Federal Court Cour fédérale

Date: 20181121

Docket: IMM-5112-17

Citation: 2018 FC 1174

Toronto, Ontario, November 21, 2018

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

THANUSHA THARMARASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

(Delivered orally from the Bench in Toronto, Ontario on November 19, 2018)

I. <u>Proceeding</u>

[1] These reasons concern an application for judicial review of a decision of the Immigration Appeal Division [IAD], dated November 2, 2017. Therein, the IAD dismissed the Applicant's appeal of a refusal of her application to sponsor her mother and three dependant siblings as permanent residents [the Decision]. This application was brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA].

[2] The Applicant is a thirty-two year old citizen of Sri Lanka. She became a Canadian permanent resident on February 16, 2007. In 2009, she applied to sponsor her widowed mother and three younger siblings, for permanent residence [the Sponsorship Application].

[3] In 2011, the Applicant married and her husband became a co-signatory to the Sponsorship Application. They have one daughter who was born on January 8, 2014.

[4] In 2009, when the Sponsorship Application was filed, subparagraph 133(1)(j)(i) of the *Immigration and Refugee Protection Regulations* [the Old Regulations] required sponsors to have a minimum necessary income [MNI] that was at least equal to the Low Income Cut-Off [LICO] for one year preceding the date of the filing of the Sponsorship Application. The LICO was calculated according to the size of an applicant’s family, including the individuals to be sponsored.

[5] However, more stringent regulations came into force on January 1, 2014 [the New Regulations]. They are found at subparagraph 133(1)(j)(i)(B)(I). They provide that the Applicant and her husband must meet an MNI, equivalent to the LICO plus 30 percent, and the relevant period is three years preceding the date of filing of the Sponsorship Application.

[6] In a letter dated August 12, 2015, the Sponsorship Application was refused by an Immigration Officer because the Applicant did not meet the MNI requirement pursuant to the Old Regulations [the Refusal].

[7] The appeal to the IAD was based on humanitarian and compassionate [H&C] grounds. The legal validity of the Refusal was not challenged.

II. The Decision

[8] The IAD noted that appeals before it are heard *de novo* and that the Applicant did not have accrued rights under the Old Regulations. The IAD relied on the judgment of the Federal Court in *Gill v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1522 to find that those "who apply for permanent residence have no accrued or accruing rights until a final decision has been made on their application. The final decision on an application is the IAD decision." On this basis, the IAD concluded that the New Regulations applied to the Sponsorship Application.

[9] Applying the New Regulations, the IAD found that the Applicant failed to meet the required MNI. The IAD also considered the size of the shortfall between the Applicant's income and the MNI. It said that "While the Applicant met the MNI requirement in 2016, she fell short of meeting the required MNI in 2015 by $8,965.00 and by $20,352.00 in 2014." It is noteworthy that the Applicant says that, had it applied the Old Regulations, the IAD would have found that she met the MNI at the time of the IAD's hearing.

[10] Regarding the H&C analysis, the IAD stated at paragraph 17 of the Decision that the Applicant "requires an abundance of H&C factors to overcome the extensive shortfall."

[11] The IAD further concluded that because the obstacle to admissibility which led to the Refusal had not been overcome, it was appropriate to apply the higher threshold established in *Chirwa v Canada (Minister of Manpower and Immigration)* (1970) 4 IAC 338 (IAB) when undertaking the H&C analysis.

[12] The IAD considered the H&C submissions using a high threshold under the following three headings: 1) hardship with respect to the Applicant's mother in Sri Lanka, 2) hardship with respect to the Applicant and her family in Canada, and 3) best interests of the child. It found only one positive factor and concluded that H&C relief was not warranted.

III. The Issues

[13] The issues are as follows:

(i) Should the questions of which regulations should have been applied and the significance of the Regulatory Impact Analysis Statement [RIAS] which accompanied the New Regulations, be considered as new issues on judicial review?

(ii) Was it reasonable for the IAD to apply the New Regulations?

(iii) Was it reasonable for the IAD to apply a high threshold in its H&C analysis?

1. Issue (i)

[14] Before the IAD, counsel for the Applicant agreed with the IAD's application of the New Regulations and did not draw the IAD's attention to the RIAS. The impact of the RIAS and

whether the IAD should have applied the New Regulations are therefore new issues on judicial review and I must decide whether, in the exercise of my discretion, they can be pursued.

[15] I have no doubt that the interests of justice require consideration of the RIAS and the applicability of the New Regulations on this application. Further, I find that the Respondent is not prejudiced because it has had ample time to prepare to address these issues. Accordingly, they will be considered.

2. Issue (ii)

[16] In my view, the determinative issue is whether the IAD proceeded reasonably when it applied the New Regulations. Their application meant that the reason for the Refusal was not overcome and the shortfalls were extensive. These findings were material because they allowed the IAD to apply a high threshold in its H&C analysis.

[17] As noted above, the IAD relied on the Federal Court's decision in *Gill* to support its conclusion that the New Regulations applied. In my view, this reliance was misplaced. *Gill* was not a case in which the Court considered when the New Regulations were to be applied and it therefore did not refer to the RIAS which accompanied the New Regulations. The RIAS reads as follows:

> The regulatory amendments would come into force on January 1, 2014. PGP sponsorship applications received before the pause on PGP application – implemented on November 5, 2011 – would be assessed based on regulations that were in force at that time. PGP sponsorship applications received as of January 2, 2014, would be assessed based on the proposed Regulations.

[18] In *Bristol-Myers Squibb Co. v Canada,* 2005 SCC 533 at paragraph 157, Mr. Justice Bastarache in dissent, but not on this issue, described the role played by a RIAS in the following terms:

> **157** The use of the RIAS to determine both the purpose and the intended application of a regulation has been frequent in this Court and others, and this across a wide range of interpretive settings: see, e.g., *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 103, at paras. 63-64*; Merck* 1999, at para. 51; *AstraZeneca*, at para. 23; *Bayer Inc. v. Canada (Attorney General)* (1999), 87 C.P.R. (3d) 293 (F.C.A.), at para. 10.

[19] In my view, since the Sponsorship Application was filed in 2009, the RIAS clearly states Parliament's intention that the Applicant's Sponsorship Application was to be "assessed" under the Old Regulations.

[20] Accordingly, in its assessment, the IAD was obliged to apply the Old Regulations and its failure to do so makes the Decision unreasonable.

[21] I should note that, in reaching this conclusion, I have considered the decisions in *Patel v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1221 and *Begum v Canada (Minister of Citizenship and Immigration)*, 2017 FC 409, wherein this Court found that the New Regulations applied in IAD appeals of negative sponsorship decisions concerning sponsorship applications filed in 2008. However, neither of these decisions addressed the RIAS, which is in my view a clear statement of legislative intent to the effect that the New Regulations are not to apply to sponsorship applications made prior to November 5, 2011.

3. Issue (iii)

[22] As noted above, the H&C analysis proceeded using a higher threshold than was justified had the Old Regulations been applied. This approach, in my view, also made the Decision unreasonable.

IV. Certification

[23] No question was posed for certification for appeal.

JUDGMENT IN IMM-5112-17

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the appeal is to be redetermined by a different panel of the IAD under the Old Regulations.

"Sandra J. Simpson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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