CITATION: SHAATH *v.* CANADA (MINISTER OF CITIZENSHIP AND IMMIGRATION), 2009 FC 731, [2010] 3 F.C.R. 117 IMM-5093-08

IMM-5093-08

2009 FC 731

Loai Shaath (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

Indexed as: Shaath v. Canada (Minister of Citizenship and Immigration) (F.C.)

Federal Court, Lemieux J.—Montréal, June 17; Ottawa, July 20, 2009.

Citizenship and Immigration — Exclusion and Removal — Removal of Permanent Residents — Judicial review of Immigration Appeal Division (IAD) decision dismissing applicant's appeal from departure order — Applicant supporting family from abroad, breaching residency obligation under Immigration and Refugee Protection Act, s. 28 — IAD concluding existing humanitarian, compassionate considerations not sufficient to grant relief under Act, s. 67(1)(c), allow applicant to retain permanent resident status — IAD alert to applicant's intention to establish himself, but not satisfied with degree of establishement at date of hearing — Applicant not discharging burden of convincing IAD children would suffer undue hardship — Application dismissed.

Administrative Law — Judicial Review — Standard of Review — Judicial review of Immigration Appeal Division (IAD) decision dismissing applicant's appeal from departure order — Impact of Canada (Citizenship and Immigration) v. Khosa (S.C.C.) on exercise of discretion under Immigration and Refugee Protection Act, s. 67(1)(c) (special relief for H&C considerations) examined — Khosa clear that reasonableness standard applicable herein, requiring deference.

This was an application for judicial review of an Immigration Appeal Division (IAD) decision dismissing the applicant's appeal from a departure order issued pursuant to paragraph 41(*b*) of the *Immigration and Refugee Protection Act* (IRPA) by reason of his failure to comply with the residency obligation under section 28 of that Act.

The applicant, a permanent resident since 2001, regularly traveled to the United Arab Emirates to find work in order to support his family, including a son with a language deficiency. As a result, he spent less than the 730 days in Canada during the relevant five-year period required to meet the residency obligation as prescribed in section 28 of the IRPA. In its decision, the IAD considered the *Ribic* factors in determining whether it should exercise its discretionary jurisdiction to grant special relief for humanitarian and compassionate (H&C) considerations, pursuant to paragraph 67(1)(*c*) of the IRPA. It found *inter alia* that the applicant could not rely on the establishment of his family in Canada alone to demonstrate that he was also established in Canada, that the breach of his residency obligation was a strong negative factor, and that his family would not suffer undue hardship if he were removed. The IAD concluded that there did not exist sufficient H&C considerations to allow the applicant to retain his permanent resident status.

The principal issues were whether, in exercising its discretion, the IAD failed to consider the applicant's intention to establish himself in Canada, and whether the IAD's treatment of the evidence relating to the best interests of the children was faulty.

Held, the application should be dismissed.

The impact of the Supreme Court of Canada's decision in *Canada (Citizenship and Immigration) v. Khosa* on the exercise by the IAD of its discretion under paragraph 67(1)(*c*) of the IRPA was examined. *Khosa* makes it clear that the reasonableness standard, applicable herein, requires deference. A reviewing court should thus not

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be allowed to substitute its own appreciation of the appropriate solution. Rather, it must determine if a tribunal's decision falls within a range of possible, reasonable outcomes.

A review of the IAD's reasons showed that it was alert to the applicant's intention throughout the period of required physical residency to establish himself in Canada; however, it was not satisfied with the degree of establishement at the date of the hearing.

The IAD was alert, alive and sensitive to the best interests of the children. After reviewing the evidence before the IAD, including factors such as the duration of the separation between the applicant and his family, and the applicant's frequent returns to Canada when not working abroad, it was found that the applicant did not discharge his burden of convincing the IAD that his children would suffer undue hardship.

STATUTES AND REGULATIONS CITED

Federal Courts Act, R.S.C., 1985, c. F-7, ss. 1 (as am. by S.C. 2002, c. 8, s. 14), 18.1(4)(*d*) (as enacted by S.C. 1990, c. 8, s. 5).

Immigration Act, R.S.C., 1985, c. I-2, s. 70(1)(*b*) (as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 18).

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 28 (as am. by S.C. 2003, c. 22, s. 172(E)), 41(*b*), 63(4), 67(1)(*c*).

