Federal Court  Cour fédérale

Date: 20090521

Docket: IMM-3528-08

Citation: 2009 FC 515

Ottawa, Ontario, this 21st day of May 2009

Present: The Honourable Orville Frenette

BETWEEN:

VERA DE ARAUJO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") of the decision of an immigration officer rendered on June 25, 2008, wherein the officer refused the applicant's application for permanent residence in Canada.

Summary of the Facts

[2] The applicant, Vera Lucia de Araujo, a citizen of Brazil, first came to Canada in 1990, entering with a 6-hour visa. She overstayed the time limit until she met her first husband and married him in Canada in 1993. They separated in 1994 and were divorced on September 18, 2007.

[3] The applicant had been ordered to leave Canada on October 26, 1995. She left Canada but failed to tell the immigration officer of her departure.

[4] The applicant returned to Canada on November 15, 2005. Since her arrival she has been living with Carlos Da Costa, whom she had met before in Brazil in 2003; they were married on October 25, 2007.

[5] On April 27, 2007, she had applied for permanent residence in Canada under the Spouse or Common-Law Partner in Canada Class. Carlos Da Costa affirmed that he was told by someone from the Immigration Call Centre, that the “applicant could qualify for sponsorship from inside Canada”.

[6] The application was filed and the applicant was assisted by an authorized representative for this application.

The Impugned Decision

[7] In his decision of June 25, 2008, the officer denied the application for two main reasons: 1) the applicant, having been ordered out of Canada and having left without notice, required

authorization to return to Canada, an authorization she did not seek; and 2) she remained illegally in Canada from 1990 to 2005, and 2007 to 2008.

The Issues

[8] Did the officer misinterpret the law and breach the duty of procedural fairness in refusing the applicant's application without considering the humanitarian and compassionate (H&C) factors raised? Did the officer exercise his discretion unreasonably by refusing the applicant's application for an authorization to return to Canada?

The Legislation

[9] Subsections 25(1), 41(a) and 52(1) of the Act read as follows:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
41. A person is inadmissible for failing to comply with this Act *(a)* in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a	**41.** S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente loi et, s'agissant du résident permanent, le manquement à

provision of this Act; and

l’obligation de résidence et aux conditions imposées.

52. (1) If a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances.

52. (1) L’exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l’agent ou dans les autres cas prévus par règlement.

[10] Subsections 224(1) and (2), section 226 and paragraphs 240(1)(*a*) to (*c*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, read as follows:

224. (1) An enforced departure order is prescribed as a circumstance that relieves a foreign national from having to obtain authorization under subsection 52(1) of the Act in order to return to Canada.

(2) A foreign national who is issued a departure order must meet the requirements set out in paragraphs 240(1)(*a*) to (*c*) within 30 days after the order becomes enforceable, failing which the departure order becomes a deportation order.

224. (1) L’exécution d’une mesure d’interdiction de séjour à l’égard d’un étranger est un cas prévu par règlement qui exonère celui-ci de l’obligation d’obtenir l’autorisation prévue au paragraphe 52(1) de la Loi pour revenir au Canada.

(2) L’étranger visé par une mesure d’interdiction de séjour doit satisfaire aux exigences prévues aux alinéas 240(1)*a*) à *c*) au plus tard trente jours après que la mesure devient exécutoire, à défaut de quoi la mesure devient une mesure d’expulsion.

226. (1) For the purposes of subsection 52(1) of the Act, and subject to subsection (2), a deportation order obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the deportation order was enforced.

(2) For the purposes of subsection 52(1) of the Act, the making of a deportation order against a foreign national on the basis of inadmissibility under paragraph 42(*b*) of the Act is prescribed as a circumstance that relieves the foreign national from having to obtain an authorization in order

226. (1) Pour l’application du paragraphe 52(1) de la Loi, mais sous réserve du paragraphe (2), la mesure d’expulsion oblige l’étranger à obtenir une autorisation écrite pour revenir au Canada à quelque moment que ce soit après l’exécution de la mesure.

(2) Pour l’application du paragraphe 52(1) de la Loi, le cas de l’étranger visé par une mesure d’expulsion prise du fait de son interdiction de territoire au titre de l’alinéa 42*b*) de la Loi est un cas prévu par règlement qui dispense celui-ci de l’obligation d’obtenir une autorisation pour

to return to Canada.

(3) For the purposes of subsection 52(1) of the Act, a removal order referred to in paragraph 81(*b*) of the Act obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the removal order was enforced.

240. (1) A removal order against a foreign national, whether it is enforced by voluntary compliance or by the Minister, is enforced when the foreign national

(*a*) appears before an officer at a port of entry to verify their departure from Canada;

(*b*) obtains a certificate of departure from the Department;

(*c*) departs from Canada; and

revenir au Canada.

(3) Pour l'application du paragraphe 52(1) de la Loi, la mesure de renvoi visée à l'article 81 de la Loi oblige l'étranger à obtenir une autorisation écrite pour revenir au Canada à quelque moment que ce soit après l'exécution de la mesure.

