Federal Court		Cour fédérale

Date: 20110207

Docket: IMM-2473-10

Citation: 2011 FC 135

Ottawa, Ontario, February 7, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

KEISHA MOLEICA PAUL
KALANJI ATONIO PAUL

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, 2010 refusing an application for permanent residency from within Canada on humanitarian and compassionate grounds pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act). The application for humanitarian and compassionate relief (H&C application) was refused by the Immigration Officer (the Officer).

Factual Background

[2] The principal applicant, Ms. Keisha Moleica Paul, is a 30-year old citizen of Saint Vincent and the Grenadines (Saint Vincent). The minor applicant, Kalanji Atonio Paul, is the nine-year old son of Ms. Paul. Ms. Paul has one other child, a two-year old daughter who was born in Canada.

[3] From 2000 to 2002, Ms. Paul was involved in a relationship with Mr. Desbert Scott, the minor applicant's father. The relationship became violent and Ms. Paul was abused both emotionally and physically.

[4] After a particularly violent incident in May 2002 which left her hospitalized, Ms. Paul decided to leave Mr. Scott. She left her son with a family member and went into hiding in the village of Canouan. Ms. Paul arrived in Canada on June 11, 2002.

[5] Four years later, the minor applicant joined his mother in Canada in June 2006. On July 24, 2006, the applicants filed a refugee claim on the basis of the abuse by Mr. Scott.

[6] On October 10, 2008, the Immigration and Refugee Board (the Board) rejected the refugee claim on the basis that the principal applicant had not availed herself of state protection and had not demonstrated that she could not have remained in Canouan. The Board found that Ms. Paul had been abused by Mr. Scott.

[7] On May 27, 2009, the applicants filed their H&C application. They requested a Pre-Removal Risk Assessment (PRRA) on August 27, 2009 and made additional submissions regarding risk on September 14, 2009.

The Impugned Decision

[8] On March 16, 2010, the Officer rejected both the PRRA and the H&C application. The Officer rejected the H&C application, finding that it would not cause the applicants unusual, undeserved or disproportionate hardship to apply for permanent residency from outside of Canada.

[9] The Officer adopted the Board's finding that the principal applicant had been abused by Mr. Scott. The Officer further adopted the Board's findings that state protection was available and that Ms. Paul had not explained why she could not remain in Canouan and thus escape Mr. Scott's abuse.

[10] The Officer considered the applicants' establishment in Canada, noting that Ms. Paul had been here for eight years and her son for four years. The Officer noted that Ms. Paul's son is attending school in Canada and that Ms. Paul had successfully completed French classes.

[11] The Officer found that Ms. Paul had failed to demonstrate steady employment during her eight years in Canada and also failed to demonstrate financial independence. The Officer considered the best interests of both of Ms. Paul's children, that is, the minor applicant and the Canadian child.

[12] The Officer also observed that Ms. Paul's son spent the first five years of his life in Saint Vincent and still has family in Saint Vincent. With respect to the Canadian child's relationship with her father - who is also a Canadian citizen - the Officer concluded that the applicants had failed to establish that the child had an ongoing relationship with her father. The Officer also found that there was insufficient evidence to establish that Ms. Paul was receiving child support payments from the child's father.

Removal Order

[13] At the time of the Officer's decision, the applicants were subject to a removal order. Immigration authorities were notified when the H&C application was refused, and a warrant of arrest was issued against the applicants because they failed to appear to their removal.

Relevant legislation

[14] Subsection 25(1) of the *Immigration and Refugee Protection Act* reads as follows:

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

compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

Standard of Review

[15] The applicants argue, *inter alia*, that the Officer applied the incorrect test in assessing their H&C application. In *Montivero v Canada (Minister of Citizenship and Immigration)*, 2008 FC 720 [2008] FCJ No 907, at para 6, this Court determined that the test applied to an H&C application is reviewable on a correctness standard:

> [6] My colleague Justice Eleanor R. Dawson recently determined that the selection of the appropriate test in the context of an H&C application should be assessed by the Court on a correctness standard: *Zambrano v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, [2008] F.C.J. No. 601. In coming to this conclusion, she noted the importance of holding Officers to the tests prescribed by Parliament. This aptly describes a central role of the Court in its exercise of judicial review and I agree that the correctness standard should be applied here.

