Federal Court  Cour fédérale

Date: 20150430

Docket: IMM-7119-13

Citation: 2015 FC 568

Toronto, Ontario, April 30, 2015

PRESENT: The Honourable Mr. Justice Diner

Docket: IMM-7119-13

BETWEEN:

VIDYAVATI LILLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case is a judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [*IRPA*], challenging the decision [Decision] of the Manager of the Port of Spain, Trinidad and Tobago visa office [Officer], which refused an Application for an Authorization to Return to Canada [ARC], that impacted an underlying Spousal sponsorship.

II. Facts

[2] The Applicant has a long immigration history, including approximately nine years in Canada between 2001 and 2009 wherein numerous immigration proceedings were engaged, which ultimately resulted in her deportation from Canada. Her immigration history includes some of the following key events and dates.

[3] The Applicant and her current husband, who is also her sponsor, obtained a divorce in Guyana, their native country, in 1988. However, they reconciled in 1992, and lived together in Guyana until the sponsor came to Canada in 2001, at which time he landed as a permanent resident.

[4] The Applicant, on the other hand, first arrived in Canada on a temporary resident visa [TRV] on December 4, 2001. With respect to her entry, she told the visa officer that she was coming to Canada to visit her family, which included her daughter and her grandson, but made no mention of the sponsor. She was granted status for the customary six months, until June 4, 2002. The Applicant's attempt to extend her temporary resident status was refused in May 2002. A subsequent application for restoration of status was refused in November, 2002.

[5] In the meantime, the sponsor became a Canadian permanent resident [PR] on March 22, 2001. He acquired his PR status after having been sponsored by his daughter under the Family Class for Parents and Grandparents [FC4]. Once in Canada, he sponsored the Applicant under the Family Class for a Spouse or Common-law Partner in Canada class [FC1].

[6] The sponsor contends that his children were unable to sponsor the couple together as FC4s, as they were unable to meet the income eligibility requirements under that class for the two of them. Therefore, he decided that the Applicant would be sponsored under FC1 classification (which has no income requirement) after she entered Canada.

[7] The first FC1 application to sponsor the Applicant was submitted on February 26, 2002, one day after the couple was remarried in Canada. It was refused in 2002, as the Applicant was found not to have met the definition of spouse or common law partner.

[8] The following year, the Applicant briefly left Canada for the United States. She returned to Canada shortly thereafter, making a refugee claim on March 11, 2003. This refugee claim was refused on June 7, 2004. An application for judicial review of the failed refugee claim was denied on August 31, 2004.

[9] The Applicant was issued a Departure Order at the time she made her refugee claim. This ultimately became a Deportation Order when her appellate rights were exhausted and the Applicant did not depart Canada within 30 days.

[10] A second FC1 spousal sponsorship application was filed on February 13, 2004, but was discontinued on July 16, 2004.

[11] A third FC1 sponsorship application was submitted on November 30, 2006. Citizenship and Immigration Canada [CIC] found the sponsor to be ineligible, as the Applicant had not been

declared and examined in the sponsor's original PR application, pursuant to *Immigration and Refugee Protection Regulations* (SOR/2002-227) [Regulations] sections 130 and 125. According to CIC's Global Case Management System [GCMS], the sponsor stated that he didn't declare the Applicant because he thought it was irrelevant to his PR application.

[12] The Applicant further submitted an application for Humanitarian and Compassionate [H&C] relief and a Pre-Removal Risk Assessment [PRRA], which were both denied. Leave to judicially review these decisions was dismissed by the Federal Court on September 21, 2009 because the Applicant failed to file an application record.

[13] The Applicant was ultimately removed in May 2009, which was the consequence of her failure to leave Canada after the refugee claim was dismissed. She was provided a direction to report to the Canada Border Services Agency [CBSA], which she complied with, and paid her own way back to Guyana.

[14] In October 2010, the Applicant thereafter submitted an FC1 sponsorship overseas, filed at the visa office in Port of Spain, Trinidad and Tobago. This application was refused early in 2011, because according to the visa office, the Applicant had not been declared in her sponsor's PR application and was therefore excluded pursuant to section 117(9)(d) of the Regulations.

[15] This overseas decision was appealed to the Immigration Appeal Division [IAD] of the Immigration and Refugee Board. The IAD allowed the appeal on January 4, 2012, because at the time that the sponsor obtained his permanent residence in 2001, the former *Immigration Act* [*IA*]

still applied through transitional provisions and the Applicant did not need to have been declared under the former legislation. Indeed, there was no category for the recognition of common law spouses under the former *IA*.

