Federal Court  Cour fédérale

Date: 20190107

Docket: IMM-1522-18

Citation: 2019 FC 13

Ottawa, Ontario, January 7, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

NEELA PARIKH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] Neela Parikh seeks judicial review of a decision of the Immigration Appeal Division (IAD), which found that she did not meet the residency requirement to qualify for permanent resident status, and that there were not sufficient humanitarian and compassionate (H&C) grounds to grant her exceptional relief.

[2] The IAD concluded that the Applicant failed to establish that she had lived with her husband in the United States for a sufficient number of days to meet the qualifying period because her evidence was not credible in light of numerous gaps and contradictions. It also found that her claim that she needed to stay in Canada to provide care to her husband was not supported in the evidence, and that neither her establishment in Canada nor the hardship she would experience if she was to return to India warranted the granting of special H&C relief.

[3] The Applicant alleges that the IAD committed several errors, ignored significant evidence, and reached an unreasonable conclusion on both the residency question and the H&C considerations. She says the evidence supports her claim that she accompanied her husband for sufficient days to meet the residency requirements set out in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. She also submits that the evidence shows that her husband has serious medical issues that require treatment in Canada, and that being forced to return to India would impose a significant hardship.

[4] I am not persuaded that any of the errors in the IAD decision are fatal flaws, or that it ignored significant evidence. Therefore, I am dismissing this application for judicial review.

I. Background

[5] The Applicant landed in Canada with her two children in 1997. Her husband had landed in Canada the previous year. She returned to India with her children for two years because of an illness in her family, and came back to Canada in 1999 and lived here for two years.

[6] The Applicant and her husband wanted their children to become doctors. She says that she moved to the United States with her children in 2001 because it was easier to obtain admission to medical schools in the United States. She says that her husband returned to Canada a few weeks later, and he stayed in Canada so that he could meet the residency requirement to qualify for Canadian citizenship. Her husband became a Canadian citizen in 2003. He continued to work and live in Canada until sometime in 2005, when he appears to have moved to the United States to work.

[7] The evidence shows that the Applicant's husband maintained various residential addresses in Canada, that he crossed the Canada-United States border on several occasions, and that he travelled to other countries during the relevant period. The Applicant produced evidence that she lived with her husband and children in the United States while the children pursued their studies; however, her assertion that her husband lived with her during this period was cast into doubt for reasons which I will explain below.

[8] The Applicant returned to Canada in November 2012, after her son received his medical degree. On April 11, 2013, a report was issued under section 44 of *IRPA* for failing to comply with the residency requirement, and on June 17, 2013, a departure order was issued against the Applicant. The IAD upheld the departure order and dismissed the Applicant's appeal in September 2015. An application for judicial review of this order was granted, on consent, and the matter was returned to the IAD for re-consideration. That resulted in a second IAD decision upholding the departure order, and this was again subject to an application for judicial review,

which was granted in May 2017. The matter was returned to the IAD for re-consideration, and that decision forms the basis for the current application.

II. Issues and Standard of Review

[9] There are two issues in this case:

A. Is the decision reasonable regarding the determination of the residency requirement?

B. Is the decision reasonable concerning the humanitarian and compassionate considerations?

[10] The standard of review is reasonableness as explained in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 58. This standard has been applied to considerations of residency requirements and H&C determinations: *Bello v Canada (Citizenship and Immigration)*, 2014 FC 745 at paras 22-26; *Samad v Canada (Citizenship and Immigration)*, 2015 FC 30 [*Samad*].

[11] To assess whether a decision is reasonable, a court looks to whether there is justification, transparency, and intelligibility in the decision making process, and to whether the decision falls within a range of possible, acceptable outcomes defensible on the facts and the law (*Dunsmuir* at para 47). Deference is owed to those findings, and it is not the role of the Court to reweigh the relative importance of evidence that was before the decision-maker (*Ali Gilani v Canada (Citizenship and Immigration)*, 2013 FC 243 at para 35; *Samad* at para 30).

[12] The Applicant's counsel submitted at the hearing that there was a breach of procedural fairness in relation to the reasons, because the IAD ignored so much significant evidence. It was argued that the gaps in the reasons – the failure to treat so much of the evidence – made the hearing unfair.

[13] I reject this argument because it is not in accordance with the accepted approach to the review of the reasons of a decision-maker. Inadequacy of reasons is not a stand-alone basis for reviewing a decision, and there is no other basis for claiming a breach of procedural fairness: see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

III. Analysis

A. *Is the decision reasonable in respect of the determination of the residency requirement?*

[14] Paragraph 28(1)(a) of *IRPA* provides that an applicant must establish residency in Canada for 730 days in a five-year period. The Applicant was outside of Canada for a significant proportion of the relevant period, between April 11, 2008 and April 11, 2013. The IAD decision contains an error in describing this five-year window, but I find that nothing turns on this, as the transcript of the hearing shows that the member was aware of the correct period.

[15] To meet the residency requirement, the Applicant relies on subparagraph 28(2)(a)(ii):

(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 :
…	[…]
(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,

[16] The Applicant claims that she was "accompanying" her husband in the United States, within the meaning of that term as defined by subsection 61(4) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]:

Accompanying outside Canada	**Accompagnement hors du Canada**
61 (4) For the purposes of subparagraphs 28(2)(a)(ii) and (iv) of the Act and this section, a permanent resident is accompanying outside Canada a Canadian citizen or another permanent resident – who is their spouse or common-law partner or, in the case of a child, their parent – on each day that the permanent resident is ordinarily residing with the Canadian citizen or the other permanent resident.	**61 (4)** Pour l'application des sous-alinéas 28(2)a)(ii) et (iv) de la Loi et du présent article, le résident permanent accompagne hors du Canada un citoyen canadien ou un résident permanent – qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents – chaque jour où il réside habituellement avec lui.

[17] The Applicant submitted the following evidence in support of her claim that she was accompanying her husband:

- Her testimony, and that of her husband, that they drove across the border in 2001, and that she has lived in the United States since then;
- Her husband's testimony, supported by stamps in his passport, and information obtained from United States officials, that he crossed the Canada-U.S. border in 2005; and
- Letters from relatives, as well as a letter from her son, stating that the Applicant lived with her husband and children near Chicago during the relevant period.

[18] The IAD decision cast doubt on the key evidence. In particular, it found insufficient evidence to establish that the Applicant had lived with her husband during this period. The key findings include that:

- There was no independent evidence to corroborate the testimony that the Applicant crossed the border into the United States in 2001 with her husband. The Applicant and her husband testified that they drove across the border but they provided no documentary evidence to support their testimony.
- The Applicant's evidence was that she did not have any legal status in the United States for much of the period she lived there. Her husband was unable to produce any evidence that he had a valid work permit or other authorization to work in the United States.
- There was no evidence that the Applicant accompanied her husband on any of the various trips he took to other countries during this period, nor any evidence that she was prevented from doing so. The IAD noted that if she had provided corroborating evidence to demonstrate that she had accompanied her husband on his trips, this would have assisted her in establishing that she was accompanying him in accordance with the requirements of sub-paragraph 28(2)(a)(ii).

- The Applicant and her son applied for Canadian citizenship in March 2010, and on this application she stated that she had lived at various Canadian addresses during the period from March 2008 to March 2013. She testified that these addresses were places her husband had rented during this period in order to maintain his connection to Canada, and that in her culture, her residence was that of her husband. The IAD rejected this explanation as unsupported by the evidence. It noted that the citizenship application required the applicant to indicate "the periods when you have been physically present in Canada."
- In support of her citizenship application, the Applicant submitted letters from neighbours, saying that they had seen her at the Canadian addresses, in contradiction to her claim that she had been accompanying her husband in the United States.
- In support of her citizenship application, the Applicant also submitted a letter from her son. This letter was not credible because the IAD found he made misrepresentations on his own citizenship application and was subject to a separate removal order.

[19] The Applicant claims the IAD ignored relevant evidence and made unreasonable findings concerning the key question – whether the Applicant had lived with her husband in the United States during the period from 2005 until 2012. If this was the case, then she was "accompanying" him and would have met the residency requirement. The Applicant says that the timing of her husband's travels was catalogued in a comprehensive chart that was provided to the IAD, but this chart was ignored. The Applicant argued that the IAD member made an error in correcting the chart during the hearing, a sign that the member did not pay sufficient attention to it.

[20] The Applicant also submits the IAD improperly ignored her testimony, her husband's testimony, and the letter from her son to the effect that they lived together in the United States. The Applicant also argues that the IAD erred in law in its interpretation of subparagraph 28(2)(a)(ii). This renders the decision unreasonable.

[21] I disagree. The decision reflects a consideration of the relevant evidence. The assessment of the credibility of the witnesses and documentary evidence is amply supported by the record. Although the test from the statute and regulations is not quoted, I find the member applied the proper test.

[22] The core problem for the Applicant is that she had offered two completely contradictory versions of where she lived during the relevant period. She initially stated that she was physically present at various addresses in Canada. Later, she said that she was accompanying her husband while residing in the United States during this period. When confronted with this contradiction, the Applicant denied that she had lied on her citizenship application. She said that her answer reflected her cultural norms, which required that her address was her husband's address.

[23] There are at least three difficulties with this explanation: (i) the specific question she was answering was whether she was physically present in Canada, not what her husband's or her address was; (ii) the Applicant produced no evidence of such a cultural norm; and (iii) the Applicant's testimony was that her husband did not really live at the listed Canadian addresses during this period, he simply maintained them to receive mail and to have a link with Canada. Her evidence was that he lived with her in the United States. So, applying the cultural norm as

she described it, her address should have been in the United States. The IAD did not err in finding this contradiction undercut her credibility.

[24] The Applicant argues that the IAD adopted an incorrect interpretation of subparagraph 28(2)(a)(ii) of *IRPA* when it stated: "The effect of the word accompany means just that, to travel with or be in company of, in this case the appellant's husband." This does not correspond with the definition of the term in subsection 61(4) of the *IRPR*, and this is an error of law. The Respondent submits that the member did not err in stating this definition, which in substance mirrors that contained in subsection 61(4), and in any event the decision shows that the member applied the proper test in assessing the evidence.

[25] The review of a decision under the reasonableness standard is not to be a "treasure hunt for errors" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54). However, the argument in this case is that it is unreasonable to not make any reference to the definition of a specific legal term on the key issue, when that term is clarified in a regulation. It is argued that a decision-maker should mention the relevant regulatory definition. That was not done here – there is no mention of subsection 61(4) of the *IRPR*. Is that a fatal flaw? I find it is not, for the following reasons.

[26] First, during the IAD hearing, the member identified the precise legal and factual issue on this question, using words that indicate that he understood the legal test in substance. The transcript shows that relatively early in the hearing, the member said the following:

> Alright, and so counsel I am just trying to make this easier for everybody; if the appellant can provide me with sufficient

> evidence that she accompanied her husband at the time to the United States in June of 2001 and there is proof that he was there… and they were living together, then she meets the elements pursuant to [s. 28(2)(a)(ii) of *IRPA*].

[27] Second, I find that the reasons demonstrate that the member was looking for indicia of the husband's and wife's cohabitation in the relevant period. Although the decision does not use the words "ordinarily residing with", that is in substance what the member examined in the decision.

[28] The Respondent argued at the hearing that the words actually used in the decision, "to travel with or be in the company of", were functionally equivalent to those used in subsection 61(4). While one interpretation of the phrase "be in the company of" could be to "ordinarily reside with" someone, that phrase could also be interpreted to refer to a series of more casual or short-term periods during which two people were together. They are not identical.

[29] However, I do not find that this decision should be overturned because the member did not precisely quote a phrase. What matters is whether the member applied the proper test to the evidence, not the particular form of words chosen. I find that the member did apply the proper test to the facts.

[30] For example, the decision contrasts the evidence about the husband's travels, including his travel to the United States, with the absence of evidence as to the whereabouts of the Applicant. There was no evidence from government or other independent authorities that supported her evidence that she lived in the United States.

[31] A few pictures of the Applicant and her husband together were produced, and they testified that these pictures were taken at their daughter's wedding in the United States. However, the pictures do not show any landmarks or other information which could confirm where they were taken. Furthermore, I agree with the Respondent that the pictures do no more than to demonstrate that the husband and wife were together at one moment in time. Apart from letters from family members, no other records appear to support their evidence that they lived for seven years together in the United States. The IAD found that the authenticity and reliability of these letters was doubtful, for reasons it explained and which are amply supported in the record.

[32] The Applicant argues that the member misconstrued the evidence about the husband's travel. The member noted the evidence from the husband's passport stamps, indicating that he had travelled to the United States as well as to India and other countries in the period between 2008 and 2011 – the same time period during which he said he was residing with the Applicant in the United States. The decision states:

> [35] There is … a lack of credible evidence to conclude that the appellant travelled with or was in the company of her Canadian husband on such short trips. There is also a lack of credible evidence why the appellant could not have accompanied her husband to these places after he obtained Canadian citizenship. If she had done so and provided credible corroborating evidence of her travels accompanying her husband, who was a Canadian citizen during these travels, it is possible the appellant would have been able to meet the residency obligation. However, this is not the case.

[33] The Applicant submits that this is an indication that the member committed an error of fact, since the combined length of these trips would not have allowed her to meet the residency

requirement. She also argues that this is an error of law, since this is an indication that the member thought that “accompany” in subparagraph 28(2)(a)(ii) meant “to travel together”.

[34] I am not persuaded. I find that the references to whether the Applicant had travelled with her husband are indications that the member would have accepted passport stamps or other evidence that they travelled together as an indicator that they were likely residing together during this period. The member notes that the husband’s travel was for very short periods of time. Even if the Applicant had accompanied her husband for every day of every trip, that would not have added much to their time together.

[35] Absent any evidence of travel together, there was no other independent documentary evidence supporting the claim that the Applicant and her husband lived together while in the United States.

[36] Finally, the member had good reasons to find that the evidence as a whole was insufficient, given the contradictions in the story of the Applicant, her evident willingness to change her story and to sign official documents attesting to different versions of events, and to submit evidence from third parties in support of both versions of events.

[37] In light of the totality of the evidence, I find the decision that the Applicant had failed to meet the residency requirement to be well within the range of reasonable outcomes in view of the law and the evidence.

B. *Is the decision reasonable in respect of the consideration of the humanitarian and compassionate considerations?*

[38] A shortfall in the number of days needed to meet the residency requirement is not necessarily fatal to a claim. Paragraph 28(2)(c) of *IRPA* provides that H&C considerations can be weighed to determine whether such factors justify the retention of permanent resident status. In this manner *IRPA* allows a breach of the residency obligation to be overcome – but this relief is exceptional and discretionary: *Canada (Public Safety and Emergency Preparedness) v Nizami*, 2016 FC 1177 at para 16. The IAD is specifically authorized to consider H&C factors in deciding an appeal: see paragraph 67(1)(c) of *IRPA*. The factors to be considered in assessing a claim of H&C relief regarding the residency requirement was described by Justice LeBlanc in *Samad*:

> [18] When determining whether there are sufficient H&C considerations warranting special relief in light of all the circumstances of the case, the IAD, in addition to the best interest of a child factor prescribed by paragraphs 28(2)(c) and 67(1)(c) of the Act, may take into consideration various factors such as the length of time the applicants spent in Canada and their degree of establishment in Canada before leaving the country, the reasons why they left Canada, ongoing contact with their family members in Canada, the hardship the family members in Canada would face if they were to lose their permanent resident status and relocate, their situation while they were living outside Canada and any attempts made to return to Canada, the hardship they would face if they were to lose their permanent residence and had to return to their country of origin, and any other special or particular circumstances warranting special relief (*Ambat v Canada (Minister of Citizenship and Immigration)*, 2011 FC 292, 386 FTR 35; *Nekoie v Canada (Minister of Citizenship and Immigration)*, 2012 FC 363, 407 FTR 63, at paras 32-33; *Canada (Minister of Citizenship and Immigration) v Sidhu*, 2011 FC 1056, 397 FTR 29, at para 44).

[39] The Applicant claims that the IAD unreasonably failed to consider evidence pertaining to her husband's health, her establishment in Canada, and the hardship she will face if returned to India. The Applicant's husband had a heart attack in 2016, and he is receiving follow-up care from a medical team. The Applicant argues that the member ignored the letter from her husband's primary treating physician advising against any change in his treatment or care team and that he avoid stress.

[40] The Applicant testified that she needed to be with her husband because he required her constant care. She and her husband both testified that he would not receive appropriate health care in India, and in particular that the lack of an equivalent to the 911 emergency service available in Canada would cause him grave concern. The husband's father had died of a heart attack in India, and he testified that returning there would cause him substantial stress and hardship.

[41] The Applicant also submitted that the member had unreasonably weighed the evidence of her degree of establishment in Canada, pointing to her employment, her involvement in various religious organizations and other volunteer activities, and her family ties to Canada and the United States. She testified that neither she nor her husband has immediate family in India and that they no longer owned a home there or had any connections to the country. Her husband was no longer a citizen of India. The Applicant argued that it was unreasonable to conclude that H&C considerations did not weigh in her favour in these circumstances.

[42] The Respondent contends that the decision is reasonable; the member applied the proper criteria. The assessment of H&C factors is a highly fact-specific exercise of discretion which warrants considerable deference from a reviewing court.

[43] I am not persuaded that the decision is unreasonable. It is not the Court's role to reassess the evidence, reweigh the factors, and substitute its own view for that of the IAD. This decision falls within the core expertise of the IAD. The member considered the proper legal test and the relevant factors, and his conclusion is supported by the evidence.

[44] Concerning the Applicant's husband's medical condition, the member properly noted that the husband recently travelled alone to India, despite the assertion he required 24/7 care and support. I also find that the member did not ignore the letter from the treating physician. Indeed, the member specifically referenced this letter at paragraph 52 of the decision. The member also noted the lack of credible evidence that the Applicant's husband could not obtain appropriate health care if he returned to India.

[45] The member also considered the Applicant's limited establishment in Canada, as well as the evidence of hardship to her if she was to return to India. As the member noted, there would be some degree of hardship for the Applicant, but she "speaks the language and has spent the majority of her years in India [which] would make the transition easier."

[46] I find this aspect of the decision reasonable. It is justified, transparent, and intelligible, and it is defensible in respect of the facts and the law: *Dunsmuir* at para 47; *Khosa* at para 59.

IV. Conclusion

[47] For these reasons, I find the IAD's decision reasonable. The member properly considered the evidence, and its credibility findings are supported in the record. Although the decision does not state the test precisely as it is set out in the statute and regulations, I find that the member applied the proper test in his consideration of the evidence. The conclusions are fully explained and supported in the evidence.

[48] The application for judicial review is dismissed.

[49] No question of general importance was proposed for certification, and none arises on the facts of this case.

JUDGMENT in IMM-1522-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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