Federal Court  Cour fédérale

Date: 20141119

Docket: IMM-1484-13

Citation: 2014 FC 1092

Toronto, Ontario, November 19, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MARIA MAGDALENA SALGUERO GUADRON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

VILMA FILICI

Intervener

JUDGMENT AND REASONS

I. Overview

[1] Maria Salguero Guadron [the Applicant] is a 73-year-old grandmother from El Salvador. She has three children, two of whom are Canadian citizens who fled El Salvador in the 1980s

and a third who fled the country in December, 2010 and was granted refugee protection in Canada on June 28, 2012. The Applicant came to Canada on July 7, 2011, on a visitor's visa.

[2] On May 24, 2012, the Applicant filed a Humanitarian and Compassionate [H&C] application under s. 25(1) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA/the Act] as a means of obtaining permanent residence in Canada. The H&C application was refused in a decision dated December 18, 2012 [Decision]. The application was prepared using the services of an immigration consultant [Intervener], who was represented by counsel at this judicial review [JR].

II. Positions of the Parties

[3] Ms. Salguero Guadron alleges that the incompetence of her immigration consultant derailed her meritorious H&C application. She contends that the consultant omitted crucial evidence regarding four key elements of her case that would have individually and/or collectively resulted in a different outcome to the negative decision she received. Specifically, the Applicant contends that her consultant acted incompetently, in that:

i. No evidence was provided to substantiate the Applicant's relationship to Elmer Rafael Guadron Salguero, her son, who had been kidnapped in El Salvador and is presumed dead.

ii. No corroborating evidence was provided that the Applicant's last remaining child in El Salvador, a daughter, had come to Canada and with her family, and made a

refugee claim, which was granted shortly after the filing of the H&C claim herein, and several months before the Decision.

iii. Little information was included to trigger a best interests of the child [BIOC] analysis for the Applicant's four grandchildren, one of whom is a Canadian, and three of whom were included in the positive refugee claim in (ii). The fact that the Applicant's three living children – all former El Salvadorian refugees – and all four of her grandchildren, were in Canada by the time of the Decision, was therefore not properly before the Board.

iv. Just as these relatives could not visit her because of their successful refugee claims against El Salvador, no evidence was included to show why the Applicant would not be able to visit them if she returned to El Salvador. This evidentiary gap was material because (a) the parents and grandparents permanent residency class was under a moratorium at the time, and (b) the Applicant would not qualify for a temporary "Supervisa" based on her health conditions (asthma and cardiovascular issues), making medical insurance unaffordable and thus rendering her ineligible for a Supervisa to get to Canada on a temporary basis.

[4] In light of these omissions, the Applicant seeks to have the decision overturned and the matter remitted to Citizenship and Immigration Canada [CIC] for re-determination on the basis of what she argues was incompetent representation.

[5] Counsel for the Intervener requested the opportunity to present oral evidence at the hearing of this JR, because the Court's initial Order of June 18, 2014 granting Intervener status, was silent as to oral evidence. After hearing from both sides on the issue, the Court accepted the request from Intervener's counsel, given the important professional interests being considered.

[6] The Intervener refuted all of the allegations, stating that a strong H&C case had been submitted with all necessary elements. Counsel argued that the Intervener had represented the Applicant diligently and completely, and placed most of the gaps at the hands of the Applicant and the Applicant's family. The Intervener argued that despite asking the Applicant and her family for certain documents, they were never provided. Likewise, the Intervener contends that missing information from the H&C was never raised by the Applicant and her family.

III. Analysis

[7] Much of the multiple and lengthy pleadings exchanged in the months before this JR hearing, including detailed affidavit evidence exchanged, amounts to claims of he said -- she said.

[8] It is not the Court's role in a JR context to take the place of a professional regulator, which is the forum where professional conduct claims should properly take place, and where a complaint was filed and determined.

[9] Rather, this Court must determine whether the omissions resulted in prejudice to the Applicant and without which would have, on the basis of reasonable probability, resulted in a different outcome.

[10] It is clear that negligent representation can result in a breach of procedural fairness, *R v GDB*, 2000 SCC 22 at para 28, and trite law that immigration consultants will be held to the same professional competency standards as counsel who appear before the Court: *Cove v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266 at para 10.

[11] In order to succeed on the basis of a procedural fairness violation resulting from incompetent representation, the Applicant must establish that all parts of the following tripartite test are met:

> 1. The representative's alleged acts or omissions constituted incompetence;
>
> 2. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and
>
> 3. The representative be given notice and a reasonable opportunity to respond.
>
> See: *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 25; and *Nagy v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 25.

[12] This case turns on the first two branches of this tripartite test, because the decision-maker found fundamental weaknesses in the application with respect to each of the four factual items listed in paragraph 3 of these Reasons.

[13] The Court must determine whether the exclusion of evidence regarding these four items, namely the Applicant's (i) relationship to her murdered son, (ii) daughter's refugee claim, (iii) grandchildren's BIOC, and (iv) likelihood of family visits (either Supervisa eligibility to Canada or Canadian family's inability to travel to El Salvador), would have severally or jointly resulted in a different outcome, based on a standard of reasonable probability.

[14] At the JR hearing, the Respondent took no position on whether the actions of the Applicant's representative constituted incompetence, given that the Intervener had retained counsel prior to the hearing. The Respondent conceded that if the Court determined that the representation was indeed incompetent, the matter should be sent back for redetermination as there was a reasonable probability that the result of the decision would have been different on the facts of this case.

[15] Counsel for the Intervener, in both his extensive written and oral submissions, did an admirable job of putting his client's best foot forward, and contending that the tripartite test had not been satisfied.

[16] Indeed, counsel for the Intervener had been successful in responding to the Applicant's complaint previously made to the Immigration Consultants of Canada Regulatory Council (ICCRC). That complaint was dismissed by ICCRC on June 25, 2013. However, the result of that disciplinary process is not binding on this Court, for all the reasons outlined in *Brown v Canada (Citizenship and Immigration)*, 2012 FC 1305.

[17] I reiterate that, in IRPA proceedings, the incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances", and such incompetence or negligence must be sufficiently specific and clearly supported by the evidence: *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36. The onus is on the Applicant to prove every element of the test for negligent representation, including rebutting the presumption that the representative acted competently and that a miscarriage of justice resulted: *R v GDB*, 2000 SCC 22 at para 27.

[18] A review of recent jurisprudence from this Court provides indicia of the kinds of circumstances which point to incompetence. In *Memari*, referenced above, the Chief Justice found that prejudice resulting from counsel's failure on several counts at the refugee hearing (including submitting an unamended Personal Information Form [PIF], failing to cross-examine individuals, and adduce crucial evidence including medical evidence) cumulatively were exceptional to deem the representation unreasonable and inadequate.

[19] Circumstances which have warranted intervention from this Court on the basis of negligence include, in the refugee context, leaving a claimant to fill out a PIF on his own, and instead leaving this to an assistant, per Justice Near in *El Kaissi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1234 at para 19. In another instance, Justice Russell in *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 86, also found that counsel was negligent in failing to assist with the PIF, where as a result, crucial evidence was omitted.

[20] Justice Shore in *Kim v Canada (Citizenship and Immigration),* 2012 FC 687, found that a failure to submit financial documentation in order to demonstrate economic establishment for an H&C application, constituted incompetence.

[21] This Court does not take lightly the moniker of incompetent counsel. Justice Boivin, for example, found that a bare allegation that a better or more credible narrative could have been submitted by counsel did not meet the threshold of incompetence: *Tjaverua v Canada (Citizenship and Immigration),* 2014 FC 288 at para 18.

[22] I acknowledge that immigration professionals are a busy group with many competing demands and responsibilities, for which they are often not paid what others might deem a good rate for the many hours put in. That may or may not have been the case here. Although details of the financial arrangements (including reduced rates) were raised by the Intervener, it is not the Court's role in this case to determine the fairness of these financial arrangements. Once a licensed representative has agreed to represent an applicant, and that applicant retains the representative, the attendant obligations of competent representation ensue.

[23] Having established that the fairness of financial consideration is not within the ambit of the reviewing court's purview, what is for this Court to pronounce upon is whether any or all of the four elements substantially absent from evidence were (i) exceptional, and (ii) resulted in a miscarriage of justice, per *GDB,* above. This inquiry necessarily includes whether there were any missed opportunities to update CIC in the months leading up to the H&C refusal.

[24] In the Court's view, that occurred in this instance. Certainly, one can query whether any one of the four items, severally, would have led to a different outcome. What appears beyond question, however, is that the four missing items, had they been jointly included in the submissions, could well have led to a different H&C result.

[25] In short, the facts of this case align with the jurisprudence of this Court where incompetence was found due to a failure of the representative to submit evidence that clearly should have been submitted and for which logic defies failure to submit that evidence. Indeed, past cases have so found with lesser evidentiary gaps or omissions, such as in the matter of *Kim* referenced above.

[26] The Intervener argues that one can always second-guess in hindsight whether evidence should have been submitted, and that in any event, that each of the four evidentiary gaps in question were addressed in some manner in the H&C application.

[27] I disagree. It was incumbent upon the legal representative, after having accepted the retainer, to apprise CIC as fully as possible of all key factual elements relevant to this H&C application.

[28] The Court makes this determination in the absence of deciding on any of the credibility concerns asserted by the Intervener *vis-a-vis* the Applicant's failures to furnish evidence on these points: I find no need to adjudicate on the "he said – she said" said aspects of this unfortunate dispute.

[29] Rather, I find that as the duly appointed legal representative under the Act, it was the representative's responsibility to make reasonable attempts to seek out crucial information required for the Applicant to overcome the significant hurdles in obtaining a highly discretionary and exceptional H&C remedy. It is not good enough to state that the Applicant (or her family) did not volunteer it. That approach undermines the reason for hiring a licensed representative, be it a lawyer, or a consultant in this case. To find otherwise would posit the question as to why one would bother to hire a professional in the first place.

[30] For instance, there is no dispute that the Applicant's youngest daughter's PIF, and/or a copy of the full refugee application, could have easily been included in the H&C application. In the Decision, the Officer found that "no evidence is submitted to substantiate this statement" - the statement being the lack of family support the Applicant had in El Salvador [Applicant's Record, pg. 17].

[31] It is clear that submitting the daughter's PIF, or some equivalent information demonstrating that a refugee claim had been made, and subsequently established, would have established several key factors found lacking in the Decision, namely: (1) the presence of all her children and grandchildren in Canada, (2) corresponding family support available in Canada, (3) the inability of her children to visit the Applicant in El Salvador, because by the time this last daughter's positive refugee decision was made - several months before the H&C adjudication - all three of the Applicant's remaining children and her grandchildren had been granted Convention refugee status by Canada, and (4) the Officer would have had before him or her irrefutable evidence that many of the hardships raised by the Applicant in her H&C application

had been independently raised before, and accepted by, the Refugee Protection Division of the Immigration and Refugee Board.

[32] It is also notable that no BIOC analysis was conducted for the Applicant's grandchildren. This is not surprising, as scant BIOC submissions were made in the H&C application and those only barely addressed one grandchild in Canada, let alone four. The Intervener, in response, contends in her Affidavit that information on the Applicant's family members was solicited, but no information about her grandchildren was provided, rendering the Intervener unable to make submissions on the point.

[33] However, this explanation does not pass muster because, firstly, the application letter mentions one grandchild in Canada, and secondly, making inquiries about the other grandchildren in the six months after the H&C submission would have shown that they were now all Convention refugees in Canada.

[34] As noted by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the best interests of a child directly affected plays a vital role in H&C applications. Indeed, the best interests of the child are the only H&C criteria IRPA explicitly requires H&C decision-makers to consider. As such, it is incumbent on counsel or a consultant to diligently pursue the issue where it may be a factor.

[35] Finally, no documentation was requested by the Intervener from the Applicant concerning medical information about her physical ailments. While a psychological assessment

was put before the officer, as a woman who suffers from asthma and cardiovascular issues for which she takes daily medication, these pre-existing conditions could very well have been a factor in the determination of whether the hardship the Applicant faced living by herself in El Salvador was "unusual, undeserved or disproportionate". After all, most likely way she would see her family in the future was based on her ability to obtain a Supervisa (due to the limitations on the parental and grandparents' class that were known to the Intervener). No medical evidence, per se (i.e. from a doctor) was tendered, and nothing was mentioned about the issue in the H&C submission.

[36] Finally, the Intervener suggests that these kinds of omissions are revealed only with the benefit of hindsight. Again, I disagree. Each of the four omissions, severally, had the potential to change the outcome, and jointly, their inclusion would have resulted, in my view, in the reasonable probability of a different results just as the cumulative effect of the exceptional circumstances had in the jurisprudence I have referenced above.

IV. Conclusion

[37] As all three parts of the tripartite test for incompetence have been satisfied. The matter will be sent back to CIC for redetermination with the inclusion of information that came to light through this JR.

[38] No questions for certification were raised.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the matter will be sent back for redetermination and there are no questions for certification.

"Alan Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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