Federal Court  Cour fédérale

Date: 20171208

Docket: IMM-2507-17

Citation: 2017 FC 1126

Ottawa, Ontario, December 8, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

RASHID SHAHNAWAZ
INARA LALANI
SHAMSA LALANI
ANOOSHA LALANI

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the Matters

[1] This is an application for judicial review under section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*] of a decision by the Immigration Appeal Division [the IAD] dated May 19, 2017, which dismissed the Applicants' appeal based on humanitarian and compassionate grounds [H&C] of a departure order issued by an immigration

officer following the Applicants' failure to meet the residency obligations for permanent residence under section 28 of *IRPA* [the Decision]. At the IAD, the Applicants conceded their non-compliance with section 28 of *IRPA*, but sought special relief under paragraph 67(1)(c) of *IRPA*, which was denied.

II. Facts

[2] The Applicants include Shahnawaz Rashid [Shahnawaz]; his wife, Shamsa Lalani [Shamsa], their oldest daughter, Anoosha Lalani (21 years old) [Anoosha] and their youngest daughter, Inara Lalani (18 years old) [Inara]. The Applicants were born in Pakistan and are citizens of Singapore only. They applied for permanent residence under the skilled worker program and received visas in July 2010. The Applicants were landed in Canada as permanent residents on July 4, 2010.

[3] The Applicants do not dispute that they failed to meet their residency obligations between July 4, 2010 and July 4, 2015 [the Relevant Period]. Shahnawaz, Shamsa and Inara remained in Canada approximately 50 days out of the 730-day residency requirement. Anoosha remained in Canada for only 344 days out of the normal 730-day residency requirement. However, the Applicants submit that there are significant H&C factors such that the IAD should have exercised equitable jurisdiction under paragraph 67(1)(c) of *IRPA* and granted them relief; more fundamentally, the Applicants argue the IAD decision is unreasonable.

[4] In my view, the application should be granted for the following reasons.

III. Background

[5] On July 20, 2010, sixteen days after landing and acquiring permanent resident status, the family left Canada for Singapore because Shahnawaz had previously committed to an employment contract with Citibank in Singapore. At the end of his posting in 2013, Shahnawaz felt he needed to complete a one-year posting to Poland in order to receive his compensation for his 22 years of service with Citibank.

[6] The family returned to Canada on August 10, 2014 to enable Anoosha to start her studies at McGill University [McGill]. However, on the Applicants' return, an immigration officer issued a departure order because they could not satisfy the requirement that they spend 730 days in Canada during the Relevant Period, as part of their permanent residence conditions.

[7] Anoosha has remained in Canada since then, but Shahnawaz, Shamsa and Inara left Canada for Poland shortly after the departure order was issued, to enable Shahnawaz to complete his posting. Shahnawaz returned to Canada for two weeks in March 2015 and again in June 2015. Shamsa and Inara returned to Canada briefly in April 2015 and returned with Shahnawaz in June 2015, to enable Inara to start grade 11. Shahnawaz, Shamsa and Inara have resided in Canada since.

A. *Anoosha*

[8] Anoosha was 14 years old when she landed in Canada and when she subsequently left with her family 16 days later. On August 10, 2014, when she was 18 years old, she returned to

Canada to study at McGill. There is no doubt Anoosha has impressive credentials as a young immigrant to Canada. She was admitted directly as a second year student due to her outstanding performance in her International Baccalaureate [IB] program. After graduating from McGill University in June 2017, she obtained a position as a junior analyst at Ernest & Young in Toronto, on condition she is a permanent resident of Canada. She purchased a condominium in Toronto and has mortgage obligations. Her many accomplishments include published novels, short stories and essays that she authored; her start-up business which facilitates and accelerates refugee integration in Canada; and her title as a "Global Shaper" by the World Economic Forum. She is currently working towards a diploma in accounting at the University of Toronto, the cost of which is being heavily subsidized by her employer. Her accounting diploma will enable her to become a Canadian Chartered Professional Accountant; a designation that Anoosha submits would not be applicable outside of Canada.

[9] She stated the following in her sworn testimony:

> As far as I can see, I would never want to move away from this place, wherein I have become firmly ensconced. I regret that I was a minor when my parents left Canada. Had I had any control in the matter, I would not have done so.
>
> […]
>
> I was unable to meet my residency requirements because I was a minor and was required to move with my family almost each time my father was posted to a new position until I turned 18.
>
> […]
>
> My parents planned to take me and my sister to Canada in July 2013, and I would have started the second year of my IB program during the following September 2013. The schools that my parents contacted cited either subject-matter mismatches, or logistical problems with accepting an overseas second-year transfer student, as reasons for which they would not accept me. Accordingly, my

> parents thought it prudent to delay our arrival in Canada I, then a minor child, finished my IB program in Singapore. I was given no choice in the matter.

B. *Inara*

[10] Inara was only 11 years old when she and her family landed and subsequently left Canada in 2010. She was 15 years old when she returned to Canada on August 10, 2014, when she and her family were issued the departure order for failure to meet their residency obligations. In April 2015, she briefly returned to Canada to complete an exam to assess her suitability for an IB program. She was 16 years old when she returned to Canada on June 25, 2015 to start the 11th grade and has stayed since then.

[11] This is another impressive young immigrant to Canada. In September 2015, Inara started her two-year IB program. She graduated in June 2017 and started her studies at McGill in August 2017. Inara worked part-time as a financial advisor with the World Financial Group during the summer after her first year of studies at McGill; like her sister, she is a published author; and has been an avid volunteer with a great number of different organizations including the McGill University Health Centre and Canadian Blood Services, caring among other things for the terminally ill. She stated the following in her sworn testimony before the IAD:

> Had it been up to me, I would have stayed in Canada and made sure that we met the residency requirements. Canada is my home and the only place wherein I see my future.
>
> […]
>
> My parents tell me that they were delayed in settling into Canada for a number of reasons – but these reasons have nothing to do with me. I came as a minor and I want to settle into my life in

> Canada. As a minor child, I had no control over these circumstances. I wish that I had come to Canada sooner.

C. *Shahnawaz*

[12] Shahnawaz is a former Citibank senior executive. When he applied for permanent residency to Canada in 2009, he understood the process would take 3-4 years. Had the application taken that long, he would have had time to complete his business assignments, see Anoosha through her secondary schooling and move to Canada with a comfortable margin within which to satisfy the 730-day residency requirement. However, the process took less than a year and at the time the family received the permanent resident visas, Shahnawaz was in the midst of a temporary posting in Indonesia and he had already accepted a 3-year posting in Singapore. Although it would have been possible for him to quit his job and sever ties with Citibank, such a departure would have come with a significant financial loss. Instead, Shahnawaz decided to complete his postings in Indonesia and Singapore, which would allow Anoosha and Inara to finish their school year and the family to satisfy the 730-day residency requirement from August 2013-August 2015.

[13] The family had considerable difficulties in their attempts to enroll Anoosha in the second year of a two-year IB program; some Toronto-area schools cited course mismatches and others preferred not to deal with the administrative difficulties of accepting an overseas transfer student. As such, Shahnawaz and Shamsa decided that it would be best to delay their arrival to Canada until August 2014, at which time Anoosha started her studies at McGill.

Since arriving on June 25, 2015, Shahnawaz has transferred his life savings to Canada, purchased a family home in Brampton, and invested in various investment properties, TFSAs, GICs, an RRSP and other local banking products. He accepted a position with HSBC in Canada, earning an annual salary of $140,000.00. He also launched a start-up company called Ace Transformation Inc., which applies his international banking expertise to the retail sector**.** He submits that his family has paid taxes for the last two years, totalling $23,000.00 on the family's annual household income. Shahnawaz and Shamsa also have plans to sponsor RESP funding of approximately $500.00 per year for two families with young children in their community, which they have committed to until 2030.

D. *Shamsa*

[14] Shamsa has lived in Canada permanently since she returned in June 25, 2015. Since 2016, Shamsa has volunteered with the Aga Khan Ismali Community where she sits on the Social Welfare Board for Ontario as the Financial Lead.

IV. Decision

[15] In a decision dated May 19, 2017, the IAD upheld the decision of the immigration officer to issue a departure order and refused to grant special relief to the Applicants under paragraph 67(1)(c) of *IRPA*.

V. Issues

[16] The Applicants submit the following issues for determination:

(1) Did the IAD err by fettering its discretion and or failing to consider establishment which post-dated the removal order (August 2014) and/or by fettering its discretion and or failing to consider establishment that post-dated the Relevant Period?

(2) Did the IAD err in finding that Inara and Anoosha had expressed a preference to remain with their family rather than retain their permanent residence status?

(3) Did the IAD err by ignoring Inara's and Anoosha's circumstances in being unable to meet their residence obligations through no fault of their own?

[17] The real issue for determination is whether the IAD's decision was reasonable. I have concluded it is not based on an assessment of the first two of the Applicants' issues.

VI. Standard of Review

A. *Reasonableness*

[18] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court has determined in several cases, that the standard of review under paragraph 67(1)(c) of *IRPA* is reasonableness: *Uddin v Canada (Minister of Citizenship and Immigration)*, 2016 FC 314 at para 19 per Strickland, J, *Duquitan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 769 at para 11 per Shore J, and *Cortez v Canada (Minister of Citizenship and Immigration)*, 2016 FC 800 at para 17 per Diner J. Reasonableness is the standard of review.

[19] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[20] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

(1) Did the IAD err by fettering its discretion and or failing to consider establishment which post-dated the removal order (August 2014) and or by fettering its discretion and or failing to consider establishment that post-dated the Relevant Period)?

[21] I have concluded that the IAD acted unreasonably in its consideration of elements of establishment that occurred both after the removal order and after the end of the Relevant Period.

[22] I accept *Nekoie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 363 [*Nekoie*] where our former colleague, Bédard J stated, at para 32, that the degree of establishment in Canada, initially and at the time of the hearing is to be considered, along with other factors:

> […] In *Ambat* at para 27, the Court listed the factors that were applied by the IAD in determining whether there were sufficient humanitarian and compassionate considerations to warrant special relief:
>
> > 27 The IAD considered the statutory provision allowing special relief found in paragraph 67(1)(c) of the IRPA. The IAD then stated that in considering whether the Applicant's breach of the residency obligation was overcome that it was guided by the IAD decisions in *Bufete Arce, Dorothy Chicay v. Minister of Citizenship and Immigration* (IAD VA2-02515), [2003] I.A.D.D. No. 370, and *Yun Kuen Kok & Kwai Leung Kok v. Minister of Citizenship and Immigration* (IAD VA2-02277), [2003] I.A.D.D. No. 514. Those two cases suggest that in addition to the best interests of a child directly affected, there are other particularly relevant factors to consider in these types of appeals. The IAD listed these at para 38:
> >
> > (i) the extent of the non-compliance with the residency obligation;
> >
> > (ii) the reasons for the departure and stay abroad;
> >
> > (iii) the degree of establishment in Canada, initially and at the time of hearing;

[23] In this case, the Applicants say there are six instances in which the IAD acted unreasonably in discounting or negating establishment that occurred post-removal order and after the Relevant Period:

> [54] Examples where the IAD erred in its decision by discounting post-removal order establishment are as follows:

A. At paragraph 22 of the Decision, the Member states with respect to Ms. Shamsa Lalani: "While I do have evidence of the work and volunteering done in Canada since July 2015, I consider this establishment outside of the residency obligation period. The evidence before me is that they bought since 2015, they bought a home[*sic*], work here and integrated into Canadian society**, the problem is that this is all outside of the relevant period** (emphasis added)."

B. At paragraph 24 of the Decision, the Member states with respect to Mr. Shanawaz Rashid: "In any event, the timeframe of when Mr. Shahnawaz enlisted a real estate agent is not as important to me as when he purchased a home and he and his family started to establish themselves in Canada on a permanent basis, given that even if he had contacted an agent in August 2014, he then left again to fulfill his Polish contract and didn't return again for another 10 months. In my view, the start of establishment in Canada began for Anoosha in August 2014 when she returned to Canada for the purpose of pursuing her post-secondary education at McGill and the rest of the family in late June 2015 when Mr. Shahnawaz was free from his work commitments with Citi Bank and where Shamsa and Inara entered Canada with him. **Therefore this demonstrates in my opinion no establishment in Canada before the removal order was issued and within the five-year residency obligation little efforts were made to actually establish themselves in Canada…**(emphasis added)**."**

C. At paragraph 25 of the Decision, assessing Mr. Shahnawaz's establishment: "Since moving to Canada on June 25, 2015, Mr. Shahnawaz transferred his life savings here which are invested in a primary home in Brampton, investment properties, TFSAs, GICs, RRSP and other local banking products. They put money as down payment on their home which Mr. Shahnawaz said he would not been able to do if he had not staying [*sic*] to see through the years with Citi Bank. Mr. Shahnawaz has worked in Canada for HSBC…He has since incorporated a business in November-December 2016 called Ace Transformation Inc. All

together with three mortgages for their primary residence and two other investment properties, their family assets are approximately $2,052,846.00 in Canada. **Mr. Shahnawaz's post removal establishment more than five years after he was originally landed is admirable but it is not sufficient to warrant granting of special relief because this all comes after the removal order was issued. While this is a positive factor in general, it does not fall within the relevant period** (emphasis added)."

D. At paragraph 27 of the Decision, with respect to Ms. Shamsa Lalani, the IAD states: "She is volunteering in Canada with Aga Khan Social Welfare Board for Ontario with the "Quality of Life" program that supports households with less than $45,000.00 incomes…**The timing of all this is post departure order and again outside the relevant period of establishment. This is a negative factor for me** (emphasis added)."

