Federal Court  Cour fédérale

Date: 20150105

Docket: IMM-4693-14

Citation: 2015 FC 3

Ottawa, Ontario, January 5, 2015

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

DAVID MORROW WRIGHT
KATHRYN ANNE WRIGHT

Respondents

JUDGMENT AND REASONS

[1] The Minister of Citizenship and Immigration brings this application for judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board [IAB], dated May 2, 2014, which found that there were sufficient humanitarian and compassionate [H&C] grounds to grant relief pursuant to paragraph 67(1)(c) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] to overcome the respondents' inadmissibility to Canada for failure to comply with their residency requirements as permanent residents.

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

Background

[3] The respondents, Mr and Mrs Wright, are citizens of the United States of America [USA] who first settled in Vogler's Cove, Nova Scotia in 1972 and became permanent residents of Canada. Mr Wright worked as a lobster fisherman but that proved challenging. Mrs Wright worked at various community newspapers. In 1977, Mr and Mrs Wright left Canada for more stable employment offered by Mr Wright's father in the USA. They did not attempt to find work in any other part of Nova Scotia or elsewhere in Canada at that time or subsequently.

[4] From 1977 to 2012, the Wrights lived in several cities in the USA and Mr Wright worked in a variety of occupations. The Wrights then returned to Vogler's Cove to resettle 35 years later.

[5] The Wrights evidence is that in the intervening 35 years they visited Canada occasionally, including Montreal and Quebec City and some business trips for Mr Wright to Scarborough. They returned to visit Vogler's Cove once in 2005 and made annual visits again in 2006, 2007 and 2008 to look for a house, and ultimately purchased a house in 2010. In January 2012, they returned to Vogler's Cove to live.

[6] On January 25, 2012, the Canadian Border Services Agency [CBSA] prepared an inadmissibility report against both Mr and Mrs Wright for failure to comply with their residency obligations as permanent residents. The Act requires that permanent residents be present in Canada for a total of at least 730 days in each five year period (paragraph 28(2)(a)). The CBSA

considered the five year period preceding the date of the Wrights return to Canada in January, 2012 and found that Mr Wright had been in Canada for 201 days and Mrs Wright for 140 days during this five year period.

[7] The Minister's delegate considered the inadmissibility reports and determined that the reports were well-founded and that no H&C grounds justified exempting the Wrights from their residency requirements and, as a result, a removal order was issued.

[8] The Wrights appealed the removal order to the IAD.

The decision under review

[9] The IAD considered the appeal, conducted an in person *de novo* hearing and issued its decision on May 2, 2014. The decision was communicated to the parties around May 23, 2014.

[10] The decision notes that the Wrights (i.e. the appellants before the IAD and the respondents in this application for judicial review) did not challenge the validity of the removal orders and the IAD agreed that the removal orders were valid. The Wrights argued that H&C grounds existed. The IAD agreed and found that they demonstrated sufficient H&C grounds on a balance of probabilities to warrant special relief pursuant to paragraph 67(1)(c) of the Act, thereby overcoming their breach of the residency obligation.

[11] The IAD set out the factors which guided its evaluation on H&C grounds. Although the IAD correctly stated that this Court has confirmed such factors, the footnote references in the

decision are decisions of the IRB or IAD rather than Federal Court decisions. The IAD considered each factor identified and made several findings.

[12] The IAD found that the duration of the Wrights establishment in Canada, which was seven years since 1972 "is not insignificant without being compelling".

[13] The IAD found that the Wrights establishment in Canada "today" (i.e. in 2014) and since their return is "more important than it was in 1977 and that it is also more important than their establishment in the USA, today." The IAD found this to be a positive factor.

[14] The IAD also found that the Wrights had imperious (meaning compelling) reasons to leave Canada because Mr Wright's work and dream of lobster fishing was not viable and "because of the importance of their economic difficulties". The IAD concluded that they could not afford to linger in Canada where employment was not available in their area.

[15] The IAD notes that during the 35 year absence, Mr Wright had several jobs in various parts of the USA. Mr Wright never sought employment in Canada. The Wrights purchased their first house in 1983 and sold and purchased other homes as they moved across the country. The IAD noted that they did not return to Canada at the first opportunity and found this to be a negative factor.

[16] The IAD notes that the Wrights do not have any children nor do they have family in Canada but that they consider their friends in Vogler's Cove, with whom they have maintained

contact, as family. The IAD remarked that ten members of the Vogler's Cove community attended the hearing to support the Wrights. The IAD concluded that this continuing connection with their friends is a positive factor.

[17] With respect to their integration in the Canadian community, the IAD focused on their integration into Vogler's Cove. Mr Wright was a volunteer firefighter in the 1972-77 period and since his return in 2012 has been participating in fundraising. Mrs Wright has been active in a community library. Both have been socially active with other members of the community. The IAD concluded that this is a positive factor.

[18] With respect to the hardship the Wrights would encounter if their appeals were dismissed and the removal order was enforced, the IAD notes that, based on their testimony, they would be devastated to pack up and leave because their hearts are in Vogler's Cove. The IAD also notes that considering their age and their pension income, it would be difficult for them to travel between two homes in the USA and in Canada.

[19] The IAD notes "It is not that their life is in danger or at risk if they were to live in the USA but the simple fact of moving would be traumatic at an age where life can certainly not be taken for granted". The IAD concluded that the Wrights would experience "serious" hardship if they had to leave.

[20] The IAD then summed up the positive and negative factors and concluded that the positive factors are "more important" than the negative factors and that the appellants have

established on a balance of probabilities that there are sufficient H&C grounds to grant special relief and set aside the removal orders.

[21] The IAD summarized the following positive factors:

- The friends that the Wrights consider as family in Canada and their continuing connection to Canada;
- The Wrights' "important establishment in Canada, more important than their very limited one in the USA at the time of the hearing and also more important than when they were landed or when they left Canada in 1977";
- The Wrights had imperious reasons to leave Canada in 1977;
- The continuous time the Wrights spent in Canada after the issuance of the deportation orders;
- Their "important integration" in the Vogler's Cove community outside of their family and their contribution to that community; and,
- The "important hardship" that the Wrights would experience if their appeals were dismissed "even if their lives would not be at risk in the USA".

[22] The IAD summarized the following negative factors:

- "The importance of the legal impediment though not insurmountable";
- The "more important" length of time the Wrights spent in the USA compared to the length of time spent in Canada since their landing;
- The Wrights did not come back to Canada at the first available opportunity; and,
- The Wrights' extended family is in the USA (which the IAD notes has limited weight because the family is not close).

Issues

[23] The primary issue is whether the decision of the IAD is reasonable; this includes whether the IAD failed to consider relevant evidence, made findings contrary to the evidence, and considered irrelevant evidence.

[24] A preliminary issue is whether the Court should extend the time for the service of the application for leave by the applicant on the respondents.

Standard of Review

[25] The parties agree that the standard of review of the decision of the Minister's delegate is the standard of reasonableness.

[26] Where the standard of reasonableness applies, the role of the Court is to determine whether the decision "falls within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and law' (*Dunsmuir*, below, at para 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome." (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59, citing *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[27] As the respondents note, a reasonable decision is one that can stand up to a somewhat probing examination (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 at para 63 [*Baker*]).

The relevant legislative provisions of the Act, sections 28 and 67, are set out in Annex A.

Preliminary issue - Extension of time for service on the respondents

[28] The applicant's motion to extend the time for service of the application for judicial review and to ratify the late service is granted. The few days delay in serving the respondents was more than adequately explained by the applicant; the applicant established its intention to file; and, the respondents agreed that the explanation is reasonable and conceded that the extension of time for service should be allowed.

Is the decision of the IAD unreasonable?

The applicant's position

[29] The applicant submits that although the Court has not defined the H&C factors to be considered in the case of a breach of residency obligations, the IAD has endorsed, albeit with slightly different wording, a list of non-exhaustive factors.

[30] The applicant submits that, overall, the decision does not respect the policy of the Act. Immigration to Canada is a privilege, not a right, and is governed by the Act. Although the goals of permanent residency include the successful integration into Canadian society, there are also obligations on permanent residents, which includes their physical presence in Canada (or one of the alternatives to physical presence set out in section 28, such as working abroad for a Canadian

company). The applicant submits that the IAD did not interpret paragraph 67(1)(c) and the exceptional relief based on H&C grounds in light of the objectives of the Act.

