Date: 20080130

Docket: IMM-1853-07

Citation: 2008 FC 92

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HASSAN GHARANEJAD-DASHKESEN

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board (the "IAD"), which allowed the respondent's appeal from a visa officer's decision that the respondent had failed to comply with the residency obligations of Canadian permanent residents.

[2] The respondent did not file a respondent's record. Furthermore, he was neither present nor represented at the hearing before me.

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[3] The respondent is an Iranian citizen who came to Canada for the first time, with his wife, in 1990 on a temporary permit. In either 1992 or 1993, the respondent and his wife had a son (there is considerable confusion in the Tribunal Record with regard to dates, which seems to be partially explained by the difference between the Canadian and Iranian calendars). At some point after the birth of his son, the respondent returned to Iran. In 1996, the respondent was sponsored by his wife and returned to Canada as a permanent resident. However, the couple separated shortly thereafter. The respondent returned to Iran, travelling to Canada a number of times until November 2005, when a visa officer refused to grant the respondent travel documents to return to Canada, as he had failed to spend the required amount of time in Canada.

[4] The respondent appealed the visa officer's decision to the IAD, although rather than challenge the substance of the decision, he sought consideration on humanitarian and compassionate ("H&C") grounds. The respondent explained that he had spent so much time in Iran in order to ensure that his pension would vest. Now that he was receiving his pension, the respondent wanted to return to Canada to spend more time with his son. The respondent also explained that, when he had been in Canada, his ex-wife had allowed him to see his son once a week, but that, since his departure from Canada, he had not spoken to his son, as this would be too stressful for his son, or to his ex-wife.

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[5] The IAD summarized the facts of the respondent's case, and noted that the factors that should be considered in an H&C decision of this kind include the length of time spent in Canada, the reasons for leaving Canada, the appellant's circumstances while away from Canada, and the hardship to family members in Canada and to the appellant if the appellant is refused admission to Canada. The IAD also noted that these factors are not exhaustive and the weight to be given to each factor may vary.

[6] According to the IAD, "[a]part from his son, the appellant's ties to Canada are tenuous. He has no other relatives or property here." However, the IAD concluded that "there are special and unique circumstances present in this case which meet the standard for special relief," particularly the hardship to the respondent and his family members in Canada if he were refused admission to Canada.

> [14] In the present appeal, the Panel is of the opinion that, 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. These may be summarized as follows:
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> 1. The age and the fact that the appellant is a pensioner will limit the appellant's ability to visit his son regularly in Canada;
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> 2. The appellant cannot communicate with his son via telephone because of the stress it causes to his son;
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> 3. The ability of the appellant to see his son on a weekly basis, at least for now, even if it only involves taking his son out to a restaurant, which is what they did together, can only improve the quality of life of the boy.

[7] Therefore, the IAD found that the respondent had not lost his permanent resident status.

[8] The following provisions of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (the "Act") are relevant:

63. (4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.	**63.** (4) Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.
67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67.** (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :
(*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.	*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.

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[9] The Federal Court of Appeal examined the standard of review applicable to H&C decisions of the IAD in *Khosa v. Minister of Citizenship and Immigration,* 2007 FCA 24, [2007] F.C.J. No. 139 (QL). It determined that the applicable standard of review is reasonableness *simpliciter*. Although the IAD has relative expertise in assessing H&C factors, the decision is not protected by a full privative clause, is not polycentric, and "relates to human interests." Although that case centered on the question of the "possibility of rehabilitation," I see no reason to depart from that standard in this case.

[10] Paragraph 67(1)*c*) of the Act gives the IAD the discretion to allow an appeal on the basis of H&C factors. The onus is on an applicant to demonstrate that H&C factors exist which justify a favourable decision (*Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84).

[11] The applicant argues that, although the IAD identified the correct factors to be considered, it erred by failing to weigh the relevant factors, such as how much time the respondent had spent in Canada, or the lack of work available to the respondent in Canada. In that regard, I agree with the applicant's submissions contained in paragraphs 31 to 38 inclusive of his Memorandum of Argument, which read:

> 31. However, the IAD failed to consider and weight all of the relevant factors it listed. No proper balancing was made by the Board.
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> 32. For instance, the factors related to the length of time the Respondent spent in Canada, his degree of establishment in Canada and his ties to Canada are important ones, especially in the case of an individual who failed to comply with his residency obligation as did the Respondent.
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> 33. The IAD's analysis with respect to such factors is laconic and insufficient.
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> 34. The IAD acknowledged that apart from his son, the Respondent's ties to Canada are tenuous, that he has no other relatives or property in Canada.
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> 35. Then, the IAD held that "despite all of this", it found that there are unique and special circumstances in this case and in particular the hardship to family members in Canada (the son) and hardship to the Respondent.
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> 36. The IAD's analysis is flawed and the words "despite all of this" fall short to provide a sound and thorough reasoning. The Board made no proper weighing or balancing of all the relevant factors,

> both favouring and mitigating against the Respondent. The IAD disregarded, without providing sufficient reasons, factors mitigating against the Respondent and solely considered the favoring ones.
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> 37. On that point, the Applicant adds that the IAD made no finding as to the length of time the Respondent indeed spent in Canada. This has a direct bearing on how much time the Respondent would have spent with his son in Canada. According to the CAIPS notes (Applicant's Record, pp. 44 and ff. – Exhibit A of V. Grillas' affidavit), which refer to an interview held with the Respondent and to an assessment of his passport (e.g. Exit and Entry stamps), the Respondent spent most of his time in Iran.
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> 38. Furthermore, the IAD is also silent as to the evidence that the Respondent never worked while in Canada [Affidavit of Vicky Grillas, par. 9] and failed to take into account that element which goes to the establishment aspect.

[12] The applicant also argues that there was no evidence before the IAD which would allow it to reach the conclusions that it did with regard to the respondent's limited ability to visit his son or to communicate with him by telephone, and with regard to the respondent's son's interests. In that regard, I also agree with the applicant's submissions contained in paragraphs 43 to 54 inclusive of his Memorandum of Argument, which read:

> 43. With respect to the nature of the relationship between the Respondent and his son, to the personal situation of the son or to the quality of life of the child, the Respondent submitted no documentation whatsoever and had no witnesses at the hearing [Affidavit of Vicky Grillas, par. 6.] The only evidence provided was the Respondent's own testimony.
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> 44. The Board had no specific evidence with respect to the actual quality of life of the boy and what would improve it. The IAD speculated. The Board simply assumed that seeing his father once a week can only be positive for the son. However, all findings have to be made with regard to all the circumstances of the instant case and need evidentiary foundation.

45. It is trite law that a tribunal must base its decision on reasonable inferences drawn from the evidence before it. The "tribunal of fact cannot resort to speculative and conjectural conclusions" [*Satiacum v. M.E.I.* (1989), 99 N.R. 171 (F.C.A.), at paras. 34-35, quoting *R. v. Fuller* (1971), 1 N.R. 112.]

46. The IAD drew the above finding while being silent as to other relevant elements on this point, including the fact that the Respondent:

- spent a lot of time in Iran, away from his son, over the past years. While in Iran, the Respondent has no communication via telephone with his son; he has been in Iran since the Fall of 2005;
- has not spoken to the mother of his son since he left Canada in the Fall of 2005;
- has provided no proof that he would have communicated in writing with his son or the mother of his son ([for] example: letters, cards, e-mails, pictures) while in Iran.

47. So, at the time of the IAD's hearing, what is the relationship with the son and the personal situation of the latter? What is really in the best interest of the child in the instant matter? This goes to the core of the Board's reasoning and yet, its analysis is incomplete; it falls short to weight the whole context before it and to address the lacunae in the Respondent's evidence.

48. Moreover, the IAD also based its conclusion on the Respondent's allegation that while in Iran, he cannot communicate with his son via telephone because of the stress it causes to his son.

49. Again, the Respondent provided no specific evidence as to the personal situation of his son to support such an allegation. The Applicant submits that the sole fact that his son, now fourteen years old, has Down Syndrome does not suffice to explain the purported stress of communication by telephone with his father.

50. In fact, the IAD had other elements of evidence it failed to consider to fully and properly assess the Respondent's allegation about communication.

51. Indeed, at the hearing, the Respondent stated that his son knows how to speak and does communicate with his father in the English language, that his son is going to a regular school and attends regular classes [Affidavit of Vicky Grillas, par. 10.] This is part of the context relating to the son and yet, the IAD is completely silent thereon despite the fact that it sheds a different light to the story.

> 52. Thus, the Applicant submits that the IAD's conclusion is based on a selective assessment of the elements favourable to the Respondent while disregarding, without proper reasons, other relevant elements. This is a central issue and the IAD made an error by not considering all the elements of evidence and by failing, in its analysis, to explain why it preferred the ones it relied upon to the detriment of other relevant ones that brought a different light to a major aspect relating to the child [*Gutierrez v. Canada (M.C.I.)* (1998), 157 F.T.R. 35.]
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> 53. Moreover, the IAD's finding that the age and the fact that the Respondent is a pensioner will limit the Respondent's ability to visit his son regularly in Canada is based on conjecture or speculation, rather than on the evidence adduced at the hearing.
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> 54. Firstly, the Respondent adduced no documentation at the hearing with respect to special circumstances related to his ability to travel to Canada. Secondly, there is nothing in the Board's reasons showing that the Respondent ever even raised possible concerns in that respect. The sole fact that the Respondent nears 70 years old is not sufficient, in and of itself, to draw a finding that his ability to travel will be limited. The same goes for the fact that he is a pensioner in Iran. The Board's conclusion is ill-founded and unreasonable in light of the evidence before it.

[13] I therefore find that the IAD made several material errors of fact and law when concluding that the respondent did establish, in light of all the circumstances of this case, sufficient H&C considerations relating to the best interests of the child and to the hardship to the respondent if not admitted to Canada to see his son.

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[14] For all the above reasons, the application for judicial review is granted, the IAD's decision dated April 13, 2007, is set aside, and the matter is sent back to a differently constituted panel of the Immigration Appeal Division for reconsideration.

"Yvon Pinard"

Judge

Ottawa, Ontario
January 30, 2008

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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No appearance	THE RESPONDENT ON HIS OWN BEHALF

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