Federal Court  Cour fédérale

Date: 20200206

Docket: IMM-4145-19

Citation: 2020 FC 214

Vancouver, British Columbia, February 6, 2020

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

PARMJIT SINGH

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Immigration Appeal Division [IAD] dismissed Mr. Singh's appeal of an officer's decision that he had failed to comply with the residency obligations of section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and that there were insufficient humanitarian and compassionate considerations to allow him to retain his permanent resident status.

[2] With some exceptions, a permanent resident must be physically present in Canada for 730 days in any 5-year period. A failure to meet this minimum requirement, unless there is a finding that there are humanitarian and compassionate grounds sufficient to overcome the breach will result in a departure notice being issued. That is what happened here, as Mr. Singh, during the relevant 5-year period, was in Canada for only 72 days and an officer and the IAD found insufficient humanitarian and compassionate considerations to overcome the strict application of the Act.

[3] As is required, the IAD examined various facts relevant to Mr. Singh and weighed each in reaching its decision whether there were sufficient humanitarian and compassionate considerations to overcome his breach of the residency requirement.

[4] On the one side of the scale, it found that the exceptionally long period of absence from Canada was "a significant negative factor that weighs against granting him discretionary relief." This was the only negative factor weighing against the IAD exercising its discretion.

[5] On the other side of the scale, it found that his "recent effort to establish himself is a positive factor in favour of granting him discretionary relief" and that his family facing financial hardship "minimally favours" granting relief.

[6] It found that his pending citizenship application, his return to Bahrain or India, and the best interests of any child were neutral factors.

[7] In the view of the IAD, when weighed together, it found that Mr. Singh had failed to meet the onus of proof that there were sufficient humanitarian and compassionate considerations to overcome his absences.

[8] It is agreed that the decision is to be reviewed on the standard of reasonableness.

[9] Mr. Singh submits that the decision is unreasonable in two aspects. First, he says it was unreasonable for the IAD to "rely materially on return to Bahrain" despite evidence that he has no legal status there. Second, he says that the IAD unreasonably found that he would suffer no hardship if he returned to India "despite clearly available reasoned inferences." Specifically, he challenges the findings in paragraph 15 of the decision:

> There was some discussion as to where the Appellant would go if he were required to leave Canada. The Appellant testified that he was allowed to remain in Bahrain for more than 30 years on the basis of a work authorization. He stated that he no longer had a work authorization in Bahrain but he would be able to obtain a new authorization and return to Bahrain if required to do so. In the alternative, the Appellant would be required to return to India. Although the Appellant moved away from India more than 30 years ago, he did not present sufficient evidence to establish that he will suffer hardship if he does return there. The panel finds that this is a neutral factor in the assessment of whether the Appellant warrants discretionary relief.

[10] I agree with Mr. Singh that the IAD improperly considered his ability to return to Bahrain. This Court has held that assessing humanitarian and compassionate considerations with reference to a country where the applicant has no legal status is an error: *Abdullah v Canada (Citizenship and Immigration)*, 2019 FC 954. The status of the person must be examined based

on his right at the date the assessment is made to relocate to any particular country. It cannot be made based on what might occur in the future.

[11] Here the evidence in the record is clear – Mr. Singh had no right to return to or enter Bahrain at the date when this decision was made.

[12] The Minister submits that even so, this was to be a "neutral" factor and thus carried no weight. I disagree. Had the IAD considered that he could not go anywhere but India if his application were unsuccessful, the IAD may well have considered this a factor in his favour and not a neutral factor. I say this because, as discussed below, its analysis of the hardship he would face in India is unreasonable as well.

[13] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 103, instructs that a decision will be unreasonable if the reasons read in conjunction with the record do not enable the Court to understand the decision maker's reasoning on a critical point.

[14] I accept the submission of the Minister that the record is slight as to the hardship to Mr. Singh if he were to return to India, a country he has not been a resident in for more than 30 years. Nonetheless, he did clearly express to the panel that he would suffer financial hardship if he were required to relocate there. When asked if he would be able to earn a living in India, he responded: "Right now there's nothing." Not considered by the IAD is that the record speaks to his immediate family all being residents elsewhere. He would return alone to his country of

nationality. On this record, I am unable to agree with the IAD when it says: "he did not present sufficient evidence to establish that he will suffer hardship if he does return there."

[15] It is not this Court's role to weigh or reweigh the evidence; that is the role of the IAD. It must do so on proper legal principles and on the entirety of the record. As this decision failed in that respect, it must be set aside.

[16] No party proposed a question be certified, and there is none.

JUDGMENT IN IMM-4145-19

THIS COURT'S JUDGMENT is that:

1. The Respondent incorrectly named as The Minister of Immigration, Refugees, & Citizenship Canada, is herewith amended with immediate effect to reflect the proper Respondent, Minister of Citizenship and Immigration;

2. The application is granted;

3. The decision of the Immigration Appeal Division is set aside;

4. The application is to be considered afresh by a different member of the Immigration Appeal Division; and

5. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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