Date: 20070731

Docket: IMM-4129-06

Citation: 2007 FC 799

Ottawa, Ontario, July 31, 2007

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

SUI WO LO and CHING TAK LO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Sui Wo Lo and Mrs. Ching Tak Lo (the Applicants) bring this application for judicial review of a decision of the Immigration Appeal Division (IAD), dated May 23, 2006 (the Decision). The IAD dismissed the Applicants' appeal from a Minister's Delegate's decision to issue removal orders against them because they failed to comply with the residency obligation for permanent residents under section 28 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Current Act).

BACKGROUND

[2] The Applicants are a retired couple from Hong Kong who became permanent residents of Canada in February 1996 as a result of their daughter's sponsorship. She and her husband and their daughter are Canadian citizens.

[3] Two years later, in February 1998, the Applicants' daughter's family sold their home in Canada and moved back to Hong Kong to live and work.

[4] The Applicants remained in Canada for another year before leaving Canada in January 1999 to arrange health care for Mrs. Lo' ailing mother in China. For the next 3 ½ years, the Applicants lived with their daughter's family in Hong Kong.

[5] Mrs. Lo suffered a mild stroke in 2000. The Applicants were scheduled to have a citizenship interview in Canada on July 19, 2000. However, since Mrs. Lo was advised not to travel at that time for health reasons, the Applicants withdrew their application for citizenship.

[6] On June 28, 2002 the former *Immigration Act*, R.S. 1985, c. I-2 was repealed and the Current Act came into force. It said that, as of December 31, 2003, permanent residents were required to have a Permanent Resident Card (PR Card) in order to travel to Canada on commercial transportation. The Applicants returned to Canada in September of 2003 ahead of the deadline. However, their daughter and her family remained in Hong Kong.

[7] In January 2004, the Applicants applied for PR Cards. According to their application forms, in the preceding five-year period when, pursuant to paragraph 28(2)(a) of the Current Act, they were each required to have been in Canada for 730 days, Mr. Lo had been physically present in Canada for only 407 days and Mrs. Lo was physically present for only 261 days.

[8] In a letter dated February 16, 2005, a Citizenship and Immigration Officer (Officer) scheduled an interview with the Applicants to determine whether they qualified for relief from the residency requirement due to humanitarian and compassionate considerations (H&C) under paragraph 28(2)(c) of the Current Act.

[9] The interview took place on March 16, 2005 and the Officer concluded that the Applicants had breached the residency requirement and that there were insufficient H&C factors to overcome the breach. The Officer also advised the Applicants to submit any additional information they wanted the Minister to consider by April 18, 2005. The Officer then forwarded a report to the Minister's Delegate pursuant to subsection 44(1) of the Current Act.

[10] The additional submissions were mailed before April 18, 2005, however, they were not received by the Citizenship and Immigration Canada office until April 19, 2005, one day after the deadline for the submission of additional information (the Late Submissions).

[11] In a letter dated April 20, 2005, which did not refer to the Late Submissions, the Minister's Delegate made removal orders against the Applicants

[12] The Applicants appealed the Minister's Delegate's decision to the IAD arguing that the failure to consider the Late Submissions breached the principles of procedural fairness and that there were sufficient H&C grounds to warrant special relief in this case.

[13] The IAD heard the Applicant's appeal on May 23, 2006 and concluded that the removal orders were valid in law; there had been no breach of the principles of procedural fairness; and that there were insufficient H&C considerations to warrant special relief.

THE PREMILINARY OBJECTION

[14] The Applicants did not contend before the IAD that they should have been notified of the change in the residency requirement or that the residency requirement in section 28 of the Current Act did not apply to them or that it violated their rights under of the *Canadian Charter of Rights and Freedom*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter).

[15] At the opening of the hearing, the Respondent asked for a ruling preventing the Applicant from arguing that Section 28 of the Current Act does not have retrospective application and that, if it does, it violates the Applicants' rights under section 7 of the Charter.

[16] The Respondent said that because the Applicant's counsel had not raised these issues before the IAD, they could not be argued on judicial review. The Respondent reinforced this submission by showing that the issues had been waived when the Applicant's counsel advised the IAD that he was not challenging the legality of the removal orders and when he said in his final submissions that the IAD should apply the principles set out in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (*Ribic*) as endorsed by the Supreme Court of Canada in *Chieu v. Canada (MCI)*, [2002] 1 S.C.R. 84, at paragraphs 40, 41 and 90.

[17] Counsel for the Applicants tried to show with references to the transcript of the hearing before the IAD that these issues had been raised but I was not persuaded by his submissions. A review of the IAD transcript makes it clear that the IAD was not asked to consider the retrospective application of section 28 of the Current Act or any related Charter or notice issues.

[18] Counsel for the Applicant then said that, even if they had not been before the IAD, these issues could be considered for the first time on judicial review. However, I disagree and adopt the conclusion of my colleague, Mactavish J. who said in *Suchit v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1004 at paragraph 18:

> There are several reasons why Ms. Suchit's Charter arguments cannot succeed. However, the issue can be disposed of on the basis that this Court has no jurisdiction to entertain the arguments, given that Ms. Suchit did not raise the Charter issues before the Board itself: see *Chen v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1954.

[19] Accordingly, the Applicant was not permitted to make submissions about the retrospectivety of section 28 of the Current Act or related Charter or notice issues.

THE ISSUES

[20] The remaining issues were:

1. Did the IAD breach the rules of procedure fairness in relation to the Late Submissions and the evidence to be given to the IAD by the Applicants' daughter?
2. Did the IAD err in failing to refer to Mrs. Lo's stroke?
3. Did the IAD err in failing to consider the fact that residency requirements changed on December 31, 2003?
4. Did the IAD err when it concluded that the Applicants had no family in Canada?
5. Did the IAD err when it failed to give adequate weight to the letter from the employer of the Applicants' son-in-law?

STANDARD OF REVIEW

[21] The pragmatic and functional approach involves consideration of four contextual factors: the nature of the question at issue, the relative expertise of the Tribunal, the presence or absence of a privative clause or statutory right of appeal, and the purpose of the legislation and the provision in particular.

[22] Issue 1 involves questions of procedural fairness and therefore does not require a pragmatic and functional analysis see *Sketchley v. Canada (Attorney General)* 2005 FCA 404 at paragraph 52.

[23] Issues 2 to 5 require a pragmatic and functional analysis to determine the standard of review. In my view, they are all issues which call into question the IAD's choice of relevant facts and the weight assigned to them. The decision made on these issues are highly discretionary and, in my view, attract considerable deference.

[24] The Respondent does not suggest that the IAD has any special expertise in dealing with these issues. Accordingly, this factor does not suggest a deferential approach. The Current Act does not include a privative clause. However, review is allowed with leave, pursuant to subsection 72(1) of the Current Act. This suggests less deference.

[25] Lastly, the purpose of the IRPA, in connection with permanent residents, is to ensure that only those who demonstrate intention to make Canada their home are allowed to maintain permanent resident status. Since appeals under subsection 64(3) of the Current Act involve individual circumstances this factor suggests less deference.

[26] On balance, I have concluded that the standard of review to be applied to issues 2 to 5 is reasonableness.

Issue 1(a) – The Late Submissions

[27] After their interview, the Officer sent the Applicants a letter dated March 21, 2005 which said, among other things:

> … If you have any additional information that you believe the Minister's Delegate should consider, regarding why she should not make a removal order against you, please submit that in writing by 18 April 2005, to the address above.
>
> [my emphasis]

[28] However, as described above, the Late Submissions although mailed before June 18, 2005 arrived one day late and were not considered.

[29] Before the IAD, the Applicants said that the Minister's Delegate's failure to consider the Late Submissions breached the rules of procedural fairness and they relied on the decision of Mactavish J. in *Pramauntanyath v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 184, 2004 FC 174. However, it was not an applicable precedent because, in that case, the submissions which were not considered had been received on time.

[30] The IAD, therefore, concluded that there had been no breach of natural justice because the submissions had been received one day late and then made the following observations in *obiter dicta*:

> Even taking into account if the letter was sent within the time frames set and received a day before the actual decision was made by the Minister's delegate, it would not necessarily be of any benefit or value to the appellants to return this matter for reconsideration to an immigration office or Minister's delegate. The appellants have a

> right to a *de novo* hearing before the Appeal Division where all information that was provided at the time of the initial decision and subsequently up to today can be considered by the panel in its determination.

[31] The Applicants now say that the Minister's Delegate breached natural justice in failing to consider the Late Submissions because they were mailed before April 18, 2005. As well, they say that the fact the IAD held a *de novo* hearing and considered the Late Submissions did not cure the breach.

[32] The 1993 edition of the New Shorter Oxford English Dictionary in Volume II at page 3120 defines "submit" as "refer or present to another for judgment, consideration or approval". As well, at page 2340, "present" is defined as to "put a thing before (in the presence of) someone".

[33] I have therefore concluded that, when the Applicants were given the opportunity to "submit" by April 18th that meant that submissions had to be received by the Respondent on or before that date. Putting the submissions in the mail before April 18th, as was done in this case, was not sufficient.

[34] For these reasons, I have concluded that the failure to consider the Late Submissions was not a breach of the principles of fairness. The Late Submissions were not submitted on time and understandably, given the prompt Decision, did not reach the Minister's Delegate before the Decision was made.