E. At paragraph 28 of the Decision, the member discusses Anoosha's McGill University studies, her job offer with Ernst & Young, the fact that she is a very good student, volunteered with youth organizations in the arts, raised money for AIDS awareness, published a novel in September 2014, spent Christmas with her family in Canada for the first time. The Board member nevertheless decides "Although Anoosha establishment may be stronger than that of her parents, **part of her establishment is also outside the residency obligation [*sic*]** (emphasis added)**.**"

F. At paragraph 29, with respect to Ms. Inara Lalani, the Member discusses her hard work in high school, her early acceptances to various university programs, he friends, volunteerism, and her writing and published poetry, but then continues to conclude that **"Although Inara's establishment may be stronger than that of her parents, her establishment was also outside the residency obligation [*sic*].** She returned to Canada only when her parents did (emphasis added)."

[Emphasis in the Applicant's Memorandum]

[24] In my view, the assessment of post-removal order establishment requires officers to consider evidence of establishment, and weigh it in the balance with all other relevant factors. It is no more liable to be ignored, than it is to be accepted, without more. Such timing is one of many factors to be looked at in the overall assessment of what is humanitarian and compassionate in the circumstances of a case like this. The assessment must also include the statutory starting point; while the starting point may eventually be the end point, an assessment is still required.

[25] In this case, I agree the Applicants have identified a number of unreasonable conclusions; they are unreasonable because they are not defensible on the law as required by *Dunsmuir*.

> (2) Did the IAD err in finding that Inara and Anoosha had expressed a preference to remain with their family rather than retain their permanent residence status?

[26] In my view, the IAD's findings in relation to the preferences of Anoosha and Inara were of central importance to the dismissal of the claims for humanitarian and compassionate relief under paragraph 67(1)(c) of *IRPA*.

[27] With respect to Inara's and Anoosha's preference to remain with their parents or remain in Canada, the IAD concluded:

> [45] Both daughters said, they have never been apart from their parents on a permanent basis and want to remain as a family. Counsel for the appellants did not argue that the appeal should be allowed for one appellant in particular over another but that the appeal should be allowed for all of them. Give [*sic*] the testimony that this family wishes to remain together, I find their family ties are stronger than their ties to Canada. The appellants have not convinced me that sufficient H&C factors exist to warrant the granting of special relief. The negative factors weigh against the granting of this appeal.

[28] With respect to Anoosha, specifically, the IAD stated:

> [28] … Anoosha did however clearly testified [sic] to wanting to remain with her family regardless of the outcome of this appeal. […] I asked her if she would want to remain in Canada if her parents were not going to be here. She initially said she did not know as there are work opportunities for here in Canada and completed her answer by stating "I want to be with my parents".

[29] With respect, a search of the record fails to reveal where the last statement was made. This conclusion therefore was neither justified nor supported by the record. What Anoosha said in response to the IAD's question, was:

> I don't know would be the honest answer. … Especially because I do want to be with my parents and if there's a place in which I can be with my parents I would much rather have that, but at the same time I don't know if I have the opportunities that Canada has given to me at other places, like I have a job lined up, I have all of this but I also want to be with my parents.

[30] It is also noteworthy that Anoosha was present in Canada for 344 days during the residency period - her first year at McGill - all time that she spent away from her family. The IAD's conclusion regarding Anoosha is unreasonable.

[31] With respect to Inara, the IAD concluded that:

> [30] … Inara has not told me she wishes to remain in Canada even if her parents lose their status here. She is now no longer a minor and she has demonstrated her ties to Canada are not stronger than her ties to her parents.

[32] Again, and with respect, this conclusion is not supported on the record. Inara actually stated at the hearing that she wished to continue growing away from her family. She testified: "I

see myself being able to grow with distance, away from my family, but also being able to be with them within a close proximity and having their support."

[33] Standing back and viewing the Decision as an organic whole, and not as a treasure hunt for errors, given the consideration of post-removal order and post-Relevant Period establishment, and the unreasonable determinations made with respect to both Anoosha's and Inara's testimony, I have concluded that the Decision is not defensible in respect of the facts or the law. Accordingly, the Decision does not fall within the range of possible, acceptable outcomes and therefore, must be set aside.

[34] Neither party proposed a question of general importance to certify, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the Decision is set aside and remanded to a different decision-maker for redetermination, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	RASHID SHAHNAWAZ, INARA LALANI, SHAMSA LALANI, ANOOSHA LALANI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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APPEARANCES:

Warda Shazadi Meighen Lorne Waldman	FOR THE APPLICANTS
Suzanne Bruce	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waldman and Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Nathalie G. Drouin Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT