

Federal Court



Cour fédérale

Date: 20240906

Docket: IMM-10722-23

Citation: 2024 FC 1397

Ottawa, Ontario, September 6, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Applicant

and

ARMAN HOSSEINI

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Citizenship and Immigration [Applicant] seeks judicial review of a decision by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada with respect to Mr. Arman Hosseini's [Respondent, or Mr. Hosseini] sponsorship application for his wife. The Applicant alleges that the IAD misapplied the residency

requirement under sections 130 and 133 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[2] For the reasons set out below, the application for judicial review is granted. The matter is to be sent back to the IAD for redetermination.

II. Preliminary Issue

[3] The Respondent was not present at the hearing (in person or virtually). He did not file any materials in these proceedings. He did not serve a Notice of Appearance pursuant to the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22.

[4] In an Order dated September 1, 2023, the Court permitted substituted service on the Respondent to his email address. Subsequently, an Order for Production dated February 28, 2024, was issued and sent to the Respondent by email. The Respondent replied by email and confirmed receipt of the Order.

[5] At the hearing, the Applicant confirmed having served upon the Respondent the Applicant's Record, including the Applicant's Memorandum of Argument and Book of Authorities. Counsel for the Applicant further confirmed that the Respondent's email address referenced in the Court proceedings "works" and is the same email address that the Respondent used in his sponsorship application.

[6] Given this, I was satisfied that the Respondent would have been aware of the hearing date. The hearing proceeded in the absence of the Respondent.

III. Background and Decision Under Review

[7] Mr. Hosseini is from Iran and obtained permanent residence in Canada in July 2010. He arrived in Canada with his two children and his wife, from whom he subsequently separated in 2013. Mr. Hosseini remarried in 2018, and his wife resides in Iran. His ex-wife and two children (now adults) still live in Canada.

[8] In June 2020, Mr. Hosseini submitted an application to sponsor his wife under the family class. On January 12, 2023, an immigration officer rejected the sponsorship application, on the basis that Mr. Hosseini did not meet the residency requirements under sections 130 and 133 of the *IRPR*. Mr. Hosseini appealed this decision to the IAD.

[9] The IAD allowed Mr. Hosseini's appeal, and concluded that Mr. Hosseini met the residency requirement. The date of the IAD's decision is listed as July 18, 2023 and the signature of the decision was August 2, 2023 [Decision].

[10] In its Decision, the IAD identified the sections of the *IRPR* that require Mr. Hosseini to demonstrate his residency in Canada at the time of the sponsorship application, which would in turn, enable him to sponsor his wife. The IAD also identified that it must evaluate a number of factors to assess the residency requirement based on *Iao v Canada*, 2013 FC 1253 [*Iao*].

[11] The IAD summarized Mr. Hosseini's life since his immigration to Canada in 2010. The IAD described the timeframes when the Respondent returned to live in Iran more permanently after his separation from his ex-wife in 2013. Then, by calculating the number of days of physical presence in Canada, the IAD found that from January 2020 to April 2023, he mainly stayed in Canada. The IAD stated that this is "more than the residence obligation requires." At the time of the IAD proceedings, the Respondent "had been in Iran since last April" and stated that he went to visit his wife. Mr. Hosseini explained that when he did return to Iran during the last years, he went for approximately two months at a time.

[12] The IAD noted that Mr. Hosseini was not back in Canada even though he said he wanted to. The IAD also noted that this was an intention and it could not base its Decision on an intention. The IAD assessed where Mr. Hosseini's family was; who lived in Canada and who lived abroad; the pattern of physical presence in Canada; whether the physical absence of Canada is a temporary situation; and, the quality of the connection with Canada including establishment based on assets or notice of assessments.

[13] The IAD concluded that on the globality of the case, "it seemed that Mr. Hosseini is residing in Canada." It found that "obviously, it is not one of the most extensive evidence of someone residing here, but I believe in the last years there were significant efforts made to show that Canada is where the Appellant resides." The IAD allowed Mr. Hosseini's appeal, finding that he had made significant efforts to reside in Canada since 2020, despite several absences from the country prior to this timeframe, among other things. The IAD's decision is the subject of this judicial review.

IV. Issues and Applicable Standard of Review

[14] The issue on judicial review is whether the Decision that Mr. Hosseini meets the requirements of sections 130 and 133 of the *IRPR* as a sponsor is unreasonable.

[15] The applicable standard of review on the merits of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, [2019] 4 SCR 653 [*Vavilov*]).

[16] On judicial review, the Court must assess whether the Decision bears the hallmarks of reasonableness – justification, transparency and intelligibility (*Vavilov* at para 99). A reasonable decision will always depend on the constraints imposed by the legal and factual context of the particular decision under review (*Vavilov* at para 90). A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125-126). The party challenging the decision bears the onus of demonstrating that the decision is unreasonable (*Vavilov* at para 100).

V. Analysis

[17] The assessment of residence starts with the *IRPR*. Section 133 of the *IRPR* states that on the day that a sponsorship application is filed up to and including the day a decision is made with respect to it, there must be evidence that the sponsor meets certain requirements, including that they meet the requirements of section 130 of the *IRPR*. Section 130(1) of the *IRPR* identifies that the sponsor must be a Canadian citizen or a permanent resident who is at least 18 years of age; resides in Canada; and filed the sponsorship application in accordance with section 10 of the

IRPR. Thus, the residency obligation in Canada extends from the filing of the sponsorship application until a decision is made (*Yodjeu Ntemde v Canada*, 2018 FC 410 at para 31).

[18] The determination of one's residence, for the purposes of section 130 of the *IRPR*, does not depend only on a mathematical calculation based on physical presence (*Jabeen v Canada (Citizenship and Immigration)*, 2020 FC 703 [*Jabeen*] at para 15).

[19] The issue of residence is also reasonably assessed by reviewing a number of factors beyond mere physical presence, taking into account the applicant's legitimate wish to spend time with a spouse residing abroad. Other factors may be considered provided that they assist in the determination of whether the sponsor has "centralized his or her mode of living in Canada" (*Jabeen* at para 8 citing *Iao* at para 32).

[20] The Applicant challenges the Decision because of the manner it made its assessment of residence at the time of filing of the sponsorship application and by only considering the Respondent's residence starting in the 2020 timeframe. The Applicant states that the IAD conflates the residence requirement by using the calculation used for permanent residence. The Applicant states that, to assess whether a sponsor was a resident at the time of the sponsorship application, the IAD should also have taken into account the timeframe prior to an application for sponsorship (*Iao* at para 31).. The Applicant further argues that while the IAD correctly identified the factors to determine whether the sponsor had "centralized his mode of living in Canada," the Decision is not justified, transparent and intelligible based on the factors the IAD was required to consider. For example, if the Respondent's significant absences from Canada

before filing the sponsorship application were a compelling factor, the IAD should have stated why.

[21] I agree with the Applicant. It was difficult to reconcile the IAD's analysis leading to its conclusion that the Respondent met the residence requirement. Reading the Decision holistically, I cannot find that the factors described in *Iao* were assessed clearly enough to ascertain how the Respondent met the requirements under the *IRPR*.

[22] The Applicant pointed to the paragraphs of the Decision that assessed the factors described in *Iao*, and noted negative findings for some of these factors. Indeed, in several passages of the Decision, the IAD made a number of negative findings of relevant factors from *Iao*. These included findings by the IAD that there was "weak establishment in Canada" or that "it was difficult to say that there was a quality of connection with Canada," for example.

[23] The IAD also made findings that there was no evidence on the record to support some factors, such as a lack of evidence that would demonstrate that the Respondent had assets or income in Canada. In fact, the record demonstrated that the Respondent's pharmacy business and the majority of his source of income were in Iran.

[24] While one factor may not necessarily be determinative over another, the Decision was silent on the weight of a negative finding or a factor where there was no evidence vis-à-vis other potential positive factors. Despite this, the IAD nonetheless found that the Respondent "globally" met the residence requirement under section 130 of the *IRPR*.

[25] I agree with the Applicant that the Decision is not reasonable in light of the legal and factual constraints that bear on it. I am also satisfied that the errors identified are sufficiently central or significant to render the decision unreasonable (*Vavilov* at para 100) as they relate to the core issue of assessing residence under section 130 of the *IRPR*.

VI. Conclusion

[26] The application for judicial review must therefore be granted. The matter will be remitted to the IAD for redetermination.

[27] There was no question to be certified and I agree that in the circumstances of this case, none arise.

JUDGMENT in IMM-10722-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. There is no question for certification.

"Phuong T.V. Ngo"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10722-23

STYLE OF CAUSE: MINISTER OF CITIZENSHIP AND IMMIGRATION v
ARMAN HOSSEINI

PLACE OF HEARING: MONTRÉAL (QUÉBEC)

DATE OF HEARING: AUGUST 27, 2024

JUDGMENT AND REASONS: NGO J.

DATED: SEPTEMBER 6, 2024

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