Federal Court  Cour fédérale

Date: 20121206

Docket: IMM-9219-11

Citation: 2012 FC 1424

Ottawa, Ontario, December 6, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MARTA SOUSA DO NASCIMENTO
YASMIN THATYANNE NASCIMENTO
BRAGA AND MANUEL SOUSA CARREIRO

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants seek judicial review of a decision by an immigration officer denying their application from within Canada for permanent residence under the spouse or common law partner class.

[2] The principal applicant, Ms. Sousa do Nascimento and her daughter Yasmin, born in 1993, are Brazilian nationals. They have had no contact with Yasmin's father since 1996. Ms. Sousa do Nascimento visited Canada on a visa in 2006. On May 25, 2008, leaving an abusive relationship,

she and her daughter attempted to enter Canada at Fort Erie, Ontario. They were prevented from doing so by reason of the Safe Third Country Agreement and excluded for one year, absent written authorization to return. The applicants then crossed the border near Montreal in June, 2008 without reporting to a Port of Entry.

[3] The principal applicant met her current husband on August 1, 2009 in Toronto. The relationship developed, and they were married on February 6, 2010. The couple prepared a sponsorship application and presented themselves for an interview at the Citizenship and Immigration Canada Etobicoke office on October 6, 2011. While the husband is named as an applicant in the style of cause herein, he is not a person "directly affected" by the decision under review as contemplated by s. 18.1 of the *Federal Courts Act* R. S. C., c. F-7 and is not, therefore, properly a party. References to "the applicants" in this decision are to the principal applicant and her daughter.

[4] Ms. Sousa do Nascimento says she was not aware that she and her daughter had been excluded for one year and were in breach of the requirement to obtain written authorization when she illegally crossed into Canada. When the couple discovered at the interview that the applicants were inadmissible, they claim that the immigration officer refused to accept and consider their representations concerning humanitarian and compassionate considerations such as unity of the family.

[5] The *Spouse or Common-law partner in Canada Class*, as set out in the Inland Processing Manual (IP 8) exempts applicants from the requirement under s 21(1) of the *Immigration and*

Refugee Protection Act, SC 2001, c 27 ("IRPA") and ss 72(1)(e)(i) and 124(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations] to have legal status in Canada but not from the other requirements for the spouse/partner in Canada class. Among other limitations, the policy specifies that people lacking status who cannot take advantage of the policy are those who are inadmissible because they failed to obtain permission to enter Canada after being deported. S. 52(1) of the IRPA and s 226(1) of the Regulations require a foreign national to obtain authorization to return to Canada (ARC) after the enforcement of a deportation order.

[6] A negative decision was rendered on November 21, 2011. The officer concluded that the marital relationship appeared to be *bona fide* but that the applicant was inadmissible. The applicants submit that the officer erred in failing to consider humanitarian and compassionate factors and fettered her discretion. Those are issues attracting the reasonableness standard of review: *Husain v Canada (MCI)*, 2011 FC 451 at para 13; *Millette v Canada (MCI)*, 2012 FC 542 at para 14; and *Jnojules v. Canada (MCI)*, 2012 FC 531 at para 16.

[7] This application also raises questions of procedural fairness. For such questions, no deference is due. The Court must determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43.

[8] At the hearing of this application, I allowed the applicants to raise an additional issue that was not identified in their notice of application or memorandum of argument. The applicants contend that they were unfairly denied prior notice that the admissibility issue would be raised by

the officer at the interview. Had they received such notice, they contend, they would have sought legal counsel and attended the interview prepared to make representations on H&C grounds.

[9] The officer states in her affidavit and on cross-examination that it is not her practice to send "fairness letters" with respect to admissibility issues in advance of a spousal sponsorship interview.

[10] In my view, the content of the duty of fairness in the context of a sponsorship interview does not require prior notice of an admissibility issue such as the breach of the authorization to return requirement. It is sufficient that the issue be raised and that the applicants are given an opportunity to respond. I note that the applicants had the benefit of immigration counsel who accompanied them to the interview but was not, apparently in the interview room. Further, they received legal advice immediately after the interview. Notwithstanding this, no effort was made to provide the officer with submissions in the five to six weeks prior to the determination of the application. In the circumstances, the lack of notice could not be said to have deprived the applicants of an opportunity to make submissions.

[11] There is no dispute between the parties that an explicit request for exemption from the requirement for an authorization to reenter Canada was never made by the applicants. The question remains whether the officer erred in failing to consider the submissions received at the interview as an implicit application for H&C consideration.

[12] In this case, the applicants argue that the officer followed the inadmissibility exclusion in IP 8 even when H&C factors were presented to her. The officer erred, they contend, in failing to

consider the unity of the family and the best interests of the dependent applicant, to which she was alerted by the applicant's spouse at the interview. They assert that the officer misled them by telling them that she had no power to overcome inadmissibility and prevented them from making H&C submissions.

[13] The principal applicant's affidavit says at para 4(q):

> When Manuel heard that our application would be refused, he explained to the officer how much my daughter and I mean to him and how big a part of his life we are now and how much he means to us. It would hurt all of us a lot if our family was torn apart. He explained also how he has always wanted a child but was never able to have one. Now, it is so important to Manuel to hear my daughter Yasmin call him 'dad'. Manuel told the officer about our lives and love and the security all three of us had together in Canada and that he would do anything for us to stay together. He asked if there is any way to prevent our family from being separated because this would be devastating for all of us. **The officer said that she could not do anything to help us because I did not wait until exclusion was over before coming back to Canada. It was clear the officer did not want to hear what we had to say because the officer cited some codes from the law which we did not know and said that there was nothing she could do.** (Emphasis added)

[14] In her affidavit and in cross-examination, the officer disputed the allegation and stated that her notes to file contain a verbatim record of what was said during the interview. Her notes indicate that the husband stated:

> For the first time I am very happy with my wife and what I have. I now have a daughter. I never had a child and it is a wonderful feeling. I work hard to provide for them and I would do anything for them. Is there anything I can do?

[15] In response to this, the officer suggested that they consult their lawyer. She understood that she could consider an exemption from the inadmissibility requirement but did not take the husband's comments to be a request for H&C consideration. She acknowledged on cross-examination that the effect of the inadmissibility decision would be that the principal applicant and

her daughter would have to leave Canada and would be separated from their husband and step-father. She conceded that these are factors that she would consider in a humanitarian request.

[16] The respondent acknowledges that the Minister (or a delegated person) may, on his own consideration, review H&C factors but contends that an H&C request has to be explicit. Absent such a request, the officer is under no obligation to consider the application of H&C grounds: *Kumari v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1424 at para 9; *Fen v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1492 at para 12. Furthermore, the Court has held that there is no duty on an officer to advise applicants of their right to make an H&C application: *Mustafa v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1092 at paras 10, 13-14.

[17] The respondent's position that the officer has no authority to consider an implied request is inconsistent with the IP Manual, recent Federal Court jurisprudence and the officer's own understanding of her duties.

[18] It is correct that the Courts have held that officers deciding inland spousal sponsorship applications can waive inadmissibility resulting from the lack of an authorization to reenter Canada on humanitarian and compassionate (H&C) factors if these factors are brought to their attention: *Araujo v Canada (MCI)*, 2009 FC 515 at paras 18-19. The Minister may waive any applicable criteria or obligation of the Act on H&C grounds and has an obligation to consider them if they are raised: *Toussaint v Canada (MCI)*, 2011 FCA 146 at para 11.

[19] But section 5.27 of the Inland Processing Manual 5 (IP 5) states, in addition, that an officer:

> a. , , , may use discretion to consider, on their own initiative, whether an exemption on H&C grounds would be appropriate. Where the applicant does not directly request an exemption but facts in the application suggests that they are requesting an exemption for the inadmissibility, **officers should treat the application as if the exemption has been requested**. (Emphasis in the original)

[20] This guideline was interpreted by Justice Russell in *Brar v Canada (Minister of Citizenship and Immigration)* 2011 FC 691. At paragraph 58 he held that it was immaterial that an applicant had not made a specific request for an exemption from inadmissibility as s 5.27 creates a duty in an officer to consider such as request when the facts suggest that a request has been made. See also *Rogers v Canada (Minister of Citizenship and Immigration)* 2009 FC 26 at paras 22-38 where the nature of officers' discretion to grant an exemption on their own initiative is discussed.

[21] The officer interpreted the husband's entreaty at the close of the interview as a statement of how he felt. During cross-examination she acknowledged having the authority to consider an implied request. She stated that when asked "Is there anything I can do? He didn't ask me if there was anything I could do for him…" This was, as the applicants argue, splitting hairs. On the face of the information before the officer, it was unreasonable not to consider whether the H&C factors would justify an exemption.

[22] For that reason, the decision must be quashed and the matter sent back for redetermination before a different officer. The parties proposed no questions of general importance and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is:

1. the application is granted and the matter is remitted for redetermination by a different officer; and
2. no questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9219-11
STYLE OF CAUSE:	MARTA SOUSA DO NASCIMENTO YASMIN THATYANNE NASCIMENTO BRAGA MANUEL SOUSA NASCIMENTO and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 9, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
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