Federal Court		Cour fédérale

Date: 20100408

Docket: IMM-5136-08

Citation: 2010 FC 376

Ottawa, Ontario, April 8, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JORGE MARQUES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision by an immigration officer (the officer), on or about October 2, 2008, refusing the application to extend the temporary resident permit issued to the applicant and for authorization to work in Canada.

[2] The applicant seeks an order setting aside the officer's decision and referring the application back for redetermination by a different immigration officer.

[3] The applicable sections of the Act are set out in the Annex to this decision.

[4] The applicant, despite being criminally inadmissible to Canada pursuant to section 36 of the Act, was granted a temporary resident permit (TRP), pursuant to section 24 of the Act, for a short visit. An application to extend his TRP was denied.

Background

[5] The applicant is a citizen of Portugal with a lengthy criminal record. He was born in the former Portugese colony, Angola, but has lived most of his life in the United States. He was deported from the United States to Portugal in 2007 following a drug conviction and the subsequent breach of his probation order.

[6] The applicant has a wife, Crystal, and a four year old son, Isaiah, born while the applicant was incarcerated in the U.S. Both Crystal and Isaiah are dual Canadian and U.S. citizens.

[7] In February 2008, the applicant came to Canada to visit his wife and son. At this time, the applicant was deemed inadmissible to Canada due to his U.S. criminal record, but was issued a TRP. Before the TRP expired, the applicant applied for an extension of the TRP and for a work permit in order to remain in Canada.

The Officer's Decision

[8] In a decision letter dated October 2, 2008, the officer determined after review that there were insufficient grounds to merit the issuance of a new permit.

[9] The applicant had been told when he entered Canada that he would be allowed a short term visit only and that no extension would be recommended.

[10] The officer then considered the best interests of the applicant's four year old son, Isaiah. It was apparent that since the applicant's arrival in Canada, he had been providing primary care for Isaiah, allowing Crystal to maintain a full time job. While the applicant had bonded with his child, the officer noted that Isaiah had spent most of his life without his father's presence.

[11] The officer also noted the applicant's efforts to rehabilitate himself, including educational courses the applicant had completed. The officer, however, did not find that these courses proved that the applicant had reformed himself. The officer did believe that he was trying.

[12] The officer considered the seriousness of the offences the applicant had been convicted of, namely, intent to distribute cocaine, conspiracy to possess with intent to distribute cocaine and driving under the influence. The applicant's convictions did not arise out of a single occurrence, but involved multiple run-ins with the law dating back to 1994.

[13] The officer articulated her final determination as follows:

> In conclusion, I find that Mr. Marques has an extensive criminal history but is trying to move forward. He stated that his family is his life. He loves his wife to death and his son is his world. He prays that he can be given a second chance. He has noticed a difference in Isaiah since he has been around. His nightmares have subsided, he has gained some weight and his temper tantrums are under control. While weight has been given to this factor and also family reunification, the seriousness of the criminal convictions outweighs the best interest of the child or family reunification in this particular case.
>
> During the course of the interview, I did find Mr. Marques sincere and he accepted responsibility for his actions and has the full support of his family. Because of these factors I found this a very difficult decision to make. As I stated above I have considered the best interest of a child and family reunification. I do not find that because he accepts the responsibility of his past criminal convictions that this outweighs the seriousness of these offences and the safety and security of Canadian Citizen and warrants a granting of a temporary resident permit extension and authorization to work in Canada.

Applicant's Written Submissions

[14] The applicant submits that the officer failed to address the nature of the applicant's criminality which was critical because she found that his criminality outweighed the best interests of the child. The record shows that the applicant only dealt cocaine to protect his family from violent drug dealers, whom Crystal's dad owed money. The applicant cooperated extensively with U.S. officials after his arrest and testified before a grand jury, helping to bring several drug dealers to justice. The officer did not have regard to this evidence.

