Federal Court		Cour fédérale

Date: 20100224

Docket: IMM-2437-09

Citation: 2010 FC 209

Ottawa, Ontario, February 24, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ALEXA KRAUCHANKA
MAKSIM KRAUCHANKA

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated March 16, 2009 by a visa officer at the Canadian Embassy in Poland which denied the applicants an exemption based on humanitarian and compassionate (H&C) grounds pursuant to s. 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), from the requirements of subsection 117(9)(d) of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (IRPR).

FACTS

Background

[2] The twenty-eight (28) year old applicant, Ms. Alena Krauchanka, and her five (5) year old son, Maksim Krauchanka, who is also an applicant, are both citizens of Belarus. The applicants' sponsor, twenty-eight (28) year old Mr. Dzianis Krauchanka, is a citizen of Belarus and a permanent resident of Canada who was landed on November 20, 2004.

[3] The sponsor and the applicant Ms. Krauchanka met in February 2002 and began dating. At the time the sponsor was a student supported by his mother. In 2003 the sponsor was himself sponsored for permanent residence as a dependant child by his Canadian father. The applicant, Ms. Krauchanka was not declared as a spouse at the time. The sponsor states at paragraph 5 of his affidavit that his relationship with Ms. Krauchanka did not amount to cohabitation:

> ¶5 At that time my father applied to sponsor me, I was not living together with my then girlfriend, the Applicant. It was not serious, just a boyfriend/girlfriend relationship. Consequently, there was no reason for my girlfriend to be mentioned in the sponsorship application.

The sponsor states that his relationship with Ms. Krauchanka intensified when she gave birth to their son on April 23, 2004. The applicant states that he had no knowledge of the requirement to declare the applicants before his landing on November 20, 2004, and neither did his father who completed the immigration forms.

[4] The sponser returned to Belarus to marry Ms. Krauchanka on December 23, 2005. An application to sponsor the applicants was filed shortly thereafter and a decision rendered on August 10, 2007. The visa officer interviewed Ms. Krauchanka and found as a matter of fact that the

sponsor cohabited with Ms. Krauchanka for 21 months as a betrothed couple before his immigration to Canada:

> PA and spr met in Feb 2002, started dating. In Feb 2003 spr moved to pa's apt. Spr was registered in the apt of his mother – this address appears on spr's questionnaire as his place of residence.
>
> PA learned about spr's plans for immigration only when she got pregnant. Spr made marriage proposal in June 2003. Did not have money for wedding so decided to postpone it. Spr went to Canada after child was born, child was 8 months. Spr promised to support pa and child, and to get married as soon as he can come from Canada and pay for the wedding…

The visa officer determined that the applicants were excluded pursuant to subsection 117(9)(d) of the IRPR for failing to be declared and examined. The visa officer was also of the opinion that the omission to declare the applicants was a deliberate misrepresentation since their disclosure would have rendered the sponsor ineligible for permanent residence in Canada as a "dependent" child. The applicants did not challenge this decision.

[5] On January 19, 2009 the applicants filed an application for an exemption based on H&C grounds from the application of subsection 117(9)(d) of the IRPR. The Canadian Embassy in Poland confirmed receipt of the applicants' H&C application on March 12, 2009.

Decision under review

[6] The visa officer rendered her negative decision on March 16, 2009, only 4 days after confirming receipt of the H&C application.

[7] The applicants submitted a number of H&C factors for consideration:

1. the sponsor's explanation for failing to declare the applicants and the lack of bad faith;
2. the best interest of the child, particularly the poverty in which the child lives and the lack of contract with his father;
3. the stability of the ongoing relationship between the sponsor and the applicants;
4. the financial and emotional dependency of the applicant wife upon the sponsor; and
5. the impact on the family if the application is denied.

[8] The visa officer relied on the CAIPS notes from the 2007 sponsorship decision and determined that the sponsor intentionally withheld his cohabitation relationship with Ms. Krauchanka and the birth of their son because he would not have met the definition of a dependent child himself.

[9] The visa officer surveyed the applicants' current living conditions in Belarus and found that they did not amount to compelling H&C grounds and denied the application:

> Situation of the Applicant in Belarus: She is sharing accommodation but this is quite common for families in Eastern Europe. Her living conditions would likely be better if the sponsor had opted to remain with her and his child in Belarus but instead he decided to go to Canada, leaving the applicant and his child behind in 2004. The sponsorship was not submitted until two years later, in 2006.
>
> There is no evidence on file that the child is suffering the emotional distress claimed by the applicant, only letters from the applicant.
>
> […]
>
> Given that the applicant and child are both being supported by the sponsor, I do not find the consultant's statement that the child is living in poverty to be compelling. The child is indeed living away from his father but he has been living away from his father since the sponsor went to Canada in November 2004 when the child was six months old. In a situation such as this, it appears unlikely that there

> would be a strong bond between the child and his father although there is undoubtedly such a bond between the child and his mother. Child does not speak English or French and is living with close family members. The H&C situation is thus not immediately obvious to me.

LEGISLATION

[10] Subsection 117(9)(d) of the IRPR excludes from the family class any foreign national who at the time of the sponsor's initial application for permanent residence, was a non-accompanying family member who was not examined:

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if … (*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes : … *d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[11] Section 25 of the IRPA allows the Minister to grant an exemption from any application of the Act or regulations on H&C grounds, best interests of the child, or public policy considerations:

25. (1) The Minister shall, upon request of a foreign national in Canada who is	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est

inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

ISSUES

[12] The applicants raise the following issues:

1. Did the Officer err in law in assessing the within application for permanent residence? Did the Officer err in concluding that there were insufficient humanitarian and compassionate (H&C) considerations to warrant an approval of the application for permanent residence:

    a. by fettering his/her discretion, considering extrinsic evidence and ignoring the totality of the evidence?

    b. by failing to assess the best interests of the child involved?

    c. by failing to give any or adequate reasons for the decision?

    d. by misinterpreting the principle relevant to humanitarian considerations?

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[14] The Federal Court of Appeal recently held in *Kisana v. Canada (MCI)*, 2009 FCA 189, per Justice Nadon at paragraph 18, that the standard of review of a visa officer's H&C decision is reasonableness: see also *Thandal v. Canada (MCI)*, 2008 FC 489, 167 A.C.W.S. (3d) 166, per Justice Phelan at paragraph 7.

[15] In reviewing the Officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra* at paragraph 47, *Khosa*, *supra*, at paragraph 59.

ANALYSIS

Issue: **Did the Officer err in law in assessing the within application for permanent residence? Did the Officer err in concluding that there were insufficient humanitarian and compassionate (H&C) considerations to warrant an approval of the application for permanent residence?**

Fettering of discretion

[16] The applicant submits that the visa officer allowed the August 2007 sponsorship decision to cloud the assessment of the application before her such that an informed person, viewing the matter realistically and practically, would conclude that the officer failed to approach the assessment of the applicants' H&C application with an open and impartial mind.

[17] The applicants relied on a number of decisions of this Court, all of which are distinguishable and bear no application to the facts at bar: *Mehe v. Canada (MEI)* (1990), 131 N.R. 315, 12 Imm. L.R. (2d) 30, per Justice Pratte; *Sivamoorthy v. Canada (MCI)*, 2003 FCT 408, per Justice Russell; *Rathor v. Canada (MEI)* (1994), 27 Imm. L.R. (2d) 192, 51 A.C.W.S. (3d) 1347, per A.C.J. Jerome; *Nasca v. Canada (MCI)*, 2004 FC 91, per Justice Mosley. In the above cases this Court found that reliance by the Refugee Protection Division panel on previous decisions not dealing with the same applicants constituted bias.

[18] The August 2007 decision is not extraneous but forms part of the applicants' record which the visa officer is entitled to rely upon: *Reza Azali v. Canada (MCI)*, 2008 FC 517, per Justice Beaudry at paragraphs 24-29; *Lahai v. Canada (MCI)*, 2002 FCA 119, per Justice Sexton at paragraph 29; *Ally v. Canada (MCI)*, 2008 FC 445 per Justice Russell at paragraphs 19-20.

[19] Contrary to the applicants' submissions, the visa officer only relied on the prior decision to determine whether the failure to declare the applicants was in good faith. This factor, while important, was not the only reason for the denying of the H&C application.

Best interests of the child

[20] The applicants submit that the visa officer unreasonably determined that the best interest interests of the child was not a compelling factor in this case because the sponsor had visited the child and was presently providing support.

[21] In *De Guzman v. Canada (MCI)*, 2004 FC 1276, [2005] 2 F.C.R. 162, aff'd 2005 FCA 436, [2005] F.C.J. No. 2119 (QL), at paragraph 55 I held at paragraph 38 that the principle of family reunification cannot trump the basic requirement that Canada's immigration laws be respected. However, I also held that s. 25 of IRPA can relieve the inflexibility by applying equitable factors in appropriate cases: *De Guzman*, *supra*, at paragraph 55.

[22] Prior case law has found that the reason why a family member was not declared or examined needs to be "compelling" to ground a positive H&C exemption from the application of subsection 117(9)(d) of the IRPR: *Pascual v. Canada (MCI)*, 2008 FC 93, per Justice de Montigny at paragraph 19; *Sultana v. Canada (MCI)*, 2009 FC 533, per Justice de Montigny at paragraph 27.

[23] When conducting an H&C assessment, the factors favouring reunification may not always outweigh the public policy consideration of upholding exclusions that result from prior misrepresentation: *Kisana*, *supra*, at paragraphs 27 and 31.

[24] The public policy of upholding compliance with Canada's immigration laws is a legitimate concern in this application. The sponsor would have been ineligible to immigrate to Canada as a dependent child had he declared the applicants before his landing. He failed to do so and the evidence on the record points toward a deliberate misrepresentation. This was an important, although not determinative, consideration which the visa officer was entitled to factor into the analysis: *Legault v. Canada (MCI)*, [2002] 4 FC 435 (C.A.), per Justice Décary at paragraph 29.

[25] Contrary to the applicants' submissions, the visa officer considered in detail the best interest of the child in question. The visa officer reasonably determined that the applicants' living arrangements were not unusual in Belarus and conditions may have been better if the sponsor opted to stay in Belarus. There was no basis to accept the applicants' submission that the child was living in poverty in light of the ongoing financial support from the sponsor.

Inadequacy of reasons

[26] The applicants submit that the visa officer's reasons are inadequate. The applicants further submit that the visa officer could not have adequately considered an application of such complexity and render a reasonable decision in just 4 days.

[27] In *VIA Rail Canada Inc. v. National Transportation Agency (C.A.)*, [2001] 2 F.C. 25 (F.C.A.), Justice Sexton explained at paragraph 21 the contents of the duty to give reasons:

> ¶21 The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. *Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based.* The reasons must address the major points in issue…
>
> [Footnotes omitted] [Emphasis added].

[28] The Court is of the view that the visa officer provided sufficiently detailed reasons setting out relevant evidence upon which her findings were based. While the refusal letter lacked sufficient reasons, the CAIPS notes provide ample justification for the visa officer's decision.

[29] The applicant relies on this Court's decision in *Khun v. Canada (MCI)*, 2006 FC 1285 where Justice Blais (as he then was) held at paragraphs 20-22 that an immigration officer could not adequately assess an H&C application containing 700 pages of documents in one day.

[30] The facts of this case are distinguishable from those *Khun*, *supra*, in that the application record contains less then 200 pages and only less then half of those pages touch directly on H&C factors. In my view, four days is an adequate period to time to assess an H&C application of this volume and complexity.

Misinterpretation of the principle of H&C exemptions

[31] The applicant submits that the visa officer erred in unduly focusing on the technical exclusion of the applicants pursuant to subsection 117(9)(d) of the IRPR instead of analysing the applicants' H&C factors.

[32] The test for determining whether an exception should be made under humanitarian and compassionate grounds was articulated in *Irimie v. Canada (MCI)* (2000), 10 Imm. L.R. (3d) 206, 101 A.C.W.S. (3d) 995 [2000] F.C.J. No. 1906, at paragraph 26, where Justice Pelletier (as he then was) wrote that the H&C exemption process "is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship".

[33] As the Court of Appeal held in *Kisana v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 27, it is well established that a misrepresentation on an application for permanent residence is a relevant public policy consideration in an H&C assessment. The Court also held at paragraph 27:

> … Inevitably, the factors favouring reunification of the family in Canada will not always outweigh the public policy concerns arising from a misrepresentation.

[34] The role of the Court is to review the evidence before the H&C officer to ensure that the H&C officer considered the relevant evidence and the relevant factors which flow from that evidence. In this case, the H&C officer's finding that the "sponsor intentionally withheld information that he was living common-law with this applicant and had a son …" was reasonably

open to the officer. However, the H&C officer must decide if the evidence and relevant H&C factors warrant granting an exception from the law.

[35] The H&C officer states in the CAIPS notes that she is satisfied that there is a relationship between the sponsor and the applicant, and that the sponsor is continuing his relationship with the applicant. However, the H&C officer states after reviewing the financial situation and living conditions of the child in Belarus that:

> The H&C in this situation is thus not immediately obvious to me.

Moreover, the H&C officer states that:

> It appears unlikely that there would be a strong bond between the child and his father.

It is the view of the Court that the H&C officer appeared to have a "closed mind" when she said that "the H&C in this situation is thus not immediately obvious to me." The H&C factor is that the sponsor obviously loves his wife and child, and that they want to be together. The sponsor provided an affidavit to the H&C officer that the sponsor moved to Belarus from Canada for eight months and tried finding work. He was not able to find work and when his money ran out, he had to return to Canada. This is evidence that the sponsor truly wants to be reunited with his wife and son.

[36] In the decision letter from the H&C officer dated March 16, 2009 the H&C officer writes:

> … I am not satisfied that there are compelling humanitarian and compassionate reasons for overriding your inadmissibility to Canada as well as that of your son. I have noted that your sponsor has visited you and provides regular financial support. I cannot see compelling reasons why it would be in the best interests of your child to move him to Canada.

Once again, this appears to not give any weight to the objective of the immigration law set out in subsection 3(1)(d) of IRPA "to see that families are reunited in Canada". Rather, the H&C officer concentrates on financial support and economic hardship.

[37] In *Sultana et al. v. The Minister of Citizenship and Immigration*, 2009 FC 533, Mr. Justice de Montigny set aside an H&C decision which only paid "lip service" to the H&C factor with respect to the reunification of the sponsor with his child because the sponsor did not disclose the child and wife at the time of his application for permanent residence. Justice de Montigny concluded that the H&C officer did not sufficiently assess the impact of the separation on the sponsor and on the applicants. At paragraph 29 Justice de Montigny held:

> … A careful reading of the CAIPS notes reveals that the Immigration officer, on more than one occasion, considers the failure to disclose as a paramount factor precluding any possibility that H&C factors could overcome the exclusion mandated by s.117(9)(d).

Justice de Montigny stated at paragraph 30:

> … Nonetheless, at the end of the day, his notes read as if the failure to disclose was the overriding consideration, and that the sponsor had brought upon himself all his and his family's misfortunes. This, in turn, led the Immigration officer to analyze the positive factors supporting the sponsorship application through the prism of the sponsor's conduct at the time of his own application to become a permanent resident, and to overlook the genuineness and stability of his relationship with his wife and children, the sincere remorse of the sponsor and the likely impact of the decision on any future prospect for this family to be re-united …

The *Sultana* case is analogous to the application at bar where the H&C officer made the failure to disclose the overriding factor, and overlooked the genuineness of the family's relationship and the humanitarian and compassionate reasons to allow the family to be reunited.

[38] For these reasons, this application for judicial review will be allowed.

CERTIFIED QUESTION

[39] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is allowed, the decision of the visa officer dated March 16, 2009 is set aside, and this matter is referred to another immigration officer to consider the H&C factors and re-determine this H&C application.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ALENA KRAUCHANKA, MAKSIM KRAUCHANKA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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