Federal Court  Cour fédérale

Date: 20191115

Dockets: IMM-1952-19
IMM-1953-19

Citation: 2019 FC 1422

Ottawa, Ontario, November 15, 2019

PRESENT: The Honourable Mr. Justice Bell

IMM-1952-19

BETWEEN:

JUAN DIEGO JOVEL FORTIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

IMM-1953-19

AND BETWEEN:

JUAN JOSE JOVEL FORTIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The within matters constitute two (2) applications for judicial review which were heard at the same time. The Applicants, Juan Diego Jovel Fortis ("Diego") born November 1, 1992, and Juan Jose Jovel Fortis ("Jose"), born March 11, 1994, are brothers. They seek judicial review, pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), of the March 8, 2019 decisions of an Immigration Officer ("Officer") employed at the Canadian Embassy in Mexico. The Officer concluded the brothers were not dependants at the lock-in date of their mother's, Ms. Isik Yebel Fortis Escobar's ("Ms. Fortis Escobar") protected person's in-Canada application for permanent residence. Furthermore, the Officer concluded that humanitarian and compassionate considerations were insufficient to justify granting an exemption.

[2] At the outset of the hearing, I granted Ms. Fortis Escobar the right to represent her sons on their applications for judicial review. She addressed the Court via a translator who was duly sworn to faithfully and accurately translate the Spanish language to the English language and vice versa.

[3] For the reasons set out below, I dismiss the application for judicial review.

II. Facts

[4] Diego and Jose are residents of El Salvador. Their mother entered Canada in December 2011 and immediately filed a claim for asylum. In the claim, she named her sons, who were then 19 and 17 years of age, as dependants. Her refugee hearing took place in Canada on April 28, 2015 and was rejected on May 4, 2015.

[5] This Court, on consent in 2015, granted Ms. Fortis Escobar's application for judicial review and remitted the matter for re-determination by a different member of the Immigration and Refugee Board ("Board"). On May 8, 2017, the Board accepted the Applicants' mother as a Convention refugee. On August 15, 2017, Ms. Fortis Escobar filed her application for permanent residence as a protected person and included Diego, then 24 years of age, and Jose, then 23, as dependents.

[6] Since their mother's departure, the Applicants have lived with their aunt in El Salvador. Diego has a son who was born on October 11, 2016. Diego was never married to, nor was he ever in a common law relationship with, the mother of his son. Diego's son currently lives with, and for present purposes will remain, with his mother. Diego sees his son on weekends and supports the child's mother financially.

III. Decision under Review

[7] The Officer concluded that the lock-in date, for purposes of determining the admissibility of the Applicants as dependent children, was August 15, 2017, the day Ms. Fortis Escobar filed her application for permanent residence. The Officer began the analysis by citing subsection 176(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 as they appeared

on the lock-in date ["*2017 Regulations*"], which stated that a permanent resident applicant may include any of their family members in the application. He then turned to subsection 1(3) of the *2017 Regulations*, which defined "family member" as "(a) the spouse or common-law partner of the person; (b) a dependent child of the person or of the person's spouse or common-law partner; and (c) a dependent child of a dependent child referred to in paragraph (b)."

[8] The Officer then considered the definition of "dependant child" as it was defined in section 2 of the *Regulations* immediately prior to August 1, 2014. The reason for the Officer's use of the definition as of that day will be explained more fully in these reasons. Immediately prior to August 1, 2014, the definition of "dependent child" that is relevant for purposes of the within applications for review was a biological or adopted child that is "less than 22 years of age and not a spouse or common-law partner."

[9] The age of the Applicants at the time of their mother's application for permanent residency was fundamental to the Officer's analysis. In view of the foregoing, the Officer determined that as at the lock-in date of August 15, 2017, Diego was 24 years of age and Jose was 23. They were therefore beyond the cut-off of 22 years of age to qualify as dependants in their mother's permanent residency application. The Officer also considered compassionate and humanitarian considerations with respect to the Applicants and Diego's son. The Officer concluded those factors were insufficient to justify granting an exemption.

[10] In the result, the Officer refused, pursuant to subsection 11(1) of *IRPA*, the Applicants' application for a permanent resident visa as family members of their mother.

IV. Relevant Provisions

[11] The parties disagree about whether the correct lock-in date for the purpose of determining the age of the Applicants was the date Ms. Fortis Escobar made her refugee claim, namely, December 14, 2011, or the date she made her permanent resident application, August 15, 2017.

[12] The version of the *Regulations* in force as at December 14, 2011, defined "dependant child" as a biological or adopted child who "is less than 22 years of age and not a spouse or common-law partner". The other aspects of the definition are not relevant in the circumstances.

