Federal Court  Cour fédérale

Date: 20140402

Docket: IMM-3464-13

Citation: 2014 FC 321

Ottawa, Ontario, April 2, 2014

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MARK DOUGLAS KATZMANN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] The applicant, Mr Mark Douglas Katzman, is seeking judicial review of a decision by an immigration officer (the Officer) of Citizenship and Immigration Canada [CIC], rendered April 29, 2013, rejecting his application for permanent residence from within Canada on humanitarian and compassionate grounds [H&C], pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The applicant was declared inadmissible to Canada for serious criminality pursuant to s 36(1)*a*) of *IRPA*.

BACKGROUND

[2] The applicant is a citizen of the United States who arrived in Canada as a child and became a permanent resident. The applicant has lived in Canada for over 40 years but has never applied for or obtained Canadian citizenship.

[3] The applicant has a son who is a Canadian citizen, and his mother and two sisters also live in Canada.

[4] The applicant has pleaded guilty and been convicted of the following offences:

- two counts of possession of cocaine with intent to sell and possession of controlled substances;
- 10 counts of breaking and entering with intent;
- one count of possession of break-in instruments;
- six counts of conspiracy; and
- one count of theft.

[5] He thereby lost his permanent residency on the grounds of serious criminality, and a deportation order was issued against him on September 27, 2011.

[6] The applicant sought an exemption of his inadmissibility for H&C considerations, based on his establishment in Canada and his family ties in Canada.

DECISION

[7] The Officer did not find that the applicant had demonstrated sufficient H&C grounds to warrant an exemption. The Officer concluded that the hardships that the applicant would face if he had to leave Canada would not be unusual and undeserved or disproportionate.

[8] The Officer considered the factors submitted by the applicant, which he identified as the following:

1. his son is bi-polar and needs his help and support;
2. his mother needs him because she is elderly and his sister, who has been taking care of her, has been diagnosed with terminal cancer; and
3. his establishment in Canada and important support network.

[9] The Officer noted that the applicant's son lives with his mother and although the applicant claims that he paid for his son's driving lessons and high school, the receipts that were submitted did not prove this fact. The Officer also noted that the applicant claims that he brings his son to work daily in order for him to gain work experience, but there was no evidence of this fact on file.

[10] The Officer also noted that the applicant's son had written a letter with regards to his father's involvement in his life, notwithstanding the fact that he lives with his mother. However, the Officer considered that the applicant was not available for his son during the two years that he was

in prison, and that furthermore, his son is an adult. The Officer also pointed out that the applicant's son can count on his mother's moral support and assistance and that if he needs financial assistance, the applicant could help his son from the United States. As a result, the Officer determined that although this evidence carried some weight, the applicant's relationship with his son was not a sufficient H&C factor.

[11] As for the applicant's claim that his mother relies on him now that his sister is suffering from terminal cancer, the Officer emphasized that although his mother is elderly, it is unclear how the applicant currently supports her and what she would need from him. The Officer stressed the fact that the applicant's mother only states that his support is "vitally important" without explaining how, and notes that she lives in the Eastern Townships while the applicant lives in Montreal. The Officer again states that the applicant was absent for two years, of his own doing, when he was incarcerated, and this mitigates his submissions as to his interdependency with his family. The Officer concluded that the applicant's time spent out of prison and sober is too short to determine whether he would relapse. The Officer also stated that she did not believe that the applicant would be available for his family even if he remained in Canada as a permanent resident, but did not explain why.

[12] The Officer then considered the applicant's establishment in Canada. The Officer did not find that the applicant had established himself in the job market, since he has only been working steadily for two years. His last employment income, before then, was in 2003. Moreover, the Officer noted that working is generally expected of adult members of society and therefore, is not sufficient in itself to grant an exception.

[13] As for his social ties, the Officer noted that the applicant did not mention friends or close personal relationships in his application. His counsel submits that he has an important support network related to his drug and alcohol problems and that it is important that he continue receiving the same support. The Officer acknowledged the importance of the support that the applicant has been receiving, but considered that he would be able to find equivalent resources in the United States.

SUBMISSIONS OF THE APPLICANT

[14] The applicant claims that the Officer drew unreasonable conclusions from the evidence that he provided and also based her findings on erroneous facts. The applicant alleges that the Officer has overlooked the improvements that he has brought to his life through rehabilitation. Moreover, the applicant submits that the Officer has minimized the seriousness of his son's condition as well as his sister's condition. The applicant argues that because of these omissions, the Officer improperly weighed the H&C grounds that he submitted.

[15] The applicant submits that the Officer's conclusion with regards to him being unavailable for his family when he was imprisoned is based on conjecture and is even contradicted by the evidence that he submitted. Although he was sentenced to two years, he was released on early parole in May 2010, after approximately six months in prison. The applicant acknowledges that this early parole was revoked in September 2010, but emphasizes that it was reinstated shortly after, relying on his letters and a criminologist's report.