[15] The applicant submits that the officer also erred in the assessment of the best interests of the child. The Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, [1999] S.C.J. No. 39 (QL) at paragragh 75, found that decision makers must be "alert, alive and sensitive" to the best interests of children affected by the decision. In *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, [2008] F.C.J. No. 211 (QL), Mr. Justice Campbell elaborated extensively on these comments and broke down more precise requirements of decision makers under the headings of "Alert", "Alive" and "Sensitive" (at paragraphs 8 to 12). The officer failed to live up to this standard. For example, the officer: (i) did not articulate Isaiah's suffering, including the serious economic insecurity that would ensue; (ii) said the applicant had not been there for most of Isaiah's life but did not mention that this was a negative for Isaiah; and (iii) did not consider the needs of the couple's unborn child.

Respondent's Written Submissions

[16] The respondent submits that the officer's decision was reasonable. The decision making process was intelligible, with the officer considering the factors both for and against an extension. While a different conclusion could have been reached, there is no legal argument to suggest her decision was unreasonable. Further, the applicant sought to use humanitarian and compassionate grounds (H&C) factors to support his TRP application, even though the Act provides other mechanisms for considering whether H&C factors warrant the granting of relief.

[17] The respondent submits two reasons the applicant's first line of argument cannot succeed. First, even though the decision shows that the officer did state the mitigating factors surrounding the

applicant's convictions, officers have no obligation nor the jurisdiction to consider any mitigating circumstances underlying a conviction. Administrative decision makers must accept a conviction at face value. Second, the officer was entitled to give the convictions considerable weight as a negative factor. They were serious offences. Parliament, in enacting paragraphs 36(1)(b) and 36(2)(b) of the Act directed that these convictions be considered serious. The applicant could have attempted to obtain a pardon, but did not.

[18] The respondent also submits that best interests of the child are not a required consideration in TRP applications. Even if the best interests of the child are to be considered, they cannot be determinative, as the applicant suggests. Even in H&C decisions, an officer's duty to consider the best interests of the child depends on the submissions made in support. Here, the applicant made passing reference to the child's best interests, but did not explain how the child would be adversely affected or would undergo hardship. No documentary evidence was provided. Thus, the officer cannot be faulted in this regard.

Issues

[19] The issues are:

1. What is the appropriate standard of review?
2. Did the officer properly assess the criminal inadmissibility issues?
3. Was the officer required to consider the best interests of the child factors on the TRP application?
4. Was the officer's best interests of the child assessment appropriate?

5. Was the officer's decision not to extend the applicant's TRP reasonable?

Analysis and Decision

[20] **Issue 1**

What is the appropriate standard of review?

The appropriate standard against which to review the officer's decision is the standard of reasonableness.

[21] **Issue 2**

Did the officer properly assess the criminal inadmissibility issues?

In making her decision, the officer put considerable weight on the applicant's criminal convictions and the seriousness of those convictions. In my opinion, she was entitled to do so.

[22] While the applicant argues that the officer failed to mention or analyze mitigating circumstances underlying those convictions, the officer had no jurisdiction to consider such factors. An administrative decision maker must accept a conviction at face value and has limited authority to re-examine it or to question a Court's determination of the seriousness of a conviction as reflected by the sentence imposed (see *Toronto (City) v. Canadian Union or Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64 (QL)).

[23] The applicant does not take issue with the officer's description of his criminal convictions or the determined equivalent offences under Canadian criminal law. The applicant's counsel also

admits that one of the applicant's convictions constitutes a serious offence under paragraph 36(1)(b) of the Act.

[24] In any event, the record demonstrates that the officer did in fact mention some of the mitigating circumstances underlying the applicant's most serious cocaine distribution conviction. She was not required, however, to give those mitigating circumstances any significant weight, as the applicant suggests. It was still open to the officer to treat his convictions as very serious.

[25] I am of the view that there was no error in the officer's handling of the applicant's convictions. As a result, I would not allow the judicial review on this ground.

[26] **Issue 3**

Was the officer required to consider the best interests of the child factors on the TRP application?

It would appear to me that this question need not be answered in this case as the officer did consider the best interests of the child. The question to be determined is whether the officer's best interests of the child assessment was appropriate. That is the subject matter of the next issue. Accordingly, I need not further consider this issue.

[27] **Issue 4**

Was the officer's best interests of the child assessment appropriate?

When an officer chooses to or is required to consider the bests interests of the child under any provision of the Act, the extent to which he or she is able to analyze those factors depends on

the submissions made about those interests and the documentation supporting those submissions. In the context of an H&C application, it was noted in *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635:

> [5]… an applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless.

The record here demonstrates that the applicant led little evidence regarding his child. No objective evidence concerning the child or the effect on the child if his father had to leave Canada was adduced.

[28] The applicant claims, nonetheless, that the officer was required to conduct a comprehensive analysis as suggested by this Court in *Kolosovs v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, [2008] F.C.J. No. 211 (QL). I cannot agree with this submission for two reasons.

[29] First, if an officer does consider it necessary to take into account the best interests of any children affected by a TRP application, the officer is not required to follow the methodology required for adjudicating best interests of the child factors under an H&C application.

[30] Second, the status of *Kolosovs* above, as an authority is rather dubious. Even officers conducting full H&C application reviews under subsection 25(1) are only required to assess best interests of the child factors under the approach suggested in *Kolosovs* above, to the degree that it is consistent with the Federal Court of Appeal's binding direction in *Hawthorne v. Canada (Minister*

of Citizenship and Immigration), 2002 FCA 475, [2003] 2 F.C. 555, 222 D.L.R. (4th) 265. The approach in *Hawthorne* above, was recently affirmed (see *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2009] F.C.J. No. 713 (QL)). Consequently, I would not allow the judicial review on this ground.

[31] **Issue 5**

Was the officer's decision not to extend the applicant's TRP reasonable?

The Supreme Court has recently explained the level of deference proscribed by the reasonableness standard. A decision will be considered reasonable if it falls within the range of potential outcomes open to the decision maker, considering the facts and the law before. A decision is reasonable if a suitable justification exists to support it and the decision is made through an intelligible process (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9 (QL)).

[32] It is clear from a reading of the decision that the officer deliberated and considered the factors both for and against granting the TRP extension. As the officer stated, it was a difficult decision to make and by reading her reasons, one can understand why. Her reasoning was intelligible and transparent. The benefits to the child and the goal of family reunification were serious considerations, but ultimately those benefits were outweighed by the seriousness of the applicant's crimes and other negative factors. It is not for this Court to engage in an exercise of re-weighing those factors. While a different decision could have been made, it has not been established that the decision made was not available to her under the law or lacks a proper factual foundation so as to be unreasonable. I would not allow the judicial review on this ground.

[33] The respondent proposed the following serious question of general importance for my consideration for certification:

> Is an immigration officer assessing a TRP extension of time request required to consider the best interests of the child? If so, how is the best interests assessment to be conducted?

[34] I am not prepared to certify this question as I agree with the applicant it would not be dispositive of the case. The officer in this case did look at the best interests of the child.

[35] The application for judicial review is therefore dismissed.

JUDGMENT

[36] **IT IS ORDERED that:**

1. The application for judicial review is dismissed.

2. No serious question of general importance will be certified.

"John A. O'Keefe"

Judge

ANNEX

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

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.	24.(1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.
(2) A foreign national referred to in subsection (1) to whom an officer issues a temporary resident permit outside Canada does not become a temporary resident until they have been examined upon arrival in Canada.	(2) L'étranger visé au paragraphe (1) à qui l'agent délivre hors du Canada un permis de séjour temporaire ne devient résident temporaire qu'après s'être soumis au contrôle à son arrivée au Canada.
(3) In applying subsection (1), the officer shall act in accordance with any instructions that the Minister may make.	(3) L'agent est tenu de se conformer aux instructions que le ministre peut donner pour l'application du paragraphe (1).
25.(1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption	25.(1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il

from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

36.(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

36.(1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

(2) A foreign national is inadmissible on grounds of criminality for

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

FEDERAL COURT

SOLICITORS OF RECORD

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