

Federal Court



Cour fédérale

Date: 20230927

Docket: IMM-5383-22

Citation: 2023 FC 1307

Ottawa, Ontario, September 27, 2023

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

LACHHMAN DAS

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Lachman Das is citizen of Pakistan. He seeks judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board. The IAD upheld a determination by a visa officer [Officer] that there were insufficient humanitarian and

compassionate [H&C] grounds to justify granting Mr. Das permanent residence pursuant to s 28(2)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

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

II. Background

[3] Mr. Das immigrated to Canada with his family in 2010. He had permanent resident status and was entitled to work, but he struggled to find employment in Canada. While working as an unregistered massage therapist, Mr. Das sexually assaulted a client contrary to s 271 of the *Criminal Code*, RSC 1985, c C-46. On April 2, 2014, the Ontario Court of Justice convicted Mr. Das and sentenced him to six months in prison.

[4] A report was prepared in relation to Mr. Das pursuant to s 44 of the IRPA, and he was found to be inadmissible for serious criminality. He was referred to an admissibility hearing for the issuance of a deportation order. Mr. Das failed to appear for the admissibility hearing, and a warrant was issued for his arrest.

[5] On or about November 8, 2014, Mr. Das left Canada and travelled to Pakistan. He stayed there briefly before moving to Oman, where he currently works as a doctor to support his family.

[6] Mr. Das' family includes his wife, their daughter, and their two sons. At the time of his application, all three children were adults in their twenties. Both sons have significant disabilities. The youngest son has intellectual deficits and developmental delays, and the eldest

has cognitive deficits. With the exception of Mr. Das, all members of the family are Canadian citizens.

[7] Mr. Das says that the needs of his sons have become more burdensome as they have grown older. Their challenges range from maintaining proper hygiene to self-harm. Mr. Das' wife and daughter struggle to care for the sons in his absence.

III. Decision under Review

[8] On October 6, 2020, Mr. Das applied for permanent residence on H&C grounds and for criminal rehabilitation pursuant to s 36(3)(c) of the IRPA. He was interviewed by telephone on March 24, 2021.

[9] In his application for permanent residence, Mr. Das declared that he had been present in Canada for zero days during the preceding five-year time period. The Officer determined that Mr. Das had failed to comply with the requirements of residency under s 28 of the IRPA. The Officer took into account H&C considerations and the best interests of the children [BIOC].

[10] Mr. Das appealed the Officer's decision pursuant to s 63(4) of the IRPA. The IAD affirmed the Officer's determination that there were insufficient H&C considerations to justify special relief.

[11] The IAD's decision was based on the following findings:

- Mr. Das' breach of the residency requirement was significant and he therefore needed a high level of H&C considerations;
- Mr. Das' reasons for leaving Canada were a negative factor in the assessment;
- Mr. Das' family ties to Canada warranted special relief but his lack of material and social establishment weighed against special relief;
- Mr. Das' strong ties to Oman weighed against special relief and his ties to Pakistan were neutral;
- No minor children would be affected by the outcome of the appeal; and
- The difficulties Mr. Das' children face weighed in favour of special relief.

[12] The IAD concluded that the factors favouring special relief, specifically Mr. Das' family ties and the challenges faced by his children, were insufficient to overcome the factors weighing against special relief.

IV. Issue

[13] This sole issue raised by the application for judicial review is whether the IAD's decision was reasonable.

V. Analysis

[14] The Officer's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only where "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[15] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[16] The Officer's GCMS notes form a part of the decision under review (*Ebrahimshani v Canada (Citizenship and Immigration)*, 2020 FC 89 at para 5).

[17] Mr. Das argues that the IAD (a) failed to conduct a proper BIOC analysis; (b) misapprehended his reasons for leaving Canada; (c) overstated the potential for his sons to visit him in Oman; and (d) exaggerated his ties to Oman.

A. *Best Interests of the Children*

[18] Mr. Das says the IAD failed to apply a proper BIOC framework. He argues that if the proper BIOC framework had been applied, then the best interests of his two sons would have been “very significant factors in favour of granting the appeal”.

[19] Counsel for Mr. Das places great emphasis on the IAD’s failure to cite this Court’s decision in *Yoo v Canada (Citizenship and Immigration)*, 2009 FC 343 [*Yoo*], and notes that the decision was explicitly brought to the tribunal’s attention. In *Yoo*, Justice Leonard Mandamin confirmed that adult children are entitled to receive the benefit of a BIOC analysis if they will be adversely affected by the decision maker’s determination.

[20] Despite not citing *Yoo* in its decision, it is clear that the IAD did in fact conduct a BIOC analysis in relation to all of Mr. Das’ children. The IAD found that “the difficulties facing the [Applicant’s] sons and his daughter weigh in favour of granting special relief.” The IAD accepted the evidence of the significant difficulties experienced by Mr. Das’ two sons, as well as his daughter’s struggle to cope. The reasons were responsive to the record and the BIOC were found to weigh in favour of granting special relief. I am satisfied that the IAD was “alert, alive and sensitive” to the adult children’s best interests (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75).

[21] There is no specific formula or approach to conducting a BIOC analysis (*Canada (Citizenship and Immigration) v Habti*, 2022 FC 433 at para 23; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 35). There are multiple factors that may

affect a child's best interests, and the analysis is highly contextual. The IAD was not obliged to state or apply a specific test; rather, it was required to consider all of the circumstances holistically. I am satisfied that it did so.

B. *Mr. Das' Reasons for Leaving Canada*

[22] The IAD observed that "keeping a job outside of Canada is contrary to the objectives of the [IRPA]" (citing *Canada (Public Safety and Emergency Preparedness) v Abderrazak*, 2018 FC 602 [*Abderrazak*] at para 24). Mr. Das says that, unlike the applicant in *Abderrazak*, he was unable to find work in Canada, and he was forced to leave in order to ensure his family's financial well-being.

[23] The Respondent notes there was no evidence before the IAD to support Mr. Das' contention that there were no viable options for him to remain in Canada. On the contrary, Mr. Das had a history of finding various temporary forms of employment, including as a security guard, a factory worker, and a massage therapist.

[24] It was open to the IAD to find that Mr. Das' departure from Canada was for reasons contrary to the objectives of the IRPA. Seeking employment outside of Canada is fundamentally inconsistent with the scheme of the IRPA (*Canada (Citizenship and Immigration) v Miteyo*, 2021 FC 763 at para 25, citing *Abderrazak* at para 24). Furthermore, Mr. Das' reasons for leaving Canada were not limited to his poor employment prospects. He had been convicted of a serious criminal offence, and he was facing an admissibility hearing that he ultimately failed to attend.

C. *Potential for the Sons to Visit Mr. Das in Oman*

[25] The IAD said the following about the potential for the sons to visit Mr. Das in Oman (at para 38):

Although the Appellant's sons are not able to live in Oman under his residency permit, they have visited their father in that country and elsewhere for extended periods. At the time of the second sitting in the appeal, the elder son was in Oman with his parents and expected to return to Canada in May 2022. While not ideal, these periodic extended stays in Oman could mitigate the hardship arising from the Appellant's sons' conditions because it could relieve the burden on Witness 2 and allow the Appellant to guide his sons.

[26] Mr. Das disputes that stays of two or three months may be reasonably described as "extended visits". He argues that visits of this duration are insufficient to allow him to fulfill his role as a father figure.

[27] I agree with the Respondent that the IAD reasonably considered visits by the sons to Mr. Das in Oman of two or three months at a time to be "extended visits". The IAD found that the situation was "not ideal", but would nevertheless help to mitigate the hardship arising from the sons' conditions. It is not the role of this Court on judicial review to re-weigh the evidence and substitute its view for that of the tribunal (*Pulido v Canada (Citizenship and Immigration)*, 2023 FC 463 at para 29).

D. *Mr. Das' Ties to Oman*

[28] Mr. Das disagrees with the IAD's conclusion that his "strong ties to Oman weigh against special relief." He says the IAD failed to consider his advancing age and future prospects, and only considered his financial status, assets, and the lengthy period of time he has lived in Oman. He says he has no family or social ties in Oman.

[29] Once again, Mr. Das is asking this Court to re-weigh the evidence that was before the IAD. That is not the role of the Court on judicial review.

[30] Mr. Das has an open-ended residency permit in Oman, renewable every two years. He is gainfully employed as a doctor. He maintains a residence and a car, as well as bank accounts in that country. It was open to the IAD to conclude that he had strong ties to Oman. Indeed, given Mr. Das' insistence that his employment prospects in Canada have always been poor, it is unclear how he could better provide for his family financially if he were to return to this country.

VI. Conclusion

[31] The application for judicial review is dismissed. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

“Simon Fothergill”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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