Federal Court  Cour fédérale

Date: 20250509

Docket: IMM-5802-24

Citation: 2025 FC 857

Ottawa, Ontario, May 9, 2025

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

MEHERDIL GOBIND SANDHU

Applicant

and

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision dated February 8, 2024, of the Immigration Appeal Division ("IAD") to dismiss the Applicant's appeal of the refusal of his permanent resident travel document because he did not meet the residency requirement to be present in Canada for 730 days in the five years preceding the application, as set out in subparagraph 28(2)(a)(i) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], and that there were insufficient humanitarian factors to overcome the residency breach ("Decision").

[2] The Applicant is challenging the IAD's humanitarian and compassionate ("H&C") jurisdiction under subsection 63(4) of the *IRPA* and the constitutionality of section 28 of the *IRPA*.

[3] The Respondent argues that the IAD's Decision was reasonable. They also submit that the Applicant's constitutional challenge should not be considered by this Court because the Applicant has failed to raise this issue properly.

[4] For the reasons that follow, this application is dismissed.

II. Background

[5] The Applicant is a citizen of India. He first entered Canada as a permanent resident in April 2008, at the age of nine years old, with his parents.

[6] Shortly after their arrival, the Applicant's parents separated and his mother had custody over him. The Applicant and his mother returned to India. The Applicant's father remained in Canada.

[7] The Applicant completed high school in India in February 2017. He began post-secondary studies later that same year. In October 2020, the Applicant completed his bachelor's level of studies at St. Andrew's College in Mumbai.

[8] On February 10, 2021, a lawyer retained by the Applicant's father obtained a Status Verification Document for the Applicant. The Applicant learned that he needed a Permanent Residence Travel Document ("PRTD") to return to Canada.

[9] On December 2, 2021, the Applicant, with the assistance of a regulated Canadian Immigration Consultant, filed an application for a PRTD with his original passport. On February 8, 2022, the Applicant's passport was returned, with a letter confirming his PRTD application was being processed.

[10] In October 2022, the Applicant contacted the New Delhi Visa Office, and he was informed that they did not have his application. On October 14, 2022, the Applicant was advised that his application was being processed in Canada. The Applicant resubmitted his PRTD application on November 1, 2022.

[11] On April 27, 2023, the Applicant received notice that his PRTD application had been denied.

III. Immigration Appeal Division Decision

[12] On May 26, 2023, the Applicant appealed the denial of his PRTD to the IAD. The basis of his appeal was not the validity of the denial; rather, he argued there were sufficient H&C grounds to overcome the residency breach, which he acknowledged.

[13] The IAD considered the non-exhaustive factors to be considered in the context of breach of the residency obligation, in addition to the best interests of a child, set out by this Court in *Ambat v Canada (Citizenship and Immigration)*, 2011 FC 292 at paragraph 27:

> (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.

[14] The IAD considered that the Applicant was a minor when he left Canada in 2008, and that the decision to leave Canada was not within his control. However, the IAD found that the Applicant's mother was in the best position to determine the Applicant's best interests and while this decision ultimately jeopardized his status in Canada, this did not bolster his claim for relief.

[15] The IAD noted that there was a 100% shortfall in this case with respect to the residency requirement; accordingly, the residency requirement shortfall required a significantly high degree of H&C factors to justify special relief. The IAD also found that the Applicant did not take serious steps to return to Canada prior to 2021, due to his financial dependence on his mother. Nonetheless, the IAD found that the Applicant had attempted to return to Canada at his first available opportunity. The IAD found that the Applicant had ties to both India and Canada but was not established in Canada. The IAD did not find evidence of hardship if the Applicant were not permitted residency in Canada. Ultimately, after reviewing all relevant factors, the IAD determined that there were insufficient H&C factors to overcome the breach of the residency requirement.

IV. Issues and Standard of Review

[16] The applicable standard of review in this case is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 25, 86).

[17] Reasonableness review is a deferential standard and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified (*Vavilov* at paras 12–15, 95). The starting point for a reasonableness review is the reasons for decision. Pursuant to the *Vavilov* framework, a reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[18] To intervene on an application for judicial review, the Court must find an error in the decision that is central or significant to render the decision unreasonable (*Vavilov* at para 100).

[19] The issues to be determined in this application are:

A. Did the IAD unreasonably fail to address the Applicant's *Charter* issues?
B. Is the Decision that the Applicant did not demonstrate sufficient H&C grounds to overcome the residency requirement reasonable?

V. Analysis

A. *Charter issues*

[20] The Applicant claimed that his rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*] have been infringed. The Applicant argued that he has *Charter* rights as a permanent resident, which include the "right to liberty to make a decision on which country

to reside in upon coming out of the definition of dependent child." The Applicant asserted that the denial of the PRTD was a breach of his section 7 *Charter* right.

[21] In addition, the Applicant challenged the validity of section 28 of the *IRPA*, as he did not have the liberty to make a decision concerning his residence as a minor child. He submits that dependent minor children should be excluded from the residency requirement until they reach 22 years of age. The Applicant requested that this Court address this issue to provide some guidance on the application of section 28 of the *IRPA* in respect of minor children.

[22] As a preliminary matter, the Respondent objected to this Court's consideration of the *Charter* issues in this application. The Respondent argued that the Applicant failed to raise the constitutional issue at the IAD, which they submit is fatal to his attempt to raise it now. In addition, the Respondent argued that the Applicant had failed to properly provide a Notice of Constitutional Question ("NCQ").

[23] The Applicant argued that an NCQ was not required before the IAD, because the question was not the *vires* of section 28 of the *IRPA*; rather, he argued the question was: is section 28 of the *IRPA* consistent with section 7 of the *Charter*?

(1) Jurisdiction of IAD to consider Charter issues

[24] The IAD has jurisdiction to hear constitutional questions, pursuant to subsection 162(1) of the *IRPA*: "Each Division of the Board has, in respect of proceedings brought before it under this Act, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction." Further, section 101 of the *Immigration Appeal Division*

Rules, 2022, SOR/2022-277 [*IAD Rules*] sets out the procedure to follow when a party "wants to challenge the constitutional validity, applicability or operability of a legislative provision."

[25] The Supreme Court of Canada has clarified that administrative tribunals have jurisdiction to determine questions of law, including the applicability of the *Charter*. This presumption may only be rebutted by demonstrating that the legislature clearly intended that the tribunal be excluded from determining such questions. The central question is: does the empowering legislation implicitly or explicitly grant the tribunal jurisdiction to interpret and determine questions of law? A specialized tribunal with "the expertise and authority to decide questions of law are in the best position to hear and decide constitutional questions related to their statutory mandates" (*R v Conway*, 2010 SCC 22 at para 6; *Kebaowek First Nation v Canadian Nuclear Laboratories*, 2025 FC 319 at paras 66–68).

[26] Therefore, the IAD has general authority to determine questions of law and there is no evidence to suggest that Parliament intended to carve the *Charter* out from this power.

(2) Was the constitutional issue properly before the IAD?

[27] As noted above, section 101 of the *IAD Rules* sets out the procedure to follow when a party "wants to challenge the constitutional validity, applicability or operability of a legislative provision."

[28] The Applicant did not follow this procedure. The Applicant argued that notice was not required. I do not agree. In oral argument, Applicant's counsel conceded that the practical effect of the constitutional issue raised challenges the constitutionality of subparagraph 28(2)(a)(ii) of the *IRPA*.

[29] Subsection 101(1) of the *IAD Rules* is not a mere formality that can be disregarded (*Magtouf v Canada (Citizenship and Immigration)*, 2007 FC 483 at paras 26–29). The Applicant failed to provide notice of the constitutional question to the IAD as required by the *IAD Rules*. Therefore, the IAD was under no obligation to consider this issue and its failure to specifically address this issue is not fatal.

(3) Are the constitutional issues properly before the Court in this application?

[30] Generally, an applicant is barred from raising an issue for the first time on an application for judicial review (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 22).

[31] Further, constitutional questions should be considered by the administrative decision maker. To raise a constitutional issue for the first time at this stage bypasses the ordinary process, ignores Parliament's grant of jurisdiction to the administrative body, and deprives the administrative body with expertise from considering the issue (*Forest Ethics Advocacy Association v Canada (National Energy Board)*, 2014 FCA 245 at paras 43–46; see also *Al-Abbas v Canada (Citizenship and Immigration)*, 2019 FC 1000 at para 16 and *Benito v Immigration Consultants of Canada Regulatory Council*, 2019 FC 1628 at para 55).

[32] The Supreme Court has stressed the importance of having a proper evidentiary record when determining constitutional issues as "*Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions" (*Mackay v Manitoba*, [1989] 2 SCR 357 at 361).

[33] In my opinion, the foregoing is determinative of this issue. The Applicant did not properly raise the constitutional question before the IAD. Therefore, it is inappropriate for this Court to consider this issue, without having the benefit of the IAD analysis.

B. *Was the Decision reasonable?*

[34] Section 28 of the *IRPA* requires permanent residents to be physically present in Canada for a total of 730 days in each five-year period. This Court has found that Parliament intended to impose the residency requirement on minors (*Saab v Canada (Citizenship and Immigration)*, 2018 FC 653 [*Saab*] at paras 57–62). Accordingly, this is a requirement for all permanent residents, including minors. I acknowledge that the Court in *Saab* was considering residency requirements pertaining to citizenship applications; however, the Court specifically examined section 28 of the *IRPA* and noted that it is a clear expression of Parliamentary intent.

[35] In the present application, there is no dispute that the Applicant has not been in Canada for the required 730 days. The evidence indicates that the Applicant returned to India with his mother when he was a minor and he has not returned to Canada since. Since the Applicant did not meet the residency provision, he required a PRTD from India.

[36] The IAD found that the Applicant "significantly breached the residency obligation" and required "a high level of H&C to overcome."

[37] The Applicant argued that the Decision is not reasonable. The Applicant's written and oral submissions focused on the *Charter* issues, and it is not clear what aspects of the Decision concerning the H&C issues were not reasonable.

[38] The Respondent argued that the Decision is reasonable, and a review of the reasons highlights that the IAD considered the appropriate H&C factors when determining if it should exercise jurisdiction in respect of the Applicant's application. The Respondent argued that the Decision is reasonable based on the evidence presented and illustrates that the IAD was sensitive to and grappled with the key issues before it.

[39] I have reviewed the Decision and considered the IAD's reasons with respect to the PRTD application. I have found no reviewable error. The Decision bears all the necessary hallmarks of a reasonable decision. It is intelligible, justified, and transparent and aligns with the appropriate factual and legal constraints.

VI. Certified Question

[40] The Applicant requested that this Court certify a question related to the constitutionality of section 28 of the *IRPA*: "Should children under the age of 22 be subject to meeting the subparagraph 28(2)(a)(ii) *IRPA* residency requirement?"

[41] The Respondent objected to the certification of that or a similar question in this matter. The Respondent noted that the framing of the question in this case is problematic, as it is not entirely clear what the issue is or what remedy the Applicant is seeking. The Respondent also noted that the question is framed differently in the Applicant's other materials than it is in the NCQ dated March 24, 2025. Further, the Respondent submitted that the question is not dispositive of the issue that was before the IAD, namely the H&C grounds.

[42] I am persuaded by the Respondent that it is not appropriate to certify a question in this application. I agree that the question is not clear and is not dispositive of the issues in this application.

VII. Conclusion

[43] The Applicant failed to provide notice of the constitutional question to the IAD as required by the *IAD Rules*. Therefore, the IAD was under no obligation to consider this issue.

[44] Because the constitutional question was not before the IAD, it is inappropriate for this Court to consider these new constitutional issues on judicial review.

[45] The reasons for Decision concerning the Applicant's request for H&C relief from the residency requirements for his PRTD application are reasonable.

JUDGMENT in IMM-5802-24

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Julie Blackhawk"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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