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## CITIZENSHIP AND IMMIGRATION

### STATUS IN CANADA

#### *Permanent Residents*

Judicial review of Immigration and Refugee Board, Immigration Appeal Division (IAD) decision determining that applicant failed to comply with permanent residency requirements under *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 28 — IAD also found that insufficient humanitarian, compassionate (H&C) considerations existing to warrant special relief pursuant to Act, s. 67(1)(c) — Applicant submitted that IAD's decision unreasonable because misconstruing evidence, failed to account for relevant, material evidence — Applicant further submitted that IAD breached her right to procedural fairness — Applicant, 34-year-old national of Fiji — Employed as health care aide at long-term care facility for senior residents in Alberta — First came to Canada in 2007 as international student; successfully completed provincial Health Care Aide Program in May 2008, after which she obtained post-graduate work permit (PGWP), worked as nursing assistant — Applicant returned to Fiji prior to expiry of her PGWP in June 2009 — In March 2014, applicant received permanent resident (PR) status in Canada — Visited boyfriend in United States (U.S.), then married him there in 2016 — Applicant's husband permanent resident of U.S. — Sponsored applicant — Applicant retaining U.S. immigration lawyer to apply for lawful permanent resident (LPR) status in U.S. — Applicant apparently advised by U.S. Lawyer not to leave U.S. to return to Canada — Later, applicant's LPR status application denied — When applicant returned to Canada, issued report under Act, s. 44(1) since found that reasonable grounds to believe applicant inadmissible to Canada for failing to comply with residency obligation under Act, s. 28, which requires applicant to be physically present in Canada for at least 730 days within every five-year period — After, applicant issued departure order for being inadmissible to Canada for non-compliance with residency obligations — At IAD hearing, applicant conceded she had failed to comply with residency requirements to maintain her Canadian PR status but sought H&C considerations from IAD on grounds she had not returned to Canada sooner due to poor legal advice; that she would face hardship if she were to lose her Canadian PR status — In decision under appeal, IAD considered, in particular, applicant's initial, continuing establishment in Canada, her ties to Canada, reasons for leaving Canada, etc. — IAD also considered fact applicant believed she could not return to Canada without jeopardizing her U.S. immigration process, as well as extent of any hardship applicant would face in Fiji — Finally, IAD considered applicant's efforts to put her professional, educational background to use in health care field during COVID-19 pandemic; found this to be moderately positive factor — IAD noted that while unclear how many days applicant had remained in Canada in period assessed, was significant shortfall from required 730 days of residency — As such, IAD found relief on H&C grounds not warranted — Issues whether IAD's analysis of evidence was reasonable; whether IAD breached procedural fairness — Pursuant to Act, s. 67(1)(c), in order to grant appeal of removal order, IAD must be satisfied sufficient H&C considerations warrant special relief; such remedy discretionary — Regarding applicant's failure to return to Canada, IAD not finding applicant's reason for departing Canada to be compelling factor in favour of her appeal; attributed moderately positive weight to applicant's attempts to return to Canada, her reasons for remaining in U.S. — While applicant ultimately responsible for her

immigration applications, evidence before IAD demonstrated that applicant verily believed she should not leave U.S. while her LPR status application was being processed — Applicant returned to Canada as soon as her LPR status application refused — While IAD characterized applicant's stay in U.S. as choosing status in U.S. over status in Canada, applicant not having choice, as demonstrated by her belief that she should remain in U.S. — As for hardship, while IAD found that applicant would not face significant hardship if separated from her family in Canada, IAD not accounting for hardship that would flow from separation from her husband if she lost her PR status in Canada — Both applicant, her husband spent many years working to establish themselves in North America — Seemed unduly harsh that only option for couple to be together would be for both to return to Fiji — By failing to assess impact of couple's separation, IAD's assessment of hardship factors lacked justification — Concerning applicant's establishment in Canada, IAD gave neutral weight to applicant's establishment, finding that, despite having PR for almost seven years, applicant lacked evidence of her establishment in Canada — IAD's analysis of applicant's establishment lacked intelligibility — In reasons, IAD acknowledged that all of applicant's immediate family reside in Canada together; that her original establishment in Canada prior to her departure for U.S. in June 2016 favoured her appeal – Such points read as positive establishment factors — As to applicant's contributions during Covid-19 pandemic, while IAD assessed applicant's efforts during COVID-19 pandemic under heading "other considerations," this was additional positive element of applicant's establishment in Canada — H&C considerations meant to provide flexible relief in appropriate situations to mitigate law's rigidity — Overall, in light of evidence in present case, IAD did not substantively assess all of H&C factors through lens of compassion, as case law requires — Context surrounding applicant's H&C application unique, important; applicant's work during COVID-19 pandemic deserved more than passing note from IAD — Along with other flaws in IAD's reasoning, IAD's decision lacked intelligibility, was unreasonable — Having determined that decision unreasonable, not necessary to address applicant's arguments respecting procedural fairness — Application allowed.

MOHAMMED V. CANADA (CITIZENSHIP AND IMMIGRATION) (IMM-3102-21, 2022 FC 1, Ahmed J., reasons for judgment dated January 4, 2022, 16 pp.)