Federal Court  Cour fédérale

Date: 20140521

Docket: IMM-1048-13

Citation: 2014 FC 460

Ottawa, Ontario, May 21, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JEEVAN BARAILY
SIDDHARTHA KUMAR BARAILY

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, wherein it was determined that they failed to satisfy their residency obligation under section 28 of the *Immigration and Refugee Protection*

Act, SC 2001, c 27 [IRPA] and that their personal circumstances did not present humanitarian and compassionate [H&C] grounds sufficient to overcome a breach of this obligation.

II. Facts

[2] The principal Applicant, Mr. Jeevan Baraily, his wife, Mrs. Siddhartha Kumar Baraily, and their child, are citizens of Nepal.

[3] They landed in Canada and were issued Canadian permanent resident visas in October 2005. The family left Canada in December 2005.

[4] At the time of landing, the principal Applicant had been working on contract for a Canadian company, LEA International Ltd., outside of Canada. The employment contract was projected to last 42 months from March 2004 to September 2007. The principal Applicant completed this contract.

[5] In September 2007, the principal Applicant was asked to join another project by LEA International in Africa for a 3 year period, which he accepted.

[6] In March 2010, the principal Applicant was asked to accept a new contract to deal with a project crisis in India. The principal Applicant returned to India and continued this contract until November 2010.

[7] In November 2010, the Applicants' permanent resident visas expired. The principal Applicant returned to Canada and applied for a renewal of his permanent resident visa. He remained in Canada until March 2011, at which time he returned to India to begin a new project with LEA International until June 2013.

[8] The principal Applicant's visa renewal application was refused by an Immigration Officer on April 14, 2011, on the basis that he and his son had not met the residency requirements outlined in section 28 of the IRPA.

[9] The Applicants appealed this decision to the IAD, and, on January 22, 2013, the appeal was dismissed, which is the underlying application before this Court.

III. Decision under Review

[10] The IAD found that the principal Applicant did not meet his residency obligation in the 5-year period (March 25, 2006 to March 25, 2011) since he did not establish that he was "assigned" to a position outside Canada by a Canadian business under section 61 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations].

[11] The IAD noted that the principal Applicant had established that he had employment on a full-time basis by a Canadian business outside of Canada during the 5-year period; however, he failed to show that the position was a temporary assignment. The IAD found that there was insufficient evidence before it to demonstrate that the principal Applicant's employment was temporary or that he would have a permanent position in Canada after his contract abroad ended.

The IAD further stressed that the principal Applicant had been given other opportunities to work in Canada; however, he had refused to take them.

[12] Relying on this Court's decisions in *Canada (Minister of Citizenship and Immigration) v Jiang*, 2011 FC 349 and *Bi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 293, the IAD reasoned that subsection 61(3) of the Regulations required the principal Applicant to show that he was assigned to a position outside of Canada temporarily and that he maintained a connection to a Canadian business; therefore, he would be likely to return to Canada after the assignment. The connection to a Canadian business, the IAD noted, required evidence pointing to a firm commitment on the part of the employer to reintegrate the employee within a specified timeframe to a position in Canada.

[13] The IAD also found that the Applicants' circumstances did not warrant relief based on H&C grounds. The IAD determined that the principal Applicant had weak ties to Canada. The principal Applicant did not own any property or other notable assets in Canada, nor did he have any family or social ties in Canada. Moreover, the principal Applicant only visited Canada a few times; he was found to have only been in Canada for a total of 150 days (his minor child, 46 days).

[14] The IAD concluded that the Applicants were primarily established outside of Canada; therefore the hardship imposed by the denial of the visas would not be significant, undue or disproportionate on them.

IV. Issue

[15] Is the IAD's decision reasonable?

V. Relevant Legislative Provisions

[16] Section 28 of the IRPA is relevant in this matter:

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 total of at least 730 days in that five-year period, they are:	*a*) le résident permanent se conforme à l'obligation dès lors que, pour au moins 730 jours pendant une période quinquennale, selon le cas :
(i) physically present in Canada,	(i) il est effectivement présent au Canada,
(ii) outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent,	(ii) il accompagne, hors du Canada, un citoyen canadien qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents,
(iii) outside Canada employed on a full-time basis by a Canadian business or in the federal	(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour

public administration or the public service of a province,	l'administration publique fédérale ou provinciale,
(iv) outside Canada accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent and who is employed on a full-time basis by a Canadian business or in the federal public administration or the public service of a province, or	(iv) il accompagne, hors du Canada, un résident permanent qui est son époux ou conjoint de fait ou, dans le cas d'un enfant, l'un de ses parents, et qui travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale,
(v) referred to in regulations providing for other means of compliance;	(v) il se conforme au mode d'exécution prévu par règlement;
(*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	
(*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.

[17] The owing legislative provision of the Regulations is also relevant:

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	(i) elle est exploitée dans un but lucratif et elle est

carried on in anticipation of profit, and

(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

c) an organization or enterprise created under the laws of Canada or a province.

susceptible de produire des recettes,

(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) toute organisation ou entreprise créée sous le régime du droit fédéral ou provincial.

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.

Exclusion

(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.

Employment outside Canada

(3) For the purposes of subparagraphs 28(2)(*a*)(iii) and (iv) of the Act, the expression "employed on a full-time basis by a Canadian business or in the public service of Canada or of a province" means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the employment or contract to

Travail hors du Canada

(3) Pour l'application des sous-alinéas 28(2)*a*)(iii) et (iv) de la Loi respectivement, les expressions « travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale » et « travaille à temps plein pour une entreprise canadienne ou pour l'administration publique fédérale ou provinciale », à l'égard d'un résident permanent, signifient qu'il est l'employé ou le fournisseur de services à contrat d'une entreprise canadienne ou de l'administration publique,

	fédérale ou provinciale, et est affecté à temps plein, au titre de son emploi ou du contrat de fourniture :
(*a*) a position outside Canada;	*a*) soit à un poste à l'extérieur du Canada;
(*b*) an affiliated enterprise outside Canada; or	*b*) soit à une entreprise affiliée se trouvant à l'extérieur du Canada;
(*c*) a client of the Canadian business or the public service outside Canada.	*c*) soit à un client de l'entreprise canadienne ou de l'administration publique se trouvant à l'extérieur du Canada.

VI. Standard of Review

[18] The interpretation of subsection 61(3) of the Regulations is reviewed on the standard of reasonableness. The reasonableness standard also applies to the application of subsection 61(3) and the IAD's analysis of the H&C factors (*Xi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 796).

VII. Analysis

[19] The Applicants primarily seek to challenge the reasons issued by this Court in *Jiang* and *Bi*, above, in regard to the interpretation of subsection 61(3) of the Regulations. The Applicants argue that the analysis in these two cases does not accord with the language of the IRPA or the Regulations, as neither require an analysis of whether employment is temporary, whether a connection is maintained to the Canadian employer, or whether a permanent resident has returned to work in Canada following an assignment abroad. The Applicants advance that the language of the IRPA only requires that the permanent resident be working abroad for a

Canadian company. The IAD therefore exceeded its jurisdiction by requiring the Applicants to comply with the criteria set out in *Jiang*.

[20] In the alternative, the Applicants argue that the principal Applicant met the criteria set out in *Jiang* and *Bi*; the principal Applicant was working for a Canadian company abroad on a temporary assignment, maintained a connection with the company and had the intent of returning to Canada after his work assignment abroad.

[21] As the interpretation of subsection 61(3) of the Regulations has already been addressed by this Court in previous decisions, including the recent case of *Xi*, above, *Wei v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1084, 418 FTR 78; *Bi*, above, and *Jiang*, above, the Court shall not embark on a substantial analysis of subsection 61(3).

[22] The Court refers to Justice Richard Boivin's summary in *Jiang*, above, for the established framework for interpreting subsection 61(3):

> [41] Section 28 of the Act sets out the residency obligations applicable to each five-year period. Subparagraph 28(2)(*a*)(iii) allows a permanent resident to work outside Canada on a full-time basis for a Canadian business or for the federal public administration or the public service of a province and to be assigned to a position outside Canada without losing their permanent resident status.
>
> [42] Subsection 61(1) of the Regulations sets out what a Canadian business is. Subsection 61(2) excludes any business that serves primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada. More importantly for the case in issue, subsection 61(3) specifically refers to subparagraph 28(2)(*a*)(iii) and offers a more precise definition of what working outside Canada means in relation to a permanent resident. On reading subsection 61(3) of the Regulations, which describes the concept of working outside

> Canada, the Court notes that the permanent resident must be employed but that Parliament added the concept of an assignment, which is absent from subparagraph 28(2)(*a*)(iii) of the Act.
>
> ...
>
> [52] In this case, it is difficult to argue that Ms. Jiang met the "assignment" criterion set out in the Regulations. The word assignment in the context of permanent resident status interpreted in light of the Act and Regulations necessarily implies a connecting factor to the employer located in Canada. The word "assigned" in subsection 61(3) of the Regulations means that an individual who is assigned to a position outside Canada on a temporary basis and who maintains a connection to a Canadian business or to the public service of Canada or of a province, may therefore return to Canada.
>
> [53] The clarification added by Parliament to subsection 61(3) of the Regulations creates an equilibrium between the obligation imposed on the permanent resident to accumulate the required number of days under the Act while recognizing that there may be opportunities for permanent residents to work abroad.
>
> [54] Consequently, the Court is of the opinion that, in light of the evidence in the record, the panel's finding that permanent residents holding full-time positions outside Canada with an eligible Canadian company can accumulate days that would enable them to comply with the residency obligation set out in section 28 of the Act, is unreasonable. [Emphasis added.]

[23] In the present case, the Court finds that the IAD's analysis in regard to subsection 61(3) is consistent with this jurisprudence and is reasonable. In applying *Jiang*, the IAD reasonably concluded that subsection 61(3) required the principal Applicant to establish that his work assignment was on a full-time, temporary basis outside of Canada, that he maintained a connection to a Canadian business, and that he could continue working for his employer in Canada after the assignment.

[24] Contrary to the Applicants' argument, the Court sees no basis upon which not to follow the decision in *Jiang* or *Bi*, above. Without establishing a material difference between the factual and evidential basis for this Application and these other decisions, a difference between the issues at bar, that there is legislation or binding authority that the decisions did not consider that would change the outcome, or that injustice would result from following these decisions, the doctrine of judicial comity applies (*Xi*, above, at para 51).

[25] The Court disagrees with the Applicants' assertion that subsection 61(3) of the Regulations allows permanent residents to accumulate days towards meeting their residency requirement simply by being hired on a full-time basis by a Canadian business outside of Canada. To accept such an interpretation of subsection 61(3) would be inconsistent with the objective set forth in paragraph 3(1)(*e*) of the IRPA "to promote the successful integration of permanent residents into Canada". It would hardly promote "successful integration" of permanent residents into Canada if the IRPA exempted immigrants from having to establish themselves in Canada on the sole basis that they work for a Canadian company abroad. Clearly, Parliament's intent in imposing the 5-year residency obligation was to prevent these types of situations. This intent is further evidenced by the addition of subsection 61(2) in the Regulations, which excludes businesses that serve primarily to allow a permanent resident to comply with their residency obligation while residing outside Canada from the definition of a "Canadian Business" under subsection 61(1). The Applicants' interpretation would also arguably be inconsistent with the objective set forth in paragraph 3(1)(*a*) of the IRPA "to permit Canada to pursue the maximum social, cultural and economic benefits of immigration".

[26] As in *Jiang*, above, the principal Applicant in this case was not "assigned" to temporarily work outside of Canada, thereby allowing him to return to continue to work for his employer in Canada after his work abroad was completed. The contracts he accepted only entailed employment outside of Canada from the moment he was hired by his employer. Following the expiry of each contract, despite his intentions perhaps, the principal Applicant was then re-hired on a full-time basis to continue to work outside of Canada. There is no evidence on record that LEA International ever intended to give the principal Applicant a firm offer or a substantial promise of relocation back to Canada after the expiry of his contracts for the purpose of relevant legislative requirements thereon.

[27] The principal Applicant testified at the hearing before the IAD that his employer had provided him "some assurances" regarding the possibility of a position in Canada after his work abroad (IAD Decision at para 12); however, the Court agrees that this alone is not sufficient evidence to establish that the principal Applicant would continue working for his employer in Canada after his contract expired.

[28] Unfortunately for the principal Applicant, he made a choice to work for a company that required him to work exclusively outside of Canada. This resulted in him developing admittedly weak ties to Canada, which were insufficient to meet the requirements of the IRPA. The principal Applicant does not own any property or other notable assets in Canada, nor does he have any family or social ties in Canada. He also only visited Canada a few times prior to the IAD's decision; he resided in Canada for a total of 150 days (his minor child, 46 days) over the 8 or so years he worked for LEA International.

[29] In light of these facts, the Court also finds that the IAD was reasonable in finding that there was an insufficient degree of hardship imposed on the Applicants by losing their permanent resident status in Canada to warrant relief based on H&C grounds.

[30] Contrary to the Applicants' assertion, the principal Applicant's good faith was never put into question by the IAD. The IAD explicitly took the principal Applicant's good intentions into consideration in its reasons, and recognized that his skill and commitment to LEA International were, at least in part, what kept him working abroad; however, the principal Applicant's commitment to ensuring the success of his Canadian employer's projects in foreign countries was deemed insufficient to overcome a breach of his residency obligation. The Court agrees.

[31] It is important to note that nothing prevents the Applicants from re-applying for permanent residence once they are able to satisfy the requirements of the IRPA, or, if they have eventual new evidence for the purposes of the Applicants' record, the requirements clearly demonstrated by which they satisfy, through the company for which the principal Applicant works or another entity, the needed substantiation of a firm commitment by a Canadian company to satisfy the specified legislative requirements.

VIII. Conclusion

[32] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicants' application for judicial review be dismissed with no question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1048-13
STYLE OF CAUSE:	JEEVAN BARAILY, SIDDHARTHA KUMAR BARAILY v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 6, 2014
JUDGMENT AND REASONS:	SHORE J.
DATED:	MAY 21, 2014

APPEARANCES:

Matthew Jeffery	FOR THE APPLICANTS
Laoura Christodoulides	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matthew Jeffery Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT