Federal Court  Cour fédérale

Date: 20220425

Docket: IMM-460-20

Citation: 2022 FC 592

Ottawa, Ontario, April 25, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

FARAH RAHBARNIA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPARDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] A departure order was made against Farah Rahbarnia after she fell 35 days short of the residency obligation imposed on permanent residents by section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada rejected Ms. Rahbarnia's appeal of the departure order, finding her situation did not "rise to the level of exceptionality" to warrant relief on

humanitarian and compassionate [H&C] grounds. Ms. Rahbarnia seeks judicial review of the IAD's decision, arguing the IAD should have recalculated the relevant residency period and that it erred in its H&C analysis.

[2] I conclude the IAD's decision was unreasonable. The IAD's conclusion on the issue of the relevant residency period was reasonable. However, the IAD's H&C analysis unreasonably failed to balance Ms. Rahbarnia's positive H&C factors against her comparatively modest shortfall in the residency obligations; compared her establishment to that of a person who had evaded deportation; and required Ms. Rahbarnia's situation to meet a standard of "exceptionality" rather than assessing whether H&C factors merited relief in the circumstances of the case. These errors are sufficient to undermine the reasonableness of the decision and require that it be set aside.

[3] The application for judicial review is therefore granted, and Ms. Rahbarnia's appeal is remitted to the IAD for redetermination.

II. Issues and Standard of Review

[4] Ms. Rahbarnia's application for judicial review raises the following issues:

A. Did the IAD err in concluding that the five-year period for assessing the residency obligation should not be recalculated?

B. Did the IAD err in concluding that Ms. Rahbarnia's appeal should not be allowed on H&C grounds?

[5] The parties agree that the standard of review applicable to each of these issues is that of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Canada (Citizenship and Immigration) v Ndir*, 2020 FC 673 at para 27. Reasonableness review is concerned with both the decision maker's reasoning process and the outcome: *Vavilov* at paras 83–87. In conducting reasonableness review, the Court considers the outcome of the decision in light of the reasons given for it to ensure the decision as a whole is transparent, intelligible, and justified when considered in relation to the factual and legal constraints that bear on it: *Vavilov* at paras 15, 83–87, 99.

III. Analysis

A. *The IAD's conclusion regarding the applicable five-year period was reasonable*

(1) Statutory and regulatory framework

[6] Section 28 of the *IRPA* imposes a residency obligation on every Canadian permanent resident. In each five-year period, the permanent resident must be physically present in Canada, or outside of Canada for certain defined purposes, for 730 days: *IRPA*, s 28(2). Failure to comply with the residency obligation may render the permanent resident inadmissible and, if in Canada, subject to an inadmissibility report and a removal order: *IRPA*, ss 41(*b*), 44(1)–(2). While the residency obligation applies to each five-year period, it is sufficient for a permanent resident to demonstrate they have met the obligation in respect of the five-year period immediately before the examination: *IRPA*, s 28(2)(*b*)(ii).

[7] The *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*] include regulations regarding the residency obligation under section 28 of the *IRPA*: *IRPR*, ss 61–62. In particular, section 62 of the *IRPR* provides that days after the preparation of a section 44 report are not included in the calculation of days in Canada for purposes of the residency obligation:

Calculation – residency obligation	**Calcul : obligation de résidence**
62 (1) Subject to subsection (2), the calculation of days under paragraph 28(2)(a) of the Act in respect of a permanent resident does not include any day after	**62 (1)** Sous réserve du paragraphe (2), le calcul des jours aux termes de l'alinéa 28(2)a) de la Loi ne peut tenir compte des jours qui suivent :
(a) a report is prepared under subsection 44(1) of the Act on the ground that the permanent resident has failed to comply with the residency obligation; or	**a)** soit le rapport établi par l'agent en vertu du paragraphe 44(1) de la Loi pour le motif que le résident permanent ne s'est pas conformé à l'obligation de résidence;
(b) a decision is made outside of Canada that the permanent resident has failed to comply with the residency obligation.	**b)** soit le constat hors du Canada du manquement à l'obligation de résidence.
Exception	**Exception**
(2) If the permanent resident is subsequently determined to have complied with the residency obligation, subsection (1) does not apply.	**(2)** S'il est confirmé subséquemment que le résident permanent s'est conformé à l'obligation de résidence, le paragraphe (1) ne s'applique pas.