CASES CITED

FOLLOWED:

Canada (Citizenship and Immigration) v. Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339, 304 D.L.R. (4th) 1, 82 Admin. L.R. (4th) 1, revg 2007 FCA 24, [2007] 4 F.C.R. 332, 276 D.L.R. (4th) 369, 59 Imm. L.R. (3d) 122, revg 2005 FC 1218, 266 F.T.R. 138, 48 Imm. L.R. (3d) 253.

APPLIED:

Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173.

CONSIDERED:

Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3, [2002] 1 S.C.R. 84, 208 D.L.R. (4th) 107, 37 Admin. L.R. (3d) 252; *Angeles v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1257, 262 F.T.R. 41, 38 Imm. L.R. (3d) 308; *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635, 318 N.R. 300.

REFERRED TO:

Chirwa, Lancelot (1970), 4 I.A.C. 338 (I.A.B.); *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL).

APPLICATION for judicial review of an Immigration Appeal Division decision ([2008] I.A.D.D. No. 2079 (QL)) dismissing the applicant's appeal from a departure order issued by reason of his failure to comply with his residency obligations. Application dismissed.

APPEARANCES

Jacques Beauchemin for applicant.

Sylviane Roy for respondent.

SOLICITORS OF RECORD

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Beauchemin Paquin Jobin Brisson Philpot, Montréal, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

LEMIEUX J.:

Introduction and background

[1] In this judicial review application, the applicant, who was born in Gaza in Palestine and has been a permanent resident of Canada since 2001, challenges the November 10, 2008 decision [[2008] I.A.D.D. No. 2079 (QL)], made by Carol Hilling of the Immigration Appeal Division, (the tribunal or the IAD) dismissing his appeal from a departure order issued against him on November 27, 2007, pursuant to paragraph 41(*b*) of the *Immigration and Refugee Protection Act* [S.C. 2001, c. 27] (IRPA), by reason of his failure to comply with section 28 [as am. by S.C. 2003, c. 22, s. 172(E)] of the IRPA, which provides a permanent resident meets with his residency obligations in each five-year period if he/she was physically present in Canada at least 730 days during that period. Section 28 of the IRPA reads:

> **28.** (1) A permanent resident must comply with a residency obligation with respect to every five-year period.
>
> (2) The following provisions govern the residency obligation under subsection (1):
>
> (*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
>
> (i) physically present in Canada,
>
> …
>
> (*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. [My emphasis.]

[2] Subsection 63(4) of the IRPA provides for a right of appeal to the Immigration Appeal Division from a determination on the residency obligation and paragraph 67(1)(*c*) of that same Act reads:

> **67.** (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
>
> …
>
> (*c*) … 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 of the circumstances of the case.

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[3] It is worthy to note at the very beginning of these reasons, the tribunal reached its conclusion despite the fact counsel for the Minister appearing before the tribunal agreed the appeal should be allowed on humanitarian grounds mainly because of the family's establishment in Canada who, except for Mr. Shaath, are Canadian citizens. Counsel for the Minister also recognized his important financial investment in Canada and "he had been credible in his efforts to obtain his certification in Canada in order to get a job in his own speciality in the near future". Her main reason for recommending Mr. Shaath's appeal be allowed, was because she thought "it was nonsense to ask for a denial of the appeal since Mr. Shaath could apply tomorrow as a member of the Family Class, sponsored by his wife and it would be really easy to obtain his permanent residency and start the whole thing again". According to her, she considered that, in all of the circumstances, "the punishment of losing his permanent residency would be disproportional in all of the circumstances".

[4] Mr. Shaath does not contest the legality of the departure order but rather his counsel submitted sufficient humanitarian and compassionate considerations existed which warranted the exercise of the tribunal's discretionary jurisdiction to grant special relief in light of all of the circumstances of this case taking into account the best interests of the children affected by the decision to order his departure.

Facts

[5] The Shaath family is composed of: the father Loai who is the applicant, his wife Lena and their children: daughter Dalya, age 14; son Ramadan, age 13; and, son Wael, age 8. As noted, Mrs. Shaath and the children are now Canadian citizens. The couple has another son Tarek, age 6½, born in Canada in February of 2002.

[6] The applicant and his wife Lena are stateless persons having been born in Palestine. They have no passports but have travel documents issued by the Palestinian Authority.

[7] Prior to arriving in Canada, the couple had been long time residents of Dubai in the United Arab Emirates (UAE). Mr. Shaath first resided there in 1985, where he worked in the audit, insurance and financial services field. His spouse Lena was employed as a teacher.

