Federal Court  Cour fédérale

Date: 20160311

Docket: IMM-3831-15

Citation: 2016 FC 314

Ottawa, Ontario, March 11, 2016

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

SURRIYA UDDIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the May 21, 2015 decision of the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board of Canada dismissing the Applicant's appeal of an immigration officer's decision to deny the Applicant's spouse's permanent resident application under the family class based on a refusal to authorize, pursuant to s 52(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), the return to Canada of the Applicant's spouse, Muhmmad Nasir Alvi ("Alvi").

Background

[2] The Applicant is a 41 year old Canadian citizen who arrived in Canada from Pakistan in 1995. She has two daughters from a previous marriage who, at the time of the IAD's decision, were 14 and 17 years old. They are Canadian citizens and have lived only in Canada. The Applicant was awarded sole custody of the children, although her ex-husband retained access rights.

[3] In the summer of 2008, the Applicant was introduced to Alvi through a mutual friend. They were married in May 2009.

[4] Alvi is a 47 year old citizen of Pakistan who has a long immigration history in Canada. He came to Canada and made a refugee claim in July 1997. This was either withdrawn or abandoned and Alvi left Canada in August 1997. However, because he did not notify Canada Border Services Agency ("CBSA") of his departure, the conditional departure order made against him when he sought refugee protection became a departure order, then a deportation order and an arrest warrant were issued against him.

[5] In May 1999, Alvi attempted to enter Canada from the United States at a land border in Ontario. He was arrested pursuant to the warrant issued the year before and was returned to the United States. In August 1999, he returned to a land border in Quebec where he made a second refugee claim. His refugee claim was heard and refused in November 2000 based on a no credible basis finding. Leave to apply for judicial review was denied in April 2001 (IMM-6296-

00). Alvi had also applied for a pre-departure risk of country conditions assessment, which was converted to a Pre-Removal Risk Assessment ("PRRA"). This was refused in 2004 and judicial review of the negative PRRA was denied in 2005. In April 2006, Alvi was scheduled, but failed to report for, removal to Pakistan. A second warrant for his arrest was then issued. A removal order was issued and in 2009 and, a few months after his marriage to the Applicant, CBSA notified Alvi that it would enforce the order.

[6] Alvi purchased an airline ticket and returned voluntarily to Pakistan in June 2010. Alvi applied for permanent resident status based on the Applicant's spousal sponsorship application in July 2010. Because a removal order had previously been enforced against him, Alvi also submitted an application requesting authorization to return to Canada ("ARC") pursuant to s 52(1) of the IRPA. In February 2013, a visa officer determined that the marriage of the Applicant and Alvi marriage was genuine. However, in March 2013, another visa officer decided not to grant the requested ARC. This decision was confirmed by a second visa officer. Therefore, by decision dated March 14, 2013, Alvi was found to be inadmissible to Canada pursuant to s 41(a) of the IRPA because, without an ARC, he could not comply with s 52(1). In the result, pursuant to s 11(1) of the IRPA, the officer declined to issue a permanent resident visa.

[7] The Applicant filed an appeal to the IAD pursuant to s 63 of the IRPA. In July 2015, the IAD dismissed her appeal, the Applicant brought the present application for judicial review of that decision.

Decision Under Review

[8] The IAD reviewed the history of the case, including Alvi's long immigration history summarized in part above. The IAD noted that in the personal history section of his application for permanent residence Alvi had falsely stated that he was unemployed in Lahore, Pakistan from July to August 1997 when in fact he was in Canada during that time. Further, that he had failed to disclose that he had made a refugee claim in 1997 as, in his application for permanent residence and during his interview in Pakistan, he referred only to his second claim in 1999. From these two discrepancies, the IAD concluded that Alvi was not accurate, honest, reliable and credible generally.

[9] The IAD described the information contained in Alvi's application form, his testimony as well as that of the Applicant's oldest daughter, and, events leading up to the application, including visits by the Applicant and her children to Alvi in Pakistan.

[10] The IAD noted that the threshold for a visa officer to grant an ARC is high (*Andujo v Canada (Citizenship and Immigration)*, 2011 FC 731). However, in considering whether relief is warranted, that the IAD may consider humanitarian and compassionate ("H&C") factors in addition to the factors a visa officer is required to consider in assessing an ARC request.

[11] The IAD stated that the criteria for discretionary relief on H&C grounds established in *Chirwa v Canada (Minister of Manpower and Immigration)*, (1970) 4 IAC 338 [*Chirwa*] had previously been referenced by the IAD. However, that marriage to a Canadian citizen is alone

insufficient to warrant special relief and, while s 3(1)(d) of the IRPA states that reuniting families is a policy objective, because this is the basis for all sponsorship applications, that too is insufficient without more. The IAD emphasized the fact that the Applicant knew of Alvi's immigration status when they married and when she brought Alvi into her daughters' lives and stated that, while a visa officer had determined that the marriage was genuine, it could not be overlooked that Alvi was highly motivated to marry the Applicant for immigration purposes and that she had to have known this.

[12] The IAD then considered the best interests of the children. It stated that it had the impression from the Applicant's eldest daughter's testimony that she had struggled to assist Alvi's case while not undercutting her and her sister's relationship with her biological father. The IAD concluded that it would be in the daughters' best interests for them to remain and be educated in Canada and to be with their biological father, uncle and cousins. And while the Applicant's eldest daughter had described Alvi as a father figure to her and to her sister, and the IAD acknowledged that being physically present with him would be better than communicating by long distance and annual visits, it found that the Applicant had failed to clearly demonstrate how Alvi played a significant parental role in the children's lives.

[13] Finally, the IAD stated that, given the genuineness of the marriage, being separated presents significant emotional hardship for the Applicant and Alvi, but that special relief requires more than this. That the Applicant's children may miss his presence is not enough, particularly since there is nothing impeding the Applicant from visiting Alvi in Pakistan.

[14] The IAD concluded that Alvi had shamefully flaunted the Canadian immigration system, again summarized his immigration history, and found that the Applicant had not met her onus of proving there were sufficient H&C considerations to warrant special relief.

Relevant Legislation

IRPA

Application before entering Canada	**Visa et documents**
11 (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11 (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
Non-compliance with Act	**Manquement à la loi**
41 A person is inadmissible for failing to comply with this Act (a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; and	41 S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.
No return without prescribed authorization	**Interdiction de retour**
52 (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by	52 (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de

an officer or in other prescribed circumstances.

l'agent ou dans les autres cas prévus par règlement.

Right to appeal — visa refusal of family class

63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

Droit d'appel : visa

63 (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

Appeal allowed

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

Fondement de l'appel

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.

Issues

[15] The Applicant submits that three issues arise:

1) Did the IAD unreasonably fetter its discretion in the H&C analysis?
2) Did the IAD breach procedural fairness by failing to notify the Applicant that the genuineness of her marriage was an issue despite the visa officer's prior finding that the marriage was genuine?
3) Did the IAD err in its H&C analysis by:
    a. Ignoring the totality of the factors?
    b. Ignoring and/or misconstruing evidence?

[16] The Respondent submits that there is only one issue, being whether the IAD erred in finding that there were insufficient H&C reasons to warrant granting the appeal and setting aside the refusal to issue the ARC.

[17] In my view, for the reasons set out below, the sole issue is whether the IAD's decision was reasonable.

Standard of Review

[18] The Applicant submits that procedural fairness issues should be reviewed on the correctness standard and that a review of the IAD's H&C analysis should attract the reasonableness standard. The Respondent submits that the standard of review is reasonableness.

[19] The standard of review has been determined to be reasonableness when the Court is reviewing a decision by the IAD not to grant special relief based on H&C considerations (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]; *Nguyen-Tran v Canada (Citizenship and Immigration)*, 2010 FC 93 at para 8 [*Nguyen-Tran*]; *Tian v Canada (Citizenship and Immigration)*, 2011 FC 1148 at paras 18-19 [*Tian*]). The decisions in *Khosa*, *Nguyen-Tran* and *Tian* all dealt with appeals from removal or exclusion orders rather than a sponsorship application, however, as in the present case, they required the IAD's consideration of whether special relief was warranted under s 67(1)(c) of the IRPA. I would also note that this Court has determined that applications for judicial review of ARC decisions made by visa officers are reviewed on the reasonableness standard (*Lilla v Canada (Citizenship and Immigration)*, 2015 FC 568 at para 27 [*Lilla*]; *Nascimento v Canada (Citizenship and Immigration)*, 2012 FC 1424 at para 6)

[20] Accordingly, in my view, the standard of review is reasonableness.

Analysis

[21] On the question of the IAD fettering its discretion, the Applicant relies on the IAD's statement that "the applicant's absences present significant emotional hardship…however, to justify the granting of special relief requires the demonstration of more than that. That the appellant's children may miss his presence is not enough". The Applicant submits that in exercising its discretion the IAD was required to balance a series of factors. Specifically, the seriousness of the breach of the IRPA, the sole negative factor in this case being Alvi's immigration history, and the compelling humanitarian factors arising from the separation of

spouses and the best interests of the children, and here the IAD accepted that this amounted to significant hardship. Despite this, it required "more", yet it did not explain what "more" was required or why "more" was required. The IAD thereby unreasonably fettered its discretion.

[22] In my view, the lack of explanation of what "more" would be required to justify special relief in this case can be considered in the context of the reasonableness of the decision, which approach is perhaps more in keeping with the concept that the Court should consider the decision as a whole and not conduct a line-by-line treasure hunt for error (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54).

[23] The Applicant also submits that the IAD breached the principles of natural justice and fairness. This is because, while the IAD stated that the genuineness of the marriage was not at issue, it then made veiled findings on the issue which were not put to the Applicant or Alvi. The Applicant points out that s 4(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 states that a foreign national shall not be considered to be a spouse if the marriage was entered into primarily for the purpose of acquiring status under the IRPA, or, is not genuine. The visa officer did not find that the marriage was entered into for immigration purposes. Therefore, by making an adverse inference in relation to the marriage by impugning Alvi's motivation and not permitting the Applicant to respond, natural justice was breached. The Applicant refers to paragraph 44 of the IAD's decision as the basis for this submission.

[24] In this regard I note that the IAD stated:

> [43] The appellant knew the immigration history and status of the applicant when she met, dated, married and brought him into

> her children's lives. Thus the applicant's fate, namely, that he would be removed from Canada, was known to her throughout that entire time. She cannot for one moment pretend to be a victim of a situation of her own making.
>
> [44] Although the visa officer was satisfied the marriage is genuine, it cannot be overlooked that the applicant was highly motivated to marry the appellant for immigration purposes and the appellant had to know this.

[25] In my view, it is not clear that the IAD was questioning the genuineness of the Applicant's marriage. The IAD stated that the Applicant was aware of Alvi's immigration history, which is supported by the Applicant's affidavit, and inferred from this that she knew that he would be removed from Canada. At paragraph 51 of its reasons, the IAD acknowledged that Alvi's absence presented significant emotional hardship for him and the Applicant "in view of the determination by the visa officer that the marriage is genuine". A review of the Computer Assisted Immigration Processing System notes also indicates that the final reviewing visa officer accepted the prior finding that the marriage was genuine.

[26] While I agree with the Applicant that the IAD's comment in paragraph 44 gives rise to ambiguity, viewing the decision in whole, I am not convinced that the comment is sufficient to support a finding that the IAD was bringing into question the genuineness of the marriage and, thereby, breached procedural fairness because the issue was not raised with the Applicant. It is true that the IAD does not explain why Alvi's motivation to marry the Applicant must be considered in the context of the appeal before it. However, this can also be addressed in the context of the reasonableness of its H&C analysis as discussed below.

Was the IAD's Decision reasonable?

Applicant's Position

[27] The Applicant submits that by focusing on Alvi's immigration history the IAD failed to consider the totality of the factors in its H&C analysis. It had a duty to consider all the evidence and balance competing factors (*Lilla*; *Akbari v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1421 [*Akbari*]). Further, that the IAD mischaracterized the evidence related to the children's relationship to Alvi and to their biological father and failed to consider the history of the latter relationship. The Applicant also submits that the IAD failed to consider documentary evidence demonstrating Alvi's parental role, including letters from the daughters, the Applicant's brother and several community members and friends describing his role in their lives. Nor did it consider Alvi's economic contribution and decision not to rely on government assistance as a positive factor in the H&C analysis. Instead, the IAD relied on Alvi's choice to work without a permit as a negative factor in its assessment. Although it was raised at the hearing, the IAD also failed to consider that Alvi had no criminal record. The fact that an applicant leaves voluntarily, as opposed to being deported, is routinely considered as a positive factor but the IAD did not do so in this case. The IAD also ignored Alvi's lack of knowledge about immigration procedures, evidenced in his testimony and in a letter he wrote, which led the IAD to paint him in a light that made him appear manipulative, rather than merely confused.

[28] The Applicant also submits that *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] must be applied by this Court and that the IAD's decision was not in line with the Supreme Court of Canada's decision. There the Supreme Court noted that children

will rarely, if ever, be deserving of any hardship (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475) and that their best interests are a primary consideration (at paras 35-37).

Respondent's Position

[29] The Respondent's written submissions provide little analysis or response to the Applicant's submissions, but state that the IAD's decision was reasonable. The IAD accepted that Alvi's physical presence would be better than communicating long distance, but that it was not made clear how he played a significant parental role. This was reasonable as Alvi lived with the children for less than a year before he returned to Pakistan more than 5 years ago. The Respondent submits that it was open to the IAD to find that the factors advanced by the Applicant were insufficient in light of the Applicant's awareness of Alvi's immigration status and Alvi's repeated failure to comply with immigration authorities.

[30] Further, that the Applicant failed to demonstrate how the IAD's decision did not align with *Kanthasamy*. The IAD did not rely on "unusual, undeserved or disproportionate" hardship which the Court warned against in *Kanthasamy*, it relied on *Chirwa*, which the Supreme Court assessed positively. The IAD was aware of the children's ages and schooling and found it would be in their best interests to be educated in Canada and to know their biological father and other members of their family. This assessment was reasonable and the Applicant simply disagrees with the weight given to the best interests of the children.

[31] The essence of the Respondent's submissions when appearing before me was that the Applicant simply seeks a reweighing of the evidence that was before the IAD.

Analysis

[32] In making H&C determinations the IAD has extensive discretion to consider and weigh factors as required by the specific circumstances of the case (*Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at para 30). As stated in *Canada (Minister of Public Safety and Emergency Preparedness) v Ferry*, 2015 FC 1059 at para 36, it is also well established that the relevant factors on an appeal to the IAD based on H&C considerations are those laid out in *Ribic v Canada (Minister of Employment and Immigration)*(1986), [1985] IABD No 4 (Imm App Bd) at para 14 [*Ribic*], and endorsed by the Supreme Court in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paras 40-41 [*Chieu*], which states that :

> 14 Whenever the Board exercises its equitable jurisdiction pursuant to paragraph 72(1)(b) it does so only after having found that the deportation order is valid in law. In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality.

[33] The IAD stated that it exercises its jurisdiction to consider H&C factors by taking into account considerations relevant to granting special relief. This is not a closed category and, in

the matter before it, the considerations included: whether the conduct of Alvi engaged public policy considerations involving the integrity of the immigration system; whether he demonstrated genuine remorse for his conduct resulting in removal; whether the Applicant knew or ought to have known that Alvi had to leave Canada in relation to the genesis of the relationship; whether and for how long the Applicant harboured Alvi knowing of the existence of a removal order and/or arrest warrant; whether there were children involved and the nature of the relationship; and, the best interests of the children.

[34] In my view, the concern in this matter is as identified by the Applicant, being that the IAD unduly focused on Alvi's prior lack of compliance with the IRPA. In that regard I would note that a great deal of the decision is devoted to Alvi's immigration history. And, while the IAD stated that Alvi "flaunted Canadian immigration system shamefully", it is not at all clear that it also assessed the relative seriousness of his non-compliances with the IRPA as weighed against the applicable H&C factors.

[35] As noted in *Lau v Canada (Minister of Employment and Immigration)*, [1984] 1 FC 434 [*Lau*]:

> 4 …What the adjudicator seems to be saying in that paragraph is that while much of the evidence adduced and many of the circumstances of the case reflect credit upon the applicant, upon his business reputation and upon his credibility, nevertheless the fact that he overstayed in Canada without authorization and accepted employment without authorization is sufficient in itself to outweigh and offset the circumstances favourable to the applicant because both of those actions were sufficient in itself to outweigh and offset the circumstance favourable to the applicant because both of those action were "deliberate and willful" on the part of the applicant. I am unable to accept this reasoning. I would think that in practically every case of this nature, the action of the applicant

> are deliberate and willful in the sense that the applicant consciously overstays or consciously accepts employment without authorization. If these circumstances were, by themselves, sufficient to entitle an adjudicator to decline to issue a departure notice, notwithstanding the existence of many other circumstances favourable to the applicant, then it would be difficult to think of a case where a departure notice would issue. In every case, the requirement for the deport/depart decision under section 32(6) only arises *after* an adjudicator has determined that an applicant is a member of an inadmissible class. Thus, a breach of the provisions of the *Immigration Act, 1976* is present in every case requiring a subsection 32(6) determination. As noted *supra*, I think in practically every case it could also be said that the illegality arises because of a deliberate act on the part of the applicant. However, subsection (6) of section 32 enjoins the Adjudicator to have regard to all of the circumstances of the case in making his deport/depart decision.
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> 5 For the reasons detailed *supra*, I have concluded that in this case, the Adjudicator has given undue weight to the circumstances of a breach of provisions of the *Immigration Act, 1976*. If Parliament had intended that circumstance to be the dominating and determining circumstances, then there would have been no point in conferring the subsection 32(6) discretion on the Adjudicator. By so conferring a discretion, Parliament must have intended the Adjudicator to look at all of the circumstances and implied in that discretionary power is the power to grant departure notices where all of the circumstances warrant it, notwithstanding that breaches of the *Immigration Act, 1976* have occurred…
>
> [emphasis in original]

[36] Similarly, in *Akbari*, where the claimant also had a lengthy immigration history, this Court held that consideration must be given to the totality of the presented factual circumstances. There the immigration officer focused on the claimants' immigration history and there was no indication that consideration was given to any of the factual circumstances presented, specifically, that the claimant had left Canada voluntarily, that she and her husband could not reunite in North America or elsewhere, and that she was not inadmissible for reasons of criminality.

[37] In this matter the IAD did consider some H&C factors. One of these was Alvi's employment while in Canada. His evidence was that from 2000 to 2010 he had worked continuously at Pizza Hut. Although not mentioned by the IAD, the record contained a letter from the owner and operator of the Pizza Hut location where Alvi had worked. It states that Alvi was the general manager, a valued employee and that the two had become friends. It also spoke to Alvi's relationship with his spouse and her children. The IAD did not consider this employment as a positive factor, stating that although Alvi "made a point of saying he never resorted to social assistance as though this were a badge of honour when he was prohibited for most of that time from being, and working in Canada". While it is true that from at least 2006 forward Alvi was working without authorization, the IAD was required to weigh the positive aspects of his employment against the negative in assessing the evidence. Instead it focused on the immigration aspects of his employment to the exclusion of other considerations.

[38] The IAD also considered that Alvi left Canada voluntarily but again did not consider this to be a positive factor characterizing this as "He was proud to announce he bought his own ticket back to Pakistan and offered these actions as support for the exercise of special relief". The IAD took issue with the fact that Alvi had not mentioned, amongst other things, that if he did not pay for his forced travel back to Pakistan then he would have to reimburse Canada if he was granted a permanent resident visa. The significance of this is unclear given that he would have paid for the ticket in either event. Again, there was no consideration of the positive aspects of this evidence.

[39] The IAD was fixated on fact that the Applicant knew about Alvi's immigration history before their marriage. The Applicant's evidence was that Alvi had disclosed his immigration history to her before they were married and that they had obtained legal advice at that time. Their plan had been to make the necessary preparations, that Alvi would then report to CBSA, leave Canada and later return by way of her spousal sponsorship. The IAD commented that it had not been explained why, armed with the knowledge of his immigration history, the Applicant would enter into a relationship with Alvi, particularly when she had custody of her two children. The reasoning behind this comment is not clear, but, in my view, it again focuses on Alvi's immigration history. To the extent that it suggests that the Applicant took a known risk of separation, it is unclear why this would be an H&C factor as the Applicant had not harboured Alvi in the face of a removal order. Further, as the marriage had been determined to be genuine, it is unclear how the Applicant's knowledge of Alvi's immigration history is relevant in determining if sufficient H&C considerations warrant special relief pursuant to s 67(1)(c) of the IRPA. Beyond stating that the Applicant could not "for one moment pretend to be a victim of a situation of her own making", the IAD does not explain the relevance of this consideration to its conclusion.

[40] The Applicant points out that in a letter that was before the IAD, Alvi expressed remorse for his actions and also did so during the hearing. Similarly, Alvi has committed no criminal acts (*Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 380 at para 15), yet there is no indication that these factors were considered or weighed by the IAD in reaching its decision. The Respondent submits that the lack of criminal activity should not be treated as a positive factor as this is an expected societal norm for all Canadians. However, I

would note that the jurisprudence requires an assessment of the relative seriousness of the offences *(Ribic; Chieu; Lau)*, and, as criminal activity is often cited as a factor weighing against applicants, it would seem that the lack of criminality would warrant positive consideration in considering the seriousness of the Applicant's IRPA breaches in this case.

[41] There were also many letters of support in the record before the IAD. These were from the Applicant's daughters, the Applicant's brother, Alvi's brother, his neighbour, his employer and others, all of which spoke to the relationship between him and the Applicant and her children, the support he has in Canada and his degree of establishment. However, the IAD did not refer to these factors in its decision.

[42] And, while the IAD did consider the best interests of the children as an H&C factor, its analysis was flawed. For example, the IAD found that "Aside from a vague reference to going to the applicant with problems and playing with him, however, it was not made clear how the applicant played a significant parental role in the appellant's children's lives". This finding is not supported by the record. In her letter, the Applicant's youngest daughter stated that Alvi always treated the girls like his own children, gave them a lot of love and care, helped with homework, made dinner, picked her up from school to take her to doctor's appointments, helped her ride her two-wheeler for the first time and took the girls places.

[43] The elder daughter also wrote a letter and she testified before the IAD. Her testimony was that Alvi paid more attention to her, and that she had a stronger relationship with him than with her biological father, that he is her father figure, that when she has things that she needs to

talk about she speaks with Alvi and that he is very loving and takes care of her, her sister and mother. With regard to the eldest daughter's testimony, upon review of the hearing transcript it is my view that the IAD mischaracterized her evidence concerning her relationships with her biological father and Alvi. When appearing before me, the Respondent acknowledged this to be the case. Accordingly, I need say nothing further on that point other than that this misrepresentation impacted the IAD's best interests of the child analysis.

[44] The other supporting letters before the IAD spoke similarly of Alvi's role in the children's and the Applicant's lives, however as noted above, these were not referred to by the IAD in its decision.

[45] In my view, this evidence was not vague and it is unclear what more would be required, beyond the evidence submitted by the Applicant, to demonstrate that Alvi "played a significant parental role".

[46] As to the application of the Supreme Court's decision in *Kanthasamy*, it concerned s 25 of the IRPA which permits the granting of permanent residence in the specified circumstances where 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 who is directly affected". There, the Supreme Court held that what warrants relief will clearly vary depending on the facts and the context of each case, but that the officer making H&C determinations "must substantively consider and weigh all of the relevant facts and factors before them: *Baker*, at paras. 74-75". The Court also found that a decision under s 25(1) will be

unreasonable if the interests of the children effected by the decision are not sufficiently considered (para 39) and that where "the legislation specifically directs that the best interests of a child who is "directly affected" be considered, those interests are a singularly significant focus and perspective" (para 40).

[47] In this case the IAD was required by s 67(1)(c) of the IRPA "to take into account the best interests of a child directly affected by the decision" when determining if sufficient H&C considerations warrant special relief in light of all of the circumstances of the case. Thus, the findings in *Kanthasamy* apply at least to the extent that the IAD was required to consider and weigh all of the factors relevant to its best interests of the child analysis and to afford them significant focus and perspective. In my view, for the reasons set out above, the IAD did not do so in this case and, on that basis, its best interests of the child analysis was unreasonable.

[48] Finally, I would note that although the IAD makes no reference to any of the evidence before it as to the impact of the separation on the Applicant and Alvi, it did state that it recognized that Alvi's absence presents significant emotional hardship for him and the Applicant in view of the determination by the visa officer that the marriage is genuine. However, while acknowledging the significant emotional hardship, the IAD's reasons dismiss the impact of the separation because the Applicant and Alvi took the risk of starting the relationship knowing of Alvi's immigration history.

[49] The Citizenship and Immigration Canada ("CIC") Operational Manual "OP 1 Procedures", May 10, 2013, addresses ARC applications and states that an applicant must

demonstrate that there are compelling reasons to consider an ARC when weighed against the circumstances that necessitated the issuance of a removal order. In addressing the factors to be considered, the Operational Manual states that a *bona fide* marriage is an example of a factor that would normally constitute a compelling reason for returning to Canada. While not necessarily determinative in an H&C assessment, separation of married spouses is a serious matter with profound consequences that requires consideration (*Sarab v Canada (Citizenship and Immigration)*, 2012 FC 969 at paras 3-7). Given the finding that this marriage was genuine and that separation results in significant emotional hardship, in my view, the IAD should have explained why it was not a compelling reason for granting the appeal in this case.

[50] In conclusion, reading the decision in whole, the overriding focus of the IAD was on Alvi's immigration history and there is no clear explanation of why this, the sole negative factor in the analysis, outweighed the other H&C factors that were addressed including the *bona fide* marriage. Further, other factors and evidence were not addressed and, therefore, were not balanced by the IAD. And, finally, the IAD erred in its best interests of the child analysis.

[51] The role of this Court is to review the decision to determine whether it is justified, transparent and intelligible or whether there is a reasonable basis for the conclusions (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47). In my view, for the reasons set out above, the IAD's reasons lack justification and transparency and the decision is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the IAD is set aside and the matter is remitted for redetermination by a different officer;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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PLACE OF HEARING:	TORONTO, ONTARIO
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JUDGMENT AND REASONS:	STRICKLAND J.
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APPEARANCES:

Krassina Kostadinov	FOR THE APPLICANT
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Krassina Kostadinov Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT