Federal Court  Cour fédérale

Date: 20210409

Docket: IMM-551-20

Citation: 2021 FC 310

[ENGLISH TRANSLATION]

Ottawa, Ontario, April 9, 2021

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

WENDLAFAN EDOUARD OUEDRAOGO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Wendlafan Edouard Ouedraogo, is a citizen of Burkina Faso. He is seeking judicial review of a decision rendered in November 2019 by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board [Decision]. The IAD then confirmed a removal order issued in June 2018 against Mr. Ouedraogo, by an officer at the port of entry

[Officer], who had found that Mr. Ouedraogo, as a permanent resident, had failed to comply with the residency obligation under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. In addition to confirming the removal order against Mr. Ouedraogo, the IAD also found that there were insufficient humanitarian and compassionate considerations to warrant special relief pursuant to paragraph 67(1)(c) of the IRPA.

[2] Mr. Ouedraogo argues that the IAD's Decision is unreasonable. He does not challenge the IAD's finding that he failed to comply with his residency obligation, but he argues that the IAD erred in finding that there were insufficient humanitarian and compassionate considerations to warrant discretionary relief. He is asking the Court to set aside the Decision and order that another decision maker reconsider his appeal. In response, the Minister of Public Safety and Emergency Preparedness argues that the Decision was reasonable in all respects.

[3] For the following reasons, I dismiss Mr. Ouedraogo's application for judicial review. Given the findings of the IAD, the evidence before it and the applicable law, I see no reason to overturn the Decision. The IAD's reasons provide a detailed analysis of the evidence and are logical and coherent in light of the relevant legal and factual constraints. There are therefore no grounds to justify this Court's intervention.

II. Background

A. *Facts*

[4] On April 25, 2013, Mr. Ouedraogo, originally from Burkina Faso, was granted permanent resident status in Canada.

[5] Just four months later, on August 29, 2013, Mr. Ouedraogo returned to Burkina Faso to assist his wife, who was suffering from severe emotional distress at the time. Since he intended to return to Canada, he did not seek lasting employment in Burkina Faso.

[6] Mr. Ouedraogo's first child was born on October 29, 2014, 14 months after his return to Burkina Faso. The pregnancy was difficult and his wife was forced to give birth by caesarean section. Mr. Ouedraogo therefore remained in the country to care for her and the child.

[7] Mr. Ouedraogo's passport expired in December 2014, but due to delays in passport processing in Burkina Faso, months passed and Mr. Ouedraogo was only able to obtain a new passport in April 2016. After obtaining his passport, however, Mr. Ouedraogo did not have the funds to purchase a return ticket to Canada. He then took out a loan and purchased a plane ticket for May 26, 2016. However, due to a conflict with his in-laws regarding his departure to Canada, he decided to cancel his plane ticket.

[8] All these years passed without Mr. Ouedraogo returning to Canada. On May 9, 2018, Mr. Ouedraogo's second daughter was born while he was still in Burkina Faso. His wife's

pregnancy again proved to be difficult, and she again had to give birth by caesarian section. Despite these difficulties, Mr. Ouedraogo quickly purchased a ticket for his return to Canada. Mr. Ouedraogo thus returned to Canada on June 18, 2018, nearly five years after his August 2013 departure, and just three days before his permanent resident card expired.

[9] Upon arrival at the port of entry, the Officer advised him that he had lost his permanent resident status for failure to meet the residency obligation. During Mr. Ouedraogo's five-year qualifying period from June 18, 2013 to June 18, 2018, he accumulated only a meager 76 days of residence in Canada.

[10] Mr. Ouedraogo immediately appealed the Officer's decision to the IAD on humanitarian and compassionate grounds.

B. *Decision*

[11] On December 10, 2019, the IAD rejected Mr. Ouedraogo's appeal and confirmed the Officer's decision.

[12] In its Decision, the IAD upheld the validity of the Officer's removal order, relying on evidence that Mr. Ouedraogo was in fact present in Canada for a grand total of only 129 days since obtaining permanent residence, whereas under section 28 of the IRPA, the law requires him to be present for at least 730 days during the five-year reference period alone. In his appeal to the IAD, Mr. Ouedraogo did not dispute that he had failed to comply with his residency obligation.

[13] The IAD also refused to exercise its discretion to grant special relief, as authorized by paragraph 67(1)(c) of the IRPA, and allow Mr. Ouedraogo to retain his permanent resident status despite his flagrant failure to comply with his residency obligation. The IAD found that there were insufficient humanitarian and compassionate considerations, taking into account the best interests of the children directly affected, to warrant special relief. In its Decision, the IAD identifies, among other things, Mr. Ouedraogo's limited degree of establishment in Canada, the lack of reasonable attempts to return to Canada at the earliest opportunity, the fact that his children and family are settled in Burkina Faso, and the limited dislocation that the loss of permanent status would likely cause to Mr. Ouedraogo and his family members. The IAD therefore finds that Mr. Ouedraogo's reasons are insufficient to outweigh his serious breach of the residency obligation.

C. *Standard of review*

[14] The current analytical framework for judicial review of an administrative decision is established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. This framework is based on the presumption that the standard of reasonableness is now the applicable standard in all cases. The parties do not dispute this, and the IAD Decision is therefore subject to review under this deferential standard. In fact, the pre-*Vavilov* jurisprudence is consistent with this and had already recognized that the standard of reasonableness applies to the question of whether special relief under paragraph 67(1)(c) of the IRPA is justified on humanitarian and compassionate considerations (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at para 58; *Dandachi v Canada (Citizenship and Immigration),* 2016 FC 952 at para 13).

[15] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post Corp.*] at paras 2, 31). A reviewing court must therefore ask itself whether "the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99, citing *Dunsmuir v New-Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 47, 74).

[16] It is not enough for the decision to be justifiable. Where reasons are required, the decision "must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" [emphasis in original] (*Vavilov* at para 86). A reasonableness review is therefore concerned with both the outcome of the decision and the reasoning process followed (*Vavilov* at para 87). A reasonableness review must include a careful evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, a reviewing court must examine the reasons given with "respectful attention" and seek to understand the reasoning process followed by the decision maker in reaching its conclusion (*Vavilov* at para 84). The reviewing court must exercise restraint and intervene only "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). The standard of reasonableness, I emphasize, is always rooted in the principle of judicial restraint and deference, and requires reviewing courts to show respect for the distinct role that Parliament has chosen to confer on administrative decision makers rather than on courts (*Vavilov* at paras 13, 46, 75).

III. Analysis

[17] Mr. Ouedraogo argues that the IAD exercised its discretion unreasonably by making an overly narrow and erroneous assessment of the relevant factors in an application for an exemption on humanitarian and compassionate considerations in the context of an appeal based on non-compliance with the residency obligation.

[18] He alleges that in making its negative findings regarding the various factors, the IAD ignored the extensive testimonial and documentary evidence before it. He submits that his testimony and written submissions demonstrate that he had to leave Canada for compelling reasons, namely his wife's depression. Mr. Ouedraogo also criticizes the IAD for its harshness in assessing his efforts to establish himself in Canada upon his arrival in April 2013 and his multiple attempts to return to Canada while in Burkina Faso. He stated that upon arrival he looked for his first job and that, but for his wife's depression, he would have eventually found housing and made further establishment efforts.

[19] With respect to the IAD's lack of evidence of his inability to work in Burkina Faso and continue to support his family financially, Mr. Ouedraogo responded that he did not want to work in Burkina Faso because of his intention not to stay there. He said that complications with his wife's pregnancy forced him to stay with her.

[20] Furthermore, according to Mr. Ouedraogo, the IAD failed to consider the evidence submitted and his testimony in concluding that he did not make sufficient efforts to renew his

passport for more than a year. In this regard, Mr. Ouedraogo claims that the IAD erroneously overlooked that fact that after the birth of his first daughter, he had to take care of the child and his wife due to complications from the pregnancy and ensure their protection following a political crisis that shook Burkina Faso and brought instability to the country. Finally, Mr. Ouedraogo also submits that the IAD erred in its assessment of the impact of removal on his two minor daughters and in its evaluation of the best interests of the child factor. In sum, Mr. Ouedraogo argues, the IAD had a duty to base its Decision on the totality of the evidence, and it failed to do so.

[21] The arguments put forward by Mr. Ouedraogo do not convince me. On the contrary, I find that the reasons for the Decision, described over fifty or so paragraphs, make it clear that the IAD assessed all of the testimony and evidence before it to conclude that the humanitarian and compassionate considerations Mr. Ouedraogo relied on were not sufficient to warrant special relief. The IAD's findings, as they are set out, make it easy for the parties and the Court to understand how the humanitarian and compassionate considerations were examined and weighed by the IAD, and how the Decision was ultimately rendered. Before concluding that the facts and Mr. Ouedraogo's clear failure to comply with his residency obligation tipped the scales in favour of denying his application, the IAD carefully analyzed all of the humanitarian and compassionate considerations identified by Mr. Ouedraogo.

[22] Following *Vavilov*, the reasons provided by administrative decision makers have become first priority and are now the starting point for the analysis. They are the primary mechanism by which administrative decision makers show that their decisions are reasonable—both to the

affected parties and to the reviewing courts (*Vavilov* at para 81). They "explain how and why a decision was made", demonstrate that "the decision was made in a fair and lawful manner" and shield against "the perception of arbitrariness in the exercise of public power" (*Vavilov* at para 79) In short, it is the reasons that establish the justification for the decision.

[23] In Mr. Ouedraogo's case, I am of the opinion that the IAD's reasons justify the Decision in a transparent and intelligible manner (*Vavilov* at paras 81, 136; *Canada Post Corp.* at paras 28–29; *Dunsmuir* at para 48). They demonstrate that the IAD followed rational, coherent and logical reasoning in its analysis and that the Decision is consistent with the relevant legal and factual constraints affecting the result and the issue in dispute (*Canada Post Corp.* at para 30, citing *Vavilov* at paras 105–107).

[24] Paragraph 67(1)(c) of the IRPA, I would remind you, empowers the IAD to allow an appeal to the IAD where it is of the opinion, having regard to the best interests of the child directly affected, that special relief is warranted on humanitarian and compassionate considerations. However, after considering and weighing all the circumstances of the case and all the relevant factors, the IAD could certainly conclude that the humanitarian and compassionate considerations did not outweigh Mr. Ouedraogo's flagrant failure to comply with his residency obligation. In the end, the errors alleged by Mr. Ouedraogo do not lead me, by any means, to "lose confidence in the outcome reached by the decision maker" (*Vavilov* at para 122).

[25] I would add that the reasons for a decision need not be perfect or even exhaustive. They need only be understandable. The standard of reasonableness is not the degree of perfection of

the decision, but rather its reasonableness (*Vavilov* au para 91). This standard requires that the reviewing court begin with the decision and an acknowledgement that the administrative decision maker has the primary responsibility for making factual determinations. The reviewing court examines the reasons, the record and the outcome and, if there is a logical and coherent explanation for the outcome, the court does not intervene. That is the case here.

[26] I note in passing that Mr. Ouedraogo acknowledges at the outset that the IAD in its Decision correctly relied on the criteria recognized in the case law to determine whether humanitarian and compassionate considerations may justify special relief under paragraph 67(1)(c) of the IRPA (*Ugwueze v Canada (Immigration, Refugees and Citizenship),* 2017 FC 713 at para 18; *Samad v Canada (Citizenship and Immigration),* 2015 FC 30 at para 18; *Ambat v Canada (Citizenship and Immigration),* 2011 FC 292 at para 27). It is useful to summarize them again. In an appeal by a permanent resident who has failed to comply with the residency obligation, these criteria include:

- the extent of the non-compliance with the residency obligation;
- the reasons for the departure from Canada;
- the reasons for continued or lengthy stay abroad;
- the permanent resident's reasonable attempts to return to Canada at the earliest opportunity;
- the permanent resident's initial and subsequent degree of establishment in Canada;
- the contact that the permanent resident has maintained with members of his or her family in Canada;
- the hardship and dislocation that the loss of permanent resident status and return to their country of origin would cause to the permanent resident and their family members in Canada;
- the permanent resident's situation while living abroad;

- the best interests of any children directly affected by the decision; and
- whether there are other unique or special circumstances that merit special relief.

[27] I note that, in all cases, the assessment of humanitarian and compassionate considerations is based on the severity of the breach of the residency obligation that led to the removal order. Mr. Ouedraogo lived in Canada for only 76 days during the five-year reference period before his abrupt return in June 2018, and was therefore absent from Canada for approximately 90% of the time required by the minimum legal residency requirement of 730 days imposed by section 28 of the IRPA. Needless to say, this is a significant deficiency and, in the circumstances, it was reasonable for the IAD to require that the humanitarian and compassionate considerations for maintaining Mr. Ouedraogo's permanent resident status despite such a deficiency be commensurate with the seriousness of the deficiency to counterbalance it (*Patel v Canada (Citizenship and Immigration)*, 2019 FC 394 at para 12).

[28] I turn now to some of Mr. Ouedraogo's more specific arguments.

[29] With respect to his establishment in Canada, the Decision reveals that Mr. Ouedraogo's efforts upon his arrival in Canada in 2013 amounted to no more than finding contractual employment and sharing an apartment. There was no evidence before the IAD of opening a bank account, obtaining a driver's license, acquiring housing or taking any other action that might have reflected a more tangible degree of settlement. Mr. Ouedraogo's only more sustained settlement efforts came as a result of his return in June 2018, subsequent to the reporting period for which he is found not to have met his residency obligation. The IAD was therefore justified in giving only limited weight to this.

[30] The IAD also extensively reviewed the reasons why Mr. Ouedraogo had to leave Canada to be with his emotionally distressed wife. Regarding Mr. Ouedraogo's situation while he was outside of Canada, the IAD reviewed in detail the various events that affected his ability to return to Canada. The IAD considered Mr. Ouedraogo's wife's post-partum health problems, financial obstacles, difficulties in obtaining a passport, and conflicts with his in-laws. Far from ignoring these circumstances, the IAD analyzed them and found that, on a balance of probabilities, Mr. Ouedraogo's efforts to return to Canada during the critical period were rather timid. After considering these factors, the IAD determined that the situation was not the result of humanitarian and compassionate considerations that could be accepted by the IAD, as Mr. Ouedraogo's reasons for not being in Canada were the result of his personal choices and not the result of events beyond his control. I find nothing unreasonable in this analysis by the IAD.

[31] The IAD was also able to give little credence to Mr. Ouedraogo's explanation that he was prevented from returning to Canada at the first opportunity because of his duty to remain with his wife to support her and his daughter following childbirth. The IAD found that Mr. Ouedraogo was placed in similar circumstances after the birth of his second child and was still able to leave Burkina Faso quickly to return to Canada, just before his permanent resident status expired.

[32] The IAD also noted that Mr. Ouedraogo's family members live in Burkina Faso and that his wife works there. His daughters, aged five and one at the time of the IAD hearing, live there with their mother and extended family. The extended family are not established in Canada in any way. Therefore, a reunification of the family in Canada or even establishment was not foreseen in the near future.

[33] Finally, the evidence on the record did not contain any evidence relating to the best interests of the children or demonstrating the hardship resulting from the loss of Mr. Ouedraogo's permanent resident status in Canada. There is no basis to question the IAD's analysis in this regard. Indeed, it appears from the Decision that the IAD considered factors related to the emotional, social, cultural and physical well-being of the two children by assessing their age, their degree of dependence on their father, their degree of establishment in Canada, their connection to and conditions in Burkina Faso, their health status, the impact on their education, and issues related to the children's gender (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 40). Again, there is nothing in the Decision to support Mr. Ouedraogo's argument that the IAD ignored the evidence before it.

[34] It is well recognized that an administrative decision maker is presumed to have weighed and considered all of the evidence before him or her, unless the contrary is established (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 36; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL) at para 1). Moreover, failure to mention a particular piece of evidence does not mean that it has been ignored or discounted (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16), and a decision maker is not required to refer to all of the evidence that supports his or her conclusions. It is only when the decision maker is silent on evidence that clearly supports a contrary conclusion that the Court may intervene and infer that the decision maker overlooked the contradictory evidence in making his or her finding of fact (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9–10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and*

Immigration), [1998] FCJ No 1425 (QL) [*Cepeda-Gutierrez*] at paras 16–17). However, *Cepeda-Gutierrez* does not support the proposition that the mere failure to refer to important evidence that contradicts the decision maker's conclusion automatically renders the decision unreasonable and causes it to be set aside. On the contrary, *Cepeda-Gutierrez* states that only when the evidence omitted is essential and directly contradicts the decision maker's conclusion can the reviewing court infer that the decision maker failed to take into account the evidence before him or her. This is not the case here, and Mr. Ouedraogo has not referred the Court to any such evidence.

[35] I can appreciate that Mr. Ouedraogo may disagree with the IAD's unfavourable assessment and challenge the weight given to the various factors at issue. However, it is not for the Court to change the weight given by the IAD to the various humanitarian and compassionate considerations. On judicial review, the Court is not permitted to substitute its own assessment of the evidence for that of the administrative decision maker. Deference to an administrative decision maker includes deference to his or her findings and assessment of the evidence (*Canada Post Corp.* at para 61). The reviewing court must in fact refrain from "reweighing and reassessing the evidence considered by the decision maker" (*Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, citing *Khosa* at para 64). I would add that, as an administrative appeal tribunal, the IAD has considerable expertise in hearing and deciding appeals under the IRPA, which therefore requires this Court to accord it a high degree of deference (*Khosa at* para 58; *Li v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 451 at para 26; *Charabi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1184 at para 21). In this case, the arguments raised by Mr. Ouedraogo,

and his repeated recriminations about the IAD's errors in its [TRANSLATION] "assessment" or [TRANSLATION] "appreciation" of the evidence, are more an expression of his disagreement with the analysis of the evidence and the weighing of the various factors by the IAD in the exercise of its discretion and expertise. Mr. Ouedraogo is in fact inviting the Court to re-weigh the evidence in his favour and reassess the humanitarian and compassionate considerations analyzed by the IAD. It is not the role of the Court to engage in such an exercise.

[36] The purpose of review on a reasonableness standard is to understand the basis on which the decision is made and to identify whether there are sufficiently central or significant deficiencies or whether the decision reveals an unreasonable analysis (*Vavilov* at paras 96–97, 101). The party challenging the decision must satisfy the reviewing court that "any shortcomings or flaws relied on . . . are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100). In this case, I am satisfied that the IAD's reasoning can be followed without a decisive flaw in rationality or logic and that the reasons were analyzed in such a way that could reasonably lead the IAD, having regard to the evidence and the relevant legal and factual constraints, to conclude as it did (*Vavilov* at para 102; *Canada Post Corp.* at para 31). There is no serious deficiency in the Decision that would taint the analysis and that would be likely to undermine the requirements of justification, intelligibility and transparency.

[37] In closing, it is worth noting that an exemption on humanitarian and compassionate grounds remains an exceptional and highly discretionary measure which cannot be applied lightly (*Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 at para 15; *Adams v*

Canada (Citizenship and Immigration), 2009 FC 1193 at para 30). The IAD has very broad discretion in this matter and it is for the IAD, in exercising that discretion, to determine, pursuant to paragraph 67(1)(c) of the IRPA, what the relevant humanitarian and compassionate grounds are and why special relief would be justified, having regard to all the circumstances. This is not a situation where some of the usual criteria for finding humanitarian and compassionate considerations were present and others were not. Rather, Mr. Ouedraogo's case presents a situation where each of the traditional indicators upon which humanitarian and compassionate considerations and special relief are normally based were simply absent, whether it was the degree of establishment in Canada, the efforts to return, the hardship that might be experienced, the interests of a child to be protected, or the family ties to be maintained.

IV. Conclusion

[38] For all these reasons, Mr. Ouedraogo's application for judicial review is dismissed. I find nothing irrational in the decision-making process followed by the IAD or in its findings. Rather, I find that the IAD's analysis bears the hallmarks of transparency, reasonableness and intelligibility, and that the Decision is not tainted by any reviewable error. According to the standard of reasonableness, it is enough for the Decision to be based on an internally coherent and rational chain of analysis and be justified in relation to the facts and the law that constrain the administrative decision maker. That is the case here.

[39] Neither party has proposed a question of general importance. I agree that none arises here.

JUDGMENT in IMM-551-20

THIS COURT DECIDES as follows:

1. The application for judicial review is dismissed, without costs.

2. No question of general importance is certified.

"Denis Gascon"
Judge

Certified true translation
Michael Palles, Reviser

FEDRAL COURT

SOLICITORS OF RECORD

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