240. (1) Qu'elle soit volontaire ou forcée, l'exécution d'une mesure de renvoi n'est parfaite que si l'étranger, à la fois :

a) comparaît devant un agent au point d'entrée pour confirmer son départ du Canada;

b) a obtenu du ministère l'attestation de départ;

c) quitte le Canada;

The Standard of Review

[11] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Supreme Court of Canada re-stated the standard of review for decisions interpreting facts or mixed facts and law, as one of reasonableness *simpliciter*. In questions of law, or of procedural fairness or rules of natural justice, the standard is also of correctness. In *Dunsmuir*, *supra*, and *Minister of Citizenship and Immigration v. Khosa*, 2009 SCC 12, the Supreme Court of Canada reiterated that decisions of administrative tribunals are entitled to deference.

[12] In the particular case of a decision founded upon section 52 of the Act, the standard of reasonableness was applied in *Umlani v. Minister of Citizenship and Immigration*, 2008 FC 1373, at paragraph 23.

[13] Counsel for the applicant submits that the officer breached the duty of procedural fairness by not advising her in advance that the question of her inadmissibility would be raised at the interview and implying he had no authority to consider H&C factors. The applicant relies heavily for this argument upon the decision of *Sahakyan v. Minister of Citizenship and Immigration*, 2004 FC 1542. The respondent answers this submission by stating that *Sahakyan* is distinguishable from the facts of the present case. Furthermore, it was not within the officer's duty to advise the applicant (who was represented by counsel) that she could make an application for permanent residence on H&C grounds under section 25, even less to decide the issue without a demand under section 25 either by the Minister or the applicant.

Analysis

[14] There is no debate about the fact that the applicant had been deported from Canada in 1995 and that she re-entered Canada without authorization as required by section 41 and subsection 52(1) of the Act and subsection 226(1) of the Regulations. The applicant did not present an H&C application and did not seek the H&C implications under subsection 25(1) of the Act. There was no legal duty on the officer's part to advise the applicant of avenues under the Act to counter the above effects of the law; a law she is presumed to know especially if advised by counsel.

[15] The applicant relies upon a policy guideline IP8 “Spouse or Common-law Partner in Canada Class” published by Citizenship and Immigration Canada which states: “New and spousal applications . . . in cases where spousal applicants do not meet the criteria, they will be instructed to apply in the regular H&C stream”. She alleges the officer did not address her with this option and he did not consider the H&C implication. The applicant refers to the decision *Sahakyan, supra*. In that case the applicant came to Canada with a visitor’s visa and applied for refugee status, an application which was denied. He did leave Canada and later returned. He then applied for permanent status which was granted, subject to any criteria upon which he was not inadmissible. When it was discovered that he had returned to Canada, without the Minister’s authorization, the officer reviewed the file and dismissed the application. Justice Shawn Harrington granted the application on the basis that the rules of natural justice had been breached because the applicant had not been given the opportunity to answer the officer’s concerns.

[16] In my view, the facts in that case differ substantially from those in the present case. In the instant case, the applicant was interviewed and had the occasion to raise the reason of inadmissibility but she did not.

[17] The respondent submits that policy guidelines are not laws and cannot contradict laws. It is trite to repeat that while guidelines are a useful tool to interpret laws they are not laws which bind the Minister (*Maple Lodge Farms Ltd. v. Government of Canada,* [1982] 2 S.C.R. 2; *Minister of Citizenship and Immigration v. Legault*, 2002 FCA 125).

[18] When the officer noticed in the applicant's form that she was illegally in Canada having returned without the Minister's authorization, he had no choice but to apply the law which rendered the applicant inadmissible.

[19] The applicant could have made an H&C application as the policy guidelines indicate but she did not. The officer had no obligation to consider the H&C factors especially if he was not asked to do so (*Phan v. Minister of Citizenship and Immigration*, 2005 FC 184, at paragraph 17; *Ali v Minister of Citizenship and Immigration* (2007), 313 F.T.R. 151, at paragraphs 16, 18 and 19). The applicant's argument on this point, must therefore fail.

[20] The applicant invokes the doctrine of legitimate expectation, a procedural doctrine which has its source in the common law. It arises when either an express promise or a reasonably implicit one made on behalf of public authority, leads a person to believe that a practice will be respected. However, such a justification cannot engender substantive rights or interfere with a statutory duty (*De la Fuente v. Minister of Citizenship and Immigration*, 2006 FCA 186, at paragraph 19; *Council for Civil Service Unions v. Minister for Civil Service*, [1984] 3 All.E.R. 935 (U.K.H.L.)). As indicated in *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, at paragraph 26: "the doctrine of legitimate expectations cannot lead to substantive rights outside the procedural domain".

[21] The facts in the present case do not support such a claim since the only reference was the declaration of the applicant's spouse that by a telephone call to an Immigration Call Centre someone told him the procedure to follow. The doctrine of "officially induced error" cannot succeed for the same reasons. In any case, this doctrine is usually invoked in criminal, penal or statutory offences

matters. Here there is not a shred of evidence to support the application of such a doctrine. There is no valid reason in this case to grant equitable relief.

Conclusion

[22] For all the above reasons, the application must fail.

Certified Question

[23] The respondent suggested that if this Court had accepted the application of the doctrine of legitimate expectations or officially induced error which would contradict the law, a certified question ought to be accepted. Seeing the conclusion reached, the question becomes *non sequitur*.

JUDGMENT

The application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of a decision of an immigration officer rendered on June 25, 2008, wherein the officer refused the applicant's application for permanent residence in Canada, is dismissed.

No question is certified.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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