Federal Court  Cour fédérale

Date: 20170119

Docket: IMM-2311-16

Citation: 2017 FC 70

Ottawa, Ontario, January 19, 2017

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

MARS VJ TACADENA CRISTOBAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Mars VJ Tacadena Cristobal [the Applicant] pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *IRPA*], of a decision made by a Visa Officer [the Officer], dated May 18, 2016, in which the Applicant was not granted permanent resident [PR] status either as a member of the family class,

pursuant to paragraph 117(9)(d) of the *IRPA*, or under subsection 25(1) humanitarian and compassionate [H&C] grounds [the Decision].

[2] The application is granted for the following reasons.

II. Facts

[3] The Applicant is a 27-year-old citizen and resident of the Philippines. He sought PR status as a member of the family class. His wife, a Citizen of Canada (previously a permanent resident, also from the Philippines), was his sponsor. After being made aware that he was not admissible as a member of the family class, the Applicant sought permanent resident status on H&C grounds, given that both his wife and Canadian-born daughter had Citizenship status and were living in Canada. Both of the Applicant's claims were denied.

[4] The Applicant met his sponsor and they began their relationship in 2005. The sponsor moved to Canada in 2007 as part of the live-in caregiver program. The two were engaged on November 15, 2009 and married on March 29, 2010. They have one child together, a young daughter, who was born in Canada in December 2010. The sponsor and the daughter have returned to the Philippines twice since the daughter's birth to visit the Applicant, once in 2011 and once in 2012; there is no evidence they have returned since. Communication has allegedly been maintained through the use of telephone, Skype and Facebook.

[5] The Applicant's sponsor landed as a permanent resident in Canada on August 31, 2010. She did not declare the Applicant as her spouse or dependant on her permanent residence

application. The sponsor claims this was an “innocent mistake”, as it did not occur to her that she would have to update her file if the changes occurred during the application processing period. It must be noted, however, that direction to this end was included in the procedural letters she received during the PR application process. Furthermore, the sponsor submitted other updated information during that very same processing period.

[6] The Applicant submitted his application for permanent resident status as a member of the family class on February 16, 2015. As part of his application, the Applicant submitted a police certificate from the National Bureau of Investigation [NBI] in the Philippines, as well as a police clearance form and several other documents attesting to his non-existing criminal record. The NBI stated “No Criminal Record”.

[7] On July 9, 2015, the Applicant received a procedural fairness letter [PFL] making note of the concern that he may not meet the requirements for immigration to Canada in that his wife had not declared him in her application for PR, which would render him inadmissible.

[8] The Applicant’s counsel submitted a response to the PFL in which he requested that his H&C application be considered based entirely on the best interests of the Applicant’s child [BIOC], i.e., that she be reunited with her father “so that he may participate in her upbringing.” The letter also states that the sponsor, the Applicant’s wife, “would benefit from the support of her husband, both financially and emotionally, if he were able to join his family in Canada.”

III. Decision

[9] On May 18, 2016, both the Applicant's application for PR status as a member of the family class and his request for PR status on H&C grounds were denied.

[10] In this application for judicial review, the Applicant does not dispute that he does not qualify as a member of the family class.

[11] Rather, his complaint is in regards to the Officer's denial of his H&C claim which turned on the BIOC.

[12] The Officer's GCMS notes as regards his H&C request make note of the following:

- The limited documents on file to establish a genuine and continuing relationship between the Applicant and his sponsor;
- The 5-year delay between the Applicant and his sponsor's marriage and the date on which the sponsorship application was submitted;
- The lack of any indication that the sponsor and the child had visited the Applicant in the four years following their visit in 2012;
- The child was born and has resided in Canada with her mother since 2010 without the physical presence of her father;
- The evidence of 1 years' worth of correspondence between the Applicant and his sponsor does not indicate in what year it occurred; there is no evidence on file of any other correspondence between the two and this correspondence does not appear to include or discuss the child and only 2 photos of the child are shared during the entire years' worth of correspondence submitted as evidence;

- The Applicant requested an additional 30 days to submit evidence of Skype and other internet and telephone communication, however he did not submit any such evidence despite being granted the time extension; and
- The sponsor may have gained an advantage from not declaring the Applicant on her PR application, as his criminal record checks indicate that he has been charged with a criminal offence.

[13] It is from this Decision that the Applicant seeks judicial review.

IV. Issues

[14] This matter raises the following issues:

1. Whether the Officer breached the duty of fairness by failing to provide the Applicant with an opportunity to address concerns regarding his criminal record in the Philippines?
2. Whether the Officer's finding regarding the best interests of the child was reasonable?

V. Standard of Review

[15] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." An officer's H&C findings are reviewed on the

standard of reasonableness: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]; *Maroukel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 83 at para 21, Boswell J [*Maroukel*]; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18. The decision of whether to grant or deny an exception for humanitarian and compassionate reasons is "exceptional and highly discretionary; thus deserving of considerable deference by the Court": *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30. The highly discretionary nature of H&C assessments results in a "wider scope of possible reasonable outcomes": *Holder v Canada (Minister of Citizenship and Immigration)*, 2012 FC 337 at para 18; *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108 at para 13.

[16] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will

> rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[18] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Analysis

[19] In my view, the determinative issue in this application is the failure of the Officer to give the Applicant notice of the Officer's concerns respecting the Applicant's criminal record in the Philippines. I also have reservations about the adequacy of the BIOC in this case.

[20] The Applicant, as Canada requires, filed a report from the National Bureau of Investigations [NBI] stating "No Criminal Record". The record however makes it abundantly clear that reports from this particular NBI are far from easy to interpret. In fact, CBSA information in the record indicates even so simple a statement as this requires "interpretation of misleading remarks. The true meaning of the remarks is not evident from the description and can be incorrectly interpreted unless one knows that the remarks really stand for." CBSA provides no

less than seven (7) possible meanings of a "No Criminal Record" report from the NBI. In light of this, CBSA states that "…officers should ask the applicant to provide court documents and police reports and an enhanced NBI clearance report detailing the reasons for the remark in order to be able to determine criminal admissibility."

[21] Notwithstanding this advice from CBSA, the Officer's case notes state that the "No Criminal Record" report indicates "that the Applicant has been charged with a criminal offence." Not only this, but the Officer then speculates with respect to both the Applicant and his wife, the sponsor: that the Applicant "may be inadmissible", and in addition the wife may also be inadmissible as a result of her having obtained Canadian Citizenship by not declaring her spouse "whose criminal record may have rendered her inadmissible to Canada."

[22] Further, and contrary to CBSA's advice, the Officer did not ask the Applicant to provide court documents and police reports and an enhanced NBI clearance report detailing the reasons for the remark in order to be able to determine criminal admissibility.

[23] These very serious conclusions were not brought to the attention of the Applicant. The procedural fairness letter did not refer to them. There is no way of determining to what extent these considerations influenced the decision to turn down the H&C application.

[24] In my view this was not fair. The Officer had no concrete basis on which to conclude that the Applicant had been charged with a criminal offence, or that the Applicant and or his wife might be inadmissible. A procedural fairness letter was clearly indicated in this situation. It was

in fact urged by CBSA - with specific instructions as to what should be asked for. Nothing in that regard was done.

[25] I am unable to determine the extent to which this procedural unfairness influenced the ultimate decision to deny the H&C application. It is not safe to let this decision stand given this relatively serious breach of natural justice. Therefore and on this basis judicial review must be granted.

[26] Before leaving this matter, I also wish to note that the BIOC analysis in this case is quite short. This may reflect the fact that the BIOC submissions were quite brief. It may be that the BIOC assessment is ultimately reasonable, that is to be decided on the reconsideration I am ordering. However, in this case the Officer did not come to a conclusion on the BIOC; rather the notes record a number of BIOC factors and then they run into the issue of criminality, and ultimately conclude that H&C is not established. There is no conclusion on BIOC which in my view is something that should not be left hanging unresolved if it is to comply with *Kanthasamy*.

[27] In my respectful view, this Decision is tainted by procedural unfairness as noted above. Therefore judicial review must be ordered.

VII. Certified Question

[28] Neither party proposed a question to certify, and no such question arises.

VIII. Conclusion

The application for judicial review is granted, and this matter must be remanded for reconsideration. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the decision of the Visa Officer is set aside, the matter is remanded for redetermination by a different Visa Officer, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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