Federal Court  Cour fédérale

Date: 20140725

Docket: IMM-3543-13

Citation: 2014 FC 745

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 25, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

DIETH VALERIE BELLO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision issued on April 10, 2013, by the Immigration Appeal Division [IAD] of the Immigration and Refugee Board, in which the IAD

dismissed the appeal by the applicant, Dieth Valerie Bello, against a departure order made against her by an immigration officer. The immigration officer had determined that the applicant was inadmissible to Canada because she had not complied with her residency obligation as a permanent resident. The applicant did not dispute the legal validity of the departure order. Rather, the issue before the IAD was whether she had established sufficient humanitarian and compassionate considerations to overcome the breach of the residency requirement.

[2] For the following reasons, the application for judicial review is dismissed.

II. Factual background

[3] The applicant is a national of Côte d'Ivoire and was sponsored to Canada by her mother, who was already a Canadian citizen at that time. The applicant obtained permanent residence in Canada on November 18, 2005.

[4] She left Canada on August 20, 2006, less than a year after becoming a permanent resident. She returned to Canada on October 27, 2010, more than four years later. This means that during the five-year period in question, the applicant was physically present in Canada for a period of 267 days, which is less than the period of 730 days of physical presence required for permanent residents under section 28 of the IRPA.

[5] The applicant testified that she left Canada to return to Côte d'Ivoire when she was 18 years old and that this stay was against her will, following a story her mother told her that she was going to spend a school year in France but that they were first going to stay for a short time

in Côte d'Ivoire. She testified that subsequently, at the age of 22, she returned to Canada as a result of her mother's choice.

[6] Because of her breach of the residency obligation, an immigration officer imposed a loss of residency on the applicant on October 27, 2010. The applicant requested a reconsideration of her loss of residency based on humanitarian and compassionate considerations the same day, which was refused, and a departure order was made against her under section 28 of the IRPA.

[7] The applicant appealed from this decision by the IAD under section 63 of the IRPA, asking the IAD to exercise its discretion on the basis of humanitarian and compassionate considerations under section 28 of the IRPA.

[8] Following a hearing held in Montréal on April 10, 2013, the IAD issued its decision refusing the appeal on the same day. At the hearing, the applicant informed the member that she had given birth to a daughter on September 25, 2012.

III. Impugned decision

[9] The IAD found that the applicant did not seem to take any personal responsibility for her decisions, which, however, affected her, and that she blamed everyone and held them responsible but did not acknowledge her own responsibility. She did not even spend a year in Canada at the time of her initial establishment and had no degree of establishment in Canada.

[10] Moreover, despite the fact that her appeal was filed in November 2010, the applicant did not even bothered to file documents in support of her appeal until the day of her hearing, which shows, according to the IAD, negligence in pursuing her appeal with diligence.

[11] The IAD also noted that the applicant, knowing that a departure order had been issued against her, nonetheless brought a child into the world, who was born on September 25, 2012. The IAD found out about this child on the day of the hearing. The child's father did not acknowledge the child, and the applicant testified that she had no contact with him.

[12] The IAD noted that the applicant had never worked in Canada and was living on social assistance. According to the IAD, this meant that the applicant had never contributed to Canadian society, which supports her today.

[13] Although the applicant submitted that she would have problems if she had to return to Côte d'Ivoire because it would be difficult to find employment, the IAD found that, at the age of 25, she should be able to support herself.

[14] Regarding the best interests of the applicant's daughter, the IAD found that while it is certainly preferable to raise a child in Canada than in Côte d'Ivoire, the child has no degree of establishment in Canada and is a Canadian citizen, which means that she could always choose to return to Canada when she reaches the age of majority.

[15] Moreover, although it would probably be more difficult for the applicant to manage in Côte d'Ivoire than in Canada, in the circumstances that is not a sufficient humanitarian and compassionate consideration.

[16] Counsel for the applicant raised the political instability in Côte d'Ivoire but submitted no documentary evidence to that effect.

[17] Permanent residence in Canada has its privileges but also involves some obligations, obligations that, according to the IAD, the appellant did not comply with.

[18] At the same time, the IAD concluded that the applicant had not satisfied her burden of proof to establish sufficient humanitarian and compassionate considerations in her case to compensate for the serious breach of her residency obligation and to warrant special relief.

IV. Legislation

[19] Section 28(1) of the IRPA establishes a residency obligation that permanent residents must comply with if they wish to maintain this status:

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.
(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 public administration or the public service of a province,

(iii) il travaille, hors du Canada, à temps plein pour une entreprise canadienne ou pour 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

(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.

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) 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.

[20] Section 63(4) of the IRPA states that the IAD has jurisdiction to determine whether a permanent resident has complied with their residency obligation:

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	**63**. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.
(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	(2) Le titulaire d'un visa de résident permanent peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.
(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.	(3) Le résident permanent ou la personne protégée peut interjeter appel de la mesure de renvoi prise au contrôle ou à l'enquête.
(4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.	(4) Le résident permanent peut interjeter appel de la décision rendue hors du Canada sur l'obligation de résidence.
(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.	(5) Le ministre peut interjeter appel de la décision de la Section de l'immigration rendue dans le cadre de l'enquête.

[21] Section 67 of the IRPA establishes the conditions under which the IAD may allow a permanent resident's appeal against an immigration officer's decision:

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67**. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé:
(a) the decision appealed is wrong in law or fact or mixed law and fact;	a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	b) il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.
(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.	(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

V. Standard of review

[22] The applicant submits that the standard of review that applies to the interpretation of permanent residency obligations is reasonableness (*Barm v Canada (Citizenship and Immigration)*, 2008 FC 893). The same standard applies to humanitarian and compassionate considerations.

[23] The respondent submits that the IAD's decision is reviewable on a reasonableness standard.

[24] In *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 58, Justice Binnie confirmed that the appropriate standard of review for a decision by the IAD under paragraph 67(1)(c) of the IRPA is reasonableness.

[25] In *Canada (Citizenship and Immigration) v Sidhu*, 2011 FC 1056 at paragraphs 31-32, Justice Kelen found as follows, referring to the Supreme Court decision in *Khosa*:

> [31] Errors of law made by the Board in exercising its discretionary jurisdiction are to be reviewed on a standard of reasonableness: *Iamkhong v. Canada (Citizenship and Immigration)*, 2011 FC 355.
>
> [32] But the Board's application of the evidence to that law – that is, its exercise of its discretionary jurisdiction – is to be reviewed on a standard of reasonableness: *Khosa*, above, at paragraphs 57-60.

[26] In this case, the IAD's assessment of the humanitarian and compassionate factors is an exercise of its discretionary jurisdiction, and the standard of review is reasonableness.

VI. Issue

[27] The only issue is the following: Is the decision of the IAD that the applicant did not establish sufficient humanitarian and compassionate considerations reasonable?

VII. Arguments of the parties

Applicant

[28] The applicant maintains that she does not dispute in law the fact that she failed to comply with her residency obligation but that the IAD did not consider the reasons that led the applicant to be outside Canada. By finding that the applicant was of legal age and could have chosen to remain in Canada, the applicant submits that the IAD applied an overly narrow approach in its interpretation of the applicant's cultural values. The IAD should have taken into account the multicultural aspect of immigrants, which in this case consists of respect for order and parents' decisions, regardless of the child's age.

[29] The applicant also argues that the IAD did not take into account the best interests of the child in that the father of her child, who is in Canada, could come forward in the future to ask to see his daughter or to care for her. The applicant refers to *Wei v Canada (Citizenship and Immigration)*, 2012 FC1084.

[30] In addition, the applicant has her mother, three half-brothers and a half-sister as well as three maternal uncles who live in Canada and are Canadian citizens. With respect to her family, the IAD simply said that the applicant was not on good terms with her family. However, it was her mother who decided to bring her back here, and it was one of her maternal uncles living in Canada who accompanied her. Disagreements between the applicant and her family do not justify not taking the family into account.

[31] Given these reasons, the applicant maintains that the IAD erred in exercising its discretion based on the existence of humanitarian and compassionate considerations.

Respondent

[32] The respondent submits that the IAD's decision is reasonable in that the reasons given by the applicant to explain her prolonged absence from Canada are not convincing. She was of legal age when she left Canada, and she takes no personal responsibility for her decisions. In addition, the IAD noted that the applicant had not even spent a year in Canada at the time of her initial establishment and has no degree of establishment in Canada. She is not even in contact with her family in Canada, she has never worked and currently lives on social assistance.

[33] Moreover, the IAD found that, despite the fact that her appeal was filed in November 2010, she did not even bother to file documents in support of her appeal until the day of her hearing.

[34] The IAD also noted that, at the age of 25, the applicant should be able to support herself in Côte d'Ivoire. In addition, she has a grandmother in Côte d'Ivoire with whom she is still in contact and who will be able to help her.

[35] Regarding the best interests of the child, the IAD recognized that it is preferable to raise a child in Canada, but at the same time the child has no degree of establishment here. In addition, she is a Canadian citizen and will always be able to return when she reaches the age of majority.

Moreover, the child's father has not acknowledged the child, and the applicant testified that she has no contact with him.

[36] The respondent therefore submits that it was not unreasonable for the IAD to not have found exceptional grounds that could justify permitting the applicant to remain in Canada, and thus the Court's intervention is not warranted.

VIII. Analysis

[37] As Justice Bédard stated in *Nekoie v Canada (Citizenship and Immigration)*, 2012 FC 363 at paragraph 29, "[s]ection 28 of the Act outlines the residency requirement for permanent residents, but affords immigration officers the discretion to determine whether humanitarian and compassionate considerations should overcome a breach of the residency obligation. The IAD is vested with the same discretion under section 67 of the Act."

[38] In this case, the applicant was physically present in Canada for a period of 267 days during the five-year period in question, and she does not dispute the fact that she therefore did not comply with her residency obligation. Because she breached her obligation, an immigration officer issued a departure order against her, and the applicant requested that humanitarian and compassionate considerations be taken into account to grant her special relief.

[39] The IAD concluded that there were insufficient humanitarian and compassionate considerations, taking into account the best interests of the child directly affected and the other circumstances of the case, to warrant special relief. The appeal was therefore dismissed.

[40] In my view, the IAD's decision was reasonable in light of the circumstances of the case. In *Nekoie* at paragraph 30, Justice Bédard noted: "The powers of the IAD concerning removal orders are highly discretionary and exceptional."

[41] In the decision *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292, 386 FTR 35, [*Ambat*] at paragraph 27, the Court listed the factors that the IAD applied to determine whether there were sufficient humanitarian and compassionate grounds to warrant special relief:

> 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;
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> (ii) the reasons for the departure and stay abroad;
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> (iii) the degree of establishment in Canada, initially and at the time of hearing;
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> (iv) family ties to Canada;
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> (v) whether attempts to return to Canada were made at the first opportunity;
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> (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.

[42] Weighing each factor and each piece of evidence is left to the discretion of the IAD; the Court should not interfere with those decisions, regardless of whether it agrees with the results (*Tai v Canada (Citizenship and Immigration)*, 2011 FC 248 at paragraph 82; *Shaath v Canada (Citizenship and Immigration)*, 2009 FC 731, [2010] 3 FCR 117, at paragraph 57; *Nekoie*, above at paragraph 37).

[43] In this case, the IAD clearly took into account the factors cited in *Ambat* in arriving at its decision.

[44] Regarding the breach of her residency obligation, the IAD noted that the applicant's physical presence in Canada of 267 days was very far from the 730 days required by the IRPA.

[45] With respect to the reasons for the applicant's departure and her stay abroad, the IAD considered the applicant's testimony that she left Canada against her will following a story that her mother told her. In the IAD's view, the applicant was of legal age at the time and could have chosen to stay in Canada despite her mother's choice to bring her to Côte d'Ivoire.

[46] This analysis is completely reasonable. In any event, the applicant's testimony about the reasons for her stay was vague and imprecise. Even if she had left against her will, it is not clear why she stayed so long in Côte d'Ivoire without returning to Canada.

[47] The IAD also noted the applicant's lack of establishment in Canada, given that she spent less than a year in Canada after becoming a permanent resident. With respect to family ties in

Canada, the IAD noted that the applicant no longer has any contact with her mother because she threw her out. She also has no contact with the other members of her family, who seem to want nothing more to do with her since she became pregnant.

[48] The fifth factor, whether the applicant attempted to return to Canada at the first opportunity, also does not seem to apply given that the applicant testified that it was her mother's decision that she return to Canada.

[49] With respect to hardship and dislocation to family members, the applicant is no longer in contact with her family at this time, so it does not appear that there would be serious hardship.

[50] Regarding the difficulties the applicant would face if removed from Canada, the IAD found that the applicant had never worked in Canada and currently lives on social assistance. She testified that she would have problems if she had to return to Côte d'Ivoire because it would be difficult to find employment, but it does not seem that that would be very different if she were in Canada, where she has no work experience.

[51] The IAD also noted that the applicant raised the political instability in Côte d'Ivoire but did not submit any documentary evidence to that effect.

[52] With respect to exceptional circumstances, the IAD assessed the best interests of the child affected, the applicant's daughter, who was born in September 2012. The IAD found that, although it is certainly preferable to raise a child in Canada than in Côte d'Ivoire, the child has

no degree of establishment in Canada but is a Canadian citizen and therefore she will always be able to choose to return to Canada.

[53] The applicant referred to the decision of Justice O'Keefe in *Wei v Canada (Citizenship and Immigration)*, 2012 FC 1084 [*Wei*] to support her argument that the IAD did not take into account the best interests of the child affected. However, the situation in *Wei* was completely different; the IAD had found that there was no child affected in that case, which was an error because the applicant had a daughter. Accordingly, Justice O'Keefe determined that the IAD had not taken an important factor into account in the case, that is, the interests of the applicant's daughter.

[54] In this case, the IAD fully addressed the subject of the applicant's daughter. However, as the IAD noted, the applicant is not in contact with her daughter's father, who did not acknowledge the daughter as his. There is no evidence that the daughter's father will want to be involved in his child's life; accordingly, that does not warrant special relief with respect to the applicant's breach of her residency obligation.

[55] The IAD's analysis meets the criteria set out in *Ambat* and is factually well-founded. The applicant did not provide sufficient evidence of exceptional circumstances that warrant special relief being granted to her. Her breach of the residency obligation is significant and must be taken seriously. I find that there is therefore no reason for the Court to intervene in the IAD's decision.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES as follows:

1. The application for judicial review is dismissed; and

2. There is no question to certify.

"Peter Annis"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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