Federal Court  Cour fédérale

Date: 20231228

Docket: IMM-8954-22

Citation: 2023 FC 1759

Ottawa, Ontario, December 28, 2023

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

SHAHIN KALANTARI

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant Minister applies under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the August 24, 2022 decision of the Immigration Appeal Division [IAD]. The IAD allowed the Respondent's appeal from a finding of inadmissibility for failure to comply with the residency obligations at section 28 of the IRPA

on the basis that there were sufficient Humanitarian and Compassionate [H&C] considerations to warrant special relief.

[2] For the reasons that follow, the Application is granted.

II. Background

[3] The Respondent is a citizen of Iran. He married a Canadian citizen in April 2010 and in December 2011 became a permanent resident [PR] through family class sponsorship.

[4] After becoming a PR, the Respondent traveled back to Iran several times. In July 2014, the Respondent went back to Iran again and has not returned to Canada since.

[5] In November 2014, the Respondent and his wife divorced. The Respondent reports he was not able to return to Canada due to mental health issues despite an effort to do so in 2017. In 2019, the Respondent remarried in Iran. In May 2021, the Respondent applied for a PR travel document to return to Canada.

[6] In June 2021, a visa officer rejected the Respondent's application. The Officer concluded the Respondent had not been present in Canada for a minimum of 730 days in the preceding five-year period (May 2016 to May 2021) as prescribed at section 28 of the IRPA. The Officer further concluded the Respondent's personal circumstances failed to disclose H&C considerations warranting the retention of PR status. The Respondent appealed the decision to the IAD on H&C grounds.

III. Decision under review

[7] In allowing the appeal, the IAD concluded that the Officer's decision to reject the application was legally valid, but found there to be sufficient H&C considerations to overcome the breach of the residency obligation.

[8] The IAD found that the breach of the residency obligation was serious (the Respondent had not been present in Canada for any days in the preceding five-year period) and held that a "high level of humanitarian and compassionate reasons" were required to overcome the non-compliance.

[9] The IAD acknowledged that factors identified in the jurisprudence guided the H&C assessment (citing *Bufete Arce v Canada (Citizenship and Immigration)*, 2003 CanLII 54304 (CA IRB) [*Bufete Arce*]). In analyzing these factors, the IAD found that four factors favoured the Respondent: (1) the reasons for his initial departure from Canada; (2) the reasons for his extended stay in Iran; (3) his initial establishment in Canada; and (4) his minimal establishment n Iran.

[10] The IAD concluded that the Respondent's initial departure from Canada in April 2012 was reasonable because he returned to Iran to collect funds in order to purchase a house in Canada with his then wife. The IAD also concluded that the reasons for his extended stay in Iran after his 2014 departure were justified by his marriage breakdown and mental health issues.

Mental health also impacted his ability to return to Canada. Further, the IAD found that the Respondent would have likely returned to Canada in 2017 if not for his mental health issues.

[11] In considering the Respondent's establishment in Iran and in Canada, the IAD found that the Respondent had not provided credible information regarding his employment in Iran and concluded his establishment in Iran was minimal – the Respondent had not worked since 2020, had no assets in Iran and only had minimal funds in an Iranian bank account. The IAD found that this weighed in the Respondent's favour. The IAD found there to be some minimal initial establishment in Canada but found no ongoing establishment, the Respondent not having been in Canada since 2014.

[12] The IAD also held that the Respondent's ties in Iran did not weigh in his favour as he has a wife (the Respondent re-married in 2019), a mother and a brother in Iran. The IAD also noted that the Respondent's ties to Canada – a sister who had recently immigrated to Canada with her family and is a PR – were minimal when assessed against ties to Iran.

[13] Finally, the IAD considered the hardship the Respondent alleged would result should he lose his PR status. The IAD found there to be insufficient evidence to corroborate the Respondent's claims of hardship and concluded no more than minimal hardship would result.

