Federal Court Cour fédérale

Date: 20090923

Docket: IMM-5100-08

Citation: 2009 FC 952

OTTAWA, ONTARIO, September 23, 2009

PRESENT: The Honourable Louis S. Tannenbaum

BETWEEN:

NENAD KOTUR and ALENKA BARESIC

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the October 1, 2008 decision of Pre-Removal Risk Assessment Officer Thierry Alfred N'kombe (the "Officer") who rejected the applicants' application for permanent residence from inside Canada on humanitarian and compassionate grounds ("H&C").

[2] The applicants, Mr. Kotur and Ms. Baresic, are citizens of Croatia. Ms. Baresic arrived in Canada in September 2003 and Mr. Kotur arrived in May 2004. They both applied for refugee

protection on the basis of their fear of persecution due to Mr. Kotur's Serbian ethnicity and their mixed common-law relationship as Ms. Baresic is Croatian.

[3] In February 2005, Ms. Baresic gave birth to their son Stjepan. He is a Canadian citizen.

[4] In February 2006, their claim for refugee status was denied on the basis of lack of credibility. Leave to apply for judicial review of that decision was denied.

[5] In June 2006, they filed their H&C application which they updated with further supporting documentation in May 2008.

[6] The applicants also filed an application for a Pre-Removal Risk Assessment ("PRRA") in November 2006, which was denied on the same day as their H&C application. The challenge to that decision will be dealt with in a separate set of reasons.

[7] On December 10, 2008, the applicants applied for, and were granted, a stay of their removal to Croatia, originally scheduled for December 13, 2008, until such time as their application for leave and judicial review is determined on both the H&C and PRRA applications.

[8] The applicants have developed very close ties with their family in Canada which consists of Ms. Baresic's sister, her sister's husband and son, as well as their extended family. The infant children, Stjepan and his cousin, are particularly close. The applicants also have family in Croatia

consisting of Mr. Kotur's widowed mother and Ms. Baresic's widowed mother and extended family.

ANALYSIS

[9] In his decision, the Officer writes: "I am of the opinion that the applicants have not satisfied me that their personal circumstances, as they relate to risk, are such that the hardship of not being granted the requested exemption would be i) unusual and undeserved or ii) disproportionate."

[10] Subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, is the Officer's legal basis for assessing the applicants' H&C application:

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.

[11] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada recognized that this section conveys a broad discretion on an officer. It held also that an officer must exercise this discretion reasonably, paying particular attention to the best interests of the child and that, therefore, the appropriate standard of review of an H&C decision is reasonableness *simpliciter.*

[12] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court collapsed the patent unreasonableness and reasonableness *simpliciter* standards into one standard of review: reasonableness. In this same decision the Court held that if prior case law has identified an applicable standard of review, there is no need to repeat a standard of review analysis. In such, the standard of review of an H&C decision is reasonableness.

Evidence Ignored

[13] This Court has held that the more important the evidence that is not specifically mentioned and analyzed in a decision, the more willing a court will be to infer from the silence that an erroneous finding of fact was made without regard to the evidence (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, at paragraphs 14-17).

[14] The Officer mentions two letters submitted in support of the H&C application: one from Mr. Kotur’s mother and one from Ms. Baresic’s mother. He indicates that both writers describe, from their point of view, the reality of post-war coexistence between Croatians and Serbs. He finds

that not only ethnic Serbs but also ethnic Roma face discrimination as a whole and that this is something that is not personal to the applicants. However, he does not address the specific contents of the letter from Ms. Baresic's mother which reads in part:

> I can't forgive you because you chose to be with Nenad [Mr. Kotur]. Your entire family is against you two being together. They are even more furious now, when they heard you have a son with the Serbian man. Your aunt Milka and her husband Zdravko visited me the other day. It was very hard for me to listen to them. They were cursing you over and over again. You know how much they hate Serbian people because they killed their son during the war. Your uncle Zdravko said he would kill Nenad if he saw him. They don't accept little Stjepan even though he is just a baby and doesn't know what's going on.
>
> …. I am scared to tell [the neighbours] you have a son who is half Croatian and half Serbian. I am scared because I don't know how they will react and what they will think. You have nobody to count on here. You have nobody to support you in your decision or protect you from the people who hate you and your family…

[15] This letter speaks to all the concerns listed by the applicants: the hardship they will face if returned to Croatia due to the general animosity towards all ethnic Serbs and their families, which the Officer acknowledges exists, the hardship they will face as a mixed ethnicity couple, and the hardship faced by their son as a child of mixed ethnicity. It contains a death threat directed at Mr. Kotur yet the Officer concludes that the situation is not personal to the applicants.

