Federal Court  Cour fédérale

Date: 20220302

Docket: IMM-2936-20

Citation: 2022 FC 289

St. John's, Newfoundland and Labrador, March 2, 2022

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

KULWINDER SINGH BRAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND JUDGMENT

[1] Mr. Kulwinder Singh Brar (the "Applicant") seeks judicial review of the decision of the Immigration and Refugee Board, Immigration Appeal Division (the "IAD"), dismissing his appeal from the decision of a Visa Officer (the "Officer"), refusing his application to sponsor his parents (the "applicants") for permanent residence in Canada.

[2] The Applicant applied to sponsor the applicants for permanent residence in Canada on July 29, 2011. The application was denied on February 22, 2017 by the Officer on the grounds that the Applicant did not meet the requirements of the Minimum Necessary Income (the "MNI") set out in subparagraph 133(1)(j)(I) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") that was in effect when the application was made. That regulation calculated the MNI by assessment of an applicant's income in the last year preceding the application.

[3] Although the Applicant did not challenge the legal validity of the Officer's decision, his appeal to the IAD sought the exercise of discretion to provide relief on H and C grounds.

[4] The IAD calculated the Applicant's MNI according to an amended version of section 133 of the Regulations. The amendment, made in 2014, increased the required MNI by thirty percent for the sponsorship of parents and required the assessment of the last 3 years of an applicant's income in determining the MNI.

[5] The IAD found that the Applicant did not meet the MNI requirements of the amended Regulations and that there were insufficient H and C factors to warrant relief.

[6] The Applicant argues that the IAD unreasonably relied on the amended version of the Regulations, contrary to the decision in *Tharmarasa v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 389. He submits that had the IAD relied on the prior version of the subparagraph 133(1)(j)(I), he would have satisfied the relevant requirements.

[7] The Officer assessed the Applicant's 2016 income in assessing the sponsorship application. The Applicant did not dispute the MNI finding and appealed on H and C grounds.

[8] The IAD heard the appeal in 2019, on a *de novo* basis.

[9] The Applicant now argues that in 2019, relying on the pre-amendment MNI, the IAD should have only considered the Applicant's income for 2018. He submits that the 2018 income met the MNI requirements, pursuant to the pre-amended Regulations.

[10] The Applicant also submits that the IAD unreasonably denied him relief on H and C grounds.

[11] The Minister of Citizenship and Immigration (the "Respondent") argues that the IAD reasonably chose to apply the amended version of the Regulations and reasonably applied it.

[12] The Respondent further argues that the IAD reasonably assessed the evidence submitted in support of the plea for H and C relief, and reasonably denied that relief.

[13] The decision of the IAD is reviewable on the standard of reasonableness, following the decision of the Supreme Court of Canada in *Canada (M.C.I.) v. Vavlilov* (2019), 441 D.L.R. (4th) 1 (S.C.C.).

[14] In considering reasonableness, the Court is to ask if the decision under review "bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on that decision"; see *Vavilov, supra* at paragraph 99.

[15] The IAD reasonably chose to apply the post-2014 version of the Regulations. It acknowledged two lines of authority in the Federal Court, that is the decision in *Tharamarasa, supra* where the Court endorsed reliance upon the pre-2014 Regulations and the decisions in *Sran v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 145 and *Gill v. Canada (Minister of Citizenship and Immigration)*, [2012] F.C.J. No. 1643 where the Court acknowledged the *de novo* nature of an appeal to the IAD and applied the amended Regulations.

[16] In the present case, the IAD carefully reviewed the decisions in *Tharmarasa, supra*, *Sran, supra* and *Gill, supra*. It explained why it chose to apply the decisions in *Sran, supra* and *Gill, supra*.

[17] In my opinion, the approach of the IAD to the MNI was reasonable. Its reasons were justified, transparent and intelligible.

[18] I turn now to the IAD's dismissal of the Applicant's request for the exercise of discretion on H and C grounds.

[19] Subsection 63(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") provides a right of appeal to the IAD in respect of refusal of a visa for a member of the family class, as follows:

Right to appeal — visa refusal of family class	**Droit d'appel: visa**
63 (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	**63 (1)** Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[20] Section 65 of the Act allows the IAD to address H and C considerations and provides as follows:

Humanitarian and compassionate considerations	**Motifs d'ordre humanitaires**
65 In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	**65** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

[21] Subsection 67(1) spells out the bases upon which the IAD can allow an appeal:

Appeal allowed	**Fondement de l'appel**
67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,	**67 (1)** Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé:
(a) the decision appealed is wrong in law or fact or mixed law and fact;	**a)** la décision attaquée est erronée en droit, en fait ou en droit et en fait;
(b) a principle of natural justice has not been observed; or	**b)** il y a eu manquement à un principe de justice naturelle;
(c) other than in the case of an appeal by the Minister, 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 the circumstances of the case.	**c)** sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[22] In the present case, the IAD made the following observations at paragraph 38 of its decision:

> The appellant's income for 2016 and 2017 remain below the MNI required to sponsor his parents. Consequently, in assessing H&C factors, the *Chirwa* standard applies rather than the *Jugpall* standard.

[23] In footnote 19, the IAD explained why it preferred to assess H and C factors pursuant to the decision in *Chirwa v. Canada (Minister of Citizenship and Immigration)*, [1970] I.A.B.D. No. 1:

> *Jugpall v. Canada (Minister of Citizenship and Immigration)* (1999), 2 IMM L.R. (3d) 222 (IAD). This case articulates that principle that it is unnecessary to look for overwhelming circumstances in order to grant special relief where the obstacle to inadmissibility has been overcome by the time the appeal is heard.

[24] The IAD addressed the following seven factors:

1. The nature and degree of the impediment, that is the extent or severity of the grounds for refusal or the MNI shortfall at the time of refusal;
2. The relationship of the sponsor to the applicants and the strength of the relationships;
3. The reasons for the sponsorship;
4. The situation of the sponsor in Canada and his past conduct;
5. The situation of the applicants abroad, including hardship, and financial dependence of the appellant,
6. The ease of travel for the sponsor and applicants; and
7. The best interests of a child affected by the decision.

[25] The IAD found that the MNI shortfall was high, due to the Applicant's "fluctuating" income.

[26] The IAD found that the sponsor and the applicants have a close family bond. It found that the reason for the sponsorship application is a positive factor. It found that the Applicant is well-established in Canada.

[27] The IAD considered the situation of the applicants abroad and noted that while the Applicant would “save money” if they lived in Canada, the applicants are not financially dependent upon the Applicant.

[28] The IAD considered the ability of the Applicant and the applicants to travel. It found that while it was difficult for the Applicant to visit India, the applicants “have been able to spend extended periods of time in Canada on an extended visa.”

[29] The IAD looked at the best interests of the Applicant’s three young children. It found that although the applicants provided some care, their grandchildren are not dependent upon them for childcare, their parents are the primary caregivers. The IAD did not say anything more about this factor.

[30] Upon my review of the manner in which the IAD addressed the *Chirwa, supra* decision, the IAD said that certain factors were positive, but otherwise refrained from using the words “positive” or “negative”. I infer from this restraint that when silent, the IAD did not find those factors to be positive.

[31] As noted above, the decision of the IAD is reviewable upon the standard of reasonableness, as discussed in *Vavilov, supra*.

[32] Upon consideration of the evidence submitted and the oral and written submissions of the parties, I am satisfied that the decision meets the applicable legal test. The Applicant has failed to show any legal error on the part of the IAD or a basis for judicial intervention.

[33] It is open for the Applicant to make another application to sponsor the applicants, should his income become more stable.

[34] In the result, this application for judicial review will be dismissed. There is no question for certification proposed.

JUDGMENT in IMM-2936-20

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed and there is no question for certification proposed.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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