Date: 20120229

Docket: IMM-1394-11

Citation: 2012 FC 277

Ottawa, Ontario, February 29, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

HUBERT LICHTENBERGER

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Board), dated February 22, 2011 and signed on March 30, 2011, wherein a visa officer's decision to deny the respondent's application for permanent resident status based on his failure to meet the residency obligation under section 28 of the Act was overturned. This conclusion was based on the Board's finding that, on a balance of

probabilities, the respondent had established sufficient humanitarian and compassionate (H&C) considerations to warrant special relief.

[2] The applicant's submissions generally suggest that he seeks to have the Board's decision set aside.

Background

[3] The respondent is an Austrian citizen. He is not married or in a common-law relationship and does not have any children. His immediate family (mother and two sisters) live in Austria and he has no family in Canada.

[4] The respondent became a Canadian permanent resident in October 2000 and worked intermittently as a truck mechanic before returning home in March 2001 to take a truck mechanic certification exam. The following year, he returned to Canada and stayed for 14 months before returning to Austria to have cataract surgery. This surgery was available free of charge to him in his home country. After the surgery, the applicant returned to Canada and later continued to travel back and forth between the two countries, submitted several applications for travel documents and received counselling from the Citizenship and Immigration Canada (CIC) on the conditions associated with his travel documents.

[5] The evidence on the respondent's length of stay in Canada between December 10, 2004 and December 10, 2009 is conflicting. Nevertheless, it generally provides that he returned to Austria in

2005 to undergo a second cataract surgery. In January 2007, he returned to Canada and stayed through to October 2007. The following year, he spent some time working in Austria. He also spent some time in New Zealand and/or Australia in 2006, 2008 and 2009. In 2009, the respondent again returned to Austria, this time to spend time with his elderly and ailing father and to support his grieving mother after his father's death on January 1, 2010.

[6] On December 10, 2009, the respondent submitted his overseas application for permanent resident status in Canada.

[7] On January 18, 2010, a visa officer in the Canadian Embassy in Austria denied the respondent's application for permanent resident status based on his failure to meet the residency obligation under section 28 of the Act, namely, that he had not met the 730 day obligation in the five year period preceding the date of his application. The visa officer was also not satisfied that the respondent's personal circumstances involved H&C considerations that justified the retention of his permanent resident status.

[8] The respondent appealed the visa officer's decision to the Board. He did not challenge the decision that he had not met the residency obligation of 730 days in the five year period. Rather, he requested that the Board exercise its discretion under paragraph 67(1)(c) of the Act by granting special relief on H&C grounds.

Board's Decision

[9] The respondent's appeal was heard by the Board on February 22, 2011. The Board's decision was rendered orally on the same day and its written decision was issued on March 30, 2011.

[10] The Board found the respondent to have significant compliance with his residency obligation, although he fell significantly short of complete compliance. It acknowledged the respondent's increasing lengths of stay in Canada, from 50 days, to 67 days, to 90 days, and finally 294 days and found this trend indicative of the respondent's increasing commitment to establish in Canada. In addition, the Board found that during his most recent and longest stay in Canada, the respondent established continuing relationships through his employment.

[11] The Board delved into the respondent's reasons for returning to Austria, particularly his return trips to have cataract surgeries there. Although the Board explicitly stated that the respondent's choice to have surgery in Austria was not a factor that weighed in his favour, it was nevertheless curious for differing from other permanent resident cases in which individuals had sought to exploit Canada's free medical services, thereby burdening Canadian taxpayers.

[12] The Board also found that it weighed strongly in the respondent's favour that he returned to Austria to spend time with his ailing father and to support his mother emotionally.

[13] The Board then acknowledged the following about the respondent:

1. Aside from some work friends, he does not have any substantial connections to Canada;
2. He owns no real estate and has no family members in Canada;
3. There is no hardship to any family should he lose his permanent resident status;
4. By remaining in Austria, he does not suffer any hardship; and
5. No best interests of any child are affected.

[14] The Board stated that it would likely not find in favour of the respondent except for the fact that he has a substantial degree of compliance and there was evidence before it to establish that the respondent had investigated and sorted through various steps to qualify as a licensed mechanic (including awareness of the specific requirements to upgrade his training and the location for doing so).

[15] In summary, although the Board acknowledged that the balance only somewhat tipped in the respondent's favour, it found that on a balance of probabilities, the respondent has established sufficient H&C considerations to warrant special relief in this case. Therefore, the appeal was allowed and the respondent retained his permanent resident status.

Issues

[16] The applicant submits that it has demonstrated arguable issues of fact and law with respect to the decision on the following grounds:

1. The Board breached the duty of fairness by providing inadequate reasons;

2. The Board failed to weigh and analyze several relevant factors;

3. The Board made a material error of fact;

4. The Board based its decision on findings that were internally inconsistent and/or not supported by the evidence; and

5. The Board gave undue preference to the factor of intent.

[17] I would phrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the Board err in weighing and analyzing the relevant factors in its H&C determination?

Applicant's Written Submissions

[18] The applicant submits that the appropriate standards of review for the issues it raises are as follows: procedural fairness – correctness; questions of mixed fact and law – reasonableness; and questions of fact – reasonableness.

[19] The applicant submits that the Board's reasons were inadequate because they were confusing in places and its reasoning process was difficult to discern. According to the applicant, the reasons did not meet the requirements specified in the jurisprudence, namely, that reasons be clear, precise and intelligible by addressing the major points in issue, setting out the decision maker's reasoning process and reflecting a consideration of the main relevant factors. In support, the applicant highlights the following sections in the decision:

1. Unclear language. The Board stated in an unclear manner that the respondent had "significant compliance with the residency obligation" but also fell "significantly short of complete compliance";

2. Lack of reasons on contrary facts. The Board did not articulate sufficient or adequate reasons on how it weighed the factual findings that worked against an H&C finding; and

3. Irrelevant discussion. The Board's lengthy discussion on what it found to "be curious" and its reference to the best interests of the children where no children were involved obscured its decision-making path.

[20] The applicant submits that due to these errors in its decision, the Board breached the duty of fairness.

[21] The applicant also submits that the Board erred by insufficiently analyzing the evidence and instead basing its decision on unreasonable findings and improperly giving dominance to the factor of intent. The applicant acknowledges the Board's identification of relevant factors, but highlights its failure to explicitly make a determination on those that weighed against the respondent and consequently, overlooking their significance in the balancing analysis.

[22] In addition, the applicant submits that the following two factors, that the Board gave the greatest weight to, were based on unreasonable findings:

1. Substantial degree of compliance. This finding was based on the respondent having spent 501 days in Canada (of the required 730 days) in the five year term preceding his application. This is the same number as was listed on the respondent's note submitted to the Board. It includes

two trips taken in 2004, prior to the five year term, which amounted to a total of 117 days. By removing these non-qualifying days, the maximum number of days in the five year term should have been 384 days. Concurrently, the applicant submits that the Board's finding that the respondent has "significant compliance with his residency obligation, although he falls significantly short of complete compliance" is flawed for its lack of intelligibility.

2. Licensed truck mechanic process. The applicant submits that the Board had no evidence before it on which to base its finding that the respondent had worked through the steps to become a licensed truck mechanic in Canada.

[23] Finally, the applicant submits that the Board erred by allowing the respondent's intention to begin a licensing course on his return to Canada to dominate its balancing of the H&C factors. This was an error in law or, at the very least, an error of mixed fact and law.

Respondent's Written Submissions

[24] The respondent did not make any written submissions.

Analysis and Decision

[25] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the Court, the reviewing Court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[26] It is established law that assessments of findings on H&C applications raise questions of mixed fact and law and are reviewable against a standard of reasonableness (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraph 62; and *Rafieyan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 727, [2007] FCJ No 974 at paragraph 15).

[27] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraphs 59 and 61).

[28] **Issue 2**

Did the Board err in weighing and analyzing the relevant factors in its H&C determination?

In this case, the respondent appealed an overseas visa officer's decision denying his application for permanent residence based on his failure to meet the statutory residency obligations.

Under paragraph 67(1)(c) of the Act, the Board may allow an appeal if it is satisfied that sufficient H&C considerations warrant special relief in light of all the circumstances of the case.

[29] The CIC Manual for Overseas Processing 10 – Permanent Residency Status Determination (OP10) offers guidance for H&C determinations on the retention of permanent resident status where residency obligations have been breached (section 5.4). It is the applicant's responsibility to describe the hardship – unusual and undeserved or disproportionate due to personal circumstances – that a loss of residency status may cause them.

[30] In the case at bar, the Board considered the following factors in its H&C assessment:

1. Factors in favour of dismissing appeal:

    a. respondent's lack of substantial connections, real estate ownership and family members in Canada;

    b. lack of hardship to the respondent or any of his family should he lose his permanent resident status and remain in Austria; and

    c. no arguments raised on the best interests of the children.

2. Factors in favour of allowing appeal:

    a. significant compliance of residency obligations (based on 501 of 730 days in preceding five-year term);

    b. increasing lengths of time spent in Canada (from February 2004 through October 2007);

    c. continuing relationships established during last employment in Canada;

d. reasons for returning to Austria (cataract surgeries and to care for parents); and

e. Respondent's preparation to obtain a mechanic's licence in Canada.

[31] The Board balanced these factors and allowed the respondent's appeal.

[32] Section 14 of OP10 offers guidance on some factors to be considered when assessing H&C grounds. Decision makers are to examine circumstances and events that occurred in the last five year period which led to the particular individual's breach of residency obligations (OP10, page 22). Although H&C applications must be reviewed on a case-by-case basis, OP10 lists some examples of factors to be weighed and considered in an H&C assessment. These include the extent of the non-compliance; circumstances beyond the person's control; establishment outside Canada; and presence and degree of consequential hardship.

[33] Although these factors are only examples of what a Board should weigh and consider, the list does offer some guidance to this application.

[34] With regards to the extent of non-compliance, it is notable that the Board considered the wrong number of days. The respondent was in Canada for 384 days, not 501 days, of the required 730 days in the five year term preceding his application. This is only marginally above half the required time. OP10 also suggests that the medical reasons for the respondent's absence are relevant to the extent of non-compliance. However, in the relevant five year period (December 10, 2004 to December 10, 2009), the respondent did not only return to Austria for medical reasons (one surgery

in 2005 and to care for his ailing parents in 2009) but also left Canada to work temporarily in Austria (in 2006) and in New Zealand and/or Australia (in 2006, 2008 and 2009).

[35] Turning to the circumstances beyond the respondent's control, the medical reasons for his absence are arguably compelling. However, as mentioned above, medical issues were not his sole reasons for leaving Canada and the respondent did not expand on the circumstances of his employment in Austria, New Zealand and Australia during the relevant five year term. The Board also found that the respondent was attempting to return at the earliest time possible and the hearing transcript does suggest that the respondent is eagerly seeking an avenue through which to return. Although the applicant correctly stated that intention is not a determinative factor in the analysis, OP10 recognizes that it is still relevant:

> While "intent" is no longer the determinative factor that it was under the former Immigration Act, the applicant's intent will be taken into consideration as an element of the humanitarian and compassionate assessment. (page 9).

[36] The third example raised in OP10 is the respondent's level of establishment in Canada. As acknowledged by the Board, the respondent clearly lacks any such establishment. The sole linkages he has maintained in Canada are some relationships he established at his place of employment in 2007. The final example in OP10, namely, the presence and degree of consequential harm, is also clearly lacking in this case.

[37] As mentioned above, the standard of review of a Board's decision on H&C assessments is reasonableness and this Court should therefore show deference to the Board's decision. This deference includes not reweighing the evidence (see *Khosa* above, at paragraph 59). However, in its

decision, the Board acknowledged that the balancing of H&C factors only slightly weighed in the respondent's favour. The fact that the Board considered the wrong number of days in Canada (501 days as opposed to 384 days) and did not consider the time that the respondent spent abroad for reasons other than medical (i.e., his employment in Austria, New Zealand and Australia) suggests that the Board failed to weigh all the relevant evidence pertaining to the five year period in question. This evidence, coupled with both the respondent's complete lack of establishment in Canada and lack of hardship to him or his family, suggests that in the circumstances of this case, the Board's decision was not reasonable and should be overturned.

[38] I would therefore allow the application for judicial review and set aside the decision of the Immigration Appeal Division.

[39] No request was made to certify a proposed serious question of general importance.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred back to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.
. . .	. . .
(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.	(1.3) Le ministre, dans l'étude de la demande d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.
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.
(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,

(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,

(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,

(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or

(v) referred to in regulations providing for other means of compliance;

(b) it is sufficient for a permanent resident to demonstrate at examination

(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;

(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) 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

(i) il est effectivement présent au Canada,

(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

(v) il se conforme au mode d'exécution prévu par règlement;

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;

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.

the determination.

. . .

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.

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

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(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.

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

. . .

63. (4) Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.

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

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

b) il y a eu manquement à un principe de justice naturelle;

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.

72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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No One Appearing	FOR THE RESPONDENT

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