Federal Court  Cour fédérale

Date: 20110216

Docket: IMM-3537-10

Citation: 2011 FC 183

Toronto, Ontario, February 16, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

THUSITHA RUWAN SIRISENA KALANSYRIYAGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant asks the Court to review and set aside a negative decision made by an officer on his application for permanent residence within Canada on humanitarian and compassionate grounds (H&C application).

[2] I appreciate the discretionary nature of H&C decisions and that they are entitled to considerable deference; however, an H&C applicant is entitled to a decision based on all of the evidence filed and that has not been influenced by irrelevant considerations. While H&C decisions are discretionary they must be made on a principled basis.

[3] In this case, the officer failed to consider some of the evidence that was before him and considered irrelevant facts; therefore, this application will be allowed.

[4] I find that the officer failed to consider one of two letters submitted by the applicant's brother. In the decision, under the heading “FAMILY OR PERSONAL TIES THAT WOULD CREATE HARDSHIP IF SEVERED" the officer writes:

> The applicant is unmarried. His brother resides in Canada as a permanent resident in that he was sponsored for his residency by his spouse. Information provided in the applicant's PRRA application indicates that the applicant's mother is residing in Canada on a visitor's visa. While previous submissions provided in January of 2008 indicate that the applicant is assisting his brother and wife with rent, and that they will be “unable to endure the pain of separation and the sense of security” if the applicant were to return to Sri Lanka, I note that the most recent submissions provided are silent with regard to the applicant's relationship with his brother and his family. While I accept that a close relationship may exist between the applicant and his family in Canada, insufficient evidence has been provided to indicate that severing these relationships would amount to an undue, undeserved or disproportionate hardship. [emphasis added]

[5] Contrary to the officer’s statement, the most recent submission included a letter from the applicant’s brother that set out in considerable detail the applicant’s relationship with his brother’s family. He writes, in part:

> Thusitha is the only family I have in Canada. Most importantly he is the only relative that my daughter, Dinara, has from the paternal side. Since her birth in May of 2009, Thusitha has been a lot of support for my wife and myself. Since I work night shift on certain days of the month, I had to count on Thusitha to help my wife with tasks such as making paediatrician appointments or getting diapers when they have run out or babysitting Dinara when we are working late. Those are some of the many things that Thusitha has been there for me. Not only has he been a great help when we were in need of help, he is caring and thoughtful as well. My daughter has grown closer to him and I would not want her to miss out on the opportunity to get to know her only uncle.
>
> Since I have made a home for myself in Canada, Thusitha is the only link to my family as I have no other relatives in Canada. By being there for each other during hard times and good times, we have definitely strengthened our brotherly bond. Having gone through the experience of being new in Canada without any family or friends, Thusitha showed me the value of having a brother. He showed me things about himself that I did not know before; hard-working, honest and family oriented.
>
> During his spare time you can always find him at my house, reading a book to my daughter or teaching her how to clap or give a flying kiss. I'm definitely proud of how my little brother has grown up to be such a responsible and successful individual. I know that Canada needs more people like him that contribute to the society in a positive way.

[6] This evidence warranted a close consideration by the officer – it appears to have received none. The finding that the applicant and his brother's family may have a close relationship is quite simply unreasonable when one reviews this evidence – there can be no question but that they do have a close relationship. Moreover, the officer's finding that "the most recent submissions provided are silent with regard to the applicant's relationship with his brother and his family" is simply wrong given the above-excerpted letter included in the recent submissions and the letter was specifically referred to in counsel's written representations.

[7] The applicant also tendered a letter from the General Counsel and HR Manager of his employer. The officer summarizes his understanding of this letter as follows:

> …[I]t is noted that the applicant has progressed well in his work at this company and currently holds a position in which he oversees sanitation inspection of a particular line at the food plant, earning $55,000 per year. The company appears to hold the applicant in high regard indicating their support for his permanent residence in Canada. They have indicated that travel outside of Canada has become a necessity for the position held by the applicant and have requested his application be expedited. It not indicated what, if any impact, a negative determination of this application for permanent residence may have on the company.

[8] In contrast, the letter writer indicates that the applicant commenced his employment in July 2006 as an hourly employee earning $15 per hour. He was promoted less than one year later to a full-time salaried position as a day shift production supervisor at an annual salary of $50,000. Some six months later, he was given added responsibility to oversee sanitation for a food product line at the plant, and his annual salary was soon increased to $55,000. The letter then indicates that the applicant is "now being considered for promotion to the position of Production Manager for our Automatic Bagel Line Plant." To say that the applicant has "progressed well" is an understatement. He has excelled!

[9] The letter writer goes on to say that the applicant is an "outgoing individual who does his work in a steady and reliable manner," that he is an "integral part of our production team" and that the company is "continually impressed by his abilities as well as his work habits and ethics." He is described as being "an asset to our company" and the author concludes with this statement:

> Mr. Kalansyriyage personifies the type of immigrant that Canada is attempting to recruit, and the type of employee that we value, in that he is educated, capable, honest, hard-working and caring. I sincerely

> hope that you will give him an opportunity and recognize his talents and abilities to Canada.

The officer's statement that the employer appears to hold the applicant in high regard is also an understatement. He clearly is held in high regard.

[10] The officer notes that "[t]he applicant has provided letters and petitions from his friends, co-workers and church associates attesting to his value and the high regard of his community." The officer then continues: "I note that these documents do not indicate that the signers of these letters are aware of the applicant's current charges for impaired driving."

[11] The fact of the criminal charge was disclosed by the applicant in the March 2010 representations included with his updated H&C submissions. It provides:

> The Applicant was charged with impaired Driving and Driving over 80. He has not been convicted, and [h]e is pleading not guilty to the charge. His trial is scheduled on April 10th, 2010 [*sic*] …

[12] The issue of the admissibility of evidence of criminal charges in proceedings before the Immigration and Refugee Board was resolved by the Federal Court of Appeal in *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, at para. 50:

> The jurisprudence of this Court indicates that evidence surrounding withdrawn or dismissed charges can be taken into consideration at an immigration hearing. However, such charges cannot be used, in and of themselves, as evidence of an individual's criminality: see, for example, *Veerasingam v. Canada (M.C.I.)* (2004), [2004] F.C.J. No. 2014, 135 A.C.W.S. (3d) 456 (F.C.T.D.) at para.11; *Thuraisingam v. Canada (M.C.I.)* (2004), 251 F.T.R. 282 (T.D.) at para. 35.

[13] The applicant and respondent are in agreement that this statement, applied in *Kharrat v Canada (Minister of Citizenship and Immigration)*, 2007 FC 842, is an accurate statement of the law. *Kharrat* makes it clear that the reasoning in *Sittampalam* applies to H&C decisions.

[14] *Kharrat* states that H&C officers can take pending charges into account; however, the applicant submits that a more recent decision, *Avila v Canada (Minister of Citizenship and Immigration)*, 2009 FC 13, indicates otherwise. The decision in *Avila* does not stand for the proposition that officers may not consider criminal charges; rather, it defines the boundaries of a procedurally fair consideration of charges. In my view, the similarities between the facts of this case and *Avila* make it clear that the officer's consideration of the applicant's charges fell outside these boundaries. In *Avila*, at paras. 15 and 17, Justice Lagacé wrote:

> In the present case, not only were there no convictions, but the Officer made no attempt to ascertain the underlying facts and circumstances of the charges, and denied the applicants an opportunity to respond. She simply relied on the existence of outstanding charges, which she discovered on FOSS, to impugn the applicants' good character. And she did so knowing that the charges were to come before the criminal court within days of her decision, but nevertheless pressed ahead despite the possibility of acquittal on the charges.
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> …
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> In brief, Justice here does not appear to have been done, as a result of this statement [regarding the applicant's criminal charges] combined [with] the failure of the Officer to wait for the outcome of the criminal proceedings or at the very least to attempt to ascertain the underlying facts and circumstances of the charges and/or to give the applicants an opportunity to respond. It appears therefore from the Officer's decision and her failure to ascertain or wait for the result of the criminal charges that the Officer was influenced negatively and acted under the prism of pending criminal charges through which she viewed the entire file.

[15] As noted by the H&C officer, the applicant was charged with impaired driving and driving over 80. He was scheduled to appear in court to face these charges in April 2010. The officer's decision is dated May 3, 2010. Justice Lagacé's decision in *Avila* parallels the applicant's situation: the officer does not appear to have attempted to ascertain any of the underlying facts, the officer knew that the charges would soon be heard by the criminal courts, if they had not been already, the officer made no attempt to determine whether the applicant had been convicted or acquitted of the charges, and the officer discounted letters from the applicant's supporters on account of the criminal charges.

[16] The respondent's submission that there is no evidence that the officer refused the application on the basis of the pending criminal charges is unconvincing given that that the officer twice mentioned the criminal charges in the decision. In my view, the officer's reference to the charges indicates that they were at the very least a factor that was considered. As stated at para. 8 of *Avila*:

> The Court does not know precisely what effect the criminal charges in question had on the analysis made by the Officer on the qualification of the applicant's social integration, however the Court can presume that it did not help the applicants with their H & C request, far from it. If the criminal charges had no effect on the result of the application, why mention it? What was the necessity to make such a statement and why suggest that as a result of these criminal charges the applicants would not be "good members of the society"?

[17] I find that the officer erred in her treatment of the applicant's pending criminal charges. This alone is a sufficient ground for allowing the application for judicial review.

[18] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision dated May 3, 2010 is set aside and the matter is referred to another immigration officer for a fresh decision. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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