Federal Court Cour fédérale

Date: 20171018

Docket: IMM-534-17

Citation: 2017 FC 923

Ottawa, Ontario, October 18, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

MANSOOR AHMAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mansoor Ahmad, seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of the December 22, 2016 decision of the Immigration Appeal Division [the IAD] dismissing his appeal from the decision of a visa officer at the Canadian Embassy in Islamabad, Pakistan. The visa officer found that Mr. Ahmad had not complied with the residency obligations of a permanent resident of Canada pursuant to section 28 of the Act and that there were insufficient Humanitarian and

Compassionate [H&C] grounds to overcome his non-compliance with the statutory requirements. The IAD conducted a *de novo* appeal and agreed that there were insufficient H&C grounds to grant relief from Mr. Ahmad's non- compliance pursuant to paragraph 67(1)(*c*) of the Act.

[2] For the reasons that follow, the application for judicial review is dismissed.

I. Background

[3] The Applicant is a citizen of Pakistan. He arrived in Canada in January 2010, as a permanent resident, but has continued to reside predominantly in Pakistan attending to his business and properties in Pakistan. The Applicant's wife and two of his three children (one of whom is a minor) live in Canada and are now Canadian citizens. The Applicant's eldest child lives in Pakistan, with her two children.

[4] The Applicant owns assets in Canada, including a home in which his wife and two of his children reside. His children in Canada attend school in Canada. The Applicant attests that it is his intention to make his principal residence in Canada and break his business and other ties to Pakistan.

[5] A permanent resident is required to comply with the residency requirements set out in section 28 of the Act. The visa officer found that in the relevant five-year period, from January 2010 to January 2015, the Applicant had only been in Canada for 354 days, rather than the required 730 days. The Applicant does not dispute that he did not comply with the residency requirement, but submits that H&C considerations overcome his non-compliance.

[6] The relevant statutory provisions are attached at Annex A.

II. The Decision Under Review

[7] The IAD considered the documentary evidence and the Applicant's testimony, which it found to be credible "for the most part".

[8] The IAD identified the factors relevant to the consideration of H&C relief as established in the jurisprudence, including: the extent of non-compliance with the residency obligation; the reasons for the departure, and for the stay abroad; the degree of establishment in Canada initially, and at the time of the hearing; the family ties to Canada; whether attempts were made to return to Canada at the first opportunity; hardship and dislocation to family members in Canada if the Applicant were to be removed from or refused admission; hardship to the Applicant if removed; and, whether there were unique and special circumstances meriting special relief.

[9] The IAD explained that these factors are not exhaustive, and can vary from case to case according to the circumstances. The IAD added that paragraph 67(1)(*c*) of the Act requires that the best interests of any children impacted by the decision be considered.

[10] The IAD then considered the applicable factors with reference to the relevant evidence. The IAD found that there was very serious non-compliance, given that the Applicant was only in Canada for less than half of the statutorily required 730 days.

[11] The IAD noted that the Applicant left Canada and remained in Pakistan in order to deal with his business and family properties in Pakistan.

[12] The IAD found that the Applicant was "very well established in Canada", noting that he owns assets, including a home, that his wife and two of his three children live in Canada, his children attend school, and that he supports his family financially.

[13] The IAD also found that the Applicant had extensive ties to Pakistan. In addition to his properties and business in Pakistan, he has three siblings, one daughter, and two grandchildren who live in Pakistan, and whom he visits.

[14] With respect to the best interests of the children, the IAD considered both the Applicant's daughter in Canada and his grandchildren in Pakistan. The IAD noted that the Applicant's 13-year-old daughter "misses her father clearly", but visits him in Pakistan during summer vacations and on the March school break, and that electronic communication with her father remains an option. The IAD commented that dismissing the appeal would not cause much hardship to the Applicant's daughter in Canada, given that the Applicant had not been in Canada for more than one of the last five years.

[15] The IAD noted that the Applicant would likely experience greater hardship if he returned to Canada immediately without dealing with his assets in Pakistan, including his business, which is the means by which he supports his family. The IAD concluded that there were insufficient H&C grounds to warrant special relief from the requirements of the Act.

[16] The IAD commented that the Applicant's wife could likely sponsor him to Canada once he was able to resolve his financial matters in Pakistan and to fulfil the requirements to remain in Canada.

III. The Issues

[17] The only issue is whether the decision is reasonable. The Applicant argues that the decision is not reasonable because the IAD erred by: inconsistently finding that he was very well established in Canada, yet finding insufficient H&C grounds; failing to consider all the evidence; and, failing to truly consider the best interests of the family and children in Canada and the impact on them if the Applicant lost his permanent resident status.

IV. The Standard of Review

[18] The IAD's assessment of whether H&C relief should be granted to overcome the requirements of the residency obligation is an issue of mixed fact and law and is reviewed on the standard of reasonableness. The IAD's decision involves a high degree of discretion and warrants considerable deference (*Samad v Canada (Minister of Citizenship and Immigration),* 2015 FC 30 at para 20, [2015] FCJ No 23; *Nekoie v Canada (Minister of Citizenship and Immigration*), 2012 FC 363 at para 15, 407 FTR 63 [*Nekoie*]).

[19] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls

within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

V. The Decision is Reasonable

[20] The IAD considered the evidence and the relevant factors identified in the jurisprudence in its determination of whether H&C relief from the residency requirement was warranted. The IAD reasonably found that it was not warranted.

[21] The Applicant's argument that the IAD contradicted itself by finding, on the one hand, that he was credible and "very well established" in Canada, but on the other hand, finding that there were insufficient H&C grounds is without merit.

[22] The evidence of the Applicant's establishment, including his assets in Canada, his income, and his family in Canada, was fully assessed and led to the IAD's conclusion that he was well established in Canada. However, establishment is only one factor.

[23] The jurisprudence teaches that while all relevant factors should be considered and that the relevant factors will vary from case to case, several factors are particularly relevant to determine whether there are sufficient H&C grounds (*Nekoie* at para 32). Contrary to the Applicant's submissions, a positive determination with respect to one factor is not conclusive of the determination. The weighing of the factors is within the discretion of the IAD. It is not contradictory to find one or more positive factors, but to ultimately find that there are insufficient H&C grounds.

[24] The IAD accepted the Applicant's evidence that he had to leave Canada to attend to his business, disputes relating to his business, and to his family's assets in Pakistan. The IAD's finding that he was "clearly very preoccupied by substantial assets" in Pakistan is based on the Applicant's own evidence and is not speculation.

[25] The IAD did not err by commenting that the Applicant's assets in Pakistan were greater than his assets in Canada. This was a reasonable conclusion, again based on the evidence, including that there were several family properties in Pakistan in which the Applicant had some interest and that his ongoing business in Pakistan, in which he worked on a day-to-day basis supported his family in Canada. A mathematical calculation of the assets in Canada compared to those in Pakistan is not required to support the IAD's finding, which was part of its assessment of the Applicant's ongoing ties to Pakistan. Moreover, the value of assets in Canada would not be determinative of H&C relief.

[26] Although the Applicant submits that the IAD ignored many documents that corroborate his ties to Canada, including a deed to a home, mortgage statements, and banking information, his establishment in Canada is not the issue. The IAD found that he was well established, based on the same evidence the Applicant submits was ignored. However, the IAD also found that he continued to have significant ties to Pakistan.

[27] The IAD was not required to refer to every piece of documentary evidence submitted and to explain how it factored into the H&C analysis. The IAD is presumed to have considered all

the evidence. In this case, the IAD clearly stated it had done so. The Applicant has not pointed to any evidence that was ignored which would contradict the IAD's findings.

[28] The Applicant's submission that the IAD did not "truly consider" the evidence that his family has been living in Canada for seven years or that his youngest child is a minor is without merit. The IAD specifically noted the family's establishment in Canada, including their home and daughters' attendance at school.

[29] Similarly, the Applicant's submission that the IAD did not apply the principles enunciated by the Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*], did not treat the best interests of his daughter in Canada as a significant factor, and did not consider how she would be affected if he lost his permanent resident status, ignores the IAD's reasons. The IAD clearly considered the best interests of the children; both the young grandchildren in Pakistan and the Applicant's daughter in Canada. It assessed the interests of the children in light of the Applicant's situation. The IAD acknowledged that the Applicant's daughter misses him, but also noted that the Applicant had already been separated from his daughter for long periods of time. The IAD also noted, as did the Applicant's own testimony, that his daughter spent over two months each summer and during the March break with the Applicant in Pakistan.

[30] The IAD ultimately found that it was in the best interests of the children affected to maintain the *status quo*. The IAD noted the reality that the Applicant had remained in Pakistan

for significant periods over the last five years and his “removal” would not result in a different situation than the norm.

[31] The IAD did not ignore the guidance of the Supreme Court in *Kanthasamy*. The IAD’s assessment of the best interests of the children was thorough; the IAD understood that the loss of the Applicant’s permanent resident status would not make a significant difference to the relationship with his daughter in Canada. Moreover, while the best interests of the child are an important consideration, it is one of several relevant factors to be considered in the determination of whether H&C relief is warranted. In the present case, the IAD found it to be a “neutral factor”.

[32] The IAD’s comment that the Applicant could likely be sponsored by his wife is not the basis for the decision. The IAD was simply noting that this could be an option. The IAD was not required to turn its mind to the time it could take for a sponsorship application to be considered. The IAD’s role was to determine if the Applicant’s non-compliance with his residency requirement could be overcome by H&C considerations. The IAD reasonably concluded that H&C relief was not warranted. The decision clearly ties the relevant evidence to the relevant factors which were considered by the IAD. The decision is clearly justified, transparent and intelligible.

JUDGMENT in IMM-534-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. There is no question for certification.

"Catherine M. Kane"

Judge

ANNEX A

RELEVANT statutory provisions

Immigration and Refugee Protection Act, SC 2001, c 27	*Loi sur l'immigration et la protection des réfugiés*, LC 2001, c 27
Residency obligation	**Obligation de residence**
28 (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	**28 (1)** L'obligation de résidence est applicable à chaque période quinquennale.
Application	**Application**
(2) The following provisions govern the residency obligation under subsection (1):	**(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,
[…]	**[…]**
(b) it is sufficient for a permanent resident to demonstrate at examination	**b)** il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

[…]

(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and

c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.

(c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.

Appeal allowed

67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

[…]

(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

Fondement de l'appel

67 (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

[…]

c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-534-17
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