Federal Court  Cour fédérale

Date: 20110310

Docket: IMM-2331-10

Citation: 2011 FC 292

Ottawa, Ontario, March 10, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

MATHEW JOSE AMBAT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA] appealing the decision of the Immigration and Refugee Board, Immigration Appeal Division (the IAD) dated March 29, 2010. The IAD dismissed the Applicant's appeal of a Visa Officer's determination that he was inadmissible for failing to meet the residency obligation for permanent residents, as set out in section 28 of the IRPA.

[2] For the following reasons, this application is dismissed.

I. Background

A. *Factual Background*

[3] The Applicant, Mathew Jose Ambat, is a 42 year old citizen of the Philippines. He came to Canada on June 11, 2003 as a permanent resident accompanied by his wife and two minor children. They settled in Mississauga and his wife and children have since become Canadian citizens. The Applicant, however, continued to work in the United Arab Emirates (UAE), traveling back and forth to Canada to spend time with his family and keeping in touch via phone and e-mail.

[4] The Applicant began working in the UAE in 1999 as an employee of United Metal Supply in Dubai. Around the time that he landed in Canada, the Applicant claims that the company he worked for at the time, Conares Metal Supply Limited, began to consider expanding into the Canadian market due to the extensive growth forecasted in the Canadian construction market. The Applicant was offered the opportunity to help form and eventually be employed by this sister company, Conares Canada Ltd., as a Director with the intention that he would one day be based out of the Canadian office. In the meantime, however, the Applicant continued to work out of Dubai. He became a consultant or technical advisor of Conares Canada Ltd. in 2006, but continued to work on projects in Dubai and was paid directly by the Dubai company.

[5] The Applicant's Permanent Residence Card (PRC) was set to expire in July 2008 so he applied to have it renewed while he was in Canada in April 2008, providing the necessary supporting documentation. The Applicant received a letter dated October 31, 2008 at his residence in Mississauga indicating that his application for renewal of his PRC had been accepted and approved and that the card was ready to be picked up. The Applicant was working in Dubai at the time, so he visited the Abu Dhabi, UAE visa office on November 15, 2008 to apply for a travel document so that he could travel to Canada to pick up his PRC. The Applicant was subsequently interviewed at the visa office in Abu Dhabi on December 3, 2008.

[6] On December 17, 2008 the visa officer in Abu Dhabi refused the Applicant's application for a travel document by way of a letter, indicating that he failed to meet the residency requirements under section 28 of the IRPA.

[7] The Applicant had physically spent 312 days in Canada during the relevant five year period – since landing in June 2003 until July 14, 2008, while the IRPA requires a physical presence of 730 days. The visa officer did not accept that the Applicant was outside Canada employed by a Canadian business.

[8] The Applicant was able to obtain a travel document based on his intention to appeal the negative residency determination pursuant to paragraph 31(3)(c) of the IRPA. Once in Canada, he collected his renewed PRC card and submitted a Notice of Appeal to the IAD on January 8, 2009.

[9] The appeal record was produced and distributed to the parties in May 2009. On February 28, 2010 the Minister advised the IAD in writing that he would not be participating at the hearing of the appeal. A copy of the letter was sent to the Applicant's Mississauga address.

[10] The appeal was heard March 1, 2010. The IAD rendered its decision on March 29, 2010 dismissing the appeal. That decision is the subject of this judicial review.

B. *Impugned Decision*

[11] The IAD concluded that the Applicant did not establish that he complied with the residency obligation set out in section 28 of the IRPA. The IAD was not satisfied that Conares Canada was a Canadian business for the purposes of IRPA and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations). Since Conares Canada had no employees in Canada and no financial information was provided for the company after 2006 the IAD was unable to find that it had ongoing operations in Canada. Moreover, the IAD found that the timing of Conares Canada's creation and incorporation, which coincided with the Applicant's landing in Canada, strongly indicated that it was a business of convenience, serving primarily to allow the Applicant to meet his residency obligation while living outside of Canada.

[12] The IAD considered the decisions in several cases to see whether the Applicant's breach of residency obligations could be overcome by humanitarian and compassionate (H&C) factors. The IAD concluded that the Applicant and his family had been living apart for several years, and the Applicant intended to continue working abroad. The Applicant could continue to visit his family by

applying for a long-term temporary resident visa and furthermore, his wife would be able to sponsor him for permanent residency as her spouse once he became ready to fulfill the residency obligation under the IRPA.

