Federal Court  Cour fédérale

Date: 20190322

Docket: IMM-1784-18

Citation: 2019 FC 362

Ottawa, Ontario, March 22, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MAKAHITO HOKU
(AKA MARYBETH MURAWSKI)

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, who is inadmissible to Canada under section 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA") wishes to retrieve her personal belongings in Canada which, according to her own spiritual beliefs, cannot be touched by anyone other than herself. Accordingly, she asked for Authorization to Return to Canada ("ARC") under section 52(1) of the IRPA and a Temporary Resident Permit ("TRP") under section 24(1) of the IRPA.

[2] On March 15, 2018, the Chief of Operations, St. Stephen Area Point of Entry (the "Decision-Maker") rejected her ARC application. The Applicant now applies for judicial review of this decision. For the reasons below, this application for judicial review is allowed.

II. **Background**

[3] The 57 year old Applicant, Makahito Hoku (also known as Marybeth Murawski), is a citizen of the United States of America (the "USA"). She describes herself as a spiritual healer. Her healing work involves helping others by using a sacred bundle containing items from all over the world: creation water, sacred feathers, a sacred pipe, crystals, and healing stones. She believes that if her sacred bundle is touched by someone else, it will lose its powers.

[4] In 2000, she purchased a vacation home in Prince Edward Island and became a permanent resident of Canada in 2005. In July 2010, she moved to Arizona. She later plead guilty to aggravated assault with a deadly weapon after an incident where she threatened a known male with a borrowed and unloaded gun.

[5] In February 2017, the Applicant and two investors purchased a home in Prince Edward Island with the intent to convert it into a Healing Centre. She was unaware that criminal convictions impact permanent residency status. When she returned to Canada in March 2017, she brought her sacred bundle with her. Due to her criminal conviction, a section 44(1) report was written against her.

[6] After an admissibility hearing found the Applicant inadmissible to Canada under section 36(1)(b) of the IRPA, the Applicant says she returned to Massachusetts to comply with her

American probation order. Later, (on October 4, 2017) the Applicant would successfully file a motion to terminate her probation order. The Applicant's additional request to vacate guilt would be rejected on February 20, 2018.

[7] In July 2017, the Applicant was given a deportation order when she tried to return to Canada. Because it was necessary to retrieve her sacred bundle for her work, she applied to the Canadian Consulate in New York City for an ARC/TRP. However, the processing time for applications is approximately 1 year, so the Applicant sought a quicker method. On March 9, 2018 she applied again for an ARC/TRP, this time at the St. Stephen border crossing. In her application she also requested one month to visit friends.

[8] The Applicant's second application was denied and the reasons for the decision are discerned from the Global Case Management System ("GCMS") notes. These notes first review why the Applicant is inadmissible to Canada, noting that she was convicted of an offence in the State of Arizona that is equivalent to an offence under section 267(a) of the Criminal Code of Canada. Because the equivalent Canadian offence would be punished with imprisonment not exceeding 10 years, the Applicant is inadmissible due to Serious Criminality under section 36(1)(b) of the IRPA.

[9] The GCMS notes go on to review the reason for the ARC application: so the Applicant may retrieve her sacred bundle. However, the GCMS notes state that she could have picked up her sacred bundle herself at some point earlier: "HOKU had nearly 10 weeks in Canada between the time the deportation order was issued and her departure was confirmed. Time which could have been utilized to move her belongings from Canada to the United State[s] where HOKU was

returning to" (emphasis in original). The GCMS notes also opine that the Applicant's TRP may not be approved.

[10] On March 15, 2018, Decision-Maker denied the Applicant's ARC application. On April 18, 2018, the Applicant applied for judicial review of this decision.

III. **Issue and Standard of Review**

[11] The Court reviews ARC decisions, which are highly discretionary decisions, for reasonableness (*Andujo v Canada (Citizenship and Immigration)*, 2011 FC 731 at paras 22-23 [*Andujo*]. In this judicial review, it is only necessary for me to consider whether the decision is unreasonable for disregarding the evidence.

IV. **Analysis**

A. *Did the Decision-Maker disregard the evidence?*

[12] The GCMS notes state that the Applicant could have retrieved her bundle during the ten weeks she was still present in Canada after receiving her deportation order. But the Applicant submits that this assumption is wrong and says that she was not present in Canada during this time. Rather, she says she exited Canada after the hearing so she could comply with her American probation order which was still in place at that time. Therefore, she submits the decision is unreasonable because it is based on an erroneous finding of fact that she was in Canada when in reality she had returned to the USA.

[13] The Applicant also submits that her detailed submissions and supporting documents were not considered. The Applicant explains that this evidence included her immigration history,

personal background, *bona fides* about her spiritual healing, the nature of her criminal conviction, and *indicia* of rehabilitation. The Applicant points out that the Minister's Policy Manual states that all of these factors must be considered, and argued that the Respondent's submissions bootstrap the actual decision and the reasons discernable from the GCMS notes.

[14] The Respondent submits that the Applicant simply failed to establish that her circumstances justify issuing an ARC, which is not intended to routinely allow persons to overcome a deportation order (*Andujo* at para 26). The Respondent also submits that it is unclear if the Applicant explained to the Decision-Maker that she exited Canada to comply with her probation order and objects to any inclusion of information not before the Decision-Maker.

[15] First, I agree with the Applicant that the Respondent's submissions bootstrap the actual Decision-Maker's reasoning. For example, there is nothing to support the Respondent's Memorandum at paragraph 16 which states that the Decision-Maker found that the Applicant's reasons for requesting an ARC were not compelling.

[16] Based on the record accompanying the skeleton decision before me, the ARC was denied on the assumption that the Applicant could have retrieved it herself at some point earlier. Nowhere in the GCMS notes does it state, nor is it possible to infer, that the Applicant's need to retrieve her sacred bundle was not considered a compelling reason. Rather, the GCMS notes recognize that the Applicant says she requested an ARC to regain her sacred bundle because she is a spiritual healer, it is important to her faith and work, and that she believes she is the only person who can handle the sacred bundle.

[17] The Applicant is correct that there was evidence before the Decision-Maker to refute the assumption that she was within Canada during the ten weeks following the issuance of her deportation order. For example, the following information was provided in an affidavit:

> After the hearing, I returned to Massachusetts, as I needed to make sure that I maintained responsibility with probation. I did not check-in at the Canadian border when I returned to the US, as I did not know I had to do that.
>
> In July 2017, I tried to return to PEI, but I was given a deportation order. They told me I needed an ARC to return.

[18] The Respondent argues that the passage relied on by the Applicant is too vague. According to the Respondent, it is not enough for the Applicant to say only "after" the hearing she returned to the USA without saying when she exited Canada. But based on this and further evidence, I agree with the Applicant that the timeline in the notes ("nearly ten weeks") indicates that the Decision-Maker disregarded the evidence. The reason is simple: before one can return to Canada, one must exit Canada. And as the departure order was issued on May 18, 2017, and her departure confirmed on July 27, 2017, the evidence that she was in the USA was overlooked by the Decision-Maker.

[19] There was further evidence before the Decision-Maker that also supports the Applicant's argument. For instance, the Certified Tribunal Record ("CTR") contains the Applicant's motion for early termination of probation in the Superior Court of the State of Arizona, County of Yavapai. In this document, the Applicant's American counsel stated "[the Applicant] was sentenced on October 19, 2015 to four years of probation. Since her sentencing, [the Applicant] has completed all requirements of her probation, has paid all fines and probation fees, **and has abided by all conditions of her probation**" (emphasis added).

[20] In addition, the CTR also reveals that the Decision-Maker had a letter from the Applicant's current counsel, dated March 5, 2018 that outlined the Applicant's submissions for issuance of an ARC. These submissions indicate that the Applicant was in the USA at some point during the ten week period between "the time the deportation order was issued and her departure was confirmed":

> The applicant is a spiritual healer, who has helped countless individuals around the world. She wishes to enter Canada so that she may retrieve the spiritual items, namely the healing tools and 'spiritual bundle' which she left at the Happy Foundation's healing centre in PEI, before she had lost her status **and learned that she might not be allowed to [return] to this country.**
>
> [Emphasis added.]

[21] As the evidence was disregarded by the Decision-Maker, I find that the assessment of her file was nothing more than illusory. In *Andujo*, Justice Shore explained that the Minister has a duty to fairly consider the reason advanced:

> 25 In addition, the decision to permit the Applicant's admission to Canada after a deportation order must be at the discretion of the Minister, "without the necessity for giving reasons ... only a duty to fairly consider the reason advanced, to acknowledge that they were read and considered, and then to decide" (*Singh v. Canada (Minister of Employment & Immigration*) (1986), 6 F.T.R. 15, 1 A.C.W.S. (3d) 28 (Fed. T.D.)).

[22] Based on the assumptions made in the GCMS notes accompanying the decision, this Decision-Maker did not fairly consider the reasons advanced. Instead, the decision is arbitrary and not based on the evidence. In other words, this decision is unreasonable and I will set it aside.

V. **Certified Question**

[23] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VI. **Conclusion**

[24] The Decision-Maker disregarded the Applicant's evidence that she exited Canada after her admissibility hearing. Accordingly, this application for judicial review is allowed.

JUDGMENT in IMM-1784-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to name the Minister of Citizenship and Immigration as the proper respondent.
2. The application for judicial review is allowed and the matter is referred to a new decision maker for redetermination.
3. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1784-18
STYLE OF CAUSE:	MAKAHITO HOKU (AKA MARYBETH MURAWSKI) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 12, 2019
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