Federal Court Cour fédérale

Date: 20240709

Docket: IMM-3290-23

Citation: 2024 FC 1076

Ottawa, Ontario, July 9, 2024

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

TITUS LEPCHA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS AND JUDGMENT

[1] Mr. Titus Lepcha (the "Applicant") seeks judicial review of the decision of a Migration Officer (the "Officer"), whereby his name was removed from his father's application for permanent residence.

[2] Mr. Suden Lama Lepcha, the father of the Applicant, was granted Convention refugee status in Canada, in 2018, relative to Nepal. In 2019, he applied for permanent residence in Canada, and included his wife and the Applicant in his application.

[3] The Officer removed the Applicant from his father's application for permanent residence because he was over the age of 22, at the lock-in date for his father's application. The Applicant was born on January 8, 1996.

[4] According to the father's affidavit, filed in support of this application for judicial review, neither he nor the Applicant learned about the removal of the Applicant from the application for permanent residence until February 9, 2023, when the Global Case Management System ("GCMS") notes were provided, following an "Access to Information" request.

[5] The Applicant now argues that he suffered a breach of procedural fairness since he was not given the opportunity to submit more information to show that he met the definition of a "dependant child" within the scope of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations").

[6] The Applicant also submits that failing to tell him that he had been removed from the father's permanent residence application and failing to give him reasons for that removal also breached his right to procedural fairness.

[7] The Applicant further contends that the decision is unreasonable, arguing that the Officer failed to take into account a public policy that was introduced to allow certain adult children of applicants for permanent residence to be considered as dependants. He submits that failure to consider this policy amounts to discrimination, contrary to section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "Charter").

[8] The Applicant argues, as well, that he was only 16 years old when his father submitted his refugee claim and the Officer failed to give the Regulations a "liberal" interpretation, considering that 6 years passed before the refugee claim was accepted and that he had no control over the timing of that decision.

[9] The Applicant further submits that subsection 25.1(9) of the Regulations addresses the lock-in date for determining the status of a dependant child and that the Officer erred by not following that provision.

[10] The Minister of Citizenship and Immigration (the "Respondent") submits that there was no breach of procedural fairness since the Officer was under no duty to seek more information about the Applicant's status, when his father applied for permanent residence. In any event, the Applicant provided more personal information in support of the request for consideration on H and C grounds.

[11] Otherwise, the Respondent maintains that the jurisprudence has established that the relevant lock-in date in this case is the date when the application for permanent residence was submitted, relying on the decisions in *Orduno Ferrer v. Canada (Citizenship and Immigration)*, 2021 FC 1010 and *Fortis v. Canada (Citizenship and Immigration)*, 2019 FC 1422.

[12] Any issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 (S.C.C.).

[13] The merits of the decision are reviewable on the standard of reasonableness, following the instructions in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] 4 S.C.R. 653 (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 the decision"; see *Vavilov*, supra at paragraph 99.

[15] I see no breach of procedural fairness and largely agree with the submissions of the Respondent on this issue.

[16] The Applicant bore the burden of presenting all relevant evidence in support of his application. According to the GCMS notes, the Officer noted that there was no evidence on file

about the Applicant's health and that he had completed university. I infer that there was no evidence of dependency, as contemplated by section 2 of the Regulations:

dependent child, in respect of a parent, means a child who	**enfant à charge L'enfant qui :**
(a) has one of the following relationships with the parent, namely,	**a)** d'une part, par rapport à l'un de ses parents :
(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or	**(i)** soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,
(ii) is the adopted child of the parent; and	**(ii)** soit en est l'enfant adoptif;
(b) is in one of the following situations of dependency, namely,	**b)** d'autre part, remplit l'une des conditions suivantes :
(i) is less than 22 years of age and is not a spouse or common-law partner, or	**(i)** il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,
(ii) is 22 years of age or older and has depended substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be financially self-supporting due to a physical or mental condition. (enfant à charge)	**(ii)** il est âgé de vingt-deux ans ou plus et n'a pas cessé de dépendre, pour l'essentiel, du soutien financier de l'un ou l'autre de ses parents depuis le moment où il a atteint l'âge de vingt-deux ans, et ne peut subvenir à ses besoins du fait de son état physique ou mental. (dependent child)

[17] While it might have been preferable to advise the Applicant sooner that he had been removed from his father's application for permanent residence, there was no positive obligation to do so.

[18] The issue of the lock-in date was addressed by Justice Furlanetto in *Orduno Ferrer*, *supra*.

[19] According to this decision, the relevant date for assessing the age of dependency is the date of the application for permanent residence. In this case, the father applied for permanent residence in 2019.

[20] In *Orduno Ferrer*, *supra*, Justice Furlanetto explained why subsection 25.1(9) of the Regulations does not apply to the Applicant's circumstances. At paragraph 24, she said the following:

> [24] As the Applicant's refugee claim was in progress as of November 15, 2012, prior to the implementation of the 2014 Amending Regulations on August 1, 2014, it was reasonable for the Officer to rely on the transitional provisions of the IRPR and to use the date of the Application as the lock-in date instead of applying the new lock-in provision of subsection 25.1(9). […]

[21] The temporary public policy referred to by the Applicant contained specific eligibility criteria, which he did not meet. No error results from the Officer's failure to consider this policy.

[22] There is an insufficient evidentiary basis to address any arguments about the Charter.

[23] The decision is reasonable and this application for judicial review will be dismissed. There is no question for certification.

JUDGMENT IN IMM-3290-23

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question for certification.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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