Federal Court  Cour fédérale

Date: 20240618

Docket: IMM-12720-23

Citation: 2024 FC 935

Ottawa, Ontario, June 18, 2024

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

R.A.
HIV LEGAL NETWORK

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] This Order and Reasons addresses a motion filed on May 31, 2024 by the Respondent, the Minister of Citizenship and Immigration, seeking an Order allowing this application for judicial review, setting aside the decision of an officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC] dated September 11, 2023, which refused the application for a study permit by the first Applicant [anonymized as RA], and referring the matter to a different IRCC officer for redetermination [Decision]. The Applicants oppose the Respondent's motion.

[2] In the Decision, the Officer refused RA's application on the basis that, pursuant to paragraph 38(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], RA was expected to cause excessive demands on the health and social services of Canada.

[3] The within Application for Leave and for Judicial Review [ALJR] seeks leave of the Court to commence an application for judicial review of the Decision and seeks relief including: (a) an order setting aside the Decision and returning the matter to IRCC for redetermination by a different officer; (b) a declaration that paragraph 38(1)(c) of *IRPA* is inconsistent with subsection 15(1) of the *Canadian Charter Rights and Freedoms* [*Charter*]; and (c) an order quashing or striking paragraph 38(1)(c) and related statutory and regulatory provisions pursuant to subsection 52(1) of the *Constitution Act*, 1982.

[4] In support of this requested relief, the ALJR asserts that the Officer made erroneous findings of fact and an unreasonable Decision based on the evidence, failed to consider relevant evidence, and breached natural justice, as well as asserting that paragraph 38(1)(c) of *IRPA* violates guarantees against discrimination contained in subsection 15(1) of the *Charter*.

[5] In support of the within motion, the Respondent acknowledges that the Officer made several errors in the Decision, in that the Officer failed to apply the appropriate threshold amount to determine that RA is inadmissible on health grounds and failed to observe principles of procedural fairness. The Respondent therefore submits that there is no lingering dispute between the parties and that the Court should grant this motion, set aside the Decision, and return the matter to another IRCC officer for redetermination.

[6] The Applicants oppose the Respondent's motion on the basis that it does not address the Applicants' request for declaratory relief related to the constitutionality of paragraph 38(1)(c) of *IRPA* and related relief quashing that paragraph and other statutory and regulatory provisions. The Applicants' arguments include an assertion that, regardless of the outcome of a redetermination of RA's study permit application, it would be discriminatory to subject RA to the application of paragraph 38(1)(c) of *IRPA* in the course of that redetermination.

[7] In response, the Respondent submits that, barring exceptional circumstances, judicial restraint requires that this Court not decide constitutional issues that are not necessary for the resolution of the parties' dispute. The Respondent refers the Court to *R v McGregor*, 2023 SCC 4 at paragraph 24; and *Kiss v Canada (Citizenship and Immigration)*, 2023 FC 1147 [*Kiss JR*] at paragraph 76.

[8] In *Kiss JR*, Justice Fothergill allowed applications for judicial review challenging decisions of a Canada Border Services Agency [CBSA] officer cancelling the applicants' electronic travel authorizations [eTAs], thereby preventing them from boarding flights to Canada. As in the case at hand, the Respondent conceded that the officer's decision, which was based on the applicants' association with others who had claimed refugee status in Canada, should be set aside on the grounds that it was procedurally unfair and unreasonable. However, the Respondent argued that the Court should not grant certain declaratory relief sought by the Applicants, to the effect that the indicator "association with refugees" applied by the CBSA officer was discriminatory and contravened subsection 15(1) of the *Charter* and international human rights law (see paras 1-5).

[9] On the latter point, Justice Fothergill agreed with the Respondent, citing the principle of judicial restraint and concluding that it was unnecessary to consider the Applicants' arguments that the *Charter* or international human rights law had been contravened (see paras 75-76).

[10] However, Justice Fothergill also explained at paragraph 20 that the procedural history of the applications included a motion by the Respondent to set aside the CBSA officer's decision and remit the matter to a different decision-maker for redetermination, which the applicants opposed on the basis of their position that the cancellation of their eTAs was unlawful and the remedies proposed by the Respondent were therefore inadequate. Justice Heneghan dismissed the Respondent's motion (*Kiss v Canada (Citizenship and Immigration)*, 2019 FC 1247 [*Kiss Motion*].

[11] In *Kiss Motion*, Justice Heneghan accepted the applicants' argument that the relief proposed by the Respondent did not correspond to the relief they sought in their notice of application for leave and judicial review. The Court concluded that the applicants were entitled to oppose the Respondents' motion and pursue that relief in their application (at paras 11-13).

[12] I find little basis to distinguish the present motion from that in *Kiss Motion*. It remains available to the Respondent to argue at the hearing of this application that the principle of judicial restraint warrants a decision not to engage with the Applicants' constitutional arguments, as was the result in *Kiss JR*. However, relying on precedent, the Court is not prepared to grant the Respondent's motion and thereby preclude the Applicants advancing their application including the requests for relief that are not conceded by the Respondent.

[13] As such, my Order will dismiss the Respondent's motion, and it is not necessary for the Court to engage with other arguments advanced by the parties, including surrounding the public interest standing of the second Applicant, the HIV Legal Network. I make no order as to costs.

ORDER in IMM-12720-23

THIS COURT'S ORDER is that the motion is dismissed, with no order as to costs.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-12720-23
STYLE OF CAUSE:	R.A., HIV LEGAL NETWORK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

ADJUDICATED BASED ON WRITTEN SUBMISSIONS

ORDER AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 18, 2024

WRITTEN SUBMISSIONS BY:

Matthew Wilton	FOR THE APPLICANT (R.A)
Anne-Rachelle Boulanger	FOR THE APPLICANT (HIV LEGAL NETWORK)
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