

Federal Court



Cour fédérale

Date: 20151119

Docket: IMM-1942-15

Citation: 2015 FC 1294

Ottawa, Ontario, November 19, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

KEFAH ABU OSBA

Applicant

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr Kefah Abu Osba arrived in Canada in 2003 with his wife and son as a permanent resident under the federal skilled worker program. The family stayed in Canada only for two weeks before returning to their home in Libya. Mr Osba has lived primarily in Libya over the ensuing years, although his family has settled in Canada.

[2] In 2006, Mr Osba signed an employment contract with a Canadian company, Submersible Consulting and Engineering (SUBCOE), which hired him to work in Libya. The contract required him to work only 16 hours a week, but specified that he could be assigned to perform additional duties. In 2006, SUBCOE assigned Mr Osba to work full-time for one of its clients, Gunny Oil Field Service (GOS). GOS paid Mr Osba a monthly stipend of \$3,000, and provided him with accommodation, transportation, medical insurance, and tuition for his children. This arrangement lasted until October 2009 when Mr Osba began working exclusively for GOS.

[3] Mr Osba travelled to Canada several times between 2003 and 2011. On two of his return trips to Canada, he was questioned by officers at the border about the nature of his employment in order to determine if he was meeting the residency requirement of his permanent resident status. Both times he was cleared. However, in 2012, another officer made similar inquiries and was not satisfied that Mr Osba met his residency requirement and issued a removal order against him.

[4] Mr Osba appealed the officer's order to the Immigration Appeal Division (IAD), which agreed with the officer that Mr Osba failed to meet the requirement of being physically present in Canada for 730 days over the course of five years (*Immigration and Refugee Protection Act*, SC 2001, c 27, [IRPA], s 28(2)(a) – see Annex for enactments cited). The IAD considered whether an exception would apply to Mr Osba for working full-time overseas for a Canadian company (s 28(2)(a)(iii)), and it found that Mr Osba did not qualify because he only worked part-time for SUBCOE. He worked full-time for GOS, but this was insufficient as GOS was not a Canadian

company. The IAD also considered whether there were humanitarian and compassionate circumstances in Mr Osba's favour, but found that the negative factors outweighed the positive.

[5] Mr Osba argues that the IAD's decision was unreasonable because it failed to recognize that full-time employment by assignment to a client of a Canadian company constituted a further exception to the residency requirement in IRPA (according to the *Immigration and Refugee Protection Regulations*, SOR/2002-227, [IRPR], s 61(3)(c)). He also contends that the IAD's analysis of the humanitarian and compassionate factors was unreasonable because it failed to take adequate account of his honest belief that he was in compliance with his residency obligations, and the best interests of his children. He asks me to quash the IAD's decision and order another panel to reconsider his appeal of the removal order.

[6] I agree that the IAD's decision on the legality of the removal order was unreasonable for failure to address the exception in IRPR. Since the Board's analysis of that issue seeped into its consideration of the humanitarian and compassionate circumstances, I find that that aspect of the IAD's decision was also unreasonable. I must, therefore, allow this application for judicial review. The sole issue is whether the IAD's decision was unreasonable.

II. The Residency Requirement

[7] IRPA states that a permanent resident will meet the obligation to reside in Canada if he or she is physically present for at least 730 days during a five-year period (s 28(2)(a)(i)). However, that obligation can equally be met if the permanent resident was employed for those 730 days outside Canada on behalf of a Canadian business on a full-time basis (s 28(2)(a)(iii)).

[8] The IRPR elaborate on the rules in the IRPA. In particular, they state that a person will be considered to be working full-time for a Canadian business if he or she was assigned on a full-time basis to a client of that business (s 61(3)(c)).

III. The IAD's Decision

[9] The IAD accepted that SUBCOE was a Canadian company. However, Mr Osba's employment contract with SUBCOE referred only to part-time employment for 16 hours a week. He did not work full-time for a Canadian business. While Mr Osba may have worked full-time for GOS, it was not a Canadian business. Therefore, according to the IAD, Mr Osba did not meet the residency requirement in IRPA.

[10] The IAD went on to consider humanitarian and compassionate factors. It found that Mr Osba's ties to Canada, the best interests of his children, and the hardship the removal order would impose on him favoured a positive decision on his behalf. On the other hand, the IAD found that negative factors outweighed the positive ones – the degree of Mr Osba's non-compliance with the residency requirement, his lack of establishment in Canada, and the absence of convincing reasons to remain outside Canada.

[11] Based on these findings, the IAD dismissed Mr Osba's appeal.

IV. Was the IAD's decision unreasonable?

[12] The Minister argues that the IAD's decision was not unreasonable because, although it did not refer to the exception in the IRPR, the evidence in the record supported its finding that Mr Osba had not met the residency requirement. Further, the Minister argues that the IAD's analysis of humanitarian and compassionate grounds merits the Court's deference.

[13] I disagree. I find that the IAD's analysis of the legality of the removal order was deficient because it did not take account of the exception set out in the IRPR, and did not address the evidence that was relevant to that issue.

[14] The evidence before the IAD clearly showed that Mr Osba worked full-time, on assignment, for a client of SUBCOE, GOS, from June 2006 to October 2009. According to IRPR, working full-time on assignment from a Canadian business for a client of that business qualifies as time spent working for the Canadian business itself. This possibility was not considered by the officer who issued the removal order, or by the IAD. Indeed, counsel for the Minister before the Board argued that working for a non-Canadian client of a Canadian business does not count as employment for a Canadian business. That submission may have caused the IAD to overlook the special rule in the IRPR relating to clients of Canadian business. If Mr Osba had been credited for the time spent working for GOS, he would have met his residency requirement.

[15] Therefore, I find that the Board's conclusion on the legality of the removal order was unreasonable. Since its analysis of that issue also figured in its consideration of the humanitarian and compassionate circumstances, I find that that aspect of the IAD's decision was also unreasonable.

V. Conclusion and Disposition

[16] As the IAD failed to consider the relevant provision of the IRPR and the evidence that related to the applicability of that rule, I find that its decision did not fall within the range of acceptable outcomes based on the facts and the law. Accordingly, I will allow this application for judicial review and order another panel of the IAD to reconsider Mr Osba's appeal of the removal order. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is referred back to another panel for reconsideration; and
3. No question of general importance is stated.

“James W. O’Reilly”

Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

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

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

(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

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

(i) physically present in Canada,

(i) il est effectivement présent au Canada,

...

[...]

(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,

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

Immigration and Refugee Protection Regulations, SOR/2002-227

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Residency Obligation

Obligation de résidence

Employment outside Canada

Travail hors du Canada

61(3) For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression “employed on a full-time basis by a Canadian business or in the public service of Canada or of a province” means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a

61(3) Pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi respectivement, les expressions « travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale » et « travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale », à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat

term of the employment or contract
to

d'une entreprise canadienne ou de
l'administration publique, fédérale ou
provinciale, et est affecté à temps
plein, au titre de son emploi ou du
contrat de fourniture :

...

[...]

(c) a client of the Canadian
business or the public service
outside Canada.

c) soit à un client de l'entreprise
canadienne ou de l'administration
publique se trouvant à l'extérieur
du Canada.

FEDERAL COURT
SOLICITORS OF RECORD

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