Federal Court  Cour fédérale

Date: 20220426

Docket: IMM-5991-21

Citation: 2022 FC 608

Ottawa, Ontario, April 26, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MAKHAN SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review under s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of the Immigration Appeal Division [IAD] dated August 10, 2021, wherein his appeal for sponsorship of his daughter's permanent residence in Canada was refused. The IAD held that the Applicant's daughter is not a member of the

family class under s 117(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[2] For the reasons that follow, the application is dismissed.

II. **Background**

[3] The Applicant is a permanent resident of Canada. His application for permanent residence under his wife's sponsorship was initially submitted in September 2012 and also included his daughter Kirandeep Kaur, then aged 18 years and 8 months, as an accompanying dependent child. At the time, the Applicant's daughter was residing in India, while the Applicant was a refugee claimant residing in Canada with his wife. Kirandeep is the biological daughter of the Applicant and his former wife who passed away in 2011.

[4] On June 5, 2015, the Applicant submitted an application on humanitarian and compassionate grounds [H&C] for the purpose of obtaining an exemption from the requirement under s 72(1)(e) of the *IRPR* to provide a passport for his permanent residence application. He was not in possession of a current passport and was unable to obtain a replacement from the Indian consular authorities in Canada on account of his refugee claim. The forms provided by the Applicant for this application listed his daughter as an accompanying dependent.

[5] The Applicant's application for permanent residence under the spouses or common-law partners in Canada class was refused on December 7, 2017. The Refusal Letter indicated that the Applicant's temporary resident status was to expire in June 2019. A waiver of the passport

requirement on H&C grounds was granted on March 26, 2018. The processing sheet related to that decision listed Kirandeep as a non-accompanying dependent resident in India. The reasons of the H&C decision note that Kirandeep was by then 24 years old. She was 21 at the time of the H&C application.

[6] On March 29, 2018 the Backlog Reduction Office – Vancouver issued a letter to the Applicant informing him that as his daughter resides outside of Canada, he cannot sponsor her until after he becomes a permanent resident of Canada. This letter also requested further information about the Applicant's daughter, which was submitted by the Applicant in May 2018.

[7] It is unclear from the Certified Tribunal Record when the Applicant became a permanent resident of Canada. Submissions from his former immigration consultant state that it was granted on February 20, 2019. The impugned IAD decision incorrectly states that it was March 26, 2018 upon the positive H&C decision, but that decision related only to the waiver of the passport requirement.

[8] On April 30, 2019, the Applicant applied to sponsor Kirandeep as a dependent child. At the time of the sponsorship application, she was 25 years old.

[9] On July 3, 2019, a Program Assistant at the Centralized Intake Office in Sydney, Nova Scotia sent a letter to the Applicant informing him that his application to sponsor Kirandeep was rejected because it was incomplete, instructing him to verify that his daughter met the definition of a "dependent child", and returning the application package because the Applicant either did

not provide proof of payment of the required processing fees, provided incorrect form of payment, or provided an insufficient amount of fees.

[10] On or about August 11, 2019, the Applicant re-submitted the application to sponsor Kirandeep, along with an affidavit asserting that Kirandeep met the conditions of a dependent child.

[11] On November 5, 2020, an Immigration Officer of the Canadian High Commission in New Delhi [Officer] rejected Kirandeep's permanent residence application as the Applicant's dependent child, as the Officer was not satisfied that she met the definition of a "dependent child" pursuant to s 117(1)(b) and s 2 of the *IRPR*, at the time the application was filed. The Officer noted that Kirandeep was over 22 years of age at the time of the sponsorship application. The Applicant appealed this decision to the IAD.

III. **Decision Under Review**

[12] In a decision dated August 10, 2021, the IAD upheld the decision of the Officer and concluded that the refusal was valid in law because Kirandeep is not a member of the family class.

[13] The IAD noted that the Applicant's application for sponsorship of Kirandeep was processed on May 6, 2019, at which time she was over 22 years old, and that she was unable to show that the two applicable criteria of s 2 of the *IRPR* were satisfied, namely that she was: (i)

substantially financially dependent on her father before the age of 22; and (ii) currently unable to be financially self-supporting due to a physical or mental condition.

[14] The IAD reiterated that the matter before it pertained to the application for sponsorship made in 2019, and not the previous unsuccessful applications that the Applicant and Kirandeep pursued since 2012. Thus, it found, the only appropriate lock-in date for Kirandeep was that of the application for sponsorship of 2019. The IAD noted that it was not within its jurisdiction to review any error that may have transpired previously with respect to the consideration of Kirandeep as a non-accompanying dependent or accompanying dependent by immigration officials.

IV. **Issues and Standard of Review**

[15] The sole issue is whether the decision of the IAD is reasonable.

[16] It follows that the standard of review is reasonableness. None of the situations that allow for a departure from the presumption of the reasonableness standard are applicable in this case: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 17, 25; *Canada Post Corporation v Canadian Union of Postal Workers*, 2019 SCC 67 at para 27.

[17] A reasonable decision is "based on an internally coherent and rational chain of analysis" and "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para 85. It must encompass the characteristics of a reasonable decision, namely, justification, transparency and intelligibility: *Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC

9 at paras 47 and 74; *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13. The reviewing court must adopt a deferential approach and intervene only "where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process": *Vavilov* at para 13.

V. **Analysis**

[18] This case turns on the application of s 65 of the *IRPA* which provides that the IAD may not consider H&C grounds, unless the foreign national being sponsored is a member of the family class, and the "lock in" date for consideration of whether Kirandeep was a member of that class.

[19] The Applicant argues that it was unreasonable for the IAD to recognize the error of the immigration officials in para 13 of its written reasons and to shift the onus onto the Applicant to bring the error to the attention of the officials, rather than rectify the error itself:

> [13] If there was a processing error by immigration officials, with respect to the issue of how the Applicant would be processed, that being as a non-accompanying dependent, as opposed to an accompanying dependent, it would have been expected that this would have been brought to the attention of immigration officials, by the Appellant and or counsel, and effectively changed.

[20] The Applicant further submits that the IAD failed to consider three elements of the evidentiary record which would have indicated that the refusal of the Applicant's sponsorship application was due to errors committed by immigration officials, namely: (i) the fact that the Applicant's H&C application was for the purpose of seeking an exemption from the passport

requirement rather than for obtaining permanent residence; (ii) the discrepancy between the APR processing sheet related to the H&C application indicating that Kirandeep was a non-accompanying dependent, and the forms provided to the immigration department for the same H&C application indicating that Kirandeep was an accompanying dependent; and (iii) the fact that the officer responsible for the H&C application considered her to be a non-accompanying dependent child, despite acknowledging that she was the Applicant's overseas dependent in India.

[21] The Applicant contends that the appropriate lock-in date for the age of Kirandeep was 2012, when she was less than 22 years of age, as it was only due to the error of immigration officials that this lock-in date was disrupted. According to the Applicant, it was unreasonable for the IAD to disregard the age of Kirandeep upon the initial application in 2012, and to fail to provide any reasons for doing so.

[22] Finally, the Applicant argues that it was unreasonable for the IAD to fail to exercise its discretion to consider H&C grounds, including the best interests of the child. In the Applicant's view, the IAD failed to properly interpret the evidence that an error had been made by the previous immigration officers which led to the incorrect processing of Kirandeep's application. Thus, the Applicant argues that it was unreasonable for the IAD to conclude that H&C considerations do not apply to Kirandeep by virtue of s 65 of the *IRPA* on account of her not being a member of the family class, as she was found not to be a member of the family class only due to the errors of immigration officials. Rather, the Applicant submits that Kirandeep is a member of the family class, and that the IAD should have exercised its discretionary power

under s 67(1)(c) of the *IRPA* to consider H&C grounds. The Applicant submits that an exemption on H&C grounds is appropriate, as both the Applicant and Kirandeep suffered hardship that could have been avoided, had the application been properly processed.

[23] The Respondent acknowledges that the outcome of the proceedings before the IAD is unfortunate for the Applicant but does not concede that immigration officials erred in processing the initial H&C application or that the status of Kirandeep was changed from an accompanying to non-accompanying dependent. Rather, the Respondent contends, she was not eligible to be processed as part of the H&C application because she was an overseas dependent. A separate sponsorship application is required after an applicant obtains permanent residence. In this case, that did not occur until 2019 by which time she was beyond the cut-off age limit for dependents save for those within the exceptions.

[24] Whether the listing of Kirandeep as an accompanying or non-accompanying dependent in the H&C application was recorded in error is immaterial to the processing of the Applicant's sponsorship application. Regardless of whether she was considered an accompanying or non-accompanying dependent at the time of the H&C application, the 2012 lock-in date for her age would have been effectively disrupted, as the Applicant's 2012 application for permanent residence under the spouses or common-law partners in Canada class, which included Kirandeep as an accompanying dependent child, was refused in 2017. Thus, the only applicable lock-in date for the age of Kirandeep at the time of her father's subsequent sponsorship application in 2019 could have been that year.

[25] In order for a decision to be set aside on the basis of unreasonableness, its flaws or shortcomings must pertain to “critical point[s]” that are “significantly central or significant to render the decision unreasonable”: *Vavilov* at paras 100, 103. In the case at bar, the failure of the IAD to recognize that there was a discrepancy in the 2018 H&C decision was not “more than merely superficial or peripheral to the merits of the decision”, as it had no bearing on the outcome of the IAD’s decision: *Vavilov* at para 100.

[26] Given that the Applicant’s application for permanent residence under the spouses or common-law partners in Canada class was refused in 2017, the only relevant events for the purposes of examining the reasonableness of the impugned IAD decision are those that transpired from 2019 onward, when the Applicant sought to sponsor his daughter after having obtained permanent residence status for himself. At the time, Kirandeep was over 22 years of age. Thus, it was reasonable for the IAD to find that Kirandeep did not meet the definition of a dependent child according to s 2 of the *IRPR*, and to conclude that she was not a member of the family class under para 117(1)(b) of the *IRPR*.

[27] It was reasonable for the IAD to not have assessed whether Kirandeep could have been sponsored on H&C grounds, as s 65 of the *IRPA* prohibits the IAD from doing so.

VI. **Conclusion**

[28] The process that has unfolded since the Applicant first sought to include his daughter in his sponsored application for permanent residence in Canada has led to an unfortunate outcome for the Applicant and Kirandeep. But the Court agrees with the Respondent that this application

for judicial review is not the most appropriate means to deal with the problem. The remedy that the Applicant seeks did not fall within the jurisdiction of the IAD to resolve on H&C grounds and there is no basis for this Court to interfere with that decision.

[29] As suggested by Respondent's counsel at the hearing, there may be other avenues for the Applicant and Kirandeep to pursue including an out of Canada application for permanent residence on H&C grounds. In the circumstances, the Court trusts that such an application would not be added to the end of the queue for processing by immigration officials.

[30] This matter turned on its specific facts. No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-5991-21

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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