Federal Court  Cour fédérale

Date: 20220104

Docket: IMM-3102-21

Citation: 2022 FC 1

Ottawa, Ontario, January 4, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BHAONA MOHAMMED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Bhaona Mohammed, seeks judicial review of an April 29, 2021 decision of the Immigration Appeal Division ("IAD"), determining that she failed to comply with the permanent residency ("PR") requirements under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The IAD also found that there were insufficient

humanitarian and compassionate ("H&C") considerations to warrant special relief pursuant to paragraph 67(1)(c) of the *IRPA*.

[2] The Applicant submits that the IAD's decision is unreasonable because it misconstrued the evidence and failed to account for relevant and material evidence. The Applicant further submits that the IAD breached her right to procedural fairness.

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

II. **Facts**

A. *The Applicant*

[4] The Applicant is a 34-year-old national of Fiji. She is employed as a health care aide at a long-term care facility for senior residents in Airdrie, Alberta.

[5] The Applicant first came to Canada in 2007 as an international student. She successfully completed the Government of Alberta's Health Care Aide Program in May 2008, after which she obtained a post-graduate work permit ("PGWP") and worked as a nursing assistant. The Applicant returned to Fiji prior to the expiry of her PGWP in June 2009.

[6] On March 15, 2014, the Applicant received PR status in Canada. In June 2016, she made plans to visit her boyfriend in the United States ("US"). The Applicant states that when her

boyfriend's family found out the couple was staying together without being married, they insisted that she and her boyfriend marry. The couple had a religious wedding ceremony in July 2016 in the US.

[7] The Applicant's husband is a permanent resident of the US. His petition to sponsor the Applicant was approved on August 6, 2018. In January 2019, the Applicant retained a US immigration lawyer (the "US Lawyer") to apply for lawful permanent resident ("LPR") status in the US. The Applicant states that the US Lawyer advised her not to leave the US to return to Canada. On October 6, 2020, the Applicant's LPR status application was denied.

[8] On October 24, 2020, the Applicant returned to Canada. Upon entry, a Canada Border Services Agency officer (the "CBSA Officer") issued a report under subsection 44(1) of the *IRPA*. The CBSA Officer found that there were reasonable grounds to believe that the Applicant was inadmissible to Canada for failing to comply with the residency obligation under section 28 of the *IRPA*, which requires her to be physically present in Canada for at least 730 days within every five-year period. On October 26, 2020, the Applicant was issued a departure order for being inadmissible to Canada for non-compliance with the residency obligations.

[9] At the IAD hearing held on March 9, 2021, the Applicant conceded that she had failed to comply with the residency requirements to maintain her Canadian PR status, but sought H&C considerations from the IAD on the grounds that she had not returned to Canada sooner due to poor legal advice, and that she would face hardship if she were to lose her Canadian PR status.

B. *Decision Under Review*

[10] In a decision dated April 29, 2021, the IAD dismissed the Applicant's appeal, determining that there were insufficient H&C considerations to find in the Applicant's favour.

[11] In accordance with *Ambat v Canada (Citizenship and Immigration),* 2011 FC 292 at paragraph 27, the IAD considered each of the following factors relevant to the H&C determination in residency requirement cases:

> a) the extent of non-compliance with the residency obligation;
>
> (b) the reasons the appellant left and remained outside Canada;
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> (c) whether efforts were made to return to Canada at the first opportunity;
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> (d) the appellant's degree of establishment in Canada;
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> (e) the appellant's family in Canada and the impact to the family that loss of status would cause;
>
> (f) the degree of hardship that would be caused to the appellant by loss of status in Canada;
>
> (g) hardship that would be caused to their family members in Canada if the appellant lost their status in Canada; and
>
> (h) the best interests of a child directly affected by the decision.

[12] The IAD considered the Applicant's initial and continuing establishment in Canada, the Applicant's ties to Canada, reasons for leaving Canada and remaining outside of Canada. The IAD also considered the fact that the Applicant believed that she could not return to Canada without jeopardizing her US immigration process, as well as the extent of any hardship the

Applicant would face in Fiji. Finally, the IAD considered the Applicant's efforts to put her professional and educational background to use in the health care field during the COVID-19 pandemic, and found this to be a moderately positive factor.

