Federal Court  Cour fédérale

Date: 20100118

Docket: IMM-2581-09

Citation: 2010 FC 32

Ottawa, Ontario, January 18, 2010

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

Bibiana Arisbet ZARAZUA GUTIERREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by an immigration officer (the officer), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. (2001), c. 27 (the Act). Bibiana Arisbet Zarazua Gutierrez (the applicant) is challenging the officer's rejection of her application for an Authorization to Return to Canada (ARC), confirmed in a letter dated April 27, 2009.

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[2] The applicant is a citizen of Mexico. She came to Canada in May 2000 and claimed refugee protection in July of that year, alleging a fear of persecution on the basis of her homosexuality. Her claim was dismissed, as was an application for judicial review of that decision. The applicant waived a pre-removal risk assessment (PRRA) on November 28, 2002, and left Canada on December 2, without notifying the Canadian immigration authorities and without obtaining a certificate of departure.

[3] In May 2003, the applicant returned to Canada using her real identity, with a resident permit valid until November 16, 2003. Shortly thereafter, a work permit issued by Citizenship and Immigration Canada (CIC) and valid until the beginning of 2004 was sent to her former address. Having received this permit and having consulted with a lawyer, who told her that she did in fact have the right to work in Canada, the applicant worked in a restaurant in Vancouver from August to December 2003. At that time she was called before CIC. CIC explained to the applicant that she was in Canada illegally and seized her work permit. CIC ordered her to leave the country on December 17, 2003, and she complied with the instructions that were provided to her to do so.

[4] Wishing to return to Canada [TRANSLATION]''in order to live with her spouse'', a Canadian woman, the applicant obtained a Quebec selection certificate and submitted an application for permanent residence in Canada. However, because the applicant had been the subject of a removal order, she was not, under subsection 52(1) of the Act, entitled to return unless an authorization was issued to her. Therefore, in conjunction with her permanent residence application, she applied for an ARC, dated December 26, 2007.

[5] The officer dismissed this application and the applicant is seeking a judicial review of that decision.

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[6] The officer determined that there were no extenuating circumstances or sufficient reasons that would justify granting the applicant an ARC.

[7] The officer noted that the applicant had left Canada without having notified the immigration authorities and that, had she notified them, a work permit would not have been issued to her. The officer also determined that this omission showed that the applicant had not cooperated with Canadian immigration authorities. According to the officer, she should have consulted CIC instead of a lawyer about the work permit. Furthermore, the officer noted that there was no evidence in the record regarding the applicant's alleged reason for withdrawing her PRRA application. According to the officer, she had resorted to this for the sole purpose of remaining in Canada longer.

[8] The officer also noted that he had doubts with regard to the actual risk facing the applicant in Mexico, given that she had withdrawn her PRRA application and had returned to live in the same city in Mexico from which she had claimed to have fled. The officer also pointed out that the woman with whom the applicant claimed to have been in a relationship for two and a half years had entered Canada as a sponsored spouse barely six months before the beginning of this relationship. According to the officer, the relationship may therefore have been a facade to bolster her claim of homosexuality. In the end, the officer found that the applicant lacked credibility.

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[9] Under subsection 52(1) of the Act, an authorization is required for any foreign national wishing to return to Canada after a removal order has been issued against them.

[10] An officer has discretionary authority to issue or not to issue an authorization to return to Canada and the factors that must weigh into his or her decision are not spelled out in the Act or in the *Immigration and Refugee Protection Regulations*, DORS/2002-227 (the Regulations). However, a CIC document entitled ‘‘OP-1 Procedures’’ provides further clarification.

[11] This document indicates that the ARC cannot be used as a means of circumventing an order of removal from Canada, that each application must be treated on its merits and that ‘‘[i]ndividuals applying for an ARC must demonstrate that there are compelling reasons to consider an Authorization to Return to Canada when weighed against the circumstances that necessitated the issuance of a removal order’’. This document also contains a list of factors to take into consideration when assessing an ARC application. These factors include the severity of the violation of the Act that led to the applicant’s removal order, his or her history of cooperation with CIC and the reasons presented in support of the ARC application. On this subject, it is stated that ‘‘[b]ona fide marriages … or acceptance under a provincial nominee program are examples of factors that would normally constitute a ‘compelling reason’ for returning to Canada. However, no one factor alone should automatically serve to override concerns related to the safety of Canadians and the security of Canadian society’’.

[12] The applicant argues that the officer based his decision on erroneous findings and failed to consider factors he should have taken into account. As such, the officer was allegedly wrong in finding that the applicant disregarded CIC instructions by failing to confirm her departure from Canada in December 2002. In fact, it would appear that the applicant never received such instructions or even a departure date. The officer also failed to consider the reasons for her application, the severity of her violation of the Act, her history of cooperation, the minimal risk she would pose if she were to return to Canada, the fact that she holds a Quebec selection certificate and her ability to provide for herself.

[13] Moreover, the officer's credibility finding with regard to the applicant is, according to her, perverse and unfounded. The applicant maintains that the officer should have given her the opportunity to plead her case before drawing such a conclusion.

[14] The respondent dismisses the applicant's argument that she never received any instructions to confirm her departure. According to the respondent, a departure order against the applicant became enforceable against the applicant following the denial of her refugee claim. The stay of removal resulting from the filing of the application for leave and for judicial review was lifted when the latter was dismissed. Since the applicant did not leave Canada within the prescribed 30-day period following the lifting of the stay, the departure order became a deportation order. Nonetheless, the Act imposed an obligation on the applicant to obtain a certificate of departure and ignorance of this requirement is no excuse for failing to comply with it. The respondent relies on the decision of Justice Pierre Blais, then of the Federal Court, in *Chazaro v. The Minister of Citizenship and Immigration*, 2006 FC 966, at paragraph 22:

> I believe that the officer was right in not considering that the applicant had a weighty argument when he stated that he did not know he had to leave. The applicant had a document entitled ''Departure Order''. Although this document did not specify a precise date for departure, it did mention that it would [TRANSLATION] ''become a removal order if no confirmation of departure is issued during the applicable period specified in the regulation''. The applicant was aware of the departure order and he should have known that he had the obligation to leave following the dismissal of his application for judicial review.

[15] The respondent also dismisses the applicant's claim that the officer failed to consider the reasons why she wished to return to Canada. In the respondent's view, the officer considered the claimant's stated desire to live with her spouse but found this assertion not to be credible.

[16] As for the Quebec selection certificate, the respondent argues that the officer must be presumed to have considered all of the evidence, that he was not obliged to comment on each piece of evidence, and that, at any rate, this fact did not, in and of itself, show the existence of compelling reasons to allow the applicant to return to Canada.

[17] Furthermore, according to the respondent, the officer was perfectly capable of determining the credibility of the applicant without confronting her with the flaws in her claim. The respondent argues that, before filing her ARC application, the applicant should have explained why she had left Canada to return to the same place in Mexico where she had allegedly feared for her safety.

[18] Lastly, the respondent is of the view that the applicant did not cooperate with CIC. According to the respondent, she did not leave Canada when the removal order became enforceable and she also failed to notify the authorities when she left Canada in December 2002. In fact, the respondent

argues that it was due to this omission that a work permit was issued to her. Furthermore, the applicant returned to Canada in 2003 without authorization and failed to notify CIC that the work permit had been mistakenly issued to her.

[19] In my view, the officer misunderstood the purpose of the ARC process, which led him to take into account factors that were not relevant and to disregard others that he should have considered in his decision. This does not fall ‘‘within a range of possible, acceptable outcomes which are defensible in respect of the facts and law’’(*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

[20] The main fact disregarded by the officer is the Quebec selection certificate obtained by the applicant. According to the guidelines set out in the document ‘‘OP-1 Procedures’’, such a certificate normally constitutes a ‘‘compelling reason’’ for issuing an ARC. The presumption that the officer considered all of the relevant circumstances in his decision does not apply in this case. Had he taken the selection certificate into account, the officer would not have undertaken a credibility assessment of the applicant, as this has no bearing on this case. The fact that the applicant has a selection certificate is not in doubt.

[21] In fact, the officer’s insistence, in his notes, on his doubts about the existence and genuineness of the applicant’s conjugal relationship convinces me that it is this relationship the officer considered to be the main – and presumably the only – reason for her ARC application. Therefore, the officer not only failed to mention the fact that the applicant had a Quebec selection certificate, but apparently overlooked this fact in his decision-making process.

[22] It is true, of course, that the fact that someone applying for an ARC has a provincial selection certificate is not determinative and that the officer must also consider other factors related to the purposes of the Act, including preserving the safety of Canadians. It should be noted here that the officer never alleged that the applicant posed the least bit of danger to Canada.

[23] In addition, there is another factor the officer failed to assess in a reasonable way, namely, the severity of the violation of the Act committed by the applicant.

[24] I note first of all that someone who has not committed a serious offence should not apply for an ARC. By definition, someone applying for an ARC is not completely innocent in this respect. However, Parliament did not want anyone who had ever committed an offence against the Act to be permanently banned from Canada. On the contrary, the possibility of returning would be kept open, contingent on the authorization of an officer. The mere fact that an applicant did not comply with the Act is not a reason for rejecting the applicant's claim. The officer must take into consideration the seriousness of the offence, as noted in the ''OP-1 Procedures'' document.

[25] It is difficult for me to imagine a less serious offence against the Act than the one committed by the applicant. It is true that the applicant did not leave Canada when the removal order became enforceable, before filing her PRRA application which, under a new regime, automatically imposed a stay on her departure order. Yet, up until the date of this PRRA application, the applicant never received instructions from CIC, and was therefore never given a departure date. It was only after she

withdrew her application, on November 28, 2002, that the 30-day deadline was reinstated. Four days later the applicant left Canada.

[26] The applicant also failed to comply with the Regulations by failing to notify Canadian authorities of her departure and not obtaining the required certificate. To be sure, ignorance of the Act does not excuse a violation. Under the circumstances, it appears to be carelessness or negligence on the applicant's part. Yet it seems clear to me that she did not act in bad faith. Unlike the *Chazaro* case, above, relied on by the respondent, she did not seek to remain in Canada longer than she was allowed. On the contrary, she left a bit too soon – without saying her farewells as prescribed by the Regulations.

[27] It is true that this negligence (combined, it should be noted, with that of CIC, which was aware that the applicant had withdrawn her PRRA application, but which, it would seem, never inquired as to whether she had left the country) allowed the applicant to return to Canada in 2003 without authorization and to work. Yet, even at that, the applicant was always honest with Canadian authorities. At the end of the day, when she was given the order to leave Canada in December 2003, she complied.

[28] All in all, the technical failings of the applicant do not justify banning her from returning to Canada when in fact there is a ''compelling reason'' as spelled out in a CIC document, allowing for her return.

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[29] For all these reasons, the application for judicial review is allowed and the matter is referred back to a different immigration officer for redetermination.

JUDGMENT

The application for judicial review is allowed. The immigration officer's decision, confirmed in a letter dated April 27, 2009, rejecting the applicant's application for an Authorization to Return to Canada, is set aside and the matter is referred back to a different officer for redetermination.

''Yvon Pinard''
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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