[8] In 1998, they applied for permanent resident status in Canada. They were approved and first landed in Canada in July 2001; they stayed only for two or three weeks to determine where in Canada they would reside. They also wanted to return to the UAE to complete their contracts of employment.

[9] After Tarek was born in Canada in February 2002, they returned to the UAE in May of 2002. In July 2003, Mr. Shaath completed his contract in Dubai; the whole family then moved to Montréal.

[10] Mr. Shaath testified he tried to find work here in the field he was familiar with—the insurance business—but was unable to obtain any work because he was not licensed nor did he have an appropriate certificate. He then enrolled in two courses at Concordia University, after which a decision was made he would return to the UAE to find work, in order to support his family since he could not find employment in Canada. He went back to the UAE in March 2004, returning to Canada in late 2004 at which time he and his sister-in-law purchased a commercial property in Lachine.

[11] From 2004 to today, Mr. Shaath began his odyssey between Canada and the UAE where he worked to support his family. He has never been employed in Canada to this date. Neither has Mrs. Shaath, who devotes her time to care of the children.

[12] It is unnecessary and perhaps impossible to detail all of his departures from and returns to Canada. After reviewing the transcript, I agree with the tribunal's finding, at paragraph 6: "It was, however, very difficult to assess just how much time he spent outside Canada because the appellant was not forthcoming with dates, saying that he did not remember. In addition, he testified that the periods indicated in his Determination of Permanent Resident Status Questionnaire were unreliable

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because he was too tired by the long journey from the UAE to Canada when he filled out the forms." In any event, both counsel at the hearing before the tribunal agreed Mr. Shaath spent approximately 500 days in Canada, during the relevant period of November 27, 2002 to November 27, 2007.

[13] In 2006, Mr. Shaath joined the Insurance Institute of Canada because: "I have to be certified in this profession to find suitable work for me in Canada" (transcript, certified tribunal record (CTR), at page 337).

[14] On October 21, 2008, when he testified before the tribunal, Mr. Shaath stated he had passed the first-level exams in December 2007 and he was studying to clear the next and final level with exams to take place in December 2008 and was aiming for his certification by July 2009. His study courses were taken on-line since he already has experience in the insurance field.

[15] In 2007, he purchased a triplex in Brossard but could not move his family into it since he needed to be in the Saint-Laurent area because his eldest son has a language problem and is being assisted by medical facilities and schools in that area which is where the family first established itself when they settled in Montréal in 2003.

[16] He leases the commercial building in Lachine in which he has a one-half interest and leases the triplex in Brossard but has to pay rent for the house the family rents in Ville Saint-Laurent. His work in the UAE supplies the rest of the income to support their needs.

[17] At that October 21, 2008 hearing, he testified he would be returning to the UAE and was in the midst of negotiating a consultancy contract. He was still there at the date of this Court's hearing.

The tribunal's decision

[18] After summarizing the facts described above, the tribunal began its analysis by considering the factors useful in deciding whether it should exercise its discretionary jurisdiction in light of all of the circumstances of this case, noting such factors were not exhaustive and the weight to each of them may vary depending on the circumstances of each case.

[19] The tribunal [at paragraph 12] quoted *Chirwa, Lancelot* (1970), 4 I.A.C. 338 (I.A.B.) for the proposition "compassionate and humanitarian considerations are defined as those facts established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another so long as these misfortunes warrant the granting of special relief from the effect of the provisions of the *Act*".

[20] The tribunal next referred to the *Ribic* factors [*Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL)] approved by the Supreme Court of Canada, in *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84 (*Chieu*), as factors which should be taken into consideration when evaluating and assessing the evidence in an application for discretionary relief to stay the removal of a permanent resident of Canada for humanitarian and compassionate considerations. Those factors [as set out by the tribunal at paragraph 12] are:

a. The degree of establishment in Canada including employment and skills training;

b. the reasons for leaving Canada;

c. the reasons of continued or lengthy stay abroad;

d. whether any attempts were made to return to Canada at the first opportunity;

e. the family support available in Canada;

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f. the impact that the removal has on a person and his family;

g. the hardship which the appellant would suffer if he was removed from Canada.

[21] The tribunal next analysed the *Ribic* factors in the following manner.

Establishment

[22] The fact Mr. Shaath owns property in Canada, pays municipal and school taxes and other taxes is a positive factor, but according to the tribunal, it is the only evidence of his establishment in Canada in contrast to the evidence which shows the rest of his family is very well established here. The tribunal stated Mr. Shaath could not rely on the establishment of his family in Canada alone to demonstrate he is established in Canada as well.

[23] The tribunal noted [at paragraph 14] he never worked in Canada and went back to the UAE "whenever he needs to supplement the income he derives from the lease of his property in Canada." The tribunal was of the view there is evidence Mr. Shaath "intends to establish himself in Canada at some point, as indicated by the courses he is taking to become a certified insurance broker in Canada". The tribunal said its decision must be based on the evidence at the hearing and viewed his courses at the Insurance Institute of Canada as not a very strong factor in the relevant period (November 2002 to November 2007).

The breach of his residency obligation

[24] The tribunal considered this failure to be a strong negative factor writing [at paragraph 15]:

> The evidence shows that the appellant left Canada of his own volition. In addition, he admitted at the hearing that he was aware he had a residency obligation. In response to questions from the Panel he testified that he never really worried about it because he thought he did not need to fully respect it. This is something that the Panel finds particularly significant as it indicates that the appellant never made any effort to abide by the conditions of his permanent resident status. [My emphasis.]

No acceptable reason not to be present in Canada and no return to Canada at the earliest possible opportunity

[25] The tribunal wrote the following on this point [at paragraph 16]:

> In itself, the fact that the appellant chose to return to the UAE to earn enough money to support his family in Canada in the way they have been accustomed while acquiring the necessary certification to find work in his field of expertise in Canada would not necessarily be a negative factor. However, in this case, it was entirely possible for the appellant to do that while respecting the residency requirements of section 28 of the *Act*. There was no acceptable reason for the appellant not to be present in Canada for 730 days between November 2002 and November 2007. By November 2002, the appellant had been a permanent resident for 20 months and had spent no more than a few weeks in Canada because, of his own choice, he decided to postpone his departure from the UAE until the end of his contract. He and his family arrived in July 2003, and after a few months he chose to go back to the UAE. The mere fact that it was very difficult to get more precise answers from the appellant as to the dates of his trips is indicative of his lack of concern about his residency obligation. In the Panel's opinion, the appellant did not try to return to Canada at the earliest opportunity. He came back when he felt he had earned enough money and has kept returning to the UAE whenever he needed more money. [My emphasis.]

The investments in Canada

[26] The tribunal next considered Mr. Shaath's investments in Canada indicating this was a positive factor but it was not sufficient. The tribunal [at paragraph 17] remarked Mr. Shaath "seems to believe that because he invested money in Canada, less attention should be given to his failure to abide by the

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residency requirements of section 28 of the *Act*." The tribunal stated its disagreement writing: he "was under no obligation to invest money in Canada" and "[h]e chose to do so." The tribunal added:

> The appellant never said he could not find work in Canada. He testified that he could not find suitable work. As noted earlier, his decision to return to the UAE where he knew he could find work in his field in no way precluded him from ensuring that he was present in Canada for a sufficient number of days to respect the requirement of section 28 of the *Act*. He did not even try. [My emphasis.]

Hardship

[27] The tribunal's consideration of the hardship which the family would experience if Mr. Shaath had to leave Canada is contained in paragraphs 18, 19 and 20 of its reasons:

> The Panel finds significant the fact that the appellant's wife did not give any evidence that the children would suffer any hardship if their father had to leave Canada. She said that she did not know how they would feel if they were told that their father could not stay. She did indicate that her children would be very disappointed in Canada if their father was not allowed to stay. They should know that in their new country one cannot ignore the law and expect to get away with it.
>
> The appellant has a child with a learning disability and has submitted evidence concerning his diagnosis, treatment and school results. It seems that the child has been cared for and his special needs met throughout the periods of his father's absence up until now and the appellant's wife gave no indication that it would not be so if the appellant were removed from Canada.
>
> The Panel does believe that if the appellant has to leave Canada for an extended period this time, it will not be easy for his family since returning with him does not appear to be an option as the children are well established here. They are, however, accustomed to his absence. In addition, the appellant losing his permanent resident status would not amount to a permanent separation of the family as the appellant will be able to reapply for permanent resident status in Canada. [My emphasis; footnote omitted.]

Counsel for the Minister's recommendation the appeal be allowed

[28] As noted, the tribunal disagreed with counsel for the Minister's recommendation "that since the appellant will likely be able to obtain permanent resident status again there is no point in sending him back." The tribunal said in response [at paragraph 21]:

> In order for the Panel to exercise its discretionary jurisdiction, sufficient humanitarian and compassionate considerations must be established. If the residency requirements under section 28 are to have any meaning, the Panel cannot exercise its discretionary jurisdiction simply because the end result will be the same. Nor does the Panel find that forcing the appellant to re-apply for permanent residence in Canada would be disproportionate punishment, as expressed by the Minister's counsel. It is the direct consequence of the violation of the section 28 requirements. In the absence of sufficient humanitarian and compassionate considerations, the Panel must dismiss the appeal. [My emphasis.]

[29] The tribunal referred to additional considerations:

- The ability of the family to visit him in the UAE [at paragraph 22] "as they have been doing nearly every summer since their arrival in Canada".

- Other than the revenues from the leases which the family will continue to receive, it will not be deprived of income because Mr. Shaath has no other source of income in Canada as his main source of funds comes from his working in the UAE [at paragraph 22] "and … has permanent resident status there" [emphasis added]. As a result, Mr. Shaath "will be able to continue to support his family."

[30] The tribunal found the negative factors in this case outweighed the positive factors. It concluded Mr. Shaath had not established, on a balance of probabilities, there existed sufficient humanitarian and compassionate considerations to allow him to retain his status as a permanent

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resident of Canada in spite of his failure to comply with his residency obligations set out in section 28 of the IRPA.

Analysis

(a) The standard of review

[31] Both parties are of the view the standard of review of the tribunal's decision is reasonableness. I agree. This conclusion is in line with the Supreme Court of Canada's reform of the standard of review analysis in *Dunsmuir v. New Brunswick*, 2008 SCS 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) by eliminating the patently unreasonable standard, leaving only two applicable standards: the correctness standard where no deference is owed by the reviewing Court to the tribunal's decision and the reasonableness standard, where some deference is accorded to the decision being reviewed.

[32] *Dunsmuir* also instructs the Court a full standard of review analysis is not a necessity if the proper standard has been satisfactorily settled by the jurisprudence. Such is the case here. The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*), held the standard of review applicable to the decision of an immigration officer whether or not to grant an exemption based on humanitarian and compassionate considerations was reasonableness.

[33] The appropriateness of the reasonableness standard is further buttressed by the statement made by Justices Bastarache and LeBel in *Dunsmuir*, at paragraph 51: "questions of fact, discretion and policy … generally attract a standard of reasonableness".

[34] In *Dunsmuir*, Justices Bastarache and LeBel explained what is the content of a reasonable decision. They wrote (at paragraph 47):

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [My emphasis.]

(b) The impact of *Khosa*

[35] On March 6, 2009, the Supreme Court of Canada released its decision in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (*Khosa*). This case has a considerable impact upon the case before me because it dealt with the exercise by the IAD of its discretion under the very paragraph which concerns us here—paragraph 67(1)(*c*) of the IRPA.

[36] The *Khosa* case involved an appeal by the Minister of Citizenship and Immigration from a decision of the Federal Court of Appeal [2007 FCA 24, [2007] 4 F.C.R. 332] applying the reasonable standard, which set aside a decision of the Chief Justice of the Federal Court [2005 FC 1218, 266 F.T.R. 138] who had refused to intervene to quash a decision of a three member panel of the IAD, who declined, on humanitarian and compassionate grounds, to quash or stay a deportation order issued against him as a result of his guilty plea of criminal negligence causing death during a road racing incident in Vancouver.

[37] Mr. Khosa is a citizen of India who immigrated to Canada in 1996 with his parents at the age of 14. He was a permanent resident of Canada at the time of his criminal conviction.

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[38] *Khosa* [at paragraph 16] also decided the meaning of paragraph 18.1(4)(*d*) [as enacted by S.C. 1990, c. 8, s. 5] of the *Federal Courts Act* [R.S.C., 1985, c. F-7, s. 1 (as am. by S.C. 2002, c. 8, s. 14)] which enables the Federal Court, on an application for judicial review, to set aside a decision of a federal tribunal where the Court is satisfied the tribunal "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard to the material before it".

[39] Justice Binnie, on behalf of the majority, held this paragraph was not a legislated standard of review and only sets out grounds for relief. However, he indicated this paragraph provided "legislative guidance" as to the degree of deference owed to the IAD. He explained this at paragraph 46:

> More generally, it is clear from s. 18.1(4)(*d*) that Parliament intended administrative fact finding to command a high degree of deference. [adding] This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*. [My emphasis.]

[40] In *Khosa*, Justice Binnie commented on the meaning of reasonableness standard of review writing (at paragraph 59):

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir* was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. [My emphasis.]

[41] Justice Binnie described the purpose of the IAD in these terms (at paragraph 56):

> As to the purpose of the IAD as determined by its enabling legislation, the IAD determines a wide range of appeals under the *IRPA*, including appeals from permanent residents or protected persons of their deportation orders, appeals from persons seeking to sponsor members of the family class, and appeals by permanent residents against decisions made outside of Canada on their residency obligations, as well as appeals by the Minister against decisions of the Immigration Division taken at admissibility hearings (s. 63). A decision of the IAD is reviewable only if the Federal Court grants leave to commence judicial review (s. 72).

[42] As to why paragraph 67(1)(*c*) was enacted by Parliament, Justice Binnie stated (at paragraph 57):

> In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(*c*) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(*c*) requires the IAD to be "satisfied that, at the time that the appeal is disposed of … sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(*c*) calls for a fact-dependent and policy-driven assessment by the IAD itself [emphasis added]. As noted in *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, at p. 380, a removal order
>
> establishes that, in the absence of some special privilege existing, [an individual subject to a lawful removal order] has no right whatever to remain in Canada. [An individual appealing a lawful removal order] does not, therefore, attempt to assert a right, but, rather, attempts to obtain a discretionary privilege. [Emphasis in original.]

[43] As to the issue before the IAD, he wrote (at paragraph 58):

> The respondent raised no issue of practice or procedure. He accepted that the removal order had been validly made against him pursuant to s. 36(1) of the *IRPA*. His attack was simply a frontal challenge to the IAD's refusal to grant him a "discretionary privilege". The IAD decision to withhold relief was based on an assessment of the

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facts of the file. The IAD had the advantage of conducting the hearings and assessing the evidence presented, including the evidence of the respondent himself. IAD members have considerable expertise in determining appeals under the *IRPA*. Those factors, considered altogether, clearly point to the application of a reasonableness standard of review. There are no considerations that might lead to a different result. Nor is there anything in s. 18.1(4) that would conflict with the adoption of a "reasonableness" standard of review in s. 67(1)(*c*) cases. I conclude, accordingly, that "reasonableness" is the appropriate standard of review. [Emphasis added.]

[44] In *Khosa*, Justice Binnie allowed the appeal and restored the IAD's decision. After describing the reasonableness standard, Justice Binnie expressed [at paragraph 60] the view "having in mind the considerable deference owed to the IAD and the broad scope of discretion conferred by the *IRPA*, there was no basis for the Federal Court of Appeal to interfere with the IAD decision to refuse special relief in this case."

[45] He then commented on Justice Fish's decision to allow the appeal and responded (at paragraphs 61–62):

My colleague Fish J. agrees that the standard of review is reasonableness, but he would allow the appeal. He writes:

> While Mr. Khosa's denial of street racing may well evidence some "lack of insight" into his own conduct, it cannot reasonably be said to contradict — still less to outweigh, on a balance of probabilities — all of the evidence in his favour on the issues of remorse, rehabilitation and likelihood of reoffence. [para. 149]

I do not believe that it is the function of the reviewing court to reweigh the evidence.

It is apparent that Fish J. takes a different view than I do of the range of outcomes reasonably open to the IAD in the circumstances of this case. My view is predicated on what I have already said about the role and function of the IAD as well as the fact that Khosa does not contest the validity of the removal order made against him. He seeks exceptional and discretionary relief that is available only if the IAD itself is satisfied that "sufficient humanitarian and compassionate considerations warrant special relief". The IAD majority was not so satisfied. Whether we agree with a particular IAD decision or not is beside the point. The decision was entrusted by Parliament to the IAD, not to the judges. [My emphasis.]

[46] In the balance of his reasons, Justice Binnie stressed the importance for the IAD to give proper reasons, reviewed the IAD's decision, found that both the majority and minority disclosed in their reasons "with clarity the considerations in support of both points of view … [differing largely a]t the factual level [on different interpretations of Mr.] Khosa's expression of remorse". Justice Binnie wrote at the end of paragraph 64 of his reasons:

It seems evident that this is the sort of factual dispute which should be resolved by the IAD in the application of immigration policy, and not reweighed in the courts. [My emphasis.]

[47] He stated [at paragraph 65] the IAD considered each of the *Ribic* factors and "[i]t rightly observed that the factors are not exhaustive and that the weight to be attributed to them will vary from case to case". He wrote the majority "reviewed the evidence and decided that, in the circumstances of this case, most of the factors did not militate strongly for or against relief."

[48] He commented "[t]he weight to be given to the respondent's evidence of remorse and his prospects for rehabilitation depended on an assessment of his evidence in light of all the circumstances of the case." He concluded [at paragraph 66]:

The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence. It did so. [My emphasis.]

[49] His overall conclusion is expressed at the end of paragraph 67 in these terms:

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However, as emphasized in *Dunsmuir*, "certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions" (para. 47). In light of the deference properly owed to the IAD under s. 67(1)(*c*) of the *IRPA*, I cannot, with respect, agree with my colleague Fish J. that the decision reached by the majority in this case to deny special discretionary relief against a valid removal order fell outside the range of reasonable outcomes. [My emphasis.]

[50] The Supreme Court of Canada's 2002 decision in *Chieu* also involved the exercise of the IAD's discretionary power under paragraph 70(1)(*b*) [as am. by R.S.C., 1985 (4th Supp.), c. 28, s. 18] of the now repealed *Immigration Act* [R.S.C., 1985, c. I-2]. In previous jurisprudence, this section had been interpreted to confer upon the tribunal discretionary or equitable jurisdiction to quash or stay a removal order. In *Chieu*, the Supreme Court applied the correctness test because the issue before it was a question of law whether the IAD had erred in not taking into account the factor of foreign hardship if Mr. Chieu was returned to Cambodia. The IAD for various reasons had held it could not take into account this factor. The Supreme Court held this was an error of law.

(c) The applicant's position

[51] Counsel for the applicant, in his written arguments, submitted the tribunal made three errors which justified this Court's intervention:

(1) Relying on *Angeles v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1257, 262 F.T.R. 41, he says the tribunal failed to consider a determining factor in exercising its discretion, namely, Mr. Shaath's intention to establish himself in Canada during the relevant five-year period.

(2) Relying on *Baker*, the tribunal's treatment of the evidence relating to the best interests of the children was faulty. According to *Baker* [at paragraph 73], the tribunal had to give serious weight and consideration to the best interests of the children; the tribunal had to be "alive, attentive or sensitive to the interests". It failed to do so.

(3) The tribunal made an erroneous finding of fact when it found the applicant had permanent resident status in the UAE.

[52] During oral argument, counsel for the applicant stressed the following as evidencing the badges of unreasonableness:

• Pointing to paragraph 18 of the tribunal's decision (reproduced at paragraph 27 of these reasons) he argues this shows the off-handed manner the tribunal considered the best interests of the children. He mentions the criticism levelled by the tribunal at the children: "They should know that in their new country one cannot ignore the law and expect to get away with it."

• He takes issue with the tribunal's statement the applicant left Canada on his own volition. That, he argues, was an unreasonable conclusion not supported by the totality of the evidence.

• He argues the statement made by the tribunal he did not worry about his residency requirements was taken out of context directing my attention to his testimony, recorded at pages 382 to 384 of the certified tribunal record (CTR). In particular, this testimony is to the effect that all his life the applicant had to depend on his own efforts to survive and he never asked any government for help. He could have stayed in Canada when he could not find a job but he did not want to ask for social assistance.

• He challenges the tribunal's statement he never said he could not find work in Canada but testified he could not find suitable work. Counsel points to pages 337 and 341 of the CTR.

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• He takes issue with the statement that Mrs. Shaath did not give any evidence the children would suffer hardship if their father had to leave; she did not know how they would feel and they would only be disappointed. Counsel points to pages 393 and 394 of the CTR.

• Counsel reiterated the mistake the tribunal made about the applicant having permanent resident status in the UAE. He invokes Mr. Shaath's testimony at page 369 of the CTR.

• He argues the tribunal's statement, at paragraph 20 of its reasons (reproduced at paragraph 27 of these reasons), the children are accustomed to his absence is pure speculation.

• He repeats his argument there was no examination of the applicant's intention to establish himself in Canada during the relevant five-year time period and this constitutes an error of law.

• He submits the tribunal omitted consideration of the relevant circumstances: the impossibility of entering Gaza and the fact he was stateless, all showing his status was a precarious one.

(d) Conclusions

[53] For the reasons that follow, I am of the view this judicial review application must be dismissed. *Khosa* makes it clear [at paragraph 59] where the reasonableness standard applies, it requires deference and reviewing courts are not allowed to substitute their own appreciation of the appropriate solution but rather must determine if the outcome falls "within 'a range of possible, acceptable outcomes which are defensible in respect of the facts and the law'".

[54] Justice Binnie pointed out in *Khosa* [at paragraph 57] that paragraph 67(1)(*c*), which applies here, provides "a power to grant exceptional relief" and "calls for a fact-dependent and policy-driven assessment".

[55] Justice Evans, on behalf of the Federal Court of Appeal, made it clear in *Owusu v. Canada (Minister of (Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635 (*Owusu*), a case dealing with the best interests of children, an applicant has the burden of adducing proof of any claim upon which a humanitarian and compassionate application relies.

[56] Returning to *Khosa* [at paragraph 62], Justice Binnie concluded the IAD's decision fell within the range of outcomes reasonably open to it, a view which he said was predicated on the role and function of the IAD, as well as the fact Mr. Khosa did not contest the validity of the removal order made against him but only "[sought the] exceptional and discretionary relief that is available only if the IAD itself is satisfied that 'sufficient humanitarian and compassionate considerations warrant special relief'".

[57] Justice Binnie made another point in his conclusion. It does not matter whether the judge agrees with a particular IAD decision or not. That is beside the point as the decision was entrusted by Parliament to the IAD.

[58] I will close these reasons by dealing with the main arguments put forward by counsel for the applicant.

[59] First, I agree with counsel for the Minister, the tribunal did not ignore the applicant's intention throughout the period of required physical residency which is measured from the date the departure order was made, namely November 27, 2007, reaching back five years to November 27, 2002. As Justice Noël stated at paragraph 13 of his decision in *Angeles*, the applicant's intention is gauged by examining the degree of establishment during the residency period.

[60] In this connection, a review of the tribunal's reasons show it was alert to this point. In particular, I refer to paragraph 14 of the tribunal's reasons, where it is specifically mentioned by the

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tribunal: “there is evidence that the appellant intends to establish himself in Canada at some point” [emphasis added]. A review of the tribunal’s entire reasons shows the tribunal was not satisfied with the degree of Mr. Shaath’s establishment in Canada at the date of the hearing (see, in particular, paragraphs 8, 13 and 14).

[61] I further agree with counsel for the Minister, the tribunal did not breach the *Baker* standard that a decision maker should be alert, alive and sensitive to the best interests of the children.

[62] I reviewed closely the testimony of Mr. and Mrs. Shaath in this issue, as well as the H&C questionnaire which Mr. Shaath filled out, which is located at page 15 of the CTR. This review satisfies me there was evidence before the tribunal which supports the tribunal’s conclusion the applicant (and his wife) did not discharge their burden of convincing it the children would suffer undue hardship. Having said this, I do not subscribe to the tribunal’s statement [at paragraph 18] the children “cannot ignore the law and expect to get away with it.” It was not appropriate but has no relevance.

[63] The evidence and the reality is that Mr. Shaath has been absent from his children a substantial amount of time; his son who suffers a language deficiency is being well taken care of with the supervision of Mrs. Shaath. The tribunal considered, as additional factors, the separation between Mr. Shaath would not be permanent as he would be able to reapply for permanent resident status in Canada. The tribunal took into consideration that the children were well adjusted and happy in Canada and the family could be together as they had been in the past when Mrs. Shaath and the children travelled during the summer to the UAE. I might add the evidence is Mr. Shaath often returned to Canada when he was not working in the UAE. His return to Canada, as counsel for the applicant mentions, is more complicated because ministerial approval for his entry would be necessary but there is no reason he should not be issued a temporary resident’s visa for short period while his application for permanent residence sponsored by his wife is being processed expeditiously.

[64] Third, my reading of the evidence does not convince me the tribunal erred on the issue of his having only temporary resident status in the UAE. It is true, in paragraph 22 of its reasons, the tribunal states he has permanent resident status there. However, a review of Mr. Shaath’s testimony at pages 361, 369 and 370 shows the tribunal well understood Mr. Shaath had to renew his visa every three years and there would not be any difficulty in obtaining renewals as he has done so for the last twenty years being sponsored by the government there. The evidence does not support his submission his status is precarious and the fact that he was stateless was a significant omission.

[65] The balance of his oral submission, for example, whether the tribunal erred in characterizing his exits from Canada as being “of his own volition” even if accepted would not be determinative in the balancing which the tribunal had to perform—the weighing of factors to arrive at a reasonable decision.

[66] For these reasons, this application must be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is dismissed. No certified question was proposed.

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