Federal Court  Cour fédérale

Date: 20170209

Docket: IMM-3323-16

Citation: 2017 FC 162

Ottawa, Ontario, February 9, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ANDREJ MANDRIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Andrej Mandric [the Applicant], pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by the Immigration Program Manager [Officer] at the Canadian Embassy in Vienna, dated June 30, 2016, in which the Applicant's application for an Authorization to Return to Canada [ARC] was denied [the Decision]. Leave was granted November 8, 2016.

II. Facts

[2] The Applicant is a citizen of Croatia. He arrived in Canada on February 23, 2013 and made a refugee claim. He was issued a Departure Order effective March 24, 2013 and in May 2013, his refugee claim was refused. The Applicant finally left Canada on February 1, 2014, some 9 months after the issuance of the Departure Order. The Applicant was therefore deemed deported.

[3] In March 2013 the Applicant met his current spouse, who is also his sponsor [Applicant's spouse]. The Applicant's spouse is a Canadian citizen and has lived in Canada for almost 30 years. She is currently employed as a social worker, a field in which she has a Master's degree and hopes to achieve her Ph.D. It is due to this relationship that the Applicant remained in Canada past the date of his Departure Order; the relationship was relatively young and they wanted to see if it would mature. It did; the Applicant and his spouse were married (in Croatia, to which he had returned) in July 2014. The bona fides of this marriage were tested and accepted by another immigration officer after an interview.

[4] The Applicant and his spouse have no children together. The Applicant's spouse has two children from a previous marriage: a 19-year-old son who is proceeding to post-secondary education, but for whom the Applicant's spouse provides financial and emotional support and a 28-year-old daughter for whom the spouse provides emotional support. Both reside in Canada.

[5] Because he had overstayed after his RPD application was dismissed, the Applicant could not return to Canada without an ARC. Accordingly he applied for one. It was dismissed, which dismissal is the subject of this judicial review.

[6] Simultaneously with the Applicant's application for an ARC, the Applicant spouse applied to sponsor him for permanent residence in the Family Class. The sponsorship application failed due to the fact that the Applicant's spouse, unbeknownst to her, was in default of an undertaking given in the 1990s on behalf of her ex-step-father to repay any social assistance he received. Refusal of the sponsorship application is not the subject of this judicial review.

[7] The default of the undertaking is critical to this application. The Applicant's spouse had sponsored her ex-step-father (her step-father at the time) and had given a 10-year undertaking to cover any social assistance he might receive. The Applicant's mother and her ex-step-father subsequently divorced. According to the Ontario Government, sometime following this divorce, the ex-step-father received social assistance for a period of one year - from September 2001 to September 2002. The amount paid to the ex-step-father was $5,438.38.

[8] The evidence before the Officer established that the Applicant's spouse did not know of the ex-step-father's receipt of social assistance. It occurred after her mother and the ex-step-father divorced. It came to her attention in the context of her sponsorship of the Applicant; she paid the full amount immediately after it was brought to her attention.

[9] Unfortunately, also before the Officer in the Global Case Management System [GCMS] Notes was an entry to the effect that the Applicant's spouse: (1) was in default of her undertaking as a result of social assistance paid to both of her parents (plural), which was not the case because only the ex-step-father was involved; and (2) the default covered a six-year period from August 24, 2001 to October 22, 2007, which was not the case because only one year was involved, not six. Further, neither the start nor the end dates set out in the GCMS, August 24, 2001 and October 22, 2007, were accurate.

[10] Why the GCMS notes are so inaccurate is not known. The issue in part is whether the Applicant should be denied an ARC because of the inaccuracy.

[11] Notwithstanding assertions that the Officer acted reasonably both in acting on the GCMS notes to file and in the overall assessment of the Applicant's claim for an ARC, it was conceded that the letter from the Government of Ontario setting out the dates, amounts and nature of the indebtedness was not made up. While it was suggested there might be other defaults by the Applicant that do not appear in the record, such suggestions are nothing but pure speculation. Moreover, such speculation is contrary to the evidence that her debt was repaid, as found by the Officer.

[12] In my respectful view, the GCMS information regarding the default was not just incorrect, but egregiously so: wrong parties, wrong dates and the wrong duration.

