Federal Court  Cour fédérale

Date: 20140718

Docket: IMM-3028-13

Citation: 2014 FC 714

Ottawa, Ontario, July 18, 2014

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

HABIB RASHAD ABOUBACAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] On March 26, 2013, an Immigration Officer denied the applicant's request for permanent resident status on humanitarian and compassionate grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). In reaching this conclusion, the Officer noted that although the applicant had achieved a reasonable level of establishment in Canada through employment, friendship and community involvement, his degree of establishment was "not exceptional" for someone who had been living in Canada for 14 years. The officer noted that his

spousal sponsorship application had received approval in principle, or phase one approval some 6 years earlier, but that was not a guarantee of final approval and permanent resident status. Neither the fact of the phase one approval, the delay in processing the application, nor the circumstances under which his sponsorship by his wife was withdrawn, gave rise to exceptional circumstances, undue hardship or burden. The officer reasoned that the applicant made a conscious decision to enter and remain in Canada without the benefit of a valid status, and had to anticipate that he might someday be required to leave. The officer also dismissed the concern that returning the applicant to Niger, with its low indicies of human development, did not meet the criteria of hardship required under section 25.

[2] For the three reasons that follow, this decision must be set aside.

[3] First, the officer imported the test under section 97 of the *IRPA* into the test for humanitarian and compassionate relief under section 25 of the *IRPA*. I will not engage, for the purposes of this application, in an analysis as to whether the selection and definition of the legal test is measured by the correctness standard or by that of reasonableness. This question has been canvassed with precision in the decision of Justice Mary Gleason in *Diabate v. Canada (Citizenship and Immigration)*, 2013 FC 129. I agree with Justice Gleason's analysis, although the law has evolved somewhat since her decision was released. While I consider the error here to arise from a reading of the legislation as a whole, and not arising from the interpretation of a specialized term of art in a home statute, and thus a matter of correctness, it is of no moment. Whether assessed against a standard of correctness or reasonableness, the articulation of the test under section 25 and hence the decision, cannot be saved.

[4] In considering the question of the hardship the applicant might face on return to Niger, the officer concluded that "… Although the conditions in Niger are not favourable, they are a common harm that affects the general population, [and that] the applicant has failed to demonstrate that he would be personally and directly seriously affected from these conditions." This formulation of the test under section 25 is neither correct, nor reasonable. The officer has imported into section 25 a requirement of section 97, namely, to be eligible for protection, an individual must face a risk "not faced generally by other individuals in or from that country." The consequence of the reasoning adopted by the officer in this case is to eviscerate section 25 of its purpose. The proper question is whether it would be undue or disproportionate hardship to return this applicant to this country in these particular circumstances.

[5] My conclusion in this regard is supported by a long line of cases. In *Shah v. MCI*, 2011 FC 1269 Justice Leonard Mandamin considered an application to review a refusal of an H&C request regarding an applicant from Trinidad. In that case, the officer found that the applicant "had provided insufficient objective evidence that she would be personally targeted by criminal elements upon her return to Trinidad" and that H&C consideration was unwarranted because the situation and hardship facing the applicant "is faced generally by other individuals in the country." In setting aside the decision, Justice Mandamin wrote:

> [73] I find the Officer applied a higher standard than appropriate for H&C decisions by incorrectly requiring the Applicant to establish a personal risk beyond that faced by other individuals in Trinidad. The test of risk causing unusual, undeserved or disproportionate hardship is not limited to personal risks to an Applicant's life or safety, and the Officer failed to properly consider whether the overall problem of criminality constituted unusual and undeserved, or disproportionate hardship in the circumstances. This constitutes a reviewable error: *Aboudaia v*

> *Canada* (*Minister of Citizenship and Immigration*), 2009 FC 1169 (CanLII), 2009 FC 1169 at para 17, *Rebaï, supra; Sahota, supra;*

[6] Reaching back to 2008, in *Rebai v. Canada (MCI)*, 2008 FC 24 Justice Pinard considered a case where the PRRA analysis seeped into the consideration of a section 25 application. Justice Pinard wrote:

> [7] With respect to the second question, while it is permissible for the same officer to make a decision on an applicant's PRRA and H&C applications, the issues to be determined on the two applications are separate (*Monemi v. Canada (Solicitor General*) 2004 FC 1648 (CanLII), (2004), 266 F.T.R. 31). When performing a PRRA analysis, the question to be answered is whether the applicant would personally be subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment (*Sahota v. Canada (Minister of Citizenship and Immigration*), 2007 FC 651 (CanLII), 2007 FC 651, [2007] F.C.J. No. 882 (T.D.) (QL)). On an H&C application, the underlying question is whether the requirement that the applicant apply for permanent residence from outside of Canada would cause the applicant unusual and undeserved or disproportionate hardship.

[7] The most recent articulation of the principle is found in *Diabate v. Canada (MCI)*, where Justice Gleason accurately observed:

> [36] …The officer's role in an H&C analysis is to assess whether an individual would face "unusual and undeserved or disproportionate hardship" if required to apply for permanent residence outside of Canada. It is both incorrect and unreasonable to require, as part of that analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin. Rather, the frame of analysis for H&C consideration has to be that of the individual him or herself, which involves consideration of whether the hardship of leaving Canada and returning to the country of origin would be undue, undeserved or disproportionate.

[8] To conclude, the officer applied the wrong test. While this is sufficient to grant the application, it is important to address evidentiary issues in embedded in the analysis of the establishment factors. In this regard, there are two errors.

[9] The applicant contends that the officer erred in failing to consider whether returning a 45 year old to Niger, after an absence of 14 years, would constitute undue, undeserved or disproportionate hardship. In response, the Minister asserts that the onus is on the applicant to bring forth evidence that linked the applicant specifically to those adverse conditions; *Kanthasamy v Canada*, 2014 FCA 113 at paras 48 and 50:

> [48] The Federal Court's cases underscore that unusual and undeserved, or disproportionate hardship must affect the applicant personally and directly. Applicants under subsection 25(1) must show a link between the evidence of hardship and their individual situations. It is not enough just to point to hardship without establishing that link: see, e.g., *Lalane v. Canada (Minister of Citizenship and Immigration*), 2009 FC 6 (CanLII), 2009 FC 6 at paragraph 1.
>
> [50] Before leaving the interpretation of subsection 25(1) of the Act, it is necessary to say a few words about the meaning of "unusual and undeserved, or disproportionate hardship." In my view, the decided cases show that the factors set out in section 5.11 of the processing manual, above, are a reasonable enumeration of the types of matters that an Officer must consider when assessing an application for humanitarian and compassionate relief under subsection 25(1) of the Act. They encompass the sorts of consequences that, depending on the particular facts of particular cases, might meet the high standard of hardship associated with leaving Canada, associated with arriving and staying in the foreign country, or both.

[10] This decision is of no assistance to the Minister. Indeed, it supports the applicant. The Court of Appeal emphasizes that section 25 requires an examination of the elements related to the hardship that affects a particular foreign national. Here, the officer noted that Niger was the

poorest country on earth, had the second highest global infant mortality rate, that 8% of its population is enslaved, and that internal war had displaced 200,000 people. The officer noted that Niger was in the grip of a longstanding drought that was endangering the livelihood of the 80% of the population that was entirely dependent on agriculture. After reciting these facts, the officer concluded: "I find there is insufficient evidence before me that the applicant would be personally affected by these country conditions. Although I recognize that the conditions in Niger are not favourable, they are a common harm that affects the general population."

[11] As noted earlier, the wrong test was applied. Further, the conclusion reached is also unsustainable in light of the facts. There is no rationale link between the evidence and the conclusion that the applicant would not be personally affected. The decision fails to meet the tri-partite criteria of justification, transparency and intelligibility.

[12] While claims for humanitarian and compassionate relief under section 25 must be supported by evidence, there are circumstances where the conditions in the country of origin are such that they support a reasoned inference as to the challenges a particular applicant would face on return to Niger. This is not speculation, rather it is a reasoned inference, of a non – speculative nature, as to the hardship an individual would face, and thus provides an evidentiary foundation for a meaningful, individualized analysis as required by *Kathasamy*.

[13] Before leaving this point, in *Vuktilaj v. Canada (Citizenship and Immigration)*, 2104 FC 188, Justice O'Keefe, after noting that section 25 (1.3) restricts consideration only to "the elements related to the hardships that affect the foreign national" continued:

> [36] That said, the provision itself restricts consideration only to the "elements related to the hardships that affect the foreign national" (emphasis added). That means that not every hardship that a person in the country of origin could conceivably suffer needs to be dealt with. Rather, the applicants must show either that it will probably affect them or, at the very least, that living in conditions where it could happen to them is itself an unusual and undeserved or disproportionate hardship. Indeed, in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 802 at paragraph 33 (available on CanLII) [*Kanthasamy*], Madam Justice Catherine Kane said the same, observing that "the considerations, including adverse country conditions and discrimination, should have a direct and negative impact on the particular applicant."

Justice O'Keefe concludes by noting that section 25(1.3) is not licence to ignore evidence in relation to risk, rather it mandates "that any evidence be assessed for hardship." I agree.

[14] There is a further error embedded in the establishment analysis. The officer dismissed, peremptorily and unreasonably, the circumstances under which the applicant came to make an application under section 25. The applicant married his Canadian wife in 2002 who sponsored him for permanent residence status. The sponsorship received first stage approval in February 2006. Thereafter, the application languished. In May, 2012, the applicant and his wife separated and she withdrew her sponsorship.

[15] Since February 2006, upon first stage approval, the applicant received a work permit and health care benefits. Under the Minister's policy directive, IP 8 Spouse or Common-law partner in Canada Class, there was an administrative deferral of any removal proceedings pending final determination. In the ordinary course, upon completion of medical, security and police checks, both in Canada and in the country of origin, status could, but not necessarily would, follow. The officer gave no consideration to the fact that under the Minister's own policy the applicant had

no expectation that he would be required to leave during that period of time. True, he had no right to stay, but that is not, in the context of a humanitarian and compassionate application, the determinative question. He expected, in the ordinary course, that he would remain, and that expectation was rooted in the minister's policy. The officer needed to integrate this consideration into the analysis.

[16] The Minister states, correctly, that IP 8 is but an administrative policy which confers no rights, can be revoked at any time and that status does not follow as a matter of course. All of this is correct, but it misses two key points. The first is that the H&C analysis does not turn on the strict application of the *IRPA*, and the second is that IP8, by its very terms, meant that any decision to leave Canada pending disposition of his sponsorship had potential adverse consequences for the applicant.

[17] Turning to the latter point, section 5.28 of IP 8 provides:

> 5.28. Applicants who leave Canada before a final decision is taken on their application for permanent residence
>
> An applicant's departure from Canada after the application is stamped as received or after assessment of eligibility for membership in the spouse or common-law partner in Canada class may affect their ability to become a permanent resident.
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> …
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> Foreign nationals are not provided with any guarantees that they will be allowed to return to or re-enter Canada. If they are unable to do so, their application for permanent residence may be refused because they are not cohabiting with their spouse or common-law partner at the time the case is finalized [R72(1)(d) and R124(a)].

[18] The officer dispensed with the argument that the applicant remained in Canada for reasons beyond his control. He noted the unfettered freedom of the applicant to make choices as to whether he would remain in Canada or leave pending approval of his spousal sponsorship. No mention is made of section 5.28, which, on its face, indicates that the analysis of choice is more nuanced than that offered by the officer. While it is appropriate for an officer to consider the extent to which portions of a stay were by choice, the consequences of those choices must be integrated into the equation in order to conduct an H&C application with substance. Lengthy periods of establishment in these circumstances cannot, in light of 5.28, be discounted to a minimum residual consideration by a simple statement that the applicant was always free to leave.

[19] I turn to the second error in the establishment analysis. The officer attempted to rationalize the lengthy six year delay in processing the sponsorship application by noting that because the applicant was entitled to an open work permit under IP 8, his continued successful employment during that period of time was not exceptional. His right to work was authorized under the directive and therefore the fact that he had been gainfully employed and became a productive member of his community was neither unique nor exceptional. This reasoning does not withstand scrutiny, as it leads to the conclusion that if an applicant had worked illegally, without the benefit of a work permit, it would be worthy of consideration as exceptional.

[20] In so far as whether the passage of 14 years; and the 6 year delay in processing his sponsorship application constituted factors to be considered, the officer accepted that “this was a lengthy period.” But concluded that “there were no guarantees that the applicant would have

granted permanent resident status." That is, legally correct. There are no guarantees. However, resorting to the scheme of the *IRPA* as an answer to requests for humanitarian and compassionate relief does not reflect an exercise of discretion by the officer. Section 25 is directed to whether an exception should be made to the unusual application of the *IRPA* laws and regulations. If the usual laws and regulations are considered to be dispositive of the outcome of a section 25 application, section 25 becomes a hollow exercise.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review of the decision of the officer dated March 26, 2013 refusing the applicant's application for humanitarian and compassionate relief under section 25 of the *IRP*A is granted. The decision is set aside and the matter is remitted to a different officer for consideration. There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Raj Sharma	FOR THE APPLICANT
Ian Wiebe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Sharma Harsanyi Barristers and Solicitors Calgary, Alberta	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT