Federal Court  Cour fédérale

Date: 20230607

Docket: IMM-6461-22

Citation: 2023 FC 806

Ottawa, Ontario, June 7, 2023

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

RAMESH NAGARAJAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Immigration Appeal Division [IAD] of the Immigration and Refugee Board of Canada [IRB] dated June 21, 2022 [the Decision]. In the Decision, the IAD dismissed the Applicant's appeal of a decision of the Immigration Division [ID] of the IRB, which found him inadmissible for misrepresentation

under subsection 40(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA] and issued an exclusion order against him.

[2] As explained in more detail below, this application is allowed, because the IAD conducted its analysis of the best interests of the Applicant's daughter in an unintelligible manner, rendering the Decision unreasonable.

II. **Background**

[3] The Applicant is a citizen of Sri Lanka. In 2004, his brother, a Canadian citizen, applied to sponsor the Applicant's parents for permanent residence as members of the Family Class. This application included the Applicant as a dependent of his parents.

[4] Prior to arriving in Canada as a permanent resident, the Applicant was married on October 17, 2008, to another citizen of Sri Lanka. They had a daughter on March 14, 2009. The Applicant did not disclose his wife and daughter on his permanent residence application, including on his most recent application form dated April 21, 2010.

[5] In 2009, the Applicant's wife misplaced their marriage certificate. The Applicant submits that at that time, during the height of a civil war in Sri Lanka, it was not a priority to replace it. His wife made unsuccessful attempts to replace the certificate in 2010.

[6] The Applicant landed as a permanent resident in Canada on July 5, 2010. He asserts that he was not interviewed when his parents attended a visa office in Sri Lanka shortly before their application for permanent residence was granted, and he does not remember completing the relevant forms. He also does not recall being examined directly after landing in Canada, but he recalls being asked to sign a form in English, which was not translated to him.

[7] The Applicant explains that his marriage was a contentious matter between him and his parents, as he married without their permission and did not advise his parents of his marriage or his daughter's existence until after they arrived in Canada. The Applicant further asserts that it never occurred to him that he would need to disclose his marriage and daughter on his permanent resident application, because they would not be coming with him to Canada at that time.

[8] The Applicant returned to Sri Lanka in October 2013 to visit his wife and daughter. As they were told by officials that the easiest way for them to get a marriage certificate was to re-marry, they married again on October 23, 2013, and were issued a new marriage certificate. On the new marriage certificate, they were listed as single, as they had no proof of their first marriage.

[9] The Applicant's wife and daughter live in Sri Lanka with his wife's mother. Her father immigrated to France, and her mother has been away from him for approximately seven years so that the Applicant's wife and daughter are not alone in Sri Lanka.

[10] After the October 2013 marriage ceremony, the Applicant returned to Canada and subsequently applied to sponsor his wife and daughter for permanent residence with the assistance of a consultant. The Applicant says that the consultant signed documents in his name and his wife's name without informing him and that she provided incorrect information on the forms. While the 2008 marriage certificate was not provided and that marriage was not mentioned in the application, the accompanying documents included the Applicant's daughter's birth certificate, which referred to her parents as married. During application processing, the Applicant's wife was able to obtain a copy of the original 2008 marriage certificate, which was also provided in support of their application.

[11] The Applicant switched to his current counsel due to issues with the consultant, and the consultant, while no longer acting, withdrew the sponsorship application. On June 23, 2017, the Applicant filed a new sponsorship application, which remains outstanding.

[12] On March 13, 2018, the Applicant was made the subject of a report under subsection 44(1) of the IRPA, which asserted he was inadmissible under subsection 40(1) of the IRPA for having misrepresented material facts that induced an error in the administration of the IRPA, namely, by failing to list his wife and child at the time of landing as a permanent resident in 2010. The section 44(1) report was referred to the ID, where the Applicant conceded that he did not disclose that he was married and had a child at the time he became a permanent resident of Canada and therefore had misrepresented. As a result, the ID issued a removal order against him The Applicant appealed the ID decision to the IAD, the Decision of which is the subject of this application for judicial review.

III. **Decision under Review**

[13] The Applicant asked that his appeal be allowed based on humanitarian and compassionate [H&C] grounds. However, the IAD found that the H&C considerations were not sufficient to overcome the seriousness of his misrepresentation and that his remorse was not genuine.

[14] The IAD found the Applicant's misrepresentation to be serious. The applicable regulations require that a foreign national must, at the time of the examination to become a permanent resident, inform an officer if they have a spouse or whether material facts relevant to the issuance of a permanent resident visa have changed or were not divulged since the visa was issued (see subsections 51(a) and 51(b) of the Immigration and Refugee Protection Regulations, SOR/2002-227). The IAD weighed the misrepresentation heavily against the Applicant in its assessment of H&C factors.

[15] The IAD also found that the Applicant did not indicate genuine remorse for his actions. On his first sponsorship application, the Applicant did not disclose that he was married in 2008. Although he took responsibility for his actions, he blamed them on the fact that his former representative entered incorrect information in the sponsorship application. In March 2016, the Applicant wrote to immigration authorities seeking to withdraw his first sponsorship application. In that letter, he indicated that he had asked his brother to remove him from his parents' permanent resident application but his brother refused. However, before the IAD, the Applicant denied asking his brother to remove him from the application. The IAD found that the Applicant

persistently blamed others, which did not indicate genuine remorse, and that, even if he had trouble understanding English, he was still responsible for ensuring he understood the content before signing the forms.

[16] The IAD found that the Applicant's misrepresentation began while he was in Sri Lanka, two years before his landing in Canada, and that, while he was not required to know Canadian immigration laws, he was required to be truthful and provide accurate and complete information to immigration authorities. The IAD further found that the Applicant was responsible for the contents of the applications he signed. The IAD also concluded that, regardless of the Applicant's reluctance to tell his family about his marriage, he was responsible for providing accurate information to immigration authorities.

[17] The IAD weighed favourably the Applicant's length of time in Canada (almost 12 years) and his social and economic establishment in Canada, including his employment, savings, and letters of support.

[18] The IAD found that the Applicant's ties to Canada were minimal when compared to Sri Lanka. While the Applicant's father had died recently, he had subsequently reconciled with his mother, brother and sister in Canada. However, his ties to Sri Lanka were found to be more significant because his wife and daughter, i.e. his nuclear family, live there.

[19] The IAD concluded that there would be minimal hardship if the Applicant returned to Sri Lanka, as he owns the house where his wife and daughter live in Sri Lanka. Although the

Applicant testified that he would not be able to get a permanent job in Sri Lanka, the IAD found this assertion to be speculative. The civil war in Sri Lanka ended in 2009, and the Applicant had not made any recent attempts to find full-time work there. While the IAD noted that country condition evidence [CCE] indicated generally that Tamils in Sri Lanka have experienced torture and discrimination and various other conditions such as sexual abuse and robbery, the IAD observed that the Applicant had not demonstrated that he or his family had experienced these problems in the past or established that they would upon his return.

[20] The IAD also found that the Applicant's expressed concerns about facing extortion or monitoring when returning to Sri Lanka was unsupported by the evidence. He is not a previous asylum seeker, and there was therefore insufficient evidence that he is vulnerable to extortion that the CCE indicated was faced by returning asylum seekers.

[21] The IAD was also not persuaded that the Applicant would experience more than minimal financial hardship if he returned to Sri Lanka. He owns a home in Sri Lanka with no mortgage and property tax amounting to $20 yearly. He may not find work immediately upon return, but he has $25,000 in savings, which he testified could last for two to three years in Sri Lanka. The Applicant also had not demonstrated that his daughter could not attend schooling alternative to her current private schooling and still have a good future or that he could not maintain a relationship with his family in Canada should he return to Sri Lanka. Further, the IAD found it reasonable to assume that any social pressures faced by his wife and daughter in Sri Lanka would be eliminated if the Applicant returned to live with them.

[22] Although the Applicant's immigration issues had been ongoing for almost six years, the IAD found this passage of time did not enhance his claim for relief, as there was no obligation on immigration officials to act within a timeframe hoped for by an applicant absent legislative direction.

[23] In relation to the best interests of the child [BIOC], the IAD ultimately concluded that the Applicant's daughter's best interests would be served by his return to Sri Lanka and that this factor did not weigh in favour of the Applicant. His daughter has had access to education in Sri Lanka, and there was no evidence to indicate she cannot continue to have adequate education there. There was also no medical evidence to indicate that her father's absence from her life had affected her mental health. The IAD observed that the Applicant's daughter has a place to live in Sri Lanka, her father has savings to sustain them for the next two to three years, and there was insufficient evidence to demonstrate she would personally be mistreated as a female Tamil in Sri Lanka. Further, his wife's mother could finally return to France to reunite with her husband if the Applicant returned to live with his wife and daughter.

[24] Overall, the IAD concluded there were insufficient H&C reasons to warrant special relief and dismissed the Applicant's appeal.

IV. **Issues and Standard of Review**

[25] The Applicant submits that the IAD erred in the following ways, rendering its decision unreasonable:

A. In placing undue emphasis on the Applicant's breach of the IRPA and ignoring or minimizing significant factors in the Applicant's favour;

B. In its assessment of the family reunification factors;

C. In minimizing and/or discounting the hardship the Applicant, his wife, and his daughter face in Sri Lanka;

D. In refusing to accept or consider the current conditions in Sri Lanka;

E. In rejecting the letters of support provided by the Applicant based on what they did not say rather than what they did say;

F. In failing to consider the impact of delays in the processing of the Applicant's case;

G. In failing to engage in an assessment of the BIOC.

[26] Consistent with the Applicant's articulation of the issues, the parties agree (and I concur) that the standard of review applicable to these issues is reasonableness (see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

V. **Analysis**

[27] As set out above, the Applicant has raised a number of issues in challenging the reasonableness of the Decision. However, in oral argument, his counsel focused on a subset of

these issues, including the reasonableness of the IAD's BIOC analysis. I find the Applicant's submissions on that issue compelling.

[28] As explained above, the IAD found that it would be in the Applicant's daughter's best interests if he were to return to Sri Lanka to reunite with her there. As such, the BIOC factor militated against granting H&C relief. However, as the Applicant submits, the Decision fails to engage intelligibly with the Applicant's argument that it would be in his daughter's best interests if his request for H&C relief was granted, so that he could remain in Canada and she could join him here. While the IAD recognized the daughter's expressed preference for them to live together as a family in Canada, the Decision contains no analysis of that possibility or explanation why the IAD rejected the Applicant's position that this outcome would be in his daughter's best interests.

[29] To be clear, the IAD was not required to agree with the Applicant's position that his daughter's best interests would be served by reuniting the family in Canada. Moreover, even if the IAD had agreed with this position, such that the BIOC factor favoured granting H&C relief, the IAD was not required to treat this factor as determinative. However, as explained at paragraph 128 of *Vavilov*, a decision-maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision-maker was actually alert and sensitive to the matter before it. In the present case, the Applicant and the Court are left unable to understand the reasoning underlying the IAD's conclusion that BIOC favoured reunification in Sri Lanka rather than Canada.

[30] In my view, the Applicant's position on the important BIOC factor was a sufficiently central argument in his H&C submissions that the IAD's failure to engage intelligibly with that argument renders the Decision unreasonable (see *Vavilov* at para 100). As a result, this application for judicial review will be granted, the Decision set aside, and the matter returned to a differently constituted panel of the IAD for redetermination. It is therefore unnecessary for the Court to consider the other issues raised by the Applicant.

[31] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT in IMM-6461-22

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a differently constituted panel of the Immigration Appeal Division for redetermination. No question is certified for appeal.

"Richard F. Southcott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6461-22
STYLE OF CAUSE:	RAMESH NAGARAJAH v. MCI
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 5, 2023
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	JUNE 7, 2023

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