Federal Court  Cour fédérale

Date: 20110812

Docket: IMM-4936-10

Citation: 2011 FC 995

Ottawa, Ontario, August 12, 2011

PRESENT: The Honourable Justice Johanne Gauthier

BETWEEN:

RAJENDRA GOVIND DURVE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Mr. Durve seeks judicial review of the decision[1] of the Appeal Division of the Immigration and Refugee Board of Canada [IAD] upholding the decision of a visa officer that refused to renew his permanent resident status because he had failed to comply with the residency obligations set out in section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[1] The second portion of the decision dealing with Mr. Durve's request for an exemption based on humanitarian and compassionate considerations [H&C] was not contested and is not the subject of this judicial review.

[2] The applicant argues that the IAD failed to consider all the evidence on file, particularly his testimony, and that it misconstrued the facts. Moreover, it appears to have a preconceived (and allegedly misconceived) idea of how a small company such as his should operate. As a result, its essentially one-page reasons[2] for rejecting his appeal cannot be reasonable.

[3] These issues of facts or mixed facts and law are reviewable on the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Ambat v Canada (MCI)*, 2011 FC 292 at para 15 [*Ambat*]).

[4] For reasons that follow, the Court agrees with the applicant that this decision should be set aside.

[5] In the decision, the IAD recognizes that Mr. Durve, who came to Canada under the Federal Skilled Worker program on May 25, 2002, has spent only 319 days in Canada in the five years immediately preceding his application for renewal in 2008. It notes that his absences were largely as a result of the operation of his Canadian business. This last statement is based on the applicant's testimony whose credibility is not challenged in the decision.

[6] After citing section 28 of *IRPA* and subsections 61(1) and (2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the *Regulations*], the IAD mentions that the Canadian corporation was incorporated in 2004, that the appellant's job is as a taxation and financial advisor and that his business is advising companies and individuals overseas of the benefits of

[2] At paragraph 13, the IAD comes to a definite conclusion with respect to the first part of the applicant's appeal. Thus, it must be considered entirely distinctly from the second portion of the decision dealing with the H&C application.

conducting business in Canada and assisting them to negotiate the financial aspect of carrying-on business here.[3] It notes that the appellant provided a letter from two such businesses but that those businesses were clients of the appellant prior to his immigration to Canada. Also, from the bank statements of the company from 2005 to 2009, one can see that monies were deposited consistently throughout the period. Although Notices of Assessment for 2005 and 2006 were filed, the IAD appears concerned by the absence of tax returns issued after 2006 and of financial statements or documentation demonstrating the business operations such as contracts between the numbered companies and its clients because this allegedly makes it difficult to know the source of the monies deposited in the business account.

[7] It then goes on to say that this is particularly problematic because there is little other indicia of the company being operated within Canada as "the business premises of the company is a friend's address; there are no employees and the person who fields the telephone calls is not doing so pursuant to any contractual agreement". Finally, the amounts deposited in the company account are said to be relatively small considering the nature of the business. It concludes that the appellant's company has been set up as a business to serve primarily to allow the appellant to comply with his residency obligations.

[8] The most relevant provisions, for the purposes of this decision, are subparagraph 28(2)(*a*)(iii) of *IRPA* and subsections 61(1) and (2) of the *Regulations* which read as follows:

Immigration and Refugee Protection Act	*Loi sur l'immigration et la protection des réfugiés*
28. (1) A permanent resident	**28**. (1) L'obligation de

[3] As will be discussed later on, this is only part of the services offered by the company that also represents Canadian clients wishing to do business in India.

must comply with a residency obligation with respect to every five-year period.

Application

(2) The following provisions govern the residency obligation under subsection (1):

(*a*) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are

[…]

(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,

[My emphasis]

[…]

Immigration and Refugee Protection Regulations

Residency Obligation

Canadian business

61. (1) Subject to subsection (2), for the purposes of subparagraphs 28(2)(*a*)(iii) and (iv) of the Act and of this section, a Canadian business is

résidence est applicable à chaque période quinquennale.

Application

(2) Les dispositions suivantes régissent l'obligation de résidence :

a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :

[…]

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

[Mon souligné]

[…]

Règlement sur l'immigration et la protection des réfugiés

Obligation de résidence

Entreprise canadienne

61. (1) Sous réserve du paragraphe (2), pour l'application des sous-alinéas 28(2)*a*)(iii) et (iv) de la Loi et du présent article, constitue une entreprise canadienne :

(*a*) a corporation that is incorporated under the laws of Canada or of a province and that has an ongoing operation in Canada;	*a*) toute société constituée sous le régime du droit fédéral ou provincial et exploitée de façon continue au Canada;
[My emphasis]	[Mon souligné]
(*b*) an enterprise, other than a corporation described in paragraph (*a*), that has an ongoing operation in Canada and	*b*) toute entreprise non visée à l'alinéa a) qui est exploitée de façon continue au Canada et qui satisfait aux exigences suivantes :
(i) that is capable of generating revenue and is carried on in anticipation of profit, and	(i) elle est exploitée dans un but lucratif et elle est susceptible de produire des recettes,
(ii) in which a majority of voting or ownership interests is held by Canadian citizens, permanent residents, or Canadian businesses as defined in this subsection; or	(ii) la majorité de ses actions avec droit de vote ou titres de participation sont détenus par des citoyens canadiens, des résidents permanents ou des entreprises canadiennes au sens du présent paragraphe;
(*c*) an organization or enterprise created under the laws of Canada or a province.	*c*) toute organisation ou entreprise créée sous le régime du droit fédéral ou provincial.
Exclusion	Exclusion
(2) For greater certainty, a Canadian business does not include a business that serves primarily to allow a permanent resident to comply with their residency obligation while	(2) Il est entendu que l'entreprise dont le but principal est de permettre à un résident permanent de se conformer à l'obligation de résidence tout en résidant à l'extérieur du Canada

residing outside Canada.	ne constitue pas une entreprise canadienne.
[My emphasis]	[Mon souligné]

[9] There is little guidance as to how section 61 of the *Regulations* is actually applied to small businesses in the Operation Manual ENF-23, however, it is noted that those provisions are meant to apply to large as well as small companies. This obviously means that the indicia one is looking for should be those one would normally expect an active company of the size under review would have.

[10] The Court asked the parties to provide more information or case law as to what criteria are generally used in determining whether a Canadian corporation has an "ongoing operation". They pointed to some cases, such as *Ambat* and *Faeli v Canada (MCI)*, [2005] IADD No 267 [*Faeli*]. They also referred to case law under the *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [the *Income Tax Act*] such as *Timmins v Canada*, [1999] 2 FC 563 (CA) at paragraphs 9, 10, and 13 in particular, as the Court had indicated that this may shed some light on the matter. However, considering the recent decision of Justice Donald Rennie in *Martinez-Caro v Canada (MCI)*, 2011 FC 640 and upon reviewing the case law provided under the *Income Tax Act* the Court finds that, in fact, this case law is not particularly helpful. The Court agrees with the parties that this is essentially a question of fact to be determined by the nature and the degree of activity of the companies in each individual case and no particular indicia is determinative.

[11] Certainly, the facts in the present matter are quite different from those reviewed by my colleagues in *Ambat* and *Faeli*. In *Ambat*, the applicant worked for a company, Conares Metal

Supply Limited in Dubai. That company wished to expand into Canada and the applicant helped them do that by incorporating a sister company in Canada, Conares Canada Ltd. In 2006, he became a consultant for Conares Canada Ltd. but continued to work in the United Arab Emirates [UAE] and to be paid by Conares Metal Supply Limited. In that case it was evident that the incorporation in Canada was really on behalf of the applicant's employer in UAE. Also, as noted by Justice David Near, the fact that Conares Canada Ltd.'s incorporation coincided with the applicant landing in Canada strongly indicated, in those circumstances, that it was a business of convenience serving primarily to allow the applicant to meet his residency obligations while living outside of Canada.

