Federal Court  Cour fédérale

Date: 20180717

Docket: IMM-5341-17

Citation: 2018 FC 744

Toronto, Ontario, July 17, 2018

PRESENT: The Honourable Mr. Justice Locke

BETWEEN:

HARJIT SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant, Harjit Singh, has applied for judicial review of the decision, dated December 4, 2017, by Officer ARJ (the officer) of Immigration Refugees and Citizenship Canada (IRCC) refusing his spousal sponsorship permanent residence application. The officer found the applicant and his sponsor were in a *bona fide* marital relationship but refused the application on grounds of criminal inadmissibility, pursuant to s. 36(2)(a) of the *Immigration and*

Refugee Protection Act, SC 2001, c 27 [the *Act*], due to a conviction for driving with over the legal limit of alcohol in his blood. The officer found there were insufficient humanitarian and compassionate (H&C) grounds to warrant an exemption from the operation of the *Act*.

[2] For the reasons below, I have concluded that the present application should be granted.

II. Background

[3] The applicant is a citizen of India who arrived in Canada on October 31, 2011, and filed a refugee claim based on fear of persecution in India. His refugee claim was subject to delay and backlog and had not yet been heard at the date of the impugned decision.

[4] The applicant married his sponsor, Julie Elizabeth Cohen, a Canadian citizen, in September 2015 and submitted an application for sponsorship for permanent residence under the family class in June 2016.

[5] On March 4, 2017, the applicant was charged with impaired driving and with driving with over the legal limit of alcohol in his blood. The Crown withdrew the impaired driving charge, and elected to prosecute the remaining charge by summary conviction, rather than by indictment.

[6] The applicant pled guilty on May 10, 2017. The judge imposed a $1,500 fine, a mandatory victim surcharge of $450, and a mandatory one year driving prohibition. The applicant paid his fines in full the same day. The applicant succeeded in receiving a restricted

license on August 11, 2017, after entering Stream “A” of the Reduced Suspension Program and leasing an interlock device. The applicant also participated in a court-mandated rehabilitation program.

[7] On June 19, 2017, IRCC issued an Inadmissibility Report, followed by a Deportation Order on September 13, 2017.

III. Decision under Review

[8] As indicated above, the officer was satisfied that the applicant and his sponsor were in a *bona fide* relationship, but found that the applicant was inadmissible on grounds of criminality pursuant to s. 36(2)(a) of the *Act*.

[9] The applicant argued for an H&C exemption. The officer reviewed the applicant’s submissions but was not satisfied that the H&C considerations warranted an exemption from the operation of s. 36(2)(a) of the *Act* and s. 72(1)(e)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[10] The applicant submitted that his low education and work prospects will affect his ability to support himself in India. The officer found that the work experience and improved English language abilities the applicant had gained since his time in Canada would assist him in finding employment should he return to India. The officer also took note that the applicant had not tried to further his education in Canada since his arrival.

[11] The applicant submitted that the health concerns of the sponsor (his wife Ms. Cohen) would cause hardship upon return to India. The officer noted that Ms. Cohen is a Canadian citizen who can continue to access the health care system in Canada. The officer also noted that the refusal of the H&C application would not immediately lead to deportation as the applicant still had a refugee application pending. I note in passing that that refugee application was subsequently withdrawn. The applicant made submissions concerning the conditions Ms. Cohen would face if she moved to India. The officer rejected these considerations and determined it would be up to her to make an informed decision on whether to move to India with her husband.

[12] The applicant submitted that his removal to India would cause a financial burden to Ms. Cohen and her family, with whom he currently lives. The officer determined that Ms. Cohen was the primary bread winner and resided with her parents, therefore there would not be a significant financial burden imposed. The officer noted that the applicant and Ms. Cohen have no children together. The officer concluded that the return to India may have a positive impact on the applicant's seven-year-old son, who still lives there.

[13] The applicant submitted that his offence was of "minimal severity" and did not cause anyone harm. The officer rejected this, stating that it was a recent offence, that the applicant had not yet completed his court-mandated rehabilitation, and that the nature of the offence was such that the applicant had consciously put others at risk, while showing a disregard for the laws of Canada.

[14] The officer was not convinced that the applicant's criminal inadmissibility was outweighed by H&C considerations.

IV. Issues

[15] The only issue to be determined is whether the officer's decision was reasonable.

V. Standard of Review

[16] The parties agree, and I concur, that the applicable standard of review in the present application is reasonableness: *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18.

[17] I recognize that the assessment of H&C considerations is highly discretionary and fact-based, and the immigration officers ordinarily will have a broad range of acceptable and defensible outcomes available to them: *Kanguatjivi v Canada (Citizenship and Immigration)*, 2018 FC 327 at para 14. That said, the decision-making process must demonstrate justification, transparency and intelligibility: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47.

VI. Analysis

[18] Despite the broad discretion available, it is my view that the officer erred in failing to:

A. Recognize that the applicant had no criminal history;

B. Recognize that the applicant had expressed remorse; and

C. Adequately consider the consequences of separation of a married couple.

[19] The paragraphs below deal with each of these issues.

A. *Absence of criminal history*

[20] There is no indication in the officer's decision that any consideration was given to the fact that the applicant had no criminal history prior to his conviction. The respondent points to a reference at the beginning of the decision to "a review of the applicant's criminal history" but this was simply to note his conviction. There is no suggestion that the officer was aware that the applicant's criminal record was otherwise clean.

[21] I accept that it was not unreasonable for the officer to note that the applicant had made a conscious choice to break the law and endanger the public, and that his rehabilitation remained a work in progress. However, the applicant was entitled to have his prior clean criminal record considered as well. This is clearly contemplated by IRCC among the factors to be considered when assessing H&C considerations to overcome criminal inadmissibility.

B. *Expression of remorse*

[22] The applicant expressed deep remorse for the behaviour that led to his conviction. I accept the respondent's argument that remorse is evidence of rehabilitation and that its genuineness can only be demonstrated over time. However, the applicant's expression of remorse is not even mentioned in the officer's decision. The only aspect of the applicant's

rehabilitation that is mentioned is court-mandated rehabilitation. It is unclear whether the applicant's expression of remorse was even recognized by the officer. I do not accept the respondent's argument that consideration of remorse would not have changed the result. I am not convinced that that is necessarily the case.

[23] In my view, the applicant's expression of remorse is a relevant factor that should have been considered by the officer. The failure to address this factor impairs the transparency of the officer's decision.

C. *Separation of married couple*

[24] One of the factors contemplated by IRCC in assessment of an H&C application is "consequences of the separation of relatives".

[25] The officer acknowledged Ms. Cohen's health problems, and did not express disagreement with the applicant's submissions about the limitations of health care available in India. However, the officer concluded that it would be Ms. Cohen's choice whether to go to India or stay in Canada and benefit from its health care system.

[26] Later in the decision, the officer acknowledged the emotional attachment between the applicant, on the one hand, and Ms. Cohen and her family, on the other. However, the officer downplayed the possible separation as "a general consequence when family and friends are residents of different countries." The officer noted that various means of communication can be used to maintain these relationships.

[27] In my view, the officer's consideration of the possible separation of the applicant and Ms. Cohen was inadequate. It may be true that certain kinds of relationships can be maintained by various means of communication such as mail, email, social media or telephone. However, a conjugal relationship is different. Many important aspects of such a relationship cannot be maintained by remote communication, especially for a couple like the applicant and Ms. Cohen, who plan to start a family. The officer's analysis of the applicant's relationship with Ms. Cohen was treated as similar to his relationship with his in-laws. That was unreasonable. The applicant was entitled to a consideration of the specific consequences of an indefinite separation from his wife.

[28] Now it is true that, just as Ms. Cohen might decide to stay in Canada, she might choose to follow him to India, in which case the applicant and Ms. Cohen would not be separated. But in that event, the consequences of such a choice on Ms. Cohen's health merited consideration in greater depth. The officer's discussion of this issue was interrupted on the basis that Ms. Cohen could choose to stay in Canada.

[29] At the end of the day, she would face a very difficult choice between following her husband to a country with limited health care (and with which she is almost entirely unfamiliar), and staying behind and enduring an involuntary separation from her husband. In my view, the officer did not adequately consider this issue.

VII. Conclusion

[30] The officer's errors concerning the applicant's clean criminal background, his expression of remorse and the consequences of his separation from Ms. Cohen are sufficient to make the impugned decision unreasonable and to merit granting the present application. It is therefore not necessary to deal with the other issues raised by the applicant.

[31] The parties agree that there is no serious question of general importance to certify.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The present application is granted.

2. Officer ARJ's decision dated December 4, 2017 is set aside and this matter is remitted for consideration by a different officer.

3. There is no serious question of general importance to certify.

"George R. Locke"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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