Federal Court  Cour fédérale

Date: 20191023

Docket: IMM-687-19

Citation: 2019 FC 1328

Ottawa, Ontario, October 23, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MAHMOUD Y A SHAHEEN

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On September 15, 2016, the Applicant received a removal order from the Canadian Border Services Agency [CBSA] because he failed to meet the residency requirements of his permanent resident [PR] status. He appealed that decision to the Immigration Appeal Division [IAD], which affirmed the removal order, finding insufficient humanitarian and compassionate

[H&C] grounds to warrant overturning the order. The IAD decision dated January 4, 2019 [the Decision] is the subject of this application for judicial review.

[2] As explained in more detail below, this application is dismissed, because I find the IAD reasonably considered the evidence that was before it, and it reasonably applied to that evidence the law applicable to the assessment it was required to perform.

II. **Background**

[3] The Applicant and his family landed in Canada in March 2010, arriving from Ramallah in the West Bank, Palestine, based on the Applicant's qualification under the skilled worker category. He is a medical doctor from Palestine. His spouse is also a PR, and two of his three adult children are now Canadian citizens. His youngest son was in the process of obtaining Canadian citizenship at the time of the Decision.

[4] Ten days after arriving in Canada, the family returned to Ramallah so that the Applicant's daughter, his eldest child, could finish her high school exams. After she began studying at the University of Toronto, the Applicant returned to Ramallah for another year, so his elder son could finish high school without disruption. Once that son was settled at Ryerson University, the Applicant decided to enroll his younger son in an English program in Ramallah, before enrolling him in Canadian high school, to avoid certain difficulties his brother and sister were experiencing at their Canadian universities. The Applicant spent substantial time in Palestine throughout these periods that his children were studying there.

[5] The Applicant applied to renew his PR card in March 2015 and became the subject of a PR determination investigation. On April 15, 2016, the CBSA issued a report under s 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], finding the Applicant had not met his requirement under s 28 of IRPA, related to the number of days required to be resident in Canada during the five-year period following his landing. The Applicant admits he was aware of this residency requirement. However, he claims, until the CBSA called him for an interview in late 2016, he did not understand the seriousness of his non-compliance.

[6] In November 2016, the Applicant resigned from his job with the Palestinian government and tried to sell the family's apartment in Ramallah. The sale was unsuccessful, because construction on a neighbouring property caused damage to the Applicant's building. With seven other owners, the Applicant began a lawsuit against the neighbour. He claims he was the most invested in this lawsuit, because he wanted to sell the apartment; and he had the most evidence and assistance to provide their counsel, as his unit is on the ground floor. The lawsuit succeeded, but three of the other claimants appealed the quantum of damages. At that point, the Applicant concluded that his presence was not required, and he came to Canada in February 2018.

[7] Once he arrived in Canada, the Applicant took steps to find employment and enrolled in the Ryerson "Internationally Trained Medical Doctors Bridging Program" [Ryerson Bridging Program]. He completed the first theoretical portion of the program, and was about to begin the second practical part, but found full-time employment as a consultant with a medical clinic. The Applicant testified before the IAD that he plans to buy the clinic eventually.

[8] The Applicant's evidence is that he remained in Palestine primarily to earn money to support his family in Canada. He worked with the Palestinian government for many years, either directly or on contracts with other organizations. He claims he has looked for work in Canada since 2010, but he was either over-qualified for the positions or lacked required Canadian experience.

[9] At the time of the IAD hearing, the Applicant's three children were either in university and working part-time or were working full-time in Canada. The children testified that separation from their father would be difficult on the family. They asserted that travel restrictions, which are frequently placed on the West Bank and Gaza by Israel, would prevent the Applicant from visiting them in the Canada and vice versa. Because the Applicant has resigned from his government position, he no longer holds a diplomatic passport, which he asserted will make travel to Canada more difficult for him than in the past.

III. **Decision Under Review**

[10] In reviewing the removal order, the IAD considered whether (1) the Applicant had met his PR requirements under s 28 of *IRPA*; and (2) sufficient H&C grounds existed to allow him to stay in Canada under s 67(1)(c) of *IRPA*.

[11] The IAD affirmed the CBSA immigration officer correctly found the Applicant had not satisfied s 28, calculating the Applicant was in Canada for a total of 141 days or 19% of his minimum residency obligation during the relevant period from May 2010 to May 2015.

[12] The IAD then considered the non-exhaustive list of factors from *Bufete-Arce v Canada (Citizenship and Immigration)*, [2003] IADD No 370 (Imm App Bd) [*Bufete-Arce*] and *Kok v Canada (Citizenship and Immigration)*, [2003] IADD No 514 (Imm App Bd) [*Kok*], which guided its determination whether to allow the appeal on H&C grounds:

- the extent of the non-compliance with the residency obligation,
- the Applicant's initial and continuing degree of establishment in Canada,
- reasons for departure from Canada,
- reasons for continued or lengthy stay abroad,
- family ties to Canada,
- whether reasonable attempts to return to Canada were made at the first opportunity,
- hardship and dislocation to family members in Canada if the Applicant is removed from or is refused admission to Canada,
- hardship to the applicant if removed from or refused admission to Canada, and
- whether or not there are unique or special circumstances present that merit special relief.

[13] On the first factor, the IAD rejected the Minister's submission that residency requirements are "minimal," but it agreed the Applicant's non-compliance was extensive, such that significant H&C considerations would be required to allow the appeal.

[14] Related to the Applicant's initial degree of establishment in Canada, the IAD canvassed how the Applicant had returned to Palestine for his daughter's exams, his elder son's last year of high school, and his younger son's enrollment in English school in Ramallah. It also noted his wife travelled back and forth between Canada and Palestine to stay with the children, while the Applicant only visited Canada to establish them in their respective Canadian schools. The

Applicant also retained his employment in Palestine during the relevant period. The IAD found this to be a negative factor.

[15] Related to current establishment, the IAD acknowledged some efforts by the Applicant to establish himself in Canada. He attended the Ryerson Bridging Program and was working full time as a Consulting Manager at a physiotherapy clinic, which he plans to buy. He has also held a joint bank account with his spouse since 2014 and deposited limited funds there. The family has rented an apartment together in Canada since 2015, and he has held a Canadian credit card since 2016. He also has strong English-language skills. While these were positive factors towards establishment in Canada, the IAD found they were not enough to outweigh what it considered to be lacking in terms of establishment. For example, considering the previous eight years, the IAD found the Applicant had little assets or investment in Canada, had little to no community involvement or continuing education, worked approximately 27 days in Canada, and had never filed a Canadian tax return. The IAD found the degree of current establishment limited and that this was a negative factor.

[16] The IAD found the Applicant's reasons for departure and lengthy stay abroad were by choice, weighing against his appeal. It acknowledged his explanation that he could not find work in Canada because he was over-qualified or did not have Canadian experience. However, it concluded that he chose to stay in his well-paying government job. It found he had not actively searched for work in Canada, as there was little documentary evidence to support his assertion of search efforts. The IAD also noted that, once the Applicant committed to being in Canada, and

made concerted efforts to find employment, he enrolled in the Ryerson Bridging Program and obtained full-time employment within 6 months.

[17] On efforts to return to Canada at the first opportunity, the IAD weighed against the Applicant the fact that he did not quit his job or try to sell his home until November 2016. He testified he did not start wrapping up his affairs in Palestine until his children were stabilized in Canada and self-sufficient, and he claimed he did not realize the seriousness of his breach until he received the removal order in 2016. The IAD rejected these explanations, finding that the Applicant realized his home was his biggest asset and he would need funds from its sale to invest in Canada, but he did not make serious efforts to try to sell it until at least 6 years after he became a PR.

[18] The IAD also weighed against the Applicant that he stayed in Palestine for an additional period to participate in the lawsuit against his neighbour. It found insufficient evidence why he could not instruct counsel from Canada, or why the seven other owners could not handle the suit without him. It specifically noted the Applicant's testimony that he realized in December 2017, when they won the suit and his co-owners appealed, that his "presence has no meaning" and that he could return to Canada.

[19] The IAD acknowledged the Applicant's family ties to Canada, but it found the hardship and dislocation to those family members would be minimal. It noted the children wanted to remain with their father in Canada and their testimony that separation over the past eight years had been difficult. However, the IAD found they would suffer minimal hardship should the

Applicant be denied his PR status, because they had lived apart from him for many years, and they are financially self-sufficient adults who are working and/or in university. The IAD found the family's phone and text relationship would continue.

[20] Although the Applicant no longer has a diplomatic passport, which increases the difficulty of him travelling to Canada, the IAD found a lack of evidence that his children would have particular difficulty visiting him in Palestine on Canadian passports. While the Applicant having less ease of travel was a positive factor weighing in favour of the appeal, it was somewhat offset by the ability of his children to visit him.

[21] The IAD had little evidence regarding the Applicant's relationship with his spouse. However, it found that she had travelled back and forth between Canada and Palestine, living for significant periods of time apart from the Applicant, such that she did not represent a strong family tie to Canada.

[22] The IAD also found the Applicant would experience minimal hardship returning to Palestine. It noted he had only been away for less than a year; he was born, educated, and successfully earned a professional livelihood there; he still owns his own apartment in Ramallah; and, he has significant family ties to Palestine. The IAD acknowledged that Palestine faces social and political instability but emphasized that the Applicant had chosen to stay in that environment for over eight years after gaining his PR status in Canada. It therefore gave the political conditions in Palestine little weight.

[23] Based on this analysis, the IAD affirmed the Officer's decision, finding that the Applicant had not met his burden to persuade the IAD that the matter was worthy of H&C relief.

IV. **Issues and Standard Of Review**

[24] The Applicant articulates the following issues for the Court's consideration:

A. Should the test for using equitable relief for matters arising from breach of s 28 of IRPA be different than for other appeals? In particular, should it be more guided by *Chirwa* and *Kanthasamy* than *Ribic*?

B. Did the IAD conduct an assessment as contemplated by *Chirwa* and confirmed by *Kanthasamy*?

C. Were the IAD's findings *vis a vis* the *Ribic* test reasonable and made without misconstruing the evidence before it?

[25] The Applicant does not identify a standard of review. The Respondent submits that the standard is reasonableness for all issues. I concur, as there is no basis to depart from the Court's jurisprudence reviewing decisions of the IAD on the reasonableness standard (see, e.g., *Canada (Public Safety and Emergency Preparedness) v Antoun*, 2018 FC 540 [*Antoun*] at para 15).

V. **Analysis**

A. ***Should the test for using equitable relief for matters arising from breach of s 28 of IRPA be different than for other appeals? In particular, should it be more guided by* Chirwa *and* Kanthasamy *than* Ribic*?***

[26] The Applicant takes the position that, when an appeal to the IAD arises from a breach of the residency requirements, as opposed to a misrepresentation or criminality, the test for H&C relief should be easier to meet. He argues that failure to meet residency requirements is less serious than a misrepresentation or criminality and that applicants like himself should therefore be able to succeed on appeal with less compelling H&C factors.

[27] In advancing this position, the Applicant first relies on the fact that s 28 of IRPA, which creates the residency obligation, itself permits a visa officer to determine that H&C considerations overcome a breach. The Applicant notes there is no similar provision allowing for H&C relief in the context of misrepresentations or criminality prior to the appeal to the IAD. I find little merit to this submission. The IAD must take H&C factors into account in all categories of appeals. In my view, the fact that the decision-maker below in the present context may also examine those factors does not suggest a different approach to the H&C analysis to be undertaken by the IAD in an appeal therefrom.

[28] The Applicant also submits his position is supported by the guidance in *Chirwa v Canada (Manpower and Immigration)* (1970), 4 IAC 338 (Imm App Bd) [*Chirwa*] at 350, and *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at paragraph

13, to the effect that H&C considerations refer to circumstances that would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of others. The Applicant argues the IAD should have analysed his circumstances in that manner, placing less reliance on the factors set out in *Bufete-Arce* and *Kok* (often referred to as the *Ribic* factors, based on *Ribic v Canada (Employment and Immigration)*, [1985] IABD No 4 (Imm App Bd)). He submits such an analysis would have allowed him to overcome the breach of his residency obligation with a lower threshold of H&C considerations than the IAD required in its Decision.

[29] Again, I do not find the Applicant's argument compelling. As the Respondent notes, while the *Ribic* factors are a non-exhaustive list, the Court has recently confirmed the application of these factors to the consideration by the IAD of H&C grounds in residency obligation appeals (see, e.g. *Sanchez Zapata v Canada (Citizenship and Immigration)*, 2018 FC 1250 at para 4; *Antoun* at para 20). I also agree with the Respondent that the relevant factors and the weight to be afforded to them varies depending on the specifics of each case.

[30] These principles do not support a conclusion that the IAD is required to apply a different test in appeals arising from breaches of s 28 of IRPA. Rather, the guidance to be derived from *Ribic*, *Chirwa*, and *Kanthasamy* applies to H&C analyses generally, with the particular analysis to be driven by the individual facts of each case rather than by the nature of the appeal giving rise to recourse to the IAD.

[31] The Applicant also argues the IAD should have considered the Applicant's future intent to meet his residency obligation. He equates this consideration to the "possibility of

rehabilitation" factor that *Ribic* prescribes for appeals arising from criminality. I agree with the Respondent's position that the Applicant's submissions to the IAD did not advance this argument in this manner. Moreover, applicable jurisprudence provides that the potential for establishment is not a relevant consideration, as the determination of establishment is not a forward-looking exercise (see *Nassif v Canada (Citizenship and Immigration)*, 2018 FC 873 at para 33; *Canada (Citizenship and Immigration) v Hassan*, 2017 FC 413 at paras 24-25; *Canada (Public Safety and Emergency Preparedness) v Hassan*, 2019 FC 1090 at paras 15-16).

[32] Finally, the Applicant relies on the recent decision in *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 [*Damian*] at para 21, in which Justice McHaffie noted that the words "exceptional" and "extraordinary" should not be considered a legal standard applicable to decisions whether to grant H&C relief. However, I do not understand the Applicant to be arguing that the IAD employed this language in an inappropriate manner in its Decision. Rather, the Applicant's argument is a response to the Respondent's submission that H&C relief represents an exceptional and extraordinary remedy. In that respect, the circumstances are similar to those considered in *Damian* (see para 18), and the applicability of that language is not determinative of this matter. To the extent the Applicant argues that the level of H&C considerations the IAD required him to demonstrate represents the application of too high a threshold, i.e. at an exceptional or extraordinary level, I do not find that to be an apt characterization of the IAD's analysis.

B. ***Did the IAD conduct an assessment as contemplated by* Chirwa *and confirmed by* Kanthasamy*?***

[33] The Applicant's argument on this issue is best summarized by his submission that the IAD's analysis "…misses the forest by concentrating on the trees." While the IAD focused on the fact that the Applicant maintained a home and job in Palestine, he submits it missed the central points that (1) he could not find work in Canada, and (2) he maintained his connection with Palestine only to support his family and their collective commitment to Canada. He argues the IAD improperly considered the *Ribic* factors individually, as there is no indication in the Decision that the IAD conducted the required global, cumulative, and holistic assessment of the factors.

[34] The Respondent has referred the Court to the analysis in *Kharlan v Canada (Citizenship and Immigration)*, 2016 FC 678 at paragraphs 22-29. In that case, Justice Fothergill held, even if the IAD's use of discrete headings in its decision created the appearance of a segmented analysis, it was unrealistic to suggest a more overtly holistic consideration of the evidence would have yielded a different result, as the applicant's H&C factors were not particularly compelling.

[35] The case at hand can be characterized similarly. A review of the Decision as a whole does not suggest the IAD misunderstood the Applicant's arguments. The IAD found most of the factors to be negative, weighing against H&C relief, or entitled to little weight in the Applicant's favour. There is no basis to conclude that a more overtly cumulative or global analysis employing those factors would have generated a positive result.

C. *Were the IAD's findings* vis a vis *the* Ribic *test reasonable and made without misconstruing the evidence before it?*

[36] The Applicant raises several areas in which he claims the IAD misconstrued the evidence before it relevant to the H&C analysis.

[37] First, the Applicant notes the IAD refers to him having a lack of continuing education in Canada, notwithstanding its acknowledgement of his attendance at the Ryerson Bridging Program in 2018. I find nothing unreasonable in this component of the Decision. The IAD clearly understood the Applicant had undertaken the Ryerson Bridging Program. I read the IAD's reference to a lack of continuing education as a conclusion that the Applicant undertook insufficient continuing education in Canada to assist in supporting a positive finding on establishment, rather than a finding that contradicted its earlier acknowledgement.

[38] Second, the Applicant refers to the IAD's finding that the Applicant did not need to remain in Palestine throughout his lawsuit to manage the litigation. The IAD relied on the Applicant's evidence that he discovered his "presence has no meaning" in December 2017. He submits this finding demonstrates a misunderstanding of his evidence: he originally believed his presence in Palestine was needed for the lawsuit, and he reached the contrary conclusion only when his co-owners appealed the decision.

[39] I do not find the IAD misunderstood the evidence. Rather, the IAD concluded on a balance of probabilities that the Applicant's presence in Palestine was not required to manage the lawsuit. It based this conclusion in part on the fact the Applicant had engaged a legal

representative, but its conclusion was further supported by the Applicant's evidence as to his own realization in December 2017.

[40] Third, the Applicant argues the IAD overlooked his children's evidence as to the difficulty they would experience visiting him in Palestine. His son testified that, because they were born in Gaza, the family would need documentation from both the Jordanian and Israeli governments in order to travel outside Palestine. His son raised concern that, due to difficulties obtaining such documentation, they may be unable to leave Palestine if they visited the Applicant there. The Applicant also relies on country condition documentation surrounding travel restrictions imposed by the Israeli government.

[41] The IAD does not expressly refer to the son's testimony or the country condition documentation upon which the Applicant relies. However, there is a rebuttable presumption that it has considered all the evidence. The IAD concluded there was a lack of evidence that the Applicant's children would have particular difficulty visiting him in Palestine on Canadian passports, suggesting this analysis turned on the children being Canadian citizens. I do not find the IAD's conclusion to demonstrate an inconsistency with the evidence that would warrant finding that it overlooked the evidence referenced by the Applicant.

[42] Finally, the Applicant submits the IAD ignored the country condition documentation surrounding the political circumstances in Palestine, characterized by civil war between factions, periods of open combat, and constant violence and threats of violence. He argues the IAD

unreasonably concluded that this hardship was ameliorated by professional and economic success.

[43] Again, I do not find the IAD's analysis unreasonable. It recognized the social and political instability in the region, but it noted this has long been the situation there, and the Applicant nevertheless chose to stay in that environment for over eight years after gaining his PR status in Canada. The IAD therefore gave that factor minimal weight in its global assessment. This analysis does not suggest the IAD overlooked or misunderstood the evidence.

[44] Having considered the Applicant's arguments, and finding no basis to conclude the Decision is unreasonable, this application for judicial review must be dismissed.

VI. **Proposed Certified Questions**

[45] The Applicant proposes the following questions for certification for appeal:

A. Should an appellant's future intent to meet their residency obligations be a factor for the IAD to consider in the context of "rehabilitation", and does the IAD have the jurisdiction to grant a stay of the removal order in a residency appeal, so as to allow appellants to demonstrate their future commitment to Canada and ability to meet the residency requirement going forward?

B. Where does a breach of residency obligations fit along the spectrum of breaches of IRPA relative to breaches involving misrepresentation and

> criminality, and how is the H&C assessment at the IAD affected by this spectrum in light of the H&C discretion inherent in s 28 of IRPA?

[46] The Respondent opposes certification of both questions, noting that, in order to be certified for appeal under s 74(d) of IRPA, a question must be a serious question of general importance and must be a question that would be dispositive of an appeal (see, e.g., *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145 at paras 22-29).

[47] With respect to the first question, as noted in these Reasons, the Applicant did not advance this particular argument, or seek a stay, before the IAD. Moreover, the Applicant has identified no divergence in the Court's jurisprudence on this issue. This question therefore fails to satisfy both elements of the test for certification.

[48] With respect to the second question, the legal principles applicable to H&C assessments are well established. Furthermore, given that the outcome of this application for judicial review turns on the reasonableness of the IAD's consideration of the particular facts of this case, the proposed question would not be determinative of an appeal. Therefore, this question also fails to satisfy the test for certification.

JUDGMENT IN IMM-687-19

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-687-19
STYLE OF CAUSE:	MAHMOOD Y A SHAHEEN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 8, 2019
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 23, 2019

APPEARANCES:

Melissa Keough Wennie Lee	FOR THE APPLICANT
David Joseph	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT