Federal Court  Cour fédérale

Date: 20171120

Docket: IMM-2293-17

Citation: 2017 FC 1052

[ENGLISH TRANSLATION]

Ottawa, Ontario, November 20, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MOKHTAR DJABALI
Z'HOR MAHDADI
OUSSAMA DJABALI
LOUAY DJABALI
NAWEL DJABALI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] After obtaining permanent residence in Canada, an immigrant must spend a minimum of 730 days in Canada in each subsequent five-year period. This obligation is set out in section 28 of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA]:

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, […]
(c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.	**c)** le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.

That is the provision that applies in this case.

[2] These permanent residents have failed to comply with the residency obligation since receiving permanent resident status.

[3] The issue that is before the Court is to decide on an application for judicial review of the decision by the Immigration Appeal Division [IAD], which upheld the departure order that was originally issued against the applicants on July 2, 2013. This application for judicial review was filed under section 72 of the IRPA. What is being debated is not the lawfulness of the removal orders, since it is agreed that the applicants did not satisfy the obligation in section 28, but rather the decision to dismiss the appeal made under section 63 of the IRPA, which presents humanitarian and compassionate considerations. It is paragraph 67(1)(c) that is cited, which reads as follows:

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 :
[…]	[…]
(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.

In other words, the applicants want to be relieved of their failure to meet the residency obligation on humanitarian and compassionate considerations. The IAD's refusal to do so is the subject of this application for judicial review.

I. The facts

[4] On July 8, 2008, the principal applicant, the father, landed in Canada as a skilled worker. Less than one month later, on August 2, 2008, the father and his family left Canada. They spent only 25 days in the country after landing. They did not return to Canada until nearly five years later, on July 2, 2013. On that day, departure orders were issued, and the immigration officer did not see any humanitarian or compassionate considerations that could have justified the absence that prevented them from fulfilling the statutory obligation to be present in Canada, which was open to him under the jurisdiction conferred by paragraph 28(2)(c) of the IRPA.

[5] The decision reveals that the permanent resident cards were valid from July 30, 2008, until July 30, 2013.

[6] When that appeal was heard, in November 2016 and in February and March 2017, the members of the family were in Algeria, except for the father. The eldest children in the family are now 18 and 20 years old, while the youngest is only 10.

A. *The IAD's decision*

[7] Ultimately, this entire case revolves around the explanations that were given for failing to meet the residency obligation that falls upon permanent residents. Clearly, Parliament intended that anyone who obtains permanent residence must stay in Canada for a minimum of two years in every five-year period. When permanent residents seek to return to Canada, they must establish a presence in Canada that is equivalent to two years in the previous five years. In this

case, it appears that the applicants spent only 25 days in Canada, or thereabouts if we consider the return date to be July 2, 2013, before returning to Algeria. Their subsequent returns to Canada appear to have been sporadic.

[8] The IAD selected a certain number of factors from the jurisprudence to be applied to these types of situations. In so doing, it noted a very serious breach of the statutory obligation. The IAD states that this is a factor that weighs heavily in assessing whether it is appropriate to grant special relief in this case.

[9] A second factor is the presence of the family in Canada, which could have an effect on the dislocation of the family. However, in this case, there is no such concern, since the family was still in Algeria at the time of the dispute. In addition, given the children's ages, special importance should be given to the situation of the youngest of them, who is 10 years old. Once again, that child has been in Algeria since November 2015 and spent very little time in Canada during the first years of his life. The best interests of that child are clearly to remain with both his parents and, in the IAD's opinion, that child can continue to live with his parents and his family in the family home in Algeria, where he still attends school.

[10] Another factor from the jurisprudence is the situation of the appellants if their appeal is dismissed, in terms of the hardship that they will face and would have to overcome if they cannot remain in Canada. The IAD noted that the children and their mother spent about a year in Canada following their return in July 2013, while the father spent a bit more than two. All the rest of their lives were spent in Algeria, and they did not encounter any particular hardship there. The

IAD notes—rightly, in my view—that the principal applicant even stated that he preferred to receive treatment for his eye problems in Algeria. As a result, it rejected the argument that he would be disadvantaged if he had to return to his country of origin, Algeria, because he has a visual impairment.

[11] As a result of the appellants' absence over a long period, it was particularly difficult to determine the extent and length of their establishment in Canada and, thus, to prove their integration into Canadian society. In fact, even after their return in July 2013, they travelled to Algeria many times for periods that were never only a few days. Moreover, at the time of the hearings before the IAD, as indicated above, the mother and the three children were living in Algeria. Thus, it was easy for the IAD to conclude that the mother and the three children were barely integrated into Canadian society and that the extent and length of their establishment in Canada were minimal. As for the husband, he spent more time in Canada between 2014 and 2017 and held jobs of varying lengths here. Although it could be said that his establishment in Canada is greater and that this is a positive point in his favour, the IAD found that he is also established in Algeria.

[12] Ultimately, the applicants' appeal in this case was based on compelling reasons why they had to leave Canada and stay abroad, rather than return at the first reasonable opportunity to the country that had granted them permanent residence. The applicants alleged that the principal applicant had a detached retina and that he had to undergo two surgeries. The principal applicant was supposedly advised by his attending physician that he was prohibited from travelling. To a large extent, that is the crux of the matter.

[13] The principal applicant first submitted that, after obtaining permanent resident status, he did not receive his Quebec health insurance card and that, under the circumstances, he could not wait. Preferring to be treated by his physician in Algeria, he returned there a few days after receiving his permanent resident status and, for all intents and purposes, remained there for the following five years. In support of their submissions, the applicants filed a medical certificate that, strangely, is dated April 28, 2013. The certificate presents the principal applicant's treatment and surgeries for a detached retina in his right eye. It lists numerous appointments for treatments said to be [TRANSLATION] "localized in each eye spanning nearly five years, from August 29, 2008, to March 27, 2013." The certificate also states that [TRANSLATION] "his health condition does not allow him to exert himself or travel and requires monitoring." The author of the certificate adds the remark: [TRANSLATION] "medical certificate prepared at the patient's request and delivered in person."

[14] The authenticity of this certificate, which is the only evidence of a contraindication against travelling over a period of five years, was called into question. In fact, although its origins could not be clearly established, the certificate appears to have been presented once again upon entering Canada in October 2014 following another stay in Algeria, after the return in July 2013. The officer's notes are worth reproducing largely as written. He wrote:

> [TRANSLATION]
> Applicant and his children spent 284 days in Canada during the five-year period immediately preceding this application. This presence in Canada was accumulated in the past year. Negative determination was made upon their arrival in Canada in 2013, and applicant appealed the decision. No appeal decision made to date. Applicant states that he returned to Algeria with his children in April 2014 in order to undergo another surgery on his eyes—Letter from attending physician on file. Other letter indicates the multiple operations that he had on his eyes between 2009 and 2012.

> Applicant cites H&C because of his eye problem that required him to return to Algeria for treatment.. .. Request sent to Algiers to confirm the authenticity of the letter provided by the physician that confirms the surgeries between 2009 and 2012.. .. checks conducted by the CBSA officer in Algiers with applicant's attending physician. Physician confirms that the applicant is his patient and that he suffers from an eye disease. He confirms that he performed minor surgery on his eyes last spring, as indicated in one of the letters presented with the application. However, physician confirms that neither he nor any of his employees prepared or signed the letter dated 2013/04/28, which describes a series of appointment dates. He also indicates that some of these appointments did not take place. The physician seems angry that his name was used to produce a forgery. I contacted the applicant by telephone. After having told him about our discovery regarding the letter, the applicant maintains that that letter was written and signed by the attending physician....
>
> Having verified the letter dated 2013/04/28 that he presented and compared it to that dated 2014/06/05, it is clear that the letters were probably not written by the same office. The font used differs, the physician's signature is very different, there are obvious syntax errors, and so on. This leads me to believe that the letter is probably a forgery, as indicated by the attending physician.
>
> [Emphasis added]

[15] The IAD concluded that the validity of the medical certificate dated April 28, 2013, was seriously undermined. In fact, the IAD states the following at paragraph 24 of its decision:

> [24] Although the panel does not doubt that the principal appellant had serious eye health problems based on the other documents on the record whose validity was not disputed, these documents do not indicate that MB [*sic*] was unable to fly due to eye health problems. Given the absence of credible and trustworthy evidence regarding this inability, the panel considers that the principal appellant did not establish, on a balance of probabilities, that his eye health problems prevented him from returning to Canada from 2008 to 2013.

[16] In addition, it appears that, at the hearing before the IAD, the applicants suddenly gave a different explanation for their departure in August 2008. They stated that they had left on August 2, 2008, because of the critical health of the principal applicant's father; the father allegedly died on August 3, 2008. However, that event was not mentioned in 2013 as being the reason behind their departure from Canada in 2008; rather, the reason was the health of the principal applicant, who could not wait for his health insurance card to be issued.

[17] That led the IAD to draw the following conclusion:

> [33] In light of the various versions of the reasons given for his departure from Canada in August 2008 and the contradictions relating to the context of the departure from Algeria, concerning, in particular, the severing of MD's employment relationship, the panel is of the opinion that the evidence does not show on a balance of probabilities that the appellants had compelling reasons to leave Canada at that time and to stay in Algeria until 2013 and that, rather, it was the choice of the principal appellant and his spouse to pursue their life in Algeria where the couple benefitted from two salaries and where MD received the care needed for his health, which, moreover, he hoped to continue to receive in Algeria. The appellants did not demonstrate that they returned to Canada at the first reasonable opportunity. After being absent for one month and obtaining permanent residence in Canada, their life in Algeria continued on unchanged. These are significant negative factors in the assessment of the H&C considerations on the record.

[18] The IAD also noted against the applicants that they were not honest about the reasons for their continued absence from Canada. It is the integrity of the immigration system that is compromised in these circumstances.

[19] Lastly, the IAD found that the principal applicant's overall testimony was laboured. It gave the impression that it was difficult for him to respond directly to the questions asked. After

examining all the factors, the IAD found that the humanitarian and compassionate considerations were insufficient to warrant special relief.

B. *Analysis*

[20] In these matters, it has been established by the highest authority that a decision regarding the existence of humanitarian and compassionate considerations is governed by the standard of reasonableness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339). As the Court states at paragraph 57, "[n]ot only is it left to the IAD to determine what constitute 'humanitarian and compassionate considerations', but the 'sufficiency' of such considerations in a particular case as well. Section 67(1)(*c*) calls for a fact-dependent and policy-driven assessment by the IAD itself." However, when a breach of procedural fairness is cited, the standard of correctness will apply (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502 [*Khela*]).

(1) Procedural fairness

[21] In his arguments, counsel for the applicants stressed the absence from the record of the letter dated June 5, 2014, which is cited in the notes that I reproduced at paragraph 14 of this decision. According to counsel, this was a breach of procedural fairness. Unfortunately, he did not refer the Court to any authority in support of such an assertion. The fact that reference is made to a document that was not produced does not in itself make that absence a breach of procedural fairness. The rules of evidence in administrative matters are very lenient. For example, hearsay is admissible without cross-examination being necessary. Rather, it is up to the

decision-maker to determine the weight that must be given to such evidence. However, the decision-maker was more interested in the remarks made by the attending physician, who reported that he had not prepared the document from April 2013 that sought to establish the need to remain in Algeria while the principal applicant was undergoing treatment.

[22] The modern concept of procedural fairness is rooted in the old principles of natural justice. There is no doubt that the duty of procedural fairness applies to decisions on humanitarian and compassionate considerations (*Baker v Canada (Minster of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*]). However, the content of the duty of procedural fairness varies, and it must be clearly understood that it concerns the proceedings. The array of procedural safeguards, which includes the right to be heard by an impartial decision-maker, varies. A useful summary of the factors to be considered was provided in *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650 at paragraph 5:

> [5] The content of the duty of fairness on a public body varies according to five factors: (1) the nature of the decision and the decision-making process employed by the public organ; (2) the nature of the statutory scheme and the precise statutory provisions pursuant to which the public body operates; (3) the importance of the decision to the individuals affected; (4) the legitimate expectations of the party challenging the decision; and (5) the nature of the deference accorded to the body: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In my view and having regard to the facts and legislation in this appeal, these considerations require the Municipality to articulate reasons for refusing the Congregation's second and third rezoning applications.

Nevertheless, these factors relate to a litigant's right to participate. In *Baker*, the Court stated that "... underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker" (paragraph 22).

[23] What we have in this case is a piece of evidence of questionable probative value. This consists of a comparison of two documents by a non-expert, where the decision-maker cannot even be satisfied with the quality of the comparison because one of the documents is missing. The applicants could have argued on that subject; there is no doubt that the IAD is an impartial decision-maker. The applicants simply submit that the fact that a letter was referenced in the proceedings results in an unnamed breach of procedural fairness. Without offering any rationale or authority, I can only find that there was no violation. Moreover, if considerable weight were given to that comparison to find that the certificate from April 2013 is a forgery, there could have been an argument on the reasonableness of such a finding, considering the probative value it would have been given. I would like to reiterate what is stated at paragraph 74 of *Khela*:

> [74] As things stand, a decision will be unreasonable, and therefore unlawful, if an inmate's liberty interests are sacrificed absent any evidence or on the basis of unreliable or irrelevant evidence, or evidence that cannot support the conclusion, although I do not foreclose the possibility that it may also be unreasonable on other grounds. Deference will be shown to a determination that evidence is reliable, but the authorities will nonetheless have to explain that determination.

(2) Weight of the evidence

[24] What is at issue here is not so much a breach of procedural fairness as it is the relative weight that can be given to an allegation that was made in the notes filed into evidence that a comparison between the medical certificate from April 24, 2013, and the one from June 5, 2014, indicated that the two documents were probably not prepared by the same office. In the IAD's decision, this finding in the notes received only a mention. Rather, it was the attending physician's hearsay testimony that made the difference and that led the IAD to have serious doubts about the authenticity of the certificate dated April 28, 2013. In reality, all things considered, I give little importance to the absence of the letter from June 2014, given how it was used. It has been stated that the judicial review is not a treasure hunt with the hope of finding an error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 SCR 458 at paragraph 54).

[25] In our case, I do not consider the weight given to a medical certificate from June 2014 to find that the one from April 2013 was likely a forgery to be in any way determinative. As specified in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, reviewing courts may, if they find it necessary, "look to the record for the purpose of assessing the reasonableness of the outcome" (paragraph 15). This does not involve re-writing the IAD's reasons (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654), but rather finding that another medical certificate (dated July 24, 2012) had an invoice that differed significantly from the certificate dated April 28, 2013. It is particularly striking that the

certificate from April 2013, in addition to the various spelling errors, uses a very different typeface, but above all refers to the office's address as being [TRANSLATION] "97streets", while the one from July 2012 indicates "97 Street". In other words, we can deduce that the certificate from April 28, 2013, had a homemade look to it that the certificate from July 2012 did not, based solely on the comparison of these two documents.

[26] In my view, the statement from the attending physician was sufficient to cast doubt on the medical certificate from April 2013, which is the only support for the principal applicant's claim that he could not return to Canada for five years. That information from the attending physician is corroborated by the comparison with another medical certificate that is on file.

[27] The parties pointed the finger at one another regarding the certificate dated April 28, 2013, in that neither party tried to clarify matters in order to submit evidence of better quality to the IAD. I admit that I do not understand how, in the information age, the principal applicant could not (or chose not to) communicate with his attending physician in Algeria to refute the information that the government had sent to him, indicating that the physician had allegedly stated that the certificate was a forgery and denied that he had prepared it. What is more, his wife was living in Algeria at the time. It would have been very simple. How could a negative inference not be drawn when the principal applicant did not bother to try to obtain that information? That being said, the government, which prepared the notes on which it relied, should have provided clarifications before the IAD in the form of affidavits or other documentation, given the failure to produce more intelligible notes.

[28] In place of a solid record, we have only bits of information with which to attempt to assemble a coherent whole. Whatever the case may be, the applicants chose to focus on the absence of a letter from the government notes that were filed in support of the appeal before the IAD. In fact, that quickly became the sole argument. Since this was not a breach of procedural fairness, all that remained was to argue that the decision as a whole is unreasonable. No such submission was made at the hearing, and one could have thought that the argument had been abandoned. That is in fact what I understood from the position taken at the hearing.

[29] In any event, the rest of the applicants' argument in their memorandum of fact and law ultimately amounts to a disagreement with the weight the IAD gave to the evidence that had been submitted. As is well established, a decision will be unreasonable only if it does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law and if the decision is lacking in justification or if the decision-making process was not transparent and intelligible (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, paragraph 47). That has not been demonstrated in this case. On the contrary, the evidence submitted to explain a five-year absence was extremely weak.

II. Conclusion

[30] From the outset, I accept the respondent's argument that the burden rests on the shoulders of the applicants and that it was up to them to counter the rather overwhelming evidence from the attending physician in Algeria, who stated that he had not prepared the medical certificate on which the principal applicant relied, a certificate that looked homemade. It was possible to cross-examine the author of the notes or to produce an affidavit from the attending physician.

The applicants did not take any of those avenues and were content to make an argument on a peripheral aspect of the evidence in the notes. The first challenge was to refute the attending physician's statements. That was also the basis for most of the IAD's finding regarding the medical treatments that supposedly required the principal applicant to remain in Algeria for five years. The comparison with another document that was prepared the following year had no impact on the outcome.

[31] I was unable to find any reason to conclude that the IAD's assessment of the factors was unreasonable. In fact, the applicants provided no developed arguments whatsoever. Consequently, the application for judicial review must be dismissed. The parties were consulted, and they agree that there is no serious question of general importance that would need to be certified.

JUDGMENT in IMM-2293-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No serious question of general importance is certified.

"Yvan Roy"
Judge

Certified true translation
This 20th day of January 2020

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2293-17
STYLE OF CAUSE:	MOKHTAR DJABALI, Z'HOR MAHDADI, OUSSAMA DJABALI, LOUAY DJABALI, NAWEL DJABALI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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