Federal Court  Cour fédérale

Date: 20190404

Docket: IMM-4270-18

Citation: 2019 FC 405

Ottawa, Ontario, April 4, 2019

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

VITALI GUEROGUEVITCH IOUSSOUPOV

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

[1] This application challenges a decision by the Immigration Appeal Division of the Immigration and Refugee Board (IAD) which denied the Applicant's appeal from a refusal to grant a visa to his spouse. The spousal visa was refused because the Applicant was found to be in default of his legal obligation to reimburse the Province of Ontario (Ontario) for social assistance benefits paid to his previously sponsored spouse. As of June 1, 2015 the Applicant owed Ontario $77,987.24.

[2] The initial decision to refuse a spousal visa was made by a visa officer (Officer) in Warsaw, Poland. Applying s 133(1)(g)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], the Officer found that, until the sponsorship debt had been fully repaid, the Applicant was ineligible to sponsor his current spouse. This finding of on-going default was made notwithstanding the fact that the Applicant had entered into an agreement with Ontario to repay the indebtedness with monthly instalments of $150.00 and was up-to-date with those payments. The Officer went on to reject the Applicant's request for humanitarian and compassionate (H&C) relief.

[3] Before the IAD, the Applicant's counsel conceded the legality of the visa refusal decision and only pursued H&C relief. In the result, the IAD did not examine the question of whether the Applicant was legally in default and, therefore, ineligible to sponsor his wife. Notwithstanding that concession to the IAD, the Applicant argues on this application that it was not open to the IAD to look behind the repayment agreement or to question the adequacy of the Applicant's efforts to pay down what he owed. This was clearly the primary reason for the IAD's refusal of the H&C claim as can been seen from its conclusion:

> [33] The main considerations that weigh against this appeal are the significance of the outstanding sponsorship debt, the lack of effort to avoid the circumstances of accumulating the sponsorship debt in the first place, the Appellant's minimal efforts to repay the debt, the lack of prioritization to repay the sponsorship debt, and the lack of a concrete plan to repay the debt in the future. I also note that the main incentive to repay the sponsorship debt would be removed once the Applicant arrives in Canada.
>
> [34] I find these factors are not outweighed by the nature of the relationship and the reason for sponsorship, the hardship to be faced if the appeal were dismissed and the immigration objective of family reunification.

> [35] The Appellant has not established sufficient humanitarian and compassionate considerations to warrant special relief in light of all the circumstances of the case. As such, this appeal is dismissed.

[4] The Applicant's concession to the IAD that the Officer's finding of default was lawful is surprising because, on my reading of the applicable regulations, the Applicant was not in default of his undertaking in connection with the sponsorship of his first wife. That is so because the Applicant had resolved the issue of his indebtedness to Ontario in the form of a repayment agreement. Although the Applicant still owed a substantial sum to Ontario, the legal effect of the repayment agreement was to cure his earlier default. That is plainly the intent of s 135 of the Regulations which provides:

Default	Défaut
135 For the purpose of subparagraph 133(1)(g)(i), the default of a sponsorship undertaking	135 Pour l'application du sous-alinéa 133(1)g)(i), le manquement à un engagement de parrainage :
(a) begins when	a) commence, selon le cas :
(i) a government makes a payment that the sponsor has in the undertaking promised to repay, or	(i) dès qu'une administration effectue un paiement que le répondant est tenu de rembourser au titre de l'engagement,
(ii) an obligation set out in the undertaking is breached; and	(ii) dès qu'il y a manquement à quelque autre obligation prévue par l'engagement;
(b) ends, as the case may be, when	b) prend fin dès que le répondant :
(i) the sponsor reimburses the government concerned, in full or in accordance with an agreement with that	(i) d'une part, rembourse en totalité ou selon tout accord conclu avec l'administration intéressée les sommes

government, for amounts paid by it, or	payées par celle-ci,
(ii) the sponsor ceases to be in breach of the obligation set out in the undertaking.	(ii) d'autre part, s'acquitte de l'obligation prévue par l'engagement à l'égard de laquelle il y avait manquement.
[Emphasis Added]	[Je souligne]

[5] This provision was considered in *Canada v Mavi*, 2011 SCC 30, [2011] SCR 504, where the Court explicitly stated at paragraph 70 that a s 133(1)(g)(i) "default can be cured by making arrangements for repayment". Although this statement is *obiter*, it accords with my own interpretation of s 135(b). If the words "or in accordance with an agreement with that government" required repayment in full, they would be rendered redundant by the preceding language. Such an interpretation would offend the presumption against tautology: see *Placer Dome Canada Ltd v Ontario*, 2006 SCC 20 at para 45, [2006] 1 SCR 715. The effect of a repayment agreement is such that even where the debt is unlikely to ever be fully repaid, the debtor is not disqualified from sponsorship: see *Mavi*, above, at para 59. It follows that it is not open to a decision-maker acting under s 133(1)(g)(i) of the Regulations to reflect on the adequacy of repayment terms accepted by a province, provided the agreement is being honoured.

[6] The question that remains is whether I can resolve this application on the strength of this issue inasmuch as it was never directly considered by the IAD.

[7] The IAD is, of course, entitled to deference insofar as it is exercising its H&C discretion. Its decision is only vulnerable to challenge if it can be shown to be unreasonable.

[8] The difficulty I have in reviewing the reasonableness of the IAD's H&C assessment arises from my inability to isolate that aspect of its decision from the question of whether the Applicant was actually in default of his sponsorship undertaking. The IAD's conclusion that the Applicant had not done enough to pay down what he owed to Ontario is only reasonable if that was a relevant consideration; and it could only be a relevant consideration if it was open to the IAD to consider the adequacy of the terms of the Applicant's settlement with Ontario in the first place. By virtue of s 135 of the Regulations, the IAD has no authority to look behind a repayment agreement because, where one is present, there is no default subject to being excused for humanitarian reasons.

[9] I am, of course, concerned that the effect of a finding of unreasonableness is to return for consideration to the IAD an issue that, through no fault of its own, was never examined. That is not an approach that should be routinely adopted.

[10] However, in the unique circumstances of this case, involving a discrete and straight-forward issue of statutory interpretation that could only be reasonably resolved in one way, this seems to me to be the best practical option. Sending the matter back to the IAD will avoid the delay and administrative burden associated with a fresh sponsorship application.

[11] I also take some comfort from the decision in *Alberta v Alberta Teachers*, 2011 SCC 61, [2011] 3 SCR 654, where the Court was faced with the problem of assessing the reasonableness of a decision involving an issue that was not raised before the primary decision-maker. The Court recognized that it had a discretion to entertain a new argument but that generally it ought

not to do so where the issue could have been raised below. Nevertheless, the issue was considered, in part, because it involved a "straightforward determination of the law, the basis of which was able to be addressed on judicial review, irrespective of what is the appropriate standard of review": see para 28. The Court also noted the absence of any asserted prejudice to the opposite party.

[12] I would add that the absence of reasons from the IAD on the issue of the meaning of s 135 of the Regulations does not place the Court at a disadvantage. That is so because there is only one reasonable interpretation of that provision, which is to say, that a s 133(1)(g)(i) default is cured by a repayment agreement.

[13] For the foregoing reasons, this application is allowed. Neither party proposed a certified question.

JUDGMENT in IMM-4270-18

THIS COURT'S JUDGMENT is that this application is allowed with the matter to be redetermined by the IAD in accordance with these reasons.

"R.L. Barnes"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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