Federal Court  Cour fédérale

Date: 20241023

Docket: IMM-12091-23

Citation: 2024 FC 1668

Toronto, Ontario, October 23, 2024

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

SEYED ALI REZA HAJI SEYED HASSANI AND HOURI FATHALI BAKHTIARI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, both citizens of Iran, are husband and wife and became permanent residents of Canada in 2009. They have two adult children ages 31 and 24, who are also both permanent residents of Canada. The husband was hired by a Canadian company in 2010 to conduct business in the Gulf States region and subsequently assumed the position of branch manager in the United Arab Emirates [UAE]. The Applicants currently reside in Iran and have valid UAE residence permits.

[2] The Applicants applied for Permanent Resident Travel Documents after their permanent resident cards expired in February of 2020. A visa officer refused to issue the requested Permanent Resident Travel Documents as they determined that the Applicants were inadmissible for failing to meet the residency obligation as set out in section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The visa officer found that the Applicants had only spent 258 days physically present in Canada during the relevant five-year period. Further, the officer found that the Applicants were not entitled to any credit for time spent outside of Canada, as the husband was not employed by a Canadian business on an assignment with the expectation that he would work in Canada when it ended.

[3] The Applicants appealed the visa officer's determination to the Immigration Appeal Division [IAD]. Before the IAD, the Applicants also asserted that if the IAD concluded that the Officer's decision was valid in law, there were sufficient humanitarian and compassionate [H&C] factors to justify special relief. After finding that the Officer's refusal was valid in law, the IAD found that there were insufficient H&C factors to warrant allowing the appeal. On this application for judicial review, the Applicants only seek to review the IAD's H&C determination.

[4] The Applicants assert that the IAD's decision was unreasonable as the IAD: (a) applied the wrong test in its assessment of the Applicants' H&C factors; and (b) failed to consider the best interests of the Applicants' children.

[5] The parties agree and I concur that the applicable standard of review is reasonableness. When reviewing for reasonableness, the Court must take a "reasons first" approach and determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified [see *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8]. 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 [see *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adeniji-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

[6] Turning to the Applicants' first argument, they assert that the IAD erred in its assessment of the Applicants' H&C factors by applying the wrong test. Specifically, that the IAD applied a hardship test focused on exceptional or special hardship in addressing the hardships the Applicants would suffer if they could not remain in Canada, rather than the *Chirwa* test [see *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338], which the Supreme Court of Canada confirmed as the appropriate test in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.

[7] Contrary to the Applicants' assertion, *Kanthasamy* does not function to disavow any assessment of hardship considerations. Before *Kanthasamy*, applicants had to demonstrate hardship of an unusual and undeserved or disproportionate nature to be granted H&C relief. The

Supreme Court of Canada rejected the rigidity of such a test and instead re-established the application of the *Chirwa* test. As to hardship, the Supreme Court held in *Kanthasamy* that the hardship tests continue to apply, but added:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
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> [Emphasis in original.]

[8] In the context of an appeal under paragraph 67(1)(b) of *IRPA* where a foreign national has failed to comply with permanent residence obligations, the IAD has the discretion to consider H&C factors, the exercise of which is subject to a number of considerations (often referred to as the *Ribic* or the *Arce* and *Kok* factors). These factors were recently summarized by Justice McHaffie in *Herradi v Canada (Citizenship and Immigration)*, 2020 FC 247 as follows:

> [37] [...] the case law has established that the factors set out in *Ribic* (as reformulated in *Ambat* as regards the failure to comply with the residency obligation) restrict the exercise of this discretion […]. These non-exhaustive factors are
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> > i. the extent of the non-compliance with the residency obligation;
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> > 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 the hearing;
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> > iv. family ties to Canada;

> v. whether the appellant attempted to return to Canada at the first opportunity;
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> vi. hardship and dislocation to family members in Canada if the appellant is removed from or refused admission to Canada;
>
> vii. hardship to the appellant if removed from or refused admission to Canada;
>
> viii. whether there are other unique or special circumstances that merit special relief; and
>
> ix. the best interests of a child directly affected by the decision, as applicable.

As is evident from a review of those factors, they expressly include various considerations of hardship.

[9] Having reviewed the IAD's reasons for decision, I reject the Applicants' assertion that the IAD applied the incorrect test. Rather, I am satisfied that the IAD properly applied the *Chirwa* test, and considered and weighed the appropriate factors prescribed by the case law. I agree with the Respondent that the IAD's use of the words "undue hardship" was merely descriptive and responsive to the evidence before it. Hardship was not used as a "separate legal [threshold] to be strictly construed" [see *Kanthasamy*, *supra* at para 60].

[10] The Applicants also argue that the IAD erred by failing to consider the best interests of their children. They assert that while the IAD referred to their children when considering other H&C factors, the IAD erred by not conducting a best interests of the children [BIOC] analysis for their adult children, who they maintain are both emotionally and financially dependent on them.

[11] Generally speaking, a BIOC analysis applies to children under the age of 18 years [see *Kanthasamy, supra*]. There may be circumstances where a BIOC analysis is appropriate for an adult child but these would be cases of special needs or other significant dependency on the applicants. In such cases, the onus is on the applicants to establish the dependency [see *Chaudhary v Canada Immigration, Refugees and Citizenship)*, 2018 FC 128 at paras 32-34; *Gesite v Canada (Citizenship and Immigration)*, 2017 FC 1025 at paras 15-19; *Choi v Canada (Citizenship and Immigration)*, 2020 FC 494 at para 13].

[12] In this instance, the Applicants' children are adults aged 31 and 24. They are both permanent residents who have established themselves in Canada to pursue their careers, with one son working following completion of university and the other completing a Master's degree. There was no evidence before the IAD that either of them have any special needs and no particulars of any asserted financial dependence on their parents. Concerning the latter, the support letters provided by the Applicants' children only vaguely refer to financial support from the parents with no details of the need for, or extent of, such financial support. In the circumstances, I find that the IAD was not required to conduct a BIOC assessment of the adult children and thus reasonably determined that there were no children that were directly affected by its decision.

[13] As the Applicants have failed to demonstrate that the IAD's decision was unreasonable, the application for judicial review shall be dismissed.

[14] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-12091-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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