Federal Court  Cour fédérale

Date: 20190205

Docket: IMM-2920-18

Citation: 2019 FC 150

Ottawa, Ontario, February 5, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

JOSEPH TORRES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The Applicant's mother, Eleonor Dumaya came to Canada in 2011 as a live-in caregiver. In 2013 she applied for Permanent Resident status, which she obtained. She then sponsored her husband and younger son to come to Canada from the Philippines. She did not, however, declare her eldest son, Joseph Torres (the Applicant), on her initial permanent residence application.

[2] Ms. Dumaya gave birth to the Applicant in the Philippines when she was 17 years old. She was an unwed single mother, and she decided it would be best for her son to be raised by her aunt and uncle. They were listed as the Applicant's parents on his birth certificate. They raised him, and cared for him as their own. For much of his life, the Applicant thought Ms. Dumaya was his aunt.

[3] The Applicant learned the truth in 2012, but at that point Ms. Dumaya resided in Canada, and no steps were taken to change his birth certificate or to otherwise confirm their legal relationship. Ms. Dumaya says that when she applied for permanent residence she did not think she could include the Applicant in her application because she was not listed as his mother on the birth certificate.

[4] When Ms. Dumaya realized her mistake, she was advised to try to adopt the Applicant. When that did not succeed (because she is, in fact, his biological mother), she had a DNA test done to confirm their relationship. She applied to sponsor him, claiming humanitarian and compassionate (H&C) grounds under s. 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] as a basis to be relieved from the exclusion under s. 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[5] An Immigration officer (the Officer) refused the Applicant's application for a permanent resident visa as a member of the family class. This is an application for judicial review of that decision.

II. Issues and Standard of Review

[6] The issue in this case is whether the decision is unreasonable because: (i) the Officer made an adverse credibility finding not supported in the record; (ii) the Officer placed undue emphasis on the exclusion under s. 117(9)(d) of the *IRPR*, and thereby fettered his discretion; and (iii) the Officer failed to give proper consideration to the H&C considerations, and in particular in relation to the best interests of the child analysis.

[7] The standard of review is reasonableness (*Da Silva v Canada (Citizenship and Immigration*), 2011 FC 347 at para 14). This involves an examination of justification, transparency, and intelligibility in the decision-making process, and whether the decision falls within a range of acceptable outcomes that are defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

[8] An exemption under s. 25(1) of *IRPA* is exceptional and discretionary relief. An officer's decision on an H&C application is highly fact-specific, and therefore deserves considerable deference from a court on an application for judicial review (*Sultana v Canada (Citizenship and Immigration)*, 2009 FC 533 at para 17 [*Sultana*]).

III. Analysis

[9] The Applicant advances three arguments: (i) the Officer erred by making adverse credibility findings that were not supported in the record; (ii) the Officer erred by giving too much emphasis to the failure of Ms. Dumaya to include the Applicant in her original application for permanent residence – which is the reason for the exclusion under s. 117(9)(d) of the *IRPR*;

and (iii) the Officer failed to consider the totality of the evidence on the H&C considerations, including the importance of family reunification, and the best interests of the Applicant's half-brother in Canada.

[10] In regard to the first issue, the Applicant's claim that the Officer made an adverse credibility finding rests on the statement that by failing to mention that she had another son, Ms. Dumaya "circumvented [the] immigration rules and gained advantage under the *Act* by not declaring [the Applicant] as a family member." The Applicant submits that this is an adverse credibility finding which ignores the explanations offered by Ms. Dumaya, and her efforts to obtain information about how to bring the Applicant to Canada.

[11] I am not persuaded. The Officer notes that the requirement in s. 117(9)(d) is to encourage honesty and to enable Canadian officials to assess an application with full knowledge of the family situation. The Officer further notes that if Ms. Dumaya had been truthful about the Applicant, her permanent residence application may have been affected – either because she would have submitted a falsified document (the Applicant's birth certificate, showing the aunt and uncle as his parents), or because she would have had to obtain a corrected record showing the Applicant as her son, and doing so could have delayed her application.

[12] As is evident from the analysis which follows, I find that this statement is reflective of the Officer's mindset and focus in assessing the H&C claim, but I am not persuaded that these statements amount to adverse credibility findings.

[13] The primary thrust of the Applicant's case rests on the second and third issues, which are intertwined. In essence, the Applicant submits that the Officer became fixated on the reason for exclusion, and that this fixation prevented the Officer from giving fair and proper consideration of the H&C factors.

[14] Where an applicant is excluded pursuant to s. 117(9)(d) of the *IRPR*, it is an error for an officer to give undue weight to the misrepresentation in assessing a claim for H&C relief: *Sultana*; *Weng v Canada (Citizenship and Immigration)*, 2014 FC 778 [*Weng*]. The question whether the officer committed such an error must be determined on the facts of each case.

[15] In *Sultana*, Justice de Montigny found that the officer failed to give weight to the impact of continuing separation on the family and ignored the evidence of their continued and regular contact, while giving undue consideration to the prior misrepresentation which gave rise to the exclusion. The following captures the essence of his reasoning:

> [30] This fixation on the failure of the sponsor to declare his family members prevented the immigration officer from genuinely assessing the H&C considerations submitted by the applicants… In the present case, the Immigration officer did look at the various considerations advanced by the applicants. Nonetheless, at the end of the day, his notes read as if the failure to disclose was the overriding consideration, and that the sponsor had brought upon himself all his and his family's misfortunes. This, in turn, led the Immigration officer to analyse the positive factors supporting the sponsorship application through the prism of the sponsor's conduct at the time of his own application to become a permanent resident, and to overlook the genuineness and stability of his relationship with his wife and children, the sincere remorse of the sponsor and the likely impact of the decision on any future prospect for this family to be re-united, as Mrs. Sultana will likely not be eligible for permanent resident status under any other category given her severely limited education and language skills and the non-existence of employment skills or experience.

[16] As *Weng* and other decisions make clear, the question is whether the prior misrepresentation was an "overriding consideration" that clouded the analysis of the H&C factors. This requires a review of the Officer's analysis and decision – and in particular whether there was an undue emphasis on the misrepresentation, and a failure to give due consideration to the evidence that supported the Applicant's claim for H&C relief.

[17] In this case, the decision letter states:

> Your sponsor was granted permanent residency on 17 November 2015; at that time you were not declared as a dependent child. Your sponsor had told you the truth about your biological relationship to her as early as 2012, yet she chose not to have you examined as [a] dependent child on her application for permeant residence which commenced in 2013 and was concluded in 2015.

[18] The letter goes on to indicate that the Applicant does not fall within the family class, pursuant to s. 117(9)(d) of the *IRPR*, and that there are insufficient H&C grounds to warrant relief.

[19] This is elaborated upon in the Officer's notes, which form part of the decision in a case such as this (*Rahman v Canada (Citizenship and Immigration)*, 2016 FC 793 at para 19). These notes recount the failure to include the Applicant in the application for permanent residence, and that Ms. Dumaya had said this was because the Applicant's birth certificate showed a different set of parents. The Officer notes that they had three years to correct the birth certificate or to submit a DNA test, but this was not done until the H&C application was filed.

[20] The crux of the argument for the Applicant on this point is based on the following passages from the Officer's notes:

> I have noted that the [Applicant's] birth record has not been amended until today. If this document was submitted in [Ms. Dumaya's permanent residence] application, it would have rendered [her] inadmissible for submitting a forged document and falsified public record. It may also have caused a significant delay in processing [her permanent residence] application given that relationship between [the Applicant] and [Ms. Dumaya] could not be readily established. [Ms. Dumaya] therefore circumvented immigration rules and gained advantage under the Act by not declaring [the Applicant] as a family member.

[21] This reference to Ms. Dumaya having "circumvented immigration rules" and thereby gaining an advantage under *IRPA* is repeated later in the notes, in the Officer's summary of findings and conclusions.

[22] The Applicant argues that these passages are an indication that the Officer was fixated on the prior misrepresentation, and ignored relevant evidence in regard to the H&C considerations. In particular, the Officer ignored the evidence of the nature of the relationship between Ms. Dumaya and the Applicant, as well as her efforts to find a way to bring him to Canada.

[23] On these points, the Officer states that Ms. Dumaya and the Applicant "had minimal interactions," noting that she went to Greece to work when he was 10 years old, and that she has visited him in the Philippines only three times in the last six years. In the summary of the decision at the end, the Officer finds that the Applicant has had "limited interactions" with his family in Canada.

[24] The Applicant points out that during the interview with the Officer, the Applicant stated the following: he speaks with his mother "almost every day"; she sends him financial support every month; he lived with his half-brother for approximately one year, when his mother was in

Greece and his step-father worked in Abu Dhabi; and he has had limited interaction with his step-father, but they are on good terms. None of this evidence was mentioned by the Officer in the decision, and it contradicts the conclusion that they had "minimal contact" or "limited interactions."

[25] The Respondent submits that the Officer must be presumed to have considered all of the evidence, and that the reasons do not reflect the kind of fixation or undue repetition or emphasis that has been found to be an error in other decisions. The Officer considered the evidence of the limited relationship between the Applicant and Ms. Dumaya and his half-brother, and contrasted that with the evidence that he had a happy, stable, and loving relationship with the aunt and uncle in the Philippines who raised him. The Officer noted that after the uncle's death, the aunt continued to play a significant role in the Applicant's life, and that he continued to rely on her for advice on his major life decisions. This is amply supported by the evidence, and it is the responsibility of the Officer to weigh this evidence.

[26] The jurisprudence requires that I examine the analysis and decision of the Officer to determine whether a fixation on the prior misrepresentation that forms the basis for the exclusion had the effect of clouding the analysis of the H&C considerations. A review of reasons is not meant to be a "line-by-line treasure hunt for errors" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34). The question is whether the steps in the analysis are evident and can be followed by a reviewing court (*Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11; *Public Service Alliance of Canada v Canada (Attorney General)*, 2018 FC 33 at paras 24-26). The law also says that an officer does not need to mention every piece of evidence and every argument that was

advanced. However, a failure to mention compelling evidence on a crucial point, or evidence on such a point that contradicts an officer's conclusions, may constitute a reversible error (*Cepeda-Gutierrez v Canada (Citizenship and Immigration)* (1998), 157 FTR 35, 1998 CanLII 8667).

[27] I find that the Officer has not demonstrated how evidence on several essential H&C factors was considered. It is not clear whether the Officer discounted the evidence, ignored it, or considered it and simply did not find it outweighed other relevant evidence. It is not the Court's role to re-weigh the evidence. It is, however, the Court's role to determine whether the Officer's decision is "intelligible" and "transparent" (*Dunsmuir*). A failure to make reference to evidence on crucial points, or to explain how it was weighed in the application of the H&C test, may lead to a conclusion that the decision fails to meet that standard. I find that to be the case here.

[28] In particular, it is troubling that the Officer concluded that the Applicant and Ms. Dumaya had "minimal interactions," without some reference to the unchallenged evidence of the Applicant that they spoke daily, and that she sent him financial support every month. Similarly, the Officer mentions on several occasions that Ms. Dumaya had "circumvented immigration rules" in her previous application for permanent residence, but makes no mention of her remorse, or her more recent efforts to find a way to clarify their relationship, including efforts to adopt the Applicant. These are particularly relevant elements in the H&C analysis; it is entirely unclear whether or how they were evaluated by the Officer.

[29] I find that the Officer committed a further error. The Applicant had a half-brother in Canada who was 17 years old when the application was filed. The H&C submissions filed by the Applicant spoke of his desire to be reunited with his birth mother and immediate family in

Canada. Although the precise term “best interests of the child” was not used in the application, clearly one of the elements was the Applicant’s desire to live with his mother and half-brother. The Officer was aware of the half-brother. Yet there is no mention of any of this in the decision.

[30] It is trite law that where more than one child is directly affected by such a decision, the officer must consider their separate interests and needs (*Weng*, para 32). Here, at the time of the H&C application, the Applicant was 18 years old and so did not fall within the accepted definition of “child” (*Leung v Canada (Citizenship and Immigration)*, 2017 FC 636 at paras 26-27; *Saporsantos Leobrera v Canada (Citizenship and Immigration)*, 2010 FC 587). However, the Officer was required to consider the interests of his half-brother, who was a minor at the time of the application. This was not done.

IV. Conclusion

[31] For all of these reasons, I find that the Officer’s decision is unreasonable, and I am granting this application for judicial review. The application should be sent back for redetermination by a different officer, in accordance with these reasons.

[32] The parties did not submit a question for certification, and I find that none arises on these facts.

[33] The style of cause is amended, on consent of the parties, to name the Minister of Citizenship and Immigration as the Respondent (*IRPA*, s. 4(1); *Department of Citizenship and Immigration Act*, SC 1994, c 31, s. 2(1)).

JUDGMENT in IMM-2920-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted.

2. The application is sent back for reconsideration by a different officer.

3. There is no question of general importance to certify.

4. The style of cause is hereby amended, with immediate effect, to name the Minister of Citizenship and Immigration as Respondent.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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