Federal Court  Cour fédérale

Date: 20180611

Docket: IMM-3977-17

Citation: 2018 FC 602

[ENGLISH TRANSLATION]

Ottawa, Ontario, June 11, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

ADLI BEN ABDERRAZAK

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review made under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision (Decision) by the immigration officer (the Officer) from the Immigration Appeal Division (IAD) on August 31, 2017, setting

aside the removal order against the respondent and concluding that he had not lost his permanent resident status.

[2] The reasons why the Officer reached this conclusion are presented in a removal order from the Minister's delegate, who found on December 3, 2016, that is, 102 days prior to the end of the five-year period, that the respondent could not have been physically present in Canada for at least 730 days during the period from March 15, 2012, to March 15, 2017. He was unable to comply with his residency obligation under section 28 of the IRPA.

[3] At the hearing, the respondent said that he does not dispute the legality of the Decision. Instead, he applied for his right to appeal on humanitarian and compassionate grounds, given the circumstances of the case and the best interests of a child.

II. Facts

[4] On March 15, 2012, the respondent, a citizen of Tunisia and France, arrived in Canada and became a permanent resident as a Quebec-selected skilled worker.

[5] On March 25, 2012, the respondent left Canada.

[6] Although the respondent immigrated to Canada as a skilled worker, he invested in several projects that required him to leave the country. More specifically, he was working on projects to open ammunitions factories in Tunisia, Malta and eventually, in September 2016, in Granby, Quebec.

[7] During that time, the respondent married Rania Ben on May 4, 2012, in Paris. She permanently relocated to Canada in September 2014. They had a son on May 21, 2016, in Montreal.

[8] Despite his permanent resident status, the respondent had never worked in Canada or filed a tax return.

[9] On December 3, 2016, the Minister's delegate issued a departure order against the respondent because he had failed to meet his residency obligation under section 28 of the IRPA.

[10] The respondent appealed that decision before the IAD on humanitarian and compassionate grounds.

III. Impugned decision

[11] In a brief 13-paragraph decision, the Officer allowed the respondent's appeal. She found that the respondent had spent about 50 days in Canada of the 102 days after his departure order, for a total of 380 days in Canada during the applicable five-year period — just over half of what was required — and that his absences were during the first period of his life in Canada.

[12] The Officer appropriately described the factors justifying an analysis based on humanitarian and compassionate grounds, as described in *Ribic v Canada (Minister of Employment & Immigration)*, [1985] IABD No 4, which were confirmed by the Supreme Court

of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at paras 40−41, 77.

[13] The Officer acknowledged that 380 days as a resident in Canada during the applicable period was not long. However, the Officer found that the limited period of residency was mitigated by the fact that the first phase of life in Canada could present challenges for certain skilled workers who were not fully participating in the labour market.

[14] She also mitigated the impact of the respondent's brief residency by pointing out that he had devoted his efforts to developing an ammunitions factory in Canada. With the same objective of explaining his absence from Canada, the Officer said that she believed his trips outside of Canada during the past two years were necessary to further his project when the required expertise was located abroad.

[15] Lastly, by distinguishing the case law prohibiting the consideration of the potential for future establishment, the Officer concluded that, even if his business was not yet operating, the tentative agreements in many cases demonstrated an effort to establish himself in Canada that surpassed simple future potential.

IV. Issues

1. Was the Decision allowing the appeal on humanitarian and compassionate grounds reasonable, considering the circumstances of the case and the best interests of a child?

V. Standard of review

[16] The IAD's analysis of humanitarian and compassionate grounds involves a high level of discretion and is subject to the reasonableness standard of review: *Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Analysis

[17] For the appeal to be allowed, pursuant to section 67(1)(*c*) of the IRPA, the IAD must be convinced during the appeal that the appeal is well-founded and that "taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."

[18] The IAD's Decision must then be reasonable.

[19] At first glance, the reasons are insufficient and lack the required justification and intelligibility. The respondent's arguments are entirely based on his investment activities, even though he obtained permanent resident status as a selected skilled worker. In addition, several other IAD findings are not supported by the evidence and are unreasonable.

[20] Although the best interests of a child and disruption of the family caused by the respondent's removal were cited as factors, no evidence whatsoever was provided for either. Consequently, the Officer did not mention them.

[21] Furthermore, the Officer acknowledged that the respondent's time in Canada was insufficient, representing approximately half of what was required to maintain his residency. This is important, especially when considering that the 730-day requirement represents only two of the five years of permanent residence: see *Canada (Citizenship and Immigration) v Wright*, 2015 FC 3 at para 82 [*Wright*].

[22] The Court's comments on the other factors the Officer considered are as follows:

1) The ties the respondent continues to have in Canada, including with his family members.

    a. The claimant has never held a job or paid taxes in Canada. In addition, there is no evidence of his family's integration into Canadian society. He returned to Canada, but there is no evidence of the role he played in his family.

2) The reasons the respondent gave for leaving Canada, his efforts to return and the reasons he remained outside of Canada.

3) The respondent's circumstances during his time outside of Canada.

4) The respondent's efforts to return to Canada at the first reasonable opportunity.

[23] The respondent left Canada 10 days after obtaining permanent residence. There is no evidence supporting the IAD's finding that he was unable to obtain a job in Canada, as was the case for obtaining his permanent residence as a selected skilled worker. The IAD's remarks that

[TRANSLATION] “the first years may present challenges for some skilled claimants, toward whom the labour market is not entirely accommodating” do not apply to the respondent. The respondent provided no evidence showing that he had looked for a job or that there were compelling reasons for him to leave Canada.

[24] The case law confirms that keeping a job outside of Canada is contrary to the objectives of the IRPA: *Canada (Citizenship and Immigration) v Jiang*, 2011 FC 349; *Canada (Citizenship and Immigration) v He*, 2018 FC 457.

[25] The IAD’s approach is erroneous, as stated in *Wright* at para 83:

> 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. <u>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</u>.
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> [Emphasis added.]

[26] The only available evidence shows that the respondent left Canada immediately to handle investments and projects abroad, and not in Canada, and that he only began focusing on Canadian operations toward the end of the five-year period. There is no evidence corroborating how he spent his time during his four years outside Canada, aside from a few documents describing his efforts to create ammunitions factories in Tunisia and Malta. Therefore, there is no

evidence explaining why he could not return to Canada more frequently. In addition, the Minister's delegate was of the opinion that he was returning to Canada to see his family and not to restore ties with the country.

[27] The Court also considers unreasonable the IAD's finding that, even if the business was not yet operating, the tentative agreements in many cases demonstrated an effort to establish himself in Canada that surpassed simple future potential. The agreements, if they may be called such, were mostly without commitment and seemed to refer to projects outside of Canada, for which no evidence of their success was provided.

[28] The evidence on the ammunitions factory project establishes the following facts: the project was to take place in Tunisia or Malta; the project was changed to take place in Granby in September 2016; in September 2016, the project received an agreement in principle based on the information provided, but no authorization to begin constructing the facilities and structures; and the financing was to be approved the week of May 29, 2017.

[29] The evidence that the project would likely go ahead was also insufficient, with no indication of commitment to an investment of several million dollars, or even a source of these funds. Nothing in the record indicates that the respondent was a prosperous businessman who had a certain expertise in the field, his own net assets or access to considerable investments that would be required to complete a project of this scope in the competitive world of ammunitions and war industries.

[30] Although the IAD acknowledges that it cannot consider potential future establishment in its Decision, it contradicts itself by considering the respondent's potential establishment in its analysis of humanitarian and compassionate considerations:

> [24] With regards to the potential future establishment of Mr. Hassan, this Court stated, although in a different situation, that a relevant humanitarian and compassionate factor is the actual establishment at the time the IAD makes its determination, which is "not a forward looking exercise" (at para 21), since formally considering potential for establishment as relevant "would be incongruous with the legislative scheme" and "could effectively render the inadmissibility finding irrelevant" (*Lofti* at para 22).
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> *Canada (Citizenship and Immigration) v Hassan*, 2017 FC 413 at para 24.

[31] Lastly, the Court considers the fact that the IAD was completely silent on all of the evidence concerning the respondent's establishment that was contrary to its conclusion. The IAD was obligated to mention that evidence and explain how it arrived at its conclusion despite the evidence.

VII. Conclusion

[32] The IAD erred in allowing the respondent's appeal on humanitarian and compassionate grounds and in finding that the respondent had not lost his permanent resident status.

JUDGMENT in IMM-3977-17

THE COURT'S JUDGMENT is that the applicant's application for judicial review is allowed and no question is certified.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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