Federal Court  Cour fédérale

Date: 20210924

Docket: IMM-6677-20

Citation: 2021 FC 1000

Ottawa, Ontario, September 24, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ANITA EFTEKHARZADEH
MOHAMMAD REZA ROUHOLLAHI

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Ms. Anita Eftekharzadeh and Mr. Mohammad Reza Rouhollahi, seek judicial review of the December 7, 2020 decision of the Immigration Appeal Division (the "IAD") of the Immigration and Refugee Board, upholding the removal orders that were issued against the Applicants for their failure to comply with the residency obligation under subsection

28(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The IAD found that there were insufficient humanitarian and compassionate ("H&C") considerations to warrant special relief pursuant to paragraph 67(1)(c) of the *IRPA*.

[2] The Applicants admit that they have not met the residency requirement for maintaining their permanent resident status. However, the Applicants argue that they had to remain outside of Canada to complete the process for adopting their son, and after that process was complete, to accommodate his psychological health needs.

[3] The Applicants submit that the IAD committed three reviewable errors in dismissing their appeal. First, the Applicants allege the IAD erred by failing to consider whether the removal orders should be stayed. Second, the Applicants allege it erred by failing to assess whether there were "unique or special circumstances that merit special relief." Third, in determining that the Applicants did not make reasonable attempts to return to Canada at the earliest reasonable time, the Applicants allege the IAD erred by ignoring evidence and retrospectively identifying windows of time in which the Applicants could have travelled.

[4] For the reasons that follow, I find the IAD's decision is reasonable. The jurisprudence affirms that the IAD was not required to consider whether a stay was warranted in the absence of the Applicants' request for that remedy, or to consider the unique or special circumstances factor. Further, I find the IAD's determination that the Applicants did not return to Canada at the earliest reasonable time is justified in relation to the relevant facts. I therefore dismiss this application for judicial review.

II. **Facts**

A. *The Applicants*

[5] The Applicants are 48-year-old citizens of Iran. On December 5, 2014, the couple landed in Canada as permanent residents. On January 4, 2015, the Applicants returned to Iran.

[6] From January 2015 to December 2019, the Applicants were mostly not physically present in Canada. They returned to Canada briefly between October and November of 2015. Mr. Rouhollahi also returned to Canada for six days in June 2019.

[7] The Applicants maintain they were absent from Canada during that period for pressing reasons. The Applicants explain that they returned to Iran in January 2015 to complete fertility treatments in February and March 2015. The treatments having failed, they remained in Iran to complete the process of adopting a child.

[8] As part of the adoption process in Iran, the Applicants state that they were required to obtain medical documentation of their fertility issues and were required to participate in counselling sessions. They applied to adopt in February 2016. The Applicants assert that they were then required to be available, with a home in Iran, in order to have a home visit by a Welfare Department inspector. This inspection was completed in December 2016. They had further examinations and Welfare Department meetings in December 2016 and January 2017.

[9] The Applicants were granted temporary custody of their son, Farnam, in March 2017, and permanent custody in November 2017.

[10] The Applicants argue that Farnam experienced trauma before they adopted him and suffered from anxiety. They took Farnam to a psychologist and were advised to wait until he was two years old, in March 2018, to complete the assessment. From April 2018 to August 2019, Farnam received treatment from Ms. Nersi, a psychologist specialised in treating children with trauma. Ms. Nersi advised that, due to Farnam's psychological condition, he should not be exposed to any significant changes or lengthy travels. The Applicants therefore remained with Farnam in Iran until his condition improved. Farnam also underwent physical medical treatment in June 2018.

[11] In August 2019, Farnam's condition had improved and the Applicants applied for the required court permission to translate their son's adoption papers in order to apply for a Canadian visa. They obtained his Canadian visa in November 2019.

[12] On December 27, 2019, the Applicants returned to Canada. Upon entry, an officer of the Canada Border Services Agency (the "CBSA") issued two reports under subsection 44(1) of the *IRPA* against each of the Applicants. The CBSA officer found there were reasonable grounds to believe that the Applicants were inadmissible to Canada for failing to comply with the residency obligation under section 28 of the *IRPA*, which requires them to be physically present in Canada for at least 730 days within every five-year period. That same day, the Respondent's delegate

found the subsection 44(1) reports were well-founded and issued departure orders against the Applicants pursuant to subsection 44(2) of the *IRPA*.

[13] The CBSA officer found that between December 27, 2014 and December 27, 2019, Ms. Eftekharzadeh spent 39 days physically present in Canada, and Mr. Rouhollahi 45 days.

[14] The Applicants then appealed their removal orders to the IAD.

B. *Decision Under Review*

[15] In a decision dated December 7, 2020, the IAD dismissed the Applicants' appeal, finding that the Applicants had not discharged their burden of proof to establish that there were sufficient H&C considerations to warrant relief. The Applicants now seek judicial review of that decision.

[16] The IAD considered the best interests of the child ("BIOC") with respect to Farnam and listed the following additional "*Ribic*" factors as relevant to the H&C determination in residency requirement cases, citing *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at para 27:

- the extent of the non-compliance with the residency obligation;
- the reasons for the departure;
- whether attempts to return to Canada were made at the first opportunity;
- the degree of establishment in Canada, initially and at the time of hearing;

- family ties to Canada;
- hardship and dislocation to family members in Canada if the Appellants are removed from or refused admission to Canada;
- hardship to the Appellants if removed from or refused admission to Canada; and
- whether there are other unique or special circumstances that merit special relief.

[17] The IAD then considered each of these factors and found that H&C relief was not warranted. However, the IAD did not address the final factor: "Whether there are other unique or special circumstances that merit special relief."

[18] The IAD further found that the Applicants did not attempt to return to Canada at the earliest reasonable time. The IAD held that there were three windows in time during which the Applicants could have returned to Canada:

A. From March 17, 2015 to January 6, 2016 — between when Ms. Eftekharzadeh miscarried, rendering the fertility treatments unsuccessful, and when the Applicants had their first counselling session required for the adoption process.

B. From February 4, 2016 to December 5, 2016 — between when the Applicants applied to adopt, and when the Welfare Department conducted its home inspection.

C. From November 2017 onwards — after obtaining full custody of Farnam. While the IAD noted that Farnam's medical condition and psychological issues required

treatment, the IAD found that the Applicants did not provide evidence that Farnam could not have been treated in Canada.

[19] The IAD concluded that the Applicants had made a conscious choice to make Iran their home instead of Canada, as they made a choice to undergo fertility treatments and then pursue adoption in Iran. It further held that the Applicants' absence from Canada was much longer than would be expected for their purposes, and that there was insufficient evidence to explain why the Applicants stayed in Iran continuously during this time.

[20] The IAD held that the residency requirements are not onerous and that "factors such as the significance of the breach, lack of meaningful establishment, as well as lack of hardship in Iran if they were to lose permanent resident status in Canada, do not support the granting of H&C relief in this case."

III. **Issues and Standard of Review**

[21] This application for judicial review raises the following issues:

A. *Did the IAD err in not considering whether a stay was warranted?*

B. *Did the IAD err in not assessing whether there were* "*unique or special circumstances that merit special relief*"*?*

C. *Did the IAD err in finding that the Applicants did not attempt to return to Canada at the earliest reasonable time?*

[22] It is common ground between the parties that the applicable standard of review for the above issues is reasonableness.

[23] I agree. The IAD's determinations on H&C assessments are reviewable on the reasonableness standard (*Yu v Canada (Citizenship and Immigration)*, 2020 FC 1028 at para 8, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") at paras 16–17, 23–25).

[24] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[25] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

IV. **Analysis**

A. *Did the IAD err in not considering whether a stay was warranted?*

[26] Under section 66 of the *IRPA*, after considering the appeal of a decision, the IAD may allow the appeal, stay the removal order, or dismiss the appeal.

[27] The Applicants argue that the IAD's decision is unreasonable because, in dismissing the Applicants' appeal, the IAD failed to consider whether a stay was warranted. They argue that the threshold for granting a stay is lower than the threshold for allowing an appeal, citing the IAD's decision in *Takeuchi v Canada (Public Safety and Emergency Preparedness)*, VA6-03614, 2008 CanLII 75491 (CA IRB) at para 16. The Applicants submit that although the IAD determined that there were insufficient H&C grounds to allow the Applicants' appeal, the IAD may have stayed the Applicants' removal orders if the IAD had turned its mind to that possibility.

[28] The Applicants acknowledge that they did not seek a stay as part of their appeal. They also acknowledge there are two decisions of this Court suggesting that a stay of removal must be requested from the IAD in order for its consideration to be required: *Lewis v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1227, 1999 CanLII 8564 (FC) ("*Lewis*"); and *Li v Canada (Citizenship and Immigration)*, 2015 FC 998 ("*Li*").

[29] The Applicants submit that neither *Lewis* nor *Li* are determinative of this application. They argue that *Lewis* is outdated, since it was issued before the *IRPA* was enacted and before the duty to provide reasons was recognized. The Applicants criticize both *Lewis* and *Li* for not providing any context or discussion as to why the IAD is not required to consider all available outcomes, including a stay.

[30] The Respondent submits that the IAD is not required under section 66 of the *IRPA* to address whether a stay of removal is an appropriate remedy in the absence of a request for a stay. Rather, the Respondent asserts that the IAD is only required to select a remedy available under that provision and provide reasons justifying its decision, which the IAD did in the case at hand.

[31] I accept that it was open to the IAD to stay the removal order pursuant to subsection 66(b) of the *IRPA*, even if it was not requested. I further accept that, in light of the IAD decision cited by the Applicants, the threshold for granting a stay may be lower than for granting an appeal. However, I am not convinced that the IAD was required to address whether a stay was warranted in its reasons.

[32] Section 66 of the *IRPA* sets out the three possible outcomes of an appeal. It does not state that the IAD is required to consider all three, just that the IAD can choose no outcome other than one of these three.

[33] In *Lewis*, the applicant asked the decision-maker to consider a stay of removal in lieu of dismissing the appeal. The decision-maker, however, did not mention the possibility of a stay in their decision (*Lewis* at paras 11-12).

[34] In setting aside the decision under review in *Lewis*, Justice Simpson held that if a stay is requested and reasons for a decision are given, then those reasons must address why a stay is not granted:

> [14] […] In my view, if a stay is requested and if the facts suggest that there is reason to consider a conditional stay, then, if reasons are given pursuant to section 69.4(5) of the *Act*, the Applicant is entitled to know why a stay was denied.

[35] Relying on *Lewis*, Justice Gleeson stated in *Li* that a stay "needs to be requested if the court is to find fault with the IAD's failure to expressly address the remedy in its reasons" (*Li* at para 30). Applying that principle to the case before him, Justice Gleeson then concluded:

> [33] The obligation of a decision maker to expressly address the denial of a stay under s. 68 based on procedural fairness is triggered where a request for a stay is made. The evidence in this case does not lead one to conclude that a stay is an obvious remedy, and I am not convinced that the applicant requested that the IAD consider the granting of a stay as either a primary or alternate remedy.
>
> [34] The mere fact that s 66 of IRPA provides that a stay is one of the options available to the IAD in considering an appeal <u>does not create a positive obligation upon the IAD to consider and address a stay on its own initiative.</u>
>
> [emphasis added]

[36] In other words, Justice Gleeson found that the IAD is not required to provide reasons for refusing a stay if a stay is not requested, expanding on the logic in *Lewis* that decision-makers are required to provide reasons for refusing a stay, if a stay is requested.

[37] Both of these cases leave open the possibility that the IAD can grant a stay where one has not been requested. However, *Li* forecloses the Applicants' argument that the IAD is required to consider a stay even where one has not been sought.

[38] In light of the above, I find the IAD's decision follows a rational chain of analysis and is justified in relation to the relevant facts and law (*Vavilov* at para 85). It was open to the IAD not to consider a stay of the Applicants' removal in the absence of the Applicants' request for that remedy.

B. *Did the IAD err in not assessing whether there were "unique or special circumstances that merit special relief"?*

[39] The Applicants argue that the IAD was required to consider whether there were "unique or special circumstances that merit special relief" under the *Ribic* factors to ensure a holistic assessment of the Applicants' circumstances. The Applicants further argue that the IAD's failure to consider this factor ignored their right to have a family, which is protected by international human rights law, which is incorporated under subsection 3(3)(f) of the *IRPA*.

[40] I am not persuaded by the Applicants' argument. The IAD recognized that the Applicants' pursuit of their goal to have children was a reasonable explanation for why they left

Canada when they did. However, the IAD noted that it was the Applicants' decision to pursue that goal in Iran and remain there instead of in Canada.

[41] In *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 ("*Chieu*") at para 77, the Supreme Court of Canada affirmed the use of the *Ribic* factors by the IAD in H&C cases. It held that the list is illustrative and not exhaustive and that the weight given to each factor will vary according to the particular circumstances of each case (*Chieu* at para 40). The Supreme Court of Canada also affirmed that the IAD, in exercising discretionary H&C relief, must consider "every extenuating circumstance that can be adduced in favour of the deportee" (*Chieu* at para 79).

[42] In my view, the IAD's requirement to consider every relevant circumstance does not require it to address each of the potential *Ribic* factors in every decision. The IAD considered all of the circumstances that could be adduced in favour of the Applicants, including the Applicants' desire to have a family. As the Applicants have not shown that there were any unique and special circumstances that the IAD failed to consider, I find the IAD's decision is reasonable.

C. *Did the IAD err in finding that the Applicants did not attempt to return to Canada at the earliest reasonable time?*

[43] The Applicants acknowledge that the IAD's conclusion that they could have returned to Canada earlier may have been reasonable if arrived at through proper assessment. However, they argue that in its decision the IAD's assessment was unreasonable because it ignored

evidence and used a backward-looking approach to identify opportunities to return that were not apparent to the Applicants at the time.

[44] The Applicants argue that in stating that they could have returned to Canada following Ms. Eftekharzadeh's miscarriage in March 2015, the IAD ignored Ms. Eftekharzadeh's testimony about her depression and the process of evidence gathering in Iran for their adoption application during that time.

[45] The Applicants also argue that it was unreasonable for the IAD to find that the Applicants could have returned to Canada between the filing of their adoption application in February 2016 and the home visit in December 2016 because it is only with the benefit of hindsight that this opportunity could be identified. They did not know at the time when the home visit would occur and therefore did not know how much time they could have spent in Canada. They also argue that they needed to have a home in Iran in order to complete the visit and so could not have uprooted themselves at that time.

[46] With respect to its finding that the Applicants chose to remain in Iran after obtaining Farnam's passport in November 2017, the Applicants argue that it is unclear whether the IAD accepted the letter from Ms. Nersi, Farnam's psychologist. The IAD found that the Applicants "did not make any submissions or provide evidence showing that the follow-up medical checkups for the son's medical matter could not have been done in Canada." However, Ms. Nersi's letter clearly stated that Farnam should not travel, as he was experiencing psychological

distress to the point that "[h]e could not even bear sitting and being buckled up in the child car seat."

[47] In light of the above, I find it was unreasonable for the IAD to conclude that the Applicants could have returned to Canada for Farnam's treatment. The issue was not whether treatment options existed in Canada, but the damage that could have been caused by the travel and relocation itself. This was made clear in the evidence before the IAD, namely the psychologist's letter. I agree with the Applicants that it was not reasonable for them to return to Canada at any time after December 2016.

[48] However, I am not persuaded that it was unreasonable for the IAD to conclude that the Applicants could have returned to Canada in March 2015 or February 2016. While the Applicants provided an explanation for why they could not have returned during those times, they provided minimal evidence to substantiate that explanation. The IAD thus reasonably found that the Applicants failed to discharge their evidentiary burden.

[49] Ms. Eftekharzadeh, in her affidavit, states that she testified before the IAD that she suffered from depression after her miscarriage in March 2015. The Applicants argue that the IAD ignored this evidence, which explained why the Applicants could not return to Canada. However, in the absence of further evidence to the contrary, I find it was reasonable for the IAD to determine this testimony alone did not establish that Ms. Eftekharzadeh could not return to Canada for the period of March 2015 to January 2016.

[50] The Applicants also argue that between March 2015 and January 2016 they were obtaining medical evidence needed to qualify for adoption. However, in the chronology submitted to the IAD, the Applicants stated that they underwent mandatory counselling sessions in January 2016, applied to adopt in February 2016, and then underwent mandatory medical examinations by the Forensic Medicine Organization in December 2016, after their home visit. Regardless of this inconsistency, the Applicants did not submit evidence to establish the requirement for these documents or that they could not have returned to Canada during that process.

[51] Likewise, with respect to the period between February and December 2016, the Applicants provided no evidence to establish what the home visit process was, what their expectations were, or how much notice they received in advance of their home visit. While they may have been required to have a home in Iran at the time of the home visit, they adduced no evidence to establish that neither of the Applicants could have returned to Canada during that period. I therefore find it was reasonable for the IAD to conclude that the Applicants had adduced insufficient evidence to establish that they could not have reasonably attempted to return to Canada earlier.

V. **Questions for Certification**

[52] The Applicants propose the following questions for certification to permit an appeal under subsection 74(d) of the *IRPA*:

1. When considering a removal order appeal under section 63(3) of the *IRPA*, does the Immigration Appeal Division need to consider and explicitly decide the applicability of all paragraphs of section 66 of the Act?

2. When considering a removal order appeal under section 63(3) of the *IRPA*, does the appellant before the Immigration Appeal Division need to have requested consideration under section 66(b) for this outcome to be considered and explicitly decided?

[53] The Applicants submit that these questions satisfy the test for certification, as each question is "a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance of general importance" (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46). The Applicants assert their proposed questions are of general importance because they are based on statutory interpretation, and that the questions are dispositive of this application for judicial review.

[54] The Applicants argue that the IAD's consideration of subsection 66(b) of the *IRPA* must be explicit, and that the IAD's decision can only be justified, pursuant to *Vavilov* (at para 86), if the reasons demonstrate that the IAD member considered the option of a stay. The Applicants submit that in *Li*, it was known from the IAD transcript that the IAD member had considered the appropriateness of a stay, but since the remedy under subsection 66(b) of the *IRPA* was not requested, no reasons needed to be provided.

[55] The Respondent opposes the Applicants' proposed questions for certification on the grounds that they are not serious questions of general importance, that there is no contradiction or ambiguity in either section 66 of the *IRPA* or the surrounding jurisprudence, and that the issue raised by the Applicants has already been addressed by this Court in *Lewis* and *Li.* The

Respondent submits that the principle stated in *Li* and *Lewis* – that the IAD only needs to address the denial of a stay where the appellant has requested a stay – is logically sound, supported by broader principles and long-standing case law, and not contradicted by any other jurisprudence.

[56] As discussed in paragraph 36 of this decision, Justice Gleeson's decision in *Li*, relying on Justice Simpson's decision in *Lewis*, affirms that section 66 of the *IRPA* does not require the IAD to consider a stay if a stay is not requested, thus answering the Applicants' proposed question in the negative.

[57] I find that the principle stated in *Li* and *Lewis* is logically sound, supported by broader principles and long-standing case law, and not contradicted by any other jurisprudence.

[58] In light of the above, I find that the Applicants' first proposed question does not meet the test for certification.

[59] With respect to the Applicants' second question, I find that it also does not meet the test for certification because it is not dispositive of this application for judicial review. The issue to be determined by this Court is whether the IAD is <u>required</u> to consider a stay in the absence of a request for a stay, not whether the IAD <u>could</u> have considered a stay under such circumstances. The IAD has the discretion to consider an unrequested stay and to decide whether to grant one; however, this does not entail that the IAD is required to do so.

VI. **Conclusion**

[60] I find that the IAD's decision is reasonable. This application for judicial review is dismissed. I also decline to certify the Applicants' proposed questions.

JUDGMENT in IMM-6677-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. No questions are certified.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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