Federal Court Cour fédérale

Date: 20160705

Docket: IMM-5599-15

Citation: 2016 FC 756

Ottawa, Ontario, July 5, 2016

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

OLENA OLIINYK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the December 3, 2015 decision of a Visa Officer denying the Applicant a temporary visitor's visa. The Officer determined that the Applicant did not have sufficient ties to her home country of Ukraine to ensure that she would leave Canada at the end of her stay.

II. Background

[2] The Applicant, Olena Oliinyk, is a citizen of Ukraine. She is self-employed as a tutor and resides in Ukraine with her young son and parents.

[3] In April of 2015, the Applicant married Mykhailo Oliinyk. Mr. Oliinyk is a Canadian permanent resident, having been sponsored in 2012 by his then spouse (they divorced in 2014) after arriving in Canada in 2009 on a visitor's visa.

[4] Subsequent to their marriage, Mr. Oliinyk invited the Applicant to visit him in Canada from November 20, 2015 to December 28, 2015, to celebrate his 35th birthday and the Christmas holidays.

[5] The Officer held that the Applicant had not satisfied him she would leave Canada at the end of her stay as a temporary resident, as required by subsection 20(1)(b) and subsection 22(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. As a result, the Officer concluded that the Applicant should not be granted a visitor's visa to come to Canada.

[6] The Officer held that the Applicant possessed weak ties to Ukraine, noting that she was self-employed. Moreover, she had not provided her full employment history for the past 10 years as required, which raised concerns she was purposely withholding relevant information.

[7] The Officer further noted that Mr. Oliinyk had arrived in Canada through “irregular migration”, and that a spousal sponsorship application had not yet been made to bring the Applicant to Canada, despite the couple having been married since April of 2015.

[8] In conclusion, the Officer was not satisfied that the Applicant was a genuine visitor to Canada or that she had demonstrated sufficient ties to Ukraine to ensure her return there at the end of her visit.

III. Issue

[9] The only issue is whether the Officer’s decision is reasonable.

IV. Standard of Review

[10] The standard of review of the Officer’s decision is reasonableness: the decision is discretionary, and is therefore entitled to significant deference (*Zhou v Canada (Minister of Citizenship and Immigration)*, 2013 FC 465 at para 8 [*Zhou*]).

V. Analysis

[11] The Respondent submits it was not unreasonable for the Officer to consider the immigration history of the Applicant’s husband, or by characterizing that history as “irregular”, given that Mr. Oliinyk did not apply for permanent residency from abroad, as is regularly required.

[12] Moreover, it is the Respondent's position that the Officer did not err by failing to consider that the Applicant's husband is ineligible to sponsor her. It is the Applicant's responsibility to provide the Officer with all relevant information to her application, and the Officer is not required to investigate why an applicant has not been sponsored by his or her spouse.

[13] Finally, the Respondent argues it was reasonable for the Officer to find that the Applicant has weak ties to Ukraine: she owns no property in the Ukraine and has a highly mobile job. The fact that the Applicant has a son and parents in Ukraine is not, on its own, sufficient to demonstrate a strong tie, as the son can always be brought to Canada at a later date.

[14] Given the deferential nature of the Officer's decision, the Court should only intervene where the decision is not made in good faith, in accordance with the principles of natural justice, or fails to take into account relevant considerations (*Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2 at para 7). In other words, only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" will the Court's intervention be warranted (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[15] However, while an officer is presumed to have reviewed all the evidence and need not mention every piece of evidence in his or her reasons (*Zhou*, above, at para 20), an officer's responsibility to analyse and comment on a specific piece of evidence increases in accordance with the importance of that evidence and the degree to which it contradicts the decision-maker's

findings (*Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)* (1998), 157 FTR 35 at paras 14-17 [*Cepeda-Gutierrez*]).

[16] In this case, I find that the Officer's decision was unreasonable.

[17] The Officer made factual findings at odds with evidence that was not discussed in his reasons. He did not mention at any point in the reasons evidence establishing that the Applicant's minor son and parents remained in Ukraine while she came to Canada to visit her husband. This evidence directly contradicts the Officer's conclusion that the Applicant possesses only weak ties to Ukraine: a mother's ties to her only son, a minor child, at the very least calls into question the Officer's finding. The lack of analysis, or even reference to such evidence demonstrates a failure to properly engage in the fact-finding process, and entitles the Court to infer that finding was made "without regard to the evidence" (*Delios v Canada (Attorney General)*, 2015 FCA 117 at para 27; *Cepeda-Gutierrez,* above, at para 14).

[18] By way of affidavit, the Officer attempted to clarify his decision, stating that though he was aware of the existence of the Applicant's son, that fact was not sufficient to convince him that the Applicant would return to Ukraine, as her son may always be brought to Canada at a later date. This statement is an impermissible attempt by the Officer to bolster his decision after the fact, and I attribute it no weight. As stated by the Federal Court of Appeal in *Sapru v Canada (Minister of Citizenship and Immigration)*, 2011 FCA 35 at paragraphs 52-53:

> 52 With respect to the affidavit of the medical officer, in my view the Judge's reliance upon this affidavit was problematic in two respects. First, the information contained in the affidavit was not before the immigration officer when he was assessing the

reasonableness of the medical officer's opinion. It was the duty of the immigration officer to assess the reasonableness of the medical opinion. Second, as candidly acknowledged by counsel for the Minister in oral argument, an affidavit cannot be used to bolster the reasons of a decision-maker on judicial review. In this Court, Justice Pelletier wrote for the majority in *Sellathurai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 255:

> 45 The application judge may have been lead to that conclusion by the nature of the affidavit filed by the Minister's delegate. While the letter setting out the reasons for the refusal of Mr. Sellathurai's request deals only with the evidence of the legitimacy of the source of the seized funds, the Minister's delegate filed an affidavit in which he restated and reviewed the grounds for suspicion identified by the customs officer, and indicated why he believed they remained unanswered. In my view, this form of affidavit is inappropriate and ought not to have been given any weight at all.
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> 46 The judges of the Federal Court have previously stated that a tribunal or a decision-maker cannot improve upon the reasons given to the applicant by means of the affidavit filed in the judicial review proceedings. In *Simmonds v. Canada (Minister of National Revenue)*, 2006 FC 130, 289 F.T.R. 15, Dawson J. wrote at paragraph 22 of her reasons:
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>> I observe the transparency in decision-making is not promoted by allowing decision-makers to supplement their reasons after the fact in affidavits.
>
> 47 Any other approach to this issue allows tribunals to remedy a defect in their decision by filing further and better reasons in the form of an affidavit. In those circumstances, an applicant for judicial review is being asked to hit a moving target.
>
> [emphasis added]

> 53 No weight should have been given to the affidavit of the medical officer to the extent the officer sought to explain or bolster her reasons.
>
> [Emphasis in original]

[19] Though this above error in the Officer's decision alone is sufficient to grant this application, I also find that the Officer made other findings, which further add to the unreasonableness of the decision.

[20] Namely, the Officer placed weight on the fact that the Applicant was not yet sponsored by her husband by way of spousal sponsorship. This is unreasonable given the facts before the Officer, which indicated that the Applicant's husband is prohibited from sponsoring her until 2017, because he himself gained permanent residency as a result of a spousal sponsorship.

[21] The Officer's failure to consider, let alone even mention, evidence directly contradictory to his finding that the Applicant had weak ties to Ukraine is a reviewable error that goes to the very heart of the decision to refuse the Applicant a temporary visitor's visa. Accordingly, I would allow the application.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is referred to a different officer for reconsideration, having regard to the reasons of this decision;
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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