Federal Court Cour fédérale

Date: 20230403

Docket: IMM-535-22

Citation: 2023 FC 471

Ottawa, Ontario, April 3, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

SURA ALI JAFFAR SAMAKA
(AKA SURA ALI JAAFAR SAMAKA)

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Sura Ali Jaffar Samaka, seeks judicial review of a decision of the Immigration Appeal Division ("IAD") dated December 30, 2021.

[2] The IAD upheld the removal order issued against the Applicant for her failure to comply with the residency obligation under subsection 28(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The IAD found insufficient humanitarian and compassionate ("H&C") considerations to overcome the breach and warrant special relief pursuant to paragraph 67(1)(c) of the *IRPA*.

[3] The Applicant submits that the IAD erred in its assessment of two H&C considerations: the IAD's assessment of the hardship on the Applicant if the appeal is not granted and the best interests of the children ("BIOC") analysis.

[4] For the reasons that follow, I find the IAD's decision is reasonable. This application for judicial review is dismissed.

II. Facts

A. *The Applicant*

[5] The Applicant is a 36-year-old citizen of Iraq. She is married and has two young children born in Canada. The Applicant's husband, Ahmed Marwan Abdullah Al-Dabbagh, currently resides and works in the United Arab Emirates ("UAE"). He has temporary resident status in the UAE and permanent resident ("PR") status in the United States ("US").

[6] In 1999, the Applicant left Iraq as a teenager and lived in the UAE. In 2006, she arrived in Canada and was granted PR status as a dependent on her father's skilled worker application. Once landed, the Applicant traveled to the UAE with her parents.

[7] In April 2020, the Applicant received a departure order for failing to meet the residency obligation of her PR status. The Applicant was required to be present in Canada for 730 days out of the five-year period preceding the departure order, but was found to have only been present in Canada for 321 days between April 2015 and April 2020.

[8] The Applicant asserts that her absences from Canada during this time were reasonable. Prior to the relevant period, the Applicant was in an abusive marriage, after which she was hesitant to let another man into her life. She met her current husband in 2013 and wished to stay in the UAE to become better acquainted with him and to save money to return to Canada. In August 2018, the Applicant and her husband arrived in Canada. They married in February 2019.

[9] Between March and April 2019, the Applicant travelled to the US for a surgery. She then returned to the UAE because her father-in-law was ill and to consult a fertility clinic in spring of 2019. Her father-in-law later passed away in 2021.

[10] In June 2019, the Applicant returned to Canada. After several months of fertility treatments, the Applicant's mental health suffered and in October 2019, she traveled to the UAE to be with her husband. While there, the Applicant learned she was pregnant and that there were complications with her pregnancy. She began treatment and was advised not to travel.

[11] In March 2020, the Applicant travelled to the US because her PR status was expired. One month later, she entered Canada and was issued the removal order. The Applicant appealed the removal order to the IAD.

B. *Decision Under Review*

[12] In refusing the appeal of her removal order, the IAD assessed H&C considerations, including the level of non-compliance, the reasons for leaving and extended stays outside of Canada, ties to Canada, establishment in Canada and abroad, the hardship on the Applicant if the appeal is refused, and the BIOC affected by her removal. The IAD found that the seriousness of this breach requires a high level of H&C considerations to overcome and the only factor weighing in the Applicant's favour is her lack of establishment abroad, which was insufficient to warrant granting special relief.

[13] The IAD further found that the reasons for the Applicant's initial departure from Canada and her extended stay abroad were not reasonable. It noted the Applicant was an adult at the time of her landing in Canada and rather than returning to the UAE because her family decided to live there, she was able to make her own decisions.

[14] The IAD agreed with the Applicant that some of her subsequent absences from Canada were reasonable, such as her time in the US for surgery, in the UAE due to her ill father-in-law, and her time in the UAE from October 2019 and April 2020 due to the COVID-19 pandemic. However, the IAD took issue with the Applicant remaining in the UAE for three years in order to stay with her now-husband, stating that she chose this over meeting her residency obligation.

Although acknowledging that it was necessary for the Applicant to be with her husband prior to October 2019 to be able to have children, the IAD found the Applicant's decision to do this in the UAE reflected a choice she made over meeting the residency obligation.

[15] With respect to hardship, the IAD noted the Applicant's testimony of the poor security situation in Iraq and the lack of acceptance she would face as a divorced woman who does not wear the hijab and observes Western, liberal norms. The IAD assessed the adverse country condition evidence in Iraq, including threats to foreigners, women travelling alone, and the institutionalization of Islamic practices and beliefs in state customs and laws.

[16] The IAD ultimately found insufficient evidence that the Applicant would experience hardship if she loses her PR status and returns to the UAE. The IAD found the Applicant's concerns regarding the renewal of her husband's temporary residency status and payment of education and healthcare to be speculative and unsupported, finding that the Applicant's husband and parents have been able to maintain their temporary resident status in the UAE since 2006 and 1999, respectively. The IAD also found insufficient evidence to demonstrate that the Applicant cannot access healthcare in the UAE.

[17] The IAD further considered the possibility of the Applicant residing in the US, where her husband has PR status. It found that the Applicant adduced insufficient evidence to demonstrate that living in the US does not remain a feasible option for the Applicant and the evidence demonstrates minimal hardship to the Applicant if she loses her PR status in Canada.

[18] Finally, the IAD found it is not in the BIOC if the Applicant lives in Iraq. However, the IAD determined the Applicant failed to demonstrate that the BIOC would not be served if the children reside with their parents in the UAE or in the US, noting that it is always in the best interests of the children to live with their parents.

[19] The IAD was not persuaded that the Applicant will be unable to maintain temporary resident status in the UAE or that the Applicant's children cannot access medical care or education in the UAE for financial or other reasons. The IAD also found the Applicant provided no evidence to demonstrate the Applicant's children cannot live with her and her husband in the US and have their best interests met there.

III. Preliminary Issue

[20] The Applicant's memorandum and reply memorandum indicate the Minister of Citizenship and Immigration as the respondent. The proper respondent is the Minister of Public Safety and Emergency Preparedness, as listed in the style of cause.

IV. Issue and Standard of Review

[21] This application raises the sole issue of whether the IAD's decision is reasonable.

[22] The standard of review is not in dispute. The parties agree the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[23] 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).

[24] For a decision to be unreasonable, an 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).

V. Analysis

[25] The Applicant submits that the IAD erred in conducting its H&C analysis of two factors: the hardship on the Applicant if the appeal is not granted and the BIOC. The Respondent maintains that the IAD reasonably assessed both H&C factors. I agree with the Respondent.

A. *Hardship*

[26] The Applicant asserts that the IAD's conclusion to overlook the hardship facing her upon return to Iraq on the basis that she may be able to maintain temporary residence in another country is unreasonable. The Applicant first contends that her ability to maintain temporary residence in the UAE is speculative because it is based on the assumption that residency in the UAE could be maintained indefinitely, relying on *Nounou v Canada (Citizenship and Immigration)*, 2017 CanLII 64580 (CA IRB) at paras 40-45. The Applicant further submits that the possibility of indefinite temporary residence cannot be equated with PR status when conducting an H&C analysis referring to the Immigration, Refugees, and Citizenship Canada guideline, "Humanitarian and compassionate assessment: Hardship and the H&C assessment" (the "Guideline"), which states that in certain circumstances, the mitigation of hardship through redress or relocation can be considered in the H&C analysis. However, these factors are not necessarily determinative.

[27] The Applicant further submits that considering an applicant's relocation outside their country of origin as a mitigating factor is restricted to countries where the applicant is a citizen, not a temporary resident, and where a high-level of stability and certainty in relocation is contemplated. The Applicant contends that this, as well as the principle of family unification under subsection 3(1)(d) of *IRPA*, supports the proposition that precariousness of status, in itself, is a hardship under the H&C analysis.

[28] The Respondent maintains that the IAD's decision is reasonable. The Respondent submits that according to the evidence, the Applicant and her family chose to reside in the UAE for over 20 years without permanent status. Therefore, the IAD did not err in concluding there is minimal hardship if the Applicant continues to do what she has voluntarily done in the past.

[29] The Respondent further submits that the Applicant is silent on the fact that her husband has PR status in the US. The Applicant did not provide any evidence that moving to the US would cause hardship, nor did she adduce any evidence to indicate why she could not be granted PR status in the US through her husband's sponsorship. The Respondent submits the Applicant's ability to relocate to the US with her family further demonstrates minimal hardship.

[30] I agree with the Respondent. It is a reasonable assessment of the available evidence that the Applicant speculated as to the reliability of her residency in the UAE, so much so that she allowed her Canadian residency to lapse over 12 years. During the relevant 12-year period, the Applicant was an adult, not tethered to the decisions of any other person, and was able to make her own decisions about her residency. The Respondent rightly notes that the Applicant's position amounts to the circular reasoning that she was entitled to speculate about the stability of her residency but the IAD is not able to take note of these circumstances in its assessment. In my view, the IAD reasonably relied on the totality of the Applicant's evidence and circumstances in its assessment, particularly the clear evidence pointing to the stability of the Applicant's residency elsewhere.

B. *BIOC*

[31] The Applicant submits that the IAD unreasonably minimizes the importance the BIOC factor. She submits that the IAD relies on the presupposition that "[t]he best interests of the [Applicant's] two minor children are better served if they reside with their parents wherever they choose to live," rather than assessing whether granting the Applicant's appeal is in the best interests of the Applicant's children.

[32] The Applicant submits that the IAD ignored the children's insecurity of having chronically insecure immigration status in a country where they are non-citizens. It did not consider the fact that the Applicant's children were born in Canada and the only country they are able to live in permanently is Canada. Rather, the IAD speculated that the children may be able to live in the UAE based on the father's ability to continue to satisfy the temporary resident requirements and the Applicant would be permitted to live there. Alternatively, the Applicant submits that the IAD speculated that the children would be able to live in the US, which hinges on the assumption that their father could successfully sponsor their mother and that he would be able to relocate to the US. The Applicant submits that this reasoning—that hardship may be overcome by hypothetical arrangements—demonstrates the application of the wrong BIOC test, citing *Bautista v Canada (Citizenship and Immigration)*, 2014 FC 1008 at para 28.

[33] The Respondent submits that the IAD reasonably found that the BIOC does not favour granting the appeal in the Applicant's case. The Respondent contends that the Applicant is asking the Court to ignore her past ability to live in the UAE and the possibility of relocation to the US. The Respondent further submits that the Applicant did not meet the burden to demonstrate her children would be unable to access education or healthcare in the UAE or the

US. The IAD was alert to the BIOC and identified it as "the ability to live with their parents where they will be able to access health care and education."

[34] I agree with the Respondent. The Applicant has failed to raise a reviewable error with respect to the IAD's assessment of the BIOC. The finding that the BIOC is insufficient to overcome other factors in the overall assessment or is not determinative of the application does not necessarily mean that the IAD was not alive, alert or sensitive to the BIOC as required. The IAD reasonably found that the Applicant's evidence fails to demonstrate that her children could not access medical care in the UAE, given that they already have, or that they would be unable to attend school. It is reasonable for the IAD to assess the culmination of factors when assessing the BIOC. For these reasons, I find that the IAD's assessment of the BIOC is reasonable.

VI. Conclusion

[35] The application for judicial review is dismissed. The IAD reasonably considered the available evidence and the totality of the Applicant's circumstances in the assessment. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-535-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-535-22
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