Federal Court  Cour fédérale

Date: 20110728

Docket: IMM-7357-10

Citation: 2011 FC 946

Ottawa, Ontario, July 28, 2011

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MARTINEZ RODRIGUEZ, NANCY CAROLINA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Martinez Rodriguez, a citizen of El Salvador, wanted to visit her aunt in Canada. She attended at the Canadian Embassy in Guatemala City in order to apply for a temporary resident visa. The visa officer told her in order to do so she would have to consent to a decision resulting in her loss of status as a Canadian permanent resident, and waive any right of appeal she might otherwise have had. Until that very moment, she was unaware that Canadian records showed her as a permanent resident, as she had come here twice before on temporary visitor visas. She signed the form.

[2] She then sought to appeal that decision to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada. The IAD held it had no jurisdiction because she had lost her status as a permanent resident. This is a judicial review of that decision.

The Facts

[3] Ms. Martinez Rodriguez accompanied her parents to Canada when they obtained permanent resident status in 1991. At the time, she was six years of age. Two months later her parents returned to El Salvador from Canada, and of course she accompanied them .She visited Canada in 1998 and in 2000, both times on a visitor's visa. Last year, she applied for another temporary visitor's visa in order to visit her aunt who lives here.

[4] This time, the visa officer realized that Ms. Martinez Rodriguez had obtained permanent resident status in 1991. However it was clear that she had not maintained her residency requirement, as she had not been here a single day in the past 10 years.

[5] This brings into play section 31 of the Immigration and Refugee Protection Act, more particularly section 3 which reads:

31. (1) A permanent resident and a protected person shall be provided with a document indicating their status.	**31.** (1) Il est remis au résident permanent et à la personne protégée une attestation de statut.
(2) For the purposes of this Act, unless an officer determines otherwise	(2) Pour l'application de la présente loi et sauf décision contraire de l'agent, celui qui

(*a*) a person in possession of a status document referred to in subsection (1) is presumed to have the status indicated; and

(*b*) a person who is outside Canada and who does not present a status document indicating permanent resident status is presumed not to have permanent resident status.

est muni d'une attestation est présumé avoir le statut qui y est mentionné; s'il ne peut présenter une attestation de statut de résident permanent, celui qui est à l'extérieur du Canada est présumé ne pas avoir ce statut.

(3) A permanent resident outside Canada who is not in possession of a status document indicating permanent resident status shall, following an examination, be issued a travel document if an officer is satisfied that

(3) Il est remis un titre de voyage au résident permanent qui se trouve hors du Canada et qui n'est pas muni de l'attestation de statut de résident permanent sur preuve, à la suite d'un contrôle, que, selon le cas :

(*a*) they comply with the residency obligation under section 28;

a) il remplit l'obligation de résidence;

(*b*) an officer has made the determination referred to in paragraph 28(2)(*c*); or

b) il est constaté que l'alinéa 28(2)*c*) lui est applicable;

(*c*) they were physically present in Canada at least once within the 365 days before the examination and they have made an appeal under subsection 63(4) that has not been finally determined or the period for making such an appeal has not yet expired.

c) il a été effectivement présent au Canada au moins une fois au cours des 365 jours précédant le contrôle et, soit il a interjeté appel au titre du paragraphe 63(4) et celui-ci n'a pas été tranché en dernier ressort, soit le délai d'appel n'est pas expiré.

[6] Consequently, the law prohibited the visa officer from issuing Ms. Martinez Rodriguez a travel document, and as a permanent resident she could not be given a temporary resident visa.

[7] To get around this, she signed, in English, a "Consent to Decision on Residency Obligation and Waiver of Appeal Rights Resulting in Loss of Status under A46(1)(b)." There were two parts thereto, both of which she signed. The first was a "Voluntary Consent to Determination of Failure to Comply with Residency Obligations" and the second was a "Voluntary Waiver of Right to Appeal a Decision on the Residency Obligation under Section 28 of the *Immigration and Refugee Protection Act*". Section 28 sets out certain residency obligations. The one applicable here is that Ms. Martinez Rodriguez should have spent at least 730 days here in the past five years. However, an officer may determine there are humanitarian and compassionate considerations which justify the retention of permanent resident status, notwithstanding any breach of the residency obligation.

[8] Section 46 of the Act deals with persons who lose permanent resident status. One way is pursuant to sub-section 46(1)(b) which provides that:

46. (1) A person loses permanent resident status	46. (1) Emportent perte du statut de résident permanent les faits suivants :
[…]	…
(*b*) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28;	*b*) la confirmation en dernier ressort du constat, hors du Canada, de manquement à l'obligation de résidence;

[9] Finally, sub-section 63(4) of the Act provides that:

(4) A permanent resident may appeal to the Immigration	(4) Le résident permanent peut interjeter appel de la décision

Appeal Division against a decision made outside of Canada on the residency obligation under section 28	rendue hors du Canada sur l'obligation de résidence.

Discussion

[10] One might wonder what would be the point of an appeal to the IAD, given that, in accordance with section 28 of the Act, she failed to maintain residency status. The answer lies in section 67(1) of the Act which provides:

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(*a*) the decision appealed is wrong in law or fact or mixed law and fact;	*a*) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(*b*) a principle of natural justice has not been observed; or	*b*) il y a eu manquement à un principe de justice naturelle;
(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[11] In this case, unlike others, the member of the IAD did not decline jurisdiction on the basis there had been no decision. That position had been argued before her, and had been so held in *Tosic*, IAD File No. TA507793.

[12] Let me make it perfectly clear. In my opinion there was a decision rendered outside Canada covered by section 46(1(b) of IRPA. If Ms. Martinez Rodriguez did not « consent to decision on residency obligation…under section 46(1)(b) » to what did she consent?

[13] What is at issue here is whether Ms. Martinez Rodriguez gave her consent. By determining that she was no longer a permanent resident so that the IAD did not have jurisdiction, in effect it was decided that her case was without merit. That decision was made without giving her a right of hearing, a hearing which is *de novo.*

[14] Ms. Martinez Rodriguez's position is that she did not understand English and did not know what she was signing. Certainly there is nothing in the CAIPS notes to indicate she was told that by waiving her right to appeal she was not simply admitting that she fell short of the residency requirements, but that she was waiving her right to raise humanitarian and compassionate considerations, whatever they might be. Had she known that she had enjoyed that status, she may well have arranged her affairs differently. True, her parents should have told her, but she should never have been granted temporary resident visas in 1998 and 2000. The visa officers who handled those applications should have informed her that she was listed as a permanent resident.

[15] Although this is not a matter of contract, consent in that context is instructive both in civil law and in the common law.

[16] Article 1399 of the *Quebec Civil Code* provides:

1399. Consent may be given only in a free and enlightened manner.	1399. Le consentement doit être libre et éclairé.
It may be vitiated by error, fear or lesion.	Il peut être vicié par l'erreur, la crainte ou la lésion.

[17] Consider also the famous *dictum* of Lord Denning in *Lloyd's Bank v Bundy*, [1975] 1 Q.B. 326, at page 339:

> Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power." By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other. When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing.

[18] I am not suggesting that the visa officer put undue pressure on Ms. Martinez Rodriguez. In her notes she states that flight reservations were on file. There is no indication whether the ticket was refundable or not. Nor am I suggesting that there was undue influence brought to bear by the visa officer. However, Ms. Martinez Rodriguez's signed the form « without independent advice », thereby losing her status as a permanent resident. Whether or not she gave a valid consent is not a matter for this Court to determine. It is the matter for the IAD to determine.

[19] The IAD is concerned that giving credence to possible vices to consent would put the immigration system in disrepute. This is what the decision maker had to say:

> [TRANSLATION] In the *Sabour* decision, the IAD found that "to conclude that the applicant retained her right of appeal and her

> permanent residence would have the effect of depriving her acceptance of the decision on the residency requirement and the renunciation of the right of appeal of its judicial effect after she gained an advantage through having signed it. Such a conclusion would undermine the integrity of the Canadian immigration system by permitting a permanent resident who has failed to meet the residency requirement under section 28 of the *Act*, but who wishes to quickly come to Canada, to bypass the obstacle posed by this failure and subsequently to take up the process of determining his status upon arrival in Canada". The same reasoning applies in the present case.

[20] With respect, and while the visa officer may well have thought she was doing Ms. Martinez Rodriguez a favour, since she was not entitled to a travel document as a permanent resident, if the only alternative was to renounce that status, she should not have been given that opportunity. She should have been sent back to El Salvador, and given a full opportunity to consider her options and to take advice. Renunciation of permanent resident status is a very important step in a person's life. It should not be decided on the spur of the moment.

[21] Although she clearly has not maintained the residence requirement, it is up to the IAD, not this Court, to determine if there are humanitarian and compassionate considerations which override that defect.

Certified Questions

[22] The Minister did not propose a serious question of general importance to certify.

Conclusion:

[23] As I am in disagreement with a number of decisions of the IRB rendered in one official language or the other, both as to whether or not there was a decision which could be brought to that division, and whether signing the government form is conclusive that one has waived a right of appeal, these reasons are being issued simultaneously in both French and English in accordance with section 20 of the *Official Languages Act*.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that the application for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada, dated 29 November 2010, IRB No. MB0-05866, is granted, the decision of the IAD is quashed and the matter is remitted to a newly constituted panel of the IAD for redetermination.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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