Federal Court  Cour fédérale

**Date: 20171103**

**Docket: IMM-1167-17**

**Citation: 2017 FC 993**

**Ottawa, Ontario, November 3, 2017**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**AHMAD HUSSAIN GAZI**
**HABLA AKHTAR**

**Applicants**

**and**

**THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] The Applicants are citizens of India and former permanent residents of Canada. They lost their permanent residence status after failing to maintain their physical residency obligations. In this application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act], they are challenging the decision of the

Immigration Appeal Division (IAD), dated February 20, 2017, upholding departure orders issued at a Port of Entry when they attempted to return to Canada.

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

## II. Background

[3] The Applicants became permanent residents of Canada in 2001 as members of the entrepreneurial class. Both have professional qualifications: the male applicant is a dentist and his wife is a doctor. Their two adult sons were landed at the same time. In or around 2004, having fulfilled the entrepreneurial qualifications, the Applicants returned to Kuwait, where they had previously lived, and resumed employment in their professional fields. They also spent some time visiting family and property they owned in Kashmir, India.

[4] The sons remained in Canada to pursue graduate studies. Both of them are Canadian citizens. One of them lives and works in the United States. He is married and has a child. The other son, a medical doctor, remained in Canada after post-graduate studies and work abroad.

[5] On November 18, 2011, the Applicants attempted to re-enter Canada from India, via the United States, at the St. Armand Québec Port of Entry. At that time they were interviewed by an officer of the Canadian Border Security Agency (CBSA). During the interviews, the Applicants answered questions regarding the impact the loss of permanent residence status would have on their lives. The agent's notes indicate that for both Applicants the "subject declares to have no

humanitarian or compassionate considerations that would justify the retention of permanent residence status".

[6] The agent issued reports under s 44(1) of the IRPA that the Applicants were inadmissible for failing to comply with the residency obligation under s 28(2)(a)(i) of the Act. A Minister's Delegate confirmed the reports and issued departure orders for non-compliance with the Act pursuant to s 41 (b) and s 44(2) of the IRPA. The non-compliance stemmed from the applicants' prolonged absence from Canada for reasons that did not fall within any of the exceptions recognized within s 28 (2)(a)(ii) to (v) of the IRPA.

[7] The departure orders required the Applicants to leave the country voluntarily within 30 days. The Applicants returned to the United States, retained counsel and appealed the departure orders to the IAD. For reasons that are not material to this application, the hearing of the appeal was delayed. It was eventually conducted by telephone on several dates in 2015 and 2016 with the Applicants testifying from India and the United States. Final submissions were received on January 4, 2017.

[8] In their submissions before the IAD, the Applicants conceded that they had not observed the residency requirement pursuant to s 28 (2)(a) of the Act. They argued that the appeal should be allowed on humanitarian and compassionate grounds. Counsel submitted that the CBSA agent and immigration officer did not direct their minds to those grounds and that the departure orders should be quashed and the matter remitted for re-determination by a different officer.

[9] The Applicants requested, in the alternative, that the departure orders be stayed for a period of four years in order to allow them to demonstrate that they had re-established their lives in Canada.

## III. Decision under review

[10] At the hearing on January 4, 2017, the IAD Member declined to return the matter for reconsideration by a different officer on the ground that he had the jurisdiction to consider and allow the appeal for humanitarian and compassionate considerations *de novo*. This was not addressed in the Member's reasons for decision. The Applicants provided an informal transcript of the hearing which indicates that the issue was raised by counsel for the Applicants and was dealt with by the Member at the outset of the January 4, 2017 hearing. No objection was made by the Respondent to the inclusion of the informal transcript in the Applicants' record.

[11] Having considered the Applicants' evidence and submissions, the IAD member concluded that the departure orders were well founded in law and fact and that the Applicants had not established that there were sufficient humanitarian and compassionate considerations to warrant special relief in light of all of the circumstances of the case pursuant to s 67 of the Act.

## IV. Issue

[12] The sole issue presented by the Applicants for determination by this Court is whether:

A. The Tribunal erred in failing to address the Applicants' request to review the impugned decision for an error of law and fact, pursuant to s 67 (1)(a) of the Act.

[13] I would restate the issue as follows:

B. Was the IAD's decision to decline to consider remitting the matter for reconsideration reasonable?

## V. Relevant legislation

[14] The following sections of the IRPA are relevant:

| | |
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| **Residency obligation** | **Obligation de résidence** |
| **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. |
| **Application** | **Application** |
| **(2)** The following provisions govern the residency obligation under subsection (1) | **(2)** Les dispositions suivantes régissent l'obligation de résidence : |
| […] | […] |
| **(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 | **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 |

the residency obligation prior to the determination.

précédant le contrôle.

[…]

[…]

**Appeal allowed**

**Fondement de l'appel**

**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.

**Effect**

**Effet**

**(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.

## VI. Standard of Review

[15] The Applicants contend that the IAD has jurisdiction under s 67 (1)(a) of the IRPA to allow an appeal on the ground that the decision appealed from is "wrong in law or fact or mixed law and fact". They contend that the immigration officer erred in finding that there were no humanitarian and compassionate grounds to justify retention of the Applicants' permanent residence status. This, they submit, was an error which the IAD Member could review in exercising his jurisdiction. He erred, they argue, in limiting himself to the authority granted under s 67 (1)(c) to consider whether humanitarian and compassionate considerations warrant special relief.

[16] This, the Applicants submit was "a clear and reviewable error of law". At the hearing counsel argued that this Court should therefore review the IAD decision on the correctness standard. The Respondent's position is that the reasonableness standard applies.

[17] It is clear from the jurisprudence that the standard of review of the IAD's decision relating to humanitarian and compassionate considerations is reasonableness. See for example, Justice LeBlanc's analysis in *Samad v. Canada (Citizenship and Immigration),* 2015 FC 30 at para 19–21, where he concluded that the existence of humanitarian and compassionate grounds in the context of remedial measures regarding the breach of residency obligations under s 28 of the Act is a question of fact falling within the expertise of the IAD which attracts a high degree of deference. I agree with that analysis.

[18] In the present matter, the issue raised by the Applicants relates to the IAD's interpretation of its own statute and is a question of mixed fact and law. Justice Boswell had occasion to consider a similar issue in *Canada (PSEP) v Rasaratnam*, 2016 FC 670, at paras 13–14:

> 13 In this case, the IAD is concerned with a provision of its home statute. The IAD is presumed to be familiar with its home statute. The IAD has expertise in the matter and, accordingly, is entitled to due deference (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190(S.C.C.), at paras 68 and 124 [*Dunsmuir*]; *Alberta Teachers* at para 39). The decision is not one outside the specialized expertise of the IAD, nor does it involve a question of law central to the legal system (*Dunsmuir* at para 70). There is no compelling reason to displace the presumption that a standard of reasonableness applies. In view of *Alberta Teachers* and *ATCO Gas* [*ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45, [2015] 3 S.C.R. 219 (S.C.C.) [*ATCO Gas*]], a deferential reasonableness standard of review, rather than a correctness standard of review, should be adopted in reviewing the IAD's decision in this case. This standard of review also applies to the IAD's application of subsection 68(4) of the Act because that involves questions of mixed fact and law (see: *Caraan v. Canada (Minister of Public Safety and Emergency Preparedness*), 2013 FC 360, [2014] 4 F.C.R. 243 (F.C.), at paras 20 and 21 [*Caraan*]). [Emphasis added]
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> 14 Before leaving this issue, I note that my conclusion that the IAD's decision in this case should be reviewed on a standard of deferential reasonableness conflicts with the Court's decisions in cases such as Canada (*Ministre de la Citoyenneté & de l'Immigration) c. Bui*, 2012 FC 457, [2013] 4 F.C.R. 520 (F.C.) at para 36 [*Bui*] and *Canada (Minister of Citizenship & Immigration) v. Smith*, 2012 FC 582, 411 F.T.R. 187 (Eng.) (F.C.) at para 25 [*Smith*], where the Court adopted a correctness standard of review in respect of the IAD's interpretation of subsection 68(4) of the Act. The decisions in Bui and Smith, however, predate the Supreme Court's more recent statements in *ATCO Gas* as to the appropriate standard of review where questions of jurisdiction are raised by a tribunal's interpretation of its home statute.

[19] I see no reason to depart from Justice Boswell's analysis in this matter and find that the appropriate standard of review is reasonableness. The Court should not, therefore, intervene

unless the IAD's decision does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

VII. Analysis

[20] As I advised counsel at the hearing, in reading the IAD Member's decision and considering the parties' written submissions, I saw no grounds for intervening with the Member's conclusion regarding the availability of special relief in the circumstances of this case.

[21] It is well established that the IAD is not a supervisory court. The hearings at the IAD are held *de novo* and the IAD must consider the whole case, including any new evidence put before it: *Mohamed v. Canada (Minister of Employment & Immigration)*, [1986] 3 FC 90, 68 NR 220, *Kahlon v. Canada (Minister of Employment & Immigration)*, [1989] FCJ No 104, 14 ACWS (3d) 81, at p 3 [*Kahlon*]. If the IAD allows the appeal, it must do so under s 66 (a) and pursuant to s 67.

[22] As Justice de Montigny said in *Mendoza v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2007 FC 934, [2007] FCJ No 1204, at para 18 [*Mendoza*]:

> "[…] not only are the opening words of paragraph 67(1) explicitly applicable to all three subparagraphs, but paragraph 67(2) confirms the *de novo* jurisdiction of the IAD, irrespective of the reasons for which the appeal is allowed, by stating that it can substitute its own decision for that which should have been made"

[23] Justice de Montigny noted, at para 20 of *Mendoza*, that *Kahlon*, above, has been followed repeatedly by this Court following the adoption of the IRPA citing: *Singh v. Canada (Minister of Citizenship & Immigration)*, 2005 FC 1673, at para. 8; *Ni v. Canada (Minister of Citizenship & Immigration)*, 2005 FC, at para. 9; *Canada (Ministre de la Citoyenneté & de l'Immigration) v. Savard*, 2006 FC 109, at para. 16; *Canada (Ministre de la Citoyenneté & de l'Immigration) c. Venegas*, 2006 FC 929, at para 18; and *Froment c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2006 FC 1002, at para 19.

[24] In this matter, the issue of the physical residency obligations was conceded by the Applicants before the IAD. None of the statutory exceptions to those obligations applied to the Applicants' situation. The only question to be resolved was whether there were sufficient humanitarian and compassionate considerations to overcome the Applicants' breach of the physical residency obligation. The Member addressed this issue through multiple *de novo* hearings in far greater depth than could be achieved during an interview at a Port of Entry.

[25] The Applicants submit that the threshold required for a determination by an officer that considerations justify retention of permanent residence status under s 28 (2)(c) is lower than the requirement under s 67 (1)(c) that such considerations "warrant special relief". No authority was offered in support of this proposition. At best, counsel readily conceded at the hearing, they might hope to encounter a more sympathetic officer if the matter was sent back for redetermination rather than be dealt with by the IAD *de novo.* In my view, that ignores the clear direction by Parliament that the IAD should itself take into account the humanitarian and compassionate considerations at the time the appeal is disposed of.

[26] There are undoubtedly cases where it is clear during the examination at the border that a permanent resident has lost that status because of a breach of the residency obligations through no fault of their own or that there are humanitarian and compassionate considerations that justify the retention of the status in the discretion of the officer. That was not the case here.

[27] The Applicants were absent for a prolonged period of time having chosen to pursue employment opportunities abroad while their sons had the benefit of educational resources in this country. The Applicants' reasons for that absence and their personal circumstances, including those of their adult sons, were explored in the Port of Entry interviews. The officer's conclusion that "subject declares to have no humanitarian or compassionate considerations that would justify the retention of permanent residence status" was poorly expressed but reflected a determination of the issue as the officer saw it at that time. Given that the IAD freshly considered the question on the basis of a much more complete record, there was no reason for the Member to parse the correctness or reasonableness of the officer's decision.

[28] In my view, the IAD Member's interpretation of his home statute was reasonable and there are no grounds for the intervention of this Court.

[29] No questions were proposed for certification.

**JUDGMENT in IMM-1167-17**

**THIS COURT'S JUDGMENT is that** the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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|---|---|
| **DOCKET:** | IMM-1167-17 |
| **STYLE OF CAUSE:** | AHMAD HUSSAIN GAZI ET AL V MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 12, 2017 |
| **JUDGMENT AND REASONS:** | MOSLEY, J. |
| **DATED:** | NOVEMBER 3, 2017 |

**APPEARANCES:**

| | |
|---|---|
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