Federal Court Cour fédérale

Date: 20231205

Docket: IMM-7865-22

Citation: 2023 FC 1635

Ottawa, Ontario, December 5, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

SJ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant applied for permanent residence from within Canada based on humanitarian and compassionate grounds ("H & C Application"). The Applicant based his H & C Application on his establishment in Canada through family, work, and community involvement, his risk of hardship in his country of citizenship, and the hardship of being

separated from his Canadian spouse and his two minor children. In the alternative, the Applicant sought a Temporary Resident Permit ("TRP").

[2] A senior immigration officer at Immigration, Refugees and Citizenship Canada [IRCC] ("the Officer") denied the Applicant's H & C Application. The Officer also denied the Applicant's alternative request for a TRP. The Officer found that the Applicant's past criminal conviction "nullified" the positive elements in his H & C Application, including that it was in his children's best interests that their father remain in Canada.

[3] The Applicant raises several arguments challenging the Officer's refusal in this judicial review. I find the Officer's consideration of the best interests of the two children impacted by this decision requires redetermination and therefore it is unnecessary for me to address the Applicant's other arguments. I also find that the Officer failed to substantively consider the Applicant's request for a TRP as required. The parties agree, as do I, that I must review the merits of the Officer's decision on these two issues on a reasonableness standard.

[4] Based on the reasons below, I grant this judicial review and order that the H & C Application and the TRP request be redetermined.

II. Preliminary Issue – Anonymization

[5] Applicant's counsel indicated at the judicial review hearing that they would be providing a letter to the Court following the hearing requesting an anonymization order because of a concern that information regarding the Applicant's criminal record may cause reputational,

social and psychological harm to his minor children. In the letter filed after the judicial review hearing, Applicant's counsel indicates that the Respondent consents to the anonymization request.

[6] Applying the test in *Sherman Estate v Donovan*, 2021 SCC 25 at paragraph 38, I am satisfied that a limitation on the open courts principle is warranted in these circumstances and the request for an anonymity order is a proportionate measure to protect the minor children impacted.

[7] The Applicant's name shall be anonymized as "SJ" in the style of cause in any document the Court makes available to the public. As requested by the parties, I have also attempted to not include identifying information in these reasons. The parties are welcome to write to the Court following the issuance of this decision to request any amendments if there remain concerns with identifying information in this decision.

III. Applicant's History in Canada

[8] The Applicant has lived in Canada for more than 20 years. The Applicant's spouse and two children are Canadian citizens. He was granted refugee status in Canada over 20 years ago. Approximately a year later, the Applicant was convicted of a serious offence involving a child. He was sentenced to 100 days of imprisonment and 18 months of probation. The Applicant completed a course of rehabilitation and, in 2006, a rehabilitation program counsellor found him to be at low-risk of reoffending. He has no other criminal convictions.

[9] The Applicant was issued a removal order because he was found criminally inadmissible under section 36(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Immigration Appeal Division rejected his appeal of the removal order. As a result, the Applicant lost his permanent residence status.

[10] In 2019, the RPD vacated the Applicant's Convention refugee status because it found that he was not residing in his country of citizenship at the time that he had alleged in his refugee claim to have experienced persecution there.

[11] In 2020, the Applicant submitted a Pre-Removal Risk Assessment ("PRRA"). This was denied in 2021. The Applicant sought leave and judicial review to challenge the refusal; this Court denied leave in March 2022.

[12] The Applicant filed the H & C Application and TRP request under review in 2020. The Officer accepted that the Applicant "is a low risk re-offend", that his wife would experience hardship in being separated from her husband, that he would experience discrimination in his country of citizenship, that he had built social and work connections in Canada during his years here, and that the best interests of the children is to have their father remain in Canada. The Officer ultimately found that in spite of these positive factors, the seriousness of the offence for which the Applicant was convicted and his negative immigration history tipped the balance to not granting the Applicant relief. The Officer relied on their analysis on the H & C application to find that the TRP is also not justified. Both the H & C and TRP were denied in March 2021.

IV. Best Interests of the Children

[13] Foreign nationals applying for permanent residence in Canada can ask the Minister to use their discretion to relieve them from requirements in *IRPA* because of humanitarian and compassionate factors (*IRPA*, s 25(1)). The Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], citing *Chirwa v Canada (Minister of Citizenship and Immigration) (1970)*, 4 IAC 338, confirmed that the purpose of this humanitarian and compassionate discretion is "to offer equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another'" (at para 21).

[14] Subsection 25(1) of *IRPA* directs officers deciding applications for humanitarian and compassionate relief to take into account "the best interests of a child directly affected." In considering this requirement, the Supreme Court of Canada in *Kanthasamy* found: "Where, as here, the legislation specifically directs that the best interests of a child who is 'directly affected' be considered, those interests are a singularly significant focus and perspective" (*Kanthasamy* at para 40).

[15] *Kanthasamy* affirmed the Supreme Court of Canada's finding in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 [*Baker*], that "where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable" (*Kanthasamy* at para 38, citing *Baker* at para 75). The Supreme Court of Canada also reaffirmed in *Kanthasamy* that a

reasonable best interests of the child analysis requires that a child's interests be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence (*Kanthasamy* at para 39, citing *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras 12, 31; *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165 at paras 9-12).

[16] There are two Canadian children, both entering their early adolescence, impacted by this decision. Both have grown up living in Canada with their father and mother as their primary caregivers for the entirety of their lives. As the Officer acknowledges, this decision has serious consequences on the lives of these children given the close and loving relationship they have with their father, who is an integral presence in their daily lives. There is no suggestion that there is some alternative means by which their father can immigrate to Canada in the near future. A refusal results in separation of these children from their father for an indeterminate length of time during their childhood.

[17] The Officer accepts a refusal will result in this separation but also finds that there are "significant mitigating factors to alleviate the hardship of separation of the applicant from his children." There are two factors discussed: videoconferencing and visits to the Applicant's country of citizenship. The Officer acknowledges that the children have been to the country of citizenship and "did not enjoy the experience very much".

[18] I find the Officer's characterization of this issue minimizes the children's concerns about visiting their father in his country of citizenship. The evidence before the Officer was that the

children had been two or three times to the country of citizenship and that these were negative experiences. One child required hospitalization due to an insect-borne infection on one visit, and that in general the children did not feel safe during their time there. The children both stated in their letters that they did not want to go to the Applicant's country of citizenship. The Applicant's wife also explained the safety concerns while travelling with her children to the Applicant's country of citizenship.

[19] Further, the Officer accepted that individuals from the particular ethnic group to which the Applicant and the children belong experience discrimination in the Applicant's country of citizenship. Applicant's counsel referenced Canada's travel advisories in place for travel to the country. These country conditions were not mentioned by the Officer in their evaluation that found that visits by the children could act as a mitigating factor to separation.

[20] The Officer failed to grapple with the evidence and submissions about the conditions in which the children would find themselves if they were to visit, and minimized the children's concerns about visiting. This is a sufficiently central and serious shortcoming because of the Officer's reliance on the children's ability to visit in their overall balancing of the relevant factors. The decision is therefore unreasonable and requires redetermination.

V. Temporary Resident Permit

[21] In the alternative, the Applicant requested that the Officer consider whether he could be granted time-limited relief through a TRP under section 24 of *IRPA*. Section 24 provides that a TRP can be issued to a foreign national who is inadmissible if "the officer is of the opinion that it

is justified in the circumstances." TRPs are issued for a fixed amount of time and "may be cancelled at any time" (section 63 of *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*]; section 24(1) of *IRPA*).

[22] The Applicant made submissions on how he qualified for a TRP, considering the guidance set out in the relevant operational manual: *Operational Manual 1: Temporary Resident Permits* ("the Guidelines"). While guidelines are not binding on an officer, they may inform a reviewing court on the factors administrative decision-makers are generally taking into account (*Vavilov* at para 94) and "offer guidance on the background, purpose, meaning and reasonable interpretation of legislation" (*Mousa v Canada (Immigration, Refugees and Citizenship)*, 2016 FC 1358 at para 11, cited in *Williams v Canada (Citizenship and Immigration)*, 2020 FC 8 at para 36).

[23] In the section of the Guidelines addressing the issuance of TRPs in cases where there is criminal inadmissibility, a series of factors an "officer should assess" in doing a risk assessment are listed, including: the seriousness of the offence, the chances of committing further offences, if there is a pattern of criminal behaviour (e.g., the offence was a single event and out of character), if all sentences have been completed, fines paid or restitution made, etc.

[24] The Officer did not reference any of the factors in the Guidelines. Instead, the Officer relied on their findings in the H & C analysis. As noted by Justice Norris at paragraph 64 of *Williams*, relief under section 24(1) "is more narrowly framed" than the "broad equitable discretion" provided for under section 25(1) of *IRPA*. I find, as was the case in *Williams*, that the

Officer failed to conduct an evaluation that appreciated the distinct legal framework for determining a TRP as opposed to an H & C Application. As was the case in *Williams* (at para 66), I find that "further analysis reflective of the legal framework for determining a request for a TRP under section 24(1) of the IRPA was required."

JUDGMENT in IMM-7865-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The matter is sent back to be redetermined by a different officer;

3. No serious question of general importance is certified; and

4. With immediate effect, the Applicant's name is anonymized as "SJ" in the style of cause in any document, including the online docket, the Court makes available to the public.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7865-22
STYLE OF CAUSE:	SJ v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 29, 2023
JUDGMENT AND REASONS:	SADREHASHEMI J.
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