Federal Court  Cour fédérale

Date: 20171101

Docket: IMM-1273-17

Citation: 2017 FC 981

Ottawa, Ontario, November 1, 2017

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

SERGIY YURIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision made by an immigration officer (the "Officer") refusing to include the Applicant as a dependent spouse on his wife's application for permanent residence on humanitarian and compassionate ("H&C") grounds ("H&C application").

II. Background

[2] The Applicant and his wife and son are citizens of Ukraine. The Applicant, Sergiy Yuris, was born in 1973. He married Olga Yuris in 1999 and their son Yev Yuris was born in 2003.

[3] Both the Applicant and Olga are homosexual. They married in order to hide their sexual orientation in Ukraine, where homosexuality is not socially accepted. They considered their marriage to be a committed, spousal relationship and they lived with Yev in the appearance of a normal family. In the meantime, they pursued homosexual relationships in secret from the rest of Ukrainian society.

[4] The Applicant was attacked on account of his sexual orientation several times in 2013 and 2014. In October 2014, he and Olga were attacked by three men who threatened to reveal their secret. Following the attacks, the Applicant, Olga and Yev came to Canada and claimed refugee status. The claims were refused by the Refugee Protection Division ("RPD").

[5] The Applicant appealed his refugee claim to the Refugee Appeal Division ("RAD"), which allowed the appeal and sent the matter back to the RPD for re-determination. Olga and Yev could not appeal their claims to the RAD because they had entered Canada through the United States. Their claims were appealed to the Federal Court, but leave to appeal was denied.

[6] In November 2015, Olga submitted an H&C application, which listed the Applicant as her husband and Yev's father. She explained the marriage was for the purpose of hiding their

homosexuality in Ukraine. As well, her submissions showed the importance of the Applicant in the lives of her and Yev.

[7] However, Olga did not list the Applicant as an accompanying family member. There were two reasons for this decision. First, re-determination of the Applicant's refugee claim was pending. Second, at the time of the application, he was not living with her, they were not in a sexual or romantic relationship and she did not consider him to be her dependent or spouse for the purposes of the application.

[8] On August 19, 2016, Olga's H&C application was approved in principle. However, Immigration, Refugees and Citizenship Canada ("IRCC") requested clarification of the relationship between the Applicant and Olga and why the Applicant was not included as an accompanying family member in the original H&C application.

[9] On January 25, 2017, submissions were made as to why the relationship is of a spousal nature and why the Applicant was not included as an accompanying family member in the original H&C application. As well, the submissions cited H&C factors in support of the Applicant's inclusion in the H&C application.

[10] On February 28, 2017, the Officer found that the Applicant could not be included as an accompanying family member on Olga's H&C application. The Officer stated:

> As per section 25 of the *Immigration and Refugee Protection Act*, specifically paragraph (1.2)(b):
>
> > "The Minister may not examine the request if the foreign national has made a claim for refugee

> protection that is pending before the Refugee Protection Division or the Refugee Appeal Division."
>
> We are unable to include you as an accompanying dependent on Mrs. Yuris' application for permanent residence on H&C grounds as you currently have a pending refugee claim before the Refugee Protection Division.

[11] The Officer further stated that the Applicant would not be excluded from a future family class application; however, as a non-accompanying family member, he would not be granted permanent residence status with Olga and Yev in the H&C application.

[12] On March 20, 2017, the Applicant applied for judicial review of the Officer's refusal to include him as an accompanying family member in the H&C application.

III. Issues

[13] The issues are:

A. Did the Officer err in finding that the Applicant could not be included in the H&C application because of his pending refugee claim?

B. Do H&C and public policy reasons dictate that the Applicant should be included in the H&C application?

IV. Standard of Review

[14] The parties agree that where a decision maker is interpreting his or her home statute, as is the case here, the standard of review is reasonableness.

V. Analysis

Preliminary Issue

[15] As a preliminary issue, the style of cause should be amended to name the Respondent as "The Minister of Citizenship and Immigration".

A. *Did the Officer err in finding that the Applicant could not be included in the H&C application because of his pending refugee claim?*

[16] The Applicant submits that paragraph 25(1.2)(b) of the IRPA does not apply to family members of a foreign national, and that interpretation is supported by case law and associated provisions in the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [Regulations].

[17] The Respondent submits that paragraph 25(1.2)(b) of the IRPA applies to all persons included on a H&C application. To interpret the provision otherwise would undermine Parliament's intention to prevent foreign nationals from accessing multiple immigration processing streams at the same time; that interpretation is supported by case law and associated provisions in the Regulations.

[18] Paragraph 25(1.2)(b) of the IRPA states:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
Exceptions	**Exceptions**
(1.2) The Minister may not examine the	(1.2) Le ministre ne peut étudier la demande

request if

(b) the foreign national has made a claim for refugee protection that is pending before the Refugee Protection Division or the Refugee Appeal Division;

de l'étranger faite au titre du paragraphe (1) dans les cas suivants :

b) il a présenté une demande d'asile qui est pendante devant la Section de la protection des réfugiés ou de la Section d'appel des réfugiés;

[19] The words of an Act are to be read contextually and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21).

[20] The "request" and "foreign national" referred to in paragraph 25(1.2)(b) of the IRPA, and repeatedly referred to in section 25 of the IRPA, relate to the "request of a foreign national in Canada who applies for permanent resident status" on H&C grounds, pursuant to subsection 25(1) of the IRPA:

Humanitarian and compassionate considerations — request of foreign national

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant

compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	directement touché.

[21] A plain reading of section 25 suggests the "request" is the H&C application and the "foreign national" is the person who submitted that application. In that sense, paragraph 25(1.2)(b) can be construed as applying only to the primary applicant. Accompanying family members are not referred to anywhere in section 25.

[22] In *Liang v Canada (Minister of Citizenship and Immigration)*, 2017 FC 287 [*Liang*], the principal applicant on an H&C application listed an accompanying family member who had a pending refugee claim. The parties agreed that paragraph 25(1.2)(b) of the IRPA did not preclude determination of the H&C application while the family member's claim was pending. Furthermore, the Court accepted the submission that "…in any event, the H&C application is based on the status of the Principal Applicant who did not have a pending refugee claim" (*Liang*, at para 22).

[23] However, section 25 of the IRPA does not explicitly distinguish between primary applicants and their dependents, nor does it specifically refer to a "request" as being the primary applicant's H&C application. Similarly, the definition of "foreign national" in subsection 2(1) of the IRPA is broad enough to include family members:

Interpretation	**Définitions et interprétation**
Definitions	**Définitions**
2 (1)	**2 (1)**
foreign national means a person who is not a	**étranger** Personne autre qu'un citoyen

Canadian citizen or a permanent resident, and includes a stateless person.	canadien ou un résident permanent; la présente définition vise également les apatrides.

[24] In that sense, "foreign national" in subsection 25(1) of the IRPA could include a family member whose "request" is his or her bid for permanent residence as an accompanying family member.

(1) The Scheme of the IRPA and the Regulations

[25] The IRPA provides a scheme for H&C applications that clearly distinguishes between primary applicants and family members; however, it may also deem family members to be considered H&C applicants for the purposes of the IRPA and Regulations.

[26] Looking through one lens, the Regulations clearly distinguish between primary applicants and their family members. "Family member" is defined in subsection 1(3) of the Regulations:

Definition of family member	**Définition de membre de la famille**
(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 paragraph 7.1(3)(a) and sections 159.1 and 159.5, family member in respect of a person means	(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 de l'alinéa 7.1(3)a) et 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 of a dependent child referred to in paragraph (b).	c) l'enfant à charge d'un enfant à charge visé à l'alinéa b).

[27] Division 5 of the Regulations then provides a scheme whereby a foreign national can request permanent residence on H&C grounds and be accompanied by family members. Section 66 of the Regulations describes the "request" in subsection 25(1) of the IRPA:

Humanitarian and Compassionate Considerations	**Circonstances d'ordre humanitaire**
Request	**Demande**
66 A request made by a foreign national under subsection 25(1) of the Act must be made as an application in writing accompanied by an application to remain in Canada as a permanent resident or […]	**66** La demande faite par un étranger en vertu du paragraphe 25(1) de la Loi doit être faite par écrit et accompagnée d'une demande de séjour à titre de résident permanent ou […]

[28] Sections 68 and 69.1 and subsection 69(2) of the Regulations (and section 67 and subsection 69(1) of the Regulations with respect to applications made outside Canada) then distinguish between the "foreign national" and his or her "family members":

Applicant in Canada	**Demandeur au Canada**
68 If an exemption from paragraphs 72(1)(a), (c) and (d) is granted under subsection 25(1), 25.1(1) or 25.2(1) of the Act with respect to a foreign national in Canada who has made the applications referred to in section 66, the foreign national becomes a permanent resident if, following an examination, it is established that the foreign national meets the requirements set out in paragraphs 72(1)(b) and (e) and […]	**68** Dans le cas où l'application des alinéas 72(1)a), c) et d) est levée en vertu des paragraphes 25(1), 25.1(1) ou 25.2(1) de la Loi à l'égard de l'étranger qui se trouve au Canada et qui a fait les demandes visées à l'article 66, celui-ci devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après, ainsi que ceux prévus aux alinéas 72(1)b) et e), sont établis : […]
(b) the foreign national is not otherwise inadmissible; and	b) il n'est pas par ailleurs interdit de territoire;
(c) the family members of the foreign national, whether accompanying or not, are not inadmissible.	c) les membres de sa famille, qu'ils l'accompagnent ou non, ne sont pas interdits de territoire.
Accompanying family member in Canada	**Membre de la famille qui accompagne l'étranger et qui se trouve au Canada**
69 (2) A foreign national who is an	

accompanying family member of a foreign national who becomes a permanent resident under section 68 shall become a permanent resident if the accompanying family member is in Canada and, following an examination, it is established that	**69 (2)** L'étranger qui est un membre de la famille accompagnant un étranger qui est devenu résident permanent au titre de l'article 68 devient résident permanent s'il se trouve au Canada et si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) the accompanying family member is not inadmissible;	a) le membre de la famille n'est pas interdit de territoire;
Requirements — family member	**Exigences — membre de la famille**
69.1 Subject to subsection 25.1(1), to be considered a family member of the applicant, a person shall be a family member of an applicant both at the time the application under section 66 is made and at the time of the determination of the application.	**69.1** Sous réserve du paragraphe 25.1(1), a la qualité de membre de la famille du demandeur la personne qui est un membre de la famille de ce dernier au moment où est faite la demande visée à l'article 66 et au moment où il est statué sur celle-ci.

[29] These provisions do not appear to support an interpretation of paragraph 25(1.2)(b) of the IRPA that would bar family members with a pending refugee claim from accompanying a primary H&C applicant. Such an interpretation requires the "foreign national" and "request" in section 25 of the IRPA to refer to a family member and his or her bid to accompany a primary H&C applicant. The Regulations clearly refer to the "requests" as related to the H&C application and the "foreign national" as the primary applicant.

[30] Looking through a different lens, subsection 10(3) of the Regulations states:

Application of family members	**Demande du membre de la famille**
10 (3) The application is considered to be an application made for the principal applicant and their accompanying family members.	**10 (3)** La demande vaut pour le demandeur principal et les membres de sa famille qui l'accompagnent.

[31] Justice Snider in *Mazhandu v Canada (MCI)*, 2005 FC 663, in considering subsection 10(3), held at paragraph 14:

> One possible and reasonable meaning of this provision is that it is in the nature of a deeming provision. Stated in other words, a family member is deemed to be an applicant for purposes of the permanent residence application by being included on the form.

[32] As well, the Immigration and Refugee Appeal Division has considered this provision in the context of family class applications, and interpreted it to mean that accompanying family members of the principal applicant have "made a complete and legal application for permanent residence in the family class" (*Wu v Canada (Minister of Citizenship and Immigration)*, 2010 CanLII 94545 (CA IRB) at para 13; *Biletsky v Canada (Minister of Citizenship and Immigration)*, 2010 CanLII 91413 (CA IRB) at para 11).

[33] Therefore, while not specifically referred to by the Officer in the decision, it was open to the Officer to reasonably interpret subsection 10(3) of the Regulations to find that accompanying family members are deemed applicants for the purpose of section 25 of the IRPA and therefore paragraph 25(1.2)(b) of the IRPA bars any family member from H&C applications where that member has a pending refugee claim.

(2) The objectives of the provision and the IRPA

[34] The objectives of the legislation are found in section 3 of the IRPA. Paragraph 3(1)(d) of the IRPA provides that one objective is "to see that families are reunited in Canada". This objective has been recently confirmed by the Supreme Court of Canada in *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paragraph 39, which

also lists as a purpose "… to promote the successful integration of permanent residents in Canada…" [emphasis in original].

[35] However, paragraphs 3(1)(f) and 3(2)(e) of the IRPA refer to "prompt processing" and "efficient procedures". These objectives can both weigh in favour and against the Officer's interpretation of paragraph 25(1.2)(b) of the IRPA. On one hand, it is inefficient to deny a family member the ability to accompany a primary H&C applicant and have them wait for a refugee claim to be processed as an alternative, considering that refugee processing generally may take significantly more time and resources. On the other hand, it is inefficient to allow a family member to be included on an H&C claim without withdrawing his or her refugee claim, which would allow that family member to access two immigration streams at the same time.

[36] Indeed, while not directly dealing with the objective or purpose of paragraph 25(1.2)(b) of the IRPA, the legislative history of the enactment of which paragraph 25(1.2)(b) of the IRPA was a part, indicates that one of Parliament's primary objectives was to reduce backlogs and abuses in the refugee determination process (*House of Commons Debates*, 41st Parl, 1st Sess, Vol 146: No 097 (15 March 2012) at (1315-1320) (Hon Wladyslaw Lizon); No 099 (26 March 2012) at (1300-1305) (Hon Nina Grewal); and No 108 (23 April 2012) at (1245-1250) (Hon Randy Kamp)).

[37] Accordingly, interpreting subsection 25(1.2) of the IRPA broadly such that bars to H&C applications should apply to family members, may also be argued to be Parliament's intent.

[38] I note that although the *Interpretation Act*, RSC 1985, c I-21 at section 12 provides that enactments "shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects", that provision is qualified by the general principle of statutory interpretation that the legislature is presumed to not to interfere with individual rights, whether common law or statutory, and legislation that curtails rights shall be strictly construed (Ruth Sullivan, *Statutory Interpretation,* 3rd ed (Toronto: Irwin Law, 2016) at 230).

[39] In balancing the relevant provisions of the IRPA and Regulations, and scheme and objectives of the IRPA purposively, even if I do not necessarily agree with the Officer's interpretation of subsection 25(1.2)(b) of the IRPA, I find that it was reasonable for the Officer to decide that paragraph 25(1.2)(b) of the IRPA applies to family members of primary H&C applicants.

B. *Do H&C and public policy reasons dictate that the Applicant should be included in the H&C application?*

[40] The Applicant submits that public policy dictates the Applicant should be included in this H&C application. There has been no misrepresentation or wrongdoing by him or his family, he has always been a central aspect of the H&C considerations and he satisfies all applicable conditions in the IRPA and Regulations. It is a waste of resources and public policy to refuse to include him now and wait for determination of his refugee claim or future sponsorship in the family class.

[41] This is not a proper question for the Court to address. The relevant legislative provisions relating to immigration applications and specific exemptions to be considered and interpreted by the Court are set out in the IRPA and Regulations, including paragraph 25(1.2)(b) of the IRPA. This Court's role is to interpret and apply these enactments, not resort to construing legislative policy.

[42] The decision under review is the Officer's interpretation of paragraph 25(1.2)(b) of the IRPA. The only proper issue for this Court is whether that interpretation was reasonable, which I find it was.

VI. Certified Question

[43] The Respondent posed a question for certification, which I agree is a serious question of general importance which will be dispositive of an appeal and transcend the interests of the immediate parties to the litigation, as well as contemplate significance or general importance (*Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89 at para 11; *Zhang v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 168 at para 9). The question is:

> Does the term "foreign national" in subsection 25(1.2)(b) of the IRPA pertain only to the section 25(1) request of a principal applicant, or does it also preclude the Minister from examining section 25(1) requests from all foreign nationals in Canada included in the application for permanent resident status, who have a claim for refugee protection pending before the RPD or the RAD?

[44] While the Applicant proposes a different question, on the basis that the issue before the Court is whether the Applicant's request to be added as an accompanying dependent should be

granted, I agree with the Respondent. The issue before the Court is whether, by operation of subparagraph 25(1.2)(b) of the IRPA in conjunction with subsection 10(3) of the Regulations, it was reasonable for the Officer to find that a foreign national is barred from being included in a H&C application as an accompanying dependent where he or she has a pending refugee claim.

[45] For the sake of completeness, the Applicant's proposed question is:

> Does subsection 25(1.2)(b) of the IRPA prevent the Minister from considering an application for permanent residence made by an accompanying dependent of a foreign national who has been granted an exemption pursuant to subsection 25(1) of the IRPA if the accompanying dependent has made a claim for refugee protection that is pending before the RPD or RAD?

JUDGMENT in IMM-1273-17

THIS COURT'S JUDGMENT is that:

1. The style of cause is hereby amended to name the Respondent as "The Minister of Citizenship and Immigration";

2. The application is dismissed;

3. The following question is certified:

> Does the term "foreign national" in subsection 25(1.2)(b) of the IRPA pertain only to the section 25(1) request of a principal applicant, or does it also preclude the Minister from examining section 25(1) requests from all foreign nationals in Canada included in the application for permanent resident status, who have a claim for refugee protection pending before the RPD or the RAD?

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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