Federal Court  Cour fédérale

Date: 20170824

Docket: IMM-4968-16

Citation: 2017 FC 784

[ENGLISH TRANSLATION]

Montreal, Quebec, August 24, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

FRANJIEH EL KHOURY

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board, dated November 8, 2016, allowing the respondent's appeal of a removal order issued on July 1, 2013, at Pierre Elliot Trudeau International Airport. The removal order was issued by an officer of the Canada Border Services

Agency (CBSA), because the respondent had not been physically present in Canada for at least 730 days during the reference period from July 1, 2008 to July 1, 2013.

II. Facts

[2] The respondent is a Lebanese citizen, 48 years old, single, with no children. She arrived in Canada in June 2006. Her family members live in Lebanon, as did her parents, who are now deceased. She does not have any family in Canada.

[3] The respondent alleges that she has lived in Montreal since her arrival in Canada and that she does contract work in computer repairs and information technology to earn a bit of income. She lives very simply, participating in few activities outside her home. Her trips outside of Canada are paid for by her brother in Lebanon. In 2013, she began to take steps with Emploi Québec, and with the Ordre des ingénieurs du Québec [Quebec order of engineers] for a licence. Since 2014, she has received social assistance.

[4] The respondent undertook a doctorate in Computer Science at the Université Claude Bernard Lyon 1, from November 2006 to December 2009. The respondent says that she did her thesis by Skype and by email exchange. After she completed her thesis, she says that she still continued to do research and volunteer assignments in order to become a university professor. She also published a book in May 2013, which contained part of her doctoral thesis.

[5] The respondent states that she made the following seven trips outside Canada during the reference period from July 1, 2008 to July 1, 2013:

- July 30, 2009–August 17, 2009, trip to Lebanon; August 17, 2009–September 1, 2009, trip to France, for her [TRANSLATION] “doctoral thesis defence.”
- December 1, 2010–March 25, 2011, the respondent’s mother is gravely ill. Lebanon visit for 114 days.
- March 29, 2011–April 15, 2011, the respondent’s mother is again gravely ill. Lebanon visit.
- August 22, 2011–September 13, 2011, trip to Lebanon.
- Christmas (December 2011, 2–3 weeks, cousin’s wedding in Lebanon [no stamps in the passport for this trip]).
- September 3, 2012–September 17, 2012, trip to Lebanon.
- June 13, 2013 – July 1, 2013, family visit in Lebanon.

[6] On July 1, 2013, a CBSA officer issued a removal order against the respondent, which stated that the respondent had not been physically present in Canada for at least 730 days of the reference period from July 1, 2008, to July 1, 2013. The respondent appealed that decision. The appeal was heard on October 25, 2016.

III. Issue

[7] The applicant raises only one issue: Is the decision reasonable?

[8] For the reasons that follow, the application for judicial review is allowed.

IV. Impugned decision

[9] The IAD allowed the appeal, because the removal order was ineffective with respect to the law. Ultimately, the IAD considered that the respondent discharged her burden of proof and that she demonstrated on a balance of probabilities that she had been in Canada for at least 730 days during the required period.

[10] First, the IAD examined the respondent's three Lebanese passports, noting the many entry and exit stamps. The IAD also noted that one trip, during the 2011 Christmas period, did not appear in the passports. The IAD commented on the various pieces of evidence of the respondent's presence in Canada during that period, including letters from employers, income tax returns, and a letter from her landlord, as well as her testimony that she had been in Canada, with the exception of her trips to Lebanon and France.

[11] Although the IAD observed many shortcomings in the evidence, the IAD ultimately considered that the respondent [TRANSLATION] "offered reasonable explanations and that these concerns, when put into the context of the rest of the evidence, did not discredit her testimony" (at paragraph 15 of the IAD decision).

[12] The IAD noted the "best evidence rule," which is advanced by the Minister to argue that the respondent did not do enough to discharge her burden. The IAD acknowledged this rule, but was also aware that the best evidence is not always available in the context of an administrative tribunal and that such a situation should not become an impossible burden.

[13] The IAD rejects the jurisprudence, specifically *Canada (Minister of Public Safety and Emergency Preparedness) v. Mohammed Chanaoui et al.*, docket IMM-5113-15, a judgment rendered on May 6, 2016 (*Chanaoui*), filed at the hearing, to the effect that passport stamps alone cannot confirm a person's presence in Canada in a given period. In this case, the credible testimony and the evidence filed by the respondent corroborate the respondent's passport stamps and the information in the record of entries into Canada.

V. Relevant provisions

[14] The relevant provisions of the *Immigration and Refugee Protection Act*, SC 2001, c 27, are as follows:

Residency obligation	**Obligation de résidence**
28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	**28** (1) L'obligation de résidence est applicable à chaque période quinquennale.
Application	**Application**
(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,
…	[…]
(v) referred to in regulations providing for other means of compliance;	(v) il se conforme au mode d'exécution prévu par règlement;

(b) it is sufficient for a permanent resident to demonstrate at examination

b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;

(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and

…

[…]

Non-compliance with Act

Manquement à la loi

41 A person is inadmissible for failing to comply with this Act

41 S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

(a) in the case of a foreign national, through an act or omission which contravenes,

directly or indirectly, a provision of this Act; and

(b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

Preparation of report

44 (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Rapport d'interdiction de territoire

44 (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

…

[…]

Right to appeal removal order

63 (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision to make a removal

Droit d'appel : mesure de renvoi

63 (3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise en vertu du

order against them made under subsection 44(2) or made at an admissibility hearing.	paragraphe 44(2) ou prise à l'enquête.
Right of appeal — residency obligation	**Droit d'appel : obligation de résidence**
(4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.	(4) Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.
…	[…]
Appeal allowed	**Fondement de l'appel**
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.

VI. The parties' submissions

A. *Standard of review*

[15] The parties agree that the appropriate standard of review is the standard of reasonableness (*Canada (Citizenship and Immigration) v. Hassan*, 2017 FC 413 at paragraph 21; *Santiago v. Canada (Public Safety and Emergency Preparedness)*, 2017 FC 91 at paragraph 25).

(1) Is the decision reasonable?

(a) *Applicant*

[16] The applicant submits that the impugned decision is not justified or intelligible. Specifically, the applicant raises the inadequacy of the reasons with respect to many pieces of evidence that he submits are important.

[17] First, in the reasons for its decision, the IAD states that the respondent's reaction at customs is a reasonable explanation [TRANSLATION] "under the circumstances," because the respondent always felt intimidated in the presence of security forces. The hearing transcript indicates that the respondent never explained why [TRANSLATION] "she always felt intimidated in the presence of security forces" (at paragraph 16 of the IAD decision). The [TRANSLATION] "reasonable explanation" that was supposedly offered is not consistent with what was stated during the hearing.

[18] Second, the applicant points out that there are other troubling aspects of the testimony, which are not discussed in the reasons. In fact, the letters filed by the respondent to confirm her jobs in Canada do not report permanent full-time jobs, but rather, occasional and on-call work. The respondent was also unable to file banking evidence for the period from 2009 to 2013. In the

IAD's written reasons, the IAD did not provide a rationale for the fact that it could find the overall evidence—which it found confusing during the hearing—credible at the time of the deliberation.

[19] Third, the applicant points out that the type of evidence referred to in the decision consists of documents that indicate a passive presence and not her actual physical presence in Canada. It is difficult to understand how the passive indicia of residence that are set out (*Canada (Citizenship and Immigration) v. Samaroo*, 2016 FC 689 at paragraph 51 [*Samaroo*]) could have corroborated the record and the stamps in question with respect to the respondent's physical presence in Canada during the reference period. In the absence of reasoning on this point, it is not possible to ascertain whether this is an acceptable, reasonable outcome.

[20] Fourth, the applicant points out that the IAD is also silent on a significant part of the evidence in the record that is clearly contradictory. First, the reasons do not refer to the respondent contradicting herself at the hearing with respect to the contents of the electronic copy of her CV that the CBSA found on her laptop. Second, there is nothing in the reasons about the other determinative, but also contradictory, evidence about whether or not it was necessary for the respondent to stay in France during her doctoral studies. Finally, the decision does not mention that the respondent's statement to the CBSA was different than the one made at the hearing regarding the duration of one of her jobs.

(b) *Respondent*

[21] The respondent submits that the IAD is presumed to have considered all the evidence. The mere fact that the IAD did not, in its reasons, refer to each and every piece of evidence submitted to it or listed in the applicant's memorandum does not mean that the IAD did not consider it. This is not sufficient to set aside the panel's general finding and to refer the matter back for redetermination. In light of the decision, it is obvious that the IAD provided many reasons and examples in connection with the testimony and the documentary evidence to make its finding. Indeed, it did not have to concentrate its analysis to the point of microscopic analysis.

[22] The respondent argues that the fact that the IAD did not assign to some pieces of evidence the weight desired by the applicant does not mean that the IAD ignored this evidence. The IAD is entitled to weigh the evidence, and the Court cannot intervene unless there was really no credible evidence on which the IAD could have relied to reach the stated conclusions.

[23] The Federal Court must show great deference to the IAD's findings. They must be upheld, unless the IAD's reasoning is flawed and the decision does not fall within the range of possible, acceptable outcomes, which are supported by the facts and the law.

(c) *Analysis*

[24] The IAD's decision is not reasonable. This Court has before it the IAD's determination of the respondent's credibility, as well as its assessment of the evidence. The IAD did not consider all the evidence to arrive at a reasonable decision.

[25] This Court notes that the respondent declared at customs that she did not write the book *Iris Biometric Model for Secured Network Access,* which was found in her luggage. She said that the book was written by her cousin, who has the same name. At the IAD hearing, she admitted that she had lied because she had been gripped by fear: [TRANSLATION] "I'm the type that I can't -- well, if someone speaks somewhat loudly, I feel … fear and, like that, that's it. That's why I don't know what happened, I panicked" (at page 59 of the IAD hearing transcript). The IAD found this explanation reasonable:

> [TRANSLATION]
> For example, we may, at first, be troubled by the appellant's reaction at customs. In fact, she acknowledged that she had lied to the visa officer when stating that she was not the author of the book in her luggage, that it was, in fact, written by her cousin. The appellant stated that she was gripped by panic and reacted negatively to the officer's questions. She always felt intimidated in the presence of security forces. It is this panel's opinion that even if it is not a usual reaction, it is a reasonable explanation under the circumstances that has as much merit as the one advanced by the Minister to the effect that the appellant necessarily had something to hide. [The Court's emphasis]
>
> (At paragraph 16 of the IAD decision.)

[26] The applicant argues that the hearing transcript indicates that the respondent never provided an explanation for why [TRANSLATION] "she always felt intimidated in the presence of security forces." A reading of the transcript shows that the respondent did not say this. However, the reasons for the decision do not go so far as to attribute these words to her. It is possible that these words simply reflect the IAD's description of the respondent, that she is a timid, reserved person who is indeed intimidated by someone who [TRANSLATION] "speaks somewhat loudly" (at page 59 of the IAD hearing transcript). The IAD relied on the explanation given at the hearing by the respondent's counsel that [TRANSLATION] "people in uniform make other people jittery.

Especially people who come from countries where the uniform has a lot of power, and Ms. El Khoury is from Lebanon, she lived there until 2006, she lived through wars there, she talked about the bombings…" (at page 125 of the IAD hearing transcript).

[27] The Court notes that the IAD was also silent on a significant part of the documentary and testimonial evidence in the record that was contradictory, specifically the actual content of the electronic copy of her CV on her computer, and whether it was necessary for the respondent to stay in France for her doctorate and the duration of one of her jobs. The IAD did not elaborate on how the different letters filed by the respondent to certify her employment could seem logical given all the circumstances described in the evidence.

