Federal Court  Cour fédérale

Date: 20111212

Docket: IMM-2925-11

Citation: 2011 FC 1446

Ottawa, Ontario, December 12, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

REHAB BADAWY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Ms. Badawy, brings this application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. She seeks to set aside an immigration officer's decision that she is not eligible for a permanent residence visa as a member of the Family Class on humanitarian and compassionate (H&C) grounds. For the reasons that follow, this application is dismissed.

Background

[2] The applicant is a citizen of Egypt, the country in which she currently resides. She married the sponsor, Mr. Elgizy, in October of 1997 and in August 1998 they had their first child. The couple had marital difficulties and after three years of marriage, they separated. The applicant then went to live with her parents.

[3] During this separation, the sponsor applied for permanent residence status in Canada under the Skilled Worker category. Acting on a friend's advice, he falsely declared that he was single and had no dependant family members; his application was accepted.

[4] Although the couple's marital difficulties were resolved the sponsor nevertheless decided to come to Canada. He left his child and pregnant wife and landed in Canada in February 2002. In September 2002, the couple had their second child.

[5] The sponsor has since spent many vacations in Egypt. On March 27, 2007, the applicants filed an application for permanent residence and Mr. Elgizy joined the application seeking to sponsor his family and requesting H&C considerations. The application for permanent residency was refused and on April 2, 2009, this Court granted the applicant leave to file an application for judicial review. Prior to a hearing on the merits, the respondent consented to have the matter sent back to a different officer for redetermination. In that first decision no reasons were provided by the officer explaining why there were insufficient H&C grounds to grant her application.

[6] On the second examination of the application, the one presently under review, the officer found that the grounds submitted by the applicant were not sufficient to warrant an H&C exception. It was noted that the sponsor had several opportunities to reveal his marriage during the processing of his permanent residence application but failed to do so. Specifically, the officer found that the sponsor had been a permanent resident in Canada since 2002 but that he had made no attempt to sponsor the applicant or the children until 2007. The officer also noted that it was the sponsor's decision to leave his family behind and not have them join him. There was evidence that the sponsor now suffers from chronic liver disease; however, the officer noted that the applicant made no mention of the alleged health concern at her interview when queried on the reason why she wanted to join the sponsor. The officer found that the applicant and her children received strong support in Egypt and that their circumstances were not at all dire.

[7] In short, the officer determined that the applicant's relationship with the sponsor was not a strong one and that the H&C grounds were insufficient to warrant special consideration of the case. The application for permanent residence was refused.

Issues

[8] The applicant has raised three issues:

a) Did the officer err in failing to take into consideration the compelling humanitarian and compassionate grounds by placing undue emphasis on the sponsor's failure to disclose his spouse and dependant child?

b) Did the officer err by relying on speculation and conjuncture to arrive at a negative credibility finding regarding the genuineness of the relationship and applicant's

statements, while failing to take into consideration the documentary evidence and not providing the applicant the ability to respond to the officer's concerns?

c) Should costs be awarded in this case?

Analysis

[9] The Act and Regulations provide that a person is not considered a family member for immigration purposes unless listed by the person entering Canada and subject to examination as a family member at the time of entry. In this case, because the applicant and the eldest child were not disclosed by the applicant to the visa officer, they are ineligible to enter Canada as family members unless the Minister waives that provision. Section 25(1) of the Act provides that a person who does not meet the requirements of the Act may seek an exemption from the provisions of the Act which shall be granted "if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected."

1. Alleged Failure to Consider the Compelling Humanitarian and Compassionate Grounds

[10] The applicant submits that the officer failed to take into consideration the compelling humanitarian and compassionate grounds she advanced. The Computer Assisted Immigration Processing System [CAIPS] notes of the officer state "PA interviewed this date. Did not reveal anything new that would support H&C consideration." The applicant submits that this line of reasoning gives rise to two reviewable errors. First, that the officer only looked at the evidence filed after the application was resubmitted for determination and ignored the evidence that had been previously filed. Second, she submits that the statement demonstrates that the officer failed to take

into consideration the subsequent supporting package which contained new evidence. This package consisted of four documents:

a) A physician's letter diagnosing the sponsor with a chronic liver disease;
b) Evidence of the sponsor's inability to afford the associated medical costs in Egypt;
c) The continued emotional and financial support offered by the sponsor to the applicant and the children;
d) Personal statements describing the hardship suffered by the sponsor and the children.

[11] With respect to the submission that the officer failed to take into consideration the H&C factors which had been highlighted in the initial package, the applicant points specifically to the evidence of the sponsor's establishment in Canada and the best interests of the children. The applicant advances that the officer did not reference or inquire into the emotional effects imposed on the children due to the prolonged separation.

[12] The applicant submits that there is no substitute for the love and support that is provided through the presence of a biological parent, regardless of the support received by the children in Egypt. The applicant argues that given the procedural history of this case, the officer's decision is insufficient and fails to give a detailed analysis of the findings. Accordingly, it is submitted that the officer's decision is unreasonable.

[13] In my view, the CAIPS notes and decision do not support the submission that the officer failed to consider the evidence filed for consideration by the first officer. The officer's statement that "PA interviewed this date. Did not reveal anything new that would support H&C

consideration" does not demonstrate that evidence was not considered. I prefer the interpretation offered by the respondent that in making the statement the officer was stating that the applicant had not provided any new evidence at the October 3, 2010 interview which would support the H&C application. The applicant had previously submitted written arguments in support of the application on October 26, 2009, and in my view, the officer was drawing a comparison between those written submissions and the *viva voce* submissions made to him or her in 2010.

[14] The documentary evidence referenced by the applicant does not directly contradict any of the officer's material findings, nor is it argued that it does. An administrative decision-maker need not refer to every piece of evidence received and it is presumed that all the evidence before the officer was considered: *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA), and *Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 417, at para 26. The decision-maker need only reference evidence that squarely contradicts a material finding.

[15] The CAIPS notes and the officer's reasons demonstrate different instances where the officer considered the interests of the children. As an example, the following from the CAIPS notes shows that consideration:

> Clearly the sponsor had little use for his family (PA and child) at the time of his migration to Canada over eight years ago. Now, primarily because of undocumented health concerns (which apparently do not prevent him from making the long journey to Egypt), he wants them at his side. Not convinced that this is in the best interest of either the PA or the child. He abandoned them once and lived apart from them for several years. What is to stop him from doing it again? In Egypt, PA and child have had strong support from PA's family. This would not be possible in Canada.
> [emphasis added].

[16] Another decision-maker may not have reached the same conclusion as this officer, but the conclusion he reached was most certainly available on the evidence and cannot be said to be unreasonable. The couple had a history of marital difficulties. They separated once during which the sponsor made his application for permanent residence and again when he left for Canada. The officer noted that other than annual vacations to Egypt, the family had been separated for over eight years. It was open to the officer to find that there was a possibility that the couple would again separate in Canada – at which point the children would not have the essential support that they are receiving in Egypt. In any event, the officer's statement and analysis is clear and convincing evidence that the officer did consider the children's interests.

2. Alleged Reliance on Speculation and Conjuncture

[17] The applicant submits that the officer erred in analyzing the applicant's positive evidence through the prism of the sponsor's conduct at the time of his own application. Specifically, the applicant submits that the officer erred by considering the H&C factors in light of the sponsor's initial permanent residence application. She submits that this emphasis tainted the officer's assessment and led to speculation and conjecture not supported by the facts on the sponsor's health conditions and the genuineness and strength of the claim.

[18] The officer's decision states that "no mention was made of the alleged health concerns." In the applicant's view, this demonstrates that the officer failed to consider the documentary evidence, namely a letter diagnosing the sponsor's chronic disease. The applicant notes the officer's comment that this medical condition still allows the sponsor to fly back to Egypt. The applicant argues that

the officer had no medical expertise on this issue and that he had a duty to inform the applicant of any possible doubts relating to this issue. The applicant submits that she was refused the opportunity to address this issue at the oral interview and it is further submitted that if the officer had doubts regarding the sponsor's medical condition, he had a duty to inform the applicant in order that she might have a chance to address the concerns. The applicant submits that this is a breach of procedural fairness.

[19] The applicant further argues that she had a genuine relationship with the sponsor. It is submitted that the sponsor has remained committed to the applicant and the children, that he has supported them financially and that he spent every possible minute that he had with them. The applicant submits that the officer's finding relating to the *bona fides* of the relationship is mere speculation and conjuncture and is not supported by the evidence. It is also submitted that none of the evidence in the record could reasonably lead to a finding of "abandonment" from the sponsor.

[20] The applicant's sworn affidavit in this application is uncontested. She swears:

> I do not understand why the Officer claims in his notes that I did not mention my husband's health problems during the interview. In response to the single question posed on this subject, I began explaining Tarek's medical history and his need for ongoing medical care. I also stated that I was worried about his physical and psychological care… I intended to discuss Terek's condition in full but was never given the opportunity.

[21] In his reasons the officer writes that: "When queried why you wished to join him in Canada now, you stated that you wished to reunite the family. No mention was made of your sponsor's alleged health concerns."

[22] On the face of these passages, these statements are contradictory. However, these statements can be interpreted in a manner that they would not contradict each other. The applicant states that she mentioned the sponsor's health concerns during the interview, whereas the officer states that no mention was made of the health concerns when queried why she wished to join him, which does not necessarily mean they were not mentioned at all during the interview.

[23] Regardless, the Federal Court of Appeal has stated that even if there are errors in a tribunal's decision, the decision will not be quashed if there was sufficient evidence upon which the decision maker could conclude as he did: *Kathiripillai v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 889 (FCA), and *Luckner v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 363 (FCA). In my view, the officer in the present matter could have concluded as he did even without the finding that the applicant failed to mention her husband's health issue. I base that determination on the fact that the officer gave weight to the fact that:

a) The sponsor failed to reveal his marriage during the several opportunities that were given to him during the immigration process;
b) Although the sponsor decided to immigrate to Canada because of marital problems, these problems were resolved when he departed; and
c) Despite the sponsor being eligible to sponsor the applicant since 2002, he made no attempt to do so until 2007.

[24] I do not accept the allegation that the officer erred in considering the H&C factors through the prism of the sponsor's conduct at the time of his own application. The sponsor's conduct was

very much relevant in determining the genuineness of the relationship and to the question of the children's best interests.

3. Costs and Certified question.

[25] Given my disposition of this application, the issue of an award of costs to the applicant does not arise.

[26] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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