[13] With respect to the extent of the Applicant's non-compliance, the IAD noted that while it was unclear how many days she had remained in Canada in the period assessed, there was a significant shortfall from the required 730 days of residency. As such, the IAD found relief on H&C grounds was not warranted.

III. **Issues and Standard of Review**

[14] There are two issues in this application for judicial review:

A. *Whether the IAD's analysis of the evidence was reasonable.*

B. *Whether the IAD breached procedural fairness.*

[15] Both parties submit that the first issue is to be reviewed on the reasonableness standard. I agree.

[16] The IAD's determinations on H&C assessments are reviewable on the reasonableness standard (*Yu v Canada (Citizenship and Immigration)*, 2020 FC 1028 at para 8; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16–17, 23–25). The issue of procedural fairness is to be reviewed on the correctness standard (*Mission*

Institution v Khela, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 ("*Canadian Pacific Railway Company*") at paras 37-56).

[17] 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).

[18] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. 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). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[19] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and*

Immigration), [1999] 2 SCR 817 ("*Baker*") at paragraphs 21-28 (*Canadian Pacific Railway Company* at para 54).

IV. **Analysis**

[20] Pursuant to paragraph 67(1)(c) of the *IRPA*, in order to grant an appeal of a removal order, the IAD must be satisfied that sufficient H&C considerations warrant special relief. This remedy is discretionary and acts as a "[…] safety valve available for exceptional cases" (*Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15).

A. *Whether the IAD's analysis of the evidence was reasonable.*

[21] The Applicant submits that the IAD erred in its consideration of: a) her reasons for not returning to Canada, b) the hardship associated with long-term separation from her husband, and c) her establishment in Canada. The Applicant argues that the IAD took a piecemeal approach to its analysis, rather than weighing the H&C considerations together.

[22] The Respondent submits that the IAD reasonably weighed the Applicant's circumstances and came to a rational conclusion based on the evidence. The Respondent asserts that the IAD is afforded a high degree of discretion in considering the appeal of a removal order which should not be exercised routinely or lightly (*Canada (Public Safety and Emergency Preparedness) v Abou Antoun*, 2018 FC 540 at para 19).

(1) Failure to Return to Canada

[23] The IAD did not find the Applicant's reason for departing Canada to be a compelling factor in favour of her appeal. The IAD attributed moderately positive weight to the Applicant's attempts to return to Canada and her reasons for remaining in the US and found:

> It is clear her first priority was pursuing status in the United States versus preserving her status in Canada. This choice diminishes the overall positive weight I can give to these factors and therefore they are moderately in favour of granting the appeal.

[24] The Applicant submits that the IAD failed to adequately consider the reasons for her departure from Canada, her decision to remain in the US and her attempts to return to Canada. At the IAD hearing, the Applicant explained that she had applied for a status adjustment to obtain her LPR status in the US, and had been advised by her US Lawyer not to return to Canada because her application would be considered abandoned if she left the US. The Applicant testified that, if not for this bad advice, she would have returned to Canada, to apply for her LPR status from Canada, and would have maintained her Canadian PR status.

[25] Furthermore, the Applicant submits that in light of her testimony, it was unreasonable for the IAD to state: "[…] there is little documentary evidence of [the Applicant] receiving incorrect advice from her immigration lawyer or that she sought advice from other sources." The Applicant testified that her conversations with the US Lawyer were in person or over the phone, and that she had written to the US Lawyer asking him to explain the steps taken in her

application, but had received no response. The Applicant contends that the IAD's finding does not account for the sympathetic considerations required of an H&C assessment.

[26] The Respondent points to how the IAD noted the discrepancies between the Applicant's testimony and her immigration documents, which include a letter stating that her US visa petition was approved on August 6, 2018 but that she "[…] does not appear eligible to adjust status in the United States." The IAD found it surprising that the Applicant had not realized her US status was in jeopardy until her application for LPR status was denied on October 6, 2020. The Respondent submits that it was reasonable for the IAD to find that the Applicant's reason for not being in Canada was the result of her personal choice to stay in the US after her marriage, not the result of events beyond her control.

[27] While I agree that the Applicant is ultimately responsible for her immigration applications, the evidence before the IAD demonstrates that the Applicant verily believed she should not leave the US while her LPR status application was being processed. The IAD accepted this by stating in its decision: "I find, on a balance of probabilities, the Appellant believed she could not return to Canada without jeopardizing her US immigration process and therefore, did not do so."

[28] The IAD diminished the overall positive weight of these factors because it found that the Applicant's "[…] first priority was pursuing status in the United States versus preserving her status in Canada." I note that the Applicant returned to Canada as soon as her LPR status application was refused. In my view, while the IAD characterizes the Applicant's stay in the US

as choosing status in the US over status in Canada, I do not find that the Applicant had such a choice, as demonstrated by her belief that she ought to remain in the US.

(2) Hardship

[29] The IAD assessed the Applicant's hardship in the context of her return to Fiji and stated:

> Overall, I find the Appellant will not experience undue hardship if she does not maintain her permanent resident status in Canada. The Appellant asserts she and her husband cannot return to the United States as a result of her refusal in October 2020. She further stated her husband could attempt to apply for her residency again in the future but since he is only a permanent resident in the United States himself his chances are very slim. As a result, I will assess the Appellant's hardship in the context of her return to Fiji.
>
> […]
>
> While it is understandable the Appellant will endure some hardship to be away from her immediate family in Canada, I find these circumstances do not rise to a significant level of hardship for the Appellant.

[30] The Applicant submits that the IAD erroneously based its analysis on the finding that the Applicant would be together with her husband in Fiji and that the IAD failed to consider the hardship associated with long-term separation from her husband should she return to Fiji and her husband remained in the US, where he lives and works. The Applicant states that should she maintain her PR status in Canada, she would be able to sponsor her husband under the Family Class so they could be together in Canada. The Applicant further submits that it was unreasonable for the IAD to speculate that she would be able to re-establish herself in Fiji and

not face undue hardship, particularly in light of how the COVID-19 pandemic has devastated the economy in Fiji.

[31] In my view, while the IAD found that the Applicant would not face significant hardship if separated from her family in Canada, I agree with the Applicant that the IAD did not account for the hardship that would flow from the separation from her husband if the Applicant lost her PR status in Canada. Both the Applicant and her husband have spent many years working to establish themselves in North America. It seems unduly harsh that the only option for the couple to be together would be for both to return to Fiji. By failing to assess the impact of the couple's separation, I find that the IAD's assessment of the hardship factors lacks justification.

(3) Establishment in Canada

[32] The IAD gave neutral weight to the Applicant's establishment, finding that, despite having PR for almost seven years, the Applicant lacked evidence of her establishment in Canada.

[33] The Applicant submits that this finding is unreasonable, particularly given the evidence that all of her immediate family members reside in Canada, that she graduated from a post-secondary program in Canada and has been granted admission to the University of Calgary, and that she currently works as a health care aide in a long-term care facility in Alberta.

[34] While not binding on this Court, the Applicant relies on the IAD's decision in *Bhimji v Canada (Citizenship and Immigration),* 2019 CanLII 54638 (CA IRB) ("*Bhimji*"), in which the IAD gave positive consideration to the appellant's establishment, which was similar to the

Applicant's situation (at paras 9-11). The appellant in *Bhimji* is a physician who was only physically present in Canada for 41 days in the five-year period assessed, due to difficulties related to the recognition of her qualifications. In *Bhimji,* the IAD found the appellant's commitment to providing her medical skills to under-served Canadians to be a significantly positive factor from an H&C perspective.

[35] The Respondent submits that it was reasonable for the IAD to find the Applicant's establishment in Canada to be a neutral factor, particularly in light of the Applicant's ties to Fiji, where she lived for the majority of her life and has extended family.

[36] I disagree. I find that the IAD's analysis of the Applicant's establishment lacks intelligibility. In its reasons, the IAD acknowledges that all of the Applicant's immediate family reside in Canada together and that her original establishment in Canada prior to her departure in June 2016 is in favour of her appeal. The IAD also states:

> Since her re-entry in October 2020, she has obtained casual employment as a health care aid[sic] with a local long term care facility. She has recently been offered admission to a degree program at the University of Calgary. I do take into consideration the Appellant has extended family outside of Canada but little establishment anywhere else in the world and her Canadian establishment should be viewed within that larger context. Therefore, overall, I find this is a neutral factor.

[37] From my perspective, these all read as positive establishment factors. While not binding, I find the IAD's decision in *Bhimji* to be persuasive, particularly with respect to the positive weight given to the appellant's contributions to health care in Canada.

(4) Contributions during the COVID-19 pandemic

[38] Upon her return to Canada, the Applicant began working as a health care aide at a local retirement home in Alberta during the COVID-19 pandemic. At the end of its decision, the IAD notes:

> I recognize the Appellant's efforts in the last few months to put her professional and educational background to use in the health care field during difficult times. I find this is a moderately positive factor in the appeal.

[39] While the IAD assessed the Applicant's efforts during the COVID-19 pandemic under the heading "other considerations," I find this to be an additional positive element of the Applicant's establishment in Canada.

[40] At a time when most people in Canada were staying at home to avoid the spread of COVID-19, frontline workers were risking their own health to provide essential services. This includes those who worked tirelessly in long-term care homes that saw frequent COVID-19 outbreaks and many deaths. The evidence before the IAD in this appeal included evidence demonstrating the heavy toll COVID-19 has taken on female immigrants working in health care.

[41] An employment letter on the record states that the Applicant has been employed at the Bethany Care Society since December 7, 2020 and is currently working as a Health Care Aide at Bethany Airdrie, a long-term care facility in Airdrie, Alberta. The letter states that the Applicant "[…] maintains casual employment at Bethany with the ability to pick up additional shifts." As

counsel for the Applicant aptly pointed out during the hearing, there was nothing casual about working at a long-term care facility during those times. This same facility was hit with a COVID-19 outbreak in early January 2021. Evidence before the IAD shows that on January 4, 2021, Bethany Airdrie reported 40 cases at the facility, including 19 employees and 21 residents, and the deaths of two residents from COVID-19. The entire facility remained under lockdown during this time.

[42] As a health care aide, the Applicant risked her own health and safety to support health-compromised and aging individuals. She is applying the very skills she acquired in Canada over a decade ago at a time when they are desperately needed, while not knowing if she herself will be able to stay in Canada. To frame this commitment and these contributions as only a "moderately positive" factor in the Applicant's appeal is unintelligible.

[43] The moral debt owed to immigrants who worked on the frontlines to help protect vulnerable people in Canada during the first waves of the COVID-19 pandemic cannot be overstated. I do not find that the IAD gave this contribution the weight it deserved.

[44] H&C considerations are meant to provide flexible relief in appropriate situations to mitigate the law's rigidity (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*") at para 19). Overall, in light of the evidence in this case, I do not find that the IAD substantively assessed all of the H&C factors through a lens of compassion, as is required by the jurisprudence (*Kanthasamy* at para 25, citing *Baker* at paras 74-75).

[45] The context surrounding the Applicant's H&C application is unique and important: the Applicant's work during the COVID-19 pandemic deserves more than a passing note from the IAD. Along with the other flaws in the IAD's reasoning, I find that the IAD's decision lacks intelligibility and is unreasonable.

[46] Having determined that the decision is unreasonable, I do not find it necessary to address the Applicant's arguments with respect to procedural fairness.

V. **Conclusion**

[47] Given the IAD's acceptance that the Applicant verily believed she should not return to Canada while her US immigration application was being processed, the hardship she would face if separated from her husband, and the evidence of the Applicant's contributions during the COVID-19 pandemic, I find the IAD reached an unreasonable conclusion. Accordingly, this application for judicial review is granted.

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

JUDGMENT in IMM-3102-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The decision is set aside and the matter referred back for redetermination by a differently constituted panel.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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