Federal Court  Cour fédérale

**Date: 20190118**

**Docket: IMM-2535-18**

**Citation: 2019 FC 78**

**Ottawa, Ontario, January 18, 2019**

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

**BETWEEN:**

**JAIRAM MAHARAJ**
**JASMIN MAHARAJ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Nature of the matter

[1] This is an application for judicial review by two Applicants, a husband [Male Applicant] and wife [Female Applicant], pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision made by a board member of the Immigration

Appeal Division [IAD] dated May 15, 2018, which dismissed the Applicants' residency obligation appeal [Decision].

## II. Facts

[2] The Applicants are a married couple and citizens of Trinidad. Their three adult children (born 1984, 1986, 1990, aged approximately 34, 32, and 28 at the time of the hearing) and three grandchildren (born 2013, 2014, 2017, aged approximately four and three years, and six months at the time of the hearing ) all reside in Canada as either permanent residents or Canadian citizens. The Male Applicant is a pharmacist in Trinidad; together with the Female Applicant they owned a pharmacy in Trinidad.

[3] The Applicants applied for and obtained permanent residence through the Skilled Worker Program and landed in Canada on August 26, 2010. The Female Applicant's five-year period began on December 19, 2010 and ended on December 18, 2015. The Male Applicant's five-year period began on July 19, 2011 and ended on July 18, 2016.

[4] The rules surrounding permanent residence require the Applicants to reside in Canada for 730 days (two years) out of five years. If they do not, they may lose their permanent residence status unless there are humanitarian and compassionate grounds for relief.

[5] This case arises from the fact that the two Applicants spent only one week in Canada after landing, before they returned to Trinidad. On analysis, the Male Applicant spent only 152 days in Canada of the two years required; the Female Applicant spent only 222 days of the 730

required. I note the Applicants submit (without disagreement) that in fact the Female Applicant was in Canada for 287 days not 222 days; the 55 day difference does not make a difference in the result.

[6] The two returned to Canada from time to time after they returned to Trinidad: the Female Applicant returned 14 times in five years, and the Male Applicant visited Canada some 16 times in five years.

[7] The Applicants deposed it was always their intention to reside permanently in Canada, but they had to return to Trinidad to sell their pharmacy and deal with the Male Applicant's father's estate following his death in 2012; the Male Applicant was the executor of his father's will. His father's estate was not wound up until 2016. The pharmacy was not sold until 2017, some seven years after landing. Consequently, the Female and Male Applicants submitted, they were only able to permanently move to Canada on July 10, 2016 and August 29, 2017 respectively.

[8] The Female and Male Applicants applied for travel documents, but their applications were refused by the High Commission because of their failure to meet subsection 28(2) of the IRPA, that is, their failure to reside in Canada for 730 days within the relevant five years.

[9] The Applicants appealed the decisions to the IAD under subsection 67(1)(c) of the IRPA. They sought extraordinary relief based on humanitarian and compassionate [H&C] factors

including the best interests of the grandchildren [BIOC]. The IAD dismissed their applications, hence (with leave) they bring this application for judicial review.

[10] Numerous issues were pursued by Ms. Seligman for the Applicants. However, because I am granting judicial review and ordering a new hearing, except as set out below it is not necessary to review these submissions.

[11] The determinative issue is that the IAD made two unreasonable findings in the course of its analysis.

[12] The first unreasonable finding turned on the treatment by the IAD of a report of a psychologist. The IAD discusses this psychological evidence at para 25:

> [25] The appellants alleged numerous sources of hardship if this appeal were dismissed. They provided a psychological examination [footnote omitted] stating they both exhibited significant distress, depressive effect and hypervigilance associated with the possibility of not being allowed to remain in Canada. This report concludes the appellants would suffer significantly from depression and despondency if this appeal were dismissed. I will give little weight to this report for two principal reasons. The first is that the author spent only 50 minutes with the appellants. The fact that neither appellant sought further medical treatment after receiving the evaluation diminishes its credibility. Both appellants testified they either gained or lost weight because of the uncertainty of their status but the evidence also suggested the male appellant was affected by other chronic diseases which may also explain these changes. The general stress from the uncertainty of their status is a consequence of their failure to respect their residency obligations for reasons I did not find compelling.

[13] In my respectful view, the IAD failed to follow the teachings of the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, which

holds that once a tribunal accepts a psychological diagnosis, requiring an applicant to adduce additional evidence regarding availability of the treatment is "problematic" because it undermines the diagnosis, at para 47:

> [47] Having accepted the psychological diagnosis, it is unclear why the Officer would nonetheless have required [the appellant] to adduce *additional* evidence about whether he did or did not seek treatment, whether any was even available, or what treatment was or was not available in Sri Lanka. Once she accepted that he had post-traumatic stress disorder, adjustment disorder, and depression based on his experiences in Sri Lanka, requiring further evidence of the availability of treatment, either in Canada or in Sri Lanka, undermined the diagnosis and had the problematic effect of making it a conditional rather than a significant factor.

[14] I have concluded, that this aspect of the Decision is not defensible in respect of the facts and the law, as required by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*]. In *Dunsmuir*, that Court explains what is required of a court reviewing on the reasonableness standard of review at para 47:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are <u>defensible in respect of the facts and law</u>.
>
> [Emphasis added.]

[15] The second unreasonable finding is the repeated assertion by the IAD that the Applicants once removed will have the capacity to continue to visit their grandchildren as they did in the past. With respect, this conclusion is not defensible on the facts and law in this case. As holders of skilled worker visas they were free to come and go from Canada. However, given the IAD's

Decision, each is required to request and obtain an Authorization to Return to Canada [ARC] from the Minister of Citizenship and Immigration before coming back to visit. This is the case because under subsection 69(3) of IRPA, a removal order was made when the appeal was dismissed by the IAD. Pursuant to subsection 224(2) of the IRPR, persons such as the Applicants against whom a removal order has been issued, must leave Canada within 30 day after the removal order becomes enforceable, failing which the departure order becomes a deportation order. Pursuant to subsection 49(1)(a) of the IRPA, the removal order comes into force the day the removal order is made, if there is not right to appeal. Because an application under section 72 of the IRPA for judicial review to this court is not a right of appeal under the IRPA or IRPR, removal orders against the Applicants became enforceable on May 15, 2018. Therefore, as of June 15, 2018, each of the Applicants was deemed to have been deported from Canada. Thus, each requires an ARC to return. While the IAD refers to their "capacity" to return, presumably with reference to their financial ability to pay the costs of travel, the fact remains that their ability to make return visits may be very significantly limited by the ARC process, regardless of their financial wherewithal. I have therefore concluded that the IAD's finding is not defensible.

[16] I appreciate the Supreme Court of Canada instructs that judicial review is not a line-by-line treasure hunt for errors; the decision must instead be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, I appreciate that a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

[17] In this case, I have noted the IAD made positive findings in respect of five of the seven factors considered in its H&C analysis.

[18] However, on balance I have concluded that it would not be safe to leave the Decision stand, because it is not defensible in respect of the facts and the law in these two respects. I do not consider it the task of this Court to reweigh the evidence to determine the proper outcome of this case; that is the task of a properly instructed and different IAD on the redetermination being ordered.

[19] Therefore judicial review is granted.

## III. Certified question

[20] Neither party proposed a question to certify, and none arises.

**JUDGMENT in IMM-2535-18**

**THIS COURT'S JUDGMENT is that** judicial review is granted, the matters are remanded to be decided by a differently constituted decision-maker, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2535-18 |
| **STYLE OF CAUSE:** | JAIRAM MAHARAJ, JASMIN MAHARAJ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | DECEMBER 5, 2018 |
| **JUDGMENT AND REASONS:** | BROWN J. |
| **DATED:** | JANUARY 18, 2019 |

**APPEARANCES:**

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|---|---|
| Robin L. Seligman and Sandra Dzever | FOR THE APPLICANTS |
| Stephen Jarvis | FOR THE RESPONDENT |

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |