Federal Court  Cour fédérale

Date: 20110301

Docket: IMM-196-10

Citation: 2011 FC 248

Vancouver, British Columbia, March 1, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TING-HSIANG TAI,
TSAI-HUEI CHANG,
WEI-HSUAN TAI, AND
LIN TAI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The *Immigration and Refugee Protection Act,* SC 2001, c 27 (IRPA) defines the residency obligation for permanent residents. Under section 28, subject to defined exceptions, permanent residents are required to be physically present in Canada for 730 days in every five-year period in order to retain their permanent resident status.

II. Introduction

[2] The Applicant, Mr. Ting-Hsiang Tai, his wife, Ms. Tsai-Huei Chang, and their two daughters, Wei-Hsuan and Lin, are citizens of Taiwan. They became permanent residents of Canada in 2001 but did not move to or reside in Canada.

[3] In April 2008, when the Tai family members sought to enter Canada, they were issued removal orders for failing to comply with their residency obligation. Ms. Chang and their daughters remained in Canada. Mr. Tai returned to his job in Taiwan and did not move to Canada until one year later at the end of April 2009.

[4] At their Immigration Appeal Division (IAD) hearing the Tai family members admitted that they had failed to meet their residency obligation and asked that their appeals be allowed based on the IAD's discretionary jurisdiction.

[5] The Tai family argues that the IAD was unfair because they were not given enough hearing time to allow them to call the two immigration officers as witnesses. This allegation is without merit.

[6] The Tai family asked for, and was given, sufficient time to call six witnesses. The Tai family did not summon the immigration officers. In addition, without complying with the *Immigration Appeal Division Rules*, SOR/2002-230 (IAD Rules) or asking for additional time prior to the hearing, they called eleven witnesses. Their lawyer chose not to call any more witnesses even though there was an hour of hearing time left and the IAD did not prevent him from calling

additional witnesses; further, the comments in the IAD's reasons regarding the officers' evidence were *obiter*.

[7] The Tai family also argues the IAD acted unfairly in refusing to accept into evidence documents dated 2008 and photos of Mr. Tai's business which were faxed to the IAD the Thursday before their Monday hearing. The IAD acted fairly in finding that the Tai family had not reasonably explained why these documents were not provided twenty days before the hearing as required by the IAD Rules, and in finding that the information in the documents could be entered through Mr. Tai's testimony.

[8] The IAD also acted fairly in requiring that Mr. Tai's testimony be completed before other witnesses were called; further, when the IAD's reasons are read as a whole, it is apparent that the IAD did not ignore or misconstrue the evidence.

[9] The IAD considered the relevant factors in exercising its discretionary jurisdiction on humanitarian and compassionate (H&C) grounds. The Tai family's request for a temporary stay of removal to allow the girls to complete school and for Mr. Tai to conclude his business operations is premature. No date has been set, or can be determined yet, for their removal from Canada. The Tai family members will be entitled to a Pre-Removal Risk Assessment (PRRA) before they can be removed from Canada. After a removal date has been set they may request a deferral of removal if appropriate given their circumstances at that time, from the Canada Border Services Agency (CBSA) which has jurisdiction over their removal from Canada.

[10] The Court is in agreement with the position of the Respondent that the IAD had fully considered the circumstances of the Tai family's case, including the best interests of their children.

II. Background

[11] In 1998 or 1999, the Tai family members applied for permanent resident visas for Canada. After they were interviewed about their application, they told Mr. Tai's parents of their plans to immigrate to Canada. His parents did not appear pleased. Mr. Tai felt his parents disapproved because they were seniors; traditionally he should care for them as they were not well, physically. His parents said they were concerned about the availability of jobs and his ability to support his family. His father wanted them to stay in Taiwan to keep him company (IAD Hearing Transcript (Transcript), Certified Tribunal Record (CTR), Vol 1 at pp 24-25 and 50).

A. *Visits to Canada*

[12] On February 2, 2001, just before their permanent resident visas expired, the Tai family members came to Canada and were granted permanent resident status. The Tai family members did not bring their possessions with them. They registered the girls in school and applied for medical care cards. After spending nine days in Canada, the Tai family members returned to their home in Taiwan (CTR, Transcript, Vol 1 at pp 23 and 52).

[13] From February 2001 until April 2008, the Tai family members only returned to Canada once: for nine days in August 2003 to pick up their permanent resident cards (CTR, Vol 1, p 6, para 2)

[14] From April 15, 2008 to April 23, 2008, the Tai family obtained medical certificates for Mr. Tai's parents, Ms. Chang's mother and Wei-Hsuan. These certificates demonstrate:

a) Ms. Chang's mother had one knee replaced in 1999 and the other in 2000;
b) Mr. Tai's father was briefly hospitalized in 2002 for a haemorrhoidectomy; in 2006 a hernia operation; and in 2007 for wounded limbs and a dislocation.
c) Mr. Tai's mother was briefly hospitalized for an injured wrist in February 2008. An April 2008 certificate states she has Osteoarthritis in both knees and is overweight.
d) Wei-Hsuan needed to have 2 molars removed and to wear braces for two years.

(Medical Certificates, CTR, Vol 2, at pp 201-212)

[15] On April 25, 2008, the Tai family members flew from Taiwan to Seattle, Washington. They had their belongings shipped to Canada, but kept their family home in Taiwan and Mr. Tai kept his job in Taiwan. Mr. Tai has a brother and sister living in Taiwan. His sister now lives and cares for his parents (Transcript, CTR, Vol 1 at pp 30, 33, 36, 54-57).

B. *Port of Entry – Removal Order*

[16] On April 26, 2008, the Tai family arrived by car at the Douglas, B.C. border travelling with a Canadian citizen friend and his family. The examining CBSA officer determined that the Tai family was seeking to return to Canada as permanent residents.

[17] The CBSA Officer reported the Tai family for having failed to comply with their residency obligation to be present in Canada for 730 days in the five-year period preceding their admission to Canada. During the relevant time period, the Tai family had spent nine days in Canada (s 28 of

IRPA); reports under ss 44(1) of the IRPA, Applicant's Record (AR), at pp 26-35/CTR, Vol 2 at pp 238-247).

[18] On April 27, 2008, the Minister's Delegate issued removal orders to the Tai family (Departure Orders, AR at Tab 3, pp 22-25/CTR, Vol 2 at pp 234-237).

C. *Mr. Tai's Continued Residence in Taiwan*

[19] In June 2008, Mr. Tai returned to Taiwan where the family still owned a house and he continued his work activities therein. Ms. Chang and the two girls remained in Canada (Transcript, CTR, Vol 1 at p 36).

[20] In September 2008, Mr. Tai came back to Canada for 12 days to pick up his Permanent Resident Card, and returned to Taiwan that same month to continue his work (Transcript, CTR, Vol 1 at p 36).

[21] In February 2009, Mr. Tai again visited Canada and returned to Taiwan (Transcript, CTR, Vol 1 at p 36).

[22] On April 30, 2008, Mr. Tai returned to Canada again and started working for Lions Travel on May 1, 2009. After that date, other than a four-day business trip to the United States in November 2009, Mr. Tai remained in Canada (Transcript, CTR, Vol 1 at pp 37 and 61).

[23] In or after May 2009, Mr. Tai then joined the Taiwan Chamber of Commerce in Vancouver, and applied to be a volunteer for a Chinese crisis line. In September 2009, he joined the Lions Club (Transcript, CTR, Vol 1 at pp 41-42 and p 79).

D. *IAD Ground of Appeal*

[24] The Tai family members appealed the removal orders to the IAD. They conceded that their removal orders were valid in law, but asked the IAD to exercise its discretionary jurisdiction to allow the appeal on H&C grounds (IAD Reasons, CTR, Vol 1 at p 6).

[25] The Tai family argued that they could not have settled in Canada earlier because Mr. Tai's father did not give his permission for them to immigrate to Canada until 2008 and Mr. Tai had to care for his father and mother-in-law (IAD Reasons, CTR, Vol1 at pp 8-9, para 8).

[26] At the hearing, the Tai family presented certificates of diagnosis, dated May 8, 2008, stating that Mr. Tai's father had Type 2 Diabetes, Ischemic Heart Disease and Arrhythmia, and that his mother had Type 2 Diabetes and Hypertensive Heart Disease. These certificates did not state how long they had had these conditions (Hua-Lien Hospital of the Health Department, Certificate of Diagnosis, CTR, Vol 2 at pp 205-210).

