Federal Court Cour fédérale

Date: 20120803

Docket: IMM-8882-11

Citation: 2012 FC 969

Vancouver, British Columbia, August 3, 2012

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

GHOLAM REZA SOLTANI REZAGH SARAB

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Gholam Reza Soltani Rezagh Sarab seeks judicial review of the decision of an Immigration Officer refusing his application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds. For the reasons that follow, I have concluded that the Officer's decision was unreasonable. As a result, the application for judicial review will be granted.

Analysis

[2] H&C decisions are discretionary in nature and involve exceptional relief. As a result, these decisions are to be reviewed against the deferential standard of reasonableness: *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para. 18; [2009] F.C.J. No. 713; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, [2008] 1 S.C.R. 190.

[3] It is clear from a review of the Immigration Officer's decision in this case that the Officer gave great weight to Mr. Soltani's immigration history, specifically his failure to appear for removal in 2004. The Officer further found that the hardship resulting from the separation of Mr. Soltani and his wife, Shelly Janvier, was not "undeserved", as the couple had married knowing that Mr. Soltani lacked status in Canada and could be deported at any time.

[4] These are unquestionably important considerations in an H&C application – ones which may be given considerable weight. Indeed, Immigration Officers may refuse to exercise their discretion to grant an exemption in cases where H&C grounds have nevertheless been established if the circumstances surrounding an applicant's entry and residence in Canada "discredit him or create a precedent susceptible of encouraging illegal entry in Canada": *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para. 19, [2002] F.C.J. No. 457.

[5] In such cases, Officers may also consider the fact that the H&C grounds claimed are the result of the applicant's own actions: *Legault*, above at para. 19; *Kessler v. Canada (Minister of Citizenship and Immigration)* (1998), 153 F.T.R. 240 (T.D.) at para. 9, [1998] F.C.J. No. 1134; *Chau v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 107 at paras. 18-19, 27-28;

Tartchinska v. Canada (Minister of Citizenship and Immigration) (2000), 185 F.T.R. 161 at paras. 21-22, [2000] F.C.J. No. 373.

[6] These factors are not, however, necessarily determinative: see *Legault*, above at paras. 11-12; *Kawtharani v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 162 at para. 32, [2006] F.C.J. No. 220. In deciding whether or not to exercise the discretion to grant an exemption on humanitarian and compassionate grounds, Immigration Officers are required to consider whether the hardship of having to obtain an immigrant visa from outside Canada would be "unusual and undeserved" or "disproportionate".

[7] "Unusual and undeserved hardship" means hardship which is not anticipated or addressed by the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and which is derived from circumstances beyond the applicant's control. Hardship may be "disproportionate" if, due to an individual's personal circumstances, forcing an individual to apply for a visa from outside Canada would unreasonably impact upon the applicant or a family member: *IP5: Immigrant Applications in Canada Made on Humanitarian or Compassionate Grounds* at ss. 5.10 and 5.11; *Serda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, [2006] F.C.J. No. 425.

[8] The circumstances surrounding the lawfulness of an applicant's entry and stay in Canada go to whether the hardship claimed is "unusual and underserved". Officers must, however, also consider whether the circumstances of a particular case give rise to hardship that is "disproportionate".

[9] The primary claim of hardship in this case related to the allegedly disproportionate hardship that Ms. Janvier would suffer as a result of Mr. Soltani's removal from Canada.

[10] The Immigration Officer accepted that the couple's marriage was genuine, but found that "marriage alone" was not sufficient to warrant a positive exercise of H&C decision. In so doing, the Officer ignored the unusual reliance of Ms. Janvier on Mr. Soltani.

[11] The record before the Officer detailed the extraordinarily difficult life that Ms. Janvier has led, the multiple losses and tragedies that she has experienced, and the psychological trauma that she has suffered as a result.

[12] The psychological report of Dr. Aubé stated that Ms. Janvier suffers from Type 2 Post-traumatic Stress Disorder, as well as anxiety and depression. The report explained the central role that Mr. Soltani has played in Ms. Janvier's recovery, and the extent to which his presence in Canada is central to her ongoing mental health. According to Dr. Aubé's report, the separation of Ms. Janvier and Mr. Soltani would be "more than tragic" for Ms. Janvier.

[13] The Immigration Officer discounted Dr. Aubé's report because the report did not explain what was meant by the phrase "more than tragic" and what that would mean for Ms. Janvier. In my view, this was unreasonable.

[14] Dr. Aubé's report carefully detailed Ms. Janvier's personal history and the instability that she has experienced in her life, as well as her history of Type 2 Post-traumatic Stress Disorder,

anxiety and depression. The report describes the symptoms that Ms. Janvier has experienced over the years as a result of her mental state, and notes the improvement in her mental health that has resulted from the stability of her relationship with Mr. Soltani.

[15] It was after discussing all of these matters in considerable detail that Dr. Aubé concluded that "it seems clinically clear that the deportation of her husband would be more than tragic for Ms. Janvier". Dr. Aubé then goes on to explain that "[i]t would again be a tragic loss, a repetition of her history, and another depletion." Dr. Aubé then offered the opinion that "because it would be a reflection of her background, there is a great probability that Mrs. Janvier's emotional condition would then worsen".

[16] When these statements are read in the context of the entire psychological report it is quite clear what Dr. Aubé is saying. The Immigration Officer's failure to appreciate the implications of Dr. Aubé's professional opinion and to take that opinion into account renders the decision unreasonable.

[17] I am further satisfied that the Officer's finding that Ms. Janvier will be able to rebuild her life after Mr. Soltani's removal was made without regard to the evidence.

[18] The Officer speculates that other positive aspects of Ms. Janvier's life, such as her family, her friends and her career, would offer her stability and happiness after Mr. Soltani's removal. However, the evidence in the record does not support this conclusion.

[19] It is clear from both Ms. Janvier's evidence and Dr. Aubé's report that Ms. Janvier had been struggling emotionally for a very long time prior to meeting Mr. Soltani, even though she had a career, friends and family for support. She had undergone years of therapy and treatment with medication, but continued to suffer from the psychological effects of her past.

[20] The record shows that it was Ms. Janvier's relationship with Mr. Soltani that allowed Ms. Janvier to cope with her trauma. Indeed, Dr. Aubé is confident that Ms. Janvier will eventually overcome the trauma of her childhood and continue to improve her emotional stability "if [she] can maintain the stability of her relationship that she has with her husband".

[21] In light of this evidence, it was unreasonable for the Immigration Officer to find that the rewards of her career and the support of Ms. Janvier's friends and family in Saskatchewan would compensate Ms. Janvier for the lack of Mr. Soltani's presence in Vancouver.

Conclusion

[22] For these reasons, the application for judicial review is allowed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application for judicial review is allowed, and the matter is remitted to a different Immigration Officer for re-determination in accordance with these reasons.

"Anne Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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