[16] The applicant argues that by overlooking the fact that he was granted early parole, the Officer ignored his early efforts towards rehabilitation. Furthermore, the applicant claims that the allegation that he was unavailable for two years was unjustified, as nothing indicated that he had no contact with his family during that time. In fact, he submits that the letters from his ex-wife indicate that she and their son were in contact with him during that time.

[17] The applicant argues that by limiting her analysis to the length of his sentence, the Officer failed to adequately weigh the specific negative and positive aspects of his history. The Officer dismissed all family considerations because of the presence of serious criminality. She overlooked the essential issue of the application, which was to determine whether the positive factors of his situation outweighed the negative. The applicant claims that by proceeding this way, the Officer overlooked important aspects of his situation, making her decision unreasonable.

[18] As for his level of establishment, the applicant submits that the Officer's decision does not account for the criminologist's report. The Officer's analysis of his employment history only goes back to 2003 and concludes that he has only been working reliably for two years. The applicant states that he worked steadily for many years before 2003, and this was part of the criminologist's conclusions. The applicant notes that the period between 2003 and 2009 coincides with his increasing drug and alcohol problems. The criminologist concluded that his criminal activity was essentially fuelled by his addictions.

[19] The applicant emphasizes that he has been sober for nearly four years now. He argues that the evidence that he has submitted shows his rapid reintegration in the job market. The applicant

argues that the fact that addiction was the main factor for his serious criminality, and is no longer an issue, should offset his criminal history. The applicant also stresses the fact that he has lived in Canada for nearly 50 years; therefore he has a significant level of establishment. He claims that both these elements have been disregarded by the Officer.

[20] Furthermore, the applicant submits that the Officer made an error by merely considering his son as an adult child. He argues that although financial assistance and modern methods of communication could have been sufficient for most 22 year olds, his son suffers from a serious mental illness which has led him to be hospitalized on several occasions. The applicant considers that the Officer demonstrated a misunderstanding of the seriousness of his son's condition when she mentioned that his son is still on social assistance and found this to be a negative factor.

[21] The applicant argues that he has demonstrated that he is a pillar in his son's life. He claims that although his son's medication was recently decreased, he is vulnerable to other episodes. As for the Officer's findings that there was no documentary evidence demonstrating that he funds his son's education and driving lessons, the applicant claims that these facts were corroborated by a letter from his son.

[22] The applicant submits that the regular physical presence of a support network is crucial to his son's stability and well-being.

[23] Finally, the applicant argues that the Officer ignored the impact of his sister's illness. He claims that if he is deported, he would face negative consequences in not being present to support

her during her illness and in the event of her death, would be unable to plan or attend her funeral service. He alleges that the Officer dismissed his argument with regards to his role as the only source of help and support for his mother, because he was incarcerated for two years and lives in Montreal. The applicant submits that as stated in the criminologist's report, he has had increased contact with both his sister and his mother since his release and has the possibility of traveling to the Eastern Townships on a regular basis because they are a short drive away.

[24] The applicant submits that these omissions make the Officer's decision incomplete and unreasonable. He also argues that the evidence that he produced demonstrates that the hardships that he would face would be undeserved or disproportionate. He claims that had the evidence been properly examined by the Officer, her decision would have been different.

ISSUES AND STANDARD OF REVIEW

A. Issues

[25] The applicant submits that the issues are the following:

1. Has the Officer rendered a legally erroneous decision or order?
2. Has the Officer rendered her decision in an arbitrary manner without taking into consideration the elements of proof submitted by the applicant?
3. Has the Officer acted in a manner that is contrary to the law itself?

[26] The Defendant frames the issue as follows:

Did the Officer commit an unreasonable error by concluding that the applicant did not file sufficient evidence to demonstrate that there were sufficient H&C considerations to grant the exemption of his inadmissibility for serious criminality?

[27] I consider the relevant issue to be:

Was the Officer's decision reasonable?

B. Standard of Review

[28] The standard of review applicable to an H&C decision is reasonableness (see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18 and *Katwaru v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1277 at para 30 [*Katwaru*]). The Officer's findings must be accorded considerable deference and this Court will not intervene if the decision falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 and *Katwaru*, cited above, at para 58).

ANALYSIS

[29] I find that the Officer's decision was reasonable, and dismiss this application for the following reasons.

[30] It is not the Court's role to reweigh factors submitted by an applicant in a claim for an exemption from the requirements for permanent residency on H&C grounds (see *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 11). The process of evaluating an

H&C application is highly discretionary and fact-based; therefore, the Officer was in the best position to assess the applicant's claim (see *Katwaru*, cited above, at para 58).

[31] It is apparent from the applicant's submissions that he is unsatisfied with the weight that was given to the factors that he submitted in support of his claim. However, the Officer considered each factor that the applicant submitted, including the positive factors, such as his son's condition and his relationship with him; his sister's condition; the fact that his mother is elderly; and his establishment in Canada.

[32] Decisions made on H&C applications depend on the weight attributed to positive and negative factors. The seriousness of an offence can outweigh the positive factors identified by an applicant (see *Katwaru*, cited above, at para 61). In this case, the Officer concluded that the positive factors did not outweigh the seriousness of the applicant's numerous offences. Therefore, I reject the applicant's claim that the Officer failed to consider the applicant's family and their needs because of his inadmissibility for criminality.

[33] Moreover, the applicant failed to provide sufficient evidence to support his claim. He did not demonstrate how he supports his mother or the negative impact on his mother that would be caused by his removal from Canada. It was similarly unclear in what way his continued presence in Canada is necessary for his sister in light of her health condition. Furthermore, he failed to provide evidence of his financial establishment in Canada, or of any close personal ties beyond his immediate family. These are all factors that the Officer considered in arriving at his decision.

[34] As for the applicant's contention that the Officer did not consider the criminologist's report, this argument is not persuasive. It is within the Officer's discretion to grant forensic reports prepared at the direction of his counsel little weight. The Court recently discussed the frailties of forensic reports in *Czesak v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1149 at paras 37 to 40:

> [37] Moreover, I am of the view that decision-makers should be wary of reliance upon forensic expert evidence obtained for the purpose of litigation, unless it is subject to some form of validation. […]
>
> [38] Our legal system has a long experience in dealing with forensic experts testifying on matters relating to technical evidence for the purpose of assisting courts in their determinations. From that experience, the courts have developed what I would describe as a guarded and cautionary view on conclusions of forensic experts which have not undergone a rigorous validation process under court procedures.
>
> [39] Some of these procedures intended to validate expert opinions include the early exchange of reports, by which I mean that normally there is a rebuttal report as a first line of validation. The parties are normally entitled to obtain extensive background information on the drafting of the reports, including production of correspondence between lawyers and experts and knowing whether there are other reports in existence not being relied upon. These procedures are further enhanced by the right to question opposing parties in discovery in relation to issues raised in reports. Most importantly, courts are provided the opportunity to assess the reliability of the expert opinions under cross-examination by competent lawyers, often under the direction of their own experts. In some cases, decision-makers will even involve neutral experts to assist resolution of more controversial points of opposing forensic experts.
>
> [40] This is not to say that every expert report prepared for litigation should be dismissed as having no, or little, weight. But what the court's experience with forensic experts does suggest in relation to these reports being proffered before administrative tribunals where there exists no defined procedure to allow for their validation, is that caution should be exercised in accepting them at face value, particularly when they propose to settle important issues to be decided by the tribunal. In my view therefore, unless there is

> some means to corroborate either the neutrality or lack of self interest of the expert in relation to the litigation process, they generally should be accorded little weight.

[35] Moreover, the fact that the Officer did not mention the criminologist's report does not equate to her not having considered it (see *Morales v Canada (Minister of Citizenship and Immigration)*, 2012 FC 164 at para 33 [*Morales*] and *Jnojules v Canada (Minister of Citizenship and Immigration)*, 2012 FC 531 at para 35). I agree with the respondent's contention that the Officer's consideration of this factor is evidenced by her conclusion that his rehabilitation was new and fragile and too recent to know if he would relapse. As well, the principle finding is that the applicant's criminality is related to his substance abuse problems, which are presently under control. The Officer considered this as a factor, but found it to be insufficient in the circumstances to outweigh his significant criminality and the risk of recidivism. I find no fault in his consideration of the evidence.

[36] The applicant argued that the Officer's error in regards to the number of months he spent in prison is significant enough that it should invalidate the decision. I disagree. The Officer, in his decision, referred to a period of two years in prison. However, the applicant spent 10 months in prison, was granted parole and released, then had his parole revoked and spent another three months in prison, for a total of 13 months. I do not find the Officer's error in reference to time spent in prison significant enough to render the decision invalid. In fact, it should be noted that the applicant's early parole was revoked because he was employed, yet nevertheless continued to collect social security payments. I find the applicant's failure to respect the laws around the collection of social security benefits, even under threat of removal and despite his arguments that he

has changed his ways, to be a significant factor supporting the Officer's conclusion that his rehabilitation was fragile.

[37] The applicant argued that his son's need for his moral and financial support should militate against his removal. I do not find this argument persuasive. The applicant's son lives with his mother, and will therefore be able to rely on her moral support and assistance. Furthermore, the applicant will be able to provide his son with financial assistance from the United States and remain in regular contact with him. His son would therefore have the regular physical presence and support network required by his condition.

[38] In terms of hardship, the United States is hardly a hardship country for purposes of an H&C analysis. It has a well-established economy in which the applicant could certainly participate. Furthermore, he has a brother there who could provide him with family support. Geographically, it is so close to Canada that the applicant would be able to remain physically close to his son and see him regularly.

[39] As for the applicant's argument in regard to his continuing need for support related to his prior drug and alcohol problems, the Officer considered that this support could be found in the United States. I agree with this analysis.

[40] The Officer considered the H&C factors presented by the applicant, but found that they were insufficient to outweigh his significant criminality.

[41] As a result of the foregoing, I find that the Officer's decision is reasonable, and certainly falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law", particularly given the "highly discretionary and fact-based nature" of the decision at hand. It was within the Officer's discretion to reject the applicant's application on the basis that he had not demonstrated sufficient H&C considerations to grant a waiver of his criminal inadmissibility.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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