Federal Court  Cour fédérale

Date: 20220420

Docket: IMM-4327-21

Citation: 2022 FC 560

Ottawa, Ontario, April 20, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

FAROOQI, MUHAMMAD USMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant, Muhammad Usman Farooqi, is a dual citizen of Pakistan and the United Kingdom. On May 17, 2016, he was granted permanent resident status in Canada. He now seeks judicial review of a decision rendered by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada dated May 20, 2021 [Decision] refusing the Applicant's appeal of a departure order issued against him for failing to comply with his

permanent residency obligation requirements under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The IAD further found that there were insufficient humanitarian and compassionate [H&C] considerations to warrant special relief pursuant to paragraph 67(1)(c) of IRPA.

[2] Section 28(1) of IRPA mandates that a permanent resident comply with the residency requirements with respect to every five-year period. Out of the statutorily required 730 days in the relevant statutory period, in this case from May 17, 2016 to May 17, 2021, the Applicant accumulated approximately 133 days of presence in Canada, falling short by 597 days.

[3] The Applicant submits that the Decision is unreasonable on the basis that the IAD (a) applied the incorrect test when assessing the best interest of the children [BIOC]; (b) erred by not being responsive to the evidence that it would be in the Applicant's daughter's best interests to grow up in Canada; (c) erred in finding that the Applicant could maintain ties with his nieces and nephews from a distance; (d) made erroneous findings as to the Applicant's reasons for departure from Canada that do not make sense in light of the evidence; and (e) applied the improper test and did not engage with the evidence as to the hardship the Applicant's family members would suffer should he not remain a permanent resident of Canada.

[4] The Respondent submits that the IAD assessed that there was an enormous shortfall in the required number of days spent in Canada by the Applicant, and reasonably found that, based on the record before it, there were insufficient H&C considerations to warrant special relief.

[5] For the reasons that follow, this application for judicial review is dismissed.

II. Standard of Review

[6] The parties agree that the applicable standard of review is one of reasonableness as set out in Canada (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is one that it justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85).

[7] It is the Applicant, the party challenging the Decision, who bears the onus of demonstrating that the Decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court 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", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

III. Analysis

[8] The Applicant does not contest that he failed to adhere to the residency requirements. This matter turns on whether the IAD's treatment of the H&C considerations raised by the Applicant was reasonable.

[9] Broadly speaking, H&C considerations are facts, established by evidence, that would excite in a reasonable person in a civilized community the desire to relieve the misfortunes of

another provided these misfortunes warrant the granting of special relief from the otherwise applicable provisions of the IRPA (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13 and 21 [*Kanthasamy*]).

[10] When determining whether there are sufficient H&C considerations warranting special relief in light of all the circumstances of the case, the IAD, in addition to the BIOC analysis, may take into consideration various factors. In rendering the Decision, the IAD relied upon the well-recognized factors set out in this Court's jurisprudence in cases of appeals by permanent residents who have failed to comply with the residency requirement (*Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 [*Ambat*]; *Samad v Canada (Citizenship and Immigration)*, 2015 FC 30 [*Samad*]). The factors listed in *Ambat* are:

> (i) the extent of the non-compliance with the residency obligation;
>
> (ii) the reasons for the departure and stay abroad;
>
> (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 admissions to Canada; and;
>
> (viii) whether there are other unique or special circumstances that merit special relief.

[11] This above list is not exhaustive and the weight granted to each H&C factor will vary depending on the particular circumstances of each case. In its Decision, the IAD addressed and weighed the factors that are relevant to the Applicant's circumstances. I note that the jurisprudence of this Court instructs that the assessment of each of these factors is left to the discretion of the IAD, and the Court should not interfere in IAD's weighting of those factors (*Bermudez Anampa v Canada (Citizenship and Immigration)*, 2019 FC 20 at para 24).

[12] Turning first the IAD's BIOC analysis, the Applicant alleges that the IAD applied the incorrect test and instead assessed the best interests of the children though a harm-based lens. The Applicant submits that the IAD ought to have asked "what is in the child's best interests?" The Applicant further submits that the IAD erred by not being responsive to the evidence that it would be in the Applicant's daughter's best interests to grow up in Canada. The Applicant states that his daughter would be unable to learn fluent Urdu and Punjabi and be educated about her family's religion, if she were to grow up away from his numerous family members in Canada.

[13] The Respondent pleads that the Applicant's daughter, save for being born in Canada in February 2021, has never lived in Canada and that the IAD reasonably found that it was in her best interests to live with her parents. The Respondent highlights that the Applicant has been living in the United Kingdom since 2008, and he has adduced no evidence that the Applicant's daughter would be unable to learn Urdu, Punjabi, and about her family's religion from the Applicant.

[14] I do not find that the IAD committed a reviewable error. The IAD assessed that it was in the best interests of the Applicant's daughter to live with her parents, wherever they may live. I am not persuaded that the IAD assessed the BIOC through a hardship lens contrary to the Supreme Court's instructions in *Kathansamy*. The use of the word "harmed" once in the context of the IAD's analysis of the Applicant's daughter's interests and a reference to no "specific hardships" in the context of the Applicant's nieces and nephews is not sufficient, taking into account the record before the IAD, to render the Decision unreasonable (*Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 at paras 21-22). In addition, the language was responsive to the Applicant's submissions to the IAD that the loss of his permanent residency would have a "negative impact on me, my child and my relationship with my family based in Canada".

[15] Furthermore, as to the Applicants daughter's ability to learn Urdu, Punjabi, and about the Applicant's religion, I find that the Decision was justified in relation to the evidence in the record. The IAD referred to the Applicant's statement as follows: "He cited the fact that his daughter would be unable to learn his mother tongue (Urdu/Punjabi) or practise his family's religion if she grew up away from her family. The panel does not consider this to be a determinative factor that would justify allowing the appeal on this ground alone." Other than the statement contained in the Applicant's submissions to the IAD to the effect that his daughter would be unable to acquire these skills, there is are no further evidence. As such, contrary to the submissions of the Applicant, I find the Decision was responsive to the record.

[16] This is similarly the case with respect to the Applicant's nieces and nephews. The IAD notes that the Applicant has maintained ties with his nieces and nephews while living in the United Kingdom. I agree with the Respondent that it was not unreasonable of the IAD to find, given that the Applicant has lived abroad, and based on the evidence before it, that the best interests of those children did not weigh in favour of granting the Applicant special relief. The Applicant drew this Court's attention to the letters of support that indicate that the Applicant has helped his nieces and nephews with their homework and taken them to McDonalds. The Applicant relies on *Chamas v Canada (Citizenship and Immigration)*, 2021 FC 1352 at para 41 [*Chamas*] for the proposition that social media cannot replace the daily care and support that is provided.

[17] I find *Chamas* to be distinguishable. In *Chamas*, the female grandparent helped to provide day-today care for her 3-year-old granddaughter, some of which her mother was unable to provide due to physical injuries. The evidence on the record in *Chamas* also detailed the daily care and support provided to the grandchild, along with the activities carried out by the grandparent (para 41). My colleague Justice Go, in *Chamas*, noted the critical care provided by the grandparent that required her physical presence in Canada (para 43). In the present case, no such evidence was submitted and I decline interfere with the IAD's weighing of this factor.

[18] Turning now to the Applicant's submission that the findings by the IAD as to his reasons for departure from Canada do not make sense in light of the evidence. The Applicant submits that the IAD's finding that he left Canada right after obtaining his permanent residence "was a personal decision that does not amount to compelling circumstances beyond his control" is

unsupported by the evidence that his common law spouse's child from another marriage was not allowed to leave the United Kingdom, at the time, because her father would not let her. The Respondent submits that the Applicant returned to the United Kingdom in 2016, then met his spouse, and chose to remain there with her. It was a personal choice, and he was not precluded from returning to Canada to fulfill his residency requirement.

[19] I find the Applicant's submission amounts to an impermissible request for this Court to re-weigh the evidence. It is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125). The IAD took into account the evidence before it, concluded that the Applicant decided to stay with his spouse, and then gave this factor negative weight. While the circumstances of having to chose between returning to Canada and leaving his spouse behind understandably evoke sympathy, I find that the Applicant has not demonstrated that the Decision is unreasonable in this regard.

[20] Finally, the Applicant submits that the IAD erred and applied an incorrect test in evaluating "the dislocation that would be caused to Mr. Farooqi and his family in Canada if the appeal were dismissed" as opposed to the "hardship and disruption" that would be caused, and relied upon *Wopara v Canada (Citizenship and Immigration)*, 2021 FC 352 at para 17 [*Wopara*].

[21] I find this to be a distinction without a difference. While *Wopara* uses the language "hardship and disruption", *Ambat,* on which the IAD relied, mentions "dislocation". Furthermore, *Samad* mentions neither dislocation nor disruption, and simply mentions hardship.

I find that the IAD applied the correct test when considering the impact on the Applicant's family members if he could not return to settle in Canada.

[22] The Applicant highlights the evidence in the record, notably letters of support from family members attesting to the hardship they will face should the Applicant lose his permanent residency. The Applicant submits that the consequences are severe, and that the IAD ought to have engaged with the contents of the letters of support. I am not persuaded that the IAD's findings are unreasonable. The IAD noted the letters written by the Applicant's family members, but ultimately found that the Applicant had been apart from his family in Canada since 2008, had ties to the United Kingdom, had not shown that he would be unable to work from abroad, and determined that the circumstances did not warrant special relief.

IV. Conclusion

[23] It was incumbent on the Applicant to demonstrate that the Decision is unreasonable, which he has not done. The Decision, when read as a whole, meets the standard of reasonableness set out in *Vavilov*. It is based on internally coherent reasons that are justified in light of the facts and the applicable law. Accordingly, this application for judicial review is dismissed.

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

JUDGMENT in file IMM-4327-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question of general importance is certified.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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