Federal Court  Cour fédérale

Date: 20161004

Docket: IMM-1259-16

Citation: 2016 FC 1103

Ottawa, Ontario, October 4, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

DOMINGO NAJAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The Applicant seeks to judicially review a decision of the Immigration Appeal Division (IAD) of the Immigration and Refugee Board. The IAD upheld the decision of a visa officer (the Officer) concluding that paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 [the Regulations], precluded the Applicant from sponsoring his daughter, Marian Gayle Najas [Marian], for permanent residence in Canada as he had not disclosed her existence when he applied for landing in the late nineties.

[2] The Applicant does not dispute that paragraph 117(9)(d) of the Regulations applies to his case. However, he claims that the Officer failed to consider any humanitarian and compassionate (H&C) factors in assessing Marian's application for permanent residence and that the IAD erred in failing to address this issue and in concluding, as a result, that the Officer's decision was valid in law. The Applicant further claims that the IAD breached its duty of procedural fairness by unduly constricting the relevant issues on appeal and by directing him to only make submissions on the preclusion issue even though it was open to him to argue that the Officer's decision was unreasonable for failure to undertake an H&C analysis under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[3] For the reasons that follow, I find that the Applicant's challenge of the IAD's decision must fail.

I. Background

[4] The relevant facts of this case can be summarized as follows. The Applicant was born in the Philippines in 1948. In August 1996, he was granted permanent resident status in Canada. At the time he made his application for permanent resident status, he declared that he had no other dependent than his wife and four children that had landed with him. However, at that time, the Applicant had three other children born from an extramarital relationship. Marian, born in the Philippines in February 1994, is one of them.

[5] The Applicant now alleges that he did not declare these three children as he did not want his wife to know about their existence. In July 2014, that is 18 months after the passing away of

his wife, he submitted his sponsorship application for Marian. On October 21, 2014, Citizenship and Immigration Canada (CIC) informed the Applicant that he was not eligible to sponsor his daughter as he had failed to declare her existence in his application for permanent residence. CIC further advised that as the Applicant had indicated he wished to continue the processing of Marian's application for permanent residence despite any eligibility, the application had been forwarded to a visa office in Manilla.

[6] In subsequent fairness letters, dated March 18, 2015, CIC advised both the Applicant and Marian of its concern that Marian may be excluded as a member of the family class pursuant to paragraph 117(9)(d) of the Regulations and invited both to respond to this concern. The fairness letters also informed the Applicant and Marian that the failure to provide submissions may result in the review of the application based on the available information on file. No submissions were filed by either of them.

[7] On September 21, 2015, the Applicant and Marian were advised of the Officer's decision to refuse Marin's application for permanent residence. On October 7, 2015, the Applicant filed a notice of appeal to the IAD and on November 2, 2015, he was invited to provide submissions regarding the appeal. Such submissions were never filed.

[8] On February 26, 2016, the Applicant's appeal was dismissed. After having noted that the Applicant had failed to provide any submissions in support of his appeal, the IAD proceeded to review the record that was before the Officer and found that on the balance of probabilities, the Officer's decision was valid in law.

II. Issues

[9] This case raises the following issues:

a) Was there a breach of procedural fairness on the part of the IAD?

b) Is the IAD's decision reasonable?

[10] It is not contested that issues engaging the principles of procedural fairness are to be reviewed on a standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43) whereas the standard of reasonableness applies to the review of the merits of the Officer's decisions (*Adjani v Canada (Citizenship and Immigration)*, 2008 FC 32, at para 13).

III. Analysis

[11] The Applicant is essentially claiming that the whole process leading to the dismissal of Marian's application for permanent residence is flawed because an H&C analysis was not conducted by the Officer, a failure that he should have been permitted to raise before the IAD and the IAD should have picked up in any event and considered in determining whether the Officer's decision was valid in law.

[12] The insurmountable difficulty with the Applicant's position is that, despite having been given the opportunity to address the concerns of the Officer, he never either requested such analysis from the Officer or provided the Officer with submissions in this respect. In other words, he never told his story. As the Respondent points out, this Court has stated on a number

of occasions that visa officers have no duty or "free-standing obligation" to consider H&C factors in the absence of a request from the applicant for the visa officer to do so (*Phan v Canada (Minister of Citizenship and Immigration*) 2005 FC 184, at para 17. See also: *Tse v Canada (Citizenship and Immigration),* 2003 FC 393, at paras 10-11; *Araujo v. Canada (Citizenship and Immigration),* 2009 FC 515, at para 19). This is consistent with the language of section 25 of the Act which provides that an H&C analysis will be conducted "on request of a foreign national in Canada who applies for permanent resident status…" ("sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent…"). The onus was therefore on the Applicant to bring to the Officer's attention any evidence or submissions relevant to the H&C factors he wished to be considered (Patel v Canada (Minister of Citizenship and Immigration) (1997), 36 Imm LR (2d) 175 (FTCD), at para 10). The Applicant did none of that.

[13] The Applicant's claim that by requesting the visa office to continue processing the application for permanent residence despite his ineligibility to sponsor Marian, he did in fact request the Officer to make a decision on this application based on H&C factors, cannot stand either. In the absence of any submissions regarding H&C grounds, the Officer could not reasonably be expected to engage in an H&C analysis. Again, both the Applicant and Marian were given, more than once, the opportunity to respond to the Officer's concerns and to request, in so doing, that Marian's application for permanent residence be considered on H&C grounds. However, they did not take advantage of these opportunities. This claim is within the realm of wishful thinking. There is no legal authority to support it.

[14] When he appealed the Officer's decision at the IAD, the Applicant also did not raise the Officer's failure to consider H&C grounds. He did not even file submissions before the IAD despite having been invited to do so. In such context, the IAD did not have to independently undertake to examine issues not raised by the Applicant (*Khan v Canada (Citizenship and Immigration)*, 2016 FC 855, at paras 29-30). In *Gramshi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 878, the Court, quoting from the Federal Court of Appeal's decision in *Guajardo-Espinoza v Canada (Minister of Employment and Immigration)*,[1993] FCJ No 797 (CA)(QL) at para 5, held, in the context of a refugee claim, that the Refugee Protection Division could not be faulted "for not deciding an issue that had not been argued and that did not emerge perceptibly from the evidence presented as a whole" (Gramshi, at para 23). It cautioned that deciding otherwise "would lead to a real hide-and-seek or guessing game and oblige the Refugee Division to undertake interminable investigations to eliminate reasons that did not apply in any case, that no one had raised and that the evidence did not support in any way, to say nothing of frivolous and pointless appeals that would certainly follow" (*Gramshi*, at para 23). In my view, these statements are equally applicable to the case at hand.

[15] There is no merit to the Applicant's contention that he was precluded by the IAD from raising the issue of the Officer's failure to consider Marian's application for permanent residence on H&C grounds on the basis that the IAD directed him to make submissions on the preclusion issue only. First, that was the only issue that could properly be before the IAD given the information that was before the Officer and the reasons for the refusal of Marian's permanent residence application. Second, there was nothing, in the Act or Regulations, preventing the Applicant from raising the H&C issue, or any other issue for that matter, despite the direction

given by the IAD. Again, not only did he not raise the H&C issue at any time during the appeal process, but the Applicant did not file any submissions whatsoever.

[16] It is therefore clear that there was no breach of procedural fairness during the appeal before the IAD and that the IAD's decision is reasonable in the sense that it sits comfortably within the range of possible and acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47). As I have already pointed out, the Applicant is not challenging that Marian is not a member of the family class pursuant to paragraph 117(9)(d) of the Regulations and that this was a valid basis in law not to grant her permanent residency application.

[17] In his written submissions, the Applicant seems to be attributing his failure to respond to the Officer's concerns or to raise before the IAD the Officer's failure to consider Marian's application for permanent residence from an H&C standpoint, to his former counsel. However, nowhere in these submissions did he ask the Court to find that he had been the victim of a denial of justice due to his former counsel's incompetence or to draw any other legal conclusion from it. In oral submissions before the Court, this issue was not addressed either. There will therefore be no pronouncement on this allegation.

[18] This judicial review application will be dismissed.

[19] Neither party proposed a question for certification. None will be certified.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1259-16
STYLE OF CAUSE:	DOMINGO NAJAS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 26, 2016
JUDGMENT AND REASONS:	LEBLANC J.
DATED:	OCTOBER 4, 2016

APPEARANCES:

Mr. Dov Maierovitz	FOR THE APPLICANT
Ms. Ladan Shahrooz	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dov Maierovitz Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT