Federal Court  Cour fédérale

Date: 20191129

Docket: IMM-1165-19

Citation: 2019 FC 1536

Ottawa, Ontario, November 29, 2019

PRESENT: The Honourable Madam Justice Fuhrer

BETWEEN:

ENXIAN ZHANG and YUN LING

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicants, Mr. Zhang and Ms. Ling became permanent residents on March 17, 2006.

[2] In April 2010, the Applicants returned to China to care for Mr. Zhang's ailing parents. His father was bedridden from a stroke, and his mother suffers from Alzheimer's disease. In

November 2010, the Applicants began working for Canada Dawa Business Press/Group Inc. [Dawa] as cross-cultural researchers and marketing professionals. They explain Dawa is a Chinese media and business group which promotes economic, technological, and educational exchanges between Canada and China.

[3] Mr. Zhang's father passed away on January 30, 2011, and his mother's condition has continued to deteriorate to the present. Until early 2011, the Applicants shared their caretaking role with Mr. Zhang's younger brother. This changed when his brother accepted a new sales job which required him to travel frequently. Further, Mr. Zhang's mother allegedly would accept assistance willingly only from Ms. Ling and the female nurse aid.

[4] On October 18 and 19, 2017, the Applicants received notice that a Visa Officer ("Officer") had determined they had not complied with their residency obligations. They appealed this decision. In support of their appeal, the Applicants provided additional submissions, and Ms. Ling participated by teleconference in two hearings before the Immigration Appeal Division [IAD] of the Immigration and Refugee Board [IRB] on October 17, 2018 and January 17, 2019.

[5] The IAD issued its decision on January 31, 2019, dismissing the Applicant's appeal from the Visa Officer's decision pursuant to section 69(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The IAD affirmed the Visa Office's decision that the Applicants had failed to fulfill their permanent residency obligations under IRPA s 28, thus rendering them

inadmissible under IRPA s 41(b), and found there were insufficient humanitarian and compassionate considerations to justify a special remedy under IRPA s 67(1)(c).

[6] For the reasons that follow, this application for judicial review of the IAD's decision is dismissed.

II. Impugned Decision

[7] The IAD detailed a timeline of the events leading up to the Officer's initial IRPA s 28 decision:

- The Applicants worked in various positions in Canada from 2006-2011;
- Between 2010 and 2011, the Applicants returned to China for about one year to care for Mr. Zhang's parents, particularly his father who was critically ill;
- After Mr. Zhang's father's death in January 2011, the Applicants returned to Canada for only one week in 2011 before returning to China, where they primarily remained until the present;
- Since 2011, the Applicants have spent 172 days in Canada, the bulk of which time - 158 days - fell between March and August, 2016;
- On August 12, 2016, the Applicants returned to China to care for Mr. Zhang's mother whose Alzheimer's disease had worsened;
- The Applicants allowed their permanent residency cards to lapse while abroad and, therefore, applied for permanent residency travel documents in order to return to Canada; and

– The Officer reviewing the application determined they had not complied with their obligations under IRPA s 28 as they had been physically present in Canada for only 172 days during the prior 5-year period, and consequently lost their permanent resident status.

[8] On review, the IAD assessed both the legality of the Officer's IRPA s 28 decision, and whether any humanitarian and compassionate [H&C] considerations nonetheless would allow for special relief under IRPA s 67(1)(c).

A. *IRPA s 28: Residency Requirement*

[9] The IAD noted IRPA s 28 requires permanent residents to be physically present in Canada for at least 730 days within a 5-year period, subject to certain exceptions including permanent residents who are outside Canada and employed on a full-time basis by a Canadian business: IRPR s 61. The IAD noted a number of factors are relevant to determining whether IRPR s 61 is engaged, including:

1. Is the Canadian business a corporation incorporated under the laws of Canada, with a majority ownership by Canadian citizens or permanent residents, with ongoing operations in Canada?
2. Is the business an enterprise with an ongoing operation in Canada that is capable of generating revenue and is carried on in anticipation of a profit?
3. Are the appellants full-time employees of the Canadian business or under contract to provide services to the Canadian business?

4. Are the appellants employees or under contract with the Canadian business who are also assigned on a full-time basis as a term of either their employment or contract to a position outside of Canada; or a client of the Canadian business outside of Canada?

[10] The IAD essentially made negative findings in respect of each of these factors. While the IAD found that the Applicants had established Dawa is a Canadian corporation, they failed to demonstrate that: (i) Dawa has ongoing operations in Canada; (ii) they are in a contractual relationship with Dawa; (iii) they were assigned on a full-time basis to Dawa's operations in China; (iv) their arrangement with Dawa was temporary (since there is no clear end date); and (v) they have a role at Dawa to reintegrate into should they return to Canada. As such, the IAD upheld the IRPA s 28 decision.

B. *H&C Considerations*

[11] The IAD next considered whether H&C considerations nonetheless justified the application: IRPA s 67(1)(c). The IAD reviewed each of the relevant factors below, noting they were not exhaustive and their weight was context-specific: *Bufete Arce v Canada (Citizenship and Immigration)*, 2003 CanLII 54304 (CA IRB); *Ambat v Canada (Citizenship and Immigration)*, 2010 CanLII 80733.

[12] **Extent of non-compliance**: The IAD characterized the Applicants' non-compliance as extensive, noting they were only in Canada 172/730 days.

[13] **The reasons for the [Applicants'] departure from Canada**: The IAD acknowledged Mr. Zhang's siblings could not assist in providing parental care at the time for various reasons, and that the cultural obligation was on him (the eldest) to care for his mother. Noting the IRPA allows for absences for up to 3 in every 5 years due to such considerations, the IAD concluded the reason for the Applicant's leaving was a positive factor toward an H&C remedy.

[14] **Reasons for the lengthy stay abroad**: Recognizing the primary reason the Applicants chose to stay abroad was to care for Mr. Zhang's mother, the IAD nonetheless found this was a negative factor. Noting Ms. Ling's explanation that she remained to assist the nanny or nurse aide to care for Mr. Zhang's mother (because his mother would accept assistance only from her female nurse aide and Ms. Ling and would beat Mr. Zhang whenever he assisted), the IAD found the Applicants had an obligation to balance this care with their Canadian residency obligations. The IAD found Mr. Zhang's brother was in China and could have assisted despite his work schedule. Further, the IAD found the Applicants did not return to Canada at the first opportunity, *i.e.* when they secured a full-time nanny or nurse aide.

[15] **Ties to the foreign country**: The IAD found the Applicants had family and business ties to China by virtue of their family's location, their businesses, and their education. These ties were factored against them.

[16] **The Applicants' degree of establishment in Canada**: The IAD found the Applicants had minimal economic and social ties to Canada, noting that: both Applicants had let their driver's licences expire; only Ms. Ling had a bank account; and neither Applicant owned

property or had a permanent address in Canada. The IAD noted both Applicants paid Canadian taxes. Overall, however, these considerations were factored against them.

[17] **Family ties in Canada**: The IAD found that despite strong family ties to China, this factor also weighed moderately positively in their favour given Mr. Zhang's sister and her family live in Canada.

[18] **Whether the Applicants or their family would suffer hardship if the appeal is dismissed**: The Applicants provided no evidence they would suffer any hardship if they remained in China. To the contrary, they are educated (having obtained law degrees in China during their lengthy absence from Canada) and have their own successful business.

[19] **The best interests of any child affected by the decision**: The IAD found this was not a relevant factor, as the Applicants have no children of their own and they provided no details regarding Mr. Zhang's niece, his sister's child, who lives in Canada.

[20] In considering the above, the IAD noted the Applicants had a high threshold to meet in order to grant special relief under IRPA s 67(1)(c), given the extensive time they were abroad. The IAD characterized the Applicants' reasons for departure and familial ties to Canada as positive. The negative factors, however - the reason for their lengthy stay, that they did not return to Canada at the first opportunity, their significant ties to China, their minimal establishment in Canada, and their lack of hardship - all militated against granting special relief. This was so

because IRPA's relevant objectives require permanent residents to make best efforts towards integration into Canada, which they failed to do over the long term.

III. Issues

A. *Was the IAD's decision on whether the Applicants' business had ongoing operations in Canada reasonable?*

B. *Was the IAD's decision on the proposed H&C grounds reasonable?*

IV. Standard of Review

[21] Both parties, and this Court, agree the IAD's decisions on whether the Applicants met their residency obligations, and whether sufficient H&C reasons justified a special remedy, are reviewable on the reasonableness standard: *Parikh v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 13 at para 10. Under the reasonableness standard, this Court will "defer to any reasonable interpretation adopted by an administrative decision maker, even if other reasonable interpretations may exist" so long as it falls "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *McLean v British Columbia (Securities Commission)*, 2013 SCC 67 at para 40; *Canada (Attorney General) v Heffel Gallery Limited*, 2019 FCA 82 at para 48; *Delios v Canada (Attorney General)*, 2015 FCA 117 at paras 27-28; *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 47. If the decision maker's reasons, when read in context with the evidence, allow this Court to understand why the Tribunal made its decision, the decision will meet the *Dunsmuir* criteria of justifiable, transparent, and intelligible: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*NL Nurses*] at paras 15-18.

V. Relevant Provisions

[22] See Annex A for the applicable provisions of the IRPA and IRPR.

VI. Analysis

A. *Was the IAD's decision on whether the Applicants' business had ongoing operations in Canada reasonable?*

[23] The determinative issue is whether the IAD erred in concluding Mr. Zhang and Ms. Ling failed to meet their residency obligations pursuant to IRPA s 28(2)(a)(iii) which is qualified by additional explanations in IRPR s 61.

[24] While the Applicants challenge the IAD's finding that they were not employees of or contractors for Dawa, they do not challenge that their arrangements with Dawa in China were part-time and not full-time. This latter condition must be established in their favour, however, to rely on the statutory residency exception: IRPA s 28(2)(a)(iii) and IRPR s 61(3). The IAD expressly made this clear to Ms. Ling and counsel during the hearings on October 17, 2018 and January 17, 2019.

[25] As the IAD's conclusion that the Applicants only provided services to Dawa on a part-time basis remains unchallenged, this precludes the Applicants from meeting the statutory requirements of IRPA s 28(2)(a)(iii). As such, the IAD's finding that the Applicants were not employed by, or under a contract to provide services to, Dawa on a full-time basis renders its

ultimate conclusion that the Applicants failed to meet their residency requirements transparent, justifiable, and intelligible: *NL Nurses, above* at para 16.

B. *Was the IAD's decision on the proposed H&C grounds reasonable?*

[26] The role of this Court on judicial review is not to re-weigh evidence, but instead ensure that all evidence tendered is considered reasonably. Pentney J recently held in *Oladihinde v Canada (Citizenship and Immigration)*, 2019 FC 1246 [*Oladihinde*] at para 16:

> [16] To put it another way, on judicial review on the deferential standard of reasonableness, a key concern is whether the process and decision indicate that the decision-maker truly "engaged" with the evidence, applying the appropriate legal test. The standard is not perfection. It must be recalled that Parliament assigned the task of conducting the initial inquiry into the facts to the officer. Deference is due to a decision-maker in particular in a context where the inquiry is primarily factual, and it is within the decision-maker's area of expertise, in a situation where greater exposure to the nuances of evidence or a greater awareness of the policy context may provide an advantage. If the chain of reasoning of the decision-maker can be understood, and if it shows that this type of engagement occurred, the decision will generally be found to be reasonable: see *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 (CanLII).

[27] The Applicants allege the IAD acted unreasonably in concluding Mr. Zhang's brother could have assisted more, despite his work schedule and Mr. Zhang's mother's preference for Ms. Ling and the female nurse aide. They further allege the IAD failed to consider the nurse aide would quit were it not for Ms. Ling's assistance, pointing to a letter provided by the care aide which stated the following [emphasis added]:

> "It is very difficult to take care of such kind of patient. **I had tried to resign several times. However, I am still here since I was moved by their insistence.** Auntie Ling has not slept well over the past several years, and Uncle Zhang wants to withstand the double

> pressure of his family and work. They always keep smile and never give up."

[28] In my view, failing to refer to the above excerpt, and the evidence relating to Mr. Zhang's mother's preferences in care aides, are not determinative errors. While the nurse aide indicates she wished to resign at times, she does not state, as the Applicants submit, that she would do so *but for* Ms. Ling's assistance. Rather, she indicates she is "moved by their insistence" and therefore willing to stay. It was open for the IAD to find the nurse aide would be similarly moved should Mr. Zhang's brother commit to her caring for her in a similar manner. It also was not unreasonable for the IAD to conclude Mr. Zhang's brother could assist with caring for his mother. The IAD noted he was employed in a busy position that took him away, but there was no evidence Mr. Zhang's brother would be unwilling or unable to provide care if the Applicants were not present. Ms. Ling testified Mr. Zhang's mother currently lives with the brother. While it may not be preferable to the Applicants nor their family for Mr. Zhang's brother to be the primary care aide rather than them, absent evidence this was impossible, it was not unreasonable for the IAD to conclude this was an alternative that would have allowed the Applicants to honour their residency obligations.

[29] Further, I note the IAD did note expressly Mr. Zhang's mother's preference for certain care aides:

> "[44] … When asked why she and [Mr. Zhang] did not return to Canada in 2012, [Ms. Ling] testified that [Mr. Zhang's] mother only recognized her and the nanny, and they would both take turns caring for her."

[30] It therefore cannot be said that the IAD ignored this. Rather, the IAD found the Applicants had an obligation to balance these challenges in homecare with their obligation to maintain their residency requirements. Disagreement on this point is not a reviewable error.

[31] I find the IAD weighed all relevant factors before arriving at its conclusion. It is clear from the IAD's analysis the Applicants' time away from Canada, economic and educational ties to China, minimal establishment in Canada, and failure to return to Canada at the first opportunity overcame any positive factors such as the rationale for leaving. Although there are other outcomes available on the record, including some undoubtedly more favourable to the Applicants, the IAD's reasons allow this Court to understand intelligibly the factors that influenced its final decision. As Pentney J noted: "It is not for a judge on judicial review to overturn a decision simply because another assessment of the evidence was possible, or another result could have been reached. The task of assessing the evidence at first instance was assigned to the officer by Parliament, and the Court's approach to the task of reviewing the decision must not lose sight of that fact:" *Oladihinde*, above at para 17.

VII. Conclusion

[32] This application for judicial review is dismissed. The IAD properly considered whether the Applicants fell within the scope of IRPA s 28(2)(a)(iii) because of their activities with Dawa, before concluding they did not. It was unnecessary to consider the Applicants' submissions with respect to Dawa's business operations or the nature of the Applicants' alleged contractual relationship given that the evidence established their role was not full-time as required by IRPA s 28(2)(a)(iii) and IRPR s 61(3). With respect to the IAD's H&C analysis, the IAD reasonably

considered all available evidence submitted. While the Applicants may disagree with the IAD's conclusions, I find the IAD made no reviewable error in its treatment of the evidence.

JUDGMENT in IMM-1857-19

THIS COURT'S JUDGMENT is that the judicial review application is dismissed and there is no serious question of general importance for certification.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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Annex A – Relevant Provisions

[1] Permanent residents must comply with a residency requirement, with respect to every five-year period, that may be fulfilled by, among other things, being physically present in Canada or by being employed outside Canada on a full-time basis by a Canadian business: IRPA s 28.

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.
(2) The following provisions govern the residency obligation under subsection (1):	**(2)** Les dispositions suivantes régissent l'obligation de résidence :
(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are	**a)** le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) physically present in Canada,	**(i)** il est effectivement présent au Canada,
(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,	**(ii)** il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,
(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,	**(iii)** il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public	**(iv)** il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique

administration or the public service of a province, or	fédérale ou provinciale,
(v) referred to in regulations providing for other means of compliance;	**(v)** il se conforme au mode d'exécution prévu par règlement;

[2] Failure to meet the residency requirement may lead to inadmissibility and a loss of status: IRPA ss 41(b), 46(1)(b).

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.	
…	**...**
46 (1) A person loses permanent resident status	**46 (1)** Emportent perte du statut de résident permanent les faits suivants :
…	…
(b) on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28;	**b)** la confirmation en dernier ressort du constat, hors du Canada, de manquement à l'obligation de résidence;

[3] Further details of the requirements under IRPA s 28(2)(a)(iii) are provided in the Regulations: IRPR s 61.

61 (1) Subject to subsection (2), for the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act and of this section, a Canadian business is	**61 (1)** Sous réserve du paragraphe (2), pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi et du présent article, constitue une entreprise canadienne :
(a) a corporation that is incorporated under the laws of Canada or of a province and that has an ongoing operation in Canada;	**a)** toute société constituée sous le régime du droit fédéral ou provincial et exploitée de façon continue au Canada;
(b) an enterprise, other than a corporation described in paragraph (a), that has an ongoing operation in Canada and	**b)** toute entreprise non visée à l'alinéa a) qui est exploitée de façon continue au Canada et qui satisfait aux exigences suivantes :
(i) that is capable of generating revenue and is carried on in anticipation of profit, and	**(i)** elle est exploitée dans un but lucratif et elle est susceptible de produire des recettes,
(ii) in which a majority of voting or ownership interests is held by Canadian citizens, permanent residents, or Canadian businesses as defined in this subsection; or	**(ii)** la majorité de ses actions avec droit de vote ou titres de participation sont détenus par des citoyens canadiens, des résidents permanents ou des entreprises canadiennes au sens du présent paragraphe;
(c) an organization or enterprise created under the laws of Canada or a province.	**c)** toute organisation ou entreprise créée sous le régime du droit fédéral ou provincial.
(2) For greater certainty, a Canadian business does not include a business that serves primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada.	**(2)** Il est entendu que l'entreprise dont le but principal est de permettre à un résident permanent de se conformer à l'obligation de résidence tout en résidant à l'extérieur du Canada ne constitue pas une entreprise canadienne.
(3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression	**(3)** Pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi respectivement, les

employed on a full-time basis by a Canadian business or in the public service of Canada or of a province means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the employment or contract to	expressions ***travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale et travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale***, à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat d'une entreprise canadienne ou de l'administration publique, fédérale ou provinciale, et est affecté à temps plein, au titre de son emploi ou du contrat de fourniture :
(a) a position outside Canada;	**a)** soit à un poste à l'extérieur du Canada;
(b) an affiliated enterprise outside Canada; or	**b)** soit à une entreprise affiliée se trouvant à l'extérieur du Canada;
(c) a client of the Canadian business or the public service outside Canada.	**c)** soit à un client de l'entreprise canadienne ou de l'administration publique se trouvant à l'extérieur du Canada.
(4) For the purposes of subparagraphs 28(2)(a)(ii) and (iv) of the Act and this section, a permanent resident is accompanying outside Canada a Canadian citizen or another permanent resident — who is their spouse or common-law partner or, in the case of a child, their parent — on each day that the permanent resident is ordinarily residing with the Canadian citizen or the other permanent resident.	**(4)** Pour l'application des sous-alinéas 28(2)a)(ii) et (iv) de la Loi et du présent article, le résident permanent accompagne hors du Canada un citoyen canadien ou un résident permanent — qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents — chaque jour où il réside habituellement avec lui.
(5) For the purposes of	**(5)** Pour l'application du sous-

subparagraph 28(2)(a)(iv) of the Act, a permanent resident complies with the residency obligation as long as the permanent resident they are accompanying complies with their residency obligation.	alinéa 28(2)a)(iv) de la Loi, le résident permanent se conforme à l'obligation de résidence pourvu que le résident permanent qu'il accompagne se conforme à l'obligation de résidence.

[4] The IAD may grant an appeal if there are sufficient humanitarian and compassionate considerations which warrant special relief, including the best interests of the child: IRPA ss 63(4), 67(1)(c).

63 (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.	**63 (4)** Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.
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.