Federal Court  Cour fédérale

Date: 20180228

Docket: IMM-3385-17

Citation: 2018 FC 225

Ottawa, Ontario, February 28, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

JASKARAN SINGH
RAJVIR KAUR

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] When Ravjir Kaur applied for permanent residency, she listed her husband Jaskaran Singh (the Applicant) and children as dependants. Mr. Singh had lived in Canada before, but due to a failed refugee claim made in 2003, was issued a deportation order. As a result of that order,

he needed to obtain authorization to return to Canada (ARC) as part of his wife's permanent residency application.

[2] On July 12, 2017, Mr. Singh's ARC was refused. According to section 42 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], a foreign national is inadmissible if they have an inadmissible family member. Thus, a second decision dated July 12, 2017, also refused Ms. Kaur's application as a result of her husband's inadmissibility.

[3] Together, Mr. Singh and his wife Ms. Kaur applied for judicial review of the two refusal decisions. I will grant this application and quash both decisions for the reasons that follow.

II. Preliminary Issue

[4] The Court is asked to review one judicial review application containing two decisions made on the same day, but by two different decision makers. Though the second decision relies on the first decision, they are very different decisions. This is contrary to rule 302 of the *Federal Courts Rules* SOR/98-106 [FC Rules]. According to rule 302:

> Unless the Court orders otherwise, an application for judicial review shall be limited to a single order in respect of which relief is sought.

[5] The materials did not contain arguments addressing this issue so the Court sought argument before the hearing. The Respondent's written response stated that they would consent to an order to hear the two decisions together.

[6] The Court has dealt with similar the same type of decisions in the past. For instance, *Khakh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 710 [*Khakh*], was a judicial review of two decisions: an ARC refusal and a permanent residence refusal made pursuant to the ARC refusal. In *Khakh*, the applicant was the same in both decisions, each decision was filed separately, and each decision had separate docket numbers. Prior to the hearing, an order of the Court was obtained to hear them together.

[7] Similarly, in *Pacheco v Canada (Citizenship and Immigration*), 2010 FC 347, Justice O'Keefe had a hearing in regards to an ARC refusal and a permanent resident visa refusal. Each decision had a separate docket number but both judicial reviews were heard together. Since the success of the second decision depended on the success of the first decision, at paragraph 4 Justice O'Keefe gave the following relief:

> Therefore, I would dismiss the application for judicial review of the visa officer's decision in Court file IMM-1267-09. By necessary implication, the judicial review of the officer's decision in Court file IMM-1266-09 is also dismissed.

[8] In the present case, the Applicant did not bring separate applications for each of the decisions, which is problematic at the hearing stage. The proper procedure would be to submit applications for both decisions and then, if sought, an order to have them heard together. Clearly, as indicated in the jurisprudence and the FC Rules, there should have been two separate applications and then an order to hear them together. That was not done here.

[9] Rule 4 of the FC Rules (colloquially known as the "gap rule" because it applies to matters not provided for) was discussed as a possible remedy to the situation. Further discussion took

place about what would happen if I chose to only review the ARC decision. The Court was concerned about whether Citizenship and Immigration Canada (CIC) would automatically reassess the permanent residence refusal if the judicial review was successful because, these decisions were in regards to two different people. Though entirely possible that CIC could reassess the wife's application if her husband's ARC is successful, it is of course not required to do so, and the Applicant could be prejudiced. The Court recognizes that the permeations of a variety of results could only be discussed speculatively.

[10] Exercising my discretion to hear this when both parties clearly ignored the FC Rules is problematic for the Court. Especially in immigration matters, Rule 302 cannot be ignored. To do so put the Court in a very difficult position—as described above, the Court can only speculate about the implications that may result. But there could be an absurdity if the Court does not hear both decisions and then the ARC decision is sent back for redetermination and granted. The result would be absurd for the permanent residence decision to remain negative and past the time to have it judicially reviewed.

[11] Reluctantly, I will exercise my discretion to hear the merits on both decisions, even though FC Rule 302 was not adhered to, for efficiency of judicial and court resources. I will hear the decisions on the basis that, had each decision been judicially reviewed separately, the Court would have allowed the matters to proceed together as evidenced by the jurisprudence. And to make the Applicant do so now and remain seized with it and grant extensions of time and so on would on these facts be a waste of judicial resources. This is clearly highly discretionally and is an exceptional circumstance not to be used as a precedent.

III. Facts

[12] Mr. Jaskaran Singh is a citizen of India, where he now lives with his family. Many years ago, on May 1, 2003, the Applicant entered Canada with a student visa to attend the University College of Cariboo in Kamloops, British Columbia. Shortly after he began his studies, he cancelled his enrollment.

[13] In September 2003, the Applicant applied for refugee status, which was denied on May 13, 2004. As a result of the unsuccessful application, he received a departure order.

[14] He applied for judicial review of the negative refugee decision, and on February 20, 2005, he incorporated a trucking company. On May 25, 2005, Justice Tremblay-Lamer upheld the negative refugee decision in *Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 742. The Applicant's departure order subsequently became a deemed deportation order.

[15] After the failed judicial review, the Applicant continued to live in Canada. On August 10, 2005, he applied for humanitarian and compassionate (H&C) consideration. This application would be denied five years later, in June 2010.

[16] On January 11, 2008, the Canadian Border Services Agency (CBSA) wrote to the Applicant and told him to attend their offices for an interview. At the interview, the CBSA imposed conditions: the Applicant must report to them every first Friday of every month, and the evidence shows he did do without fail. During a meeting with CBSA on September 3, 2009, they

invited the Applicant to make a Pre-Removal Risk Assessment (PRRA) application. He obtained counsel and submitted the PRRA on September 15, 2009.

[17] In January 2010, before the PRRA was decided, the Applicant told the CBSA he would leave Canada voluntarily at his own expense. At some point after that the Applicant received a negative PRRA decision, and he purchased his own ticket and left Canada on March 5, 2010.

[18] Two weeks later, in India, on March 21, 2010, the Applicant married a physiotherapist named Rajvir Kaur who also lives in India.

[19] Today the Applicant and his wife still live in India, with their two children. On February 2, 2012, Ms. Kaur applied for Canadian permanent residency to come as a physiotherapist, listing her husband and their children as dependents. Since the Applicant previously had a deportation order, he was required to apply for an ARC according to section 52(1) of the IRPA. He submitted his ARC application on April 26, 2013.

[20] As evidenced by Global Case Management System (GCMS) notes, a CIC Officer first reviewed the Applicant's ARC application, and gave it a negative recommendation. Despite the negative recommendation, on April 20, 2017, the Deputy Program Manager (DPM) initially approved the application. But later, the DPM said this approval was made in error. On July 12, 2017, the ARC approval was overturned and refused instead.

[21] The Applicant was notified that the prior approval was made in error and he now had a negative outcome. In letters both dated July 12, 2017, the applications of Mr. Singh and Ms. Kaur were refused. Ms. Kaur's letter explained her refusal is related to her husband's negative ARC decision; she was found ineligible for permanent residency due to having an inadmissible family member.

IV. Issues

[22] The issues presented by the Applicant are:

A. Was the Officer's decision reasonable in light of the Operational Manual guidelines?

B. Did the Officer err in findings of fact?

C. Did the Officer err in failing to consider the reasons for the delay in the Applicant's departure?

D. Did the Officer violate the principles of procedural fairness?

[23] The Court characterizes the issues as:

A. Was the decision to refuse the application for an ARC reasonable?

B. Was there any procedural unfairness in the ARC decision?

V. Standard of Review

[24] The standard of review of ARC decisions under section 52(1) of the IRPA is reasonableness (*Sahakyan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1542 at para 34; *Khakh* at para 14; *Umlani v Canada (Citizenship and Immigration)*, 2008 FC 1373 at

para 23). The correctness standard applies to questions of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12).

VI. Analysis

A. *Was the decision to refuse the application for an ARC reasonable?*

[25] The Applicant argues that the DPM erred by making findings that were not supported by the evidence, such as finding he was "not cooperative", and incurred "costs to government". As well, argument was presented that the decision was unreasonable in light of the criteria in the Operational Manual, OP1 at section 6.2.

[26] Below are the reasons given for the refusal in the GCMS notes:

> Application refused. Have provided reasons for refusal as per GCMS notes. Have informed MP rep that ARC was initially approved in error. Positive decision had been entered in error. As can be seen my note of 04/20/2017 was at odds with recommendation and how case had been presented. Error has been brought to my attention. **Reviewing the case and its circumstances in their entirety in fact do not see compelling reasons for ARC issuance. There is no BIOC. Applicant was not cooperative and availed of all possible venues to extend stay. Generating significant costs for the Government of Canada. Given these facts do not see justification for ARC.**
>
> Refused.
>
> [Emphasis added].

[27] These reasons are brief and lack detail to inform the reader why the decision maker came to those conclusions. When that happens, the Court looks to the GCMS notes and file. While the Respondent argues the conclusions are reasonable, the problem is the decision maker did not

indicate why the conclusions in the reasons were reached. Nor does the file contain evidence that would support any of the arguments presented by the Respondent as the factual basis for the decision maker's conclusions.

[28] The parties and the Court looked through the record for clues, and the parties speculated why the decision maker made the conclusions found in the reasons and on what evidence.

[29] The reviewing Court cannot quash a decision on the adequacy of reasons alone. Nor do the reasons need to be perfect or have all of the details or arguments. But also to take note of is that the Supreme Court of Canada cautions the Court not to substitute its own view where there are omissions in the reasons (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*]).

[30] In *Komolafe v Canada (Citizenship and Immigration*), 2013 FC 431 at paragraph 11, Justice Rennie held:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, **is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made.** This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.
>
> [emphasis added]

[31] To put this in context of this case, there are no bread crumbs to lead us to the decision maker's reasons. There is no trail of breadcrumbs to follow in the file and none in the GCMS. The Applicant is unable to solve the mystery or draw a conclusion from disparate facts by linking bits of information to form a big picture as *Newfoundland Nurses* supports.

[32] In this case it is impossible to tell whether the decision was reasonable and within a range of possible acceptable outcomes or was instead capricious or just arbitrary.

[33] For instance, the reasons state the Applicant is refused for "*Generating significant costs for the Government of Canada.*" Yet there is no evidence or breadcrumbs in the file of costs incurred by the government. The Respondent speculated that the costs referred to were the cost to CIC for the Applicant's monthly reporting and the cost to process his PRRA and H&C applications. The respondent argued that those costs would be significant even if the cost of a one way ticket back to India that he paid for himself is subtracted. There is no evidence of any costs on the file or what the decision maker categorized as costs. The only evidence in the file is that the Applicant paid for his own return ticket and paid his Canadian taxes. When the entire Certified Tribunal Record (CTR) is reviewed it is a mystery what the basis for the DPM's statement is.

[34] Another example of not being able to know why the decision maker made the conclusion

is the statement in the reasons that "*Applicant was not cooperative and availed of all possible venues to extend stay.*" The known and not speculated facts are that:

- The Applicant reported every month for the entire time he was asked to, had no convictions or infractions and purchased his own one way ticket to leave Canada when requested to.
- The Applicant did file an H&C application and then a PRRA after being presented the opportunity by CIC.
- The Applicant did not request a deferral or a stay, nor did he judicially review his negative PRRA or H&C. Both of those applications he had a legal right to apply for and did so in a timely fashion. The H&C took 5 years for a decision to be rendered.
- The evidence on the file is that he then (as requested to) started to prepare to leave Canada before his PRRA decision. When his PRRA was negative, he left Canada and paid for his own ticket before his H&C decision was rendered.

[35] There are no breadcrumbs to follow in the notes or the file. The respondent speculated what the decision maker's reasons were for that conclusion and statement. For instance the respondent argued that the evidence that the Applicant started to prepare to leave Canada before his PRRA and H&C decisions were rendered supports the negative conclusion reached in the reasons that "Applicant was not cooperative and availed of all possible venues to extend stay." I disagree as what the Applicant did seems exactly what CIC asks of applicants. Often it is seen as a negative if applicants seek a deferral or a stay and do not prepare to leave Canada once they have a deportation order and they do not have their affairs in order to leave. In this case it was the opposite and the Applicant prepared to leave even though he had outstanding PRRA and H&C applications. It cannot be seen as a negative or as uncooperative for the applicant to bring a timely PRRA and H&C application. When the negative PRRA was issued he left. I cannot see how this can be the basis for the finding in the reason of "Applicant was not cooperative and availed of all possible venues to extend stay."

[36] Again I note that if the decision maker had actually indicated in the reasons or in the notes of why they concluded that the Applicant was uncooperative then I would have been able to determine if it was reasonable. The evidence listed above does not support the conclusive statements in the reasons and I am not prepared to make findings of fact and provide reasoning that the decision maker did not. The decision is unreasonable as it is not based on the evidence nor is it transparent or intelligible.

[37] I find it unnecessary to address any more of the Applicant's arguments or issues and will grant the application.

[38] For the reasons above, I find Mr. Singh's ARC decision is unreasonable and will send it back to be re-determined. By necessary implication, the judicial review of the officer's decision regarding the negative permanent residence application of Ms. Kaur is also quashed and that decision will be re-determined after the ARC decision is re-determined.

[39] Neither party submitted a certified question and none arose.

JUDGMENT in IMM-3385-17

THIS COURT'S JUDGMENT is that:

1. The application is granted and both decisions are sent back to be re-determined by a different decision makers;

2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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