Federal Court Cour fédérale

Date: 20151030

Docket: IMM-7087-14

Citation: 2015 FC 1229

Ottawa, Ontario, October 30, 2015

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

AR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] AR has a long immigration history in Canada. Originally from Kosovo, AR came to Canada to seek refugee protection in 2000. He was found to be ineligible for refugee status based on his commission of crimes against humanity when he was involved in the Yugoslav National Army [JNA] in the 1990s. AR applied for two pre-removal risk assessments [PRRAs] which were unsuccessful.

[2] He then asked for relief on humanitarian and compassionate grounds [H&C] and, in 2014, an immigration officer refused that request. AR now seeks judicial review of the H&C decision, arguing that the officer's decision was unreasonable. In particular, AR contends that the officer erred by discounting the severity of the conditions he faced as a person of Roma ethnicity and a suspected Serb collaborator. He also maintains that the officer's analysis of the evidence relating to his involvement in the JNA and his assessment of the best interests of his children were inadequate. He asks me to quash the officer's decision and order another officer to reconsider his H&C application.

[3] I agree with AR that the officer erred in his treatment of the evidence. I must, therefore, allow this application for judicial review. The sole issue is whether the officer's decision was unreasonable.

II. AR's Request for a Confidentiality Order

[4] Subsequent to the hearing of this application for judicial review, AR requested that the record be sealed, that the hearing take place *in camera*, or that he be referred to by his initials, AR, rather than his full name. The request was based on the potential harm that could come to AR on his return to Kosovo if his identity were to be disclosed.

[5] The Minister opposes AR's request for a sealing of the file as it is already part of the public record in this case. The Minister also opposes the request for an *in camera* hearing since a public hearing has already taken place. However, the Minister takes no position on AR's request for the use of his initials in this proceeding rather than his full name.

[6] In my view, AR's interests can be sufficiently protected by anonymizing this decision through the use of his initials instead of his full name. His interests can be protected, by ensuring that his identity is not revealed in this decision. AR has not provided sufficient grounds to justify sealing the entire file. His request for an *in camera* hearing, obviously, is out of time.

III. The Officer's Decision

[7] The officer reviewed the circumstances relating to AR's inadmissibility to Canada. The officer found that AR had disclosed his involvement in the JNA in 1990 and 1991 in an interview he gave in 2000, and that the JNA's unlawful conduct was confirmed in objective documentary evidence. According to the officer, the evidence showed that AR was personally involved in rocket attacks against civilians. At the same time, the officer accepted that AR's service in the JNA in 1999 might have been involuntary, but did not find that he carried out his military activities under duress.

[8] The officer found that AR had established himself in Canada by virtue of his employment, financial circumstances, and community ties. He also had formed a relationship with his common-law spouse; the couple are parents to two Canadian-born children.

[9] Regarding the welfare of the children, the officer agreed that it was best for both parents to be present for their upbringing. However, the officer repeatedly stated that AR's absence would not necessarily be contrary to the children's best interests. The officer noted that AR's spouse had left her two older children with her ex-husband in the Philippines while she re-located to Canada. Those children seem to be doing fine. Similarly, according to the officer,

AR’s children could presumably be cared for by a single parent, with frequent contact with him through various means of communication.

[10] As for the risk to AR on return to Kosovo, the officer cited his analysis from an earlier negative PRRA decision and went on to consider more recent evidence. That evidence showed that the Roma are a vulnerable group in Kosovo, but laws and policies are in place to protect them. The Roma clearly face discrimination and hardship; however, the officer could not conclude that AR would likely face a risk to his life, or a risk of torture or cruel and unusual treatment or punishment on his return.

[11] Similarly, the officer thought it unlikely that AR would face a risk of harm as an alleged Serb collaborator.

[12] In the end, balancing the positive and negative factors, the officer found that AR did not deserve H&C relief.

IV. Was the officer’s decision unreasonable?

[13] The Minister argues that the officer’s decision was reasonable because it properly addressed the evidence relating to the risk AR would face if he returned to Kosovo. In addition, the Minister contends that the officer’s assessment of the best interests of AR’s children was reasonable.

[14] I disagree. In my view, the officer failed to address the evidence showing the seriously disadvantaged treatment of the Roma population in Kosovo, especially those regarded as Serb collaborators. Further, the officer's consideration of AR's children was inadequate. I must, therefore, allow this application for judicial review.

[15] Clearly, the officer understood the difference between the PRRA application, based on a probability of risk, and the H&C, based on a likelihood of significant hardship. However, it is not clear how the officer concluded that the risk to AR did not amount to unusual, undeserved, or disproportionate hardship. The officer explained why the evidence did not meet the PRRA threshold, but did not articulate why the same evidence did not demonstrate significant hardship. There is no separate analysis of the evidence with that standard in mind.

[16] In addition, the officer stated numerous times that AR's absence from his children would not necessarily impinge on their best interests. The implication of those comments is that the children might actually be better off if he were removed from Canada. There is absolutely no evidence that would support that conclusion. Removal of a parent will almost always be contrary to a child's best interests (*Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, at paras 5-6). When an officer's conclusion is to the contrary, there is a heavy burden on him or her to explain why. Here, the officer simply did not address that question.

[17] Therefore, in my view, the officer's decision was unreasonable because it failed adequately to address the evidence relating to the hardship of removal on AR personally, and on

the best interests of his Canadian-born children. The officer's conclusion did not represent a defensible outcome based on the facts and the law.

V. Conclusion and Disposition

[18] The officer's decision was unreasonable because it failed to offer an intelligible and transparent explanation of the officer's conclusion that AR's removal from Canada would not impose a significant hardship on him, or adversely affect the best interests of his children. I must, therefore, allow this application for judicial review and order another officer to reconsider AR's H&C application. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicant's request that his initials, rather than his full name, be used in this decision is allowed.
2. The application for judicial review is allowed, and the matter is returned to another officer for reconsideration.
3. No question of general importance is stated.

"James W. O'Reilly"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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