Federal Court  Cour fédérale

Date: 20180717

Docket: IMM-4740-17

Citation: 2018 FC 743

Ottawa, Ontario, July 17, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

HAJDAR KRASNIQI

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns a decision (the "Decision") of a Deputy Migration Program Manager to reject a temporary resident permit ("TRP") application made pursuant to s. 24(1) of the *Immigration and Refugee Protection Act* ("IRPA"), SC 2001, c 27. The provision reads as follows:

> **Temporary resident permit**
>
> 24 (1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

[2] The Applicant, Hadjar Krasniqi, is a citizen of Kosovo and the husband of a Canadian citizen. He was living and working in the United Kingdom (U.K.) from December 2007 until he tried to leave that country in August 2013 on falsified documents. He was convicted to nine months imprisonment, but requested to be sent home to Kosovo and returned there in November 2013. He subsequently applied to come to Canada, and requested a TRP to overcome his criminal inadmissibility.

[3] The decision-maker rejected the Applicant's request for a TRP, finding that such permits are only to be issued in exceptional circumstances or when compelling Canadian interests are served. The Applicant now seeks judicial review of the Decision before this Court.

II. Facts

[4] The Applicant is a 36-year-old citizen of Kosovo. He is married to Nora Hashani ("Ms. Hashani"), his sponsor and a Canadian citizen residing in Mississauga, Ontario.

[5] The Applicant travelled to the U.K. on December 21, 2007 on a six month visitor visa. To enter the U.K., he used a United Nations Mission in Kosovo (UNMIK) travel document, as Kosovo was not yet a recognized country. After a month in the U.K., he learned that his father

was ill and had been diagnosed with cancer. As his father could not work, the burden of supporting the family fell to the Applicant (as the eldest male child). He found some work in the construction industry, and he used his earnings to support the family.

[6] The Applicant's travel document expired during his stay in the U.K. Wanting to return to Kosovo but without valid identification, he asked a friend for help. This friend agreed to procure a "European ID" to allow the Applicant to travel by bus out of the U.K. On August 21, 2013, the Applicant was arrested at Dover Port for carrying the fake identity document, and he was charged with "Possess/Control Identity Documents with Intent." He pled guilty to the charges and was sentenced to 9 months in prison. He returned to Kosovo on November 27, 2013.

[7] In February 2014, Ms. Hashani sponsored the Applicant for a permanent resident visa as a member of the family class. Ms. Hashani asked that the application also consider the possibility of issuing a TRP. The Applicant was called to an interview in Pristina, Kosovo, on June 17, 2015, which he attended.

[8] The application was initially refused by way of a letter dated June 8, 2016, which indicated that the Applicant was criminally inadmissible to Canada. The Applicant sought to appeal this decision to the Federal Court on the grounds that the decision contained an erroneous equivalency analysis in determining that the Applicant was criminally inadmissible to Canada, applied the incorrect legal test for the issuance of a TRP, and that the decision was otherwise unreasonable. The Respondent settled the matter by agreeing to have the decision set aside and

sent back for redetermination by a different decision-maker. The Applicant accordingly discontinued the application for judicial review.

[9] By way of two separate letters dated September 13, 2017, the Applicant's applications for a permanent resident visa and a TRP were rejected. The letters were accompanied by Global Case Management System (GCMS) notes, which form part of the reasons for the decision. The permanent resident visa rejection letter indicates that the application is rejected pursuant to s. 36(2)(b) of *IRPA* because the Applicant was convicted of a criminal offence that, if committed in Canada, would constitute an indictable offence. The letter rejecting the application for a TRP is authored by an unnamed Deputy Migration Program Manager (DMPM). It also refers to the Applicant's criminal inadmissibility under s. 36(2)(b) of *IRPA*, and the DMPM finds that there are insufficient grounds to issue the TRP.

[10] The accompanying GCMS notes stipulate that there were no questions concerning the *bona fides* of the Applicant's marriage. The decision-maker of the notes compares the offence for which the Applicant was convicted against a Canadian equivalent, namely s. 368 of the *Criminal Code*: "use, trafficking or possession of forged document." The decision-maker then expresses the view that the acts, had they been committed in Canada, could result in a conviction. The decision-maker then proceeds to stipulate that "compelling" reasons justify issuance of a TRP, and weighs the factors:

> On the one hand, I recognize that the relationship between client and his Canadian citizen spouse has been assessed as genuine, that there may be spousal dependency issues aggravated by separation, and that the client has no known criminal record between 2014 and 2017. On the other hand: There are reasonable grounds to believe that the client has exhibited a pattern of non-compliance with the

> UK authorities – overstaying his legal status, working without authorization, using and possessing forged documents – that extends over a period of between 5 and 6 years…The client's disregard for UK immigration and employment laws could be reasonably interpreted as a disregard for laws in general. The circumstances presented by the client as extenuating (to pay for father's medication and support other family members) can reasonably be viewed as self-serving and lacking credibility
>
> […]
>
> [S]ponsor confirms in Affidavit document dated 30Dec2016 that she could return to Kosovo; while they have raised relocation challenges as an issue for my consideration, the client and sponsor have not provided information to support the claim that sponsor would face significantly adverse country conditions. Relocation has therefore not been ruled out as an option available to the client and sponsor.
>
> [GCSM Notes, CTR pp. 20-21]

[11] The decision-maker concludes by stating that he or she is "not satisfied there are sufficiently compelling reasons to warrant the issuance of a TRP" (GCMS Notes, CTR, p. 21).

III. Issues

[12] As a preliminary matter, it is unclear which decision the Applicant seeks to challenge. The Notice of Application contains a request for *mandamus* to compel a newly constituted tribunal to decide on the application for permanent residence and TRP. However, the Applicant's written materials appear to exclusively address the TRP application. As such, my analysis will deal exclusively with the TRP refusal.

[13] The Applicant advances two grounds in support of granting leave for judicial review: 1) the decision is incorrect because it fails to consider the Ministerial guidelines for the issuance of a TRP, and 2) the decision is unreasonable in light of the factual circumstances of the case.

IV. Standard of Review

[14] The assessment by the immigration officer of an applicant's eligibility to a TRP, pursuant to s. 24(1) of the *IRPA*, is a highly discretionary matter attracting the standard of review of reasonableness (*Vaguedano Alvarez v Canada (Citizenship and Immigration*), 2011 FC 667 [*Vaguedano*] at para.18.

V. Analysis

A. *Was the failure to apply the guidelines an error of law?*

[15] I have rephrased the Applicant's first issue for the purpose of clarity as follows: does the failure of the decision-maker to apply the guidelines constitute an error of law?

[16] The Applicant argues that the decision is incorrect because the decision-maker did not consider the Ministerial guidelines concerning the issuance of a TRP in cases of criminal inadmissibility. The Applicant accepts that a decision-maker is not bound by the guidelines, but submits that they must be considered and cites *Sitarul v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No. 1067 [*Sitarul*] and *Martin v. Canada (Citizenship and Immigration)*, 2015 FC 422 [*Martin*] in support of this position.

[17] The Respondent argues that the guidelines are not law, are not binding on the Minister, and cannot fetter the discretion of an officer. The Respondent further asserts that a TRP is a highly discretionary decision, and that applicants must demonstrate "compelling reasons" to be allowed to enter Canada notwithstanding their inadmissibility.

[18] I am not persuaded by the Applicant's reliance on *Sitarul*. That case concerns an application for permanent residence, not a TRP. Moreover, in that case, the decision-maker considered the relevant policy guidelines (in that instance, pertaining to the family reunification of a "last remaining family member"), but applied the policy incorrectly. That is unlike the case at bar, where the Applicant argues that the decision-maker failed to apply the guidelines altogether. Similarly, *Martin* does not stand for the proposition that a decision-maker must consider the guidelines when rendering a TRP decision; rather, in that case, Justice Shore set aside the decision because it was made without "regard to the evidence and applicable factors, as a whole": *Martin* at para. 30.

[19] Equally, I am not persuaded by the Respondent's contention that applicants must demonstrate "compelling reasons" to be issued a TRP. While much of the Federal Court jurisprudence appears to have applied such a test, I will adopt the view articulated by Justice Harrington in *Palmero v. Canada (Citizenship and Immigration)*, 2016 FC 1128 at para. 21:

> I am concerned that the Guidelines speak of "compelling reasons", while the Act itself does not. Not only are guidelines not law, but they cannot go beyond the boundaries of the statute itself.

[20] Federal Court jurisprudence indicates that there is no legal obligation for a decision-maker to consider and apply the guidelines; it is often repeated that the guidelines are not law,

not binding, and do not create any legal entitlement in the context of a TRP application: *Vaguedano* at para. 35; *Shabdeen v. Canada (Citizenship and Immigration)*, 2014 FC 303 at para. 16. However, this Court has also recognized that a decision-maker must nevertheless consider the relevant circumstances and the reasons advanced by an applicant when assessing eligibility for a TRP: *Zlydnev v. Canada (Citizenship and Immigration)*, 2015 FC 604 at para 20; *Mousa v. Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1358 at para. 9; *Ali v. Canada (Citizenship and Immigration)*, 2008 FC 784 at para. 12. In my view, this obligation covers any relevant circumstances or reasons, whether or not they are specified in the guidelines.

[21] In sum, I do not believe that the decision-maker's failure to consider the guidelines is an error of law *per se*. To find otherwise would be to impermissibly constrain the discretion of the decision-maker. On judicial review, this Court should instead look to determine whether the decision-maker reasonably considered the circumstances and reasons supporting the Applicant's TRP request; this happens to be the argument that is presented in the Applicant's second ground for judicial review.

B. *Is the decision unreasonable?*

[22] The Applicant states that the Decision is unreasonable because it conflates the Applicant's criminality with the fact that he remained in the U.K. without status, adding that the Applicant's submissions specifically addressed the contextual factors relevant to the crime (seriousness of the offence, likelihood of future criminality, time elapsed since the incident, etc.). The Applicant argues that his criminal offence concerned a single incident and arose on a very particular set of circumstances, and notes that immigration infractions are not generally subject

to criminal sanction in Canada. The Applicant identifies three other purported errors. First, the Applicant submits that there was no opportunity to respond to the decision-maker's finding that his statements about the reasons for staying in the U.K. were "self-serving and lacking credibility" (GCMS Notes, CTR, p. 21). Second, the Applicant submits that the decision-maker unreasonably found the Applicant's statement that he was "unemployed" to be inconsistent with his spouse's statement that he was unable to find "continuous employment." Finally, the Applicant submits that it was unreasonable for the decision-maker to conclude that Ms. Hashani could simply return to Kosovo in light of the evidence that she has very little connection to that country.

[23] The Respondent contends that the decision-maker did not fail to take into account the Applicant's circumstances, asserting that the reasons adequately illustrate why "compelling reasons" to issue a TRP do not exist in the case at bar. The Respondent asserts that the decision-maker appropriately considered the Applicant's failure to leave the U.K. upon expiry of his status, and relies upon the decision of this Court in *Rodgers v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1093 at para. 10 for the proposition that a failure to comply with immigration laws is relevant to a TRP determination.

[24] With respect to the issue of criminality, the Respondent has not addressed the Applicant's argument. It is correct for the Respondent to state that the decision-maker can rely upon immigration history as a relevant consideration. However, the Applicant's argument is that the decision-maker confounded the Applicant's criminality (possession of a fraudulent document in September 2013) with his immigration history (overstaying his visa and working without

authorization). The decision-maker's letter clearly refers to the possibility of issuing a temporary resident permit to overcome the Applicant's criminal inadmissibility, but the GCMS Notes indicate that the Applicant's criminal conduct was considered alongside his immigration history. While the former conduct is criminal, the latter conduct is unlawful, but the Decision shows no appreciation for this distinction. This blurring of issues is such that, in my view, the decision-maker has not conducted the necessary analysis of the Applicant's criminal conduct, which ought to have considered factors such as those listed in the guidelines (for example, time elapsed since the offence, controversy or risk caused by the Applicant's presence in Canada, pattern of criminal behaviour, etc.). Accordingly, the Decision lacks transparency and intelligibility and ought to be returned for redetermination.

[25] I further agree with the Applicant's argument that the decision-maker did not have due regard to the couple's family circumstances. The Decision states that Ms. Hashani "could return to Kosovo" and that there was no information "to support the claim that the sponsor would face significantly adverse country conditions" (GCMS Notes, CTR, p. 21). Adversity of country conditions in Kosovo does not appear to have been raised by the Applicant; as such, I am unclear as to why the decision-maker was compelled to comment on this factor. Rather, Ms. Hashani's affidavit dated December 30, 2016, raises substantial hardship concerns: she would have to leave her employment, her home, most of her family, and perhaps most importantly the Canadian society into which she has integrated for the past 25 of her 34 years of age. The decision-maker was bound to consider these circumstances and reasons when arriving at a decision on the TRP, but the anemic analysis in the Decision – limited to two sentences – demonstrates a complete absence of any appreciation for the hardships that Ms. Hashani would face if she were to return

to Kosovo. It should be noted that the claims in Ms. Hashani's affidavit are supported by the documentary evidence (condo lease documents, employment records, tax returns, etc.). In my view, the decision-maker's analysis in this regard is unreasonable and must be corrected upon redetermination.

VI. Conclusion

[26] The decision-maker confounded the issue of the Applicant's criminality with the unlawful nature of his stay in the U.K.; instead, the DMPM ought to have considered the circumstances surrounding the Applicant's criminality, and then separately addressed the issue of the Applicant's unlawful work and residence in the U.K.

[27] Moreover, the decision-maker's analysis of Ms. Hashani's situation was wholly insufficient and demonstrated a complete lack of appreciation for her circumstances. Although framed in the language of "compelling reasons" (which I have already described as problematic above), Justice Shore wrote in the oft cited decision of *Farhat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275 at para. 22, "[b]asically, the TRPs allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic commitments [emphasis added]." In my view, the case at bar potentially engages all three of those criteria, and I believe that a fulsome analysis of those interests may have yielded a different result.

VII. Certification

[28] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

JUDGMENT in IMM-4740-17

THIS COURT'S JUDGMENT is that:

1. The decision concerning the Applicant's Temporary Resident Permit is set aside and the matter referred back for redetermination by a different decision-maker in conformity with these reasons.
2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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