Federal Court  Cour fédérale

Date: 20210608

Docket: IMM-7555-19

Citation: 2021 FC 564

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 8, 2021

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

FIRAS BOUZGARROU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Firas Bouzgarrou is seeking judicial review of the decision of the Immigration Appeal Division (IAD) rendered on November 26, 2019, dismissing his appeal against a removal order. The IAD concluded that humanitarian and compassionate grounds were not sufficient to warrant special relief and that, as a result, the applicant had lost his permanent resident status for failure

to comply with his residency obligation under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] Given the deference that the Court must give to the IAD on humanitarian and compassionate grounds and the highly discretionary nature of such decisions, Mr. Bouzgarrou has not demonstrated a reviewable error that would justify the Court's intervention. The IAD has weighed the relevant humanitarian and compassionate considerations against the evidence and legal constraints affecting its decision. I therefore conclude that this application for judicial review will be dismissed.

I. Background

[3] Mr. Bouzgarrou is a citizen of Tunisia. He is married and has a seven-year-old daughter. His wife and daughter reside in Tunisia.

[4] Mr. Bouzgarrou was granted permanent residence in Canada as a skilled worker on April 28, 2014. Eight days later, he left Canada to be reunited with his wife, who had told him, one month before his arrival in Canada, that she was pregnant. The applicant stated that he remained in Tunisia because of his daughter's medical condition, his father-in-law's cancer diagnosis, and his wife's depression and grief following the death of her father.

[5] Mr. Bouzgarrou returned to Canada on August 8, 2018, and a Canada Border Services Agency officer issued a removal order. The officer found that Mr. Bouzgarrou had not been present in Canada for at least 730 days since April 28, 2014, as the relevant five-year period had

not yet ended. He had only been present in Canada a total of 273 days leading up to his return. Mr. Bouzgarrou has therefore not complied with his residency obligation under section 28 of the IRPA.

[6] On September 5, 2018, Mr. Bouzgarrou appealed the removal order to the IAD. He did not challenge the validity of that order. Instead, Mr. Bouzgarrou requested that his appeal be allowed on the basis of his personal circumstances and his daughter's best interests, which warrant special relief from the IAD.

[7] The IAD dismissed the appeal and confirmed the validity of the removal order. In assessing humanitarian and compassionate grounds, the IAD considers the criteria set out in the case law (*Bufete Arce v Canada (Citizenship and Immigration)*, 2003 CanLII 54304 (CA IRB) (*Bufete Arce*); *Nekoie v Canada (Citizenship and Immigration)*, 2012 FC 363 at paras 32–33 (*Nekoie*)).

[8] The IAD found that the positive elements described in its decision do not sufficiently counterbalance the negative elements that are present in this case, "namely, the very significant degree of non-compliance with his residency obligation, his non-existent initial establishment during the five-year period, the unjustified reasons for his departure from Canada and for some of his absences from Canada, and the fact that he has not demonstrated any probative evidence that he attempted to return at the first opportunity".

[9] Mr. Bouzgarrou has remained in Canada since the removal order was issued against him.

[10] Mr. Bouzgarrou is now seeking judicial review of the IAD's decision. He complains that the IAD unreasonably analyzed his justification in terms of his failure to comply with the residency obligation; his establishment in Canada and the best interests of his daughter; and that the IAD imposed or added a factor, being immediate establishment in Canada, that is irrelevant or not recognized by the legislation or by the case law.

II. Issue and standard of review

[11] In this case, there is only one issue: did the IAD make an unreasonable decision in dismissing Mr. Bouzgarrou's appeal by concluding that there are no humanitarian and compassionate grounds for special relief?

[12] The IAD's decision with respect to the assessment of humanitarian and compassionate grounds must be reviewed under a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16–17, 23 (*Vavilov*); *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58).

[13] Where the standard of reasonableness applies, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100). A reasonableness review must focus on the decision made by the decision maker, including the reasoning followed and the outcome (*Vavilov* at para 83). A reasonable decision is "based on an internally coherent and rational chain of analysis" that is justified in relation to the relevant facts and law (*Vavilov* at para 85). Such a decision is entitled to some deference from the reviewing court.

III. Analysis

[14] Section 28 of the IRPA provides that a permanent resident complies with the residency obligation if they are physically present in Canada for at least 730 days in a five-year period. In the event of non-compliance, an immigration officer has the discretion to determine whether there are humanitarian and compassionate grounds for continued status. If the officer finds that the permanent resident's humanitarian and compassionate considerations do not justify the retention of status, the permanent resident loses status and a removal order is issued.

[15] Notwithstanding the issuance of a removal order, the IAD has the discretion to allow the appeal if it is satisfied that there are humanitarian and compassionate considerations that warrant special relief in light of all the circumstances of the case (paragraph 67(1)(c) of the IRPA). In making this assessment, the IAD must consider the best interests of the child directly affected by the decision. The IAD's power to issue removal orders is highly discretionary, but it is also exceptional and should not be exercised routinely (*Canada (Public Safety and Emergency Preparedness) v Abou Antoun*, 2018 FC 540 at para 19).

[16] The factors to be considered in assessing a humanitarian and compassionate application under the residency obligation are as follows (*Nekoie* at para 32, citing *Bufete Arce*, followed by the Federal Court in *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at para 27 (*Ambat*)):

> i) the extent of the non-compliance with the residency obligation;
>
> ii) the degree of establishment in Canada, initially and at the time of hearing;

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

iv) family ties to Canada;

v) whether attempts to return to Canada were made at the first opportunity;

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 admission to Canada; and

viii) whether there are other unique or special circumstances that merit special relief.

[17] In its decision, the IAD addresses the criteria set out in the case law that are relevant to Mr. Bouzgarrou's circumstances. It gives full and sympathetic consideration to all of Mr. Bouzgarrou's evidence, including his testimony at the hearing and his submissions. Accordingly, I find that the IAD's decision has the characteristics of a reasonable decision, namely, rationality, transparency and intelligibility. Further, the decision is justified in light of the relevant factual and legal constraints (*Vavilov* at para 99).

[18] I turn now to the specific arguments Mr. Bouzgarrou raised.

[19] First, Mr. Bouzgarrou argued that once the IAD accepted that he could not reasonably have complied with his residency obligation in order to remain near his sick young daughter, the panel should have accepted his appeal. Mr. Bouzgarrou returned to Tunisia in May 2014, a few days after his initial arrival in Canada. His daughter was born on October 7, 2014, and her health problems continued until late 2016. According to Mr. Bouzgarrou, this period of time

corresponds to approximately 800 days, which is a period of absence greater than the residency obligation in Canada. Therefore, the IAD's dismissal of the appeal was inconsistent and illogical.

[20] I do not agree. The IAD considered all the circumstances listed by Mr. Bouzgarrou to justify his lengthy absence from Canada. The justification he gave for staying in Tunisia for two years to care for his daughter's health is only one of the important circumstances in this case. The fact that the IAD accepted Mr. Bouzgarrou's reason for staying with his family until the end of 2016 does not necessarily mean that the IAD should allow his appeal.

[21] The IAD then turned to Mr. Bouzgarrou's explanation that he was unable to return to Canada in late 2016 because his father-in-law was ill and his wife was suffering from depression and was exhausted from caring for her dying father.

[22] The IAD considered Mr. Bouzgarrou's statement that he was only able to "return to Canada once he felt that his wife was feeling better and was able to take care of their daughter". The IAD also described the illness of Mr. Bouzgarrou's father-in-law and his wife's family obligation to care for her seriously ill father. The IAD referred to the document produced by the father-in-law's oncologist as evidence of his wife's depression at the time and the treatment she was allegedly receiving. It pointed out that "[t]he document is vague with regard to the duration of the treatment, and the [IAD] gives very little weight to this document because it was issued by an oncologist, not an attending psychologist or psychotherapist". The IAD then concluded that Mr. Bouzgarrou had not demonstrated that he returned to Canada at the first opportunity.

[23] The oncologist was not a psychologist or psychotherapist treating his wife. It was open to the IAD to give little weight to the oncologist's certification in this context. Moreover, Mr. Bouzgarrou's argument that the IAD is obliged to accept his testimony that his wife had a psychological breakdown and that he had to stay in Tunisia to care for their young daughter is not convincing. The IAD engaged in a transparent and coherent analysis of the applicant's explanation that he had to remain in Tunisia to provide assistance to his family members until July 2018.

[24] In light of the above, I am of the view that the IAD did not commit any reviewable errors in concluding that the evidence regarding the health of Mr. Bouzgarrou's daughter, wife and father-in-law and the justification for the length of his stay in Tunisia were insufficient to show that he returned to Canada at the first opportunity.

[25] Mr. Bouzgarrou then argued that the IAD did not reasonably consider his establishment in Canada following his return in August 2018. In doing so, the panel failed to consider the evidence submitted. He argued that his employment and integration in Canada following his return was devalued by the IAD.

[26] The IAD first noted that Mr. Bouzgarrou does not have initial establishment as he only stayed in Canada for eight days after obtaining permanent residence. Mr. Bouzgarrou submitted that the IAD imposed an additional obligation that is irrelevant and unrecognized in the case law in this regard, that of immediate establishment in Canada.

[27] I do not accept this argument. The IAD refers not to immediate establishment, but to initial establishment. It is clear that Mr. Bouzgarrou was unable to establish himself in Canada in 2014, as he returned to Tunisia shortly after his arrival.

[28] The IAD noted that Mr. Bouzgarrou's wife had told him that she was pregnant one month before his arrival in Canada. Nevertheless, he came to Canada and his wife remained in Tunisia. The IAD determined that his return to Tunisia cannot justify the fact that he stayed in Canada for only eight days and that he was absent from Canada until the birth of his daughter. The panel does not believe that Mr. Bouzgarrou intended to settle in Canada at the time he came to Canada to obtain permanent residence.

[29] It is well established that Mr. Bouzgarrou's initial degree of establishment is a relevant factor for the IAD to consider (*Nekoie* at para 32). I find no reviewable error in its conclusion that Mr. Bouzgarrou's early departure from Canada is an adverse factor in granting special relief.

[30] In addition, the IAD made no errors of fact in considering Mr. Bouzgarrou's evidence of his settlement since August 2018, including his employment and general integration in Canada. The IAD concluded that he had a "moderate and extremely late" degree of establishment in Canada. In my opinion, Mr. Bouzgarrou is simply seeking to invite the Court to intervene and reassess his establishment in Canada.

[31] Finally, Mr. Bouzgarrou argued that the IAD failed to perform a reasonable analysis of the best interests of his daughter in light of her particular circumstances and his testimony at the

hearing. In his testimony, Mr. Bouzgarrou noted that he and his wife had long dreamed of coming to Canada, primarily for the well-being of their daughter and the quality of life she would have there. He argued that the IAD made an unreasonable decision because it failed to mention that it is certainly in the daughter's best interest to live with both parents in Canada rather than Tunisia.

[32] The IAD deals briefly with the interests of Mr. Bouzgarrou's daughter in the decision. It found that her best interests are to live with both parents and "that the evidence does not demonstrate that if the appellant were to return to Tunisia, it would compromise the best interests of his child".

[33] The Minister stated that Mr. Bouzgarrou has submitted no evidence as to the impact that the dismissal of his appeal would have on his daughter, who was born and still resides in Tunisia. The case law emphasizes that the onus is on the applicant to demonstrate to the IAD why the best interests of the child involved would be compromised by the refusal of the appeal.

[34] I agree with the Minister that Mr. Bouzgarrou must establish any allegation on which he bases his application. The onus was on Mr. Bouzgarrou to demonstrate to the IAD why it was in his young daughter's best interests to come to Canada (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5). Mr. Bouzgarrou's testimony describing his dream of living in Canada with his family and the fact that living conditions are better in Canada than in Tunisia does not relieve him of his burden. He has therefore not established that the IAD ignored important aspects of the evidence presented.

[35] In conclusion, I am satisfied that, when read as a whole, the RAD decision meets the standard of reasonableness set out in *Vavilov*. The list of factors in *Ambat* is not exhaustive and the weight given to each factor will vary depending on the particular circumstances of each case (*Bermudez Anampa v Canada (Citizenship and Immigration)*, 2019 FC 20 at para 24). In this case, the IAD considered each argument made by Mr. Bouzgarrou in an intelligible and transparent manner. Its decision is based on internally coherent reasons that are justified in light of the facts and the applicable law. Accordingly, Mr. Bouzgarrou's application for judicial review is dismissed.

[36] The parties have not proposed any questions for certification, and I agree that there are none.

JUDGMENT in IMM-7555-19

THIS COURT'S JUDGEMENT is as follows:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

Certified true translation

Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7555-19
STYLE OF CAUSE:	FIRAS BOUZGARROU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	MARCH 17, 2021
JUDGMENT AND REASONS:	WALKER J.
DATED:	JUNE 8, 2021

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