[16] In the section titled "Family ties" the Officer writes that it "is reasonable to expect that family will provide support if needed". This statement is directly contradicted by this same letter.

[17] In light of these contradictions, it is clear that the Officer ignored this evidence or, if he was of the view that these statements were not relevant, he erred in failing to provide the reason why he discounted them.

Weighing the Interests of the Child

[18] Although a child's best interests should be given substantial weight, it will not necessarily be the determining factor (*Legault v. Canada (Minister of Citizenship and Immigration),* [2002] 4 F.C. 358 (C.A)). However, as stated in *Baker* at para. 75:

> ... where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable.

[19] In the Ministerial Guideline for consideration of H&C applications (Operational Manual IP-5), s. 5.19, "Best Interests of the Child", indicates that a child's "emotional, social, cultural and educational welfare should be taken into account". It concludes with the following statement:

> The facts surrounding a decision under A25(1) may sometimes give rise to the issue of whether the decision would place a child directly affected in a situation of risk. This issue of risk may arise regardless of whether the child is a Canadian citizen or foreign-born…

[20] The Officer finds that the applicants' child Stjepan is "young enough that the hardship associated with relocation to another country will be minimal". Further, he finds "there is little evidence before me to suggest this child cannot be allowed legal entry or attend school in Croatia".

[21] The Officer minimized Stjepan's interests. That he may be granted legal entry to the country or be able to attend school in Croatia does not address the potential impact on his emotional or cultural welfare in light of his mixed Serbian/Croatian ethnicity, or the risks he may face considering the antipathy expressed by his maternal grandmother on behalf of his extended family in conjunction with the discrimination faced by the entire Serbs population in Croatia.

Conclusion

[22] The Officer's decision makes false assumptions and ignores evidence which contradicts his conclusion. As a consequence, the decision reached is unreasonable and must be quashed.

[23] Neither party proposed a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted and the matter is to be sent back for re-determination by a different officer.

2. There is no question of general importance to certify.

"Louis S. Tannenbaum"
Deputy Judge

AUTHORITIES CONSULTED BY THE COURT

1. *Salibian v. M.E.I.*, [1990] 3 F.C. 250 (C.A.)

2. *Hersi v. M.E.I.*, [1993] F.C.J. N9. 553 (F.C.A.)

3. *M.E.I. v. Villafranca* (1992), 18 Imm. L.R. 2(d) 130

4. *Pacia v. M.C.I.*, 2008 FC 804

5. *Liyanage v. M.C.I.*, [2005] F.C.J. No. 1293

6. *Melchor v. M.C.I.*, [2004] F.C.J. No. 1600

7. *Baker v. M.C.I.* SCC ?????

8. *Hawthorne v. M.C.I.*, 2002 FCA 475

9. *Legault v. M.C.I.*, [2002] F.C.J. No. 457 (CA)

10. *Jack v. M.C.I.*, 192 F.T.R. 132 (TD)

11. *Ahmad v. Canada (MCI)*, 2003 FCT 592

12. *Kolosovs v. M.C.I.*, [2008] F.C.J. No. 211

13. *Rahmatizadeh v*. M.E.I., [1994] F.C.J. No. 578

14. *Sellathurai v. M.C.I.*, 2003 FC 1235

15. *Marinova v. M.C.I.*, 2001 FCT 178

16. *Casetellanos v. S.G.C.* (December 15, 1994, IMM-6067-93, F.C.T.D.)

17. *John v*. M.C.I., 2007 F.C.J. No. 634

18. *Pillai v. M.C.I.*, 2008 FC 1312

19. *Gallardo et al v. Canada (M.C.I.)*, 2003 FCT 45

20. *Qureshi v. Canada (M.C.I.)*, [2000] F.C.J. No. 1551

FEDERAL COURT

SOLICITORS OF RECORD

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