Federal Court  Cour fédérale

Date: 20150327

Docket: IMM-5405-14

Citation: 2015 FC 392

Ottawa, Ontario, March 27, 2015

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

SHALOM BARGIG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *IRPA*) for judicial review of a decision by a Citizenship and Immigration Canada officer denying the applicant's application for permanent residence and determining that there were insufficient humanitarian and compassionate (H&C) grounds to warrant an exemption from the requirements of the *IRPA*.

[2] For the reasons that follow, I conclude that this application for judicial review should be granted.

II. Facts

[3] The applicant is a citizen of Israel who applied for permanent residency in Canada through a spousal sponsorship. He sought an exemption from paragraphs 36(1)(b) and 36(2)(b) of the *IRPA*, pursuant to which he is inadmissible for serious criminality.

[4] The applicant has a fairly extensive criminal record in Israel, including convictions for assaulting a police officer in November 1991, uttering threats in December 1991, and keeping a gaming or betting house in March 2004 and in September 2005. In February 2012, the applicant was convicted in Israel of infractions of attempt to obtain anything by deceit under aggravated circumstances, similar to the infractions of fraud and of uttering forged documents in the Canadian *Criminal Code*, RSC 1985, c C-46. In that particular instance, the applicant and his accomplices forged fraudulent documents to simulate a land transaction and defraud the tax authorities of 1,424,888 NIS (approximately $425,000.00 CAN).

[5] The applicant will not be eligible to apply for rehabilitation until 2018.

[6] In 2002, the applicant married a Canadian citizen who also has citizenship in Israel. They have four children, born between 2003 and 2009.

[7] For many years, the applicant's wife and children lived in Canada and the applicant spent time with them in Canada as visitor, but also travelled frequently to Israel due to his temporary status.

[8] From January 2010 to January 2011, the applicant's wife and children moved to Israel to live with him. The applicant's wife found it difficult to adjust to living in Israel and returned to Canada with the children to look after her mother, who has cervical cancer and diabetes.

[9] The applicant arrived in Canada on August 15, 2012 and claimed refugee status the next day. His refugee claim was refused on September 27, 2012. In June 2013, the applicant's motion for a stay of removal was denied and he was deported to Israel.

[10] Following his removal, the applicant applied for permanent residency as a member of the family class and requested an exemption from his criminal inadmissibility on H&C grounds. He submitted that his separation from his family has been difficult for his children. Furthermore, his wife is studying to obtain an Early Childhood Education certificate and he could assist by staying home with the children.

III. The decision

[11] In a decision dated May 15, 2014, the visa officer refused the applicant's application for permanent residence and his request for an exemption from his criminal inadmissibility on H&C grounds.

[12] The officer determined that the applicant was inadmissible for serious criminality pursuant to paragraph 36(1)(b) of the *IRPA*. After reviewing the applicant's criminal record, the officer dealt briefly with the best interests of the applicant's children, as follows in the GCMS notes:

> I also considered the best interest of the children however it is my opinion that PA's wife (who is Israeli citz) and the children can come to Israel anytime and can even reside in Israel with PA if he

> wants to. I know that this has been tried before by the family and it apparently didn't worked (sic) but given the circumstances, nothing prevent them of trying again (sic). The school system and social services of Israel are good and comparable to Canada.

[13] In another GCMS note, the officer indicated that he was not convinced that H&C grounds exist, noting that the applicant and his wife have been married since 2002 but the applicant had not previously made an application for permanent residence, opting instead to visit his family frequently. The officer concluded that the applicant and his wife deliberately chose that arrangement and "[s]o I am not convinced that sudden H+C considerations would exist now while this seemed never to have been the case for the last 10 years." The officer questioned the applicant's stated desire to help take care of the children given the long wait before either spouse made an application for permanent residency either in Israel or Canada.

[14] The officer concluded that there were insufficient H&C grounds in this case, in light of the applicant's criminal behavior and the danger he poses to Canadian society, and in light of the fact that the applicant never made any attempt to live permanently in Canada before.

IV. Issues

[15] The sole issue for determination in this case is whether the visa officer erred in rendering the impugned decision.

V. Pertinent legislation

[16] The applicant was found to be inadmissible for serious criminality pursuant to paragraphs 36(1)(b) and 36(2)(b) of the *IRPA*, which read as follows:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
[…]	[…]
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
(2) A foreign national is inadmissible on grounds of criminality for	(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
[…]	[…]
(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

[17] Pursuant to paragraph 36(3)(c) of the *IRPA*, foreign nationals who would otherwise be inadmissible can be admitted after the prescribed period, if they satisfy the Minister that they have been rehabilitated:

36 (3) The following provisions govern subsections (1) and (2):	**36** (3) Les dispositions suivantes régissent l'application des paragraphes (1) et (2) :
[…]	[…]
(c) the matters referred to in paragraphs (1)(b) and (c) and (2)(b) and (c) do not constitute	c) les faits visés aux alinéas (1)b) ou c) et (2)b) ou c) n'emportent pas interdiction de

inadmissibility in respect of a permanent resident or foreign national who, after the prescribed period, satisfies the Minister that they have been rehabilitated or who is a member of a prescribed class that is deemed to have been rehabilitated;	territoire pour le résident permanent ou l'étranger qui, à l'expiration du délai réglementaire, convainc le ministre de sa réadaptation ou qui appartient à une catégorie réglementaire de personnes présumées réadaptées;

[18] Pursuant to Rule 17(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *Regulations*) foreign nationals must wait five years after the completion of their sentence before they are eligible for consideration by the Minister as to whether they have been rehabilitated.

[19] Lastly, pursuant to subsection 25(1) of the *IRPA*, the Minister has the discretion to grant an exemption from any requirement of the *IRPA* or the *Regulations* on H&C grounds:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the	**25**. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il

Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VI. Submissions & Analysis

A. *Did the visa officer err in rendering the impugned decision?*

(1) Standard of Review

[20] It is well-settled that the standard of review applicable to H&C decisions is that of reasonableness: *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 460 [*Kisana*] at paras 18-20.

[21] The Court should not intervene if the decision is justified, transparent and intelligible, and falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47; *Canada v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 59.

(2) Applicant's submissions

[22] The applicant argues that there was no analysis of the best interests of the children other than an acknowledgement that the mother and her children could move to Israel and would have access to schools and social services comparable to those in Canada. The officer made no mention of the children's interest in continuing in their school program in Montreal.

[23] In addition, the applicant argues that the officer's H&C analysis, quite apart from the best interest of the children, was similarly deficient. The applicant points out that the officer, in determining that the applicant's wife and children could move to Israel, made no mention of the his spouse's interest in continuing her educational program in Montreal or her duty to look after her ailing mother.

[24] Lastly, the applicant argues that the officer erred in considering the delay before the applicant applied for permanent residency and did not consider the reasons offered by the applicant for why he had not applied previously – namely, that he hoped his wife and children would join him in Israel.

(3) Respondents' submissions

[25] The respondents argue that the visa officer could reasonably conclude that the applicant has not shown sufficient H&C grounds to justify granting him an exemption from his inadmissibility for serious criminality.

[26] The respondents argue that the exemption that the applicant was seeking – having to wait for five years from the date of the completion of his last sentence before being eligible for the Minister to determine that they are rehabilitated, as well as having to satisfy the Minister that he is rehabilitated – is much more important than the typical H&C application, such as requests for exemptions from the requirement of submitting a permanent residence application from abroad.

[27] The respondents contend that the applicant bore an onus to show H&C grounds on par with the importance of the exemption he was seeking. The respondents point out that that the applicant visited his family in Canada often but made no attempt to move to Canada from 2002-

2012 and voiced a preference for his wife and children to move to Israel instead. In the respondents' view, it was reasonable for the visa officer to conclude from the foregoing that H&C considerations would not suddenly exist now when this appears not to have been the case for the past ten years.

[28] The respondents submit that the officer took into account the best interests of the children, noting that the applicant's wife has Israeli citizenship and that she and the children could live in Israel with the applicant. The visa officer noted that, given the circumstances, nothing prevents the family from moving back to Israel, even if this is not the wife's preference. The visa officer noted that the school system and social services of Israel are good and comparable to Canada.

[29] The respondents contend, relying on *Legault v Canada (Citizenship and Immigration)*, 2002 FCA 125, at para 12 (*Legault*) and *Kisana* at para 24, that it is for the officer to determine what weight must be given to the best interests of the children. It was reasonable for the officer to give more weight to the applicant's criminality.

VII. Analysis

[30] In my view, the officer's analysis of the best interests of the children is manifestly deficient and I allow the application for judicial review on that basis.

[31] The Supreme Court indicated in *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 (at para 75) states that an H&C decision will be unreasonable if the decision-maker does not adequately consider the best interests of the children affected by the decision:

> The principles discussed above indicate that, for the exercise of the discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them.

[32] In *Legault*, the Federal Court of Appeal indicated that officers must engage in a best interests of the child analysis that is well identified and defined (at para 12) and "[t]he mere mention of the children is not sufficient. The interests of the children is a factor that must be examined with care and weighed with other factors. To mention is not to examine and weigh" (at para 13).

[33] In *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813, Justice Zinn indicated that, in the context of an H&C analysis where there is some evidence of the best interests of the children, it is incumbent upon the officer to clearly articulate what is in the best interest of the child before weighing this against the other positive and negative elements in the H&C application (at paras 13-16).

[34] In *Kolosovs v Canada (Citizenship and Immigration)*, 2008 FC 165, Justice Campbell described the level of analysis that an officer must undertake in order to be alive, alert, and sensitive to a child's best interests. He defined being alert to the child's best interests as "an awareness of the child's best interests by noting the ways in which those interests are implicated" (at para 9). To be alive to a child's best interests, an officer must "demonstrate that he or she well understands the perspective of each of the participants in a given fact scenario, including the child if this can reasonably determined" (at para 11). Lastly, to demonstrate sensitivity, the officer must be able to "clearly articulate the suffering of a child that will result from a negative decision" (at para 12).

[35] In an affidavit dated December 8, 2013, the applicant makes the following claims in support of his H&C request. He indicates that his wife is overwhelmed with the demands of looking after four children on her own while completing a full-time educational program in Early Childhood Education. He states that when in Canada, he was the primary caregiver for his children during the day and the separation has been emotionally traumatic for his children. He also discusses the degree of establishment of his children in Canada; he states that the move to and from Israel was disruptive for them and the fact that Hebrew is not their first language caused them to fall behind in school. Furthermore, he stated that his wife's mother has cancer and diabetes and is dependent upon his wife to give her daily insulin injections and blood tests.

[36] It is apparent from the officer's notes that the officer considered that the children: (a) would have access to good educational and social services in Israel, and (b) had spent much of their life without their father's presence. However, nowhere does the officer articulate what is in the best interests of the children. Nor does the officer assess the benefits of non-removal. Moreover, in indicating that the children would receive schooling and social services of comparable quality in Israel, the officer does not consider any adverse consequences were they to move to Israel, such as the reduction of their establishment in Canada, the disruption of their schooling in Montreal, their separation from their extended family in Montreal, or any linguistic or cultural challenges they might experience in integrating into Israeli society. In my view, this does not demonstrate that the officer was alert, alive, and sensitive to the children's best interests. My concerns in this respect remain, even in view of the guidance of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 12, that a respectful attention should be paid to the reasons that could have been offered in support of a decision.

[37] This is a sufficient basis on which to allow this application for judicial review.

VIII. Conclusion

[38] This application for judicial review is accordingly allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application for judicial review is granted.

2. The officer's decision on the applicant's H&C application is set aside and the matter is remitted for consideration by another officer.

3. No serious question of general importance is certified.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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