

Federal Court



Cour fédérale

Date: 20200124

Docket: IMM-4077-19

Citation: 2020 FC 124

Ottawa, Ontario, January 24, 2020

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

THE MINH BANH THONG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Ms. The Minh Banh Thong (the “Applicant”) seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Appeal Division (the “IAD”), dismissing her appeal made on Humanitarian and Compassionate (“H and C”) grounds in respect of her failure to meet the residency requirements for permanent residence status, pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”).

[2] The Applicant acquired permanent residence status in Canada in 2007, following her recognition as a Convention refugee. In 2008, she married an American citizen and divided her residence between Canada and the United States of America.

[3] In 2012, the Applicant gave birth to a child in Canada.

[4] The Applicant applied for a Permanent Resident Travel Document in December 2017. On February 21, 2018, her application was refused for her failure to comply with the residency obligations under subsection 28(2) of the Act.

[5] The IAD reviewed H and C factors, including the Applicant's establishment in Canada, the reasons for her stay abroad, and the best interests of her child. It noted that the Applicant has a Canadian born child and family members in Canada, including her parents. It observed that the Applicant's absence from Canada was "moderate," that is 119 days short of the required 730 days. However, the IAD said it was not satisfied that there were sufficient H and C considerations to warrant relief pursuant to subsection 25(1) of the Act.

[6] The decision of the IAD is reviewable on the standard of reasonableness; see the decision in *Islam v. Canada (Citizenship and Immigration)*, 2018 FC 80.

[7] In its recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada revisited the standard of review of administrative decisions. It said that, presumptively, such decisions are reviewable on the standard of

reasonableness, with two exceptions: where legislative intent or the rule of law requires otherwise. Neither exception applies in this case.

[8] In *Vavilov, supra*, the Supreme Court of Canada confirmed the content of the reasonableness standard as set out in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.

[9] According to the decision in *Dunsmuir, supra*, the standard of reasonableness requires that a decision be justifiable, transparent and intelligible, falling within a range of possible, acceptable outcomes that are defensible on the law and the facts.

[10] The Applicant argues that the IAD erred in considering the best interests of her child and failed to consider all the evidence.

[11] In my opinion, the decision does not meet the standard of reasonableness as discussed in *Dunsmuir, supra*. The IAD failed to engage with the best interests of the child and unreasonably focused on the ability of the Applicant's child to adjust to life outside Canada.

[12] In the result, the application for judicial review is allowed, the decision of the IAD is set aside and the matter is remitted to a differently constituted panel of the IAD for redetermination.

[13] There is no question for certification arising.

JUDGMENT in IMM-4077-19

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Immigration and Refugee Board, Immigration Appeal Division is set aside and the matter is remitted to a differently constituted panel of the Immigration Appeal Division for redetermination.

There is no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4077-19

STYLE OF CAUSE: THE MINH BANH THONG v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: JANUARY 15, 2020

JUDGMENT AND REASONS: HENEGHAN J.

DATED: JANUARY 24, 2020

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