[35] In view of this conclusion, it is not necessary to comment on the IAD's *obiter dicta*.

Issue 1(b) – The Daughter's Evidence

[36] The second issue under this heading deals with the evidence of the Applicants' daughter. She provided a written statement dated April 26, 2006 (the Daughter's Statement) but she was also available to testify at the hearing by telephone from Hong Kong. However, when the time came to contact her, the following exchange took place. It involved the Presiding Member and Mr. Ho, who was the Applicants' counsel, and Mr. Macdonald, who was counsel for the Respondent:

> **PRESIDING MEMBER**: (After excusing the previous witness Mr. Lo)
>
> Now, do you have an estimate of how long you are going to be with the daughter?
>
> **MR. HO**: It shouldn't be long. I can actually forego my questioning because she already made a statement, so I'd be happy if my friend – if he can just start with cross and then we can – but I don't know.
>
> **PRESIDING MEMBER**: Of course I think she's made the statement so there's no point in having to go over that and maybe we can just move forward. I'd like to be able to finish the witness. Hopefully it wouldn't be too long, but I don't know if you have an estimate of –
>
> **MR. HO**: She speaks English too so…
>
> **MR. MACDONALD**: I don't need to cross-examine on the document if – if it will help move things forward, and I'm sure it will.
>
> **PRESIDING MEMBER**: Okay. Then that's fine. Then you don't need to call her. You can rely on her statements. Okay. So you can have a seat with your counsel.

> **MR. HO**: Can I get her friend to call her up and tell that we don't need her, just – because it's a different time zone and they're waiting.
>
> **PRESIDING MEMBER**: Yes. That's fine.

[37] Against this background, the Applicants take issue with paragraph 16 of the Decision. It says:

> While there was a statement by the appellant's daughter and a recent letter from the daughter's husband's employer about return to Canada in December of this year, I find that is not sufficient evidence to guarantee that, in fact, the daughter and son-in-law will come back to Canada at that time.

[38] The Applicants say that, if the IAD was not satisfied with the Daughter's Statement, it should have heard her oral testimony. They also say that the IAD erred when it required that there be evidence to "guarantee" her return.

[39] In my view, it was the responsibility of counsel for the Applicants to lead the evidence required to make the Applicants' case. The transcript makes it clear that Mr. Ho offered to forego examination in chief and the offer was not prompted by any comment by the Presiding Member suggesting that the Daughter's Statement was adequate. Only after the offer to forego evidence in chief was made did the Presiding Member say that the Applicants could rely on the Statement. This comment simply affirmed that the Statement was in evidence. It did not provide any information about its quality or sufficiency. In these circumstances, I can find no procedural unfairness in the fact that the Daughter did not give oral evidence and the IAD later concluded that the Daughter's Statement was insufficient.

[40] The Applicants say that the IAD cannot decline to hear evidence and then complain that an applicant has not discharged his or her burden of proof (see *Ntumba v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 154, 2005 FC 124 at paragraph 33. However, this decision does not apply to this case because the IAD did not decline to hear the Daughter's oral evidence.

[41] With regard to the word "guarantee", while it appears unduly onerous, it must be read in context. At their interview on March 16, 2005, the Applicants told the Officer that their Daughter planned to return from Hong Kong and settle in Canada by the end of 2005. However, that did not happen and in the Daughter's Statement she said she planned to return in December 2006. Notwithstanding this intention, the Daughter's Statement showed that she had made no concrete plans.

[42] Given this background, I think it fair to read the IAD's statement as one of simple disbelief not as one that imposes an excessive burden of proof. In my view, when the IAD said there was not sufficient evidence to "guarantee" that the Daughter and her family would return, he meant that there was insufficient evidence. For example, although the Daughter's Statement said that she had been looking at schools for her daughter in Canada, she had not selected a school or made any personal contacts with any prospective schools. All she provided were three pages of general information from the website of the British Columbia Ministry of Education.

[43] As well, her statement says that flights to Vancouver have been “booked” for herself, her husband and her daughter. However, this evidence is very weak. The relevant attachment only shows that a travel agency has prepared an itinerary for the family. There is no indication that airplane tickets were actually purchased.

[44] For these reasons and because the IAD’s decision clearly states that it decided the case on the balance of probabilities, I am not prepared to conclude that the IAD erred in imposing an incorrect burden of proof in connection with the Daughter’s Statement.

Issue 2 - Mrs. Lo’s Stroke

[45] The Applicants say that the Decision did not mention Mrs. Lo’s stroke. However a reference is found in paragraph 11. It reads “there was also evidence that the appellant’s wife suffered some form of stroke in 2000 and that was also a reason for not returning to Canada.” This conclusion was consistent with the evidence in the Officer’s Report to File following her interview with the Applicants on March 16, 2005. In her report, she said that Mrs. Lo’s stroke occurred in March of 2000. However, she also noted that the Applicants admitted that the medical treatment they were receiving in Hong Kong was available in Canada.

[46] In my view, there was nothing more the IAD could have said about the stroke particularly in the absence of any evidence to suggest it prevented the Applicants from returning to Canada until September 2003.

Issue 3 – Changed Residency Requirements

[47] The Applicants say that the IAD should have referred to the fact that the residency requirements which applied to the Applicants changed on December 31, 2000 and should have given weight to the fact that, by the date of the IAD hearing, the Applicants had been in Canada for almost three years.

[48] Under the former *Immigration Act*, a permanent resident's residency obligation was not to be outside Canada for more than 183 days in a given 12-month period. If they were, they would be presumed to have abandoned Canada as their place of permanent residence, subject to demonstrating an "intention not to abandon Canada" as their place of permanent residence. This made intention the only factor to be considered.

[49] Under section 28 of the Current Act, the Applicants are not to be outside Canada for more than 730 days in a 5-year period. A breach of this obligation may be overcome if there are sufficient Humanitarian and Compassionate considerations. They would normally include an examination of a variety of factors including an appellant's intentions in relation to residency in Canada, see *Ribic* at paragraphs 4 and 5. Accordingly, the Current Act did not involve a dramatic change. Intention was still relevant. In these circumstances it was not necessary for the IAD to refer to the impact of the Current Act on the Applicants.

[50] The IAD noted in paragraph 12 of the Decision that the Applicants had remained in Canada since September 2003. However, it did not give positive weight to the fact that they were still here at the time of the IAD hearing in May of 2006.

[51] In my view, once the IAD concluded that the Applicants' extended (3½ year) absence from Canada was not sufficiently explained and once it had reason to doubt, in spite of their presence here since September 2003, that the Applicants intended to reside permanently in Canada because there was no evidence that their daughter and her family were making serious plans to return to Canada, the IAD had reasonably and adequately canvassed the issue of the Applicants' intentions.

Issue 4 – Family in Canada

[52] The Applicants say that the IAD erred in concluding that the Applicants had no family in Canada. The Respondent says that this error is immaterial because the Applicants have no "close" family in Canada. I accept this submission. It is clear that the Applicants' daughter, granddaughter and son-in-law are the Applicants' most important family members and that they are in Hong Kong.

Issue 5 – The Letter re the Applicants' Son-in-Law

[53] Exhibit A-2 before the IAD was a letter from the employer of the Applicants' son-in-law in Hong Kong. It was dated May 18, 2006 which was only five days before the IAD's hearing. The letter was addressed "To whom it may concern" and said that the Applicants' son-in-law "…has

resigned from the above position due to his family decision to move back to Canada for a new life by the end of this year. His last working day with the company will be on 31 July 2006."

[54] The Applicants criticize the IAD for failing to refer to the letter's mention of a return to Canada. However, the IAD did mention the letter but found it insufficient. In my view, since it was hearsay evidence and since there was no direct evidence from the son-in-law, it was not necessary for the IAD to refer to the letter in greater detail.

Issue 6 – Future Sponsorship

[55] The Applicants submit and the Respondent agrees that the IAD erred in law when it said that the Applicants' daughter could sponsor her parents before she returned to Canada. However, in my view, this error was not material since there is no doubt that, after she returns to Canada, the Applicants' daughter will be entitled to sponsor her parents.

THE CERTIFIED QUESTION

[56] The Applicants proposed the following question for certification pursuant to section 74 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

> *Should the IAD specifically include the retroactive application of section 28 of the IRPA and its effect on the Applicant as a mitigating fact in a humanitarian and compassionate analysis under section 63(4) of the IRPA?*

[57] The short answer is that the appeal to the IAD, in this case, was not considered under subsection 63(4) of the IRPA. That section deals only with decisions which are made by a Minister's Delegate outside Canada. In this case the Decision was made in Vancouver. Accordingly, an answer to the question could not be dispositive. For this reason, certification is denied.

JUDGMENT

UPON reviewing the material filed and hearing the submissions of counsel for both parties in Vancouver on April 12, 2007;

AND UPON considering the post-hearing letters from counsel for the Applicants dated April 13 and 15, 2007 and from counsel for the Respondent dated April 13, 2007;

AND UPON determining that, for the above reasons, this application should be dismissed.

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is hereby dismissed.
2. The question posed for certification for appeal, pursuant to section 74 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is not certified.

"Sandra J. Simpson"
JUDGE

FEDERAL COURT

SOLICITORS OF RECORD

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