Federal Court  Cour fédérale

Date: 20120628

Docket: IMM-6146-11

Citation: 2012 FC 831

Ottawa, Ontario, June 28, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

FEHIM DELOSEVIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGEMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of a Senior Immigration Officer who denied the applicant's Humanitarian and Compassionate (H&C) application. The officer determined that Mr. Delosevic would not face unusual and undeserved or disproportionate hardship if returned to Montenegro.

Background

[2] In 1989, Mr. Delosevic left Montenegro for the United States, claiming asylum based on difficulties with Serbs in Yugoslavia. He married a citizen of the United States and they had two daughters. He abandoned his refugee claim in the United States and relied on a sponsorship application; however, it was never completed and in 2007 he was deported back to Montenegro. His wife has since met another man and today the applicant is legally separated from her.

[3] Mr. Delosevic came to Canada on March 22, 2008, and claimed refugee protection alleging that he was involved in an altercation with a high ranking police officer in February of 2008 and was forced into hiding.

[4] In January 2009, his daughters joined him in Canada, claiming refugee status against the United States. In September 2009, they withdrew their claim and returned to live with their mother.

[5] On July 14, 2010, due to credibility concerns, the Refugee Protection Division determined that Mr. Delosevic was not a Convention refugee or a person in need of protection. Leave to this Court was denied on November 16, 2010. The applicant initiated a Pre-Risk Removal Application (PRRA) and the H&C application. The PRRA assessment was negative and the H&C application denied.

[6] The officer reviewed the applicant's establishment in Canada, the best interests of his daughters, and the country condition in Montenegro and concluded that there was no unusual and

undeserved or disproportionate hardship. The issue that arises in this application concerns the manner in which the officer dealt with the best interests of his two children in the United States.

[7] The officer acknowledged that the applicant has two American born daughters, age 11 and 9, and that he alleges that his ex-wife relies on him to support them. The officer found that information on how the applicant supports his daughters financially was not provided and there was no indication regarding the nature or frequency of communication with his daughters since their return to the United States. Although the applicant had stated that it would be easier for his daughters to visit him in Canada, the officer said that there is no indication as to how the girls, who are still minors, would travel to Canada or would be allowed to do so by their mother.

[8] The officer wrote that while not determinative, a negative inference was made because neither his ex-wife nor daughters provided any evidence in support of his application. In the end, the officer found that the evidence did not indicate that his daughters' best interests would be impacted such that an exemption was warranted.

Issues

[9] The applicant raises the following issues:

1. Did the officer err when considering the best interests of the applicant's American daughters;

2. Did the officer err in drawing negative inferences from the absence of evidence; and

3. Did the officer err by negatively speculating over the applicant's assertions.

Analysis

Best Interests of the Children

[10] It is submitted that the officer ignored statements made by the applicant that went to the issue of his children's best interests. Specifically, it is submitted that the following were ignored: (1) his ex-wife greatly relies on him for their support and that she is struggling financially; (2) if he is required to leave Canada he would not see his daughters as he would be struggling to survive; and (3) he would suffer chronic unemployment in Montenegro. The applicant submits that it was an error for the officer to not consider these statements.

[11] Alternatively, the applicant submits that if these statements were considered but not believed by the officer, fairness required that he be offered an interview and an opportunity to address the concerns.

[12] Additionally, the applicant states that the officer erred in failing to assess his establishment and economic hardship as factors having an impact on his daughters.

[13] I am not persuaded that the applicant's statements were not considered. They are all listed and dealt with in the officer's decision; they were just not given the weight the applicant believes they ought to have been given.

[14] The officer stated that he expected to see evidence from the ex-wife and children confirming the statements of the applicant. It was open to the officer to draw an adverse

inference from that lack of evidence since it was reasonable to expect it: *Ma v Canada (Minister of Citizenship and Immigration)*, 2010 FC 509 and *Rojas v Canada (Minister of Citizenship and Immigration)*, 2011 FC 849 at para 6.

[15] As for the applicant's statement that he would suffer chronic unemployment in Montenegro, the officer clearly dealt with this when he weighed the statement against the fact that the applicant was employed between 2007 and 2008 as a tradesperson and that the skills and experience he had in Canada would be useful there.

[16] The officer, when assessing the children's best interests, makes the following statement: "The applicant submits that it is easier for [the children] to come to Canada but he has not indicated how the girls – who are still minors – would travel to Canada or that they would be allowed to do so by their mother." It is submitted that this statement is perverse as the children had previously visited him in 2009 when they travelled from Florida to stay with him in Canada.

[17] I am not convinced that the officer's statement is either perverse or unreasonable. The officer most certainly was aware that the girls had previously visited their father – reference is made to that fact immediately prior to the statement that is challenged. However, what is also clear from the record is that the travel was done two years earlier, and the girls made a refugee claim in Canada, which had since been withdrawn, and they had returned to their mother. In short, the circumstances have changed. Absent any evidence from the mother in Florida, there is nothing to indicate that she would be prepared to have her children travel to meet their father in Canada or how they would do so, unless she agreed to accompany them. These observations and the dearth of evidence corroborating his statements is relevant and the finding not perverse.

Negative Inferences

[18] The applicant submits that he relied on incompetent counsel who did not see the need to make a fulsome application or even make submissions. He submits that it is unreasonable for the officer to have drawn a negative inference from his failure to offer information when he was so advised by counsel: *Kassa v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 801 [*Kassa*].

[19] In my view, *Kassa* is distinguishable. In *Kassa*, the applicant had testified in two previous refugee proceedings and, on his counsel's advice, did not testify on the third. As a result, a negative inference was drawn. In the present matter, the applicant did not present credible evidence in his previous proceedings that would have aided his H&C application. More importantly, he has not presented any evidence to suggest that a more competent counsel could have resulted in a positive H&C application. I adopt Justice Dawson's reasoning at paragraph 54 of *Ahmad v Canada (Minister of Citizenship and Immigration, 2008 FC 646) [Ahmad]* where she held that there is no evidence that would "likely have affected the outcome had it been placed before the officer."

Speculation

[20] It is submitted that the officer speculated when he found that the applicant would not face unemployment or economic hardship, his Canadian skills are transferable, and his family would help him reintegrate. Making these findings, according to the applicant, was an error because they were made in the absence of evidence to support them.

[21] I agree with the respondent that the officer based these findings on the evidence before him. The officer noted that the applicant was self-employed in construction in Montenegro when he lived there between 2007 and 2008, that there was no evidence his skills would not still be needed there, that he remained employed in the construction industry in Canada, and that he is familiar with the language and culture and his family there would likely help him with reintegration. Certainly there was evidence that the applicant had reintegrated in Montenegro before; there was no evidence that he could not do so again.

Conclusion

[22] For these reasons this application is dismissed. The decision was reasonable and the officer made no error of law in reaching it. There is no question to be certified based on these facts and the basis of this decision.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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