Federal Court  Cour fédérale

**Date: 20190110**

**Docket: IMM-2270-18**

**Citation: 2019 FC 20**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, January 10, 2019**

**Present: The Honourable Mr. Justice Bell**

**Docket: IMM-2270-18**

**BETWEEN:**

**NATALY ADELA BERMUDEZ ANAMPA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Nature of the matter

[1] This case concerns an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], against the decision rendered on April 23, 2018, by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board.

The IAD upheld the decision of a program manager [the manager] who concluded that Nataly Adela Bermudez Anampa [the applicant] had breached her residency obligation in Canada under section 28 of the IRPA.

[2] In their respective decisions, the manager and the IAD denied special relief on the basis of humanitarian and compassionate grounds and the best interests of the child with respect to the applicant pursuant to paragraph 28(2)(c) of the IRPA and paragraph 67(1)(c) of the IRPA, respectively.

## II. Facts

[3] The applicant is a 37-year-old citizen of Peru. She was granted permanent resident status in Canada on April 5, 2011, and remained in Canada for four months, from April 2011 to August 2011. Subsequently, she returned to Peru to continue her studies in law. In December 2011, she returned to Canada for less than a month. Finally, she returned again to Canada in 2012, but this time for about a month.

[4] According to her testimony before the IAD, the applicant explained that, during the five-year period in question, she was pursuing her master's degree in criminal law in Peru. She finished her master's degree in 2013. In December 2013, after obtaining her master's degree, the applicant returned to Canada, where she stayed for approximately 20 days. Subsequently, she returned to Peru once again because she had decided to pursue a semester of a doctorate in law.

[5] On August 29, 2014, the applicant married in Peru.

[6] In October 2014, while pregnant, the applicant returned to Canada where she gave birth to her daughter on December 5, 2014. She then returned to Peru in June 2015. The applicant returned to Canada for the holiday season in December 2015 until January 2016. Subsequently, she returned with her daughter and husband to Peru.

[7] On August 18, 2016, the manager at the Canadian Embassy in Lima, Peru, informed the applicant by letter that she had failed to meet her residency obligation for the five-year period between August 4, 2011, and August 4, 2016. The applicant appealed this decision to the IAD, arguing that the manager should have allowed her to retain her permanent resident status on humanitarian and compassionate grounds, as set out in paragraph 28(2)(c) of the IRPA.

[8] Since October 2016, the applicant has been living in Canada with her daughter. She has been studying and working in Canada since that time. She and her husband have since separated, and the applicant started divorce proceedings on December 19, 2017.

## III. IAD Decision

[9] The applicant's claims with respect to humanitarian and compassionate considerations were rejected by the IAD. The non-exhaustive list of criteria taken into account by the IAD to arrive at this conclusion can be summarized as follows: the extent of the non-compliance with the residency obligation, the reasons for the departure from Canada and the extended stay abroad, the question as to whether the applicant had attempted to return to Canada at the first opportunity, the initial and continuing degree of establishment, family ties to Canada and Peru, the upheaval that would be caused to the applicant and her family in Canada if she were to lose

her permanent resident status, the best interests of the child directly affected by the decision, and whether there are unique or special circumstances that warrant special relief.

[10] The IAD calculated a significant deficit in the number of days the applicant had spent in Canada. She remained in Canada for only 338 days, less than half of her residency requirement of having to be present for at least 730 days in Canada during the five-year period. The IAD considered that she had opted for a lifestyle that it described as that of a [TRANSLATION] "visitor". The IAD was of the view that this deficit represented a serious breach of the applicant's obligation under section 28 of the IRPA. In light of the applicant's desire to remain in Peru for extended periods of time, the IAD concluded that a heavy burden was placed upon her in the circumstances, and that therefore, she had an obligation to show considerable evidence for humanitarian and compassionate considerations that would meet that burden.

[11] With respect to the initial level of establishment, the IAD found that the applicant had spent only four (4) months in Canada after obtaining her permanent resident status in 2011. Subsequently, she had returned to Peru to continue her education until 2014, while returning briefly to Canada in the meantime. On this point, the IAD was of the view that the applicant's presence in Canada during the five-year period had been sporadic and that, therefore, there was no permanent establishment.

[12] The applicant submitted in evidence her tax assessment notices and tax returns. The IAD concluded that those documents did not demonstrate any establishment in Canada. On the contrary, the IAD noted that the notices of assessment "indicate a minimal total income and that

the ensuing statements instead enabled her to receive substantial family benefits for her daughter, even when she was in Peru, which in fact constitutes fraud."

[13] As to the question of whether the applicant had attempted to return to Canada at the first opportunity, the IAD was aware that it was a personal choice to remain in Peru to continue her studies. On the other hand, even if she preferred this strategy to coming to study law in Canada, this choice cannot be treated without legal consequences. In approaching this choice, the IAD concluded that the evidence of the applicant was not credible. The IAD believed that she "wanted to have it both ways by building a life in Peru while trying to maintain a gateway into Canada, and some of the resulting benefits, as long as possible."

[14] With respect to the degree of establishment after the five-year period, the IAD was aware that since October 2016, the applicant had been residing in Canada with her daughter, a Canadian citizen. In addition, the applicant benefitted from the presence of her mother, grandmother and also her brother. The IAD recognized that she worked in a factory and was taking French-language courses to improve her level of French.

[15] Notwithstanding this, the IAD was of the opinion that there were several elements that cast doubt on the applicant's intention to move to Canada. Notably, the IAD noticed the high rate of absenteeism from her French-language courses and the fact that she did not take positive steps to have her degrees recognized in Canada. According to the IAD, if she had intended to settle for good in Canada, she would at least have undertaken research to find out what should be done to obtain the equivalencies required for her to practise law in Canada as soon as possible.

[16] With regard to the presence of family ties in Canada, the IAD was aware that the mother, brother and grandmother provided family support in Canada. However, the IAD was of the opinion that she also had a good support network in Peru because her father and sisters were there. In addition, she had spent the majority of her life there.

[17] The applicant claimed that her daughter would be a victim of "femicide" if she were to return to Peru. However, the IAD was not convinced. According to the IAD, the evidence presented on the situation of women in Peru was very general, and the applicant did not show that her daughter would be subject to "femicide" were she to return to Peru.

[18] In light of the foregoing, the IAD therefore dismissed the applicant's appeal.

## IV. Relevant provisions

[19] For the sake of brevity, the relevant provisions of the IRPA are appended to this judgment.

## V. Analysis

### A. *Standard of review*

[20] The Supreme Court of Canada characterizes paragraph 67(1)(c) of the IRPA as a power to grant exceptional relief (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57–58, [2009] 1 SCR 339).

[21] As a result, decisions made pursuant to this paragraph are reviewed on a standard of reasonableness (*Samad v Canada (Citizenship and Immigration)*, 2015 FC 30 at para 20, *Bello v Canada (Citizenship and Immigration)*, 2014 FC 745 at para 26; *Nekoie v Canada (Citizenship and Immigration)*, 2011 FC 363 at para 15, 407 FTR 63 [*Nekoie*]).

[22] When a decision is reviewed on a standard of reasonableness, the analysis must address the justification, transparency, and intelligibility of the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

B. *Did the IAD err in concluding that the cited humanitarian considerations are insufficient to grant the applicant special relief?*

[23] The list of factors that the IAD must consider in determining whether there are humanitarian and compassionate considerations were developed by Justice Near, as he then was, in *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at para 27, 386 FTR 35:

> i. the extent of the non-compliance with the residency obligation;
>
> ii. the reasons for the departure and stay abroad;
>
> iii. the degree of establishment in Canada, initially and at the time of hearing;
>
> iv. family ties to Canada;
>
> v. whether attempts to return to Canada were made at the first opportunity;
>
> vi. hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;

vii. hardship to the appellant if removed from or refused admissions to Canada; and,

viii. whether there are other unique or special circumstances that merit special relief.

[24] The list of factors above is not exhaustive and the weight given to each of them varies according to the particular circumstances of each file. The jurisprudence of this Court as it currently stands shows that the assessment of each of these factors is left to the discretion of the IAD, and the Court should therefore not interfere in its weighting of those factors (*Nekoie*, at para 33).

[25] I note that the IAD considered the factors listed above and developed its reasons for rejecting the applicant's claims. In addition, the applicant submits that it is not reasonable for the IAD to draw negative inferences against her with respect to the days missing needed to meet the residency requirement. In support of her argument, she alleges that the dispute focuses on the humanitarian and compassionate considerations and not on the residency obligations. I disagree.

[26] First of all, the extent of the breach of the residency obligation was a factor that the IAD was entitled to consider, as it appears in the list of factors mentioned above. Therefore, it was entirely reasonable for the IAD to begin its analysis by verifying the extent of the non-compliance with the residency obligation. I am of the view that this is a significant breach that does not reflect an intention to reside in Canada permanently during the relevant five-year period. Given the extent of the breach, the IAD reasonably concluded that the threshold to be met for establishing humanitarian and compassionate considerations had to be set at a high level.

[27] The applicant claims that the IAD erred in criticizing her strategy of continuing her graduate studies in Peru instead of pursuing them in Canada. With respect, although this decision is understandable, this does not change the fact that she made a choice to study in Peru instead of Canada. Her decision to stay abroad to pursue her professional career also reflects a choice she made during that time. She could have decided to return to Canada at any time before her permanent resident status was jeopardized. Let us not forget that she did a master's degree in Peru after completing her undergraduate degree and that she started her doctoral studies before returning to Canada full time. I am of the opinion that the IAD reasonably concluded that the choice to study abroad, instead of Canada, does not justify the applicant's long absence from Canada, especially when she says she wants to practise law in Canada.

[28] With respect to the best interests of the child, the applicant submits that the IAD did not provide a clear rationale for why it was of the view that the applicant's daughter would not be exposed to the risk of violence against women in Peru, should they return to that country.

[29] It must be remembered that the burden remains on the applicant to convince the IAD of her claim. According to the IAD, the evidence provided by the applicant regarding "femicides", as well as the situation of women in Peru, was too generalized. I note here that the situation of women in Peru allowed the applicant, a woman, to go to university, finish two law degrees, including a master's degree, and continue her studies to obtain a doctorate. There is nothing unreasonable in the analysis or conclusion of the IAD regarding the best interests of the child. Even if I am wrong, the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR (4th) 193, states the principle that a decision-

maker “must consider the children’s best interests as an important factor, but that is not to say that children’s best interests must always outweigh other considerations” (*Elias v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1329 at para 14, 149 ACWS (3d) 641).

[30] I take the opportunity to reiterate that the role of this Court in judicial review is not “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, [2013] 2 SCR 458). In this case, the applicant is asking the Court to reassess the evidence in search of such an error. This is not the role of the Court (*Alvarez v Canada (Citizenship and Immigration)*, 2014 FC 702, at para 12).

## VI. Conclusion

[31] In this case, I conclude that the applicant has failed to meet her evidentiary burden of demonstrating how the IAD’s conclusions or analysis were unreasonable.

[32] The application for judicial review is therefore dismissed. No question is certified.

## JUDGMENT

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is dismissed; and

2. No question is certified.

"B. Richard Bell"
Judge

## APPENDIX

| *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 | *Loi sur l'immigration et la protection des réfugiés*, L.C. 2001, ch. 27 |
|---|---|
| **Residence 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: |
| **(a)** a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a total of at least 730 days in that five-year period, they are | **a)** le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas: |
| **(i)** physically present in Canada, | **(i)** il est effectivement présent au Canada, |
| **(ii)** outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent, | **(ii)** il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, |
| **(iii)** outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, | **(iii)** il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale, |

**(iv)** outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or

**(iv)** il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

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

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

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

**b)** il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

**(i)** if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;

**(ii)** if they have been a permanent resident for five years or more, that they have met the

residency obligation in respect of the five-year period immediately before the examination; and

**(c)** a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.

**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 précédant le contrôle.

**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

**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

the circumstances of the case.

spéciales.

**Application for judicial review**

**72 (1)** Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is, subject to section 86.1, commenced by making an application for leave to the Court.

**Demande d'autorisation**

**72 (1)** Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est, sous réserve de l'article 86.1, subordonné au dépôt d'une demande d'autorisation.

**Application**

**(2)** The following provisions govern an application under subsection (1):

**Application**

**(2)** Les dispositions suivantes s'appliquent à la demande d'autorisation:

**(a)** the application may not be made until any right of appeal that may be provided by this Act is exhausted;

**a)** elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;

**(b)** subject to (f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the Applicant is notified of or otherwise becomes aware of the matter;

**b)** elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;

**(c)** a judge of the Court may, for special reasons,

**c)** le délai peut toutefois être prorogé, pour motifs

allow an extended time for filing and serving the application or notice;

valables, par un juge de la Cour;

**(d)** a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and

**d)** il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;

**(e)** no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

**e)** le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | IMM-2270-18 |
| **SYTLE OF CAUSE:** | NATALY ADELA BERMUDEZ ANAMPA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | NOVEMBER 7, 2018 |
| **JUDGMENT AND REASONS:** | BELL J. |
| **DATED:** | JANUARY 10, 2019 |

**APPEARANCES:**

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| Michel Pépin | FOR THE RESPONDENT |

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