

Federal Court



Cour fédérale

Date: 20081118

Docket: IMM-289-08

Citation: 2008 FC 1285

Ottawa, Ontario, November 18, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Applicant

and

BALJINDER SINGH BRAR

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2002, c. 27 (the Act), by the Minister of Citizenship and Immigration for judicial review of a decision of the Immigration Appeal Division of the Immigration and Refugee Board (the Board), dated January 7, 2008, in which the Board determined that the Respondent, Baljinder Singh Brar, was eligible to sponsor his wife.

I. **Issues**

[2] The Applicant raises the following issues:

- a. Did the Board make serious errors in the interpretation of clause 133(1)(e)(ii)(A) of the Regulations?
- b. Did the Board fail to consider the legislative intent behind clause 133(1)(e)(ii)(A) of the Regulations, such that its interpretation was flawed?

[3] The application for judicial review shall be dismissed for the following reasons.

II. Factual Background

[4] On April 21, 1997, the Respondent, who is a Canadian citizen, was convicted in India of culpable homicide, not amounting to murder, under section 304 of the Indian Penal Code. The victim of the crime was his sister-in-law (his brother's wife), who died from severe burns that resulted from the Respondent and his brother dousing her with kerosene oil and setting her on fire.

[5] The Respondent was sentenced to life in prison but the sentence was appealed and reduced to imprisonment for seven years. The Respondent was released from prison on July 19, 2004.

[6] After being released from prison, the Respondent returned to Canada, where he was residing, and filed a sponsorship application for his new wife. The Respondent had married Karamjit Brar in India on March 14, 1997, prior to his conviction.

[7] The Respondent submitted an application for spousal sponsorship via the Family Class category to the Canadian High Commission in New Delhi, India in December 2004.

[8] A visa officer rendered a negative decision and concluded the Respondent fell within the scope of clause 133(1)(e)(ii)(A) of the *Immigration and Refugee Protection Regulations* SOR/2002-227 (the Regulations) and therefore was ineligible to act as a sponsor.

[9] The immigration officer found that the Respondent was convicted in India of an offence that, if committed in Canada, would constitute an offence that results in bodily harm, as defined in section 2 of the *Criminal Code*, R.S., 1985, c. C-46. The application for permanent residence was refused for failure to comply with paragraph 133(1)f) of the Regulations.

[10] The Respondent appealed his refusal to the Immigration Appeal Division of the Immigration and Refugee Board.

III. Decision Under Review

[11] The Board stated that at first glance, the Respondent ought to be the exact type of person the Regulations meant to prevent from abusing or harming another family member since the purpose of the Regulations is to protect immigrant and refugee women from domestic violence. The Respondent is a sponsor with a specific conviction involving violence against a woman in his family, namely his sister-in-law.

[12] However, the wording of subparagraph 133(1)e)ii) of the Regulations denies the right of sponsorship to Canadian citizens and permanent residents who have committed offences involving bodily harm against only certain enumerated victims.

[13] According to the definition in section 2 of the Regulations, “relative” means a person who is related to another person by blood or adoption. The Board accepted the submission that the Respondent’s sister-in-law is not a blood relative. Furthermore, the victim does not fit within the definition of “family member” as defined in subsection 1(3) of the Regulations.

[14] Section 133 of the Regulations restricts the victims of assaults causing bodily harm to the sponsored spouse or common-law partner and family members of the sponsor’s spouse or common-law partner. It does not include all family members on each side of the family and is not worded so as to catch a sponsor who has committed a crime causing bodily harm against a sister-in-law. Therefore, the Respondent’s sister-in-law does not fit within the narrow definition of victims of offences causing bodily harm in clause 133(1)(e)(ii)(A).

IV. Relevant Legislation

[15] The applicable provision is clause 133(1)(e)(ii)(A) of the Regulations:

133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the

133. (1) L’agent n’accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu’à celle de la décision, le répondant, à la fois :

sponsor

(e) has not been convicted under the *Criminal Code* of

e) n'a pas été déclaré coupable, sous le régime du Code criminel :

(ii) an offence that results in bodily harm, as defined in section 2 of the *Criminal Code*, to any of the following persons or an attempt or a threat to commit such an offence against any of the following persons, namely,

(ii) d'une infraction entraînant des lésions corporelles, au sens de l'article 2 de cette loi, ou d'une tentative ou menace de commettre une telle infraction, à l'égard de l'une ou l'autre des personnes suivantes :

(A) a relative of the sponsor, including a dependent child or another family member of the sponsor,

(A) un membre de sa parenté, notamment un enfant à sa charge ou un autre membre de sa famille,

[16] The term “relative” is defined at section 2 of the Regulations:

2. “relative” means a person who is related to another person by blood or adoption.

2. « membre de la parenté » Personne unie à l'intéressé par les liens du sang ou de l'adoption.

[17] The term “family member” is defined at subsection 1(3) of the Regulations:

1. (3) For the purposes of the Act, other than section 12 and paragraph 38(2)(d), and for the purposes of these Regulations, other than sections 159.1 and 159.5, “family member” in respect of a person means

1. (3) Pour l'application de la Loi — exception faite de l'article 12 et de l'alinéa 38(2)d — et du présent règlement — exception faite des articles 159.1 et 159.5 —, «membre de la famille», à l'égard d'une personne, s'entend de :

(a) the spouse or common-law partner of the person;

a) son époux ou conjoint de fait;

- | | |
|------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|
| (b) a dependent child of the person or of the person's spouse or common-law partner; and | b) tout enfant qui est à sa charge ou à la charge de son époux ou conjoint de fait; |
| (c) a dependent child referred to in paragraph (b). | c) l'enfant à charge d'un enfant à charge visé à l'alinéa b). |

V. Analysis

A. *Standard of Review*

[18] It is the interpretation of clause 133(1)(e)(ii)(A) of the Regulations that is at issue here. The parties suggest and the Court agrees that the standard of review is correctness (*Mohamed v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 696, 296 F.T.R. 73 at paragraph 34).

1. *Did the Board make serious errors in the interpretation of clause 133(1)(e)(ii)(A) of the Regulations?*

[19] The Applicant's position is that the Board made serious errors in its interpretation of the Regulations. The Applicant believes that the legislation is designed to prevent someone exactly like the Respondent, someone convicted of a violent domestic offence, from sponsoring a spouse.

[20] The Applicant submits that section 133 of the Regulations does not restrict the victims of assaults causing bodily harm to the sponsored spouse or common-law partner and family members of the sponsor's spouse or common-law partner. The class of victims necessarily involves a larger category of people and the Board's decision fails to recognize the full range of relationships contemplated by clause 133(1)(e)(ii)(A).

[21] The Board erred in finding that clause 133(1)(e)(ii)(A) sets out an exhaustive list of potential victims, because it is actually set out as a non-exhaustive list which begins with one overarching category entitled “relative” and continuing with a non-exhaustive list of examples of the kinds of relationships included in the term “relative”.

[22] The Applicant alleges that if clause 133(1)(e)(ii)(A) was intended to create an exhaustive list of potential victims, it would not have utilized the word “including”. Exhaustive definitions characteristically use the term “means” prior to the class of things it wishes to restrict (*R. v. Verma*, 31 O.R. (3d) 622, 112 C.C.C. (3d) 155 (Ont. C.A.); *Yellow Cab Ltd. v. Alberta (Board of Industrial Relations)*, [1980] 2 S.C.R. 761; *R. v. Caines*, 72 W.C.B. (2d) 747 (N.L. Prov. Ct.), [2007] N.J. No. 2 (QL)).

[23] Clause 133(1)(e)(ii)(A) utilizes “including”, indicating that the section was not intended to be restrictive as to the class of potential victims caught by the category of “relative”. “Include” is understood to be an indication of a non-exhaustive definition (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773 at paragraph 53; *Canada (Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66 at paragraph 29; *R. v. Mansour*, [1979] 2 S.C.R. 916).

[24] In its analysis of the term “relative” in clause 133(1)(e)(ii)(A), the Board relied wholly on the definition of the term found at section 2 of the Regulations. The Applicant contends that basing the definition of relative entirely on this one section was an error, as “relative” in section 2 is

narrower than “relative” in clause 133(1)(e)(ii)(A). “Relative” in section 2 is limited by the term “mean” and is restricted to two classes of individuals, blood relatives or relatives by adoption. “Relative” in clause 133(1)(e)(ii)(A) is much broader, as it also necessarily includes “family members”, which encompasses common-law partners and spouses, pursuant to subsection 1(3) of the Regulations. These two additional categories of people are not caught by the section 2 definition. As such, “relative” in clause 133(1)(e)(ii)(A) is necessarily broader than “relative” in section 2.

[25] The Applicant therefore argues that the Board erred in failing to recognize that clause 133(1)(e)(ii)(A) is not a list of three exhaustive categories of persons. Rather, this section makes clear that a person who commits an offence which harms a “relative”, such as a dependent child or another family member, is prohibited from sponsoring someone to Canada.

[26] According to the Respondent, the term “relative” found in section 2 of the Regulations is the appropriate and applicable definition of “relative” found in section 133 of the Regulations. The Board member correctly concluded that the Respondent does not come within the scope of clause 133(1)(e)(ii)(A) of the Regulations because the definition found in section 2 of the Regulations is applicable to section 133 and because this definition does not include “sister-in-law”.

[27] The Respondent asserts that since the “sister-in-law” is not related by blood to the Respondent and was not adopted by the Respondent, she is not a “relative” of the sponsor. Also, section 2 of the Regulations defines “relative” as “a person who is related to another person by

blood or adoption” and this definition only applies to sections 117, 133 and 139 of the Regulations. Since the term “relative” is only referred to in three sections of the Regulations, the Respondent urges that Parliament consider its definition with respect to section 133.

[28] Furthermore, as the definition of “family member” under subsection 1(3) of the Regulations does not encompass “sister-in-law”, it is submitted that the Respondent does not fall within section 133 of the Regulations. As well, the Respondent notes that subsection 1(3) of the Regulations specifically state that the term “family member” applies to all the Regulations with the exception of two specific sections: 159.1 and 159.9. Section 133 of the Regulations is not one of the exceptions noted in the legislation and thus, the definition of “family member” is applicable to the case at bar.

[29] The Respondent notes that the list set out in clause 133(1)(e)(ii)(A) of the Regulations is exhaustive. Parliament chose not to leave the definitions open to interpretation because it would have defined each term in that section if it had intended for the definitions to be different than those provided elsewhere in the Regulations.

[30] The definitions in sections 1 and 2 of the Regulations are also very specific whereas section 133 of the Regulations is general. The specific provisions set out in sections 1 and 2 of the Regulations are therefore applicable to section 133 of the Regulations because it is a standard rule of interpretation that a specific provision takes precedent over a general provision, provided the two sections can be read together. The Respondent cites the decision of the Immigration and Refugee Board’s Immigration Appeal Division in *Peralta v. Canada (Minister of Citizenship and*

Immigration), [2005] I.A.D.D. No. 329 (QL) in mentioning the statutory interpretation principle of the presumption of consistent expression.

[31] According to the Respondent, in light of the decision of the Immigration and Refugee Board's Immigration Appeal Division in *Kular v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 745 (QL), where the Board concluded that a sister-in-law was not a "relative" within the scope of section 2 of the Regulations, the Board in our case rendered a decision that is internally consistent with other Board decisions.

[32] The Court is of the opinion that the Board committed no errors in interpreting clause 133(1)(e)(ii)(A) of the Regulations in the case at bar. Although the provision employed in section 133 utilizes the term "including", the provision must be read in its entirety, in order to capture the essence of the section. A reading of the provision requires defining the uses of the terms "relative" and "family member".

[33] The definitions of "relative" at section 2 and of "family member" at subsection 1(3) of the Regulations specifically exclude a "sister-in-law" because their definitions are limited by the use of the term "means". Although the use of the word "including" in clause 133(1)(e)(ii)(A) could be understood as being non-exhaustive, the definitions in the case at bar cannot be read more broadly because of the explicit limitations of the words "relative" and "family member".

2. *Did the Board fail to consider the legislative intent behind subsection 133(1)(e)(ii)(A) of the Regulations, such that its interpretation was flawed?*

[34] According to the Applicant, the Board failed to take into consideration the legislative intent behind clause 133(1)(e)(ii)(A) of the Regulations.

[35] The Applicant analyzes the Regulatory Impact Assessment Statement (RIAS) corresponding to the Regulations in order to determine their legislative intent. While the RIAS has no force of law, it can be considered as a relevant commentary (*Sunshine Village Corp. v. Canada (Parks)*, 2003 FCT 546, [2003] 4 F.C. 459 at 475).

[36] Based on a review of the relevant RIAS, the Applicant submits that the legislative intent is that the section is in place to prevent a person who has been convicted of a criminal act which harms a member of his family from being a sponsor for a wide array of relationships. The RIAS also states that clause 133(1)(e)(ii)(A) prohibits people who have committed offences under the *Criminal Code* that involve bodily harm against “relatives or family members” from sponsoring anyone under the Family Class. Based on this analysis, a sister-in-law (the wife of a brother) is a relationship contemplated by the legislator in drafting clause 133(1)(e)(ii)(A) of the Regulations.

[37] The Applicant submits that the Board did not take into account the amendment of the RIAS of 2004 to paragraph 133(1)(e):

Amendments to paragraph 133(1)(e) have been made to better reflect the policy intent of the sponsorship bar. Where a person has been convicted

Des modifications ont été apportées à l'alinéa 133(1)e) pour mieux respecter l'objectif poursuivi par l'interdiction de parrainage. Ne peut ainsi

under the Criminal Code of a sexual offence or an attempt or threat to commit such an offence, whether the victim is a relative or not, or of an offence that results in bodily harm or an attempt or threat to commit such an offence against a relative, including a family member of the sponsor or relative of a family member, that person is barred from sponsoring a member of the family class to Canada until 5 years have passed since the completion of their sentence or they have received a pardon or rehabilitation.

parrainer un membre de sa famille, avant cinq ans après avoir fini de purger sa peine ou après avoir été réadaptée, la personne déclarée coupable, en vertu du Code criminel, d'une infraction d'ordre sexuel ou d'une tentative ou menace de commettre une telle infraction — que la victime soit un membre de sa famille ou non — ni la personne déclarée coupable d'une infraction entraînant des lésions corporelles, ou d'une tentative ou menace de commettre une telle infraction à l'égard d'un parent, y compris un membre de la famille du répondant ou un parent d'un membre de la famille de celui-ci.

[38] The Applicant also alleges that it would be incompatible that legislation which aims to prevent persons who have committed family violence from sponsoring a member of the family class would allow the Respondent, who was tried and convicted for the killing of his sister-in-law, to sponsor his wife. The Board's interpretation of clause 133(1)(e)(ii)(A) of the Regulations is therefore internally inconsistent and erroneously limits the scope of that section.

[39] The Respondent argues that the decision in *Lavigne*, above, should be put in proper context because in that decision, the Supreme Court indicated that the term “including” merely provides a non-exhaustive list of examples to demonstrate the aforementioned wording. However, *Lavigne* can be distinguished from the case at bar because the applicable definitions here clearly state where they

are to be applied. The scope of section 133 of the Regulations was therefore limited by Parliament and by the law itself.

[40] According to the Respondent, the Board considered the intention of Parliament in its analysis and did not err in its interpretation and application of clause 133(1)(e)(ii)(A) of the Regulations, as it clearly does not include “sister-in-law”.

[41] If Parliament had intended for the definition of “family member” to include all relationships linked to the concept of family, it would have explicitly done so, especially since there are two exceptions in the context of the Regulations to the application of the term “family member”.

[42] The Board may not have looked at the RIAS’s 2004 amendment but considered the legislative intent of section 133 (Applicant's Record page 8, paragraphs 12 and 13 of the decision). It even considered that the Respondent at first sight, ought to be barred to sponsor his wife by the Regulations at paragraph 14 of the decision:

At first blush the sponsor in this appeal ought to be the exact type of person the Regulations meant to prevent from abusing or harming another family member. The appellant is a sponsor with a specific conviction involving violence against a woman in his family, his sister-in-law.

[emphasis in the original]

[43] In the end the Board concluded that the word "sister-in-law" did not fit within the definition of "family member".

[44] This Court is of view that the Board did not err in its interpretation of clause 133(1)(e)(ii)(A) of the Regulations due to the limited applicability of the definition of “family member”.

[45] No question for certification was proposed and none arises.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-289-08

STYLE OF CAUSE: **THE MINISTER OF CITIZENSHIP AND
IMMIGRATION
and
BALJINDER SINGH BRAR**

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AND JUDGMENT:** Beaudry J.

DATED: November 18, 2008

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