Federal Court  Cour fédérale

**Date: 20190724**

**Docket: IMM-3049-18**

**Citation: 2019 FC 983**

**Ottawa, Ontario, July 24, 2019**

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

**BETWEEN:**

**SANA HAMMO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. OVERVIEW

[1] The applicant, Sana Hammo, is a citizen of Jordan who was born in 1958. In December 2000, she, her husband and their four children became permanent residents of Canada under the business investor category. Since then, the applicant has for the most part lived in Jordan.

[2] In May 2017, the applicant applied for a permanent resident travel document so that she could return to Canada from Jordan. On June 5, 2017, a visa officer with the Canadian Embassy in Amman refused the application because, during the preceding five-year period (that is, between June 5, 2012 and June 5, 2017), the applicant had been physically present in Canada for only 386 days. This is well below the 730 days required under section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] to retain one's permanent resident status. The officer considered the humanitarian and compassionate [H&C] factors the applicant identified in her application but found that they were insufficient to warrant an exemption from the residency requirement and the retention of her permanent resident status.

[3] The applicant appealed this decision to the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada under section 63(4) of the *IRPA*. She relied on the H&C jurisdiction of the IAD as set out in section 67(1)(c) of the *IRPA*, arguing that special relief was warranted in light of all the circumstances of her case.

[4] The appeal was heard on May 28, 2018. The applicant testified at the hearing and also provided additional evidence concerning H&C considerations.

[5] In a decision dated June 12, 2018, the IAD dismissed the appeal.

[6] The applicant now applies for judicial review of this decision under section 74(1) of the *IRPA*.

[7] For the reasons set out below, the application will be dismissed.

## II. DECISION UNDER REVIEW

[8] In disposing of the appeal, the IAD considered several factors including the extent of the applicant's non-compliance with the residency requirement, the reasons for the applicant's departure from Canada and prolonged stay abroad, the applicant's establishment in Canada, her ties to Jordan, the potential hardship she and her family would suffer if she were to lose her permanent resident status, and the best interests of any children that may be affected by the decision. There is no dispute that these are all relevant considerations.

[9] There is also no dispute that the applicant had been physically present in Canada for only 386 days during the relevant five-year period. The IAD found that the extent of non-compliance with the residency obligation was "moderate to extensive." As a result, the IAD determined that the applicant had to meet a "moderate to high threshold of H&C grounds" to be entitled to special relief under section 67(1)(c) of the *IRPA.*

[10] The IAD judged the evidence concerning the applicant's long-term residential history to be somewhat unclear but found that after the applicant and her family were landed in Canada in 2000, they lived here for only about two years. After that, the applicant lived primarily in Jordan, returning to Canada for visits. It appeared that the applicant had not met her residency obligation for any five-year period since she became a permanent resident. In the IAD's view, the applicant had never made a sustained effort to reside permanently in Canada since being landed in 2000.

[11] Looking at the five-year period in issue, the applicant had returned to Canada in May 2012 and then left for Jordan again in July 2013. The applicant declared in her application that she had been present in Canada for 386 days. In response to the question on the application form about whether there were humanitarian and compassionate considerations that would justify retention of her permanent resident status despite the fact that she did not meet the residency obligation, the applicant cited various health conditions she was suffering from including hypertension, osteoporosis and "generalized fatigue" for which she had been treated in Jordan.

[12] In her appeal to the IAD, the applicant explained that she had left Canada in 2013 to care for her mother. She also stated that this was why she had remained outside Canada until 2017. The IAD found the evidence in this area "problematic." As noted, in her 2017 application for a travel document, the applicant had cited only her own medical conditions as the reason she had remained in Jordan. A medical note submitted with the travel document application stated that the applicant had been treated at the Jordan University Hospital over the last four years in the cardiovascular, orthopedic and general medicine departments, with "frequent" hospital admissions and clinic visits. Given the applicant's "general condition," complete home rest was recommended and she was prevented from travelling long distances. The applicant was now "doing well," however, and she could return to her normal life and even travel.

[13] The applicant did not mention any need to care for her mother in her travel document application. At the appeal to the IAD, however, the applicant testified that she had remained in Jordan because she had to care for her elderly mother. The IAD found that this "inconsistent

evidence, absent any satisfactory explanation, undermines the credibility of the appellant's explanation for why she remained outside Canada for such a lengthy time." No corroborative evidence regarding the applicant's mother's circumstances was offered in support of the appeal.

[14] The IAD recognized that the applicant's husband and three of her adult children were now living in Canada. (Their fourth adult child was living in Jordan.) The IAD found, however, that apart from this, the applicant had little, if any, establishment in Canada. For example, the applicant had no investments, property or other financial interests in Canada. On the other hand, the IAD found the applicant to have a "moderate" level of establishment in Jordan given that she had lived most of her life in that country and given the presence of other family members there. The IAD judged this to be a negative factor in assessing the H&C merits of the appeal.

[15] The IAD found that there would be some hardship to the applicant's family if she was not able to live in Canada as a permanent resident. Three of the applicant's adult children are Canadian citizens and well-established here. The applicant's husband, who is currently living in Canada, has increasing needs for medical and other care. The IAD found that there would be "moderate" hardship to the applicant's husband in the event that the appeal was dismissed and the couple chose to live separately rather than together in Jordan. Similarly, the IAD found there would be some hardship to the applicant herself if she could not live in Canada with her family.

[16] Finally, the IAD found that there was no evidence to suggest that there were children whose best interests had to be considered. (The applicant had only one grandchild and she lived in Jordan with her parents.)

[17] Balancing all of these factors, the IAD concluded that the applicant had failed to discharge the onus upon her of demonstrating sufficient H&C grounds for the appeal to be allowed.

## III. STANDARD OF REVIEW

[18] It is well-established that the reasonableness standard of review applies to IAD decisions relating to the determination of residency obligations and H&C considerations (*Canada (Citizenship and Immigration) v Tefera*, 2017 FC 204 at para 18; *Ahmad v Canada (Citizenship and Immigration)*, 2017 FC 923 at para 18 [*Ahmad*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 58 [*Khosa*]). Section 67(1)(c) "calls for a fact-dependent and policy-driven assessment by the IAD itself" (*Khosa* at para 57). The IAD's decision is a discretionary one which warrants considerable deference from a reviewing court (*Ahmad* at para 18).

[19] Under the reasonableness standard, it is not the role of the reviewing court to reweigh the evidence or to substitute its own view of a preferable outcome (*Khosa* at paras 59 and 61-62). Rather, the court should examine the decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determine "whether the decision falls 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 [*Dunsmuir*]).

## IV. NEW EVIDENCE

[20] In support of her application for judicial review, the applicant filed an affidavit from her husband as well as one from her daughter. Both affidavits were sworn on December 12, 2018. Obviously, neither was before the IAD when it considered the appeal. The affidavits supplement in some material respects the information that was considered by the IAD. The applicant also submitted her own affidavit in support of the application for judicial review. It, too, supplements in some material respects the information that was before the IAD. As well, the applicant provided an undated medical note regarding her husband that was not before the IAD.

[21] The general rule is that the evidentiary record on an application for judicial review of an administrative decision is restricted to the record that was before the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at para 13 [*Bernard*]). The rationale for this rule is grounded in the respective roles of the administrative decision-maker and the reviewing court (*Access Copyright* at paras 17-18; *Bernard* at paras 17-18). The decision-maker decides the case on its merits. The reviewing court can only review the overall legality of what the decision-maker has done. This general rule admits of exceptions (as stated in *Access Copyright* at para 20 and *Bernard* at paras 19-28) but none apply here. As a result, I have not placed any reliance on the new information contained in the affidavits from the applicant, her husband or her daughter, or the undated medical note.

[22] For the same reasons, on April 1, 2019, I issued an Order dismissing the applicant's post-hearing motion to file additional new evidence.

## V. ANALYSIS

[23] The applicant challenges several aspects of the IAD's decision but in essence she contends that the decision should be set aside because it is unreasonable. For the following reasons, I do not agree.

[24] The applicant bore the onus of establishing that an H&C exemption was warranted in her case (*Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45). She had to provide sufficient evidence to support the granting of exceptional and discretionary relief in her case (cf. *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 84, 2002 SCC 3 at para 57). The question of why the applicant had been absent from Canada for so long was front and centre from the very outset of this matter. The applicant originally cited only her own medical conditions to explain her long absence from Canada. She never mentioned the need to care for her mother. On appeal, she tried to explain that she did not mention her mother's circumstances in her 2017 application because her sister was now in Jordan to look after their mother. While this might explain why the applicant now felt free to return to Canada, it does not explain why she relied exclusively on her own medical conditions to explain why she did not meet the residency obligation when she was now claiming that she had to care for her mother in Jordan. As set out above, the IAD found that the evidence relating to this issue was "problematic." On the record before it, this finding was reasonably open to the IAD.

[25] The IAD recognized that there were factors that weighed in favour of granting the applicant the relief she sought. There were also factors that weighed against this, some rather heavily. Given the extent of the shortfall in meeting the residency requirement, given the absence of a consistent explanation for why this happened, and given the absence of any meaningful degree of establishment in Canada, it was reasonably open to the IAD to conclude that the applicant's circumstances were not sufficiently compelling to warrant an exemption.

[26] The applicant takes particular objection to the IAD's finding that the evidence indicated that her children in Canada "would be in a position to assist in caring for [her husband] if required." I agree with the applicant that there was no evidence directly to this effect before the IAD. However, in my view this was a reasonable inference for the IAD to draw in light of the evidence that was before it. It is also important to view this finding in context. The IAD did not assume that the applicant's husband would necessarily remain in Canada if the appeal was not successful. Rather, the IAD also found that returning to Jordan with the applicant was also an option for her husband (in which case care by the Canadian adult children would not be required). This finding was also reasonably open to the IAD on the record before it.

[27] It is not my role to re-weigh the individual factors considered by the IAD or to second-guess the IAD's overall assessment of how the balance finally settled. The result, while certainly disappointing for the applicant and her family, falls within the range of acceptable outcomes which are defensible in respect of the facts and law. The reasons explain how that result was reached in a transparent and intelligible manner. The requirements of *Dunsmuir* are met. There is no basis for me to intervene.

[28] In her written submissions the applicant also contended that the IAD's decision is tainted by a reasonable apprehension of bias. This ground for review was not pursued in oral argument. In my view, it is without merit.

[29] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

## VI. CONCLUSION

[30] For these reasons, the application for judicial review is dismissed.

**JUDGMENT IN IMM-3049-18**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.

2. No serious question of general importance is stated.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3049-18 |
| **STYLE OF CAUSE:** | SANA HAMMO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | FEBRUARY 6, 2019 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | JULY 24, 2019 |

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