[8] The exception in subsection 62(2) is of particular relevance to this application, as Ms. Rahbarnia argues the IAD should have "subsequently determined" that she complied with the residency obligation, such that subsection (1) would not apply.

(2) Ms. Rahbarnia's residency and departure order

[9] Ms. Rahbarnia, an Iranian citizen, became a permanent resident in August 2011, when her husband was granted permanent residence under a provincial nominee program. Her husband chose not to complete the requirements of the nominee program. He returned to Iran soon after landing, remains there with the couple's first child, and is no longer a permanent resident.

[10] Ms. Rahbarnia also returned to Iran shortly after becoming a permanent resident, staying there for all but five weeks of the period between September 2011 and January 2016 and returning to Iran for a further three months in mid-2016. In November 2016, when back in Canada, Ms. Rahbarnia applied to renew her permanent resident card. It was determined she did not meet the residency obligation, her renewal was denied and a report was prepared under section 44 of the *IRPA*.

[11] The section 44 report was issued on February 7, 2018. It considered both the five-year period from November 3, 2011 to November 1, 2016 and the five-year period from February 3, 2013 to February 2, 2018. In the latter period, Ms. Rahbarnia had been in Canada for 690 days, 40 days short of the 730-day obligation. The report concluded there were grounds to believe Ms. Rahbarnia was inadmissible for failing to comply with the residency obligation of section 28 of the *IRPA*.

[12] On March 22, 2018, a delegate of the Minister reached the same conclusion and found there were insufficient H&C factors to overcome Ms. Rahbarnia's non-compliance with the residency obligation. The Minister's delegate therefore issued a departure order.

(3) Appeal to the IAD

[13] Ms. Rahbarnia appealed the departure order to the IAD pursuant to subsection 63(3) of the *IRPA*. An appeal before the IAD proceeds as a *de novo* hearing: *Castellon Viera v Canada (Citizenship and Immigration)*, 2012 FC 1086 at paras 10–12; *Petinglay v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1371 at para 27. Ms. Rahbarnia filed documents with the IAD, and gave evidence and made submissions through counsel at a hearing held on December 16, 2019.

[14] Ms. Rahbarnia argued to the IAD that since the appeal was *de novo*, the IAD could and should consider the five-year period ending on the day of the appeal to assess her compliance with the residency obligation. Using that five-year period, Ms. Rahbarnia would meet the 730-day residency obligation. Ms. Rahbarnia argued the IAD could re-determine her eligibility, invoking the exception contained in subsection 62(2) of the *IRPR*. Ms. Rahbarnia also argued that her appeal should be allowed on H&C grounds, citing a number of factors discussed below.

[15] The IAD concluded the exception in subsection 62(2) of the *IRPR* did not apply since there had been no "subsequent determination" that Ms. Rahbarnia complied with the residency obligation. The IAD found it clear that the *IRPR* did not "anticipate that the IAD should make an assessment of section 28 compliance as of the hearing date that would supplant the five-year

period used by the section 44 officer." Using the five-year period ending with the issuance of the section 44 report, namely February 8, 2013 to February 7, 2018, Ms. Rahbarnia had 695 days of presence in Canada and was therefore 35 days short of the 730-day residency obligation. The IAD therefore found the departure order was valid.

(4) The IAD's conclusion on section 62 of the *IRPR* is reasonable

[16] Ms. Rahbarnia argues on this application that the IAD failed to exercise its *de novo* hearing power. She argues it was unreasonable for the IAD to conclude that it cannot make a new determination during the appeal, so as to trigger the exception in subsection 62(2) of the *IRPR* that would otherwise prevent days after the preparation of the section 44 report from being counted toward the residency obligation.

[17] I disagree. The IAD's reading of subsection 62(2) is consistent with the text, context, and purpose of the regulatory provision: *Vavilov* at paras 115–124. Subsection 62(1) effectively provides that the residency obligation "clock" is stopped upon the preparation of a section 44 report based on non-compliance [paragraph 62(1)(*a*)] or a decision outside Canada finding non-compliance [paragraph 62(1)(*b*)]. Were it otherwise, a permanent resident found inadmissible for non-compliance might become compliant simply by passage of time pending an appeal to the IAD.

[18] Subsection 62(2) appears on its face to pertain to a situation in which a non-compliance report or decision is made that is subsequently determined to be "incorrect" in the sense that the permanent resident did in fact comply with the residency obligation. This might be, simply by

way of example, due to additional information filed with the IAD regarding the individual's presence in Canada during the five-year period at issue in the section 44 report or the decision outside Canada. In such circumstances, the five-year period "clock" continues to run and is not frozen at the date of the report or decision found to have been incorrect.

[19] As the IAD reasonably concluded, subsection 62(2) does not appear on its face to give, or to be designed to give, the IAD the authority to simply re-determine an appellant's compliance based on a new five-year period, supplanting that used in the section 44 report. While the appellant refers to the IAD's "*de novo* power," I see nothing in the fact that an appeal to the IAD is conducted *de novo* that gives it a power to simply re-determine the question of compliance with the obligation using a new five-year period ending on the date of appeal.

[20] I therefore conclude that the IAD's interpretation of subsection 62(2), and its rejection of Ms. Rahbarnia's request that her compliance with the residency obligation be re-determined using a new five-year period ending on the date of the appeal, is reasonable.

[21] While the IAD did not refer to it, I note that the French version of subsection 62(2), which uses the term "*[s]'il est confirmé subséquemment*" (if it is subsequently *confirmed* that the permanent resident complied with the obligation) does not suggest that the IAD has the power to re-determine the issue of compliance with a new five-year period, but rather is consistent with the IAD's interpretation. So too is the Regulatory Impact Analysis Statement (RIAS) that accompanied the publication of the *IRPR*: RIAS, SOR/2002-227, *Canada Gazette Part II*, Vol 136, Extra No 9 at p 177. In describing the regulations governing the calculation of days,

i.e., section 62, the RIAS states that the "regulations specify the period, after an officer has made a decision that a permanent resident has failed to comply with the residency obligation, that cannot be considered by the Immigration and Refugee Board (IRB) during an appeal as days of physical presence in Canada for the purpose of satisfying the residency obligation" [emphasis added]: RIAS at p 211. While noting that the rule will not apply "in cases where the permanent resident is subsequently determined to have complied with the residency obligation," the language of the RIAS is consistent with the IAD's interpretation.

B. *The IAD's assessment of the H&C factors was unreasonable*

[22] While I conclude the IAD's interpretation of subsection 62(2) of the *IRPR* is reasonable, I cannot reach the same conclusion with respect to its assessment of Ms. Rahbarnia's appeal based on H&C grounds. In particular, I conclude that three aspects of the IAD's reasons render the decision as a whole unreasonable.

(1) Failure to balance H&C factors against the shortfall

[23] The IAD began its analysis of Ms. Rahbarnia's request for H&C relief by reasonably referring to its prior decisions in *Bufete Arce* and *Kok*, each of which set out relevant factors for H&C consideration in an appeal related to non-compliance with the residency obligation: *Bufete Arce v Canada (Citizenship and Immigration)*, 2003 CanLII 54304 (CA IRB) at para 9; *Kok v Canada (Citizenship and Immigration)*, 2003 CanLII 87863 (CA IRB); each citing *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL); see also *Ambat v Canada (Citizenship and Immigration)*, 2010 CanLII 80733 (CA IRB), aff'd 2011 FC 292 at

para 27. In addition to the best interests of any child directly affected, the IAD set out the relevant factors in the same language used in *Ambat*, namely:

- the extent of the non-compliance with the residency obligation;
- the reasons for the departure and stay abroad;
- whether attempts to return to Canada were made at the first opportunity;
- the degree of establishment in Canada, initially and at the time of hearing;
- family ties to Canada;
- hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;
- hardship to the appellant if removed from or refused admission to Canada; and
- whether there are other unique or special circumstances that merit special relief.

[24] In considering the extent of Ms. Rahbarnia's non-compliance with the residency obligation, the IAD reasonably concluded her 35-day shortfall was "not egregious" for the five-year period under consideration. While unwilling to consider this a "positive factor" since the 730-day requirement is not particularly onerous, the IAD found that "when assessing whether there are sufficient H&C grounds, those considerations need not be as compelling as in cases where the Appellant has fewer, or zero, days of physical presence in Canada" [emphasis added].

[25] This latter observation is an eminently reasonable one that is consistent with the jurisprudence. The inclusion of the extent of non-compliance as a factor in the H&C analysis recognizes that relief from inadmissibility is not a binary assessment, and that "the persuasive value of the H&C considerations must be commensurate with the degree of inadmissibility": *Patel v Canada (Citizenship and Immigration)*, 2019 FC 394 at para 12, citing *Jugpall v Canada*

(Citizenship and Immigration), 1999 CanLII 20685 (CA IRB), [1999] IADD No 600 at paras 23–25, 41–42 (QL); *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23.

[26] However, having made the statement that the considerations need not be as compelling given the modest shortfall, the IAD did not apply this principle and did not assess whether the H&C considerations met this standard. Having reviewed the various H&C factors, at least one of which it found merited some positive weight, the IAD had to balance those factors against the extent of non-compliance. It did not do so, and did not explain why it concluded that the H&C factors did not overcome the 35-day shortfall.

[27] Nor is this a case where the IAD's balancing can be understood implicitly from the context or the nature of its analysis. To the contrary, the IAD expressly adopted a different approach in its final analysis, assessing whether Ms. Rahbarnia's situation rose to a "level of exceptionality." As discussed below, this is an unreasonable approach to an H&C analysis. In addition, the IAD's adoption of this approach after its initial recognition that Ms. Rahbarnia's H&C considerations "need not be as compelling" in light of her limited shortfall, creates an internal inconsistency that is another hallmark of unreasonableness: *Vavilov* at paras 102–104.

(2) Establishment analysis

[28] The IAD concluded that Ms. Rahbarnia's initial establishment in Canada was negligible. This was a reasonable assessment given her departure within six weeks of landing in August 2011.

[29] The IAD's assessment of Ms. Rahbarnia's current establishment was brief, and cited this Court's decision in *Shallow v Canada (Citizenship and Immigration)*, 2012 FC 749:

> The Appellant's current establishment is also not very compelling. She has never worked in Canada and her husband lives in Iran. She came here as a fully-formed middle-aged adult, after having been raised and educated in her home country. In respect of this factor, I also note the case of *Shallow v. Canada*, where the Court stated as follows at paragraphs 8 and 9:
>
> > I agree that establishment in Canada is a relevant factor. However, merely managing to evade deportation for a lengthy period of time through various procedures and protections available through the immigration process ought not to enhance an applicant's "right" to remain in Canada on H&C grounds. […]
> >
> > For this factor to weigh in favour of an Applicant, much more than simple residence in Canada must be demonstrated. […] Unless the establishment in Canada is both exceptional in nature and not of the applicant's own choosing, this will not normally be a factor that weighs in favour of the applicants.
>
> This factor is not a positive consideration.
>
> [Emphasis added.]

[30] In my view, this analysis, and in particular the IAD's reference to and reliance on these paragraphs of *Shallow* is unreasonable, for two reasons.

[31] First, these paragraphs refer to the case of foreign nationals who chose to remain in Canada without status and whose establishment therefore arose by evading deportation for a lengthy period. Ms. Rahbarnia, on the other hand, was a permanent resident of Canada who was entitled to remain in Canada and whose establishment in the relevant five-year period arose while she had that status. By quoting these paragraphs of *Shallow* as being relevant, the IAD appears to have considered Ms. Rahbarnia's situation comparable to that of someone who has

"evaded deportation" through the immigration process. This is an unreasonable comparison. Nor is it a relevant consideration in such circumstances whether the establishment was "not of the Applicant's own choosing," given that a permanent resident has the right to choose to remain and become established in Canada.

[32] Second, the Court in *Shallow* referred to the need to demonstrate establishment that is "exceptional in nature." However, since the Supreme Court of Canada's decision in *Kanthasamy*, this Court has found it unreasonable to adopt a "standard of exceptional establishment" in assessing an H&C request: *Jimenez v Canada (Citizenship and Immigration)*, 2021 FC 1039 at paras 25–28; *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 at paras 16–17; *Sivalingam v Canada (Citizenship and Immigration)*, 2017 FC 1185 at para 13; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.

[33] As can be seen in the passage above, the IAD does not expressly say it is comparing Ms. Rahbarnia to someone who has remained in Canada without status or applying an "exceptional establishment" standard. However, the IAD's quotation of these particular passages of *Shallow* constitutes a large part of its establishment analysis, and it notes them immediately before its brief conclusion that "[t]his factor is not a positive consideration." In context, the reference can only be taken to suggest that the IAD considered the passages apposite and relevant to its analysis. Even in the context of the limited evidence of establishment put forward by Ms. Rahbarnia, I conclude the IAD's assessment of Ms. Rahbarnia's establishment was unreasonable.

(3) Exceptionality

[34] The IAD concluded its analysis of the H&C factors with reference to this Court's decision in *Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204:

> The granting of an appeal for H&C consideration is an "exceptional relief". It has been consistently held that an H&C exemption under the IRPA provisions is an exceptional and discretionary remedy. This relief sits outside the normal immigration classes or refugee protection streams by which foreign nationals can come to Canada permanently or permanent residents can maintain their status. It acts as a sort of safety valve available for exceptional cases. A common theme animating the H&C considerations in the IRPA is the need to link the H&C relief to some form of serious hardship to be corrected, to some misfortunes that amount to more than the normal and expected consequences of removal from Canada and that need to be relieved.
>
> [Citations omitted; emphasis added; *Tefera* at para 46.]

[35] Having set out this passage from *Tefera*, the IAD concluded that Ms. Rahbarnia's "situation does not rise to the level of exceptionality as set out in *Tefera*" and thus dismissed the appeal.

[36] As I have noted above, adopting a requirement to meet the "level of exceptionality as set out in *Tefera*," a case that involved a "colossal shortfall" in the residency requirement, is inherently inconsistent with the IAD's stated approach at the outset of its reasons that Ms. Rahbarnia's H&C considerations "need not be as compelling as in cases where the Appellant has fewer, or zero, days of physical presence in Canada." In addition, the IAD's conclusion goes beyond merely using "exceptional" as descriptive of the nature of H&C relief, to impose a test or standard of a certain "level of exceptionality" that must be met to warrant

H&C relief. In my view, imposing such a standard is inconsistent with the approach to H&C relief mandated by the Supreme Court of Canada in *Kanthasamy*: *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at para 21; *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at paras 22–23. It is particularly inapposite in the present case as it would lead to applying the same "level of exceptionality" in all residency obligation cases, regardless of the degree of shortfall.

[37] I am satisfied that the foregoing errors are sufficiently serious that the IAD's decision cannot be said to exhibit the requisite degree of justification, intelligibility, and transparency required of a reasonable decision: *Vavilov* at para 100. The IAD's decision must be set aside and Ms. Rahbarnia's appeal of her removal order remitted for re-determination.

IV. Conclusion

[38] The application for judicial review is therefore granted. Neither party proposed a question for certification and I agree that none arises in the matter.

JUDGMENT IN IMM-460-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. Farah Rahbarnia's appeal of her removal order is remitted to the Immigration Appeal Division for re-determination by a differently constituted panel.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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