Federal Court  Cour fédérale

Date: 20210929

Docket: IMM-1044-20

Citation: 2021 FC 1010

Toronto, Ontario, September 29, 2021

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

JULIO CESAR ORDUNO FERRER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Mr. Julio Cesar Orduno Ferrer, seeks judicial review of a January 28, 2020 decision [Decision] of an Officer from Immigration, Refugees and Citizenship Canada [IRCC] which found that the Applicant's son, Julio Ariel Orduno Maso [JA Orduno Maso], did not meet the definition of a dependent under section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR] and was therefore ineligible to remain on the Applicant's permanent residence application [Application].

[2] The Applicant asserts that the Decision was unreasonable because the wrong provision of the IRPR was used to determine the lock-in date for establishing JA Orduno Maso's age.

[3] For the reasons that follow, I find that the Officer's interpretation of the IRPR and its policy documents was the only reasonable interpretation to be given and therefore that the application must be dismissed.

I. Background

[4] The Applicant arrived in Canada from Cuba and applied for refugee status on November 15, 2012, but did not obtain refugee status until 2018. He applied for permanent residence as a protected person on April 24, 2018. The Application included his wife and two sons as dependent family members. His eldest son, JA Orduno Maso, born on July 23, 1994, was 23 years old at the time of the Application.

[5] On January 21, 2020, the Applicant received a Procedural Fairness letter [PFL] from IRCC indicating that JA Orduno Maso did not meet the definition of an eligible family member. The letter provided the following explanation:

> Your claim for refugee protection was received on **November 15, 2012**. Your application for permanent residence was received on **April 24, 2018**. Based on the date of your refugee claim (prior to August 1, 2014), the age of your child is locked in on the date IRCC receives a complete application for permanent residence. Transitional measures are in place to allow certain applicants under multi-step permanent resident immigration programs who are in the immigration process before August 1, 2014, but who had not submitted their application for permanent residence until after this date, to have their applications processed based on the previous definition of dependent child.

[6] The letter cited the definition of “dependent child” in subsection 2 of IRPR as it read on November 15, 2012 and stated that JA Orduno Maso did not meet the definition. As such, he was not eligible to be included in the Application. The Applicant was given 60 days to provide additional information.

[7] In response to the PFL, the Applicant’s representative submitted a letter asserting that section 2 of the IRPR and the transitional provisions did not apply. Referencing the IRCC *Operational Bulletin 588 (modified) - December 13, 2016* [OB 588], the representative asserted that dependent status was governed by subsections 25.1(1) and 25.1(9) of the IRPR and that the lock-in date for determining the age of JA Orduno Maso was the date of the Applicant’s refugee claim.

[8] On January 28, 2020, the Officer issued the Decision, maintaining that JA Orduno Maso was not a dependent in accordance with section 2 of the IRPR and the *Temporary public policy regarding requests to process children aged 19 to 21 as dependents*. The Decision stated that:

> Your response has been reviewed in accordance to subsection 2 of the *Immigration and Refugee Protection Regulations*. Furthermore, your request has also been reviewed in accordance with instructions provided by Immigration, Refugees and Citizenship Canada (IRCC), under Temporary public policy regarding requests to process children aged 19 to 21 as dependants.
>
> As ORDUNO MASO, JULIO ARIEL 1994/07/23 does not meet the definition of a dependent, they are ineligible to remain on the application.
>
> [Emphasis in Original]

II. Standard of review and Issue

[9] I agree with the Respondent that the standard of review of the Decision is reasonableness even though the Officer was required to interpret the IRPR and its policy documents: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras 25, 115 and 116 [*Vavilov*].

[10] The only issue raised by this application is whether it was reasonable for the Officer to not apply the lock-in date set out in subsection 25.1(9) of the IRPR when determining the age and dependent status of JA Orduno Maso.

III. Analysis

[11] The parties disagree about the interpretation and application of the legislative provisions and policy documents used by the Officer to determine the lock-in date and age of JA Orduno Maso.

[12] On November 15, 2012, the relevant portion of section 2 of the IRPR defined "dependent child" as:

dependent child, in respect of a parent, means a child who	**enfant à charge**, L'enfant qui:
(a) has one of the following relationships with the parent, namely,	(a) d'une part, par rapport à l'un de ses parents :
(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse	(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son

or common-law partner of the parent,	époux ou conjoint de fait,
… and	…
(b) is in one of the following situations of dependency, namely,	(b) d'autre part, remplit l'une des conditions suivantes :
(i) is less than 22 years of age and is not a spouse or common-law partner	(i) il est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait,
…	…

[13] On August 1, 2014, the IRPR were amended by the *Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2014-133, Canada [2014 Amending Regulations]. The amendments changed the applicable age for a "dependent child" to "less than 19 years of age". The 2014 Amending Regulations added section 25.1 to the IRPR. This section defined the lock-in date for determining the age of a child who might be included as a dependent:

General rule — one-step process	**Règle générale — processus à une étape**
25.1 (1) 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 is a member of any of the classes set out in these Regulations, other than in those cases referred to in subsections (2) to (9), and who makes an application under Division 5, 6 or 7 of Part 5 is the date on which the application is made.	25.1 (1) La date déterminante de l'âge d'un enfant, pour établir s'il est l'enfant à charge d'une personne appartenant à une catégorie visée par le présent règlement — sauf dans les cas visés aux paragraphes (2) à (9) — qui présente une demande au titre des sections 5, 6 ou 7 de la partie 5, est celle où la demande est faite.
…	…
Refugee protection	**Demande d'asile**

(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, 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.	(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 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 2014 Amending Regulations included transitional provisions restricting the application of section 25.1 in certain circumstances and allowing the former section 2 definition of "dependent child" to be used. The transitional provisions included the following:

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).

