Federal Court  Cour fédérale

Date: 20121102

Docket: IMM-1100-12

Citation: 2012 FC 1277

Ottawa, Ontario, November 2, 2012

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

CODINE PALMER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The present application is a challenge to a decision of a member of the Immigration Appeal Division of the Immigration and Refugee Board [panel], dated December 20, 2011, in which the panel upheld an exclusion order previously issued against the applicant for misrepresentation within the meaning of paragraph 40(1)(a) of the Immigration and Refugee Protection Act, SC 2001, c 27 [Act]. The panel found that there were no grounds to warrant special relief for humanitarian and compassionate [H&C] considerations pursuant to paragraph 67(1)(c) of the Act.

Background

[2] The applicant is a 28-year-old citizen of Jamaica. She immigrated to Canada on September 6, 2006 as a sponsored permanent resident under the family class, having been sponsored by her father. However, she was not granted landing on entry because she was found to have been "directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act," as contemplated in paragraph 40(1)(a) of the Act.

[3] Prior to coming to Canada, the applicant became pregnant and gave birth to a child. She disclosed this information to the nurse who performed her medical examinations for the purpose of assessing her admissibility, but she did not have an immigration interview and did not think of informing the visa officer when she went to the embassy to pick up her visa.

[4] Upon arriving in Canada, the applicant revealed to the Visa Officer that she had a son and immigration officials immediately commenced a misrepresentation process against her. On May 14, 2009, the Immigration Division found that the disclosure of a child, whether that child accompanied the applicant or not, was a material fact and that the applicant had failed to meet her expected duty to communicate this information to the immigration authorities prior to coming to Canada. The Immigration Division further found that her disclosure at the port of entry was not sufficient. An exclusion order was accordingly issued against her.

[5] On appeal before the Immigration Appeal Division, the applicant did not challenge the validity of her exclusion order but requested that the panel exercise its discretion to consider whether sufficient H&C grounds exist to warrant special relief in light of the special circumstances of her case under paragraph 67(1)(c) of the Act.

[6] In 2009, the applicant started developing symptoms of schizophrenia. She was admitted to the Sunnybrook Hospital in Toronto twice in 2010 for psychiatric care; she has been diagnosed with paranoid schizophrenia and requires continuing treatment with anti-psychotic medication. Since January 22, 2009, she resides in an emergency shelter for single homeless women where she receives supportive care from a psychiatrist, a nurse, and a caseworker.

[7] For purposes of the appeal hearing, the applicant was found to be a vulnerable person under Guideline 8, *Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada*, and in need of a designated representative [DR]. The applicant's social worker, Ms. Allen, was so appointed. Ms. Allen and the applicant's half-sister testified on her behalf as her condition did not allow her to testify.

[8] The panel examined the *Ribic* factors, as applied by the Supreme Court in *Chieu v Canada (Minister of Immigration and Citizenship)*, 2002 SCC 3, [2002] 1 SCR 84, and determined that special discretionary relief for H&C considerations was not warranted.

[9] First, the panel stated that the withholding of information in this case is serious and significant and strikes at the very integrity of Canada's immigration system, but that this must be tempered by the fact that the applicant voluntarily disclosed her child at the port of entry and that her misrepresentation is closer to an inadvertent misrepresentation.

[10] Second, the panel found that the applicant had little establishment in Canada at the time of the hearing, notwithstanding the length of time she had spent here. The panel noted that the applicant is unemployed, although according to the testimony of the DR she had worked in the past; that there is no letter of support from the applicant's father or any other member of her family although according to the testimony of her sister, she has aunts, uncles, cousins, and a grandmother in Canada; and the applicant is not in touch with her relatives and has limited contact with her father.

[11] Third, the panel concluded that none of her family members would suffer hardship should the applicant return to Jamaica. The panel noted that the applicant's father had not taken an active role in caring for her or supporting her and the sole family support appeared to come from her half-sister. It found that the latter seems to be her only family member likely to experience some emotional hardship as a result of her departure, as she is continuously in touch with her and provides her with some financial and emotional support.

[12] Fourth, the panel rejected counsel's argument that the medical and social community-based support the applicant receives as a result of her medical condition will not be available in Jamaica. The panel accepted the objective evidence (including letters from two Directors of the Mental health and Substance Abuse Unit of the Ministry of Health and Environment of Jamaica) asserting that most people with chronic mental disorders are treated in communities under the supervision of their families as there are no state-run shelters and that, without close family support, they could end up homeless and victims of abuse and stigmatization. However, the panel found that this evidence did not address the specific circumstances of the applicant as to the level of family support she might have in Jamaica. The panel accepted that the applicant may suffer hardship if she were to return to Jamaica and that her condition could deteriorate as a result of limited access to healthcare, but held that it could not speculate as to the applicant's lack of family support in her country. The panel stated:

> A key part of the determination of this factor is whether the appellant's mother is willing or able to provide some support to her if she was returned to Jamaica. There is no evidence that the appellant's DR and her sister have made any effort to contact the appellant's mother and find out from her what she is capable and willing to provide for the appellant, and no reason has been provided as to why the appellant's mother could not be called as a witness at the hearing. The appellant is her daughter and had lived with her in Jamaica prior to coming to Canada.
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> The panel has not heard from the appellant's mother or anyone who has actually spoken to her in any depth regarding the appellant's condition and her needs. The panel finds there is insufficient evidence that the appellant's mother is unable or unwilling to provide her with a home, take her to a clinic or obtain medication for her. If the appellant's sister is willing to contribute financially to support the appellant in Canada, as she testified, she should also be willing to send money to Jamaica to help support the appellant there.

[13] Finally, the panel found that there is no child whose interest would be negatively affected by its decision to dismiss the appeal. The applicant's son has lived with his father in Jamaica since the applicant came to Canada. He is now six years of age and his father does not want him to leave Jamaica before he reaches the age of majority. The panel found that in the circumstances, the child's best interest was for the applicant to return to Jamaica as it appeared that she regularly spoke with him by telephone and maintained a close relationship with him.

[14] The panel therefore concluded that there were insufficient H&C reasons to warrant discretionary relief in the circumstances and maintained the applicant's exclusion order.

Standard of Review

[15] The following issues are raised by the applicant:

1. Whether the panel erred in law or arrived at unreasonable conclusions based on the evidentiary record before it by finding that the applicant can get the psychiatric, social and housing support she requires in Jamaica?

2. Whether the panel erred by elevating the standard of proof to one that is unattainable, ignoring the applicant's actual circumstances?

3. Whether the panel violated natural justice by failing to raise during the hearing its concerns with respect to the availability of relatives in Jamaica?

[16] For the reasons that follow, the Court finds that overall the panel's decision is unreasonable and that the panel breached its duty of procedural fairness as the applicant's witnesses and counsel were not given the opportunity to respond to some of the panel's determinative concerns.

[17] In the applicant's view, the appropriate standard of review is correctness as this application is purely an issue of law. The respondents did not specifically address the standard of review applicable to each of the above issues but submitted that these questions do not lend themselves to a single result and that the Court ought not to intervene unless the decision falls outside the range of possible acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[18] In *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 57-58, [2009] 1 SCR 339, the appropriate standard of review for matters arising pursuant to paragraph 67(1)(c) was found to be that of reasonableness:

> In recognition that hardship may come from removal, Parliament has provided in s. 67(1)(c) a power to grant exceptional relief. The nature of the question posed by s. 67(1)(c) requires the IAD to be "satisfied that, at the time that the appeal is disposed of ... sufficient humanitarian and compassionate considerations warrant special relief". Not only is it left to the IAD to determine what constitute "humanitarian and compassionate considerations", but the "sufficiency" of such considerations in a particular case as well. Section 67(1)(c) calls for a fact-dependent and policy-driven assessment by the IAD itself.
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> [The respondent] accepted that the removal order had been validly made against him pursuant to s. 36(1) of the IRPA. His attack was simply a frontal challenge to the IAD's refusal to grant him a "discretionary privilege". The IAD decision to withhold relief was based on an assessment of the facts of the file. The IAD had the advantage of conducting the hearings and assessing the evidence presented, including the evidence of the respondent himself. IAD members have considerable expertise in determining appeals under the IRPA. Those factors, considered altogether, clearly point to the application of a reasonableness standard of review. There are no considerations that might lead to a different result. Nor is there

> anything in s. 18.1(4) that would conflict with the adoption of a "reasonableness" standard of review in s. 67(1)(c) cases. I conclude, accordingly, that "reasonableness" is the appropriate standard of review.

[19] The jurisprudence of this Court has consistently held that the standard of review for the panel's assessment of the evidence in withholding relief is reasonableness (*Gardner v Canada (Minister of Citizenship and Immigration)*, 2011 FC 895 at paras 24-25, [2011] FCJ 1119; *Manalang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1368 at paras 71-79, [2007] FCJ 1763). Although the applicant framed them as questions of law, the first two issues are questions of mixed fact and law, reviewable on a reasonableness standard.

[20] On the other hand, the issue of the procedural fairness - as to whether the applicant was afforded a fair hearing before the panel - is reviewable on a standard of correctness (*Khan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 22 at para 29, [2010] FCJ 24).

Review of the impugned decision

The panel's assessment of the evidence of the applicant's hardship in Jamaica

[21] The applicant submits that the panel erred in requiring positive evidence that the applicant's family in Jamaica, and particularly her mother, will not be supportive of her while the evidence satisfactorily established that the support she requires is not available in Jamaica, thus elevating what is required for H&C consideration beyond what the law requires. The applicant argues that the panel's assumption is unsupported by the evidence. She relies on this Court's recent decision in *White v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1043, [2011] FCJ 1299, where it was held that an immigration officer had erred by making unsupported speculative findings that the applicant, a Jamaican immigrant who was found inadmissible to

Canada on the basis of serious criminality, could make suitable arrangements for specialized psychiatric care in Jamaica, as there was no evidence that the kind of care the applicant required was available or how much it would cost.

[22] The applicant also takes issue with the panel's finding that the letters from the Ministry of Health and Environment of Jamaica on the country conditions are not conclusive as they do not specifically address the circumstances of the applicant. She argues that objective evidence need not name an individual in order to be relevant and reliable.

[23] Having reviewed the documentary and testimonial evidence submitted on behalf of the applicant, I agree that the panel's assessment of the evidence of the applicant's hardship in Jamaica was unreasonable. The panel accepted that the applicant could not expect any state-run or community-based services that could provide her with the care she requires. However, it stated it could not speculate that the applicant would not have sufficient family support in her country, and ended up speculating that she would. Yet, having regard to the entirety of the record, there was more evidence in support of the applicant's allegation than in support of the panel's finding. Both the applicant's DR and her half-sister testified that they had little to no contact with the applicant's mother and that the latter never expressed any willingness to be supportive of her daughter for the past three years that she has lived at the women's shelter. In fact, no relative other than the applicant's half-sister has remained in contact with the shelter, including those who live in Canada.

[24] Even if none of the witnesses have directly raised the issue with the applicant's mother (a fact that is in my view understandable given the respondents' admission and the panel's finding that the applicant has little to no relation with her father and mother), the facts objectively indicated that there is little chance that the applicant's mother would support her sufficiently upon her return to Jamaica. I agree that it is for the panel and not for the Court to assess the evidence. However, the panel's assumption that either the applicant's mother or her half-sister would be able to provide financial support for her remains purely speculative and unsupported by any evidence at all. Rather, the applicant's half-sister testified that the mother is unemployed, that she consistently complains about financial difficulties when she calls, and that she has trouble taking care of the applicant's younger siblings and sending them to school. When the applicant's mother has called the applicant in the past, it was to blame her for not sending money to Jamaica to help her mother with her younger children. The applicant's father has beaten the applicant for not reading the Bible and her mother believes she is under a curse. The applicant's half-sister is herself a single mother to a 5 year old. According to her testimony, most of the applicant's expenses are taken care of at the shelter, but she sometimes buys clothes, toiletries or phone cards for the applicant. I find the panel findings to be in direct contradiction with this evidence.

[25] I also find that the panel's decision generally ignored the severity of the applicant's condition, the extent of care that her condition requires and the degree to which she is currently dependent on the community-based medical and social support she is receiving in Canada. All of these factors tend to demonstrate, in the special circumstances of this case, the applicant's establishment in Canada.

The failure to provide witnesses and counsel with an opportunity to respond

[26] The second and third issues are interrelated and will be dealt with together. Since the overall question is one of procedural fairness, it will be reviewed on a standard of correctness

[27] The applicant asserts that considering her special circumstances it was unreasonable for the panel to expect that she compel her mother, or other relatives in Jamaica, to testify at the hearing as they have shown no interest in her well being despite knowing that she lives in a shelter. The applicant submits that there is no legal requirement that testimony be corroborated to be believed, unless there is a basis to disbelieve it.

[28] The applicant further relies on *Gracielome v Canada (Minister of Employment and Immigration)*, [1989] FCJ 463, for the proposition that for the panel to predicate its decision on the fact that the applicant's relatives and friends in Jamaica were not called as witnesses, it should have confronted counsel or witnesses with its concerns and give them the opportunity to respond to the perceived lack of evidence. The applicant contends that the failure to do so constitutes a breach of procedural fairness as this deprived the applicant of her right to refute the panel's assumptions.

[29] I agree. The panel's conclusion that further testimonial evidence from the applicant's mother and/or other family members in Jamaica was required was at least partially determinative of the issue before it. However, at no point in the hearing transcript does the panel raise this question or inquire into it.

[30] In the context of hearings before the Immigration Appeal Division, the jurisprudence recognizes that an applicant must be able to respond to concerns that are likely to harm his or her case, particularly where they are highly material to the decision and cause the panel to exclude or discount other relevant evidence (*Sidhu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 515 at paras 78-82, [2012] FCJ 771). In *Ziade v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1352, [2007] FCJ 1754 [*Ziade*], in the context of an H&C application, the panel took issue with the absence of the applicant's family members at the hearing but failed to raise the issue in a meaningful manner at the hearing or provide the applicant with a real opportunity to present the required evidence. Justice Lemieux of this Court held that the panel was required to give the applicant the opportunity to prove his case before concluding, in the absence of this evidence, that the applicant had not demonstrated that there were sufficient H&C considerations in his favour.

[31] Although the facts of the present case are slightly different with those of *Ziade*, above, in the sense that in that case the applicant's family members were able to be present and testify at the hearing, I believe that the rationale from *Ziade* readily applies here. The panel in the case at bar could not choose to rely on a lack of evidence that was not brought to the attention of those appearing on behalf of the applicant without providing them with an opportunity to alleviate its concerns or clarify the reasons why the evidence it required was not available.

[32] For these reasons, I will allow this application for judicial review. The parties agree that there is no question of general importance for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT IS THAT:

1. The application for judicial review is allowed; the decision of the panel is set aside and the matter sent back to the Immigration Appeal Division of the Immigration and Refugee Board for a re-determination by a differently constituted panel;
2. No question of general importance is certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-1100-12**
STYLE OF CAUSE:	**CODINE PALMER v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND MCI**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 13, 2012
REASONS FOR JUDGMENT:	GAGNÉ J.
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