[12] The Court understands that here, all the consulting fees were paid to the Canadian corporation; there is no evidence of any salary being paid by any other company to the applicant. Moreover, the incorporation of the Canadian company did not coincide with the applicant's entry in Canada. In his testimony, he indicated that he had failed to find suitable work in his particular field of expertise in Canada and thus decided to "go on his own" (Certified Tribunal Record [CTR][4] page 382).

[13] In *Faeli*, the applicant was an Iranian businessman who incorporated a company in Canada to export goods obtained internationally from Canada to Iran through the UAE. In rejecting his appeal, the IAD found that the applicant's company had not been incorporated primarily for the purpose of allowing the applicant to meet his residency obligations. However, the IAD found that the applicant's business had not been ongoing during the required time period. To come to that conclusion it noted that the appellant was operating his business in Iran with travel to Dubai and

China, not to Canada. Relying on his testimony that he would like to set up a retail business for baby and children's clothing, a different business entirely from the appellant's allegedly ongoing Canadian operation, it held that the current Canadian company was not ongoing.

[14] Paragraph 29 of that decision is of interest:

> **29** The panel acknowledges that an entrepreneurial lifestyle can be very difficult, especially one that is operated among various countries. Nevertheless, the term "ongoing" must have some meaning. It is relatively easy in Ontario, or under the federal jurisdiction in Canada, to incorporate a business. It is really only a matter of some minor paperwork and a fee. Therefore, for a business to be "...an ongoing operation in Canada", there must be more to it. There was more to it in the appellant's situation for a time. But once he returned to Iran in 2001, the business incorporated in Canada ceased to be ongoing. The appellant returned to Iran to try to salvage money and resources and deals there, as well as to try to generate new ones in the hope of eventually returning to Canada. He did not accomplish this in a timely framework to avoid violating the residency obligation.

[15] This passage underlines the importance of examining the nature of an applicant's activities while outside of Canada in relation to the business of his or her Canadian company. It also makes it clear that the application of subsections 61(1) and 61(2) of the *Regulations* involves two distinct concepts. A company that does not have an ongoing operation is not necessarily a company incorporated primarily for the purpose of allowing an applicant to meet its residency obligations.

[16] That said, in the present instance, the IAD does not refer at all to the Mr. Durve's evidence indicating that he had Canadian and American clients who wanted to do business in India and that he does accounting work for Skyport Financial Corporation Inc., a Canadian company that wanted

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[4] It must be mentioned that the transcript in this matter is extremely poor with too many words missing as "inaudible". It also contains obvious mistakes in the transcription of answers given. It made the judicial review of this matter

to do business with a Canadian corporation even if the work was to be carried out in India (presumably at Indian prices) (CTR pages 383-385, 394, 402-403, 411-412, 415). Also, the Court notes that, apart from the applicant's testimony in that respect, written evidence was produced to the visa officer who initially refused to renew the applicant's visa and is described in some detail in the Computer Assisted Immigration Processing System [CAIPS] notes before the IAD.

[17] It is also not clear why the IAD expressly refers to the fact that the authors of the two customer letters filed before it were clients of the applicant before he immigrated to Canada. Was this meant to signal that the IAD did not believe the applicant's evidence and his counsel's argument that he ceased doing work with his former clients who had no interest in doing business in Canada and that the services he now renders to the Indian companies that he kept as clients (those with intent to do business in Canada) were different from those he rendered when in India? Or, does it mean that it found it suspicious for an entrepreneur to market his new services to people he already knew and with whom he had already worked in the past, albeit in a different capacity and thus an indication that the exclusion of subsection 61(2) applied?

[18] In the first case, the decision would be deficient as there is no explanation as to why the credibility of the applicant is put in doubt while in the second alternative, without further explanation, the Court simply cannot understand the reasoning of the decision maker.

[19] With respect to the IAD's statement that it is difficult to know the source of the monies deposited in the company's bank account in the absence of financial statements, written contracts between the numbered company and its clients, or tax returns for 2007 and 2008, again the IAD

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particularly difficult.

does not deal at all with the applicant's testimony in that respect, including the fact that during his testimony he clearly stated that he actually had these documents with him at the hearing and that some invoices and contracts with an American and a Canadian company had been provided to the visa officer as reflected in the CAIPS notes.

[20] This is again troubling; especially when one considers that the reasons given in paragraph 11 of the decision do not accord with the evidence before the IAD. In effect, there is simply no evidence that the business premises of the Canadian corporation is a "friend's" address. Mr. Durve testified that the company's address at the time of its incorporation was the address where he lived. He was renting a room from Mr. Kapoor (also written "Kapur" in some documentation), the owner of KNS Marketing and Consulting Services, the company he initially hired and paid to help him with his settlement in Canada.[5] The company also had an office at 2354 Derry Road. It appears from the CAIPS notes before the IAD that the two-year rental agreement dated August 1, 2007 for that space was provided to the visa officer (CTR page 31).

[21] Moreover, although the small company[6] had no employees in Canada on its payroll, it certainly had a verbal agreement[7] with Mr. Kapoor to whom it paid a retainer every year to provide various services such as collecting mail, fielding telephone calls, dealing with the bank, etc. These fees were paid by company cheques.

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[5] Copy of the written agreement is at page 50 of the CTR. There was evidence that in 2006 the applicant bought a condominium to be built across the street from where he rented a room in Mississauga but that the construction was delayed. This explains why he was still living at 1580 Mississauga Valley Blvd.

[6] The company was essentially a one-man operation and the applicant himself declared revenue ranging from $24,484 to $33,435 between 2004 and 2006.

[22] Finally, the Court does not understand the IAD's comments that the revenues of the company are relatively small when one considers the nature of its business activities. This is especially so given that the applicant explained how the implementation of most of the projects he had been working on with Indian clients had been delayed because of the economic situation. That said, it is also far from clear whether the IAD concluded that the applicant's company was set up as a business that served primarily to allow him to comply with his residency obligations because it is not an ongoing operation or whether it actually considered these two concepts separately. If the latter, there is no explanation as to why it concluded that the exclusion applied. Also, considering that the applicant had sold his properties in India, including the condo where he lived in Bombay, it would have been helpful to mention where he resided outside of Canada (see last words of subsection 61(2) of the *Regulations*).

[23] In the circumstances, the Court finds that the presumption that the decision maker has considered all the evidence has been rebutted. Also, the Court concludes that the decision does not meet the requirements of justification and transparency applicable under the standard of reasonableness.

[24] The decision should thus be set aside and the matter reconsidered by a new panel after the applicant has had an opportunity to file again any and all relevant documentation, it being clear that this will likely be his last opportunity to do so.

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[7] When one reviews the transcript, CTR pages 397-398 particularly, it becomes evident that when Mr. Durve said that the company had no agreement with Mr. Kapoor, he is referring to a written agreement as opposed to a verbal one which he refers to as a "mutual understanding" on the basis of which Mr. Kapoor was actually paid every year.

[25] Nothing in my decision should be construed as implicitly accepting that Mr. Durve's company falls within the parameters of subsection 61(1) of the *Regulations* and that it is not excluded under subsection 61(2) of the *Regulations* or even that the applicant would meet the requirement of subparagraph 28(2)(*a*)(iii) of *IRPA*. The Court simply finds that this matter has not been properly assessed on the basis of all the facts and the evidence before the decision maker and that the said decision maker has not sufficiently explained its reasoning to enable the Court to properly assess the validity of its conclusion. In that respect, I note that it would be helpful if the IAD could be more precise as to the indicia it will look at when considering the application of the above-mentioned provisions to businesses started by new permanent residents on a very small scale and which involve developing clientele abroad. For example, if a one-man operation is not acceptable, it should be clearly spelled out.

[26] The parties did not propose any question for certification and the Court is satisfied that this case turns on its own facts.

ORDER

THIS COURT ORDERS that:

1. The application is granted;

2. The matter shall be reconsidered by a different panel of the IAD.

"Johanne Gauthier"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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