[31] The applicant argues that in order to make a positive H&C finding, the IAD was required to consider: whether the Wrights have maintained such strong ties to Canada for 35 years; whether the Wrights' reason for leaving Canada was so important; whether their contribution to their community since their return promoted the objectives of the Act; and, whether their return to the USA would put them in an unbearable situation. The applicant notes that these issues should have been considered against the backdrop of the circumstances that the Wrights have no family in Canada and that, although they have friends, they had not visited their friends for approximately 30 years, and they had lived in the USA for 63 years out of their current lifetime of 71 years.

[32] The applicant argues that the IAD failed to consider relevant evidence and considered irrelevant evidence and, as a result, reached findings that were not based on the evidence before it.

[33] The IAD failed to consider the extent of the breach of the Wrights' *residency obligation*. The IAD considered the Wrights' absence from Canada only in the five year period preceding their return in 2012, but failed to properly consider that they were absent for 35 years and failed to comply with their previous residency obligations in each five year period. Although the IAD found their breach to be "not insignificant", the applicant argues that it is far more than this – it is overwhelming.

[34] The applicant further submits that the IAD's assessment of the Wrights' *length of time in Canada and degree of establishment* and its conclusion that the Wrights' establishment in their community was "more important", failed to properly take into account the length of time spent in Canada (seven years in two separate periods) as opposed to the time spent out of Canada (more than 60 years).

[35] The applicant also argues that there is no evidence to support the IAD's finding that the Wrights' establishment since 2012 is greater than it was or had been in the USA or in Canada in the 1972-77 period.

[36] The applicant agrees that there is no doubt that the Wrights are good neighbours and are well liked in their community, but submits that the evidence of their *integration* falls short of establishment. The applicant submits that Mrs Wright's volunteering a few hours per week at the library and Mr Wright's attendance at meetings of the volunteer firefighters, coupled with social visits with neighbours, are not sufficient to base a finding of establishment or integration.

[37] The applicant further notes that Mr Wright continues to do the same work he did in the USA prior to returning to Vogler's Cove via his consultancy work, and that all his clients are in the USA. Similarly, Mrs Wright does some editorial work, also for clients in the USA. The applicant submits that this work could be undertaken from the USA once again. This also shows that the Wrights remain integrated to some extent in the USA and could reintegrate there. The IAD simply failed to consider this in the context of its analysis of their degree of establishment.

[38] With respect to the IAD's finding that the Wrights' had no imperious (i.e. compelling) *reason to leave Canada*, the applicant notes that although the IAD found this to be a negative factor, it failed to consider that the Wrights had no reason for not returning to Canada earlier and did not do so until 2008 when they began to search for a house. Even after they found a house in 2010, they remained in the USA until 2012. The IAD accepted that the Wrights could not relocate until their home in Massachusetts was sold; however, they had already purchased the house in Vogler's Cove and done renovation work before they sold their house in Massachusetts.

[39] There was no evidence that the Wrights ever attempted to find work in Canada. The IAD concluded that they had no choice but to leave for a job offer by family in the USA. The IAD failed to consider that they made no attempt to find work in Vogler's Cove, in Nova Scotia, or elsewhere in Canada. The IAD simply accepted that they had no other options. The applicant notes that moving across the USA was not an impediment to the Wrights, yet the only place they sought to work in Canada, which would have been required in order to maintain their permanent resident status, was the small community of Vogler's Cove.

[40] The applicant submits that the IAD failed to consider Mr Wright's own evidence that his ability to earn money was in the USA. Although Vogler's Cove was the Wrights' dream destination, the USA was the chosen location to earn a living for the past 35 years. The applicant submits, therefore, that the Wrights' attachment is really to the USA and not to Canada.

[41] The applicant also argues that the IAD's finding that the Wrights have *continuing connections* to Canada is not supported by the evidence. According to the IRB and IAD

guidelines, two elements should be considered in assessing this factor; connection to family members in Canada and the dislocation of the family in Canada if removed from Canada.

[42] The applicant notes that the IAD rephrased the factors to substitute friends as family. Although they assert close ties with friends in Vogler's Cove, the applicant notes that the IAD and the IRB factors refer to *family* connections. In addition, the objectives of the Act include promoting the reunification of families, but do not include the objective of reunification of friends.

[43] Moreover, the IAD's finding regarding the Wrights' connections with their friends is not supported by the evidence. The evidence clearly indicates that the Wrights did not return once to Vogler's Cove in at least a 24 year period, although they visited other parts of Canada.

[44] The applicant also argues that it was unreasonable for the IAD to find that the Wrights had no financial ability to return to Vogler's Cove earlier because their own evidence was that they had travelled to other parts of Canada and that Mrs Wright had travelled abroad.

[45] In addition, the IAD did not take into account Mr Wright's statement, in response to a direct question, that he was returning to Canada for retirement.

[46] With respect to the assessment of *hardship*, the applicant submits that there must be hardship beyond the normal consequences of removal. The IAD's finding that the Wrights would suffer serious hardship if they were required to leave Canada is not supported by their own

evidence. Mr Wright indicated in response to specific questions relating to the impact of his return to the USA that "I suppose I could" (Certified Tribunal Record, at p 466) and that the impact would be primarily economic because they would have to maintain two residences.

[47] The applicant submits that the IAD also failed to consider that the Wrights took out a line of credit to purchase the house in Vogler's Cove and paid it off once their home in Springfield, Massachusetts was sold. The IAD did not consider that the Wrights could do the same again upon their return to the USA. As a result, the IAD's consideration of the economic impact on removal was not supported by the evidence. The applicant notes that, understandably, they cannot afford two homes but submits that this type of economic impact is a normal consequence of removal of a person who does not have status in Canada.

[48] The applicant also notes that the record before the IAD included financial information which establishes that, although the Wrights are not wealthy, they have a mortgage free house, a monthly pension income, a tax free savings account and that Mr Wright continues to do his consultancy work, with several clients in the USA.

[49] Mrs Wright indicated that leaving would be emotionally difficult but that she could keep in contact with her friends as she had in the past.

[50] Although the IAD considered the Wrights' age as relevant to the hardship factor, their age was not an impediment to relocation two years ago and there is no evidence that moving back to the USA would be traumatic.

[51] Separation from friends and the disruption and economic impact of relocation are the normal consequences of a removal order. The facts do not support a finding of either "serious" hardship or "important hardship" as found by the IAD.

[52] The applicant emphasizes that the Minister is not asking the Court to reweigh the evidence and rebalance the factors for and against a finding that there were sufficient H&C grounds, rather that the Court determine whether the IAD's findings are supported by the evidence. The IAD reached an unreasonable conclusion because it failed to consider relevant evidence, made findings contrary to the evidence and considered irrelevant evidence.

The respondents' position

[53] The respondents submit that their 35 year absence is not the issue. The issue is whether the IAD reasonably found that there were sufficient H&C factors to overcome the breach of their residency obligation. This discretion has been delegated to the IAD as it is the expert body and is aware of the objectives of the Act. The respondents submit that regardless of the length of time away or the degree of their non-compliance with the Act, the IAD was alert to all the relevant factors and provided cogent reasons for its findings.

[54] The respondents argue that the applicant is merely challenging the conclusion of the IAD which the applicant disagrees with and, given that the Court cannot reweigh the evidence considered by the IAD, the applicant has failed to establish how the decision is unreasonable. The respondents note that the IAD conducted a full day hearing, found them to be highly credible, and carefully analyzed the facts and the circumstances of their absence from Canada.

The respondents argue that the applicant has not rebutted the presumption that the IAD considered all the evidence.

[55] The respondents' position is that the decision is intelligible, transparent and justified. The Court should, therefore, defer to the expertise of the IAD.

[56] The respondents dispute the applicant's characterisation of the onus on those seeking special relief and the IAD's task in assessing the H&C grounds. They argue that there is no requirement for the situation upon removal to be unbearable, nor does the hardship have to be undue or disproportionate, as established in the context of section 25 of the Act. The respondents note that paragraph 67(1)(c) requires only that there be "sufficient" H&C grounds.

[57] The respondents also dispute the allegation that the IAD considered irrelevant evidence or failed to consider relevant evidence. The IAD is presumed to have considered all the evidence and need not mention every piece of evidence in its reasons.

[58] With respect to the *length of time the Wrights remained outside of Canada*, the respondents contest the applicant's position that the length of their absence cannot be overcome by H&C factors. There is no limit on the number of years of absence which cannot be overcome by H&C grounds; if that were Parliament's intention, the Act would provide for such a limit. The IAD considered the length of time they were outside of Canada, yet still exercised its discretion to overcome their breach of the residency obligation due to the H&C grounds.

[59] The respondents also note that, although the IAD focussed on the five year period preceding their return in 2012, it did not ignore the length of their time out of Canada and assessed this as a negative factor.

[60] The respondents take issue with the applicant's characterisation that their *reasons for leaving* were *only* economic and that this was not a sufficient reason. The respondents, however, agree that they did not make any attempt to find work in Canada and their testimony indicated that when faced with a firm offer of employment in the USA and given that they were nearly destitute in 1977, it was reasonable for them to leave.

[61] The respondents submit that, contrary to the applicant's argument, the IAD specifically acknowledged that they made no attempt to return to Canada at the first opportunity as they moved to various cities in the USA and assumed various jobs. The IAD found this to be a negative factor.

[62] With respect to *establishment and integration in the community*, the respondents argue that they were as integrated and established as possible in their community given its small size. Contrary to the applicant's argument that the Wrights' volunteer work and social activities do not constitute sufficient reintegration or establishment, the IAD recognised that this was indeed sufficient. They submit that the size and character of the community informs what it means to be active in the community. In Vogler's Cove, there is little more one could do to be more established.

[63] The respondents note that the list of factors to be considered by the IAD is not exhaustive; the IAD is entitled to consider any factor that arises from the particular circumstances of the case. The IAD reasonably considered the Wrights *continuing connections* to their friends in Vogler's Cove as part of the particular circumstances of their case and not as a substitute or an extension of the factor regarding connections to family.

[64] The respondents also dispute the applicant's argument that the IAD failed to consider that their return was for the purpose of retirement. Mr Wright's testimony about retiring to Vogler's Cove was taken out of context. The transcript of Mr Wright's testimony indicates that his reference to retirement was based on a definition put to him by counsel for the Minister, meaning retirement from full time employment in the USA. Mr Wright continues to work and has transferred his business to Canada. Although he is in receipt of social security benefits, these are payable at the age of 65 years of age regardless of retirement from full time employment. The respondents submit that this testimony does not support the applicant's contention that the Wrights had no continuing intention to return to Canada during their "active" life.

[65] The respondents argue that the IAD's failure to refer to any particular piece of evidence is not fatal. The IAD had the opportunity to witness the Wright's testimony and found them to be highly credible. The IAD identified the factors to be considered, made a finding on each one and on a balance of probabilities, found there were sufficient H&C grounds to overcome the breach of the obligations of permanent residents.

[66] Generally, the respondents argue that the IAD is an expert tribunal and given that it conducted a thorough hearing and a careful analysis of the evidence and assessed the relevant factors both for and against H&C grounds, its exercise of discretion is reasonable and entitled to deference.

The decision of the IAD is not reasonable

[67] The IAD was impressed by the Wrights and understood their dream to live in Vogler's Cove. There is no dispute that their testimony was candid and credible. Nor is there any issue about their adaptability to the community or that they would be good residents. However, the criteria for immigration are more onerous, as are the criteria for overcoming a breach of the obligations of permanent resident status.

[68] The reasonableness standard of review requires more than a clearly worded decision that identifies the factors considered and the conclusions reached. The standard of reasonableness requires that the findings and overall conclusion withstand a somewhat probing examination. Where evidence is not considered or is misapprehended and where the findings do not follow from the evidence, the decision will not withstand the probing examination.

[69] As the respondents noted, the standard for a somewhat probing examination was noted by the Supreme Court of Canada in *Baker* at para 63:

> [63] I will next examine whether the decision in this case, and the immigration officer's interpretation of the scope of the discretion conferred upon him, were unreasonable in the sense contemplated in the judgment of Iacobucci J. in *Southam*, *supra*, at para. 56:
>
> > An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a

> somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. *The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it*. [emphasis added]

[70] In *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 [Ambat], Justice Near (as he then was) noted at paras 32 and 33:

> [32][…] The IAD is free to weigh each factor, and is consequently free to give no weight to any given factor depending on the circumstances. The Respondent cited Justice Yves de Montigny's decision in *Ikhuiwu*, above, at para 32:
>
> [32] The applicant disagrees with the IAD's conclusions that the circumstances of this case do not warrant the exercising of the panel member's discretion in providing humanitarian and compassionate relief in his favour. Unfortunately for him, the fact that he is not happy with the manner in which the IAD weighed all of the relevant H&C factors is not sufficient for this Court to intervene.
>
> [33] Similarly, in the present matter, absent some indication that evidence had been ignored or facts misapprehended, there is no basis for this Court to intervene.

[71] The present case can be distinguished from *Ambat* because evidence has been ignored and facts have been misapprehended. As a result there is a basis for the Court to intervene.

[72] In *Canada (MCI) v Sidhu*, 2011 FC 1056, the Court found the decision of the IAD to be unreasonable because evidence was overlooked, although the Court agreed that some of the IAD's findings were reasonable. The Court noted at para 50:

> [50] Finally, the Board found that the respondent and his family would suffer severe hardship if the respondent's application was denied. […]

> Again, the Court finds that while such a finding would be open to the Board, the Board has a duty to consider all of the evidence. […] In preferring the respondent's evidence that he would suffer extreme hardship, the Board had a duty to confront this contrary evidence.

[73] As in *Sidhu*, some of the findings of the IAD with respect to the applicable factors are reasonable, but other key findings are not. In particular, the IAD's findings that the Wrights had continuing connections to Canada, had an important (which I interpret as meaning significant) establishment in Canada, and would suffer serious harm if removed, were not supported by the evidence. The IAD had a duty to consider all of the evidence.

[74] The applicant suggested that the Court had not defined the applicable factors governing H&C grounds where permanent residents have failed to comply with their residency obligations. While it is true that the Court has not precisely defined the specific factors, the Court has confirmed that the factors identified by the IRB and IAD are appropriate and are adaptable to the different contexts where H&C grounds may justify overcoming a breach of the Act.

[75] In *Sidhu*, the Court confirmed, as it has in other cases, the relevant factors to be considered to determine if H&C grounds justify a breach of the residency requirement, noting at para 43 that the factors set out by the IRB in *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD 4 (QL), were endorsed by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship & Immigration)*, [2002] 1 SCR 84, 2002 SCC 3 at paras 40-41 and para 77.

[76] The Court in *Sidhu*, further noted at para 43 that the *Ribic* factors were established in the context of the exercise of discretion in the face of a deportation order, but have been adapted by the IRB and IAD for other contexts, noting for example *Tai v Canada (Citizenship and Immigration)*, 2011 FC 248 at paras 36 and 47 [*Tai*], and *Shaath v Canada (Citizenship and Immigration)*, 2009 FC 731 at para 20 [*Shaath*].

[77] In *Tai*, above, Justice Shore noted that the *Ribic* factors had been extensively relied on for H&C assessments and he applied these same factors in the context of section 28. Section 28 is an analogous provision to paragraph 67(1)(c) to determine if H&C grounds justify a breach of the requirements for permanent residence.

[78] The *Ribic* factors are:

a) The degree of establishment in Canada including employment and skills training;

b) The reasons for leaving Canada;

c) The reasons of continued or lengthy stay abroad;

d) Whether any attempts were made to return to Canada at the first opportunity;

e) The family support available in Canada;

f) The impact that the removal has on a person and his family;

g) The hardship which the appellant would suffer if he was removed from Canada.

[79] In the present case, the IAD referred to similarly worded factors adapted from other IAD and IRB decisions. As the respondent noted, the list is not exhaustive and some factors may not be applicable depending on the facts of a particular case.

[80] As noted, some of the IAD's findings are reasonable.

[81] The IAD reasonably found the Wrights' overall *length of absence* from Canada to be "important" and a negative factor. Again, I interpret important to mean significant.

[82] The IAD found that the legal impediment to their permanent resident status – i.e. their absence from Canada in the five year period considered – to be a negative factor, but added that this was not insurmountable. While this may be so, the IAD did not acknowledge that in that five year period, which requires only 730 days of physical presence, or two out of five years, the Wrights were present only a small fraction of the required time. Regardless, it was a negative factor and while the IAD does not appear to have attached significant weight to the breach, it is not for the Court to reassess weight.

[83] I do not share the respondents' characterisation of the applicant's argument as that the length of the Wrights' absence cannot be overcome by H&C factors. The applicant's argument is that that the IAD focussed on only the five year period preceding their resettlement and, although the length of absence was found to be a negative factor, the IAD did not consider that the Act requires a permanent resident to be present for at least 730 days out of each five year period. Although it may appear to be an argument about not attaching sufficient weight to the negative factor, it is really about not acknowledging the requirements of the Act.

[84] Several other findings of the IAD are not supported by the evidence and are not reasonable.

[85] The IAD found that the Wrights' "important establishment in Canada, more important than their very limited one in the USA at the time of the hearing and also more important than when they landed or when they left Canada in 1977" to be a positive factor.

[86] The IAD first found that the duration of the Wrights' establishment in Canada, which was seven years since 1972, "is not insignificant without being compelling". That is an understatement. A period of establishment of seven years out of the preceding 40 or out of their lifetime cannot reasonably be considered as "not insignificant".

[87] This finding was part of the overall positive finding that the Wrights' establishment in Canada was "important". (As noted, I have interpreted the IAD's use of the term "important" to mean significant.) Their two year period since 2012 cannot reasonably be considered significant, nor can seven years out of 40 or out of 70 years be considered a significant period of establishment in Canada.

[88] The IAD assessed the continuous time the Wrights spent in Canada after the issuance of their removal orders as a positive factor, noting that they continually resided in Vogler's Cove after 2012, yet this is not a factor relevant to establishment in the period assessed by the CBSA.

[89] The IAD found their integration in the Vogler's Cove community outside their family and their contribution to that community to be important (i.e. significant).

[90] As the respondents note, the Wrights may have done all that is possible to integrate into the small village of Vogler's Cove. However, the factors to be considered by the IAD refer to integration in the *Canadian* community which could include the region, the province and the country more broadly, given that immigration is to Canada and not to a specific locale.

[91] I agree with the applicant that the evidence does not support the IAD's finding that the Wrights' establishment *since 2012* is greater than it was in 2012 or had been in the USA previously or in Canada in the 1972-77 period. Their establishment since 2012 is minimal; social activities with friends, volunteer hours and occasional fundraising for the volunteer firefighters. There is also evidence of remaining establishment in the USA through the Wrights' work for American clients, which is the same work they did before relocating to Vogler's Cove. The IAD appears to have not considered this evidence.

[92] The IAD's finding that the Wrights had imperious (meaning compelling) reasons to leave Canada in 1977 is also not supported by the evidence. Lobster fishing was not economically viable. The IAD concluded that the Wrights had no ability to "linger" in the area and look for a job when a solid job offer was presented to them in the USA. While it may be understandable that the job offer in the USA was too good to pass up, any expectation that their permanent resident status would not be jeopardised by their departure is not realistic. Nor is the IAD's finding that they had no other options; the IAD failed to consider what the options would have been for a young couple beyond the small village of Vogler's Cove.

[93] The respondent sought to characterise the IAD's positive finding that the Wrights had a continuing connection to Canada through their friends that they consider as family in Canada as part of the special or particular circumstances the IAD is permitted to consider. However, the IAD clearly equated the connections with friends as a substitute for family. The Act promotes reunification of families. The *Ribic* factors refer to family support and the impact of the removal on the person and their family. In the present case, the IAD stated at the outset the factors it would consider including "the continuing connections the appellants have to Canada, including connections to family members here and whether the dismissal of the appeal would cause the dislocation of the family in Canada". However, in applying that factor, the IAD then noted that the Wrights have no family in Canada so went on to extend the family factor to friends. I agree with the applicant that this reinterpretation by the IAD does not reflect the objectives of the Act or the factors the IRB and IAD have relied on, and that the Court have endorsed in other decisions.

[94] Even if the IAD considered the Wrights' connection to Canada via their friends in Vogler's Cove as a special circumstance, the finding is not based on all the evidence before the IAD. It is apparent that the Wrights have supportive friends in Vogler's Cove now, but their own evidence was that their contact with these friends in their 35 year absence was sporadic and minimal, amounting primarily to Christmas cards and occasional other correspondence. The Wrights did not return to Vogler's Cove to visit from 1977 until 2005 although they did travel to other Canadian cities occasionally. They then returned to Vogler's Cove once in 2005 and then again only once a year until they purchased a house and then moved in 2012.

[95] The IAD also found that the Wrights would suffer serious or "important" (interpreted as significant) hardship while noting that their lives would not be at risk in the USA.

[96] This finding is not supported by the evidence and is unreasonable.

[97] The Court has considered many applications for judicial review arising from H&C determinations in the context of other provisions of the Act, including sections 25, 28 and 67 and, although the wording of the provisions varies slightly, the provisions do not refer specifically to "hardship" but to "humanitarian and compassionate considerations" or "sufficient humanitarian and compassionate considerations". However, the jurisprudence has consistently confirmed that the hardship to be considered along with other factors to determine whether sufficient humanitarian and compassionate considerations exist must be more than the hardship that would normally result from removal (for example, *Ambat*, above, at para 27; *Shaath*, above, at para 42).

[98] The respondents' argument that the considerations relevant to an H&C decision pursuant to section 67 differ from those under section 25, and that unusual or disproportionate hardship is not required, fails to appreciate the overall guidance of the analogous jurisprudence. There is no reason, in my view, for *some* hardship to be sufficient in the context of considering H&C grounds to overcome a breach of permanent resident status when in other contexts, such as refugee protection, the criteria established by the IRB and IAD and confirmed by the Courts calls for *unusual, undue or disproportionate* hardship; more than the normal and expected consequences of removal from Canada.

[99] Although the IAD did find that the consequence of the Wrights' removal would be serious hardship, which appears to acknowledge its understanding that more than the expected or normal hardship of removal is required for such a finding, the evidence before the IAD was of inconvenience, disappointment and emotional upheaval, along with the economic impact of maintaining two residences. Mr Wright indicated that he "supposed" that he could have two residences although this would not be easy. By their own evidence, the Wrights acknowledged that they could cope with removal although they clearly do not want to leave. They acknowledged that it would be difficult to retain two residences on a pension income but did not say that this would be impossible, or that they would not spend as much time as possible in Vogler's Cove, even if they cannot retain their permanent resident status.

[100] The IAD failed to consider that the Wrights had both employment income and pension income and were not destitute nor would they be homeless in the USA, given that they had purchased and sold several homes in the USA and most recently divested themselves of their home in Massachusetts in 2012. In addition, their age was no more an impediment to relocation than it was in 2012, yet the IAD considered it to be so.

[101] In conclusion, on the basis of a somewhat probing examination, I find that the IAD did not consider relevant evidence that would have had a bearing on its findings with respect to several of the factors, in particular the Wrights' establishment in Canada, their continuing connections with Canada in the intervening 35 years and the serious hardship they would suffer if removed. This would, in turn, have a bearing on the weight to be attached to those factors and on the overall assessment of whether there are *sufficient* – not just *some*- humanitarian and

compassionate grounds to justify the exceptional relief of overcoming the breach of their obligation to be physically present in Canada 730 days in each five year period.

[102] The appeal must be reconsidered by a different panel of the IAD, and in that reconsideration the IAD must assess each relevant factor and then consider all the factors cumulatively to determine if sufficient H&C grounds justify the exceptional relief to overcome the breach of the residency requirement.

Proposed Certified Question

[103] The respondent proposed the following question for certification:

> *Is the nature and character of a community a relevant consideration when assessing the degree of establishment in Canada?*

[104] The test for certifying a question was set out by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, 176 NR 4 at para 4. The question must be one which transcends the interest of the immediate parties to the litigation and contemplates issues of broad significance of general application and must be determinative of the appeal. In other words, and as noted in subsequent cases, in order to be a certified question the question must be a serious question of general importance which would be dispositive of the appeal.

[105] The question proposed by the respondents is not appropriate for certification. The issue in the present case is whether the IAD reasonably found that there were sufficient H&C grounds to overcome the respondents' breach of the residency requirement in accordance with paragraph 67

(1)(c). As the IAD noted, this entails the consideration of several factors. No single factor is determinative. Moreover, the IAD did not indicate the specific weight it attached to any specific factor and the balancing of positive and negative factors was not a mathematical calculation. Whether or not the nature and character of the community is a relevant consideration, the overall determination of sufficient H&C grounds would not necessarily differ.

[106] In addition, the proposed question is specific to the facts of this application; the respondents' settled in the small village of Vogler's Cove and may have been as active as possible given the nature of that community, but this question does not transcend the interests of the respondents. It is not an issue of broad significance of general application.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the decision of the IAD is quashed. The appeal of the decision of the Minister's delegate shall be reconsidered by a differently constituted panel of the IAD. No costs are awarded.

No question is certified.

"Catherine M. Kane"

Judge

ANNEX A

The relevant legislative provisions of the *Immigration and Refugee Protection Act* are:

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

administration or the public service of a province, or

fédérale ou provinciale,

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

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

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

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;

(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

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

status overcomes any breach of the residency obligation prior to the determination.

précédant le contrôle.

[…]

[…]

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 :

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

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

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

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

(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.

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

FEDERAL COURT

SOLICITORS OF RECORD

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