III. Decision

[13] On June 30, 2016, the Officer denied the Applicant's application for an ARC pursuant to subsection 52(1) of the *IRPA*. The GCMS notes provide the following reasons which repeatedly refer to the default. The default disqualified the Applicant's spouse from her sponsorship, as held in separate reasons for its rejection. The importance of the default carried over into the facts and reasoning for denying the ARC:

> ARC application carefully reviewed taking into consideration the information available on the application and on FOSS/GCMS. PA is Croatian national. He arrived in Canada on 23FEB2013. He made a refugee claim on the same day on the grounds of being bi-sexual. Departure Order effective on 24MAR29013 [*sic*]. Refuge claim refused on 09MAY2013. Departure was confirmed on 01FEB2014 and removal cost covered by airline. PA is deemed deported. PA met with sponsor in MAR2013. They started relationship and they got married in Croatia on 05JUL2014. FC1 sponsorship was submitted on 15OCT2014. Sponsor failed eligibility decision related to the sponsorship given the fact she sponsored parents [*sic*] as FC4 with a 10 year undertaking. They were landed as FC4 on 11DEC1992 and they collected social assistance from 24AUG2001 to 22OCT2007 [*sic*]. As this collection falls within the period of undertaking and it has not been repaid to the province, sponsor was in default of that previous Undertaking as defined in R135. Therefore sponsor was not eligible as per R133(1)(g)(i). She opted to continue if found not eligible. Repayment to the province was done in 2015, but sponsor is still not eligible as per R133(1)(g)(i) as she was in default at the time of submission of the sponsorship. PA was interviewed on 24MAR2015 and case officer indicated marriage seems to be a bona fide of the relationship. Sponsor has two children from previous marriage, who are now 19 year old and 28 year old. PA and sponsor have no children together. In reviewing the ARC application.). [*sic*] I am taking into account the fact that PA is married to a Canadian citizen and the case officer seemed satisfied about bona fide of the relationship. However PA did not leave within prescribed time and is deemed deported. In addition, sponsor is not eligible to sponsor under R133(1)(g)(i) as she was in default of a previous Undertaking. Taking into account the non-compliance with the immigration laws by PA and sponsor; that sponsor can join PA in Croatia and live with him as spouse of a Croatian national and that there is no undue hardship for them to live in Croatia, which is an EU Member State, I am not satisfied there is compelling reasons to the issuance of an ARC to allow PA

> to return to Canada. In taking my decision, I also reviewed the application in regards to the best interest of the child, but I noted that both children of sponsor from a previous relationship are adult and PA and sponsor do not have any child together. ARC refused. IMM1202 and refusal letter prepared and signed.
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> [emphasis added]

[14] The Applicant seeks judicial review from this Decision.

IV. Issues

[15] The issue is whether the Officer's Decision is reasonable?

V. Standard of Review

[16] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." A decision by an Immigration Officer on an ARC application is subject to review on the standard of reasonableness: *Lilla v Canada (Citizenship and Immigration)*, 2015 FC 568 at para 27, Diner J.

[17] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-

> making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

VI. Analysis

[18] While a number of issues were argued, including procedural fairness, in my respectful view the determinative issue is the Officer's reliance on egregiously incorrect information, namely, the mistaken description of the nature and extent of the undertaking regarding social assistance. To summarize, I have found that the information entered into the GCMS notes was not only incorrect, but egregiously so: wrong parties, wrong dates and substantially wrong duration.

[19] The analytical part of the reasons begins with a recital of the wrong information regarding the parties, dates and duration. The foundation of the analysis that followed was therefore not defensible on the record.

[20] The Decision then relies on that incorrect information in its analysis and conclusion:

> In addition, sponsor is not eligible to sponsor under R133(1)(g)(i) as she was in default of a previous Undertaking. Taking into account the non-compliance with the immigration laws by PA and sponsor; that sponsor can join PA in Croatia and live with him as spouse of a Croatian national and that there is no undue hardship for them to live in Croatia, which is an EU Member State, I am not satisfied there is compelling reasons to the issuance of an ARC to allow PA to return to Canada.
>
> [emphasis added]

[21] The Officer first considers the incorrect information in discussing the Applicant's spouse's ineligibility and then, a few lines down, makes specific reference to "the non-compliance", referring back to the erroneous information as part of the rationale for denying the application. The use of the definite article "the" underscores that the Officer was not referring to a default in general terms but rather, to the egregiously incorrect amount set out at the outset of the Decision.

[22] I am asked to ignore these errors, to look at the balance of the reasons and on that basis to conclude the Decision is reasonable; but to do so entails unscrambling eggs. Reliance on the default referred to was not defensible nor supported by the facts; indeed, reliance on such flawed evidence is contrary to the record. The factual underpinning of what I consider a central component of the Decision, intertwined with the analysis and conclusion as it is, leaves me unable to determine to what extent the egregiously incorrect information regarding the default influenced the Decision. I have concluded that this unreasonableness vitiates the entire Decision; it is not safe to allow it to stand.

[23] In my respectful view, the Decision is contrary to the evidence and therefore does not fall within the range of permissible outcomes that are defensible on the facts, as required by the Supreme Court of Canada in *Dunsmuir*. Therefore, judicial review is must be granted.

VII. Certified Question

[24] Neither party proposed a question to certify and in my view none arises.

VIII. Conclusions

[25] Judicial review is granted. No question is certified.

JUDGMENT

THIS COURT ORDERS that judicial review is granted, the Officer's Decision is set aside, the matter is remanded for determination by a different decision-maker, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Patricia Wells	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Patricia Wells Immigration Lawyers Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT