Federal Court  Cour fédérale

Date: 20181005

Docket: IMM-571-18

Citation: 2018 FC 999

Ottawa, Ontario, October 5, 2018

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

EMMANUEL ONESON ANIMODI
KEMMERY MARIA ANIMODI

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review by the Applicants Emmanuel Oneson Animodi [male Applicant] and Kemmery Maria Animodi [female Applicant], challenging the decision of a Senior Decision-maker [Officer] at Immigration, Refugees and Citizenship Canada [IRCC] dated January 23, 2018 [Decision] denying their application for permanent residence from within

Canada on humanitarian and compassionate [H&C] grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. This is the third time that the Applicants have applied for such relief and the third time it has been denied.

[2] For the reasons that follow, I conclude that the application should be granted because the Applicants' right to procedural fairness was breached by the Officer in failing to alert them about concerns regarding the Applicants' charitable work and to provide them with an opportunity to respond to those concerns.

II. Background Facts

[3] The facts leading up to the Decision are not in dispute.

[4] The Applicants are citizens of Angola. They arrived in Canada in January 1997 with their daughter Leticia and claimed refugee status. Their claim was denied by the Convention Refugee Determination Division in February 1998. Leave to bring an application for judicial review of the negative decision was dismissed by this Court in September 1998.

[5] The Applicants submitted their first application for permanent residence in Canada on H&C grounds on September 11, 2000, which included their daughter Leticia. They were approved at stage one on July 27, 2001.

[6] In April 2004, the female Applicant was convicted of social assistance fraud of over $5000, contrary to s. 380 (1)(a) of the *Criminal Code*, RSC, 1985, c C-46 [Criminal Code]. She

was sentenced to pay restitution to the Toronto Community Neighbourhood services in the amount of $10,000.

[7] The H&C application submitted in September 2000 was ultimately rejected on April 20, 2007, pursuant to s. 36(1)(a) of the IRPA, because there were reasonable grounds to believe that the female Applicant was inadmissible to Canada as a result of her criminal conviction.

[8] In December 2009, the Applicants were issued Temporary Resident Permits [TRP], valid for one year. In March 2011, the male Applicant's request for an extension of the TRP was denied as he had been charged with sexual assault. The male Applicant filed an application for leave and for judicial review [ALJR] of the refusal to extend his TRP, which was denied by this Court in August 2011. The criminal charge was later withdrawn.

[9] On June 1, 2011, the male Applicant was charged a second time with sexual assault contrary to s. 271 of the Criminal Code.

[10] On July 22, 2011, the Applicants submitted an application for a Pre-Removal Risk Assessment [PRRA]. Eleven months later, on June 6, 2012, the male Applicant presented a second H&C application, once again including Leticia. Both applications were denied on February 17, 2014. The PRRA application was denied on the basis that the Applicants presented generalized documentary evidence that did not describe their personal risk and experience. The second H&C application was refused on the grounds that the Applicants failed to provide sufficient reasons to warrant an exemption pursuant to s. 25(1) of the IRPA.

[11] The Applicants sought judicial review of the two decisions in Court File Nos. IMM-2545-14 and IMM-2546-14.

[12] On March 28, 2014, the male Applicant was acquitted of the sexual assault charge by Justice Kelly of the Ontario Superior Court of Justice. Other charges were dropped or stayed as a result of the acquittal.

[13] On June 19, 2014, the Applicants filed a motion to stay their removal to Angola pending the outcome of their applications for judicial review. The motion was granted by Mr. Justice Roger Hughes on June 24, 2014.

[14] In September 2014, the Applicants submitted their third H&C application, arguing that the female Applicant's criminal inadmissibility warrants an exemption. The application raised the best interests of their two Canadian born children, the hardship of their return to Angola, the female Applicant's medical condition, the Applicants' charity work and evidence of rehabilitation of the female Applicant. Leticia, 21 years old at the time, submitted a separate H&C application that was later approved.

[15] On July 29, 2015, Mr. Justice James Russell denied the applications for judicial review of the negative PRRA and second H&C decisions: *Animodi v Canada (Citizenship and Immigration*), 2015 FC 929.

[16] On November 11, 2015, the Applicants requested a deferral of their removal pending a decision on their third H&C application. The deferral request was denied by an enforcement officer of the Canada Border Services Agency [CBSA] on November 20, 2015. The Applicants filed an ALJR of the CBSA officer's negative decision in IMM-5174-15. Mr. Justice Richard Southcott dismissed the application for judicial review on July 20, 2016.

[17] On September 26, 2016, the Applicants requested a second deferral of removal. The deferral request was granted on September 28, 2016 for medical reasons. A third request for deferral of removal was submitted on August 24, 2017 and granted on the basis of the pending third H&C application.

[18] At the time of the Decision, the Applicants have been living in Canada for over 21 years. The male Applicant is an Evangelical pastor and a self-proclaimed prophet. The female Applicant has been working as a healthcare support worker. Together, they run two registered charity organizations: Fire of Miracle Ministries and Afro Canadian Development Inc. They have three daughters, Leticia, Anointing and Josephine, aged 23, 18 and 13 respectively. All three children are currently enrolled in school or university.

III. The Officer's Decision

[19] On January 23, 2018, the Officer of the IRCC refused the Applicants' third H&C application. With regard to the female Applicant's criminal conviction that rendered her inadmissible under paragraph 36(1)(a) of the IRPA, the Officer found her lack of remorse and downplaying of the offense of fraud troubling, given that criminal charges of this nature must

show “clear evidence of intent to defraud”. The Officer noted that the female Applicant minimized her responsibility and attempted to explain it away as lack of knowledge that she was not entitled to work and collect welfare at the same time.

[20] The Officer also found troubling and undesirable from the public’s point of view, given the female Applicant’s conviction of fraud, that both Applicants appear to be in positions of trust and are heavily involved in running charitable organizations. The Officer requested and analyzed tax documentation of the registered charities and concluded that the charity records were inaccurate, that the charitable activities were inappropriate and that there was a laxity in the family’s financial situation. The Officer considered the situation to be a risk-factor for recidivism. The Officer was ultimately not satisfied, on the basis of the evidence before him, that the female Applicant was rehabilitated. Rather than a positive factor, the Officer concluded that the Applicants’ charitable activities weighed against the granting of an exemption.

[21] The Officer also analyzed the best interests of the children and concluded that while the children would be saddened and disappointed by their parents’ removal, their best interests would not be negatively impacted by a refusal to grant the Applicants permanent residence, as Josephine and Anointing may either remain in Canada with their older sister as guardian, or move to Angola for a short period. The Officer noted that many options are open to the family to mitigate the challenges of the parents relocating to Angola. Further, the Officer recognized that although the public services offered in Angola differ from ones offered in Canada, there was no evidence to support that their minor child would be denied education.

[22] The Officer then analyzed the Applicants' establishment in Canada and noted inconsistencies in the Applicants' evidence. He found the employment letters, stating that the female Applicant was working in healthcare support, unreliable. However, the Officer accepted that the male Applicant was a pastor in Canada. The Officer did not give much weight to the Applicants' evidence that they are both students enrolled at the Dominion College, given that the College does not appear to be an institution which has a proven track record of providing serious vocational training.

[23] The Officer also referred to the circumstances surrounding the allegation of sexual assault as set out in the judgment of the Ontario Superior Court to shed light on the male Applicant's activities as a pastor. He noted that the male Applicant's congregation has members who would be considered vulnerable or disadvantaged and that he would be in a position of trust. The Officer expressed his concerns regarding the male Applicant's involvement in the private lives of his parishioners who viewed him as a prophet. The Officer noted that the male Applicant sees himself as someone who can offer solutions to their problems but is simultaneously soliciting donations without being held accountable for the use of these funds.

[24] With regard to the Applicants' medical conditions, the Officer concluded that there was insufficient evidence to establish that the female Applicant could not access appropriate care to treat her epilepsy in Angola. The Officer added that the male Applicant has only himself to blame for his adjustment disorder to his situational crisis due to his persistent attempts to stay in Canada.

[25] Taking all the various elements of this case into account, the Officer concluded that there are insufficient humanitarian and compassionate considerations to warrant an exemption to the female Applicant's inadmissibility or to either spouse passing stage one eligibility assessment for the purposes of permanent residence. It is from this Decision that the Applicants seek judicial review.

IV. Analysis

[26] Section 25(1) of IRPA allows applicants to seek admission from within Canada due to H&C considerations. It provides the flexibility to approve deserving cases for processing in circumstances which were not anticipated in the legislation. Exemptions for H&C reasons are discretionary and an applicant is not entitled to a particular outcome.

[27] It is well-established in the jurisprudence that generally, a denial of H&C relief under section 25(1) of the IRPA is reviewed on the reasonableness standard (*Kanthasamy v Canada (Minister of Citizenship and Immigration*), 2015 SCC 61 at para 44; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Taylor v Canada (Minister of Citizenship and Immigration)*, at para 16).

[28] The Applicants raise a number of arguments seeking to impeach the Decision. Most of these arguments have already been considered and rejected by this Court on judicial review of the second H&C decision and do not resonate with me. As stated earlier, the dispositive issue in this case is procedural fairness.

[29] The applicable standard of review in respect of questions of procedural fairness in an H&C application, such as whether the Officer breached the Applicants' right to procedural fairness by failing to provide them with an opportunity to respond to the material inconsistencies of their file, is correctness: *Lopez Arteaga v Canada (Minister of Citizenship and Immigration)*, 2013 FC 778 at para 19. The correctness standard does not warrant any deference to the decision-maker's reasoning process. Rather, the Court will undertake its own analysis of the question: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 50.

[30] At page 5 of the Decision, the Officer observes that the Applicants have been heavily involved in running charitable organizations. While recognizing that charitable work can demonstrate community involvement and pro-social values, the Officer states that running a charity is different as it involves the collection of and accountability for funds with very little oversight. The Officer then concludes that to have both a fraud conviction and be in a position of trust to collect monies on behalf of charities is undesirable from the public's point of view. I see no flaw in this reasoning.

[31] In light of the above concerns, the Officer requested that the Applicants produce tax documentation of the registered charities. Declarations were provided as well as unaudited and what the Officer considered rather vaguely drawn up Income Statements. Based on a review of the documents produced, the Officer finds that it is difficult to understand what the "Afro Canadian Development" charity is all about. The Officer notes that very little, if any, of the monies raised from 2012 to 2015 was spent on programming associated to the stated purposes of the charities and that significant amounts were devoted to expenditures on phone, internet and

automobile costs. Given the female Applicant's history of fraud, the reputation of evangelical preachers of the charismatic/prophetic type in Angola of exploiting the vulnerable, and what is perceived to be "the laxity of the family's financial situation", the Officer concludes that the Applicants' charitable activities are inappropriate and constitute a factor weighing against the granting of an exemption.

[32] The Respondent argues that the Officer's findings regarding the Applicants' charitable work were reasonable and that it was open to the Officer to make them because they were based on the evidence or reasonable inferences from the evidence. I disagree.

[33] A key concern of the Officer was that the tax documentation provided by the Applicants was not only deficient, but highly suspect. The Applicants could not reasonably have foreseen that the Officer would conduct what can only be characterized as a forensic audit of their tax records and convert what they put forward as a positive factor into a negative one. The Applicants were not put on notice of the Officer's preoccupations about the finances and purposes of their charitable organizations and were therefore in no position to address them.

[34] In *El Maghraoui v Canada (Minister of Citizenship and of Immigration)*, 2013 FC 883 at para 22, Mr. Justice de Montigny states that:

> [22] […] the principles of procedural fairness require that an applicant be provided with the information on which a decision is based so that the applicant can present his or her version of the facts and correct any errors or misunderstandings.[…] Ultimately the concern will always be to ensure that the applicant has the opportunity to fully participate in the decision-making process by being informed of information that is not favourable to the

> applicant and having the opportunity to present his or her point of view.

[35] In support of the application for judicial review, the Applicants filed documentation from the Canada Revenue Agency [CRA] that they claim establishes that the donations to the charities were indeed being put towards charitable programming. I agree with the Applicants that documentation showing that their charities are in good standing with the CRA, which has the expertise in tax and charity matters, may possibly have allayed some, if not all of the Officer's concerns. I consider the failure of the Officer to provide the Applicants with a fairness letter and an opportunity to correct any misperceptions to be procedurally unfair. In the circumstances, the Decision must be set aside.

V. Conclusion

[36] For the above reasons, the application for judicial review is granted. The Decision is set aside and remitted back for redetermination by a different officer.

[37] Counsel did not suggest a question for certification. Therefore, no question is certified.

JUDGMENT IN IMM-571-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision of the IRCC Officer dated January 23, 2018 is quashed and set aside.

3. The matter is remitted for redetermination by a different IRCC officer.

4. No question is certified.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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