Federal Court  Cour fédérale

Date: 20140404

Docket: IMM-6179-13

Citation: 2014 FC 333

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 4, 2014

PRESENT: The Honourable Mr. Justice Noël

BETWEEN:

DIDIER SÉNÉPART

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (IRPA) of a decision dated September 10, 2013, by Carlos Costa, an immigration officer with Citizenship and Immigration Canada (CIC, immigration officer), refusing the applicant's application for permanent residence on humanitarian and compassionate grounds (H&C application).

II. Facts

[2] The applicant is a Belgian citizen who was born on January 26, 1960, and arrived in Canada on February 24, 2003.

[3] His spouse, whom he married on February 24, 2010, after approximately seven years together, has HIV. The diagnosis was made in January 2008.

[4] In Belgium, the applicant was convicted of forgery, using forged documents, breach of trust and embezzlement in 1984, and of forgery, using forged documents, fraud and possession of stolen property in 2003.

[5] The applicant filed a refugee protection claim on February 27, 2007, which was rejected by the Immigration and Refugee Board on February 10, 2010. The Federal Court of Canada dismissed his application for leave and judicial review regarding that rejection.

[6] In July 2010, he filed an initial H&C application accompanied by a sponsorship application by his spouse. A CIC immigration officer refused that application on January 14, 2013. The H&C application relied on the applicant's settlement in Canada and on his marriage to his spouse. On January 31, 2012, the applicant filed an application for leave and judicial review with respect to that refusal, but abandoned it after the respondent offered to reconsider his H&C application.

[7] That reconsideration took place on September 10, 2013, and it is the CIC's refusal at the end of that process that is the subject of this application for judicial review.

[8] Meanwhile, in September 2010, the applicant filed a pre-removal risk assessment application, which was rejected in May 2011.

III. Impugned decision

[9] After summarizing the applicant's arguments and stating the applicable legal framework and burden of proof in the case, the immigration officer refused the H&C application.

[10] According to him, the fact that the H&C application was accompanied by a sponsorship application prepared by the applicant's spouse was a positive aspect, but the applicant did not submit a Quebec Selection Certificate (QSC) or demonstrate that he took steps to obtain it, which was a negative aspect. Furthermore, CIC attached little weight to the applicant's argument concerning the importance of his relationship because he attempted to settle permanently in Canada only after he had lived with his spouse for seven years.

[11] The immigration officer also attached little weight to the applicant's argument concerning his spouse's state of health, finding that the applicant did not submit evidence that his spouse is unable to work or support himself because of his HIV diagnosis.

[12] Little weight was given to the applicant's argument that he has not stopped working since he arrived in Canada because he did not work from September 2007 to April 2009 and did not submit evidence of income from 2004 to 2009 as well as from 2010 until today. Moreover, the applicant stated that he started working in 2003 whereas his record in the immigration information system shows that he got his first work permit in 2007. Thus, either the applicant contradicted himself in that respect or he worked illegally in Canada for four years.

[13] The immigration officer was of the opinion that the applicant did not demonstrate that his extended stay in Canada was not the result of an inability to leave the country or circumstances that were out of his control. Finally, CIC attached significant weight to a negative aspect of the H&C application, that is, the fact that the applicant did not claim refugee protection until 2007 even though he arrived in Canada in 2003 and consequently stayed in the country illegally for several years.

[14] The applicant stated that he would have nowhere to stay in his country of origin and that he would not be able to find employment there, but the immigration officer found that he has family in his country of birth and that the skills that he has acquired here would be transferable. Consequently, CIC did not attach a lot of weight to that argument.

[15] Regarding the applicant's settlement in Canada, the immigration officer found that the fact that the applicant's spouse is a Canadian citizen and lives here does not automatically mean that the applicant is settled in the country.

IV. Applicant's arguments

[16] The applicant claims that the immigration officer's decision is not reasonable for various reasons.

[17] He states that CIC misinterpreted the system, that is, the decision-making process surrounding the processing of an H&C application regarding the issuance of a QSC. The immigration officer wrongly drew a negative inference from the absence of a QSC in the applicant's

record, as the applicant was unable to submit a QSC because a request in that respect can only be made after an H&C application has successfully passed its first stage, which was not the case.

[18] Furthermore, it was not reasonable to doubt the relationship between the applicant and his spouse by stating that seven years had passed before a permanent residence application was filed. Such reasoning disregards the proceedings undertaken by the applicant over the years, namely his refugee protection claim.

[19] The immigration officer also erred in his assessment of the potential consequences of the applicant's departure on his spouse, who has HIV. The decision refers only to the relationship of financial dependence between the spouses and completely eliminates the concept of the moral and psychological support between the spouses, who were required to go through significant hardship because the applicant's spouse was diagnosed with HIV. The applicant reasonably expected the immigration officer to explain why he did not accept that important argument, which is at the heart of the application and which makes their application, notwithstanding the decision, exceptional relative to other couples. The applicant also claims that CIC, in its decision, lacked compassion for persons with HIV by barely touching on the daily reality of a couple where at least one member has the virus.

[20] Finally, the immigration officer should have considered the fact that the applicant has a criminal record in Belgium and that the processing of a permanent residence application from outside Canada would consequently be longer and that, during that time, the applicant would not be able to offer the daily moral and psychological support that he has been offering his spouse for years.

V. Respondent's arguments

[21] The respondent claims that the decision is completely reasonable, mainly because it constitutes the result of the exercise of a highly discretionary power that requires a reviewing court to show deference and respect. Furthermore, the immigration officer repeated passages from the applicant's written submissions word for word, which indicates that the decision-maker was attentive to the applicant's claims. Furthermore, had it been made, proof of the applicant's settlement in Canada would not have been sufficient to obtain a positive response, and the applicant refused to have his application processed in the spouse/common-law partner class.

[22] In addition, the respondent adds the following in reply to the applicant's arguments. First, the burden was on him to prove his allegations concerning the moral and psychological support that he and his spouse provide each other because of the illness. In that regard, the applicant submitted nothing except for his written submissions, and the respondent specifies that the separation of a couple cannot in itself justify a positive decision. Furthermore, the immigration officer's finding regarding the absence of a QSC in the applicant's record was not determinative in the outcome of the H&C application. The mere fact of having stated that many people with HIV lead a normal life despite their illness is not reflective of a lack of compassion on the part of the immigration officer. Finally, it is unthinkable that the existence of a criminal record should favour a positive determination because that would result in preferential treatment for people who have a criminal record over those who have never come into conflict with the law.

VI. Issue

[23] Did the CIC immigration officer err by refusing the H&C application?

VII. Standard of review

[24] It is well established that a decision rendered by a CIC officer in an H&C application must be reviewed on the standard of reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, [2009] FCJ No 713 (Kisana); see for example, *George v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1240 at paragraph 31, [2012] FCJ No 1348).

[25] As a result, the Court should be careful not to intervene if the immigration officer's finding is justified, transparent and intelligible and if it falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] SCJ No 9).

VIII. Analysis

[26] Before beginning the analysis of this case, it would be advisable to state the legal framework in which an H&C application is filed. In filing such an application, under section 25 of the IRPA, foreign nationals intend to be relieved of, for humanitarian and compassionate reasons, their general obligation to file their application for permanent residence from outside the country. In order for foreign nationals to be provided the relief sought, which also constitutes the exception to the rule, they must prove their allegations—the burden is on them (see *Kisana*, above, at paragraph 35; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paragraph 5, [2004] 2 FCR 635). Thus, in this case, it was up to the applicant to convince the immigration officer that his personal situation was such that the filing of his application for permanent residence from abroad would lead to unusual and undeserved or disproportionate hardship.

[27] Furthermore, as indicated by the respondent, it is true that the power conferred by section 25 of the IRPA is highly discretionary (see *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No 39 at paragraphs 51-53) and it is also important to note that a reasonable exercise of that discretionary power may result in a wider scope of possible outcomes (see for example *L.A.H. v Canada (Minister of Employment and Immigration)*, 2012 FC 337 paragraph 18, [2012] FCJ No 353). And despite the fact that reviewing courts cannot substitute their own appreciation of the appropriate solution or re-weigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] SCJ No 12), they can nevertheless examine the justified, transparent and intelligible nature of the decision rendered (*Dunsmuir*, above, at paragraph 47).

[28] It is therefore within the limits of that legal framework and for the following reasons that this Court states that the decision by the immigration officer to refuse the applicant's H&C application that is under review here is unreasonable and that the matter must be referred back to another immigration officer for redetermination.

[29] The immigration officer's primary error is the result of a misapprehension of unusual and undeserved or disproportionate hardship as it relates to the radically different reality that the applicant and his spouse live with relative to most couples, at least regarding one aspect of their life, that is, the illness. For many years, they have mutually supported each other and have provided each other with needed moral and psychological support to confront the challenges that being infected with HIV brings. That reality inevitably disrupts their individual everyday life and their life as a couple. The applicant has reason to claim that the moral and psychological support in their relationship is an essential component of his H&C application and he was entitled to expect the issue to be addressed by the immigration officer because it was important. The immigration officer

completely eliminated that notion in his reasoning; for CIC, only the financial support seemed to be taken into consideration. Although the applicant emphasized the financial support between himself and his spouse in his written submissions, the fact remains that he addressed the moral and psychological aspect of the support in their relationship, and the decision does not explain why that crucial issue was not accepted. Without suggesting that the immigration officer lacked compassion for persons with HIV, that is an unreasonable error.

[30] An assessment of the decision reveals other less serious errors. First, the immigration officer stated that he attached little significance to the applicant's argument that he has been in a relationship with his spouse for many years on the grounds that he filed an application in the aim of settling permanently in Canada after living with his spouse for seven years. By finding as such, the immigration officer seems to have not taken into consideration the proceedings undertaken by the applicant since his arrival: he filed a refugee protection claim in 2007 (which was rejected in 2010), an application for leave and judicial review of the rejection of his refugee claim (which was dismissed), a pre-removal risk assessment application (which was rejected), an initial H&C application in 2011 and a reconsideration of that H&C application in 2013 (which led to this application for judicial review). It was, however, relevant for the immigration officer to point out that, in the absence of evidence to the contrary, the applicant seems to have stayed in Canada without status for some time—more specifically, from the time his visitor's visa expired on May 23, 2003, until February 14, 2007, when his refugee claim was filed—but given the proceedings undertaken by the applicant, it is completely unreasonable to suggest that he waited until he had lived with his spouse for seven years before taking steps to remain in Canada, especially since the immigration officer minimized the importance of the applicant's relationship because of that finding.

[31] Then, the immigration officer also erred regarding the QSC. In fact, according to the process in place for the processing of H&C applications, which is in two stages, a QSC can only be requested and obtained if an H&C application had been approved in principle at the first stage. It was therefore completely unreasonable for the immigration officer to draw a negative inference from the absence of a QSC in the applicant's record. The erroneous finding in that regard is perhaps not fatal in itself for the outcome of the H&C application in this case, but it undermined the weight the officer attached to the fact that the H&C application was accompanied by a sponsorship application, which, in addition to the other errors that have already been mentioned, most certainly contributed to the outcome of an unreasonable finding.

[32] However, it was completely reasonable for the immigration officer to note certain problems in the application. For example, the applicant did not provide financial data for certain years in Canada. Also, the applicant's argument that his H&C application should have received a positive determination because he has a criminal record is flawed for obvious reasons raised by the respondent in his submissions: such a situation would result in giving preferential treatment to people who have come into conflict with the law over those who have no criminal record. That being said, I am of the opinion that those problems in the H&C application at the heart of this matter cannot compensate for the errors made by the immigration officer that fatally undermine the decision, especially regarding the moral and psychological support the applicant provides to his spouse and the unusual and undeserved or disproportionate hardship that their potential separation would cause in that regard.

[33] The parties were invited to submit a question for certification, but none was proposed.

ORDER

THE COURT ORDERS that:

1. The application for judicial review is allowed;
2. The immigration officer's decision refusing the H&C application is set aside;
3. The matter is referred back to another immigration officer for redetermination;
4. No question is certified.

"Simon Noël"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Anabela Cosme	FOR THE APPLICANT
Simone Truong	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Anabela Cosme Montréal, Quebec	FOR THE APPLICANT
Simone Truong Montréal, Quebec	FOR THE RESPONDENT