Federal Court  Cour fédérale

Date: 20211105

Docket: IMM-2637-20

Citation: 2021 FC 1192

Ottawa, Ontario, November 5, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

YAN YAN WONG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Yan Yan Wong, seeks judicial review of a decision of the Immigration Appeal Division (the "IAD") dated January 30, 2020, dismissing her appeal of an immigration officer's (the "Officer") determination that she breached the residency obligations under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). At the IAD, the Applicant did not challenge the legal validity of the Officer's findings, but sought

relief on humanitarian and compassionate ("H&C") grounds. The IAD found that the Applicant did not meet the onus of establishing sufficient H&C grounds to warrant special relief.

[2] The Applicant submits that the decision of the IAD to refuse H&C relief to overcome the requirements of her permanent resident ("PR") visa is unreasonable. The Applicant contends that the IAD failed to adequately consider her level of establishment in Canada, the hardship she would face if she returned to China, as well as the best interest of her Canadian-born grandchild.

[3] For the reasons that follow, I find the IAD decision is unreasonable. This application for judicial review is allowed.

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 63-year-old national of China. The Applicant landed as a permanent resident in Canada on November 16, 2010 with her only child, Mr. Ka Cheung Henry Chan (Mr. "Chan"), who was her dependent at the time.

[5] Mr. Chan became a Canadian citizen in 2013. In 2014, he married another Canadian citizen, and had a child born in Canada in October 2015. Mr. Chan and his family live in Vancouver, British Columbia.

[6] The Applicant has purchased an apartment in the same building as her son in Vancouver and assists with the care of her granddaughter. In total, the Applicant owns three residential properties in Canada: one is for personal use and the other two are investment properties.

[7] The Applicant and her son have also leased a building for 15 years in Surrey, BC where they plan to operate a preschool centre. The Applicant has transferred the majority of her savings to Canada to invest in the preschool centre.

[8] According to the Applicant, once she became a permanent resident, she sold her residential property in China and ceased her involvement with her trading company based in Guangzhou, China.

[9] The Applicant has three siblings: her sister and two brothers. Her sister was hospitalized in December 2010 and passed away in February 2012 after 14 months in critical condition.

[10] The Applicant's mother also suffered from ill-health and was hospitalized often during the five-year period assessed by the Officer. The Applicant's mother died on April 1, 2020.

[11] Neither of the Applicant's brothers were able or willing to support her sister and mother when they were ill. The Applicant therefore returned to China in December 2010 to care for her sister. Following her sister's death, the Applicant remained in China to care for her mother as her condition worsened.

[12] The Applicant resided in Canada for a period of time in 2013 and 2014, and returned in 2015 when her granddaughter was born.

[13] In November 2015, the Applicant submitted a renewal application for her PR card, which expired on December 13, 2015. After the expiry of the PR card, she was unable to travel to Canada.

[14] On January 14, 2019, IRCC sent the Applicant a letter regarding her PR card application and required her to appear for an in-person interview in Vancouver in order to be issued her PR card. The Applicant then applied for a PR Travel Document to travel to Vancouver. The application was received by IRCC on January 29, 2019, and was denied on July 23, 2019 by the Officer at the IRCC visa office in Guangzhou.

[15] The Officer found that the Applicant failed to comply with the residency obligations under section 28 of the *IRPA,* which requires a permanent resident to reside in Canada for at least 730 days of every five-year period. In the five-year period assessed by the Officer, the Applicant had only resided in Canada 104 days out of the required 730 days.

[16] The Applicant appealed the Officer's decision to the IAD on H&C grounds.

B. *Decision Under Review*

[17] The IAD hearing occurred on January 30, 2020. The Applicant testified in person, as did her son. On February 6, 2020, the IAD dismissed the Applicant's appeal, finding that the

Applicant had not established that there were sufficient H&C considerations to warrant special relief in light of all the circumstances of the case. The IAD decision states:

> [3] The Appellant does not challenge the legal validity of the decision. She conceded that she failed to meet her residency obligation in the five-year period leading up to submission of her travel document application on January 29, 2019. I find that the determination is valid in law.
>
> [4] I also find, taking into account the best interests of the child directly affected by the decision, that the Appellant has not met the onus of establishing that there are sufficient humanitarian and compassionate considerations that warrant special relief in light of all the circumstances of the case. The appeal is dismissed.

[18] The IAD considered the Applicant's residency patterns in the five-year period assessed and found that the Applicant had not been strongly motivated to reside or establish herself in Canada. The IAD found that the Applicant's breach of the residency obligations was significant, that her presence in Canada had decreased over time, and that she would continue to breach her obligations in the foreseeable future.

[19] While the IAD accepted that the Applicant made efforts to establish herself permanently in Canada by selling her property in China to purchase property in Canada and financing a business enterprise, the IAD determined that the primary reason for this was for investment purposes and monetary gain.

[20] The IAD accepted that the main reason the Applicant had resided principally in China over the five-year period assessed was to take care of her ailing sister and mother and that if not for this, she would have been in Canada with her only son and his family. The IAD also

recognized that the delay in processing the Applicant's application for a PR card had some bearing on her failure to return to Canada for almost four years. However, the IAD found that the Applicant did not return to Canada at the earliest opportunity and that the separation from her son's family was caused by the Applicant's "compulsion to stay by her mother's side" and that this separation would continue regardless of how the appeal was determined.

[21] Finally, the IAD considered the best interest of the Applicant's grandchild to have her grandmother play a full and active role in her life. The IAD found that the outcome of the appeal would not influence the Applicant's relationship with her grandchild, as the Applicant had no plan to return to Canada while she was caring for her mother. The IAD concluded that without a plan to come and reside permanently in Canada, the best interest of the child ("BIOC") or speculative hardship could not be given much weight.

III. **Issue and Standard of Review**

[22] The sole issue is whether the IAD decision is reasonable.

[23] It is common ground between the parties that the applicable standard of review is reasonableness. I agree. The IAD's determinations of whether H&C relief should be granted to overcome the requirements of the residency obligation are reviewable on the reasonableness standard (*Yu v Canada (Citizenship and Immigration)*, 2020 FC 1028 at para 8, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16–17, 23–25).

[24] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[25] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

IV. **Analysis**

[26] Section 28 of the *IRPA* requires a permanent resident to maintain residence in Canada for a period of at least 730 days within every five-year period. The Applicant does not dispute the Officer's finding that she did not meet the residency requirements under section 28 of the *IRPA.* Rather, the Applicant submits that it was unreasonable for the IAD to find that there are insufficient H&C considerations in her case to overcome a breach of the residency obligations, pursuant to subsection 28(2)(c) of the *IRPA.*

[27] The Respondent submits that the reasons for the decision and the transcript of the hearing demonstrate that the IAD correctly cited the relevant factors for considering whether there are sufficient H&C grounds to warrant special relief, and carefully considered all of the evidence as well as the Applicant's circumstances.

[28] In *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 ("*Ambat*"), at para 27, this Court confirmed the relevant factors to be considered by the IAD in determining whether sufficient H&C grounds warrant special relief:

(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;

(iv) family ties to Canada;

(v) whether attempts to return to Canada were made at the first opportunity;

(vi) hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;

(vii) hardship to the appellant if removed from or refused admissions to Canada, and

(viii) whether there are other unique or special circumstances that merit special relief.

[29] In addition to these factors, the IAD is required to consider the BIOC directly affected (*Ambat* at para 27).

A. *Reasons for departure and stay abroad*

[30] When considering H&C grounds, a decision maker must "substantively consider and weigh all the relevant facts and factors before them" (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at para 25, citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 74-75). The Supreme Court in *Kanthasamy* asserted, "there will sometimes be humanitarian or compassionate reasons for admitting people who, under the general rule, are inadmissible" (*Kanthasamy*, at paras 12-13).

[31] The IAD decision cites the expectation that permanent residents must establish themselves in Canada by way of physical presence. However, the Applicant provided testimony about the circumstances that prevented her from being physically present in Canada.

[32] I find that there was a plethora of evidence before the IAD that the Applicant's absence from Canada was temporary and caused by the Applicant's duty to care for her ailing sister and mother. The Applicant was clear that it was always her intention to relocate to Canada to be with her son and his family.

[33] At the time of the IAD hearing, the Applicant's mother was still ill and the Applicant testified that she planned on returning to Canada to fulfill her residency obligations when her mother recovered or passed away:

> […] And also -- so the only reasons that keeps me away from my son is my mom that needs my care. So when my mom pass away, like, I would come back here. Or when she gets better, I will come

> back here. Just, you know, I would just come back here whatever chance that get. So there's no way I wouldn't come back here, because all my assets is in Canada, and given that I already make an investment.

[34] I agree with the Applicant's argument that this statement demonstrates her intention to come back to Canada, and that caring for her relatives was her only reason for leaving Canada and staying in China.

B. *Degree of establishment and motivation to reside in Canada*

[35] While accepting that the Applicant had compelling personal reasons for not residing in Canada, the IAD found that she had not met the onus of demonstrating sufficient H&C grounds to warrant special relief. The IAD took issue with the Applicant's failure to demonstrate a strong motivation to reside or establish herself in Canada and her lack of a clear future plan to do so, as her reason for remaining in China—to take care of her mother—had not changed at the time of the hearing. The IAD also noted that the Applicant's presence in Canada had reduced over time and that she had failed to show a pattern of residency in Canada over the last ten years.

[36] As part of the IAD's finding that the Applicant had only minimally established herself in Canada, the IAD also raised concerns that the Applicant had not credibly established that she had no further income or assets in China, given that she was able to transfer large sums and secure large loans for her investments in Canada.

[37] The Applicant contends that the IAD's focus on the Applicant's reduced time in Canada does not take into account the full context of her situation. At the IAD hearing, the Applicant was asked about her time away from Canada. She explained that the need to care for her ailing mother and her PR card's expiry are what kept her away:

> Q: So from November 2015 until August of 2019, you would have spent about ten days in Canada during that entire period of time?
>
> A: So at that time, so my PR card had expired. In addition that my mom was ill, so I don't see any other ways that I can come back to here.

[38] The Applicant further submits that in determining that she has no intention of residing in Canada long-term, the IAD focused its analysis on the amount of time the Applicant had spent away from Canada, and failed to adequately weigh the Applicant's otherwise lack of ties to China, her family connections in Canada, and her efforts to anchor her assets in Canada by investing in property and making plans to open a local business.

[39] With respect to the IAD's concerns about the Applicant's access to funds in China, the Respondent contends that the IAD reasonably found that the Applicant must continue to have access to significant sums in China if she was able to secure large loans. I disagree. The evidence submitted by the Applicant shows that she no longer owns property in China, has no employment or income sources in China and there is nothing to suggest that she continues to have access to funds in China.

[40] I am persuaded by the Applicant's submissions that the IAD failed to account for the full context of the Applicant's situation. The Applicant also has shown a motivation to establish herself in Canada by transferring assets from China, investing in property and making plans with her son to open a business.

[41] I find that the Applicant's motivations are beyond financial as she has made it clear that she wishes to be near her only son and his family in Canada, including playing an active role in her grandchild's life. From the evidence submitted by the Applicant, the only reason for her absence over the five-years assessed by the Officer was due to the temporary nature of her familial obligations to care for her ailing sister and mother, who are no longer alive. Even while fulfilling her filial duties, she continued to make plans to make a life in Canada.

[42] Given the evidence before the IAD and the Applicant's testimony that her time away from Canada was temporary and solely because of the need to care for her mother in China, I do not find the IAD's conclusion to be justifiable and intelligible (*Vavilov* at para 15).

[43] For these reasons, I find the IAD's decision is unreasonable. Given this finding, I do not consider it necessary to address the Applicant's submissions with respect to the BIOC or the hardship associated with dislocation from family in Canada as they have been sufficiently discussed above.

V. **Conclusion**

[44] The Applicant found herself torn between Canada and China during a period when she undertook to fulfill her family obligations to care for her ailing mother in China. While the IAD accounted for the Applicant's reasons for her absence from Canada, it failed to acknowledge the temporary nature of this absence. In particular, the IAD failed to give full weight to the Applicant's lack of ties to China and her efforts to establish herself in Canada in order to be near her only son and his family.

[45] No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-2637-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed and the matter is referred back to a differently constituted IAD for redetermination.

2. There is no question for certification.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2637-20
STYLE OF CAUSE:	YAN YAN WONG v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 20, 2021
JUDGMENT AND REASONS:	AHMED J.
DATED:	NOVEMBER 5, 2021

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