[27] Mr. Tai stated that his father changed his mind about permitting the family to immigrate in 2008 for several reasons. The Taiwan economy was bad and Mr. Tai's father had lost faith in the governing party. His father was concerned about Mr. Tai and his children and the fact that school

was stressful for them in Taiwan. At this time, the elder daughter, Wei-Hsuan had graduated from high school (Transcript, CTR, Vol 1 at pp 27-29).

E. *IAD Hearing*

[28] Rule 37 of the IAD Rules requires that a party who wishes to call a witness at a hearing provide the other party and the IAD with witness information, including the time needed for the witnesses testimony, at least 20 days before the hearing. If the information is not provided in accordance with Rule 37, then the witness may not testify, unless the IAD gives its permission to do so.

[29] On August 26, 2009, Mr. Wong, the Tai family's lawyer, wrote to the IAD and requested 1½ days for their appeal hearing. Mr. Wong stated that he intended to call 6 witnesses: the four Tai family members, the examining officer and the Minister's Delegate (Letter to IAD, dated August 26, 2009, AR, Tab 3 a p 17/CTR, Vol 2 at p 282).

[30] On September 10, 2009, the IAD partially granted the Tai family's request for a longer hearing by doubling the standard hearing time from a half-day to a full day. The IAD determined that this would be an appropriate amount of time in the circumstances (IAD Letter, dated September 10, 2009, AR, Tab 3, at p 18/CTR, Vol 2 at pp 283-284).

[31] On November 20, 2009, Mr. Wong informed the IAD that he intended to call eight witnesses: the four Tai family members and four additional witnesses. Mr. Wong did not indicate

the time needed for the witnesses' testimony nor ask that a summons be issued to the two immigration officers under Rule 38 of the IAD Rules.

[32] On December 7, 2009, at the beginning of the Tai family's IAD hearing, in response to a question from the Presiding Member, Mr. Wong stated that he intended to call the Tai family as witnesses plus six additional witnesses to testify about Mr. Tai's work and community activities: a total of ten witnesses. Mr. Wong had not notified the IAD of the two additional witnesses, nor of the length of their testimony, 20 days prior to the hearing as required by Rule 37 of the IAD Rules (Transcript, CTR, Vol 1 at pp 20-21).

[33] The Presiding Member stated that he would have to be convinced that six additional witnesses would be necessary, and he asked the Tai family's lawyer to manage his time so they could complete the hearing that day. In fact, the IAD permitted Mr. Wong to call 11 witnesses during the hearing (Transcript, CTR, Vol 1 at p 21).

[34] During the IAD hearing, Mr. Wong did not indicate the he intended to call the immigration officers as witnesses, nor that he had summoned them to appear as witnesses.

[35] Near the end of the Tai family's appeal hearing, after the Presiding Member asked their lawyer to call the next witness, their lawyer asked how late the hearing was going to go. The Presiding Member responded that he would like to have the complete evidence presented. The Tai family's lawyer responded that he could wrap up the hearing and did not need to call the younger Tai family member or the mother. The lawyer confirmed to the Presiding Member that "their

concerns had been dealt with through the other witnesses". During the next hour of the hearing, the parties gave their submissions orally (Transcript, CTR, Vol 1 at pp 127-128; Affidavit of Kathleen Lynch, sworn March 15, 2010, at para 6).

F. *IAD Decision*

[36] On December 10, 2009, the IAD dismissed the Tai family's appeal. In weighing and assessing the Tai family's evidence of their circumstances, the IAD considered the following factors:

e) The nature and degree of their non-compliance with their residency obligation, in particular, the length of time the Tai family spent in Canada; (para 7)

f) The circumstances around the Tai family's failure to meet their residency obligation including the Tai family's reasons for leaving and remaining outside of Canada; (paras 8-9)

g) The Tai family's establishment in Canada and community support; (para 10)

h) Whether hardship would be caused to family members in Canada; (para 11)

i) Hardship to the Tai family in being required to leave Canada, including the best interests of their children; (para 12)

[37] The IAD found that the Tai family obtained permanent residence in Canada seven years before they were ready to commit to living permanently in Canada. The IAD found that the Tai family had no establishments or connections of substance with Canada before 2008. The IAD weighed the Tai family members' reasons for not settling in Canada earlier and the evidence that they have worked hard to establish themselves since arriving in Canada in 2008.

[38] The IAD considered the length of time the Tai family members has lived in Canada; their connections to Canada; their reasons for leaving Canada and remaining outside Canada; the lack of an explanation for why the care arrangements made now for their parents could not have been made earlier; the fact that Mr. Tai had the means to visit his parents regularly in Taiwan; recognized Mr. Tai's cultural duties as a first-born son; their establishment in Canada and community support; and the hardship they would experience if required to return to Taiwan.

[39] The IAD concluded there were insufficient H&C considerations to warrant special relief.

III. Issue

[40] Has the Tai family shown that the IAD breached procedural fairness; ignored or misconstrued evidence; erred by not referring to case law in exercising its discretion; or erred in not considering whether to grant a temporary stay of the removal orders?

IV. Analysis

A. *Relevant Statutory Provisions*

[41] Section 28 of the IRPA defines the residency obligation for permanent residents. Under section 28, subject to defined exceptions, permanent residents are required to be physically present in Canada for 730 days in every five-year period in order to retain their permanent resident status.

[42] Paragraph 62(1)(*a*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), provides that the calculation of days towards a permanent resident's residency obligation:

… does not include any day after (*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; …	[...] ne peut tenir compte des jours qui suivent : *a*) soit le rapport établi par l'agent en vertu du paragraphe 44(1) de la Loi pour le seul motif que le résident permanent ne s'est pas conformé à l'obligation de résidence; [...]

Therefore, the days that the Tai family spent in Canada after they were reported do not count towards their residency obligation unless their appeal would have been allowed.

[43] Under the IRPA, the Tai family members retained their permanent resident status until the IAD determined their appeal from the removal orders (paras. 46(1)(*c*) and 49(1)(*c*) of the IRPA).

[44] Permanent residents may appeal to the IAD against a decision to make a removal order against them. Sections 66 to 69 of the IRPA set out the possible dispositions of an appeal. Section 66 provides:

66. After considering the appeal of a decision, the Immigration Appeal Division shall	**66.** Il est statué sur l'appel comme il suit :
(*a*) allow the appeal in accordance with section 67;	*a*) il y fait droit conformément à l'article 67;
(*b*) stay the removal order in accordance with section 68; or	*b*) il est sursis à la mesure de renvoi conformément à l'article 68;
(*c*) dismiss the appeal in accordance with section 69.	*c*) il est rejeté conformément à l'article 69.

(Subsection 63(3) and section 66 of the IRPA)

[45] Subsections 67(1) and 68(1) of the IRPA set out the grounds on which the IAD may allow or stay an appeal, respectively. Under subsection 67(2) of the IRPA:

67. (2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.	**67.** (2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

(Sections 67 and 68 of the IRPA)

[46] Under subsection 69(1) of the IRPA, if the IAD does not allow the appeal or stay the appeal, it must dismiss the appeal.

B. *Ribic Factors*

[47] IRPA does not provide any factors to be considered by the IAD in exercising its discretionary jurisdiction; however, for at least 25 years the IAD has applied the "*Ribic* factors", which factors were approved by the Supreme Court of Canada in *Chieu*:

> [1.]… the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order[;]
>
> [2.]… the length of time spent in Canada and the degree to which the appellant is established;
>
> [3.] family in Canada and the dislocation to that family that deportation of the appellant would cause;

> [4.] the support available for the appellant not only within the family but also within the community and
>
> [5.] the degree of hardship that would be caused to the appellant by his return to his country of nationality. [Emphasis in the original.]
>
> This list is illustrative, and not exhaustive. The weight to be accorded to any particular factor will vary according to the particular circumstances of a case…

(*Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84, at paras 40-41, factors quoted from *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4 (QL/Lexis); reference is also made to *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 137 (Justice Marshall Rothstein concurring reasons)).

C. *Standard of Review*

[48] The Supreme Court of Canada has held that the IAD's credibility findings and its discretionary decision on whether to grant special relief on H&C grounds are to be reviewed on a standard of reasonableness and warrant considerable deference (*Khosa*, above, at para 60).

[49] Much of the Tai family's argument in its Memorandum of Argument filed in support of this application is a challenge to the weight given to the evidence by the IAD. It is not the role of this Court to reweigh the evidence on judicial review (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3; *Barm v Canada (Minister of Citizenship and Immigration)*, 2008 FC 893, 169 ACWS (3d) 171, at para 23).

