Federal Court  Cour fédérale

Date: 20161114

Docket: IMM-3629-15

Citation: 2016 FC 1261

Ottawa, Ontario, November 14, 2016

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

ADOLF HORVATH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Adolf Horvath, seeks judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision by an Immigration Officer (the Officer) dated July 28, 2015, refusing his application for permanent residency based on spousal sponsorship on grounds of his criminal inadmissibility and finding that an exemption from his criminal inadmissibility on Humanitarian and Compassionate (H&C) grounds was not warranted.

[2] For the reasons that follow, the application for judicial review is dismissed.

[3] The Officer considered all the relevant H&C factors, explained why some factors were given less weight than others, and reasonably found that there were insufficient H&C factors to justify an exemption from criminal inadmissibility.

[4] Mr. Horvath's allegations of institutional bias are not supported by the evidence. The record reveals that each decision-maker acted within the bounds of their authority and based their decisions on the evidence before them. The Officer's decision does not show any pre-disposition to the outcome; it shows a careful scrutiny of the application with reference to the facts and the law. Although Mr. Horvath is dissatisfied with the outcome of this and previous applications, his bald allegations of bias are without merit.

I. Background

[5] Mr. Horvath is a Hungarian citizen of Roma ethnicity.

[6] He first arrived in Canada using an alias and made a claim for refugee status on February 16, 1989. His claim was rejected, and he left Canada sometime after May 25, 1990.

[7] Mr. Horvath arrived in Canada again on March 10, 1994, using another alias. He made a second refugee claim, which was denied, as was his subsequent judicial review of the decision. A removal order was issued.

[8] Mr. Horvath arrived in Canada for a third time on January 1, 1999. His refugee claim was refused due to a pre-existing exclusion order. It appears that he remained in Canada.

[9] He first applied for permanent residence on H&C grounds in January 2002. This application for permanent residence was denied based on serious criminality in July 2005.

[10] On February 9, 2003, Mr. Horvath requested a Pre-Removal Risk Assessment (PRRA). On October 4, 2004, he received a positive PRRA decision and was granted protected person status. On January 31, 2005 he applied again for permanent residence as a protected person.

[11] In the meantime, extradition proceedings were underway due to criminal charges against Mr. Horvath in Hungary. On November 14, 2003, he was arrested under the *Extradition Act*, SC 1999, c 18. After unsuccessful legal challenges to his pending extradition, including an unsuccessful application for leave to appeal to the Supreme Court of Canada, he was extradited to Hungary on September 1, 2009. He was convicted and sentenced on two counts of extortion with respect to offences that occurred between 1995 and 1997.

[12] Mr. Horvath returned to Canada on May 18, 2011. As a result of his convictions in Hungary, a Section 44 Report was made and a removal order was issued on August 8, 2012. He appealed and, on consent of the Respondent, the Immigration Appeal Division (IAD) stayed his removal order, with conditions, on March 22, 2013.

[13] Mr. Horvath's application for permanent residency as a protected person (made in January 2005) was refused on February 12, 2013, due to criminal inadmissibility.

[14] On March 13, 2013, he submitted a spousal sponsorship application for permanent residence. He also requested an H&C exemption from his criminal inadmissibility (paragraph 36(1)(b) of the Act).

[15] On January 30, 2015, the IAD found that Mr. Horvath had complied with the conditions of his stay of removal order, cancelled the stay, and set aside his removal order.

II. The Decision Under Review

[16] On July 28, 2015, the Officer refused Mr. Horvath's spousal sponsorship application for permanent residency. The Officer found that Mr. Horvath's marriage to a Canadian citizen was genuine and that he met the first stage eligibility criteria. However, he did not meet the statutory requirements under subparagraph 72(1)(e)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 for permanent residence because he was criminally inadmissible pursuant to paragraph 36(1)(b) of the Act. The Officer also found that there was insufficient evidence to justify an exemption on H&C grounds.

[17] The Officer set out Mr. Horvath's immigration history and the basis for his spousal sponsorship application.

[18] The Officer acknowledged Mr. Horvath's submissions regarding the hardship he would face if returned to Hungary, the best interests of his son, and his establishment in Canada, but found that, as a protected person, Mr. Horvath did not face removal from Canada, and therefore, these factors were not significant.

[19] The Officer addressed Mr. Horvath's submissions regarding his rehabilitation, including that his most recent conviction in 2009 was for offences committed in 1997, and that he had not committed any offences since that time. The Officer set out a chronology of Mr. Horvath's criminal history from 1977 to the time he left Hungary in 1999. The Officer noted that Mr. Horvath was extradited in 2009, was convicted of extortion, and was sentenced to one year and ten months in prison, followed by three years of probation. The Officer described the nature of the extortion, which included the use of violence and occurred over a two year period. The Officer took issue with Mr. Horvath's submission that his last offence occurred in 1997. The Officer noted that Mr. Horvath had fled justice in Hungary, remained in Canada as a fugitive, and went into hiding to avoid the extradition process. The Officer added that Mr. Horvath had repeatedly flouted Canada's immigration laws since his first arrival in 1989.

[20] The Officer found that, based on the totality of the information before him, there was insufficient evidence to establish that Mr. Horvath was rehabilitated, noting his many convictions, the serious nature of his crimes , and his failure to acknowledge and accept responsibility.

III. The Issues

[21] Mr. Horvath argues that the Officer's decision is unreasonable because it is devoid of a sense of compassion, fails to grasp the reason for his request for an H&C exemption and does not reflect a global assessment of the relevant H&C factors as required by *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*].

[22] Mr. Horvath also argues that the record demonstrates a reasonable apprehension of institutional bias against him.

IV. The Standard of Review

[23] An immigration officer's decision to grant or refuse an H&C application is discretionary and the standard of review is reasonableness (*Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835 at para 6, [2006] FCJ No 1061 (QL); see also *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57-62).

[24] The reasonableness standard focuses on "the existence of justification, transparency and intelligibility within the decision-making process" and considers "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Deference is owed to the decision-maker. The Court will not re-weigh the evidence.

[25] The right to an independent and impartial tribunal is a matter of procedural fairness (see *Martinez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1065 at para 5, [2005] FCJ No 1322 (QL)). The standard of review for issues of procedural fairness is correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). If a breach of procedural fairness is found, no deference is owed to the decision maker.

V. Is the Officer's decision reasonable?

[26] Mr. Horvath argues that the Officer erred in his H&C analysis by misunderstanding his submissions and failing to consider the hardship he would face in Hungary, the impact on his son's best interests, and his establishment in Canada. He submits that the Officer erroneously assumed that, because he is a protected person, he does not face removal from Canada. He argues that these factors remain relevant, despite his protected person status in Canada. Mr. Horvath points to the affidavit of his son, who indicated the impact of both being separated from his father and the uncertainty of his father's removal, and his own affidavit, in which he noted the debilitating effect of being "in limbo."

[27] Mr. Horvath adds that he has little confidence in his protected status in Canada because despite that status, he was extradited to Hungary in 2009.

[28] Mr. Horvath points to *Mirza v Canada (Minister of Citizenship and Immigration)*, 2016 FC 510 at para 49, [2016] FCJ No 473 (QL) [*Mirza*], where the Court found that, although the applicant was not facing imminent removal, "this does not alleviate or address the impact on him

of his lack of status at the present time." He submits that the same principle applies to his circumstances.

[29] Mr. Horvath also argues that the Officer erred in his H&C assessment because the Officer did not apply the guidance of the Supreme Court of Canada in *Kanthasamy*, which calls for a global or cumulative assessment of all relevant considerations. He submits that the Officer focussed on his criminal history and failed to consider all the positive factors favouring an H&C exemption.

[30] Mr. Horvath also submits that the Officer focussed on his lack of remorse but failed to consider that he should not be expected to feel remorse for criminal charges and convictions that he was not responsible for. He notes that he did express regret for his violations of Canadian immigration laws.

[31] The Respondent submits that the Officer considered Mr. Horvath's request for an exemption on H&C grounds in its proper context, which is an exemption from criminal inadmissibility by a protected person. The Officer considered the factors relevant to the particular request and weighed the evidence accordingly. The Officer did not err in finding that the hardship of returning to Hungary, the loss of his establishment in Canada, and the impact on his son's best interests were not significant factors, because Mr. Horvath was not being removed from Canada.

[32] The Respondent submits that the Officer exercised his discretion reasonably and found that Mr. Horvath's criminality outweighed other H&C considerations.

VI. The Decision is Reasonable

[33] The Officer did not err in his analysis of whether an exemption was warranted on H&C grounds. Although the Officer did not have the guidance of the Supreme Court's decision in *Kanthasamy*, he did not restrict his consideration of the H&C exemption to "unusual and undeserved or disproportionate hardship" and considered all the relevant factors holistically.

[34] At para 33 of *Kanthasamy*, Justice Abella noted:

> The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.

[35] Justice Abella also noted earlier in the decision, at para 25:

> What *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them: *Baker*, at paras 74-75.

[36] In the present case, the Officer considered all of Mr. Horvath's submissions in the context of the case. This context included the fact that Mr. Horvath is not facing removal from Canada and will not face removal unless he commits further criminal offences. Even then, he would have the benefit of a further risk assessment.

[37] The Officer found that in order to address Mr. Horvath's submissions regarding the hardship he would face in Hungary as a Roma, he should first assess the probability that Mr. Horvath would be returned to Hungary. The Officer noted that Mr. Horvath had protected person status and could not be removed from Canada unless he commits further serious crimes and is identified by the Minister as a danger to Canadian society. The Officer added that there was no indication that the stay of Mr. Horvath's removal order would be reassessed or cancelled, nor was there any other evidence that he would be removed from Canada.

[38] In *Balathavarajan v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 340, 152 ACWS (3d) 301, which involved consideration of H&C relief from a deportation order issued against a Convention refugee, the Federal Court of Appeal noted at para 9:

> Here, the Minister had not specified the country of deportation, and at the time of the IAD appeal had not taken the necessary steps under subsection 115(2) of the IRPA to remove the appellant. It was, at the time of the IAD appeal, not only unlikely but legally improper to remove the appellant to Sri Lanka. For the IAD to consider potential hardship the appellant might face if deported to Sri Lanka would have been a hypothetical and speculative exercise. This it need not do.

[39] As in *Balathavarajan*, at the time of the Officer's decision, Mr. Horvath's removal to Hungary was neither imminent nor likely. Therefore, it was not necessary for the Officer to

conduct a more detailed assessment of hardship on the basis of an unlikely hypothetical and it was reasonable for the Officer to find this factor to be not relevant.

[40] Contrary to the Applicant's assertion, I do not agree that *Mirza* established a general principle that a decision maker must consider the impact of an applicant's lack of status in Canada and all the possible H&C factors that would result from removal, despite the fact that the applicant is not facing removal. Mr. Mirza was found criminally inadmissible due to his membership in the Muttahida Qaumi Movement in Pakistan when he was 14 years old. He sought an exemption from criminal inadmissibility due to a range of H&C factors and made extensive submissions on the impact of his lack of status in Canada and the consequences of his possible removal. The Immigration Officer found that there were insufficient H&C grounds to refer his application to the next level of decision-maker. I found that the decision was unreasonable because, first, the Officer failed to consider the nature of Mr. Mirza's criminal inadmissibility and, second, the Officer did not grasp Mr. Mirza's evidence regarding the impact of his lack of status in Canada and erred in characterizing his submissions as emotional rather than legal issues.

[41] The statement at paragraph 49 of *Mirza*, relied on by Mr. Horvath, arose from the particular facts and the impact on Mr. Mirza who, as noted, had made extensive submissions about his lack of status.

[42] In the present case, unlike *Mirza*, the Officer thoroughly considered the nature of Mr. Horvath's criminal inadmissibility. Although Mr. Horvath stated in an affidavit, submitted in

support of his spousal sponsorship application in 2012, that “living in limbo is also very difficult. The uncertainty is debilitating and I suffer from it”; he did not provide extensive submissions on the impact of the uncertainty of his status in Canada.

[43] Mr. Horvath’s concern that his protected person status did not protect him from extradition in 2009 and would not protect him today overlooks the fact that he is no longer facing outstanding criminal charges in Hungary. This differs from the context in 2004 when, despite a positive PRRA, he was fully aware that he was facing removal to Hungary under the criminal extradition process. At present, given his assertions that he is a model citizen and has no criminal convictions or outstanding charges of any sort in Canada or abroad, he does not face the same risk of removal.

[44] The Officer did not ignore or misunderstand the submissions regarding the best interests of Mr. Horvath’s son. The Officer noted the affidavit of Mr. Horvath’s son, which described the impact upon him of witnessing persecution in Hungary as a young child. The Officer also acknowledged Mr. Horvath’s own affidavit, which stated that his wife and son would face risks in Hungary and that they could not return there to live or to visit him. The Officer reasonably found that, in the circumstances, there was no evidence that Mr. Horvath would be removed and, therefore, the best interests of his son, who at that time was 20 years old, were not at stake. The Officer also noted the contradictory evidence that Mr. Horvath’s wife and son had visited Hungary for two long periods during his most recent incarceration, without incident.

[45] The Officer accepted that Mr. Horvath and his family are well established in Canada but, given that Mr. Horvath did not face removal, reasonably found that there was insufficient evidence that this establishment was in jeopardy.

[46] The Officer conducted a detailed assessment of Mr. Horvath's criminal history and, given that the exemption sought was from criminal inadmissibility, reasonably attached significant weight to the rehabilitation factor.

[47] In *Lupsa v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1054, [2009] FCJ 1270 (QL) [*Lupsa*], at para 51, Justice Shore noted that, in finding insufficient H&C grounds to overcome criminal inadmissibility, the Minister's delegate is entitled to place more weight on the applicant's criminal history:

> In *Cha v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 F.C.R. 409, the Federal Court of Appeal, relying on the Supreme Court of Canada's decision in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, stated that Parliament had made it clear that criminality of non-citizens is a major concern:
>
> > [24] Parliament has made it clear that criminality of non-citizens is a major concern. Two of the objectives of the Act are criminality driven:
> >
> > - The protection of the health and safety of Canadians and the maintenance of the security of Canadian society (paragraph 3(1)(*h*) of the Act);
> >
> > - The promotion of international justice and security . . . by the denial of access to Canadian territory to persons who are criminals or security risks (paragraph 3(1)(*i*) of the Act).
>
> The Supreme Court of Canada has recently stated that the objectives stated in the new Act indicate an intent to prioritize security and that this objective is given effect, *inter alia*, by

> removing applicants with criminal records from Canada. Parliament has demonstrated a strong desire in the new Act to treat criminals less leniently than under the former Act. (*Medovarski, supra*, at paragraph 10).
>
> [Emphasis in original]

[48] In the present case, the Officer noted both Mr. Horvath's lengthy criminal record and his denial or lack of acceptance of responsibility for his past crimes. The Officer also noted Mr. Horvath's violations of Canadian immigration law. The Officer reasonably rejected Mr. Horvath's contention that his criminal record was due to being targeted in Hungary. The Officer's thorough assessment of the record, dating back to 1977, justifies the Officer's conclusion that there was no evidence to support the assertion that those convictions were the result of being targeted as a Roma.

[49] The Officer did not dwell unreasonably on this aspect of his application. On the contrary, the Officer was required to fully assess the nature of Mr. Horvath's criminal record because the exemption sought pertained to criminal inadmissibility.

[50] The Officer's finding that Mr. Horvath did not demonstrate any remorse is reasonable. The evidence before the Officer shows only that Mr. Horvath expressed regret at not reporting for his extradition, remaining at large, and exposing his family to the consequences. The Officer considered Mr. Horvath's argument that it was reasonable for him to evade extradition to avoid persecution in Hungary, but found that Mr. Horvath had availed himself of the Canadian judicial system to contest his extradition and had the opportunity to advance this argument at that time.

[51] Mr. Horvath disputes his criminal record, and maintains that he did not commit the extortion offences. He maintains he chose not to contest the charges in order to secure an earlier release. Nonetheless, the Officer's conclusion was based on a reasonable assessment of the charges and the legal process, as described in the Hungarian Court documents.

[52] The Officer considered all the relevant H&C factors, explained why some factors were not relevant or were given less weight than others, and determined that there were insufficient H&C factors—on the facts and in the context of this case—to justify an exemption from criminal inadmissibility. The assessment reflects the approach established in *Kanthasamy* (at para 25).

[53] The Officer's decision reflects the hallmarks of a reasonable decision; the decision is justified, transparent and intelligible and falls within the range of acceptable outcomes which is supported by the evidence on the record and by the law.

VII. The Record Does Not Demonstrate Institutional Bias

[54] The test for bias was established by Justice de Grandpré, writing in dissent, in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at 394, 68 DLR (3d) 716:

> […] the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information […] [T]hat test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[55] In *R v S (RD)*, [1997] 3 SCR 484, 151 DLR (4th) 193 [*RDS*], at para 113, Justices L'Heureux- Dubé and McLachlin referred to the test and noted that the threshold for a finding of real or perceived bias is high, explaining that "an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice." They cautioned that allegations of bias are serious and should not be made lightly.

[56] I noted that same caution at the hearing of this application.

[57] Mr. Horvath's allegations of bias appear to be based on his immigration history in Canada as a whole, which he asserts gives rise to a reasonable apprehension of institutional bias, and which is also reflected in the Officer's decision. He suggests that there is a "guiding hand," presumably within the Department of Citizenship and Immigration, that does not want him to have status in Canada.

[58] Mr. Horvath submits that the tone of the Officer's decision, particularly the Officer's lengthy description of his criminal history, and the emphasis placed on the rehabilitation factor, does not demonstrate an open mind. He adds that the Officer's remarks about his avoidance of immigration laws ignores that he had a valid reason to evade deportation.

[59] Mr. Horvath provided a chronology of his immigration proceedings from 2002 to 2015, noting that he applied for status many times and yet remains without status.

[60] In oral submissions, Mr. Horvath pointed to an email exchange in 2003 between Enforcement Officers in the Toronto Fugitive Squad and the Liaison Officer at the Canadian Embassy in Budapest. He submits that these emails demonstrate a desire or intention that his PRRA not proceed and is an example of the pre-disposition of the Respondent to ensure he does not gain status in Canada.

[61] The onus of establishing bias rests on Mr. Horvath. A reasonable apprehension of bias requires more than mere suspicion and bald allegations arising from dissatisfaction with the outcome. The allegation must be accompanied by cogent evidence (*RDS* at paras 114, 117). In this case, there is no evidence, let alone cogent evidence, to suggest that an informed person would have a reasonable apprehension of bias.

[62] Mr. Horvath's allegations regarding the email exchange in 2003 are without merit. The email exchange demonstrates that the Enforcement Officers were doing exactly what they were tasked with doing. In the exchange, it is clear that the Officers were requesting information about Mr. Horvath's criminal history in Hungary, given that he was applying for both H&C relief and a PRRA. The Enforcement Officers noted several relevant facts, including that Mr. Horvath was under a deportation order, had used a false passport, and was living at an address other than that provided to immigration authorities. At that point in time, Mr. Horvath had sought entry to Canada three times using aliases and false documents. The Enforcement Officers simply stated a fact that, if Mr. Horvath were granted status pursuant to his H&C or PRRA, it would take additional time to prepare to remove him from Canada if that decision were made.

[63] Similarly, the allegation that there is a “guiding hand” is contradicted by the evidence. Mr. Horvath pursued several immigration applications with different results. For example, he was granted protected person status in 2004. His removal order was stayed in 2013 and set-aside in January 2015. This does not suggest any “guiding hand.” Rather, each decision-maker assessed the particular application with regard to the Act and the evidence before them.

[64] Nor does the Officer’s focus on the rehabilitation factor suggest bias. Mr. Horvath seeks an H&C exemption from his criminal inadmissibility. The Officer’s thorough assessment of the nature of Mr. Horvath’s criminal record is exactly what the Officer is required to do.
Mr. Horvath disagrees with the significant weight the Officer attached to his criminal record, and to his lack of acceptance of responsibility and remorse, but the weighing of relevant factors is the role of the Officer in the exercise of his discretion (*Lupsa* at paras 3-4) and does not suggest bias to a reasonable person.

[65] Nor does the Officer’s reference to Mr. Horvath’s immigration history suggest bias. This is simply a statement of fact, amply supported by the record.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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