Federal Court  Cour fédérale

Date: 20221110

Docket: IMM-5342-21

Citation: 2022 FC 1527

Ottawa, Ontario, November 10, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JAVED ARYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision by an Immigration Officer [the "Officer"] of Immigration, Refugees and Citizenship Canada ["IRCC"], dated June 24, 2021, refusing the Applicant's application for permanent residence as a member of the Spouse or Common-law Partner in Canada class [the "Decision"]. The Officer found the Applicant to be inadmissible for misrepresentation under paragraph 40(1) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 [*IRPA*] and therefore ineligible for permanent residence under subparagraph 72(1)(e)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

II. Background

[2] The Applicant, Javed Aryan, is a 35-year-old male citizen of Afghanistan. He married his wife, Shakira Sadiq Mohammad, in 2014. They had a son in July 2016. His wife is the sponsor of his permanent residence application.

[3] The Applicant graduated from the National Military Academy of Afghanistan in early 2009. He left Afghanistan for the United States in July 2009 to attend pilot training. The Applicant entered Canada from the United States in January 2010 and made a successful refugee claim under the false identity, Rihad Farzad.

[4] In support of his refugee claim, the Applicant alleged that between graduating from the Afghan military academy and entering the United States, he married a woman (his first wife) against the wishes of her conservative Pashtun family. After arriving in the United States, he learned that his then-wife's family was threatening to kill him to restore the family honour.

[5] Having obtained refugee status, the Applicant made a protected person permanent residence application in 2011.

[6] After discovering the Applicant's true identity, the Canadian Border Services Agency detained him for about one month. The Applicant divorced his first wife in 2013. There is no documentation of the Applicant's first marriage or divorce.

[7] In March 2016, the Applicant updated his permanent residence application, presenting an explanation for the use of the false identity. The Applicant claimed that he erroneously believed that if Canadian authorities knew he had been in the Afghan military and in the United States, they would return him to the United States, from where United States authorities would send him to Afghanistan.

[8] In a decision dated April 11, 2019, the Refugee Protection Division of the Immigration and Refugee Board of Canada granted an application by the Minister of Public Safety and Emergency Preparedness under section 109 of the *IRPA* to vacate and nullify the Applicant's Convention refugee status because the Applicant made misrepresentations and withheld facts in obtaining that status.

[9] On May 22, 2019, IRCC refused the Applicant's outstanding permanent residence application because he was no longer eligible to obtain permanent residence status as a protected person under subsection 21(2) of the *IRPA*.

[10] In June 2019, a removal order was issued against the Applicant.

[11] In January 2020, the Applicant, sponsored by his wife, filed an application for permanent residence under the Spouse or Common-law Partner in Canada class, created through section 123 of the *IRPR*.

[12] Typically, to apply for permanent residence under the Spouse or Common-law Partner in Canada class, a foreign national must have temporary resident status in Canada [*IRPR* subsection 124(b)]. However, in 2005 the Minister established a public policy under subsection 25(1) of the *IRPA, Public Policy Under A25(1) of IRPA to Facilitate Processing in accordance with the Regulations of the Spouse or Common-law Partner in Canada Class* [the "Public Policy"]. The Public Policy exempts applicants from the requirements of subsections 124(b) of the *IRPR* and the inadmissibility due to "lack of status" under subsection 21(1) of the *IRPA* and section 72(1)(e)(i) of the *IRPR*.

III. Decision Under Review

[13] In his application, the Applicant requested that the Officer allow him to respond to any admissibility concerns and advised the Officer that there were compelling humanitarian and compassionate ["H&C"] factors under subsection 25(1) of the IRPA in his case. The Applicant indicated that if any inadmissibility concerns arise he would request an exemption on H&C grounds or apply for a Temporary Resident Permit.

[14] The Officer sent the Applicant a procedural fairness letter dated December 9, 2020. The letter outlined the Officer's concerns that the Applicant was ineligible for the Public Policy, because the policy stated that "lack of status" did not include:

i. Failure to obtain permission to enter Canada after being deported;

ii. Persons who have entered Canada with a fraudulent or improperly obtained passport, travel document, or visa and who have used the document for misrepresentation under *IRPA*;

iii. Persons under removal orders or facing enforcement proceedings for reasons other than lack of status reasons.

[15] In response, the Applicant sent a letter, dated January 8, 2021, arguing none of the above exclusions from the Public Policy applied to him. In the alternative, he asked the Officer grant him an exemption to the temporary residence status requirement under subsection 124(b) of the *IRPR* on H&C grounds. He also requested that the Officer give him an opportunity to respond to any second-stage admissibility concerns.

[16] The Officer refused the permanent residence application, finding the Applicant inadmissible for misrepresentation under paragraph 40(1) of the *IRPA*. The Officer did not consider the H&C factors, instead concluding that an outstanding removal order for the Applicant's misrepresentation was overriding.

IV. Issues

A. *Did the Officer fail to consider the H&C factors in a manner that renders the Decision unreasonable?*

B. *Did the Officer breach the duty of procedural fairness?*

V. Standard of Review

[17] The substantive standard of review is reasonableness [*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 25].

[18] The standard of review for the procedural fairness issue is correctness or a standard of the same import [*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 34 to 35 and 54 to 55, citing *Mission Institution v Khela*, 2014 SCC 24 at paragraph 79].

VI. Analysis

A. *Did the Officer fail to consider the H&C factors in a manner that renders the Decision unreasonable?*

[19] The Applicant argues that the Decision is unreasonable because the Officer inadequately considered the relevant H&C factors to grant the Applicant an exemption to requirements of the *IRPA* and the *IRPR*.

[20] The Respondent argues that the Officer weighed the H&C factors appropriately, but found that the Applicant's status as the subject of a removal order outweighed them.

[21] Under subsection 25(1) of the *IRPA*, the Minister or his delegate must consider H&C requests made by applicants in Canada. Ordinarily, H&C applications take the form of a parallel application accompanying a permanent residence application. However, H&C requests made ad

hoc in the course of other immigration applications are nonetheless to be considered [*Tocrurai v Canada (Minister of Citizenship and Immigration)*, 2016 FC 95 at paragraphs 2 to 4; *Abid et al v Canada (Minister of Citizenship)*, 2011 FC 164 at paragraphs 34 to 36].

[22] In this case, the Applicant requested H&C consideration in the form of an exemption to subsection 124(b) in his January 8, 2021 response to the Officer's procedural fairness letter. The Applicant's submissions request consideration of the following factors:

i. The best interests of his child.

ii. The length of time he had been in Canada.

iii. His wife's inability to work due to medical issues.

iv. Hardship he would face if returned to Afghanistan.

[23] The Officer's determination with respect to this request was unreasonable. The Officer's decision must be read in whole and assessed in light of the legislative and administrative scheme of the *IRPA* and the *IRPR*.

[24] There are two stages of analysis for an application for permanent residence under the Spouse or Common-law Partner in Canada class. First, the Officer determines if the Applicant meets the eligibility requirements of the Spouse or Common-law Partner in Canada class. This

includes determining whether the Applicant meets the subsection 124(b) requirement to have temporary residence status or is entitled to an exemption under the Public Policy or an exemption under other H&C grounds. At the second stage, the Officer assesses if the Applicant is otherwise inadmissible and therefore restrained from obtaining permanent residence under subparagraph 72(1)(e)(i) of the *IRPR*. This includes considering if the Applicant is inadmissible for misrepresentation under subsection 40(1) of the *IRPA*.

[25] The Officer did not consider the H&C factors in this case because he felt failure of the Applicant's application at the second stage would be unavoidable.

[26] In doing so, the Officer unreasonably ignored the Applicant's H&C request. The Officer failed to consider the H&C factors provided to him in any transparent or intelligible manner and certainly did not balance the weight to be given to the H&C evidence against the inadmissibility issue.

[27] To find that failure at the second stage was inevitable, without considering even at a superficial level the comprehensive H&C factors provided by the Applicant, was unreasonable.

B. *Did the Officer breach the duty of procedural fairness?*

[28] The Applicant argues that the Officer breached the duty of procedural fairness by failing to send a second procedural fairness letter outlining the Officer's concerns at the second stage of the analysis. The Applicant argues this is especially because he had requested such a letter in his

response to the Officer's December 9, 2020 procedural fairness letter and that he was unaware that there was a removal order against him.

[29] There was no requirement for the Officer to send a second letter. Where an officer's concerns arise directly from provisions of the *IRPA* or *IRPR*, there is no requirement that an officer allow an applicant to address those concerns [*Hassani v Canada (Citizenship and Immigration)*, 2006 FC 1283 at paragraph 24].

[30] The Officer's concerns that the Applicant was inadmissible due to misrepresentation arose directly from subsection 40(1) of the *IRPA*. Additionally, the Officer had already put his admissibility concerns to the Applicant in the first procedural fairness letter.

[31] There was no breach of procedural fairness.

VII. Conclusion

[32] The application is allowed.

JUDGMENT in IMM-5342-21

THIS COURT'S JUDGMENT is that

1. The application is allowed and the matter is referred for reconsideration by a different officer.
2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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