Federal Court  Cour fédérale

**Date: 20171006**

**Docket: IMM-1074-17**

**Citation: 2017 FC 886**

**Ottawa, Ontario, October 6, 2017**

**PRESENT: The Honourable Mr. Justice Locke**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**JESSICA MA and MICHELLE MA**

**Respondents**

## JUDGEMENT AND REASONS

[1] This is an application for judicial review of a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada. The IAD's decision granted the respondents' appeal from a refusal by a visa officer to excuse (on humanitarian and compassionate (H&C) grounds) their failure to comply with the residency obligation for permanent residents as set out in the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Minister of Citizenship and Immigration seeks an order setting aside the IAD's decision.

[2] For the reasons provided below, I have concluded that the application should be allowed.

## I. FACTS

[3] The respondents are two sisters who came to Canada as young children with their parents from South Africa as permanent residents in July 1994. However, their stay was brief. They returned to South Africa in September 1994 with their parents for business reasons. Though the respondents claim that their parents intended to settle in Canada once the business issues were resolved, this never happened. The family came to Canada for short visits with family in 1995, 1996, 1998 and 2000, but they never stayed to reside in Canada. The respondents have not visited Canada since 2000.

[4] By 2015, the respondents had reached 24 and 25 years of age, respectively. That year, the respondents' parents sought to come to Canada. Knowing that they had failed to respect the residency requirements for permanent residents, and believing that their status as permanent residents had lapsed, they applied for visitor visas. They were informed that they retained their permanent resident status, but that they appeared to have violated the residency requirements. The respondents' status was the same. The parents were given the following options: (i) show compliance with the residency requirements; (ii) make an argument for relief from the residency requirements on H&C grounds; or (iii) renounce their permanent resident status. After being informed that their decision would not affect the respondents' rights, they elected to renounce their permanent resident status.

[5] The respondents made their application for travel documents in February 2016, about eight months after learning of their status. They acknowledged that they had failed to meet the

residency requirements. However, they sought relief from this failure on H&C grounds. This application was dismissed by an immigration officer.

[6] The respondents then appealed this decision to the IAD. In support of their appeal, the respondents submitted a bundle of documents. They also each testified at the hearing, as did their mother. The IAD's decision on this appeal is the subject of the present application for judicial review.

## II. IMPUGNED DECISION

[7] The IAD noted the following non-exhaustive list of H&C considerations:

1. The extent and seriousness of the breach of the residency obligation.
2. The respondents' initial and continuing degree of establishment in Canada.
3. The reasons for the original departure from Canada and for continuing or lengthy stays abroad.
4. Whether attempts to return to Canada were made at the earliest opportunity.
5. Any family ties that they have in Canada.
6. Whether there are unique or special circumstances present in the case.

[8] The IAD found that the evidence submitted by the respondents, as well as the witnesses' testimony was credible and reliable.

[9] The IAD stated that the extent and seriousness of the breach of the residency obligation was significant, but that it was not the respondents' decision to leave Canada to return to South Africa. They had little choice because of their age. The IAD also found it significant that the

respondents learned of their continued permanent resident status only shortly before seeking travel documents. The IAD found that, in the circumstances, there need not be "substantial positive factors to offset the breach of the residency obligation."

[10] The IAD acknowledged that the respondents' return visits to Canada in 1995 to 2000 were brief and not intended to enable them to put down roots, but assigned some positive weight to these efforts. After acknowledging that the respondents had not established themselves in Canada through bank accounts, investments, real property or filing annual income tax returns, the IAD found these to be, "at best, neutral factors."

[11] The IAD assigned positive weight to the respondents' continued contact with family in Canada.

[12] The IAD noted that the respondents had reached the age of majority several years before they sought to return to Canada, and found that it would have been much more reasonable to provide H&C relief if they had sought to return at the first opportunity. However, the IAD found it to be a critical and positive factor that they did so once they learned of their status.

[13] The IAD was of the view that the respondents "now seek the relative political and economic stability of Canada". The IAD found that "to fail to provide the relief would be unfair and possibly even dangerous or cruel", and that "by remaining in South Africa, the [respondents] will face hardships of a kind and to an extent that only by allowing the appeal, will the hardships be alleviated."

[14] The IAD concluded that H&C considerations warranted special relief, and accordingly granted the respondents' appeal.

## III. ISSUES

[15] The Minister submits that the IAD made the following errors:

1. The IAD unreasonably minimized the respondents' breach of their residency obligation when it found that, in the circumstances, there need not be "substantial positive factors to offset the breach of the residency obligation."
2. The IAD unreasonably considered the respondents' complete failure to establish themselves in Canada (including not having even visited Canada since 2000) as possibly something other than a negative factor.
3. The IAD's reasoning in consideration of the hardship the respondents faced if relief was not granted was unreasonable.

## IV. ANALYSIS

[16] At the outset, I wish to note a number of issues on which the parties are in agreement.

[17] They agree that the applicable standard of review is reasonableness and that reasonableness should be assessed based on the evidence as a whole. They also agree that the IAD's discretion to grant H&C relief or not is entitled to substantial deference. The Court should not reweigh the evidence. The Supreme Court of Canada had this to say on the subject of deference and the reasonableness standard of review in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47:

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned

> mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[18] The parties do not disagree on the list of factors to be considered in determining whether to grant H&C relief. They also agree that the respondents and their mother were heard by the IAD and considered credible.

A. *Breach of Residency Obligation*

[19] The Minister notes that the respondents' breach of their residency obligation was total. They have not set foot in Canada since 2000. The Minister argues that the IAD's finding that, in the circumstances, there need not be "substantial positive factors to offset the breach of the residency obligation" misstates the applicable legal framework by suggesting that little was required to excuse the respondents' total failure. The Minister identifies two errors under this heading: (i) excusing the respondents because of their age, and (ii) excusing the respondents' ignorance of the law.

[20] On the question of excusing the respondents because of their age, the Minister cites *Lai v Canada (Citizenship and Immigration)*, 2006 FC 1359 [*Lai*]. At paragraph 26 of that decision, the Court stated:

> In the case of a dependent child of relatively tender years there is little, if any, opportunity to independently fulfill the residency obligation required to preserve landed status or to create the genuine ties to Canada that are typically necessary for H & C relief. In most cases the child can only accomplish that which the parents are prepared to allow and support. Ms. Lai's status in Canada may have been jeopardized by the decisions of her parents,

> but her claim to relief should not be enhanced by those parental decisions.
>
> [Emphasis added.]

[21] The Minister also cites several IAD decisions which have followed the principle set out in *Lai* that young age does not excuse a breach of the residency obligation.

[22] In my view, *Lai* is distinguishable from the facts in the present case. In *Lai*, the impugned decision had denied the applicant's request for H&C relief. The Minister was the respondent in that case. Accordingly, Ms. Lai was seeking to overcome the impugned decision by focusing on her age. The Court focused on the need for deference to the IAD. In *Lai*, age was the principal factor in issue.

[23] In the present case, the respondents seek merely to maintain the IAD's exercise of discretion, and many other factors are in issue. I do not read the above-quote passage from *Lai* as a blanket prohibition against consideration of age as a factor when considering H&C relief from a failure to meet one's residency obligation.

[24] I turn now to the issue of the respondents' ignorance of their continued permanent resident status. The Minister cites authority for the proposition that ignorance of the law cannot excuse a failure to meet the residency obligation: *Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at paras 27-28. In my view, there is an important distinction between reliance on ignorance of the law and reliance on ignorance of one's legal status. I would characterize the latter as a mistake of fact rather than law. The revelation that prompted the respondents to seek H&C relief concerned their status under the law, not the law itself.

[25] To conclude on this section, I acknowledge that the IAD's statement that there need not be "substantial positive factors to offset the breach of the residency obligation" unfortunately suggests that the breach was not total. However, I do not believe that the IAD misunderstood the factual situation or the legal test to be applied. In my view, the IAD was simply stating that the respondents' age was a consideration in assessing their request for H&C relief, such that not much more in the way of positive factors was necessary. It is also my view that it was open to the IAD to apply that reasoning.

B. *Establishment in Canada*

[26] The Minister notes that the IAD found no establishment in Canada by the respondents but still accepted that establishment may be a neutral factor. The Minister argues that this finding was unreasonable in view of *Canada (Citizenship and Immigration) v Sidhu*, 2011 FC 1056 [*Sidhu*] at para 49:

> … [T]he Board found that the respondent's degree of establishment in Canada was neutral, despite finding that there was absolutely no evidence of any establishment in Canada. This, too, was unreasonable. In the absence of any evidence of establishment, this factor should have weighed against the respondent.

[27] In response, the respondents note that *Sidhu* is distinguishable because there were factors other than establishment at play in that case.

[28] That may be the case, but the proposition set out in para 49 of *Sidhu* stands independent of other issues. I agree that it was unreasonable for the IAD to find that establishment could be a neutral factor.

C. *Hardship*

[29] The Minister argues that the IAD's decision contained almost no analysis of the evidence concerning hardship to which the respondents would be exposed if H&C relief were not granted. The Minister also notes that the H&C relief the respondents seek is exceptional, special relief which sits outside the normal immigration classes. The Minister argues that there was evidence that weighed against the respondents' assertion of hardship, and that such evidence should have been discussed in the IAD's decision. In the absence of such discussion, the Minister argues that the IAD's conclusion on hardship was unreasonable, lacking in justification, transparency and intelligibility.

[30] The respondents rely on authority to the effect that a tribunal is not required to refer to each and every detail supporting its conclusion. The respondents' mother had testified concerning issues of security and racism in South Africa. The respondents also made reference to security concerns. The respondents submit that the evidence of hardship was ample.

[31] I accept that the IAD did not have to refer to all of the evidence it relied on to reach its conclusions. However, I am troubled by the dearth of analysis on the issue of hardship, especially in light of the following:

1. The firm conclusions by the IAD that (i) "to fail to provide the relief would be unfair and possibly even dangerous or cruel", and (ii) "by remaining in South Africa, the [respondents] will face hardships of a kind and to an extent that only by allowing the appeal, will the hardships be alleviated."

2. The fact that the respondents and their parents appear to have built generally successful lives for themselves in South Africa and most of the security and racism concerns referred to in the evidence have not affected the respondents personally.

[32] It is not clear to me how the IAD reached its conclusions regarding hardship, and indeed whether it considered all of the evidence. I agree with the Minister that the IAD's analysis of hardship lacks justification, transparency and intelligibility.

## V. CONCLUSIONS

[33] Having considered the issues raised by the Minister, I have concluded that the IAD erred in its analysis of (i) the respondents' establishment in Canada, and (ii) the hardship to which they could be exposed if H&C relief is not granted. Moreover, I am satisfied that these errors could have affected the result in the IAD's decision. For these reasons, and despite the respondents' argument that the IAD's decision should be considered as a whole, I have concluded that the present application should be allowed.

[34] The parties are agreed that there is no serious question of general importance to certify.

**JUDGMENT in IMM-1074-17**

**THIS COURT'S JUDGMENT is that**:

1. The present application for judicial review is granted.

2. The decision of the Immigration Appeal Division is set aside and the matter is remitted for redetermination by a differently-constituted panel.

3. No serious question of general importance is certified.

"George R. Locke"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1074-17 |
| **STYLE OF CAUSE:** | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v JESSICA MA AND MICHELLE MA |
| **PLACE OF HEARING:** | VANCOUVER, BRITISH COLUMBIA |
| **DATE OF HEARING:** | AUGUST 14, 2017 |
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| **DATED:** | OCTOBER 6, 2017 |

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