[16] As for the standard of review applicable to decisions on H&C applications, the Court determined that the applicable standard is reasonableness (see *Kisana v Canada (Minister of Citizenship and Immigration)* 2009 FCA 189, [2009] FCJ No 713, at para 18. Thus, the Court is not concerned with whether the Officer's decision was correct, but rather "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law"(*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47).

Analysis

Merits of the application – "clean hands" issue

[17] Prior to examining the merits of the application for judicial review, the Court must first consider whether the applicants have come to the Court with unclean hands as a result of the warrant for the principal applicant's arrest.

[18] At the hearing before this Court, a new piece of evidence was filed by counsel for the applicants - with the consent of counsel for the respondent - confirming that the principal applicant presented herself voluntarily at a Canada Border Services Agency's office on January 24, 2011 and was released for removal process. The removal order has been issued and indicates that the removal from Canada is scheduled for February 27, 2011. The principal applicant requested that the Court examine the merits of the application for judicial review in light of this additional evidence.

[19] The issue as to whether an arrest warrant for failure to comply with a removal order can constitute unclean hands on the part of an applicant was addressed in *Wong v Canada (Minister of Citizenship and Immigration)* 2010 FC 569, [2010] FCJ No 668)

[20] Although the clean hands doctrine can give rise to situations in which the Court will decline to hear the merits of an application, the Court is of the view that the facts of this case are not analogous to the facts in *Wong* and can therefore be distinguished.

[21] In *Wong*, the applicant was avoiding immigration authorities and went into hiding after he was ordered to leave Canada. Mr. Wong had been personally served with a notice requiring him to

attend a meeting with immigration authorities and, following his failure to attend that meeting, several phone calls to him remained unanswered.

[22] In the case at bar, there is no evidence that the applicants have gone into hiding or that the authorities unsuccessfully attempted to contact Ms. Paul. There is no evidence on record to suggest that Ms. Paul and her son have excluded themselves from the immigration system in the same manner as the applicant in *Wong*.

[23] Also, the Court notes that *Wong* dealt with an applicant whose refugee claims were denied on the basis of credibility, whereas the present applicants were found to be credible.

[24] This is not to say that the conduct of Ms. Paul is blameless. Ms. Paul is clearly guilty of misconduct. This misconduct was admitted by her counsel but the fact that Ms. Paul's misconduct was repaired, albeit lately – one day before the hearing on judicial review – was also emphasized.

[25] Hence, after considering and balancing all of the above factors, the Court concludes that it should exercise its discretion in Ms. Paul's favour. The Court will therefore consider the merits of the application for judicial review.

Issues

[26] The applicants have raised four issues in their submissions: whether the Officer applied the incorrect test in assessing their application, whether the Officer erred in making credibility findings

without providing the applicants with a chance to respond, whether the Officer ignored relevant documentary evidence, and whether the Officer properly assessed the best interests of the children.

Analysis

[27] The Court is of the opinion that the Officer applied the incorrect test in assessing the H&C application.

[28] The applicants claim that, as a result of the abuse by Mr. Scott, they would be subject to unusual, undeserved or disproportionate hardship if they are forced to apply for permanent resident status from Saint Vincent. In assessing this claim, the Officer adopted several of the Board's findings:

> […] Comme la SPR, je ne remets pas en doute les allégations de la requérante voulant qu'elle ait été victime de violence conjugale. Toutefois, je constate qu'elle ne soumet pas avec sa DRP d'éléments de preuve à l'appui des risques invoqués.
>
> Dans la présente demande, l'absence de preuve au dossier démontrant que les autorités de son pays ne lui offrent pas de recours pour assurer sa sécurité et que sa vie serait toujours menacée après près de huit ans passés au Canada est pris en considération de même que les remarques qui suivent. Je note que la requérante affirme dans ses soumissions avoir trouvé refuge à Canouan, un endroit où son ex-conjoint ne l'a pas retrouvée: « As I was hiding in Canouan. I made sure that he could not find me, finally I managed to leave Saint-Vincent for Canada on the 11th of June 2002 ». Ainsi donc, selon les dires de la requérante, son ex-conjoint ne l'a pas retrouvée à [sic] endroit. Or, la requérante n'explique pas pourquoi, elle n'est pas restée Canouan alors qu'elle y avait trouvé refuge. […]
>
> (Tribunal Record, p. 5)

[29] Although it was certainly open to the Officer to adopt the Board's findings about the risk to the applicants, the Officer was still required to assess that risk on the threshold applicable to H&C

applications: that of unusual, undeserved or disproportionate hardship. The Officer did not apply the facts of the application to this threshold, but rather looked at whether the applicants had established that they would be subject to personal risk on their return.

[30] The Officer set out the correct test for assessing an H&C application at the outset of the reasons and again in the conclusion. However, the Court is not satisfied that the Officer actually applied this test.

[31] Recognizing that the applicants are failed refugee claimants, the Officer correctly assessed the risk they would face if they are returned to Saint Vincent. The Officer was entitled to adopt the Board's findings about risk, in particular about the availability of state protection and about the principal applicant's time in Canouan.

[32] However, the Officer failed to assess whether that risk resulted in unusual, undeserved or disproportionate hardship. The reasoning in *Ramsawak v Canada (Minister of Citizenship and Immigration)*, 2009 FC 636, [2009] FCJ No 1387, at paras 26 and 27, applies to the case at bar:

> [26] This Court has emphasized, in a number of cases, the importance of assessing an H&C claim through the lens of "hardship", as distinct from that of "risk" applied in relation to a PRRA: see, for example, *Uddin* v. *Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 460; *Serda* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 356; *Sha'er* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 231; *Pinter* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 296; *Ramirez* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404.
>
> [27] The mere fact that the officer stated the proper test at the outset of his reasons does not indicate, of course, that the officer properly assessed the evidence. To come to the contrary conclusion would be

> to privilege form over substance. Of course, there is nothing wrong with an officer relying on the same set of factual findings in assessing an H&C and a PRRA application, provided these facts are analysed through the proper prism relevant to each application. This is precisely where the officer went wrong: he appears to have parroted the findings made in his PRRA decision, which was released the same day.

[33] In the case at bar, the Officer committed the same error. The Officer seems to have conflated the H&C application with the PRRA. Indeed, the Officer found that the applicants had failed to demonstrate hardship because of the availability of state protection and because Ms. Paul could return to Canouan, where she took refuge before coming to Canada. Those conclusions are mirrored in the Officer's reasons for refusing their PRRA.

[34] The Officer correctly considered the risk, which remains relevant in assessing the H&C application (*Ramsawak*). However, the Court finds that the Officer failed to go beyond the issue of risk and consider whether that risk gives rise to unusual, undeserved or disproportionate hardship. The section entitled "Risque personnalisé de retour pour la requérante" is telling. Although, it could be argued that the title is not fatal, it reveals nonetheless the lens through which the Officer assessed the evidence i.e., "risk" instead of "hardship".

[35] The Court finds that the Officer applied the incorrect legal test in assessing the H&C application. The Officer's failure to examine hardship in assessing the H&C application is thus an error that warrants this Court's intervention. Having decided in favour of the applicant with respect to this argument, there is no need to address the other arguments.

[36] The application for judicial review will be allowed. No question was proposed for certification and there is none in this case.

JUDGMENT

THIS COURT ADJUDGES that:

1. The application for judicial review is allowed;

2. The Officer's decision is set aside;

3. The matter is referred back to be determined by a different Officer; and

4. No question of general importance is certified.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2473-10
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