[14] After giving weight to the Respondent's mental health issues and finding that the Respondent's minimal establishment in Iran weighed in his favour, the IAD concluded that there were sufficient H&C considerations to warrant granting special relief.

IV. Issues and Standard of Review

[15] The Applicant submits the IAD erred by:

A. adopting an unreasonably low standard for the granting of special relief, thereby failing to respect the legal constraints on the IAD; and

B. by reaching findings of fact that are without basis in the evidence.

[16] I have framed the issue more succinctly – did the IAD unreasonably conclude that H&C relief was warranted?

[17] It is not in dispute that the IAD's decision is to be reviewed against the presumptive standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 16 [*Vavilov*], *Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at para 18 [*Tefera*], *Canada (Public Safety and Emergency Preparedness) v Imalenowa*, 2022 FC 1286 at para 25).

[18] In conducting a reasonableness review, the Court's role is to consider whether the decision reflects the attributes of justification, transparency and intelligibility. Courts must be deferential and exercise judicial restraint, particularly where the impugned decision is one where an individual has sought a discretionary privilege, such as in the present case (*Vavilov* at para 30, *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-59 and 64).

[19] A reviewing court will examine the reasons holistically and contextually in order to understand the reasoning behind the decision. Reasons need not be perfect (*Vavilov* at paras 91 and 97). The party challenging a decision has the burden of showing there are shortcomings or flaws that are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100).

V. Analysis

A. *Legislative scheme*

[20] Before considering the arguments advanced, it is helpful to briefly review the scheme within which the IAD's H&C decision was made.

[21] In order to maintain status as a permanent resident, an individual must comply with section 28 of the IRPA, requiring that permanent residents be physically present in Canada for at least 730 days (2 years) in every 5-year period. The Respondent failed to meet this mandatory residency requirement and was therefore inadmissible to Canada by operation of section 41 of the IRPA.

[22] Subsection 63(3) provides a right of appeal before the IAD, a right the Respondent exercised. Where a respondent concedes non-compliance with the residency obligation on appeal, paragraph 67(1)(c) allows the IAD to nonetheless grant relief where the IAD is satisfied that "sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."

[23] The IAD's H&C determinations are highly discretionary, however relief is exceptional and should not to be exercised routinely or lightly (*Chieu v Canada (Minister of Citizenship and Immigration*), 2002 SCC 3 at para 57 [*Chieu*]). The factors to be considered include the following (*Bufete Arce* at paras 9-10, *Chieu* at paras 40-41, *Tefera* at paras 9-10):

A. the extent of the non-compliance with the residency obligation;

B. the reasons for the departure and stay abroad;

C. the degree of establishment in Canada, initially and at the time of the hearing;

D. family ties to Canada;

E. whether attempts to return to Canada were made at the first opportunity;

F. hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;

G. hardship to the appellant if removed from or refused admission to Canada; and

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

B. *The IAD's decision is unreasonable*

[24] The Respondent submits the IAD reasonably identified the H&C factors relevant to the request for special relief, engaged in a detailed consideration of each factor in light of the evidence and drew conclusions that were reasonably available to it. Any resulting flaws or shortcomings are merely superficial or peripheral to the merits of the decision which the Respondent argues is intelligible, justified and transparent. In effect, the Respondent argues the

Applicant simply disagrees with the IAD's decision and seeks to have the Court reweigh the evidence and reach a different result.

[25] *Vavilov* teaches that two types of fundamental flaws will render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. The second occurs when a decision is untenable in light of the relevant factual and legal constraints that bear on it (para 101).

[26] The Applicant generally does not take issue with the Respondent's view that the IAD's consideration and analysis of the H&C factors was not unreasonable. Instead, the Applicant argues that the decision itself is untenable because the IAD granted exceptional relief on an unreasonably low standard. I agree.

[27] In the face of the Respondent's utter and complete non-compliance with the requirement to be in Canada for at least 730 days, the IAD correctly recognized that the extent of the residency breach was serious, that it could not weigh favourably in assessing the request for special relief, and that a "high level of humanitarian and compassionate reasons" were needed to overcome the non-compliance.

[28] The IAD's overall assessment of the Respondent's circumstances is reflective of and consistent with the views expressed by this Court in *Tefera*. In *Tefera,* as here, the IAD had granted special relief despite a "colossal shortfall" in the residency requirement and an absence of usual H&C considerations:

> [43] Here, the outcome reached by the IAD defies all logic. It cannot be reasonable that a family who stayed only six weeks in Canada, who had close to no establishment in the country, whose members went back to their country of origin while awaiting for their appeals, and who have not showed hardship in case of removal from Canada, can still be found to have proven sufficient H&C considerations to obtain the benefit of the exceptional relief provided by paragraph 67(1)(c). The provision is not meant to allow the retention of permanent resident status with such a track record.

[29] As in *Tefera*, I am unable to determine on what reasonable basis the IAD concluded special relief was warranted in the context of the IAD's treatment of relevant H&C factors.

[30] The Respondent has no current establishment in Canada and his prior establishment was both minimal and arguably unsuccessful. The Respondent failed to demonstrate more than minimal hardship would flow from the loss of his PR status – his family ties, which include his wife, mother and a brother, are almost exclusively in Iran. The IAD found the Respondent's establishment in Iran to be minimal and therefore a positive factor, but I note the evidence indicates that Iran is the only country in which the Respondent is established.

[31] The Respondent's reasons for remaining in Iran were properly considered as a relevant H&C factor by the IAD. It was also was open to the IAD to conclude, as it did, that this factor was to be given positive weight. The IAD's findings in this regard are due deference and I take no issue with them.

[32] However, it is not enough for the RAD to assess individual factors; the RAD is also required to engage in a transparent and justified weighing of those factors. It is the absence of a

transparent weighing analysis that leads me to conclude relief was granted on an unreasonably low standard rendering the decision unreasonable.

[33] A court undertaking a reasonableness review must consider both the reasoning process and the outcome. Where the outcome is not reflective of the underlying analysis, the decision will be unreasonable (*Vavilov* at paras 87 and 103).

[34] In this instance, the Respondent's mental health concerns amount to a justification for non-compliance with the residency requirement, but special relief requires more than an explanation. Faced with the Respondent's "colossal shortfall" in the residency requirement, the IAD's finding of no hardship and the IAD's recognition that a high level of H&C reasons are needed to warrant the granting of relief, the IAD was required to do more than point at the few favourable factors identified in its analysis and indicate that weight had been given to the justification for the extended absence abroad.

[35] The purpose of H&C relief is to offer equitable relief where an individual's circumstances are such that they excite in a reasonable person a desire to relieve the misfortunes of another (*Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 at para 13, citing *Chirwa v Canada (Minister of Citizenship and Immigration),* [1970] IABD No 1 at 350). To provide special relief without engaging in a transparent weighing of competing factors, particularly where core H&C factors clearly weigh against the granting of that relief, not only undermines the reasonableness of the decision, but it also undermines the H&C process itself.

VI. Conclusion

[36] The Application is granted. The parties have identified no question of general importance, and none arises.

[37] As a final matter, pages 1-152 (as marked) of the Certified Tribunal Record [CTR] contain tribunal reasons and documentation relating to a separate and unrelated proceeding. The information is of no relevance to this proceeding and therefore will be excised from the CTR.

JUDGMENT IN IMM-8954-22

THIS COURT'S JUDGMENT is that:

1. The Application is granted.

2. The matter is returned for redetermination by a different decision-maker.

3. No question is certified.

4. Pages 1-152 (as marked) of the Certified Tribunal Record are to be excised.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Lorne McClenaghan	FOR THE APPLICANT
Ingrid E. Mazzola	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
IEM Légal inc. Montreal, Québec	FOR THE RESPONDENT