[16] The Respondent acknowledged this error, and consented to the file being sent back to Port of Spain visa office for continued processing. This included the need for an ARC to allow the Applicant back into Canada, due to the enforcement of the Applicant's Deportation Order, and the requirement under section 52(1) of the *IRPA* to obtain an ARC for any future re-entry to Canada.

[17] On September 17, 2013, a negative Decision was made on the application by the Port of Spain visa office, as the Officer refused to issue an ARC. That refusal forms the basis of this judicial review.

III. The Decision

[18] The refusal letter, addressed to the Applicant, states:

> Subsection 52(1) of the Act provides that if a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer in other prescribed circumstances.
>
> Subsection 226(1) of the Regulations states 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.
>
> Subsection 11(1) of the Act provides that a foreign national must, before entering Canada, apply to an officer for a visa or any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that

> the foreign national is not inadmissible and meets the requirements of this Act.
>
> Based on the information that is available, I am not satisfied that you are not inadmissible and that you meet the requirements of the Act. On 11 March 2003, a Deportation Order was issued against you. Your departure from Canada was confirmed on 31 May 2009.
>
> I have considered all the information you provided in your application and I have determined that you do not meet the requirements to obtain permission to return to Canada according to subsection 226(1) of the Regulations. I am therefore refusing your application for authorization to return to Canada.

[19] The GCMS notes set out much of the case history outlined in the facts above. The GCMS notes, after reviewing the positive and negative factors in support of and counter to the issuance of an ARC, conclude with the following analysis:

> The applicant has egregiously manipulated the system to remain in Canada. She misled immigration when seeking a TRV in 2001, when she applied for refugee status, and appears to have conspired with her sponsor to circumvent family class sponsorship rules. I have considered all the information of this application as a whole. Having reviewed and considered the grounds the applicant has forwarded, and having been alert, alive and sensitive to the best interests of the children involved and the personal circumstance of the applicant, If [sic] find that the positive factors described in A3(1)(d) – reunification family members – is insufficient to overcome the aforementioned negative factors – that is, the severity of the IRPA violations. ARC refused.

IV. Position of the parties

[20] The Applicant submits that the Respondent erred in law in applying an unreasonably high standard in assessing the ARC application - higher than that established by the legislation and jurisprudence. The Applicant notes that sections 52(1) of the *IRPA*, and 226 of the Regulations,

provide no test; they neither state that the granting of an ARC should be exceptional, nor a mini-humanitarian and compassionate application.

[21] The Applicant notes that while there is generally little jurisprudence regarding these provisions and no test has been established, some cases are helpful in interpreting the relevant considerations to be applied. The Applicant relies on this court's decision in *Khakh v Canada (Citizenship and Immigration)* 2008 FC 710, which references various objectives of the *IRPA*. The Applicant submits that this includes section 3(1)(d), the objective of which is to see that families are reunited in Canada. As for section 3(1)(h) of the *IRPA*, which seeks to protect the security of Canadians, the Applicant submits that she has never posed any security threat, committed any crimes, or failed to comply with a CBSA direction. Ms. Lilla reported to CBSA when requested, and paid for her own ticket home.

[22] Furthermore, the Applicant contends that the Officer's concern regarding the non-declaration of an accompanying spouse is unreasonable, since the issue was already decided in the Applicant's favour by the IAD, with the assent of the Respondent. Therefore, the Officer should have been estopped by the finding of the IAD from raising the issue again (*Haughton v Canada (Minister of Citizenship and Immigration*), [1996] FCT No 421 (IMM-1310-95; FCTD; November 29, 1996) [*Haughton*]).

[23] The Respondent replies that all circumstances of the file were considered in rejecting the ARC. The Applicant was found, reasonably, to have abused the immigration system by misleading authorities including when she (i) applied for the TRV in 2001, (ii) later applied for

refugee status, and (iii) conspired to circumvent the family class sponsorship rules. Furthermore, the ARC is not meant to be used as a routine way to overcome the permanent bar against returning to Canada pursuant to a removal order.

[24] The reasons for refusal are not to be read microscopically, and when read as a whole, they show that all the circumstances of this case were considered. The Respondent relies on *Parra Andujo v Canada (Citizenship and Immigration*), 2011 FC 731 [*Andujo*], in which Justice Shore endorsed the following interpretation of CIC on the ARC, as noted in Operation Manual OP1 [OP1]:

> Individuals 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. Applicants must also demonstrate that they pose a minimal risk to Canadians and to Canadian society. Merely meeting eligibility requirements for the issuance of a visa is not sufficient to grant an ARC.
>
> (*Andujo*, at para 26)

[25] The factors, set out in OP1, section 6.2, while not binding on the Officer, are a useful indicator of what constitutes reasonable considerations (*Baker v Canada (Minister of Citizenship and Immigration*), [1999] 2 SCR 817 at paras 72-74). The Respondent submits that there was a reasonable basis for the Officer to make his Decision, given that he weighed various factors, including the positive factors of family in Canada, but decided that these positive factors did not overcome the Applicant's abuse of the immigration system. Consideration of the contested omission was not the determinative factor, but only one of several legitimate considerations of the Officer, who took into account the outcome of the IAD decision.

[26] The eligibility of the sponsor, the Respondent reminds the Court, does not necessarily result in a positive ARC. Further, the IAD did not consider the issuance of an ARC, which may only be issued by a visa officer, in its decision. Further, the case of *Haughton*, relied on by the Applicant, was based on an entirely different set of circumstances.

V. Standard of review

[27] The parties agree that the applicable standard is reasonableness, a deferential standard, wherein this Court will only intervene when there is an absence of justification, transparency and intelligibility within the decision-making process, and the decision falls outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Issues of procedural fairness are to be reviewed on the standard of correctness *(Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board*), 2011 SCC 62 at para 14; *Mission Institution v Khela*, 2014 SCC 24 at para 79).

VI. Assessment

[28] It is clear that the CIC Manual OP1 gives wide scope to the Officer in an ARC decision to consider all the circumstances surrounding the deportation, including the positive elements that support the return of the individual to Canada. The jurisprudence is consistent with this approach, and has acknowledged the primacy of the officer's discretion, as well as the deferential standard that is to be applied to the officer's decision on judicial review: (*Andujo* at para 22*;*

Bravo v Canada (Minister of Citizenship and Immigration), 2010 FC 411 at para 9; *Gutierrez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 32 at para 10).

[29] The problem with the Decision lies where the Officer states that the Applicant "misled the immigration system when seeking a TRV in 2001, […] and appears to have conspired with her sponsor to circumvent the family class sponsorship rules." There are two fundamental concerns with this conclusion.

[30] First, it is worth noting that the conclusion runs contrary to the finding and reasons of the IAD, which specifically found that the Applicant did not breach the family class sponsorship rules in 2001, and was the basis upon which the Respondent (a) settled the IAD appeal with the Applicant, and (b) advised the visa office of its mistake in refusing the sponsorship.

[31] More importantly, and what is determinative in this application, is that in so finding, the Officer owed a duty of fairness to the Applicant, such that she should have been given the opportunity to provide her input regarding this concern. While decisions of visa officers normally engage the lower end of the spectrum for procedural fairness (*Canada (Minister of Citizenship and Immigration) v Patel*, 2002 FCA 55 at para 10), I find, at the very least, the duty of fairness to be elevated when the officer's decision rests on, and is in contrast to, matters that have been resolved favourably for the applicant upon appeal or judicial review (*Keryakous v Canada (Citizenship and Immigration)*, 2015 FC 325 at para 20).

[32] While the Officer states in his GCMS notes that he has "considered all of the information of this application as a whole", the Respondent conceded, based on the absence of the IAD decision in the Certified Tribunal Record, that it was not placed before the Officer, and, therefore, that he did not read the IAD decision. At best, the Officer only read the GCMS notes regarding the outcome of the IAD hearing, and perhaps counsel's notes regarding the settlement of the Appeal.

[33] Since the very crux of that prior IAD decision was also a key element of the ARC refusal in question, I am neither able, nor is it necessary, to pronounce on the issue of whether denying the ARC on the facts before the Officer was reasonable. Indeed, the basis of the fairness argument is that the Officer denied issuance of the ARC based on an incomplete record and in the absence of a key piece of evidence. Procedural fairness thus dictates that I send this matter back for reconsideration.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed. The matter is to be sent back for reconsideration by a different officer. There are no certified questions, and no costs awarded.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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