[28] The IAD considered the issue of the respondent completing a doctorate in France during her residence in Quebec, as well as the issue of the respondent's CV. At paragraph 10 of the decision, the IAD writes that the respondent [TRANSLATION] "fulfilled her obligations remotely using various technological means." Given the ambiguities and contradictions heard in the courtroom, how can an administrative tribunal make speculations without inherently logical written evidence?

[29] The IAD did not have to explain in detail why it rejected the contrary position, but this Court points out that the two letters from the Canadian employers, Thoransoft and Idées Plus, are ambiguous with regard to the jobs held by the respondent. Further, the IAD did not explain why it considered the letters sufficient to establish the respondent's physical presence. The IAD simply observed that [TRANSLATION] "the appellant offered reasonable explanations and that

these concerns, when put into the context of the rest of the evidence, do not discredit her testimony" (at paragraph 15 of the IAD decision), with no rationale for this reasoning.

[30] The letters from the Beirut employers are far more detailed. The respondent reported her income ($8,480 in 2008; $9,940 in 2009; $9,880 in 2010; $10,500 in 2011; $5,675 in 2012; $9,848 in 2013), but only reported receiving social assistance in 2014. The IAD did not explain why, in its opinion, this was enough for it to be satisfied with the respondent's explanations, without an adequate analysis of the situation in this regard.

[31] This Court notes the judgment in *Canada (Citizenship and Immigration) v. Abdulghafoor*, 2015 FC 1020 (*Abdulghafoor*) regarding the sufficiency of reasons in the credibility assessment. In fact, "even where the reasons for the decision are brief, or poorly written, this Court should defer to the decision-maker's weighing of the evidence and credibility determinations, as long as the Court is able to understand why the citizenship judge made its decision" (*Abdulghafoor*, above, at paragraph 33). The Court cannot understand the basis of the IAD's decision in this regard.

[32] Second, the applicant alleges that the respondent did not provide evidence of active indicia of her residence to corroborate the passport stamps or the Integrated Customs Enforcement System [ICES] report. A single passport stamp alone cannot confirm a person's presence in Canada (*Chanaoui*, above).

[33] The active indicia of the respondent's residence are limited to two letters of employment, a letter from her landlord, and income tax returns. The passive indicia of residence show "registration, not attendance" (*Canada (Citizenship and Immigration) v. Qarri*, 2016 FC 113 at paragraph 7) and consist of evidence such as "health cards, social insurance cards, Canadian income tax returns, bank letters confirming that an account had been opened and leases as well as notices of rent increase" (*Samaroo*, above at paragraph 51; *Canada (Minister of Citizenship and Immigration) v. Chved*, [2000] FCJ No. 1661 at paragraphs 7 and 11).

[34] The Court does not understand how the respondent could have spent the 2011 Christmas holidays in Lebanon without the trip appearing in her passport or in the ICES record. The IAD refers to this without explaining the reason (at paragraph 8 of the decision). The IAD rejects the fact that the respondent could have had some of her trips stamped on a [TRANSLATION] "pink card," used by fraudsters to hide their presence in Lebanon: [TRANSLATION] "It cannot be concluded based on the mere existence of this practice that the appellant, a national of that country, used it" (at paragraph 13 of the decision). This is just speculation. An administrative tribunal has the obligation to examine all the evidence submitted, unless the contrary is established (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paragraph 16; *Florea v. Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 598 (FCA) at paragraph 1).

[35] However, in this case, the IAD greatly relied on the passport stamps and the ICES record to establish physical presence in Canada. As a whole, the decision therefore lacks transparency

and intelligibility with regard to a central and indeed paramount piece of evidence. The absence of stamps leads this Court to find that there was a determinative and fundamental error.

VII. Conclusion

[36] For all these reasons, the application for judicial review is allowed. The matter is referred back to a different panel of the IAD for redetermination.

JUDGMENT in IMM-4968-16

THIS COURT'S JUDGMENT is that the application for judicial review is allowed. The matter is referred back to a different panel of the IAD for redetermination. There is no question of general importance to be certified.

"Michel M.J. Shore"
Judge

Certified true translation
This 4th day of December 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

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