Federal Court  Cour fédérale

Date: 20171027

Docket: IMM-809-17

Citation: 2017 FC 963

Ottawa, Ontario, October 27, 2017

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

Z. W.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Under review is a decision of a Senior Immigration Officer that "the applicant's personal circumstances are [not] such that sufficient humanitarian and compassionate grounds exist to approve this request for an exemption from the requirements of the Immigration and Refugee Protection Act."

[2] For the reasons that follow, I find the officer's decision to be unreasonable and I grant this application for judicial review.

[3] Z. W. was born in China but left in 1991 and moved to Kenya with her only child, a daughter. She adopted an English name, gained Kenyan citizenship and lost her Chinese citizenship, and operated a business in Kenya which she says was robbed. The police offered her no assistance. In 2001, her daughter was granted a student visa and Z. W. was granted a visitor visa and they came to Canada.

[4] The daughter has since graduated, gotten married, and has two children. She is now a permanent resident of Canada.

[5] Efforts by the applicant to remain in Canada by way of a refugee application and a spousal sponsorship application were unsuccessful. She has no family members in Kenya. She has learned that she is HIV positive.

[6] Her counsel advanced four grounds why the decision refusing her humanitarian and compassionate [H&C] application was unreasonable: (1) the officer ignored or misconstrued evidence, (2) the officer fixated on the applicant's past immigration history, (3) the officer failed to consider the best interests of the child, and (4) the officer unreasonably failed to exempt the applicant from medical inadmissibility on H&C grounds.

[7] I agree with the applicant that the officer misconstrued the evidence that showed that there is discrimination in Kenya towards Chinese persons. The officer appears to have accepted that the discrimination towards those of Chinese origin is directed only to those who poach ivory, sell low quality Chinese goods, or engage in unfair commercial practices. In fact, the evidence appears to indicate that these are the "reasons" why Kenyans discriminate against Chinese persons and that such discrimination occurs regardless of their activities.

[8] I also agree with the applicant that the officer appears to have been unduly focused on the applicant's immigration history and the fact that she overstayed her visa, without considering that she did so to remain in Canada with her underage daughter.

[9] Alone, neither of these would have resulted in a finding that the decision was unreasonable; however, the officer's findings in two other respects do lead to that conclusion.

[10] The applicant's daughter and son-in-law both wrote letters of support. Her daughter wrote:

> She has been more than a mother to me and we have been each other's only family members and main supporters for numerous years.
>
> […]
>
> She has been a great help to my little family, and without her here we would have practically no support system.

Her son-in-law wrote:

> It would be absolutely devastating if [the applicant] will not be allowed to remain in Canada. We would not have the profound family support that [the applicant] has showed us, and the support

> we need as a young, small family. My own parents have not been there for us like my mother-in-law has, and we need her to be part of our little family.

[11] Both provided examples of this "profound family support" including the applicant caring for her granddaughter. The officer fails to reference these letters and certainly fails to engage with this evidence. The officer's conclusion that the applicant's family would experience "the normal emotional sadness which is experienced when separating from one's parent/child" is unreasonable unless the officer actually addresses this evidence.

[12] The second aspect of the decision that fails a reasonableness analysis involves the applicant's HIV status. The officer acknowledges that "many people living with HIV continue to face stigma and discrimination" in Kenya, yet finds that there is insufficient evidence that the applicant "may be forced to disclose her HIV status" and that "it is difficult to understand how or why the applicant would be shunned if people did not know of her health concerns."

[13] The officer describes at length the available treatment in Kenya for HIV positive persons – treatment this applicant will require. What the officer fails to consider is that one cannot receive treatment without disclosing that one is HIV positive and whether such disclosure might or is likely to result in further disclosure. Moreover, as the applicant submits, if she will face stigma and discrimination if her status is discovered, then she "will have to live her entire life in fear of being 'discovered' that she is HIV positive should she return to Kenya." That is a reality this officer failed to consider.

[14] For these reasons the decision cannot stand and I need not address the applicant's submissions regarding the best interests of the child or the applicant's request for exemption from medical inadmissibility. Neither party proposed a question for certification and on the particular facts there is none.

ORDER IN IMM-809-17

THIS COURT ORDERS that this application is allowed, the decision is set aside and the applicant's H&C application is remitted back to be determined by a different officer, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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