[13] Conversely, the version of the *Regulations* in force as at August 15, 2017 defined "dependant child" as a biological or adopted child who "is less than 19 years of age and is not a spouse or common-law partner." The age in the *2017 Regulations*, as compared to the December 14, 2011 version of the *Regulations*, was therefore reduced to 19 years from 22 years. Another relevant section of the *Regulations* as at August 15, 2017 is subsection 25.1(9), which was not in force as of December 14, 2011. It was promulgated by the *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2014-133 ["*2014 Amending Regulations*"] and reads as follows:

Refugee protection	**Demande d'asile**
25.1 (9) For the purposes of determining whether a child is a dependent child, the lock-in date for the age of a child of a person who has submitted a claim for refugee protection inside Canada under subsection 99(3) of the Act,	25.1 (9) La date déterminante de l'âge d'un enfant, pour établir s'il est l'enfant à charge d'une personne qui a présenté une demande d'asile au Canada conformément au paragraphe 99(3) de la Loi, à qui la qualité de personne

who has acquired protected person status and who has made an application for permanent residence is the date on which the claim for refugee protection was made.	protégée a été reconnue, et qui a présenté une demande de résidence permanente, est celle où la demande d'asile a été faite.

[14] The final relevant provisions are sections 13(1), 13(2) and 14 of the *2014 Amending Regulations* which constitute transitional provisions for the coming into force of subsection 25.1(9):

13. (1) The definition "dependent child", set out in section 2 of the *Immigration and Refugee Protection Regulations*, as it read immediately before the coming into force of these Regulations, continues to apply in respect of a dependent child of the following persons:	**13. (1)** La définition de « enfant à charge » à l'article 2 du *Règlement sur l'immigration et la protection des réfugiés*, dans sa version antérieure à l'entrée en vigueur du présent règlement, continue de s'appliquer à l'égard des enfants à charge d'une personne dans les cas suivants :
[…]	[…]
(f) a person who made a claim for refugee protection in Canada before the coming into force of these Regulations and who acquired protected person status before or after the coming into force of these Regulations;	***f)*** cette personne a fait une demande d'asile au Canada avant l'entrée en vigueur du présent règlement et la qualité de personne protégée lui a été reconnue avant ou après l'entrée en vigueur du présent règlement;
(2) Section 25.1 of the *Immigration and Refugee Protection Regulations* does not apply with respect to the dependent child of a person referred to in subsection (1).	**(2)** L'article 25.1 du *Règlement sur l'immigration et la protection des réfugiés* ne s'applique pas à l'égard des enfants à charge d'une personne visée au paragraphe (1).

[…]	[…]
14. These Regulations come into force on August 1, 2014.	**14.** Le présent règlement entre en vigueur le 1er août 2014.

V. Issue

[15] The only issue is whether the Officer erred in interpreting the lock-in date for determining the age of the Applicants.

VI. Submissions of the Parties

A. *Applicants*

[16] The Applicants contend that the Officer erred by using the wrong lock-in date. They cite subsection 25.1(9) of the *Regulations*, which states that for a refugee who acquired protected person status and who makes an application for permanent residence, the lock-in date for determining the age of the dependent is the date of the refugee claim. As a result, the Applicants assert the correct lock-in date was December 14, 2011, and not the date of her permanent residence application on August 15, 2017.

[17] The Applicants further contend that the cut-off age in this case was 22 years of age. Had the Officer correctly determined the lock-in date, December 14, 2011, the Applicants would have met the definition of "dependent" as they would have been 19 and 17 years of age. Therefore, they would qualify as dependent children for the purposes of their mother's application for permanent residence.

[18] The Applicants did not make any submissions about the standard of review.

B. *Respondent*

[19] The Respondent contends that the standard of review is reasonableness, citing *Mehmood v Canada (Citizenship and Immigration)*, 2017 FC 962 at para 3 [*Mehmood*]. In *Mehmood*, the question before the Court was whether the lock-in date was the day the refugee claim was made or the day permanent resident status as a protected person was granted. The Court concluded that the decision under review attracted a reasonableness standard of review.

[20] The Respondent contends that subsection 25.1(9) of the *Regulation*s does not apply to the Applicants. While that subsection came into force on August 1, 2014, subsection 13(2) of the *2014 Amending Regulations'* transitional provisions clearly states that section 25.1 "does not apply with respect to the dependent child of a person referred to in subsection (1)". Paragraph 1(f) refers to "a person who made a claim for refugee protection in Canada before the coming into force of these Regulations and who acquired protected person status before or after the coming into force of these Regulations". Because (1) Ms. Fortis Escobar meets all of the defining characteristics of the exception set out in subsection 25.1(9) of the *Regulations*, namely that she sought asylum before the coming into force of that section and was granted permanent resident status after its coming into force, and (2) the clear language of subsection 13(2) of the *2014 Amending Regulation*, the Respondent contends that Diego and Jose cannot benefit from a lock-in date that is the date of the asylum claim. As a result, the Respondent submits that to be eligible as their mother's dependants, the Applicants had to meet the definition of "dependent" at the time of their mother's application for permanent resident status, dated August 15, 2017.

Since the applicants were 24 and 23 years of age, respectively, they did not meet the required definition and the Officer's decision was reasonable.

VII. Analysis

[21] The Officer was interpreting his home statute. I therefore agree with the Respondent's contention that the standard of review is reasonableness (*Mehmood* at para 3; *Anata* at para 2; *Shomali v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1 at para 12).

[22] Subsection 25.1(9) of the *Regulations* does not save the Applicants' application for a permanent resident visa. Unfortunately, for the Applicants and their mother, subsection 13(2) of the transitional provisions of the *2014 Amending Regulations* states clearly that section 25.1 does not apply in the circumstances.

[23] Prior to the enactment of that section, lock-in procedures for family and refugee streams were broadly described at sections 121, 128, and 142 of the *Regulations*, and further clarified in the department of Citizenship and Immigration Canada's ("CIC") operational manuals. Accordingly, CIC locked in the age of a dependent child at the date that it received a complete application for permanent residence. This approach was further confirmed in the jurisprudence (see, for example, *Anata v Canada (Citizenship and Immigration)*, 2017 FC 665 [*Anata*]; *Lu v Canada (Minister of Citizenship & Immigration)*, 2008 FC 625 at para 2; *Vehniwal v Canada (Minister of Citizenship & Immigration)*, 2007 FC 279 at para 2, 310 FTR 135 (Eng); *Feng v Canada (Minister of Citizenship & Immigration)* (1998), 153 FTR 59 at para 12; *Choi v Canada (Minister of Employment & Immigration)*, [1992] 1 FC 763 at paras 9-11, 15 Imm LR (2d) 265).

[24] By way of explanation to the Applicants and their mother, I would point out that when the Governor General in Council adopted the *2014 Amending Regulations*, the accompanying *Regulatory Impact Analysis Statement* recognized that, at that time, the *Regulations* only "broadly described" the lock-in procedures. As mentioned, CIC's practice was to set the lock-in date as the date it received a completed application for permanent residence. This process had a negative impact upon applicants who had to pursue a multi-step immigration process. A later lock-in date could result in aging children surpassing the cut off date to qualify as dependents. As demonstrated by the transitional provisions, the Governor General in Council did not intend the new lock-in provisions to apply to applications already in progress. It did; however, intend to permit the cut-off date to remain at 22 years of age rather than 19. Therefore, while applications already in progress could not benefit from the new lock-in provisions, this negative effect was somewhat mitigated by permitting those claimants to benefit from the higher cut off age of 22.

[25] It was therefore reasonable-for the Officer to conclude that the Applicants did not meet the definition of "dependant child" as of the lock-in date of August 15, 2017. They were older than 22 years of age and did not meet any of the other requirements related to dependency, such as schooling or mental or physical health conditions.

[26] The parties did not make submissions regarding humanitarian and compassionate grounds that might justify an exemption, and none are raised in the within applications. I therefore do not intend to address the issue.

VIII. Conclusion

[27] For all of the above reasons, the applications for judicial review are dismissed. No question was proposed for consideration by the Federal Court of Appeal and none appears from the record. A copy of these reasons shall be placed in both Court File No. IMM-1952-19 and No. IMM-1953-19.

JUDGMENT in IMM-1952-19 and IMM-1953-19

THIS COURT'S JUDGMENT is that the applications for judicial review are dismissed, without costs. No question is certified for consideration by the Federal Court of Appeal. A copy of these reasons shall be placed in both Court File No. IMM-1952-19 and No. IMM-1953-19.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1952-19 IMM-1953-19
STYLE OF CAUSE:	JUAN JOSE JOVEL FORTIS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION; AND BETWEEN JUAN DIEGO JOVEL FORTIS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 2, 2019
JUDGMENT AND REASONS:	BELL J.
DATED:	NOVEMBER 15 2019

APPEARANCES:

Isik Yebel Fortis Escobar	FOR THE APPLICANTS
Taylor Andreas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Isik Yebel Fortis Escobar Ottawa, Ontario	FOR THE APPLICANTS
Attorney General for Canada Ottawa, Ontario	FOR THE RESPONDENT