Federal Court  Cour fédérale

Date: 20230412

Docket: IMM-1475-22

Citation: 2023 FC 517

Ottawa, Ontario, April 12, 2023

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ROGELYN CABIGAS

Respondent

JUDGMENT AND REASONS

[1] The Respondent, Ms. Rogelyn Cabigas, is a citizen of the Philippines and permanent resident of Canada. She applied to sponsor her husband for permanent residence. The application was denied. The negative decision was appealed to the Immigration Appeal Division [IAD]. In a decision dated February 2, 2022 the IAD allowed the appeal on humanitarian and compassionate grounds [H&C].

[2] The Minister applies under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the IAD's decision. The Minister submits that the IAD breached procedural fairness by failing to provide an opportunity to make submissions on the H&C issue, contrary to the process proposed by IAD and to which the Parties had agreed.

[3] The Minister submits that the IAD had, with the agreement of the Parties, adopted a process that would address the issues in two distinct phases. In phase one, the IAD was to consider the substantive issues raised on appeal. If the manner in which the IAD disposed of the substantive issues then required the IAD to consider its equitable H&C jurisdiction (section 65 IRPA), the proposed phase two of the proceeding would be conducted and the Parties would be provided the opportunity to advance evidence and make H&C submissions.

[4] Questions of procedural fairness are not decided according to any particular standard of review but instead engage a legal question: whether, taking into account the particular context and circumstances at issue, the process followed by the decision maker was fair (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]). The circumstances to be considered include the non-exhaustive contextual factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. A fairness review is functionally similar to, and is best described as, review on a standard of correctness (*CPR* at para 54).

[5] The Respondent argues there was no breach of fairness. The Respondent submits that upon conclusion of the oral hearing of the substantive issues raised on appeal, the IAD was in a

position to conclude, as it did, that H&C relief was warranted. The Respondent submits the Minister was on notice that she would be seeking H&C relief, and the Minister had ample occasions to advance evidence and arguments on the issue – opportunities that the Respondent took advantage of when she submitted materials in favour of relief. The Respondent further argues that the IAD, as master of its process, has a wide discretion to determine matters without the benefit of an oral hearing and reasonably did so in this instance.

[6] The Respondent acknowledges the two-phase approach to the proceeding was raised and discussed but was not clearly and unambiguously adopted by the IAD. The Respondent argues the IAD did not commit to a further hearing or an opportunity to advance evidence or make submissions on the H&C considerations. According to the Respondent, the possibility that the IAD might solicit H&C submissions was not equivalent to a promise and did not raise a legitimate expectation (*Canada (Attorney General) v Mavi*, 2011 SCC 30). Finally, the Respondent argues that if there was a breach of fairness, the Minister's failure to present evidence of actual prejudice resulting from the breach is fatal to the Application.

[7] Contrary to the Respondent's view, I am satisfied that the IAD first proposed a two-phase procedure and that there was an understanding between the IAD and the Parties that the matter would proceed on that basis at the outset of the June 15, 2021 hearing. The hearing transcript evidences:

A. The IAD proposed that the substantive issues raised on the appeal be addressed and decided first and that the H&C issue be addressed subsequently, if required (Applicant's Record [AR] at pages 62-63).

B. In responding to Respondent's counsel, the IAD confirmed that the intent was to hear the witnesses on the substantive issues and then hear the witnesses again at a later time on the H&C issue (AR at page 63).

C. The IAD acknowledged that the Respondent had filed some H&C evidence but also acknowledged that "if we need to come back for a further sitting" additional evidence can be filed (AR at page 64).

D. The IAD then asked counsel to confirm if the proposed process "made sense"; both Parties responded in the affirmative (AR page 64).

[8] The Respondent points to, and I acknowledge, the conditional language used throughout the discussion on June 15, 2021. However, the conditional language was not due to any uncertainty in the process. Rather, it reflected the simple fact that H&C considerations depended on how the IAD determined the substantive issues in the first phase. Considering the exchange as a whole and in context, I am satisfied there was a clear and unambiguous understanding reached that the Parties would be given a further opportunity to advance evidence and make submissions if, after having determined the substantive issues, the IAD had to decide the H&C issue.

[9] The IAD's undisputed discretion relating to its process is of little assistance to the Respondent where, as here, the IAD directed a process and, without notice, proceeded differently. Similarly, the argument that the Minister had the opportunity to advance H&C evidence and make submissions during phase one of the process cannot be held against the Minister where it was understood the H&C issue was to be addressed separately.

[10] In the circumstances, the IAD's failure to respect the process was manifestly unfair and a clear breach of fairness. The jurisprudence establishes that a breach of fairness will ordinarily render a decision invalid unless it can be demonstrated the outcome is legally inevitable or the breach of fairness has been cured in an intervening proceeding (*Canada (Attorney General) v McBain*, 2017 FCA 204 at paras 9-10). Neither of these exceptions apply here.

[11] The Respondent argues that if the Court finds a breach of fairness occurred then the matter should be remitted for redetermination on the sole issue of whether H&C relief is warranted. The Respondent further submits that the Court direct the matter be considered by the same panel.

[12] The Minister argues it would be inappropriate to remit this matter back to a decision maker who has already ruled that H&C factors warrant a positive decision, albeit without the evidence and submissions of the Minister.

[13] The IAD hearings in this matter extended over the course of a year, evidence was heard over more than 7 hours, and the Respondent's interests in a final determination of this matter are significant. The sole issue raised on judicial review was a procedural error. In the circumstances, I am not persuaded that it would be inappropriate to remit the matter to the original panel to decide the H&C issue on the basis of the existing record and in accordance with the process established by the IAD. The Parties should first be provided the opportunity to advance evidence and submissions on the H&C issue.

[14] The Parties have not identified a question for certification, and I am satisfied none arises.

JUDGMENT IN IMM-1475-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted in part; the H&C portion of the IAD's February 2, 2022 decision is set aside.

2. The H&C portion of the IAD's February 2, 2022 decision is remitted to the original panel for redetermination based on the entire existing record and the Parties will be provided the opportunity to advance evidence and submissions on the H&C issue.

3. In the event the original panel is unavailable the Parties may seek further direction from the Court.

4. No question of general importance is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1475-22
STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION v ROGELYN CABIGAS
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