Federal Court Cour fédérale

Date: 20160420

Docket: IMM-3270-15

Citation: 2016 FC 449

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 20, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

FOUNDIE ABRAHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

Introduction

[1] The applicant, a citizen of Haiti, contests, through this judicial review, the decision rendered by an immigration officer (the Officer) on June 25, 2015, determining her to be ineligible—for the purposes of her application for permanent residence on humanitarian and

compassionate grounds, submitted to the respondent several weeks earlier, upon the lifting of the temporary suspension of removals (TSR) to Haiti (in effect since 2004)—for benefits under the Temporary Public Policy (TPP), implemented in December 2014 upon the lifting of the TSR.

[2] A decision in favour of the applicant would have essentially granted her, throughout the entire processing period for her application for permanent residence on humanitarian and compassionate grounds, an administrative stay against enforcement of the removal order to which she could be subject during this period.

[3] The applicant maintains that the Officer's decision must be quashed on the grounds that the Officer did not provide sufficient grounds for it. She maintains, in this regard, that the decision in question did not enable her to understand why she was not eligible for benefits under the TPP.

[4] She also maintained in her initial statement that the Officer had contravened the rules of procedural fairness by sending her a decision in English. This action was definitely clumsy, and possibly contrary to the requirements of the *Official Languages Act*, R.S.C., 1985, c. 31 (4th Supp.), but insofar as the applicant did not demonstrate that she had suffered harm as a result of this action with regard to the procedural protection she was entitled to expect in this case, this argument cannot stand. Furthermore, this argument was not resumed by the applicant in her new statement, and her new attorney did not mention this item at the hearing for this case.

Background

[5] The applicant arrived in Canada following the earthquake that ravaged Haiti in January 2010. She was 22 years old at the time and was accompanied by her parents and her two brothers. Her father, Gérard Jean Abraham (Mr. Abraham) has been a Canadian citizen since 1979, and her mother has been a permanent resident since 2011. Shortly after the family arrived in Canada, Mr. Abraham applied for Canadian citizenship on behalf of his three children. This application was accepted in the case of the two brothers, but things proved more complicated in the applicant's case because—although she had always thought of him as her father, and he had always thought of her as his daughter—she is not Mr. Abraham's biological daughter, nor his adopted daughter in any formal sense. Ultimately, for reasons upon which is it not useful to elaborate within the context of these proceedings, the application for citizenship made in the name of the applicant was, on December 11, 2014, denied by Citizenship and Immigration Canada authorities.

[6] At around the same time, that is to say, on December 1, 2014, the Canadian government, as authorized by section 230 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, lifted the TSR to Haiti, which had been put in place in 2004. It felt that the people of Haiti were no longer faced with a generalized risk. This caused removal orders against Haitian nationals to become enforceable.

[7] In the few days preceding the lifting of the TSR, that is to say, on November 26, 2014, the respondent adopted, under subsection 25.2(1) of the *Immigration and Refugee Protection*

Act, S.C. 2001, c. 27 (the Act), the TPP for Haitian nationals. This provision grants the Minister of Citizenship and Immigration the discretionary power to examine the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, and to grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act "if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations."

[8] An operational bulletin ("OB 600"), dated January 23, 2015, whose purpose was "to provide functional guidance with respect to the processing of applications for permanent residence on humanitarian and compassionate (H&C) grounds" following the lifting of the TSR to Haiti (and Zimbabwe), set out the eligibility criteria for the TPP. Thus, anyone from Haiti making such an application—and hoping to receive an administrative stay of the enforcement of a removal order during the processing of said application—must meet the following requirements:

a) be a national of Haiti;

b) have been residing in Canada on the day of the TSR lifting (December 1, 2014);

c) never have been found to be ineligible to have a refugee claim referred to the Immigration and Refugee Board of Canada (IRB);

d) not be inadmissible on grounds of security, human or international rights violations, criminality, serious criminality or organized criminality;

e) not have been excluded by the IRB from refugee protection under the United Nations Convention Relating to the Status of Refugees;

f) not have had criminal charges dropped by the Crown to effect a removal order;

g) not have an outstanding criminal warrant;

h) have applied for permanent residence on H&C grounds in Canada no later than six months after the date of the TSR lifting or, for those who have applied for refugee protection on or before the date of the TSR lifting and whose claim is pending, no later than six months from a negative decision by the IRB. This applies even if the IRB decision is made more than six months after the date of the TSR lifting.