[50] The Tai family appear to be arguing that this Court may reweigh the evidence that was before the Refugee Protection Division (RPD) on judicial review, relying on a 2006 decision of this Court in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1195, 155 ACWS (3d) 424; however, the Supreme Court of Canada, again confirmed in *Khosa*, above, that it is not the role of this Court to reweigh the evidence on judicial review of the IAD's decision (*Khosa*, above, at paras 61 and 64).

D. *Credibility Finding is Reasonable*

[51] The Tai family seeks to challenge the IAD's credibility finding. First, the IAD's finding was *obiter*: it stated that its decision did not rely on this finding. Second, the IAD's credibility findings are reasonable.

[52] Contrary to the Tai family's assertion, the IAD did not ignore Mr. Tai's evidence that there was no interpreter available to him at the port of entry interviews. Rather, the IAD specifically referred to Mr. Tai's evidence that the discrepancies in his port of entry statements were due to the lack of an interpreter.

[53] The IAD considered that there was no evidence that Mr. Tai requested an interpreter; the officer appeared satisfied that Mr. Tai had sufficient fluency to be able to communicate in English; and the Statutory Declarations he gave in English. The IAD reasonably concluded that Mr. Tai's evidence was not credible.

E. *Waived Right to Interpreter*

[54] The Tai family's argument about the requirement for a quality of interpretation, ignores their onus to request an interpreter if required.

[55] Mr. Tai and his adult daughter were asked more than once if they understood what the officer said to them. The Tai family waived any rights to interpretation by not raising any concerns and by failing to request an interpreter. The IAD's findings are reasonable (*Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, [2001] 4 FC 85).

F. *IAD Not Bound by Rules of Evidence*

[56] The Tai family argues that the IAD should have given the written statements made by the immigration officer less weight than its direct testimony. The IRPA provides:

175. (1) The Immigration Appeal Division, in any proceeding before it,	**175.** (1) Dans toute affaire dont elle est saisie, la Section d'appel de l'immigration :
…	[...]
(*b*) is not bound by any legal or technical rules of evidence; and	*b*) n'est pas liée par les règles légales ou techniques de présentation de la preuve;
(*c*) may receive and base a decision on evidence adduced in the proceedings that it considers credible or trustworthy in the circumstances.	*c*) peut recevoir les éléments qu'elle juge crédibles ou dignes de foi en l'occurrence et fonder sur eux sa décision.

[57] The Tai family argues that the IAD could not dismiss Mr. Tai's testimony without good reason: the IAD had good reason to doubt the truthfulness of Mr. Tai's evidence. The IAD found

Mr. Tai's testimony about his interview with the immigration officer was evasive. The IAD specifically considered Mr. Tai's argument that he did not make the statement of just being on a day trip, and did not find it credible that Mr. Tai did not know that this information would be provided at the border. The IAD reasonably weighed the evidence and chose to give more weight to the officer's statement (IAD Decision, at para 6).

G. *Ample Hearing Time Provided*

[58] The Tai family's argument that they were prevented from calling the immigration officers to give evidence and that the IAD had not given it enough hearing time is not supported by the evidence (IAD Reasons, para 6).

[59] Prior to their IAD hearing, the Tai family's lawyer stated he wanted to call all four family members as witnesses and summons the two officers as witnesses: a total of 6 witnesses. In response, the IAD gave the Tai family a full day hearing: twice the amount of time normally allotted for an IAD appeal.

[60] The Tai family did not summons the officers as witnesses, nor did they state at the opening of their hearing that they wanted to call the officers as witnesses. Instead, the Tai family chose to call 11 witnesses at their IAD hearing, including Mr. Tai and his adult daughter. The Tai family had ample opportunity to call the two immigration officers as witnesses, but chose not to do so.

[61] In addition, the IAD did not stop the Tai family from calling further witnesses at their hearing: it was the Tai family lawyer who chose not to call further witnesses because he did not feel

it was necessary. The IAD only indicated that it wanted to get the evidence in by the end of the day: it did not say anything about submissions. Instead of calling further witnesses, the parties spent the last hour of the hearing making oral submissions. This Court has held that the IAD does not err even where it is cognizant of the hearing time and counsel agrees to the IAD's suggestion not to call further witnesses. The IAD acted fairly (*Chiu v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1671, 144 ACWS (3d) 722).

