Federal Court  Cour fédérale

Date: 20150525

Docket: IMM-1846-14

Citation: 2015 FC 677

Toronto, Ontario, May 25, 2015

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

PABLO SEBASTIAN SALAZAR MUNOZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review by Pablo Sebastian Salazar Munoz [the Applicant] under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 of a decision by an Immigration Officer [the Officer], dated December 19, 2013, in which the Officer refused the Applicant's application for permanent residence in Canada on humanitarian and compassionate [H&C] grounds. The application is granted because the Applicant was denied procedural fairness.

[2] The Applicant was born on June 9, 1981 in Chile, where he is a citizen. The Applicant entered Canada on July 8, 2010 and was granted temporary resident status as a visitor, valid until January 7, 2011. The Applicant remained in Canada beyond the expiry of his temporary resident status without authorization. On May 26, 2011, the Applicant married a Canadian citizen who submitted a sponsorship application to sponsor him on January 31, 2012. This sponsorship application was withdrawn on September 16, 2012 due to a separation in the relationship. On March 1, 2013, the Applicant applied for permanent residence from within Canada on H&C grounds. His application was based on establishment (he resided in Canada for over three years, was employed for over one year, participated in volunteering activities, and had numerous letters of support from friends, community liaison and volunteer coordinator in Canada) as well as risk and adverse country conditions (hardship, discrimination and violence due to his homosexuality and HIV status).

[3] On December 19, 2013, the Officer refused the Applicant's application for permanent residence from within Canada on H&C grounds. The Applicant filed an application for leave and judicial review in this Court on March 25, 2014, which was granted on February 4, 2015.

[4] The Officer was asked to determine whether the Applicant, in order to obtain permanent residence, should be exempt, on H&C grounds, from the requirement of presenting his application from outside Canada and from the obligation to meet the requirements of a permanent resident category. In this connection, the Officer noted that the Applicant bore the onus of establishing that his personal circumstances are such that the hardship of having to

obtain a permanent resident visa from outside Canada in the normal manner would be unusual and underserved, or disproportionate.

[5] The Officer made a number of findings in his reasons, many if not most of which were challenged by the Applicant in his written and oral submissions.

[6] However, in my view the determinative issue is the Officer's discussion and findings that the Applicant, as a national of a country which is a member of the Union of South American Nations [USAN], had the right to live and work in Brazil, Paraguay, Uruguay, Venezuela, Bolivia, and specifically, in Argentina. The Applicant alleges this discussion and analysis were arrived at in breach of his right to procedural fairness. I agree.

[7] The Officer reported on research conducted independent of the application and found that "[w]hile same-sex marriage and same-sex adoption is not currently legal in Chile, […] they are legal and acceptable in Argentine, Chile and Uruguay". I note parenthetically that the Officer erred in mentioning Chile; the Applicant suggested Brazil was intended. The Officer said there were no reports of societal discrimination against persons with HIV/AIDS in Argentina and Uruguay. The Officer also found there was no official discrimination based on sexual orientation in employment, housing, statelessness, and no issues of access to education or health care in Argentina. The Officer criticized the Applicant for not demonstrating why he could not relocate to these countries. The Officer noted that based on the information the Applicant provided, the Applicant himself had held previous employment in Argentina and Brazil as a sales representative and tour guide.

[8] The critical finding made by the Officer is that, based on the results of the Officer's review of various country conditions, the Applicant could relocate to Argentina because he had a legal right to live and work there should he desire.

[9] In my view, the Officer erred in making these findings for several reasons.

[10] First, there was no evidence before the Officer that nationals of USAN member countries had the right to work and live in other member countries. Neither is there any such evidence before this Court. A finding made without regards to the evidence is an error of law: *Siad v Canada (Secretary of State)*, [1997] 1 FC 608 at para 24 (FCA).

[11] In addition, the USAN treaty was not before the Officer. While the treaty was filed with this Court on judicial review, in my view its language does not support the Officer's findings that the Applicant had a right to live and work in other USAN countries.

[12] The Officer referred to a number of webpages as sources for his finding that the Applicant could relocate to other USAN countries. However, none of these webpages support the Officer's conclusions in this regard. This underscores both the need for evidence on the record and the unreasonableness of expecting the Applicant to anticipate the Officer's procedurally unfair independent research.

[13] The Officer denied the Applicant procedural fairness by engaging in this examination and making the resulting conclusions without providing him any notice or warning. Procedural

fairness entitles the claimant to know the case he or she has to meet: *Muthusamy v Canada (Minister of Employment and Immigration)* (1994), 50 ACWS (3d) 475 at para 4; *Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1368 at para 36; *Yildiz v Canada (Minsiter of Citizenship and Immigration)*, 2013 FC 839 at para 47. Knowledge of the case to meet may be imputed where it is reasonable to expect the claimant to know or anticipate the panel's findings, such as where the RPD relies on publicly available country documentation that is not materially different from the documents it disclosed: *Chen v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1218 at paras 16-17. Here however, the claimant could not reasonably be expected to know or anticipate that the Officer would engage in this supplementary research and reach the conclusions he did on its basis.

[14] If an officer wishes to find that an H&C claimant could return elsewhere than the country of his or her nationality, which finding an Officer may or may not be entitled to make in the context of an H&C application, a point I do not need to decide, that officer must respect the rules of procedural fairness.

[15] Finally, it was a breach of procedural fairness for the Officer to criticize the Applicant for failing to rebut the Officer's findings where the Applicant had no reason to anticipate either the Officer's line of investigation or the Officer's conclusions.

[16] The Court is asked to uphold the decision of the Officer because, according to the Respondent, it would be futile to send it back for re-determination given the many other findings

the Officer made against the Applicant. The Respondent argues that these flawed findings were irrelevant, immaterial or peripheral. I disagree.

[17] In this connection, the leading authorities are *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Boa*rd, [1994] 1 SCR 202 and *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643. In this Court, Justice de Montigny summarized the relevant principles in *Sarker v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1168 at paras 16-17:

> [16] Where the parties differ, however, is with respect to the consequences of this breach. Relying on *Cardinal v Director of Kent Institution*, [1985] 2 SCR 643, 24 DLR (4th) 44, counsel for the Applicant argues that this denial of natural justice is so egregious that it calls for the quashing of the decision. Counsel for the Respondent, on the other hand, submits that nothing turns on this mistake and that it was purely peripheral to the assessment of the Applicant's credibility.
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> [17] Having carefully examined the impugned decision, I do not think it can confidently be said that this breach of procedural fairness had no impact on the decision of the Board. The Respondent's argument may have been more compelling had the Board Member not dealt with the identity issue after paragraph 16 of his decision. To the contrary, the Board's identity concerns appear to have permeated its credibility analysis and may have had a material impact on the Applicant's claim. At paragraph 23 of its decision, the Board mentions the Applicant's lack of personal identity documents in questioning the authenticity of the newspaper articles and the arrest documents. Most importantly, the Board explicitly links the identity concern with the credibility analysis at paragraph 27 ("The absence of documentation confirming both his identity and arrival in Canada is problematic and further contributes to an overall concern with the credibility of the claim"). Accordingly, it cannot be said that the breach of procedural fairness was not material and that there is no point sending the Applicant's claim back to the Board. This is not such a case as *Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, 111 DLR (4th) 1, where it could safely be said that the Board would most likely reach the same decision if it were to re-examine the Applicant's claim

> afresh. There is every indication that the Board's assessment of the Applicant's identity coloured its credibility analysis.

[18] The Respondent submitted, and I certainly agree, that not every breach of procedural fairness results in a right to a new hearing because otherwise the doctrine of futility would have no purpose. Judicial review as has often been stated, is not a "line-by-line treasure hunt for error" criticized by the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at paragraph 54, [2013] 2 SCR 458. However, in the case at bar, I am unable to say with confidence that these particular breaches had no impact on the Officer's decision. The Officer devoted some considerable attention to these issues. The Applicant's alternative places of residence and work were researched in detail by the Officer. I am entitled to assume that the Officer went to this effort because it was considered important to decide the point in the Applicant's case. On balance, these findings were material to the decision of the Officer in the sense that they formed an integral part of his reasons. I am unable to determine if the result would be the same but for the errors. I conclude that it would be unsafe to permit this decision to stand and therefore it is set aside.

[19] Having found that the decision is flawed by an error of law, there is no need to address the impugned findings further. However, I note a report from the Chilean consular offices in Toronto, filed by the Applicant as proposed new evidence, that indicated that there is no agreement between USAN member countries that allow citizens of one member country, without obtaining work permits, to work in another member country. In this connection, there is no evidence before this Court on whether work permits are easy or difficult to obtain. However, I

need not decide the admissibility of the proposed new evidence but wish to add that the applicable law in this connection was recently revised in *Delios v Canada (AG)*, 2015 FCA 117.

[20] Given the above, it is not necessary to determine the other issues raised by the Applicant.

[21] Neither party proposed a question to certify, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision is set aside, the matter is remitted for re-determination by a different H&C officer, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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