Date: 20080111

Docket: IMM-551-07

Citation: 2008 FC 43

BETWEEN:

JAMMAL ABBUD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] The outcome of Mr. Abbud's case depends on how it is characterized. His counsel submits that the decision not to allow him to remain in Canada on humanitarian and compassionate grounds while his application for permanent residence was being processed was made without all the relevant material at hand. Thus the subsequent refusal to reopen the matter was, to use the language of section 18.1 of the *Federal Courts Act* "made in a perverse or capricious manner…" and should be set aside.

[2] However, I have concluded that the mess in which the applicant finds himself arises from the fact that his immigration consultant made the wrong request to the officer who was dealing with the file. The request was not to reopen the H&C file, but rather to treat everything as an inland spousal application. As Mr. Abbud's criminal past made him ineligible for such consideration, there are no grounds to grant judicial review. Furthermore, Mr. Abbud has not suffered irreparable harm in that he may file a fresh application.

[3] Mr. Abbud, an Israeli citizen, arrived in Canada in October 2003 and filed a refugee claim some four months later. It was refused as was a subsequent pre-removal risk request.

[4] He then applied to remain in Canada pursuant to section 25 of the *Immigration and Refugee Protection Act* which allows the Minister to waive requirements on humanitarian and compassionate grounds. Normally, a person must apply for permanent resident status from outside Canada. The application, as first filed, was not under the spouse or common-law partner class because his previous criminal convictions in Israel and in the United States made him ineligible to apply thereunder. However, come August 2006, some six months after his original H&C application, a new immigration consultant filed more material and asked that everything be processed as a spouse or common-law partner in Canada application. The consultant used the wrong file number and this material was not before the officer when she made her negative decision.

[5] Mr. Abbud sought leave and judicial review of that decision. I dismissed the application for leave. As is customary, no reasons were given.

[6] Apparently taken aback, his counsel applied for reconsideration. In my reasons which are reported at 2007 FC 223, I said that since Mr. Abbud's previous criminal convictions made him ineligible to apply under that class, there was no consequence arising from the officer not considering something which could not be considered in any event. I concluded:

> Apparently Mr. Abbud has gone back to the Minister and has asked him to reconsider. He has refused. That matter is not before me, but it bears mentioning that the dismissal of the application for leave, and the dismissal of the motion for reconsideration do not preclude the Minister from taking another look at this matter.

[7] What actually happened is that a few days after the negative H&C decision, the immigration consultant wrote to ask that the matter be reopened and processed in accordance with the provisions pertaining to the spouse or common-law partner in Canada class. That letter was followed by two more which again reiterated that the matter be treated as a spousal sponsorship. The decision maker had no option but to refuse to reopen the matter because Mr. Abbud simply was not eligible for consideration under that class.

[8] As a matter of policy, in 2005 the Minister set out criteria under which spouses and common-law partners of Canadian citizens or permanent residents could be assessed for permanent residence from within Canada, even though they were out of status. The purpose of the policy was to promote family reunification and facilitate processing in cases where spouses and common-law partners were already living together in Canada.

[9] Having never actually asked that the H&C decision, without spousal sponsorship, be reconsidered, Mr. Abbud has no right to complain. However, nothing prevents from making a fresh H&C application which would include the material which was not before the decision maker the first time around.

[10] Mr. Abbud shall have until Monday, 21 January 2008 to submit a question of general importance via the Toronto Registry. The Minister shall have until 28 January 2008 to respond.

"Sean Harrington"
Judge

Ottawa, Ontario
January 11, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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