H. *Flexibility in Order of Witnesses*

[62] The Tai family members complain that the IAD acted unfairly because it did not allow them to interrupt Mr. Tai's examination-in-chief to allow them to call other witnesses. Contrary to the Tai family's assertion, the IAD acted fairly.

[63] When Mr. Wong first asked the IAD if he could interrupt Mr. Tai's testimony to allow other witnesses to testify as they arrived, the IAD stated that it would prefer not to break up the testimony of a witness, and suggested they see where they are when the witnesses arrive and the IAD would attempt to accommodate them (Transcript, CTR, Vol 1 at pp 20-21).

[64] When the other witnesses arrived, Mr. Tai was still under examination-in-chief. Mr. Wong asked if they could interrupt Mr. Tai's examination to allow the other witnesses to testify. The IAD Member stated his preference was to at least conclude examination-in-chief (Transcript, CTR, Vol 1 at p 37).

[65] After hearing the Minister's objection to proceeding in this matter, the IAD ruled that the witnesses would be heard after Mr. Tai's testimony was complete. The IAD Member reiterated that he would try to fit in the other witnesses that morning and accommodate them in that manner (Transcript, CTR, Vol 1 at pp 37-38).

[66] The Supreme Court of Canada has held that administrative tribunals, such as the former immigration adjudicators, are masters of their own procedure. As long as they act fairly and in accordance with the principles of natural justice, administrative tribunals may control their own procedures. The IAD acted fairly. (*Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, 57 DLR (4th) 663, at para 16).

[67] At the beginning of the hearing, Mr. Wong stated that he intended to call six witnesses other than the Tai family. Mr. Wong actually called eight witnesses who were not Tai family members.

I. *Refusal to Admit Documents*

[68] For the first time, in their Supplementary Memorandum of Argument, the Tai family argues that the IAD treated them unfairly by refusing to admit into evidence documents that failed to comply with the IAD's Rules (Non-complying Documents).

[69] The Non-complying Documents consisted of a shipping receipt dated April 25, 2008: information about a financial planning course that Mr. Tai had taken (apparently dated September 2008), and photos of Mr. Tai's business in Canada (Transcript, CTR, Vol 1 at pp 17-18; Affidavit of Mr. Tai, sworn May 28, 2010).

[70] Under the IAD Rules, the Tai family was required to provide these documents to the IAD and the Minister no later than 20 days before the hearing. The Tai family's lawyer faxed these documents to the IAD on Thursday, December 3, 2009, for use at their hearing on Monday, December 7, 2009 (Rule 30 of the IAD Rules; Transcript, CTR, Vol 1 at pp 17-18).

[71] The IAD refused to allow the Non-complying Documents into evidence because the disclosure was too late and it was not satisfied with the explanation for the delay in providing these documents. Mr. Wong stated they were late because Mr. Tai was at a worldwide Taiwanese Chambers of Commerce meeting in the United States and didn't get back until the beginning of December 2009. The IAD noted that the Tai family could testify about these matters (Transcript, CTR, Vol 1 at pp 18-20).

[72] Mr. Tai later gave evidence that he went to Dallas for a conference of the North American chambers of the worldwide Taiwanese Business Association from November 19-22, 2009 and did not leave Canada from April 30, 2009 until that date. In these circumstances, the IAD's decision was fair. (Transcript, CTR, Vol 1 at pp 41 and 61; Taiwanese Chambers of Commerce of North America conference agenda, CTR, Vol 1 at p 161; ETKT e-mail Itinerary/Receipt, CTR, Vol 2 at p 213).

[73] Nothing in the IAD's decision turned on these documents. The IAD expressed no concern about the evidence that the Tai family shipped its belongings to Canada in April 2008; that Mr. Tai had taken a financial planning course; or that Mr. Tai had expanded his business in Canada. The IAD acted fairly.

J. *Evidence not Ignored or Misinterpreted*

[74] The Tai family also argues that the IAD ignored evidence in finding that they entered Canada through the land border in order to avoid closer scrutiny. The IAD was not required to refer to Mr. Tai's evidence that he came through the land border because he had visited a friend in Seattle. The IAD is presumed to have considered all of the evidence before it and had sufficient reasons to support its conclusions (*Hassan v Canada (Minister of Employment and Immigration)* (1992), 147 NR 315 (FCA); *Florea v Canada (Minister of Citizenship and Immigration),* [1993] FCJ No 598 (FCA) (QL/Lexis)).

[75] Contrary to the Tai family's argument, the IAD reasonably assessed its evidence and reasons for not residing in Canada during the entire time of their permanent residence. The fact that the Tai family chose to remain in Taiwan due to family obligations, and did not stay in Taiwan due to circumstances that were not possible to overcome, was just one relevant factor considered by the IAD. The IAD reasonably concluded that if Mr. Tai had "had a genuine desire to be in Canada and an intention to meet his residency requirement…the challenge of complying was not onerous" (IAD Decision, at para 9).

[76] Contrary to the Tai family's argument that the IAD "did not take into account the fact that the Tai's old aged parents were in a long term dependency situation", the IAD did take into consideration the reasons given for leaving and remaining outside Canada. The IAD considered that Mr. Tai stayed to care for his father and that his father did not want his son to move so far away. The IAD considered the cultural reasons for remaining in Taiwan and that Mr. Tai's father

is mobile. The evidence provided by Mr. Tai regarding his parents' dependency was limited. The IAD's decision is reasonable (IAD Decision, at paras 8-9).

[77] The Tai family also argues that the IAD misinterpreted the evidence when it stated that "the appellants have not provided clear reasons for leaving Canada and remaining outside of Canada for almost the entire period, since landing". When this sentence is read in context it is apparent that the IAD considered the Tai family's explanations for remaining outside Canada. The rest of the paragraph and the one that follows the IAD reasons, read:

> [8] [Mr. Tai told the immigration officer, that] … they left Canada due to a need to take care of his father and mother-in-law. There is also reference to this in the written statement given by Mr. Tai. Yet, in his testimony there was scant mention of any condition that could be interpreted as requiring Mr. Tai to be in Taiwan to care for his father, aside from some periodic medical concerns. His father is aging but mobile, even today. What came through clearly in the testimony from Ting-Hsiang Tai is that his father was unhappy about the prospect of his eldest son moving so far away. Mr. Tai repeatedly referred to returning to Taiwan to attempt to gain his father's permission to immigrate to Canada, permission that was not granted until 2008. This granting of permission happens to coincide with the expiry date for the appellants' permanent resident cards. Notably, when the appellants were landed in Canada, they had waited until their authorizations had almost expired before landing. As Mr. Tai stated, 'in 2001 just came over here to report before the expiry of the term'. I conclude that much the same motivation occurred in 2008 as the permanent resident cards were about to expire; the appellants determined they had to 'use them or lose them'.
>
> [9] It should also be noted that currently the appellant's parents are living with his sister in Taiwan and she is providing any daily assistance they require. There was no explanation as to why this same arrangement could not have been effected much earlier, even going back to when the appellants were landed. In addition, the appellant Ting-Hsiang Tai has a brother in Taiwan who can provide some assistance to their parents…

[78] The Tai family further argues that the IAD ignored evidence that Mr. Tai's mother had knee replacement surgery; however, that surgery took place in 1999 and 2000 before the Tai family became permanent residents of Canada.

[79] The Tai family also argues that the IAD ignored evidence of Mr. Tai's father and his mother-in-law's medical conditions. The IAD was not required to specifically refer to this evidence. As the IAD noted, the Tai family had not explained why they could not have earlier made the arrangements they have now made to leave their parents behind in Taiwan. The IAD noted and considered the medical concerns in its reasons for decision (IAD Decision, at paras 8-9).

K. *IAD Considered the Relevant Factors*

[80] Contrary to the Tai family's assertion, the IAD reasons are adequate when viewed as a whole. The IAD considered all of the circumstances of the case, and not just the failure to meet the residency obligation.

[81] In arguing that the IAD was required to explain why the Tai family's recent efforts to establish themselves was not sufficient to overcome their breach of the residency obligation, the Tai family misunderstands the nature of the IAD's discretionary jurisdiction. The IAD is required to consider all of the circumstances in the case and not just the Tai family's recent efforts to establish itself (para 67(1)(*c*) and ss 68(1) of the IRPA).

[82] The Tai family argues that the IAD should have placed great weight on the *Ribic* factor of "rehabilitation" in its case, in that it has apologized for the breach and now worked hard to

establish itself in Canada. “Rehabilitation” is a factor that is considered by the IAD in exercising its discretionary jurisdiction with respect to criminal inadmissibility. “Rehabilitation” is not applicable in this case. It is not for this Court to determine the weight to be given to the particular factors.

[83] The Tai family’s positive contribution to Canada is only one factor that is considered under the *Ribic* test that is applied by the IAD. These factors are adapted in cases that do not involve criminal inadmissibility to consider “the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order,” instead of rehabilitation. The IAD applied the correct test (*Chieu*, above, at paras 40-41).

[84] The Tai family is again asking this Court to reweigh the evidence and place more weight on the evidence of its efforts to establish itself after the removal order was made. It is the role of the IAD and not this Court to weigh such evidence. The IAD weighed the evidence and reached a reasonable conclusion. The IAD’s decision does not warrant intervention.

[85] Contrary to the Tai family’s assertion, the IAD was not required to refer to the case law. The IAD applied the appropriate principles from the case law: its decision does not warrant intervention.

L. *IAD Considered Best Interests of the Children*

[86] The Tai family’s argument that the IAD was not alert, alive and sensitive to their children’s best interests relies on a partial reading of the IAD’s reasons for decision.

[87] The IAD reasons show that the IAD considered the hardship that would be faced by the children on their return to Taiwan. The IAD considered that they have made close friends; they are flourishing and would appear to have a good future here. The IAD also considered that they have family support in Taiwan and resourceful and supportive parents to help them to readjust to living in Taiwan again. The IAD noted that the children are intelligent and resourceful and they will likely do well regardless of where they live.

[88] The Federal Court of Appeal has held that when an immigration officer assesses an application for an H&C exemption from the law, the best interests of the child are just one factor to be considered. The Federal Court of Appeal further held that it may be assumed that child is better off living in Canada: what the officer must assess is the likely degree of hardship to children on removal and to assess that hardship against the other factors in the case. That is what the IAD did in the case of the Tai family. The IAD's decision is reasonable (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555 (CA), at paras 4-6).

M. *Wrong Venue for a Deferral of Removal Request*

[89] Finally, the Tai family argues that the IAD erred by not referring to their request to grant them a temporary stay of their removal orders until the children had finished their school year. The IAD was not required to refer to this request as it was premature: the IAD has no control over the timing of the Tai family's removal from Canada. This issue is now moot.

[90] The CBSA, under the Minister of Public Safety and Emergency Preparedness, is responsible for the Tai family's removal from Canada. A date had not yet been set for the Tai family members'

removal from Canada, nor can it be set yet as they are not “removal ready” (para. 4(2)(*b*) of the IRPA; *Canada Border Services Agency Act*, SC 2005, c 38).

[91] Under existing procedures, the Tai family would be given an opportunity to make a PRRA before a date can be set for its removal from Canada. With a timely PRRA application, the family would not be removed from Canada until that application has been determined (s 112 of the IRPA; s 160, s 162, s 232 of the IRPR).

[92] The proper venue to make such a request for deferral of removal is to the CBSA, if required, once a date has been set for their removal from Canada.

[93] Under subsection 66(1) if the IRPA, the IAD has jurisdiction to dispose of an appeal in one of three ways:

(*a*) allow the appeal…;	*a*) il y fait droit[...];
(*b*) stay the removal order…; **or**	*b*) il est sursis à la mesure de renvoi [...];
(*c*) dismiss the appeal….	*c*) il est rejeté conformément [...].

[Emphasis added].

[94] Contrary to Mr. Tai’s argument, the IAD does not have jurisdiction to both dismiss the appeal and temporarily stay the removal orders: the IAD can only do one or the other (s 66 of the IRPA).

[95] Under subsection 69(1) of the IRPA, the IAD may only dismiss an appeal if it does not allow the appeal or stay the removal order:

69. (1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.	**69.** (1) L'appel est rejeté s'il n'y est pas fait droit ou si le sursis n'est pas prononcé.

[96] If the IAD allows the appeal, there is no need to stay the removal order, as the IAD must set aside the removal order. Subsection 67(2) of the IRPA states:

67. (2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.	**67.** (2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

[97] If the IAD simply granted a temporary stay as requested by the Tai family, it would then have to reconvene the hearing to finally dispose of the appeal without knowing or having any control over the actual date of their removal. The IAD is not the proper venue for a temporary stay of removal.

[98] As conceded by the Tai family, this matter is now moot.

V. Conclusion

[99] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicants' application for judicial review be dismissed with no question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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