II. Issues

[13] The Applicant submits that the IAD made several serious errors of fact and law in the decision. The issues are best summarized as:

(a) Was the IAD's determination that the Applicant's employer was not a Canadian business for the purposes of the IRPA unreasonable?

(b) Did the IAD violate any principles of procedural fairness by failing to advise the Applicant of the Minister's intention not to appear at the hearing?

(c) Did the IAD err in failing to analyze only six of eight factors that are particularly relevant to determining residency obligation appeals?

(d) Did the IAD misinterpret the relevant provisions of the IRPA?

III. Standard of Review

[14] The appropriate standard on the issue of procedural fairness is the standard of correctness.

[15] The other issues are issues of mixed fact and law and are therefore reviewable on a standard of reasonableness (*Kim v Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1048 at para 14).

IV. Argument and Analysis

A. *Did the IAD Make Any Unreasonable Findings of Fact Regarding Conares Canada?*

[16] The Applicant submits that the IAD erroneously arrived at the conclusion that the Applicant was not outside Canada employed full-time by a Canadian business. The Applicant argues that Conares Canada Ltd. is a Canadian business as defined in the IRPA.

[17] With respect, the Applicant's submissions on this point amount to nothing more than a restatement of the evidence that was before the IAD with an insistence that the opposite conclusion should have been reached.

[18] Section 28 of the IRPA lays out the residency requirement for permanent residents:

Residency obligation	Obligation de résidence
28. (1) A permanent resident must comply with a residency obligation with respect to every five-year period.	28. (1) L'obligation de résidence est applicable à chaque période quinquennale.
Application	Application
(2) The following provisions govern the residency obligation under subsection (1):	(2) Les dispositions suivantes régissent l'obligation de résidence :
(a) a permanent resident complies with the residency obligation with respect to a five-year period if, on each of a	a) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période

total of at least 730 days in that five-year period, they are

(i) physically present in Canada,

[…]

(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province,

[…]

quinquennale, selon le cas :

(i) il est effectivement présent au Canada,

[…]

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,

[…]

(b) it is sufficient for a permanent resident to demonstrate at examination

[…]

(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and

b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;

(c) a determination by an officer that humanitarian and compassionate considerations relating to a permanent resident, taking into account the best interests of a child directly affected by the determination, justify the retention of permanent resident status overcomes any breach of the residency obligation prior to the determination.

c) le constat par l'agent que des circonstances d'ordre humanitaire relatives au résident permanent — compte tenu de l'intérêt supérieur de l'enfant directement touché — justifient le maintien du statut rend inopposable l'inobservation de l'obligation précédant le contrôle.

[19] The Applicant admitted that he was not in Canada for 730 days during the relevant five year period, but argued that he was instead employed by a Canadian business. Section 61 of the Regulations further defines "Canadian business":

Canadian business	Entreprise canadienne
61. (1) Subject to subsection (2), for the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act and of this section, a Canadian business is	61. (1) Sous réserve du paragraphe (2), pour l'application des sous-alinéas 28(2)a)(iii) et (iv) de la Loi et du présent article, constitue une entreprise canadienne :
(a) a corporation that is incorporated under the laws of Canada or of a province and that has an ongoing operation in Canada;	a) toute société constituée sous le régime du droit fédéral ou provincial et exploitée de façon continue au Canada;
(b) an enterprise, other than a corporation described in paragraph (a), that has an ongoing operation in Canada and	b) toute entreprise non visée à l'alinéa a) qui est exploitée de façon continue au Canada et qui satisfait aux exigences suivantes :
(i) that is capable of generating revenue and is carried on in anticipation of profit, and	(i) elle est exploitée dans un but lucratif et elle est susceptible de produire des recettes,
(ii) in which a majority of voting or ownership interests is held by Canadian citizens, permanent residents, or Canadian businesses as defined in this subsection; or	(ii) la majorité de ses actions avec droit de vote ou titres de participation sont détenus par des citoyens canadiens, des résidents permanents ou des entreprises canadiennes au sens du présent paragraphe;
(c) an organization or enterprise created under the laws of Canada or a province.	c) toute organisation ou entreprise créée sous le régime du droit fédéral ou provincial.

Exclusion	Exclusion
(2) For greater certainty, a Canadian business does not include a business that serves primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada.	(2) Il est entendu que l'entreprise dont le but principal est de permettre à un résident permanent de se conformer à l'obligation de résidence tout en résidant à l'extérieur du Canada ne constitue pas une entreprise canadienne.
[…]	[…]

[20] In the present matter the IAD found, based on the evidence, that Conares Canada was a business described in subsection 61(2) of the Regulations – a business serving primarily to allow the Applicant to comply with his residency obligation while residing in the UAE. The Applicant lists several points that he feels the IAD ignored. However, several of these points were listed in the IAD's reasons and despite the submissions of the Applicant, underlie the IAD's conclusion that Conares Canada was a business of convenience. For example, the fact that the Applicant's UAE residence permit issued on September 15, 2008 was sponsored by United Metal Supply, the company that the Applicant worked for prior to landing in Canada and a company also owned by Mr. Bhatia, a director of Conares Canada and Conares in Dubai, reasonably suggests, as found by the IAD, that the Applicant had been working for the same company in the UAE and in Canada. This bolsters, rather than diminishes, the IAD's finding regarding the purpose for which Conares Canada was established. This finding is further supported by the fact that no financial information was provided for the company after 2006 and there are no longer any employees of Conares Canada in Canada. The Applicant offers nothing to show that this finding was unreasonable and outside the range of possible defensible conclusions. The task of this Court on judicial review is not to re-

weigh or re-examine the evidence, but rather to make sure that the reasoning can stand up to a somewhat probing examination (*Ikhuiwu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 35, 163 ACWS (3d) 438 at para 34). In this case the IAD's reasoning stands up to that standard.

B. *Did the IAD Violate the Principles of Natural Justice in the Conduct of the Hearing?*

[21] The Applicant submits that the IAD erred in not disclosing the document indicating the Minister's intention not to participate prior to the commencement of the hearing. The Applicant further submits that the IAD assumed the role of the adverse party at the hearing.

[22] I agree with the Respondent's submission that there is no serious issue here. The letter from the Minister's counsel was faxed to the IAD on February 28, 2010, but it was also copied to the Applicant at his Mississauga address. If the Applicant did not learn of the Minister's position until the day of the hearing because he was overseas and did not receive the letter, as suggested by the Respondent, I agree that this could not have had a serious adverse effect on his case.

[23] The letter in its entirety reads:

> Please be advised that the Minister will not be appearing in person for the hearing of this matter now scheduled for March 1, 2010. The Minister has not received any information/documentation from the Appellant as such, relied on the Appeal Record produced and distributed to the parties on May 19, 2009.
>
> After carefully reviewing the information contained in the Record, the Minister takes no position in this matter.

[24] Furthermore, as the Respondent points out, there is no indication that the Applicant or his counsel raised an objection on this point at the hearing or requested an adjournment. Failure to raise a timely objection to a perceived breach of natural justice is considered by the jurisprudence of this Court to be an implied waiver of any breach of natural justice that might have occurred (*Kamara v Canada (Minister of Citizenship and Immigration)*, 2007 FC 448, 157 ACWS (3d) 398 at para 26).

[25] I cannot find any indication that the Applicant did not receive a fair hearing, or any reason that this Court should intervene.

C. *Did the IAD Err in its Application of the Arce and Kok Factors?*

[26] The Applicant submits that the IAD erred in analyzing only six out of eight factors that the IAD listed as being particularly relevant to residency obligations appeals.

[27] The IAD considered the statutory provision allowing special relief found in paragraph 67(1)(c) of the IRPA. The IAD then stated that in considering whether the Applicant's breach of the residency obligation was overcome that it was guided by the IAD decisions in *Bufete Arce, Dorothy Chicay v Minister of Citizenship and Immigration* (IAD VA2-02515) and *Yun Kuen Kok & Kwai Leung Kok v Minister of Citizenship and Immigration* (IAD VA2-02277), [2003] IADD No 514. Those two cases suggest that in addition to the best interests of a child directly affected, there are other particularly relevant factors to consider in these types of appeals. The IAD listed these at para 38:

> (i) the extent of the non-compliance with the residency obligation;
> (ii) the reasons for the departure and stay abroad;

> (iii) the degree of establishment in Canada, initially and at the time of hearing;
> (iv) family ties to Canada;
> (v) whether attempts to return to Canada were made at the first opportunity;
> (vi) hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;
> (vii) hardship to the appellant if removed from or refused admissions to Canada; and.
> (viii) whether there are other unique or special circumstances that merit special relief.

[28] The Applicant argues that the Board erred in not considering whether attempts to return to Canada were made at the first opportunity and whether there are other unique or special circumstances that merit special relief. The Applicant states that there was extensive evidence before the IAD with respect to the two un-assessed factors, but does not fully explain what that evidence was other than the Applicant's own insistence that he was deputed abroad for a Canadian company.

[29] The Respondent submits that, firstly, as the IAD noted, these factors are not exhaustive and the weight given to each factor varies on the circumstances, and that secondly, the IAD did consider the two allegedly ignored factors.

[30] It is well accepted that in making H&C decisions the IAD has extensive discretion to consider and weigh factors as required by the specific circumstances of the case. In *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IADD No 4, the case that first discussed the considerations more recently laid out in *Arce* and *Kok*, above, the Board recognized the importance of context in making H&C decisions, stating at para 14, "while the general areas of review are similar in each case the facts are rarely, if ever, identical."

[31] I agree with the Respondent that the IAD turned its mind to whether attempts were made to return to Canada at the first opportunity in the IAD's analysis of "reasons for departure and remaining abroad and attempts to return" (emphasis added) at para 41 of the decision. The IAD noted that the Applicant did not explicitly testify that he would return to Canada whether or not the project he had been working on was completed by the projected deadline of September 2011. The IAD came to the conclusion that the Applicant had no definite intention of returning to Canada and that this factor therefore weighed against him.

[32] Given the very fact specific nature of H&C considerations, I share the view of the Respondent that the Applicant presents no evidence of a reviewable error, but essentially disagrees with the IAD's weighing and assessment of the evidence. The Applicant does not mention what unique or special circumstances the IAD overlooked and having reviewed the decision I cannot come to the conclusion that the IAD's analysis of the H&C factors is unreasonable. The IAD is free to weigh each factor, and is consequently free to give no weight to any given factor depending on the circumstances. The Respondent cited Justice Yves de Montigny's decision in *Ikhuiwu*, above, at para 32:

> [32] The applicant disagrees with the IAD's conclusions that the circumstances of this case do not warrant the exercising of the panel member's discretion in providing humanitarian and compassionate relief in his favour. Unfortunately for him, the fact that he is not happy with the manner in which the IAD weighed all of the relevant H&C factors is not sufficient for this Court to intervene.

[33] Similarly, in the present matter, absent some indication that evidence had been ignored or facts misapprehended, there is no basis for this Court to intervene.

D. *Did the IAD Correctly Interpret and Apply the Provisions of the IRPA?*

[34] The Applicant submits that the IAD failed to understand that the Applicant had already been found to have met the residency obligation at the time the assessment of the visa officer occurred. The Applicant argues that the second assessment was unnecessary as he had already been issued a renewed PRC.

[35] The Respondent contends that the Applicant's argument is based on a fundamental misunderstanding of the process and relevant statutory provisions.

[36] The Applicant suggests that the issuance of a renewed PRC made it unnecessary for the Applicant to be examined for admissibility prior to being issued a travel document. With respect, this understanding is contrary to jurisprudence and the clear language of the IRPA. The Respondent explains that the issuance of a PRC by an inland CIC office and the assessment of whether an applicant meets the residency obligation by an officer outside of Canada are in fact two separate processes, and submits that the residency obligation must be assessed and met at the point of examination by the visa officer, irrespective of whether an applicant holds a PRC.

[37] Both the Respondent and the IAD cite *Ikhuiwu*, above, for the proposition that the mere possession of a PRC in not conclusive poof of status. At para 19 Justice de Montigny wrote:

> Turning first to the permanent resident card, the legislative scheme under the IRPA makes it clear that the mere possession of a permanent resident card is not conclusive proof of a person's status in Canada. Pursuant to section 31(2) of the IRPA, the presumption that

> the holder of a permanent resident card is a permanent resident is clearly a rebuttable one. In this case, it is clear that the permanent resident card, which was issued in error after it was determined by the visa officer in Nigeria that the applicant had lost his permanent residence status, could not possibly confer legal status on him as a permanent resident, nor could it have the effect of restoring his permanent resident status which he had previously lost because he didn't meet the residency requirements under section 28 of the IRPA. There is no provision in the IRPA or the Regulations which suggests that the mere possession of a permanent residence card, which was improperly issued, could have the effect of restoring or reinstating a person's prior permanent resident status.

[38] Although in the *Ikhuiwu* case, above, the PRC in question was improperly issued, that the Applicant's PRC in the present matter might have been properly issued is of no distinguishing effect. The relevant IRPA provisions are clear that the residency obligation must be met when a travel document is requested.

[39] Subsections 11(1) and 28(1) and paragraph 28(2)(b) of the IRPA provide that:

Application before entering Canada	Visa et documents
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
[…]	[…]
Residency obligation	Obligation de résidence
28. (1) A permanent resident	28. (1) L'obligation de

must comply with a residency obligation with respect to every five-year period.	résidence est applicable à chaque période quinquennale.
Application	Application
(2) The following provisions govern the residency obligation under subsection (1):	(2) Les dispositions suivantes régissent l'obligation de résidence :
[…]	[…]
(b) it is sufficient for a permanent resident to demonstrate at examination	b) il suffit au résident permanent de prouver, lors du contrôle, qu'il se conformera à l'obligation pour la période quinquennale suivant l'acquisition de son statut, s'il est résident permanent depuis moins de cinq ans, et, dans le cas contraire, qu'il s'y est conformé pour la période quinquennale précédant le contrôle;
(i) if they have been a permanent resident for less than five years, that they will be able to meet the residency obligation in respect of the five-year period immediately after they became a permanent resident;	
(ii) if they have been a permanent resident for five years or more, that they have met the residency obligation in respect of the five-year period immediately before the examination; and	
[…]	[…]

[40] Section 31 of the IRPA provides that a rebuttable presumption is raised if a person is in possession of a PRC:

Status document	Attestation de statut
31. (1) A permanent resident and a protected person shall be	31. (1) Il est remis au résident permanent et à la personne

provided with a document indicating their status.

protégée une attestation de statut.

Effect

(2) For the purposes of this Act, unless an officer determines otherwise

(a) a person in possession of a status document referred to in subsection (1) is presumed to have the status indicated; and

(b) a person who is outside Canada and who does not present a status document indicating permanent resident status is presumed not to have permanent resident status.

Effet

(2) Pour l'application de la présente loi et sauf décision contraire de l'agent, celui qui est muni d'une attestation est présumé avoir le statut qui y est mentionné; s'il ne peut présenter une attestation de statut de résident permanent, celui qui est à l'extérieur du Canada est présumé ne pas avoir ce statut.

Travel document

(3) A permanent resident outside Canada who is not in possession of a status document indicating permanent resident status shall, following an examination, be issued a travel document if an officer is satisfied that

(a) they comply with the residency obligation under section 28;

(b) an officer has made the determination referred to in paragraph 28(2)(c); or

(c) they were physically present in Canada at least once within the 365 days before the examination and they have made an appeal under

Titre de voyage

(3) Il est remis un titre de voyage au résident permanent qui se trouve hors du Canada et qui n'est pas muni de l'attestation de statut de résident permanent sur preuve, à la suite d'un contrôle, que, selon le cas :

a) il remplit l'obligation de résidence;

b) il est constaté que l'alinéa 28(2)c) lui est applicable;

c) il a été effectivement présent au Canada au moins une fois au cours des 365 jours précédant le contrôle et, soit il a interjeté appel au titre du paragraphe

subsection 63(4) that has not been finally determined or the period for making such an appeal has not yet expired	63(4) et celui-ci n’a pas été tranché en dernier ressort, soit le délai d’appel n’est pas expiré.

[41] The above provisions make it clear that a permanent resident must comply with the residency requirement at the time of examination. The Applicant was not in possession of his PRC when he applied for a travel document, and there was therefore no presumption that he was a permanent resident. There is no basis in the IRPA for finding that the overseas visa officer was precluded from assessing whether or not the Applicant met the residency obligation simply because he had a letter from the CIC inland office showing that his renewed PRC was ready for pick up.

[42] The Applicant has failed to show that there is any reason for this Court to disturb the findings of the IAD.

V. Conclusion

[43] In consideration of the above conclusions, this application for judicial review is dismissed.

[44] No question to be certified was proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-2331-10**
STYLE OF CAUSE:	**AMBAT V. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**FEBRUARY 2, 2011**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**MARCH 10, 2011**

APPEARANCES:

H.S. (Harry) Mann	FOR THE APPLICANT
Alex Kam	FOR THE RESPONDENT

SOLICITORS OF RECORD:

H.S. (Harry) Mann Mann Law Mississauga, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General Canada	FOR THE RESPONDENT