Federal Court  Cour fédérale

Date: 20090731

Docket: IMM-5315-08

Citation: 2009 FC 789

Ottawa, Ontario, July 31, 2009

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

MUHAMMAD TARIQ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Mr. Muhammad Tariq, is a citizen of Pakistan who came to Canada as a permanent resident on March 15, 2003. He seeks to sponsor his wife, whom he married on March 13, 2002, and daughter, born March 23, 2002, to come to Canada. Upon his initial application for sponsorship of his wife and child, he was advised by Citizenship and Immigration Canada (CIC) that his spouse was excluded from the family class – and, therefore did not qualify for sponsorship – because he had not disclosed her existence at the time of his landing in Canada, as

required under s. 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR).

[2] The Applicant attempted to circumvent this problem by divorcing and remarrying his wife. Once again, he applied to sponsor his wife and daughter. This second application was refused on the same legal basis in a letter dated January 9, 2006. The Applicant appealed this rejection to the Immigration Appeal Division of the Immigration and Refugee Board, Refugee Protection Division (the IAD), which heard the matter on May 27, 2008.

[3] At the outset of the hearing, counsel for the Applicant and the Minister agreed that the refusal of the Applicant's wife was valid in law. The wife was therefore not a member of the family class because she was excluded under s. 117(9)(d) of the IRPR. At the same time the Minister's counsel conceded that the refusal of the daughter of the Applicant and his wife was not valid in law, as she was born on March 23, 2003, after the Applicant became a permanent resident on March 15, 2003. Therefore, she was not yet in existence at the date of the Applicant's landing and could not have been examined before he landed in Canada. The Applicant's counsel agreed and the panel concurred, concluding that, on the face of the evidence, the decision of the visa officer was not valid in law in regards to the child.

[4] At this point in the hearing, the Applicant's counsel advised the panel that the Applicant was still pursuing the appeal because, even if the visa officer's decision was not valid in law in respect of the child, it was his right to make submissions as to humanitarian and compassionate (H&C) considerations under s.67(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA). Specifically, the Applicant wanted to argue that the best interests of his daughter, who had

just been declared a member of the family class, require that her mother accompany her to Canada. Essentially, the Applicant sought to ask the IAD to allow the appeal of his wife based on the existence of sufficient humanitarian and compassionate considerations.

[5] In a decision dated November 12, 2008, the IAD dismissed the appeal on the basis that the relevant provisions of IRPA did not allow the Applicant's child, whose appeal to the IAD had already been granted, to make further submissions on H&C considerations in order to allow her to bring her mother (the Applicant's wife) to Canada despite her exclusion as a member of the family class.

[6] The Applicant seeks judicial review of this decision.

II. Issues

[7] The sole issue in this judicial review is whether the IAD erred by concluding that it did not have the jurisdiction to consider the Applicant's H&C submissions in its consideration of the appeal of the refusal of the Applicant's sponsorship application for his daughter.

III. Relevant statutory provisions

[8] The following provisions of *IRPA* are relevant to this application:

Right to appeal — visa refusal of family class	Droit d'appel : visa
63. (1) A person who has filed	**63.** (1) Quiconque a déposé,

in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

Humanitarian and compassionate considerations

Motifs d’ordre humanitaires

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

65. Dans le cas de l’appel visé aux paragraphes 63(1) ou (2) d’une décision portant sur une demande au titre du regroupement familial, les motifs d’ordre humanitaire ne peuvent être pris en considération que s’il a été statué que l’étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

Appeal allowed

Fondement de l’appel

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

67. (1) Il est fait droit à l’appel sur preuve qu’au moment où il en est disposé :

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

(*b*) a principle of natural justice has not been observed; or

b) il y a eu manquement à un principe de justice naturelle;

(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of

c) sauf dans le cas de l’appel du ministre, il y a — compte tenu de l’intérêt supérieur de l’enfant

a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[9] The following provisions of *IRPR* are relevant to this application:

Family class	Catégorie
116. For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.	**116.** Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.
Member	Regroupement familial
117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117.** (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(a) the sponsor's spouse, common-law partner or conjugal partner;	*a*) son époux, conjoint de fait ou partenaire conjugal;
. . .	. . .
Excluded relationships	Restrictions
(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

. . .	. . .
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle

IV. Analysis

[10] The Applicant's position is that, pursuant to s. 67(1)(c) of IRPA, the Board was required to give the Applicant the opportunity to address the H&C considerations affecting his daughter's sponsorship application. This obligation, he argues, arises even though the IAD had already determined that the decision of the visa officer to reject the sponsorship application for the daughter was wrong in law. Had the IAD heard those H&C considerations, it could have considered whether the best interests of the daughter required that her mother accompany her to Canada. In the Applicant's submission, the Board's "equitable jurisdiction" under s. 67(1)(c) to grant "special relief" extends to the ability of the IAD to order that the Applicant's spouse be admitted to Canada where it is in best interests of his daughter to do so.

[11] As creative as the Applicant's proposal is and in spite of very capable submissions, I do not believe that the Applicant is correct in law.

[12] In my view, the IAD committed no error by refusing to hear the Applicant's submissions as to H&C considerations. By seeking to make H&C submissions relating to his child, the Applicant was attempting to appeal the refusal of his wife's application for permanent residence by making further submissions on an appeal (of his child's case) that had already been allowed by the IAD. A review of the relevant provisions of IRPA and the IRPR make it abundantly clear that this is not permitted.

[13] Under s. 63 of the IRPA, the Applicant made an appeal in respect of an application to sponsor his wife as a member of the family class. Section 65 of the IRPA expressly provides that, in respect of an application under s. 63, H&C considerations may not be considered if the appellant in question is not a member of the family class. In relation to the Applicant, his wife was determined by a visa officer to not be a member of the family class because, pursuant to s. 117(9)(d), she had not been declared when the Applicant made his own application for permanent residence. The parties have accepted that this determination was valid in law. Therefore, applying s. 65 to these facts, no H&C considerations could be considered in respect of an appeal of the Applicant's wife's application for permanent residence.

[14] The Applicant submits that in respect of his child, submissions as to humanitarian and compassionate considerations could be made pursuant to s. 67(1)(c). I disagree. Having already allowed an appeal of the visa officer's refusal of the child's application, the IAD did not need to then go on to consider the H&C considerations that may have existed to warrant the appeal relating to the child's application. It had already allowed the appeal on a different ground. Insofar as the

H&C submissions would have benefited the Applicant's wife, s. 65 makes it clear that they could not have been considered by the IAD. Once that determination has been made, it would be an absurd result to permit the refused wife to enter Canada on the basis of a child's submissions. Section 67 was never intended to provide the wife with an opportunity that is clearly barred under s. 65.

V. Conclusion

[15] The Applicant is not without remedy. The Applicant's spouse may apply from outside Canada for permanent resident status based on H&C considerations. The husband has status in Canada and the daughter is a member of the family class. Thus, subject to other H&C application considerations, it appears that the spouse would have a strong *prima facie* case. I am advised that a s. 25 application has been made in this case. In my opinion, it is much preferred that the Applicant's family be reunited under the directly applicable provision of s. 25 of IRPA rather than attempt to distort the intent and ordinary meaning of s. 65 and 67 of IRPA.

[16] The Applicant proposes that I certify a question as follows:

> Is 67 of IRPA broad enough to allow, based on the best interests of a child, an otherwise inadmissible person to be admitted to Canada?

[17] The facts of this family's situation are unique. This application for judicial review came about because of: (a) an undeclared spouse who is accepted to be not a member of the family class; (b) a child born after the Applicant came to Canada; and (c) a mistaken conclusion of a visa officer that the child was not a member of the family class. Absent any one of these three circumstances, the question would never have been before the IAD. Accordingly, I do not believe that the question proposed by the Applicant for certification is one of general interest. I decline to certify the question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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