Federal Court  Cour fédérale

Date: 20181009

Docket: IMM-568-18

Citation: 2018 FC 1009

Ottawa, Ontario, October 9, 2018

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

ANDREI COJUHARI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

[1] Mr. Cojuhari is an ordinary man. He lives an ordinary life. If it were not for October 27, 2012, in all likelihood he would be a permanent resident, if not a Canadian citizen. October 27, 2012, was the day he drove while under the influence. He was stopped. He submitted to a breathalyser test, was charged, pleaded guilty and paid a fine of $2,000. The incident so unnerved him he sold his car and has not driven since.

[2] Stripped of its legalities, this case is about redemption, deliverance from sin and damnation.

[3] In law, this is the judicial review of the refusal to allow Mr. Cojuhari to apply for permanent resident status from within Canada on humanitarian and compassionate grounds, or failing that, for a temporary resident permit.

I. Background

[4] Mr. Cojuhari came to Canada from Moldova in 2010 under the Live-In-Caregiver Program. He has a sister and niece here with whom he has a close relationship. He has a few close friends, but is hardly a civic leader.

[5] He has a mother and daughter back in Moldova, both of whom he helps support financially.

[6] His application for permanent resident status is not only for himself, but also extends to his daughter. She is "locked in" under his current application. However, she is now an adult and would not be eligible to come to Canada as a member of the Family Class under a fresh application.

[7] On October 27, 2012, Mr. Cojuhari attended a party at a friend's house where he had a few beers. He got into a verbal altercation with another partygoer. Out of fear, he hurried up and drove away, which led to the drunk driving charge.

[8] A charge under Section 253 and following of the *Criminal Code* may proceed by way of indictable offence or summary conviction. Maximum imprisonment is five years. The minimum fine is $1,000. The conviction rendered him criminally inadmissible under Section 36(2) of the *Immigration and Refugee Protection Act (IRPA)*. That section deals with criminality as opposed to serious criminality which is covered by Section 36(1).

[9] After pleading guilty to the offence, Mr. Cojuhari was sentenced to pay a $2000 fine. He paid his fine; the sentence has been served. It appears that his record suspension application is pending. If granted, Mr. Cojuhari will no longer be criminally inadmissible.

II. The Decision

[10] The Officer used the word "weight" eleven times in his notes which run a little over two pages. He gave no weight to the following factors:

a) Mr. Cojuhari has completed his Federal sentence by paying the fine. The Officer was given proof of payment;

b) the sentence was lenient;

c) he did not go to the party with the intention of driving after drinking;

d) the record suspension application;

e) he otherwise has fully complied with Canadian immigration law and has a stable life with friends who speak warmly of him in their letters of support.

[11] The Officer gave some weight to the fact that this was his only conviction, that he is close to his niece and that his daughter will not be able to join him as a dependant.

[12] Section 25 of *IRPA* provides that the Minister may grant a foreign national who is inadmissible permanent resident status if of the opinion that same is justified by humanitarian and compassionate considerations, also taking into account the best interests of a child directly affected. Section 24 of *IRPA* provides that an inadmissible foreign national may be granted a temporary resident permit [TRP] if the Officer is of the opinion "that it is justified in the circumstances".

[13] An application for judicial review should be limited to a single decision unless the Court orders otherwise under Rule 302 of the *Federal Courts Rules*. The parties have acted on the assumption that the two decisions would be dealt with at once, and I so order.

[14] The decisions were rendered January 23, 2018. No mention is made of the leading case *Kanthasamy v Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61, or indeed of any other case. *Kanthasamy* dealt with the Ministerial Guidelines under Section 25 of *IRPA* as they were then written. Those Guidelines, which are useful but which are not law, provided that applicants must demonstrate "unusual and undeserved or disproportionate" hardship. The Guidelines set out a non-exhaustive list of circumstances to assess, including

establishment in Canada, ties to Canada, the best interests of any children affected, and the consequences of separating relatives.

[15] Paragraph 25 of *Kanthasamy* provides that officers making humanitarian and compassionate determinations must substantially consider and weigh all the relevant facts and factors in the context of the case.

[16] At paragraph 29 and following the Court noted that there were two schools of thought. One view held that the test was simply whether refusal would cause unusual, undeserved or disproportionate hardship. The second approach held that humanitarian and compassionate considerations were not limited to hardship, and that the Guidelines are only of limited use because they cannot fetter the discretion Parliament gave Immigration Officers.

[17] The Court noted that the second approach was more consistent with Section 25 and focussed more on the equitable underlying purpose of the humanitarian and compassionate relief process. Favourable reference was made to the decision of the Immigration Appeal Board in *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970), 4 IAC 338, at p 350, where it was held that humanitarian and compassionate considerations referred to "those facts, established by the evidence, which would excite in a reasonable man in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the *Immigration Act*".

[18] It appears that I have always followed the *Chirwa* school of thought, for in 2006 I said:

> *Espino v Canada (Minister of Citizenship and Immigration)*
> 2006 FC 1255
>
> [1] "Can you heare a good man grone And not relent, or not compassion him?" so it was said in Shakespeare's *Titus Andronicus*, Act IV, Scene I. Compassion has been defined as including suffering together with another, participation in suffering; fellow-feeling, sympathy, the feeling or emotion when a person is moved by the suffering or distress of another and by the desire to relieve it.

[19] The Officer does not say what would satisfy him. I question whether anything would. Mr. Cojuhari came here on a visa eight years ago, has established himself, made one serious mistake but paid his debt to society. I find the decision to deny the application for an exemption from the admissibility requirements taking into consideration humanitarian and compassionate grounds unreasonable.

[20] Turning now to the TRP, all the Officer said was that he would not speculate as to whether Mr. Cojuhari would obtain a record suspension in the near future. There are cases which hold that it is not necessary to carry out a distinct analysis of a TRP attached to a permanent resident application. However, the basis of those decisions is that the H&C application and the TRP application are intertwined and the same reasoning may apply to both: (*Voluntad v Canada (Minister of Citizenship and Immigration*), 2008 FC 1361; *Ferraro v Canada* (*Minister of Citizenship and Immigration*), 2011 FC 801 and *Chaudhary v Canada* (*Immigration, Refugees and Citizenship*), 2000 FC 128). Be that as it may, in this case, there is a disconnect. The sole reason given for rejecting the TRP is that the Officer was not persuaded that a record suspension would necessarily be granted.

[21] Yet the Guidelines under Section 24 of *IRPA* provide that in reviewing criminal cases officers should consider the time elapsed since the sentence was served, whether the applicant is eligible for rehabilitation or is deemed rehabilitated, asses the odds if further offences will be committed, whether the influence of alcohol was a factor in the commission of the offence, whether there is a pattern of criminal behaviour, whether the sentence has been completed and fines paid and eligibility for record suspension (my emphasis).

[22] There was no such analysis and so the decision is unreasonable.

[23] Although the Guidelines say that officers should only issue TRPs "in exceptional circumstances and when the need of the individual to enter or remain in Canada is compelling …", the Guidelines do not mirror Section 24 of *IRPA*. The question under the Statute is whether a TRP is "justified". As per *Kanthasamy* the Guidelines appear to be over-restrictive.

JUDGMENT in IMM-568-18

THIS COURT'S JUDGMENT is that for reasons given the judicial review is granted. The decisions to refuse a permanent resident visa and a temporary resident visa are quashed and the matter is referred back another Officer for a fresh redetermination.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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