[9] To be eligible for the TPP, the individual making an application for permanent residence on humanitarian and compassionate grounds following the lifting of the TSR must also, and this is the criterion causing the issue in this case, "be the subject of a removal order (including conditional removal orders) or have benefitted from the Haiti Special Measures (HSM) at the time of the lifting of the TSR." The HSM, which ended on November 30, 2014, had been implemented to allow certain Haitian nationals in Canada, affected by the 2010 earthquake in Haiti, to apply for a work permit without needing a labour market opinion and to benefit from health care coverage under the Interim Federal Health Program.

[10] The applicant, who meets all of the other criteria, is aware that she is not the subject of a removal order, but feels that it is sufficient, with regard to this final criterion, to have benefitted from the HSM at the time of the lifting of the TSR to be eligible for the benefits of the TPP and therefore, for an administrative stay of the execution of any removal order that could be brought against her, given that she is without status in Canada while her application for permanent residence on humanitarian and compassionate grounds is being processed.

[11] The respondent admits, for its part, that the two components of the criterion are not cumulative but that one or the other must absolutely be met to allow for eligibility for benefits under the TPP.

Issue and applicable standard of review

[12] Therefore, the question here is whether, as the applicant alleges, the Officer's decision, denying her eligibility for benefits under the TPP on the grounds that she had not benefitted from the HSM at the time of the lifting of the TSR, was tainted by an error justifying, under section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, the Court's intervention.

[13] The parties agree that the argument of insufficient grounds regarding the Officer's decision must be analyzed using the reasonableness standard. They are correct (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paragraph 14 [2011] 3 SCR 708 [*Newfoundland and Labrador Nurses' Union*]).

[14] Nonetheless, the applicant maintains that, insofar as the consideration of the Officer's decision requires an interpretation of the TPP eligibility criteria, the applicable standard is the standard of correctness, since this is a question of general importance related to implementing non-discretionary power.

[15] We must be careful here not to confuse matters. The decisions made by an immigration officer responsible for implementing a policy adopted by the Minister of Citizenship and Immigration while exercising a purely discretionary power cannot be held to a more rigorous

standard than that which applies to the Minister himself in developing and implementing policies adopted under the Act.

[16] It is now well-established that, other than in cases of procedural fairness, the standard of correctness does not apply except in questions (i) linked to the constitutional validity of legislation; (ii) genuinely related to the jurisdiction of the administrative decision-maker; (iii) of central importance to the legal system as a whole and outside the specialized area of expertise of the administrative decision-maker; or, (iv) regarding the jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir v. New Brunswick,* 2008 SCC 9, paragraphs 57–61, [2008] 1 SCR 190 [*Dunsmuir*]).

[17] None of this applies in this case. Furthermore, the TPP is a policy, not an Act or regulation. Strictly speaking, its interpretation cannot, consequently, be characterized as a question of law (*Rakheja v. Canada (Citizenship and Immigration)*, 2009 FC 633, paragraph 29, 345 FTR 159 [*Rakheja*]). Therefore, insofar as an immigration officer is called upon, in the implementation of a policy instituted by the Minister, according to the discretionary powers conferred upon the Minister under the Act, to interpret certain components of the policy, the standard of reasonableness applies (*Rakheja*, at paragraph 33). If the wording of the policy leaves the officer no latitude, a decision that is contrary to this wording will be unreasonable.

Analysis

[18] The applicant maintains that the Officer's decision did not allow her to understand why her application was denied. The relevant portion of this decision reads as follows:

> You are not eligible for the special procedures announced under the temporary public policy following the lifting of the temporary suspension of removals (TSR) on Haiti and Zimbabwe, because you:
>
> > [x] are not the subject of a removal order (including a conditional removal order) and you were not benefiting from the Haitian Special Measures at the time of the lifting of the TSR.

[19] It is worth noting that insufficient grounds is not, in itself, enough to justify setting aside a decision. This argument requires two separate analyses—one regarding the grounds, and the other regarding the outcome. In other words, it requires a more global exercise in the sense that the grounds must be examined in relation to the outcome so as to gain an understanding of the rationale behind the decision and to determine whether this can reasonably be considered to be among the possible acceptable outcomes, in light of the facts and the law (*Newfoundland and Labrador Nurses' Union*, paragraph 14; *Dunsmuir*, at paragraph 47).

[20] In my opinion, the Officer's decision clearly explains why the applicant is not eligible under the TPP for the purposes of her application for permanent residence on humanitarian and compassionate grounds. The Officer had to be satisfied that the applicant met each of the policy's criteria, as stated in the bulletin BO 600. This is what he did. In my opinion, the Officer did not need to provide any further justification for his decision in order to understand the underlying rationale and to determine if it fell within a range of possible, acceptable outcomes, within the meaning of *Dunsmuir*.

[21] What the applicant is ultimately contesting is the very basis of the decision. She maintains that the Officer wrongly interpreted the criterion that required her to have benefitted

from the HSM at the time of the lifting of the TSR. The applicant admits that she did not take advantage of the HSM before the lifting of the TSR, on December 1, 2014, but she argues that she did not do so in due time because she was unable to work and was awaiting her Canadian citizenship. She maintains that the Officer should have taken these two factors into account and that he should have, under the circumstances, opted for a loose interpretation of the TPP eligibility criteria. In other words, the applicant is arguing that it was sufficient, in this context, for her to have been eligible for the HSM at the time of the lifting of the TSR to be considered as having benefitted from the HSM and as meeting, by the same token, the TPP criteria.

[22] I cannot subscribe to this argument. Not only does it go against the wording used in the document—bulletin BO 600—aiming to operationalize the TPP (the applicant "must . . . have benefitted" from the HSM "at the time of the lifting of the TSR,") which, without twisting its meaning, clearly refers to taking concrete actions within a specific time period. However, it does allow for an element of discretion on the part of those immigration officers called to implement the TPP, which the wording of the policy, even here, does not provide for or consider.

[23] In this regard, the Officer did not have any latitude: he had to ensure that a certain number of criteria—all perfectly objective—were met, in order to determine whether the applicant was eligible for the TPP (*Terante v. Canada (Citizenship and Immigration)*, 2015 FC 1064, at paragraph 34). The applicant, as she herself admits, believing she had legitimate reasons for failing to do so, did not concretely take advantage of the HSM, even though she was eligible for them. Despite the unfortunate nature of the situation, the TPP criteria,

as stated in the bulletin BO 600, are clear on this, to the point that the Officer, in my opinion, had no other choice under the circumstances but to decide as he did.

[24] The applicant criticizes the respondent's position in this instance, alleging that it goes against the very purpose behind the establishment of the TPP, which was to protect Haitian nationals affected by the lifting of the TSR. She also argues that an examination of the body of administrative documents introduced into evidence by the respondent reveals a certain dichotomy regarding the TPP eligibility criteria, specifically Appendix C of the affidavit made by the respondent's affiant. Yet, as the respondent notes, this appendix refers to unsuccessful refugee protection claimants subjected to a 12-month blackout period for consideration of any applications for permanent residence on humanitarian and compassionate grounds. The applicant does not belong to this category of Haitian nationals residing in Canada. Regarding the rationale behind the TPP, it is not up to the Court to question the wisdom of a government policy as opposed to its legality, even though in this case one could very easily imagine that the Minister could have intended to prioritize, in defining the eligibility criteria for the TPP, those who had actually applied for the HSM in due time, namely, before the lifting of the TSR.

[25] That said, the applicant is in a rather unusual, and ultimately unenviable, position. Although the Canadian status of all of her immediate family members is secure, hers remains uncertain and leaves her subject to a possible removal. It is to be hoped that her particular situation, which is due in part to circumstances beyond her control, will be duly considered when her application for permanent residence on humanitarian and compassionate grounds is

examined, and that her application will be processed with the expeditiousness required in the circumstances.

[26] Counsel for the parties have agreed that there is no cause, in this case, to certify a question to the Federal Court of Appeal. I am also of that view.

ORDER

THE COURT ORDERS that:

1. The application for judicial review is dismissed; and

2. There is no question to be certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3270-15
STYLE OF CAUSE:	FOUNDIE ABRAHAM v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	JANUARY 21, 2016
ORDER AND REASONS:	LEBLANC J.
DATED:	APRIL 20, 2016

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