Federal Court  Cour fédérale

Date: 20170831

Docket: IMM-2966-16

Citation: 2017 FC 798

St. John's, Newfoundland and Labrador, August 31, 2017

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

MAHRAB MASSEY AND SHIRLY EUGINA MASSEY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Mahrab Massey (the "Male Applicant") and Mrs. Shirly Eugina Massey (the "Female Applicant"), collectively ("the Applicants"), seek judicial review of the decision of the Immigration and Refugee Board, Immigration Appeal Division (the "IAD"), dismissing their appeal from the decision of an Immigration Officer who determined that they had not met their residency obligations pursuant to section 28 of the *Immigration and Refugee Protection Act*, S.C.

2001, c. 27) (the "Act") and that there were insufficient humanitarian and compassionate ("H&C") grounds to overcome that breach.

[2] The male Applicant was born on March 25, 1925. His wife was born on February 26, 1934. Both are citizens of India.

[3] In 2006, the Applicants came to Canada as permanent residents and resided with their younger son, Rajiv. Rajiv immigrated to Canada in February, 2000 and his wife followed in April 2000. Rajiv and his wife are now Canadian citizens and are the parents of two Canadian born children.

[4] In 2007, the Applicants left Canada and returned to India where they lived with their elder son, Ashok, his wife and their daughter, Myra. According to their evidence before the IAD, the Applicants intended to return to Canada, after attending to some personal matters in India.

[5] In 2012, the elder son immigrated to Canada with his family. It was around that time that the Applicants discovered that their permanent resident cards had expired. Their permanent resident cards had expired in 2011.

[6] The Applicants applied for a travel document in 2013. An Immigration Officer (the "Officer") reviewed their application. The Officer determined that the Applicants were in breach of the residency requirements set out in section 28 of the Act and further, that there were

insufficient humanitarian and compassionate ("H & C") grounds to justify reinstatement of their permanent resident status.

[7] The Applicants appealed to the IAD, pursuant to subsection 63(4) of the Act.

[8] The Applicants' appeal was heard between April, 2015 and March 30, 2016. The Applicants testified by telephone from India. Evidence was also heard from their sons Rajiv and Ashok; their granddaughter Myra, the daughter of Ashok; Ayush Massey, a great-nephew of the Male Applicant; and Marie Molliner, a retired senior public servant and friend in Canada of Ashok Massey and his family.

[9] The evidence before the IAD focused on the family relationships and ties among the extended Massey family in Canada.

[10] The IAD, in its decision, acknowledged the existence of H & C factors but concluded that they were insufficient to overcome the breach of the residency requirement of section 28 of the Act and dismissed the appeal. At paragraphs 35 and 36 of its decision, the IAD said the following:

> Permanent resident status is granted by the government, in the exercise of its authority to regulate the admission of non-citizens into Canada, and may be lost as a result of the actions of the appellant. It is incumbent on newcomers to Canada to know their obligations and their rights and when they do not satisfy the residency requirements, they have the burden to establish that there are exceptional circumstances to overcome those requirements. Although humanitarian and compassionate grounds do exist, in all the circumstances of this case, they are insufficient to find in the appellant's favour.

> Having considered the evidence and submissions, the panel finds that the immigration officer's decisions are valid and that, taking into account the best interests of a child directly affected by the decision, there are not sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances. The appeals are dismissed pursuant to paragraph 66(c) of the *IRPA* [*sic*].

[11] In this application for judicial review, the Applicants raise three issues.

[12] The Applicants frame the issues as errors of law. First, they argue that the IAD erred in law by misstating the legal test by saying that they were required to show "such humanitarian and compassionate circumstances which warrant the granting of special relief."

[13] Next, the Applicants allege that the IAD erred in law by failing to apply the established legal test.

[14] Finally, the Applicants argue that the IAD erred in law by failing to exercise its equitable jurisdiction in the manner discussed by the Supreme Court of Canada in its decision in *Kanthasamy v. Canada (Minister of Citizenship and Immigration),* [2015] 3 S.C.R. 909.

[15] In brief, the Applicants submit that the IAD erred in law and that its decision should be reviewed on the standard of correctness.

[16] The Minister of Citizenship and Immigration (the "Respondent") submits that the decision of the IAD should be reviewed on the standard of reasonableness and that the decision meets that standard.

[17] The first issue for consideration is the applicable standard of review. Questions of law are generally reviewable on the standard of correctness; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[18] The reasonableness standard requires that a decision be intelligible, transparent, and justifiable, and falling within the range of possible, acceptable outcomes; see *Dunsmuir*, *supra* at paragraph 47.

[19] I disagree with the Applicants' characterization of the issue in this case, as raising errors of law. The heart of the case is the IAD's finding about the positive exercise of discretion, on H & C grounds, to overcome the breach of the residency requirements set out in section 28 of the Act.

[20] The Applicants acknowledge that they did not meet the requirements of paragraph 28(2)(a), which provides as follows:

(2) The following provisions govern the residency obligation under subsection (1):	(2) Les dispositions suivantes régissent l'obligation de résidence :
(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are	a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) physically present in Canada,	(i) il est effectivement présent au Canada,

(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,	(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,
(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,	(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or	(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(v) referred to in regulations providing for other means of compliance;	(v) il se conforme au mode d'exécution prévu par règlement;

[21] I agree with the Respondent that the Applicants are erroneously focusing on the H & C discretion provided by section 28 of the Act. The subject of this application for judicial review is the decision of the IAD, not the decision of the Officer. The Respondent correctly notes that the IAD enjoys its own H & C discretion pursuant to paragraph 67(1)(c) of the Act, which provides as follows:

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 :
(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.

[22] Proceedings before the IAD are recognized as *de novo* hearings; see the decision in *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1673. This means that the IAD can review new evidence and render its own decision; it is not bound by the original decision-maker. In this regard I refer to the decision of the Supreme Court of Newfoundland and Labrador in *Newterm Ltd., Re*, (1988), 70 Nfld. & P.E.I.R. 216 (Nfld. T.D.) at paragraphs 4 and 5.

[23] The Applicants submit that the IAD erred by failing to apply the law for the exercise of H & C discretion as discussed in *Kanthasamy, supra*. They refer to paragraphs 11 to 21 in that decision, and suggest that the IAD improperly limited its consideration of the scope of the relief available.

[24] I disagree with these submissions. Although the Supreme Court of Canada's decision in *Kanthasamy, supra,* certainly puts emphasis on the humanitarian purpose of the "general" H & C

discretion set out in subsection 25(1) of the Act, that decision does not stand for the proposition that every request for the exercise of the H & C discretion should be granted.

[25] In my opinion, the decision of the IAD shows that the decision-maker considered the evidence submitted and relevant jurisprudence. The fact that the Applicants have adult children in Canada, a university aged granddaughter, and two young granddaughters does not automatically lead to the positive exercise of the H & C discretion.

[26] As noted above, this application for judicial review does not raise errors of law. It raises a typical issue about the exercise of H & C discretion, although under paragraph 67(1)(c) of the Act dealing with the powers of the IAD, and not under subsection 25(1).

[27] The facts of this case are straightforward and invite sympathy.

[28] The Applicants are elderly. They are the parents of two adult sons, both of whom are married, with children. The sons now live in Canada, with their families. There are members of the extended family in Canada. There are no surviving siblings of the Applicants in India. However, I see no reviewable error on the part of the IAD. Accordingly, this application for judicial review will be dismissed.

[29] Counsel for the Applicants proposed the following question for certification:

> What is the proper legal test when the Immigration Appeal Division is considering the humanitarian and compassionate factors in an appeal of a decision mar pursuant to s.28 of the IRPA?

[30] The Respondent opposes certification of this question on the grounds that it does not meet the test set out in *Zazai v. Canada (Minister of Citizenship and Immigration)* (2004), 318 N.R. 365, that is a serious issue of general importance that is dispositive of an appeal.

[31] I agree with the submissions of the Respondent on this point. The proposed question does not meet this test and no question will be certified.

JUDGMENT FOR IMM-2966-16

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2966-16
STYLE OF CAUSE:	MAHRAB MASSEY AND SHIRLY EUGINA MASSEY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 20, 2017
JUDGMENT AND REASONS:	HENEGHAN J.
DATED:	AUGUST 31, 2017

APPEARANCES:

Wennie Lee	FOR THE APPLICANTS
S. Hillary Adams	FOR THE RESPONDENT

SOLICITORS OF RECORD:

LEE & COMPANY Immigration Advocacy, Counsel & Litigation Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT