Federal Court  Cour fédérale

Date: 20230801

Docket: IMM-8676-22

Citation: 2023 FC 1056

Toronto, Ontario, August 1, 2023

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

MORTEGA TONDKAR MOGHADAM

Respondent

JUDGMENT AND REASONS

[1] The Applicant, the Minister of Citizenship and Immigration [Minister], seeks judicial review of an August 15, 2021 decision [Decision] of the Immigration Appeal Division [IAD], granting an appeal under paragraph 67(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] on the basis of humanitarian and compassionate [H&C] grounds. The IAD found sufficient H&C grounds to warrant relief from a visa officer's finding that the Respondent had failed to comply with his residency obligations under section 28 of the IRPA.

[2] For the reasons that follow, I find that the Decision was unreasonable as the IAD's consideration of the H&C factors do not display a rational chain of analysis. As such, the application will be granted.

I. Background

[3] The Respondent is a 57-year old citizen of Iran who is married and has two sons, who were aged 17 and 13 at the time of Decision. He was granted permanent resident status in Canada in 1995 after making a refugee claim.

[4] The Applicant returned to Iran in 2002 to be married and is asserted to have travelled frequently between Iran and Canada from 2002 to 2008. He was last physically present in Canada in or about April 2008. He started a business with a partner in Iran in 2005 and bought a home in Iran in 2008 where he lived with his family until 2019.

[5] In 2004, the Respondent attempted to sponsor his wife's application for permanent residence [PR] in Canada. In June 2005, the sponsorship application was refused.

[6] In 2011, the Respondent's wife made an application for PR under the Quebec Skilled Workers class. In and around the same time, the Respondent applied for a Permanent Resident Travel Document [PRTD]. The Respondent claims that he was advised to withdraw the Application as he had an active Canadian citizenship application. He claims that he was not able to attend a hearing before a citizenship judge later in 2011 as he was under a travel ban in Iran

from 2009 to 2015 after reporting unlawful business practices. He asserts that he was advised that his PR status was lost in 2015. The wife's PR application was refused in 2013.

[7] In September 2018, Iranian authorities arrested the Respondent on what he claims were suspicions of espionage associated with his business dealings. He claims that he confessed to a non-specific crime under duress after being detained and tortured for two months and was subject to conditions on release. The Respondent and his family fled to Sweden in 2019 and made a claim for asylum, which was ultimately denied by the Swedish Migration Appeal Board [SMAB] on credibility concerns. He is currently under a suspended departure order.

[8] In August 2021, the Respondent applied for a PRTD, which was refused for inadmissibility under subsection 41(b) of the IRPA for failure to comply with section 28 of the IRPA, as the Respondent had not been resident in Canada for the previous five years.

[9] The Respondent appealed under paragraph 67(1)(c) of IRPA, arguing H&C grounds. The IAD granted the appeal on August 15, 2022.

[10] The IAD found the Respondent's lack of compliance with the residency obligation to be total and egregious when considered with his lack of physical presence in Canada for 14 years, but found his circumstances exceptional and it credible that the Respondent was being sought by authorities in Iran and that he would not be safe there.

[11] The IAD found that while the Respondent was not in a situation of hardship, his life in Sweden was constrained significantly, his activities were extremely limited and his family was under a deportation order, which would not be in the best interests of the children [BIOC] moving forward and weighed heavily on the appeal.

II. Issues and Standard of Review

[12] The Applicant asserts that the IAD's decision is based on a selective assessment of evidence favourable to the Respondent without regard or proper reasons for disregarding other evidence. He argues that the IAD ignored important contradictory evidence, failed to consider issues relating to credibility, and provided an inadequate and unintelligible assessment of the BIOC.

[13] The parties assert, and I agree, the standard of review is reasonableness. Reasonableness is the presumptive standard of review for an administrative decision and none of the situations that rebut the presumption of reasonableness review are present: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17, 23, 25.

[14] A reasonable decision is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision will be reasonable if when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

III. Analysis

[15] The factual background to this application is lengthy. When assessing the challenges raised by the Minister, it is important to first consider the statutory regime governing IAD decisions on H&C grounds and the scope of the IAD's decision: *Canada (Citizenship and Immigration) v Ndir*, 2020 FC 673 at para 20.

[16] The IAD has jurisdiction to entertain H&C considerations pursuant to an appeal under paragraph 67(1)(b) of IRPA where a foreign national has failed to comply with PR obligations. The decision is discretionary and is subject to a number of considerations, often referred to as the *Ribic* factors, which were recently summarized in *Herradi v Canada (Citizenship and Immigration)*, 2020 FC 247 as follows:

> [37] ... the case law has established that the factors set out in *Ribic* (as reformulated in *Ambat* as regards the failure to comply with the residency obligation) restrict the exercise of this discretion: *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL) at para 14; *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at paras 27, 30; *Sanchez Zapata v Canada (Citizenship and Immigration)*, 2018 FC 1250 at para 4. These non-exhaustive factors are
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> i. the extent of the non-compliance with the residency obligation;
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> ii. the reasons for the departure and stay abroad;
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> iii. the degree of establishment in Canada initially and at the time of the hearing;
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> iv. family ties to Canada;
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> v. whether the appellant attempted to return to Canada at the first opportunity;

> vi hardship and dislocation to family members in Canada if the appellant is removed from or refused admission to Canada;
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> vii hardship to the appellant if removed from or refused admission to Canada;
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> viii. whether there are other unique or special circumstances that merit special relief; and
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> ix. the best interests of a child directly affected by the decision, as applicable.

[17] In this case, the IAD found that the Respondent's "failure to maintain residence in Canada during the period 2002-2005 and his lack of persistence in pursuing a return to Canada" was a negative factor that "carrie[d] some weight in the appeal". However, the IAD found that positive factors on the appeal were based on the perceived forward looking hardship to the Respondent and his family from the imminent departure order in Sweden and risk in Iran, and the corresponding long-term BIOC:

> [30] ... the basic needs of the [Respondent], his wife and their children are being met in Sweden. At the moment, they are not in a situation of hardship. ...
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> [....]
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> [32] At the same time, the [Respondent's] life in Sweden is constrained in significant ways. Neither he nor his wife can undertake employment. They cannot possess a credit card or open a bank account. They are supplied with a card with a monthly credit of 480 Euros to pay for necessities. The Appellant said that he cannot receive mail because he does not have adequate identification. They are also under a deportation order that could be enforced at any time.
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> [33] I do believe that if [the Respondent] remains in Sweden in what could be described as a state of limbo, with very limited financial circumstances and no opportunities for employment, the long-term situation will amount to hardship.

> [34] ... I believe, on the balance of probabilities, that the Appellant is at some considerable risk in Iran including imprisonment or worse. This is a positive factor in this appeal.
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> [...]
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> [37] The best interest of the [Respondent's] sons are not being seriously compromised at the moment. However, given the restrictions placed upon their parents, if I were to deny this appeal, the [Respondent's] sons would be likely be limited in their education options and their ability to pursue employment. This is not in their best interest. It is also not in their best interest that they live in a situation where they could be removed to Iran at any time. The limited circumstances of their parent and uncertainty regarding their future is also bound to have a negative effect on the sons of the Appellant.
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> [...]
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> [39] Should the [Respondent] be allowed to return to Canada, there would be a period of separation while he applied to sponsor them. In my view, this does not outweigh the long-term interests of the Appellant's children, which would be severely compromised if they were to remain in Sweden.
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> [40] I find that it is not in the best interest of the [Respondent's] children that this appeal be dismissed. This is a positive factor in this appeal.

[18] The Minister asserts that the IAD erred by not commenting on certain evidence in the Decision, which it asserts was contradictory. I do not find this first argument persuasive.

[19] The alleged inconsistencies around the Respondent's 2011 PRTD application and the 2009-2015 travel ban do not go to facts that would have changed the IAD's overall findings, particularly as the IAD already concluded that the Respondent lacked persistence in pursuing a return to Canada. Further, the Decision indicates that the IAD considered the circumstances around the Respondent's 2011 PRTD application and the open question of whether the Respondent voluntarily withdrew the application, but preferred an interpretation of the facts that

was consistent with both the Respondent's narrative and the 2011Global Case Management System notes. I do not consider this approach to be unreasonable.

[20] Likewise, I do not consider the IAD to have ignored the SMAB's overall finding on the Respondent's testimony that he was arrested, detained and tortured by Iranian authorities on suspicions that he was a spy. The IAD acknowledged that the SMAB rejected the Respondent's claim. However, based on the evidence from the Respondent's parents and the Order from the Great Tehran Police Department, it accepted that the Respondent was being "sought by the Iranian authorities and that he bear[ed] some risk if he were to return to Iran" [emphasis added]. As rationalized by the IAD, "[i]t does not make any sense that the [Respondent], who was established in Iran, with family and an apparently successful business, would uproot his family, abandon his business and move to Sweden, unless he felt he was at some risk." In my view, it was open for the IAD to make this general finding at this stage of the analysis; I do not consider it to be inconsistent with the surrounding factual circumstances or to show a lack of consideration for the SMAB's decision rejecting the asylum claim because of credibility.

[21] The Applicant raises a list of asserted credibility concerns before this Court, which it argues the IAD should have grappled with. I agree with the Respondent, the Applicant had an opportunity to raise these concerns to the IAD, but did not do so. The list relates to background associated with the Respondent's establishment or reasons for leaving Canada or staying abroad and in my view, is not material to the overall findings already made on these factors, which the IAD already weighed against the Respondent. The IAD was not required to comment on every potential discrepancy.

[22] The Minister argues that the IAD's BIOC assessment was inadequate and unintelligible. It asserts that the IAD's finding that the children's education and employment prospects would be limited in Sweden was vague, evolving, and contradictory with its other finding that it would be "speculative" to find that the children would not be able to continue schooling in Iran if the Respondent were arrested upon his return there. The Applicant notes that H&C determination is a global consideration. Although the BIOC is an important factor, it must be weighed with the other H&C factors.

[23] In this instance, I agree with the Applicant, the IAD's reasons do not follow a rational chain of analysis. The IAD notes that the Respondent is not currently in a situation of hardship, but concludes that his life in Sweden is constrained and limited and that the children are likely to face a limited future in Sweden and possibly, in Iran. The IAD states that it has placed significant emphasis on the BIOC; however, the circumstances relating to the children are prospective and seem to flow directly from the circumstances associated with the Respondent's departure from Iran and the perceived risk if he were to return there. The IAD states that it finds the Respondent's circumstances exceptional in that it has found it credible that the Respondent is being sought by authorities in Iran, and that the Respondent would not be safe there. The consideration of risk to the Respondent is elevated at this stage of the Decision, without explanation, when compared to the earlier more limited conclusion that the Respondent would be subject to "some risk" if returned to Iran. Although not accepted in full earlier because of the SMAB decision, the IAD accepts the circumstances around the Applicant's departure from Iran as fact and rationalizes that "the accusations of espionage and subsequent detention are misfortunes the [Respondent] could not have foreseen."

[24] In my view, the IAD's overall conclusion does not rationally flow from its analysis. Further, it is not clear how the IAD's findings are balanced within the *Ribic* framework and why the prospective finding on the BIOC was considered to overcome the Respondent's total and egregious lack of compliance with his Canadian residency obligation.

[25] For all of these reasons, the application is granted and the matter will be remitted back to the IAD to be redetermined by another member.

[26] There was no question for certification proposed by the parties and I agree none arises in this case.

JUDGMENT IN IMM-8676-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The August 15, 2021 decision of the IAD is set aside and the matter is remitted back to be redetermined by a different member.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Suzanne M. Bruce	FOR THE APPLICANT
Marvin Moses	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Toronto, Ontario	FOR THE APPLICANT
Marvin Moses Law Office Barristers and Solicitors Toronto, Ontario	FOR THE RESPONDENT