[15] In 2017, the definition of dependent child found in section 2 of the IRPR was amended further by the *Regulations Amending the Immigration and Refugee Protection Regulations (Age of Dependent Children)*, SOR/2017-60 [2017 Amending Regulations] to, *inter alia*, increase the age limit found in subparagraph (b)(i) back to "less than 22 years of age".

[16] The Applicant argues that the 2017 Amending Regulations rendered the transitional provisions found in section 13 of the 2014 Amending Regulations meaningless such that subsection 25.1(9) of the IRPA should have been applied by the Officer to determine the age of JA Orduno Maso.

[17] The Applicant refers to the *Temporary public policy regarding requests to process children aged 19 to 21 as dependants* [Temporary Policy] cited by the Officer. However, I agree with the Respondent that this Temporary Policy is of little assistance to the Applicant, as found by the Officer.

[18] The Temporary Policy indicates that it was motivated by the potential number of requests for humanitarian and compassionate consideration the IRCC could receive to add or process requests for older children on pending applications, and in the interests of facilitating family

reunification. However, it is specific in that it applies to children aged 19 to 21. JA Orduno Maso was over 22 at the time the 2017 Amending Regulations were published (May 3, 2017) and had turned 23 by the time they were introduced (October 24, 2017). The Officer reasonably referred to the Temporary Policy and found that it did not change the determination of the age of JA Orduno Maso.

[19] The Applicant also references the *Program delivery update: Regulation change for dependent children – October 24, 2017* [Program Delivery Update]. This Program Delivery Update states that the 2017 Amending Regulations relate to a "new definition of dependent child" but "do not include any changes to regulations regarding when the age of a child of the principal applicant is locked in." The Program Delivery Update notes an "inadvertent omission" in the transitional provisions from the 2014 Amending Regulations as they relate to a dependent child who made an application as a principal applicant. This is not the case here. The principal applicant is the father of JA Orduno Maso.

[20] The Program Delivery Update refers to OB 588 and notes that information on the transitional provisions can be found in OB 588. The first bullet point of section 3.1.7 of OB 588 is consistent with both the Officer's application of the transitional provisions and with the use of the lock-in date as at the date of the Application:

> **3.1.7 Protected persons (in-Canada refugee claimants)**
>
> Foreign nationals submitting refugee claims inside Canada have similar experiences and face similar reuniting with their children as refugees abroad.
>
> - Under **transitional provisions**, children of applicants who made an in-Canada refugee claim prior to August 1, 2014, and who acquired protected person status either before or after that

> date are to be assessed by IRCC using the pre-amendment definition of dependent child. This applies even if their complete APR is received by IRCC on or after August 1, 2014. Pre-amendment lock-in procedures are to be applied – i.e., the age of the child is locked in on the date on which IRCC receives the APR from the principal applicant.
>
> - **Other APRs not covered by transitional provisions:** The new definition of dependent child should be applied.
>
> - **New lock-in date:** The lock-in date for the age of a child of an in-Canada refugee claimant who has acquired protected person status is the date on which IRCC or the CBSA received the principal applicant's refugee claim [R25.1(9)].

[21] The Applicant states that the decision in *Mehmood* v. *Canada (Citizenship and Immigration)*, 2017 FC 962 [*Mehmood*] "confirmed that the lock-in date for the age of a child of a refugee claimant was the date on which the claim for refugee protection was made." While the Court in *Mehmood*, applied subsection 25.1(9) of the IRPR to determine the lock-in date, the material facts in that case were different. In *Mehmood*, the refugee claim was made on December 10, 2014, after the coming into force of the 2014 Amending Regulations on August 1, 2014; thus, subsection 13(1)(f) of the transitional provisions of the IRPR did not come into play.

[22] Rather, a closer fact situation was that considered in *Fortis* v. *Canada (Citizenship and Immigration)*, 2019 FC 1422 [*Fortis*]. In that case, the application for refugee status was made before the 2014 Amending Regulations, at a time when the Applicant's sons, in that case, were 19 and 17. When the application for permanent residence was made on August 15, 2017, the sons were 24 and 23, respectively. The Officer reviewing the permanent residence application determined that the lock-in date for determining the age of the sons was the date of the

application for permanent residence and that subsection 25.1(9) of the IRPR did not apply. As held by Justice Bell at paragraph 24 of *Fortis* in his decision on the judicial review:

> ...when the Governor General in Council adopted the *2014 Amending Regulations*, the accompanying *Regulatory Impact Analysis Statement* recognized that, at the 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.

[23] Although by 2017 the 2017 Amending Regulations had returned the cut-off date to "less than 22 years of age", the underlying parameters for the new lock-in date as stated in *Fortis* remained applicable: "the Governor General in Council did not intend the new lock-in provisions to apply to applications already in progress".

[24] As the Applicant's refugee claim was in progress as of November 15, 2012, prior to the implementation of the 2014 Amending Regulations on August 1, 2014, it was reasonable for the Officer to rely on the transitional provisions of the IRPR and to use the date of the Application as the lock-in date instead of applying the new lock-in provision of subsection 25.1(9). Consistent with the transitional provisions, the Officer referred to section 2 of the IRPR, as it read prior to the 2014 Amending Regulations, and came to the conclusion that JA Orduno Maso, who was over 22 years of age at the date of the Application, was not a dependent child.

[25] I note that there was no evidence provided by the Applicant in response to the PFL that JA Orduno Maso met other requirements relating to dependency, such as being financially dependent on the Applicant and unable to be financially self-supporting due to mental or physical health conditions. Therefore, it was reasonable that the determination of eligibility was based on age alone.

IV. Conclusion

[26] For all of these reasons, I conclude that the Decision was reasonable and that the application must be dismissed.

[27] I note that no question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-1044-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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