions, the IAD did not ignore or fail to weigh the reasons for her departure and extended stay outside Canada. The IAD engaged in a detailed assessment of this factor, including the extent to which the health of her father required her to be outside Canada. The fact that the IAD did not find this to be a factor that justified Ms. Yu's lengthy absence does not mean that the factor was not considered and weighed.

[21] Similarly, the IAD considered and weighed Ms. Yu's degree of establishment both before her departure and at the time of the hearing. The IAD considered the various elements of Ms. Yu's establishment, including the length of time she had spent in Canada and her activities and circumstances before her departure for China and after her return. The IAD concluded that Ms. Yu's establishment was "a positive factor even though it is somewhat superficial for a skilled worker and a permanent resident of Canada of twelve years." Again, I find nothing unreasonable in this conclusion and find that it belies Ms. Yu's contention that the IAD failed to consider or assess factors other than the extent of the shortfall in the residency obligation. While Ms. Yu provided detailed counts of the number of days that she spent in Canada both before and after the five-year period, the time spent in Canada outside the relevant five-year period is simply one aspect for consideration by the IAD in the context of assessing establishment and whether H&C relief is warranted.

[22] Ms. Yu argues that the IAD did not give adequate consideration to the fact that the delay in processing her citizenship application was a major reason for her non-compliance with the residency obligation. Ms. Yu argues that the nearly four years between her application in July 2012 and her convocation for a hearing with a citizenship judge in May 2016 amounted to an unreasonable, arbitrary, and abusive delay, and that it constituted an abuse of her rights and a violation of the law. She says that if the citizenship hearing had been convoked within a reasonable time, she would have complied with the residency obligation and would be a citizen, which would have allowed her to remain in China indefinitely. She argues it was unreasonable for the IAD to ignore what she says was the "root cause" of the non-compliance.

[23] The IAD considered this issue, citing Justice Annis' observation that "[t]he applicant cannot reasonably cite delays in the administrative process to explain her own failure to comply with her residency obligation": *Nassif v Canada (Citizenship and Immigration)*, 2018 FC 873 at para 32. The *Citizenship Act* provides no fixed period in which the processing of a citizenship application must occur: *Citizenship Act*, RSC 1985, c C-29, ss 5, 12, 13, 14. If an applicant considers that there has been undue delay in processing, they may seek an order of *mandamus* from this Court: *Torres Victoria v Canada (Citizenship and Immigration)*, 2006 FC 857 at para 37. However, there are no grounds before me to conclude that the delay in processing Ms. Yu's application, long as it may have been, was arbitrary or abusive, or violated the *Citizenship Act* or Ms. Yu's rights as she contends. Further, as neither an application for citizenship nor a delay in processing the application suspends the residency obligation, the mere timing of a citizenship application cannot in itself justify non-compliance with the residency obligation.

[24] Ms. Yu seeks to distinguish *Nassif* on its facts. Notably, she argues that unlike Mr. Nassif, she returned to Canada to live for almost three years at "her first opportunity," namely after receiving notice of her citizenship hearing. I cannot accept this as a point of distinction for two reasons. First, given the IAD's factual findings regarding Ms. Yu's ability to leave China despite her father's illness, it cannot be said that Ms. Yu left China and returned to Canada at "her first opportunity." Rather, she returned to Canada when she mistakenly believed she was first required to. Second, regardless of the extent of subsequent establishment, the issue remains the extent to which non-compliance can be considered "caused by" an administrative delay or can be justified by that delay. Thus while the outcome in *Nassif* certainly cannot dictate

the outcome in Ms. Yu's case, as each H&C case will depend on the particular factors and circumstances, the principle in *Nassif* remains relevant in considering the question of whether and to what extent a delay in processing a citizenship application is a relevant H&C consideration.

[25] Ms. Yu's argument is effectively that since she would have satisfied the residency obligation if her application had been processed in what she considered to be a reasonable time, this ought to be a strong enough H&C consideration that she should be relieved of her failure to meet the residency obligation. However, even if *Nassif* does not go so far as to preclude processing delay from ever being a relevant H&C circumstance, there was no evidence in this case that the delay was either beyond usual or expected processing times, or that the delay prevented Ms. Yu from returning to Canada to ensure that she satisfied her obligations. To accept Ms. Yu's contention that the delay in her citizenship application was the root cause of her non-compliance and that this ought to be determinative of her H&C application would effectively write in to section 28 of the *IRPA* an exception to the residency obligation that is not found there. In the circumstances, I cannot conclude that the IAD's assessment that the processing delay was not a material consideration was unreasonable.

[26] In addition to the foregoing factors, the IAD considered the hardship that would be caused to Ms. Yu, personally and financially, if removed to China. The IAD noted that Ms. Yu had become engaged to a Canadian, and that the couple was expecting a child, who would be Canadian regardless of where they were born. The IAD considered the financial situation of the family and the availability of other methods to keep the family together in China or Canada,

including through potential visas and/or spousal sponsorship. Again, I find that the IAD assessed these factors reasonably, ultimately concluding that the absence of significant hardship was a negative factor.

[27] Finally, the IAD considered the best interests of Ms. Yu's unborn child and concluded this factor did not weigh in favour of staying the removal order. The Minister argues that the IAD should not have done so, relying on the Supreme Court's recognition that a fetus is not a legal person: *Winnipeg Child and Family Services (Northwest Area) v G(DF)*, [1997] 3 SCR 925 at paras 15–16. I need not decide this issue, as Ms. Yu had the benefit of this assessment and nonetheless the IAD concluded that H&C relief was not warranted, so the Minister's argument would not affect the outcome of the application. I note, however, that I consider persuasive the reasoning of Justice Barnes of this Court in *Kaur v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 549 at para 5.

[28] Overall, the IAD found that there were positive factors in Ms. Yu's situation, notably her initial and current establishment. However, the IAD found that in the overall balancing, the important breach of the residency obligation outweighed the positive factors, and that there were not sufficient H&C considerations to warrant special relief. I cannot accept Ms. Yu's argument that this conclusion effectively means that non-compliance was the only factor considered, or that other factors were ignored. Essentially, Ms. Yu's argument is that the IAD ought to have weighed the factors differently and that in her circumstances, there was only one reasonable outcome, namely granting relief. I cannot agree. The existence of positive factors does not dictate a particular outcome in an H&C application. While an applicant will invariably consider

that the positive factors in their case ought to outweigh any negative ones, the IAD is tasked by Parliament to undertake its own independent weighing process and reach a conclusion as to whether the factors justify discretionary H&C relief in the particular case. Absent unreasonableness in that assessment, this Court is not to substitute its own assessment of that balancing: *Ambat (FC)* at para 32; *Vavilov* at paras 108, 125.

B. *The IAD Did Not Display an Inadequate Degree of Sensitivity*

[29] Ms. Yu argues that the IAD's decision showed an absence of sympathy or sensitivity. This Court has recognized that an H&C determination may be unreasonable if it demonstrates a lack of sensitivity to an applicant's circumstances: *Tosunovska v Canada (Citizenship and Immigration)*, 2017 FC 1072 at para 21.

[30] In addition to referring to the IAD's reasons as a whole, Ms. Yu points to two passages as showing a lack of sensitivity. First, she criticizes the IAD's statement that she "has family in China, she is employable there, and she had been there happily for almost five years before she returned." Ms. Yu states that she was looking after her father who had had a stroke, and suffering the stress of awaiting citizenship. In these circumstances, she argues that describing her situation as "happy" shows a lack of sympathy or sensitivity. I cannot agree. In context, the IAD was considering the degree of hardship she would face if required to return to China, and appears to use the term "happily" to mean something akin to "willingly" or "without significant hardship." I do not take the IAD to have been concluding that Ms. Yu was happy in her circumstances, in respect of either her father's illness or her presence in China. In any event, while the choice of word may have been infelicitous, to seize on the word in the context of the reasons as a whole

would run contrary to the Supreme Court of Canada's instruction that reasonableness review is not a "line-by-line treasure hunt for error" in which a "minor misstep" is cause to set aside a decision: *Vavilov* at paras 100, 102.

[31] Similarly, I see no insensitivity in the IAD's assessment of the potential hardship arising from the loss of Ms. Yu's recent employment at a law office in Canada. The IAD noted that "there is no evidence that the absence of this revenue will cause serious hardship to anyone." Ms. Yu argues that her revenue came from her hard work and should have been respected, rather than simply dismissed by the IAD. In my view, Ms. Yu is imputing to the IAD an assessment that is not seen in the decision. The IAD did not disdain Ms. Yu's position or the revenue earned from it. To the contrary, the IAD recognized her new position as part of her establishment in Canada that was recognized as a positive factor. The recognition that loss of this position would not cause a serious financial hardship, in making an assessment of the hardship that would be suffered if H&C relief is not granted (one of the *Ambat* factors) does not show insensitivity, even if Ms. Yu would have preferred for her employment to weigh more positively in her favour.

[32] Having reviewed the decision as a whole, I cannot conclude that it shows insensitivity to Ms. Yu's circumstances.

C. *Errors in the IAD's Reasons Do Not Undermine the Reasonableness of the Decision*

[33] Ms. Yu argues that several errors contained in the IAD's decision show that it is unreliable, and demonstrate how little attention was paid to her circumstances and to the extensive evidence she submitted. She points to three errors in particular.

[34] First, she notes that the IAD referred to her as a "Chinese citizen of 42 years," while she was actually 44 years old at the time of the decision. This minor error, whether based on a miscalculation or a typographical error, has no impact at all on the IAD's decision. It in no way undermines the reasonableness of the IAD's conclusions, nor suggests that the IAD failed to examine the evidence.

[35] Similarly, Ms. Yu points to the IAD's statement that she was a "university student from 2007 to 2011." Ms. Yu notes that while she took some short-term training in 2007 about starting a business, she in fact did not enrol at McGill University until the fall of 2009. Again, I cannot accept that this difference in any way affected the IAD's assessment. It might have been more accurate for the IAD to repeat, as it did elsewhere, that Ms. Yu "began taking courses as soon as October 2007," rather than that she was a "university student." However, the IAD was assessing Ms. Yu's establishment before her departure, concluding that in the 2007 to 2011 period, she had demonstrated establishment as a student, with limited evidence of her search for employment. Whether this was as a university student, or simply taking training courses, is immaterial. In any case, the IAD reasonably concluded that Ms. Yu's establishment was a positive factor in her H&C assessment, such that any error cannot have weighed against Ms. Yu. I cannot conclude that it shows the decision as a whole to be unreliable or unreasonable.

[36] Finally, Ms. Yu states that the IAD was wrong to suggest she could "be in Canada on a super visa," which would allow the family to be together. The "super visa" is a multi-entry visa that allows parents or grandparents of a Canadian citizen to visit Canada for periods up to 2 years at a time. Ms. Yu argues she is not eligible for the program and that the reference to it showed

the IAD lacked the expertise in immigration matters that it required to make a reasonable decision. Neither party submitted program information or arguments regarding Ms. Yu's eligibility for such a visa. In any case, I do not find Ms. Yu's eligibility for a super visa determinative of the reasonableness of the decision. The IAD was considering the hardship that would arise from the refusal of Ms. Yu's application, highlighting other ways she might visit Canada to be with her fiancé. Even if Ms. Yu is ineligible for a super visa in particular, the IAD's conclusion was simply based on the existence of other avenues under the *IRPA* that could allow the family to be reunited. In other words, I cannot conclude that the inclusion of the word "super," even if erroneous, renders the analysis or the decision unreasonable.

[37] Ms. Yu's attempt to rely on insignificant errors to create an aura of unreliability and unreasonableness in the IAD's decision is wholly unconvincing. As the Supreme Court reiterated in *Vavilov*, a reviewing court must consider the administrative context in which a decision is issued and "bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection": *Vavilov* at para 91; see also *Miranda v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 437 (TD) at paras 3–5. Ms. Yu's arguments ask this Court to apply a standard of perfection that is not warranted.

IV. Conclusion

[38] The IAD undertook a reasoned and complete assessment of the applicable H&C factors, applying an appropriate framework and assessing the circumstances of Ms. Yu's case. While Ms. Yu considers that her positive factors ought to outweigh her non-compliance with the

residency obligation, the fact that a different outcome might be reached is not a basis to conclude that a decision is unreasonable.

[39] The application for judicial review is therefore dismissed.

[40] Neither party proposed a question for certification. I agree that none arises in the matter.

[41] Lastly, with the consent of Ms. Yu, and in accordance with subsection 4(1) of the *IRPA* and subsection 5(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection* Rules, SOR/93-22, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

JUDGMENT IN IMM-3631-19

THIS COURT'S JUDGMENT is that

1. The style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.
2. The application for judicial review is dismissed.

"Nicholas McHaffie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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