Federal Court Cour fédérale

**Date: 20210609**

**Docket: IMM-7034-19**

**Citation: 2021 FC 575**

**Ottawa, Ontario, June 9, 2021**

**PRESENT: Mr. Justice McHaffie**

**BETWEEN:**

**GIACOMO METALLO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Every Canadian permanent resident is required to comply with a residency obligation, which typically requires physical presence in Canada for 730 days in each five-year period. The obligation applies to every five-year period, but it is sufficient to show it is met in respect of the five-year period "immediately before the examination" during which it is assessed. A breach of the residency obligation is overcome if an officer concludes that humanitarian and

compassionate (H&C) considerations justify the retention of permanent resident status. The main issue in this case is what five-year period should be used in an H&C assessment for someone living in Canada who applied for a permanent resident card: the five years ending on the date of the application or the five years ending on the date of the officer's decision.

[2] In prior decisions dealing with this circumstance, the Immigration Appeal Division (IAD) has used the date an officer prepared an inadmissibility report assessing the residency obligation. This approach is also seen in decisions of this Court, although not as a contested issue. However, in Giacomo Metallo's case the IAD used the date he applied for his permanent resident card: *Metallo v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 129108 (CA IRB) at para 9 [IAD Decision]. This had a material effect on the IAD's assessment of the residency shortfall and thus the H&C assessment. I conclude this unexplained departure from prior decisions is unreasonable, and requires Mr. Metallo's appeal to be redetermined. I reach this conclusion even though Mr. Metallo's counsel did not object to the use of the application date or the shortfall count at his IAD hearing. While an applicant is typically precluded from relying on arguments on judicial review that were not raised before an administrative tribunal, I conclude the Court should exercise its discretion to consider the issue in the circumstances of this case.

[3] The application for judicial review is therefore allowed. Mr. Metallo's appeal is remitted to the IAD for redetermination by another member.

## II. Issues and Standard of Review

[4] Mr. Metallo raises the following issues on this application for judicial review:

A. Did the IAD err in assessing Mr. Metallo's H&C factors with reference to his residency shortfall during the five-year period prior to the date of his application?

B. Did the IAD err in considering Mr. Metallo's other H&C factors?

[5] The parties agree the IAD's decision on these issues is reviewable on the reasonableness standard: *Canada v (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25, 115; *Gazi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 993 at paras 17–19.

[6] A reasonable decision is one that bears the "hallmarks of reasonableness – justification, transparency and intelligibility – and [is] justified in relation to the relevant factual and legal constraints that bear on the decision": *Vavilov* at para 99. Relevant "legal constraints" that bear on the decision include the relevant statutory scheme, prior binding precedent, the past decisions of the administrative body, and the submissions of the parties: *Vavilov* at paras 106, 108–112, 127–132.

## III. Analysis

### A. *The IAD Unreasonably Adopted a Different Five-Year Period in Mr. Metallo's Case*

#### (1) Factual context

[7] Mr. Metallo became a permanent resident of Canada in 1972 when he came from Italy with his parents as a toddler. He spent his childhood in Canada before returning to Italy with his family in 1982 after his father had a workplace accident. He started returning to Canada to visit family in 2009. He spent between a few weeks and a few months per year in Canada between then and when he arrived to stay in 2016. Mr. Metallo applied for a permanent resident card in November 2015 to allow him to get a social insurance number and begin working in Canada.

[8] Although he did not find out about it for a number of years, Mr. Metallo's application for a permanent resident card was reviewed by an immigration officer on November 14, 2016. The officer concluded Mr. Metallo did not comply with the residency obligation of section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. That section requires permanent residents to be physically present in Canada for 730 days in each five-year period (with certain qualifications and exceptions not relevant here):

| **Residency obligation** | **Obligation de résidence** |
| --- | --- |
| **28 (1)** A permanent resident must comply with a residency obligation <u>with respect to every five-year period</u>. | **28 (1)** L'obligation de résidence est <u>applicable à chaque période quinquennale</u>. |

**Application**

**(2)** The following provisions govern the residency obligation under subsection (1):

**(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

**(i)** physically present in Canada,

[…]

**(b)** it is sufficient for a permanent resident to demonstrate at examination

[…]

**(ii)** if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination;

**(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.

**Application**

**(2)** Les dispositions suivantes régissent l’obligation de résidence :

**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)** il est effectivement présent au Canada,

[…]

**b)** il suffit au résident permanent de prouver, lors du contrôle, qu’il se conformera à l’obligation pour la période quinquennale suivant l’acquisition de son statut, s’il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu’il s’y est conformé pour la période quinquennale précédant le contrôle;

**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.

| [Emphasis added; irrelevant sub-paragraphs omitted] | [Je souligne; dispositions non-pertinentes omises.] |
| --- | --- |

[9] The immigration officer assessing Mr. Metallo's case referred to two "Relevant 5 year period[s]": the five years prior to his application for a permanent resident card (November 24, 2010 to November 23, 2015) and the five years prior to the review (November 15, 2011 to November 14, 2016). The officer stated that subparagraph 28(2)(*a*)(i) of the *IRPA* required Mr. Metallo to accumulate 730 days of residence in the five years prior to the date of his application. However, they conducted the calculation in respect of each of the two indicated five-year periods. In the five-year period prior to the application date, Mr. Metallo had been in Canada 436 days, a 40% shortfall in the residency obligation. In the five years prior to the review, he had been in Canada for 601 days, an 18% shortfall.

[10] The officer found Mr. Metallo did not meet the 730-day obligation, and had not presented H&C factors to justify retaining his permanent resident status. They therefore issued an inadmissibility report pursuant to subsection 44(1) of the *IRPA*, giving the opinion that Mr. Metallo did not comply with the residency obligation.

[11] For unknown reasons, Mr. Metallo did not hear the result of this review or receive the section 44 report, despite efforts to follow up on the status of his permanent resident card application. He ultimately filed another application for a permanent resident card in August 2017. He received that card, but was also summoned for an inadmissibility interview with a delegate of the Minister in July 2018. It was not until that interview that Mr. Metallo became aware of the inadmissibility report.

[12] The Minister's delegate interviewed Mr. Metallo with respect to the section 44 report. The notes of that interview in the Global Case Management System (GCMS) state that Mr. Metallo was advised that the relevant five-year period was "five years prior to the date <u>of the report</u>" [emphasis added], but that the period in question was November 24, 2010 to November 23, 2015 (*i.e.*, five years prior to the date of the application). In an oral decision issued the same day, the Minister's delegate concluded that Mr. Metallo's H&C considerations did not justify retention of his permanent resident status, noting that the extent of his non-compliance was significant. They therefore issued a departure order on July 10, 2018. In the GCMS notes apparently entered at the conclusion of the interview, the Minister's delegate referred again to the same five-year period, but referred to the date of application for a permanent resident card rather than the date of the section 44 report.

(2) The IAD hearing and decision

[13] Mr. Metallo appealed to the IAD. He did not contest that he did not comply with the residency requirement, which is true for either five-year period. At the outset of the hearing, the IAD referred to the five-year period prior to the permanent resident card application, and asked whether Mr. Metallo was contesting the validity of the decision, or was just relying on H&C considerations to explain the breach. Counsel confirmed that the appeal was based on H&C considerations. The remainder of the hearing pertained to the H&C factors. However, during one exchange, counsel confirmed that Mr. Metallo was not disputing that he had not met the residency requirement, and did not object to the count of 436 days that Mr. Metallo was in the country.

[14] The IAD dismissed Mr. Metallo's appeal. It noted that under section 28, a permanent resident "must be physically present in Canada for at least 730 days immediately preceding the control" [the IAD uses the term "control" rather than "examination," presumably related to the use of the term *le contrôle* in the French version of the section]: IAD Decision, para 9. The IAD stated that in this case, the control (examination) was when Mr. Metallo filed for a permanent resident card on November 23, 2015. The IAD found that the breach of the residency obligation "is significant since it represents more than one third of the number of days of presence legally required": IAD Decision, para 11. After considering the circumstances of the case, the IAD concluded there were not sufficient H&C grounds to justify special relief to allow the appeal of the departure order and permit Mr. Metallo to retain his permanent resident status: *IRPA*, s 67(1)(*c*).

(3) The Court will exercise discretion to consider the applicable five-year period

[15] As a general rule, the Court on judicial review will not address arguments that could have been raised before an administrative tribunal but were not: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at paras 22–23; *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at para 71. The reasons for the rule include allowing the tribunal to make the decision at first instance, the risk of prejudice to the other party, and the risk of having an inadequate evidentiary record: *Alberta Teachers* at paras 24–26; *Oleynik* at para 71; *Yahaya v Canada (Citizenship and Immigration)*, 2019 FC 1570 at para 41.

[16] In this case, as in *Alberta Teachers* itself, the "rationales for the general rule have limited application": *Alberta Teachers* at para 28. The IAD had the opportunity to decide the issue at

first instance, and did so, giving its view that the examination in question was the application for a permanent resident card. The IAD had at its disposal all evidence necessary to reach this conclusion, as both the date of the application and the date of the section 44 report were known, as were the number of days Mr. Metallo was in Canada during the respective periods. The Minister did not assert any prejudice arising from the issue being raised at this stage.

[17] In the current context, in particular the inconsistency between this decision and the IAD's recent jurisprudence, as discussed below, I conclude the Court should exercise its discretion to consider the issue, which may have an impact on Mr. Metallo's status as a permanent resident of Canada.

(4) Prior decisions on the applicable five-year period

[18] As discussed by the majority of the Supreme Court in *Vavilov*, administrative decision makers are not bound by their previous decisions as a matter of *stare decisis*. Nonetheless, those affected by administrative decisions are entitled to expect that like cases will generally be treated alike: *Vavilov* at para 129. As a result, consistency with an administrative body's past decisions is a constraint to be considered in assessing reasonableness. Where a decision maker departs from "longstanding practices or established internal authority," it bears a "justificatory burden" of explaining that departure in its reasons: *Vavilov* at para 131.

[19] In *Rastgou v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 129864 (CA IRB), the IAD was faced with the same situation that arose in Mr. Metallo's case. Mr. Rastgou had applied for a new permanent resident card from within Canada and a section 44

report was prepared almost a year later. In considering whether H&C factors favoured Mr. Rastgou, the IAD had to consider whether his residency shortfall should be calculated based on the five-year period preceding the application, or the five-year period preceding the report: *Rastgou* at paras 3, 9–12. As in Mr. Metallo's case, the officer identified both windows in their notes: *Rastgou* at para 13.

[20] The Minister in *Rastgou* argued the earlier five-year period should apply. At the same time, the Minister said the officer identified both windows because the applicant would be found to comply with section 28 if they met the residency requirement in the later five-year period preceding the section 44 report. The IAD felt this supported a finding that the later window applied: *Rastgou* at para 16.

[21] The IAD in *Rastgou* contrasted the situation of those applying from within Canada with that of someone applying for a permanent resident travel document overseas: *Rastgou* at paras 17–19. In such cases, compliance with the residency obligation is assessed based on the five-year period preceding the application: see, *e.g.*, *Amorocho-Diaz v Canada (Citizenship and Immigration)*, 2009 CanLII 76301 (CA IRB) at para 16, quoting Overseas Processing Manual 10 (OP-10: Permanent Residency Status Determination). Using the date of application when an applicant is outside Canada prevents them from being disadvantaged by any delay in the assessment of the application: *Amorocho-Diaz* at para 16. This approach can be seen in the factual descriptions of such determinations reviewed by this Court: *Tantoush v Canada (Citizenship and Immigration)*, 2014 FC 245 at para 16; *Behl v Canada (Citizenship and*

*Immigration)*, 2018 FC 1255 at paras 7–8; *Sanchez Rebaza v Canada (Immigration, Refugees and Citizenship)*, 2019 FC 509 at paras 9–10.

[22] The IAD concluded that using the date on which the review was conducted and the report issued was consistent with the language of subparagraph 28(2)(*b*)(ii) of the *IRPA*, the language of subsection 62(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, and the Minister's position on compliance with section 28: *Rastgou* at paras 16–21. It therefore concluded the applicable five-year period was the five-year period preceding the section 44 report, noting this is "consistent with the approach taken by other panels and Minister's counsel in similar types of appeals": *Rastgou* at para 22, citing *Gilbert v Canada (Public Safety and Emergency Preparedness)*, 2017 CanLII 77079 (CA IRB) and *Razaghi v Canada (Public Safety and Emergency Preparedness)*, 2012 CanLII 99644 (CA IRB).

[23] In addition to the *Gilbert* and *Razaghi* cases, a number of decisions of this Court show the IAD using the date of the section 44 report as the relevant date for the five-year period where the applicant is in Canada. In *Parikh*, the five-year period examined ended on the date of the section 44 report, although the applicant entered Canada and was interviewed five months earlier: *Parikh v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 13 at paras 8, 14, aff'g 2015 CanLII 92733 (CA IRB). While the applicable period was not in dispute, Justice Pentney described the five-year period ending on the date of the section 44 report as the "correct period": *Parikh* at para 14. Similarly, in *Li* the applicant entered Canada and was examined in April 2016, but the applicable five-year period ended on the date of the section 44 report in May 2016: *Li v Canada (Citizenship and Immigration)*, 2018 FC 187 at para 10, aff'g 2017 CanLII

63732 (CA IRB) at para 5 and fn 4. In *Huang*, the period examined was again the five years prior to the determination, rather than the five years prior to the applicant's application for a permanent resident travel document: *Huang v Canada (Citizenship and Immigration)*, 2020 FC 327 at paras 4, 6, aff'g 2019 CanLII 30481 (CA IRB).

[24] The IAD in the current case, however, adopted the contrary approach by considering only the five-year period ending on the date of the application. The IAD identified this as being the five-year period prior to the examination (or control). While the IAD clearly turned its mind to the question of the applicable "examination," it gave no explanation why the triggering "examination" was the date of application rather than the date on which the section 44 report was prepared. While *Rastgou* and the other cases referred to above may not be enough to constitute "established internal authority," they include considered opinions of IAD members on the precise issue and appear to reflect at least a longstanding practice, requiring some justification for departure: *Vavilov* at para 131.

[25] In my view, the unexplained departure from the IAD's prior approach to the determination of the relevant five-year period is unreasonable, even though the lack of explanation likely stems from the parties not having identified the issue.

(5) Impact on Mr. Metallo's case

[26] Not every flaw or shortcoming in a decision will render the decision as a whole unreasonable. An administrative decision should not be set aside for a "minor misstep" or an error on a superficial or peripheral matter: *Vavilov* at para 100. The Minister suggests the use of

the earlier five-year window was not determinative given the IAD's assessment of the shortfall and its determinations on the other H&C factors.

[27] I disagree. The extent of non-compliance with the residency obligation is a material factor in assessing whether H&C considerations justify the retention of permanent resident status: *Ambat v Canada (Citizenship and Immigration)*, 2010 CanLII 80733 (CA IRB) at para 38, aff'd 2011 FC 292 at para 27. As noted above, the IAD considered the breach of the residency obligation "significant since it represents more than one third of the number of days of presence legally required": IAD Decision at para 11.

[28] The Minister argues the difference in the extent of the shortfall (from 40% to 18%) was not enough to change the outcome, and contrasts it with the 10% non-compliance that the IAD found to be a "not significant breach" in *Rastgou*. In my view, the IAD's consideration of the extent of the shortfall was sufficiently material to its rejection of Mr. Metallo's appeal that I cannot conclude the result would have been the same if the later five-year window had been used. While there may be no bright line between what is a "significant breach" and a "not significant breach," I am unable to say that the difference in the extent of the shortfall between the two five-year periods in Mr. Metallo's case would not have affected the IAD's consideration of the H&C factors. I therefore conclude that the IAD's decision should be set aside.

[29] Mr. Metallo argued that the IAD's use of the five-year period prior to the date of application was inconsistent with the principles of statutory interpretation, and that the only reasonable interpretation was that the "five-year period immediately before the examination"

was the five years ending on the date of the section 44 report: *Vavilov* at paras 115–124. In the circumstances, I do not believe I should pronounce on these statutory interpretation arguments or purport to undertake that exercise at first instance: *Vavilov* at paras 115–116. Rather, the matter will be remitted to the IAD for redetermination: *Vavilov* at paras 140–141.

B. *The IAD's Analysis of the H&C Factors*

[30] The foregoing conclusion is sufficient to determine this application for judicial review. As the IAD on redetermination will have discretion to consider the H&C factors in context, I will not discuss Mr. Metallo's arguments on this issue at length, particularly as they relate to factual and discretionary assessments. However, I do consider it appropriate to make brief comments on two elements of the IAD's discussion that relate to more legal matters.

[31] First, in assessing the reasons why Mr. Metallo left Canada, the IAD noted he had returned to Italy with his family as a child. The IAD cited paragraph 26 of this Court's decision in *Lai v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1359:

> In the case of a dependent child of relatively tender years there is little, if any, opportunity to independently fulfill the residency obligation required to preserve landed status or to create the genuine ties to Canada that are typically necessary for H & C relief. In most cases the child can only accomplish that which the parents are prepared to allow and support. Ms. Lai's status in Canada may have been jeopardized by the decisions of her parents, but her claim to relief should not be enhanced by those parental decisions.

[32] Based on this passage, the IAD concluded that "the application of a special measure to the situation of the Appellant would be tantamount to endorsing the parents' decision, which

would be contrary to the case law": IAD Decision at para 15. It therefore evaluated "negatively" the factor related to the reasons for leaving Canada.

[33] In my view, *Lai* does not suggest that granting an appeal based on H&C factors would be "tantamount to endorsing the parents' decision." Nor would such a result be contrary to the reasoning in *Lai*. To the contrary, this Court in *Ma* recognized that *Lai* does not preclude considerations of age at departure: *Canada (Citizenship and Immigration) v Ma*, 2017 FC 886 at paras 22–23. While *Lai* recognizes that a claim to relief should not be *enhanced* by a parent's decision to remove a child, this does not mean that this must or should be treated as a *negative* factor in an H&C assessment.

[34] Second, the IAD referred to Mr. Metallo's lack of awareness that he was a permanent resident in Canada, stating that "no one can plead ignorance of the law": IAD Decision at para 17. However, Justice Locke in *Ma* observed that "there is an important distinction between reliance on ignorance of the law and reliance on ignorance of one's legal status": *Ma* at para 24. He concluded that the latter was a mistake of fact rather than one of law, which could be a relevant H&C consideration: *Ma* at para 24.

[35] Given my conclusions regarding the applicable five-year period, I need not assess whether the IAD's approach to these issues constituted an error sufficient to render the decision unreasonable.

## IV. Conclusion

[36] The decision of the IAD is therefore set aside and the matter is remitted for redetermination by a different panel of the IAD.

[37] Neither party proposed a question for certification. At the conclusion of the hearing, I granted the applicant leave to give the matter of certification further consideration, but no question for certification was subsequently proposed. In my view, no question meeting the requirements for certification arises in the matter and no question will be certified.

**JUDGMENT IN IMM-7034-19**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is granted. The Immigration Appeal Division's decision is set aside and Mr. Metallo's appeal is remitted to the Immigration Appeal Division for redetermination by a differently constituted panel.

"Nicholas McHaffie"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-7034-19 |
| **STYLE OF CAUSE:** | GIACOMO METALLO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |

**HEARING HELD BY VIDEOCONFERENCE ON MARCH 31, 2021 FROM OTTAWA, ONTARIO**

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| **JUDGMENT AND REASONS:** | MCHAFFIE J. |
| **DATED:** | JUNE 9, 2021 |

**APPEARANCES:**

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|---|---|
| Arghavan Gerami | FOR THE APPLICANT |
| Yusuf Khan | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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