Federal Court Cour fédérale

Date: 20121107

Docket: IMM-1823-12

Citation: 2012 FC 1303

Toronto, Ontario, November 7, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LEOBARDO AHUMADA ROJAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Ahumada Rojas seeks to set aside a decision of an immigration officer made February 2, 2012, refusing his application for permanent residence under the spouse or common-law partner in Canada class.

[2] The application was refused because the officer found that the applicant failed to comply with subsection 72(1)(e)(i) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 (the Regulations), which requires a foreign national who seeks to become a permanent resident of

Canada to establish that his family members are not inadmissible, whether or not they are accompanying the foreign national.

Background

[3] Mr. Ahumada Rojas was born in Mexico. He travelled to Canada in September 2005 as a visitor and in December 2006 met Janice Leona Cotterell, a Canadian citizen. A relationship began and he moved in with Ms. Cotterell and her son in March 2008.

[4] On January 6, 2010, Mr. Ahumada Rojas submitted an application for permanent residence under the spouse or common-law partner in Canada class, sponsored by Ms. Cotterell. At that time, Mr. Ahumada Rojas was already married, but he obtained a divorce from his first wife on January 14, 2010. He married Ms. Cotterell on October 10, 2010.

[5] In his application, Mr. Ahumada Rojas listed three children from his first marriage – Esteban, Rebeca, and Mariana (born in 1992, 1995, and 1998, respectively) – and stated that all three children were living in Costa Rica with his ex-wife. Mr. Ahumada Rojas did not, however, specify who had custody of them, although he stated that he had no contact with the children since 2009 and that they were estranged from him. Mr. Ahumada Rojas asked to have them excluded as family members for the purpose of his application, acknowledging that this meant that he would not be able to sponsor them at a later date.

[6] Mr. Ahumada Rojas' application was refused because he neither provided documentary evidence that the children were in the sole custody of another person nor ensured that they underwent examination.

Issues

[7] Mr. Ahumada Rojas raises the following issues:

a. Did the officer err in law by ignoring, misconstruing, or disregarding relevant evidence in arriving at his decision to refuse the applicant's application?

b. Did the officer fail to observe the rules of procedural fairness in failing to address key documentary evidence in the applicant's application and/or failing to provide adequate reasons for dismissing said evidence?

c. Did the officer err in law by not taking into account the respondent's public policy, which clarifies an otherwise restrictive application of section 72(1)(e)(i) of the Regulations?

[8] The standard of review of the first question is reasonableness: *Negash v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1164, at paras 15-16. The standard of review of the second question, which deals with procedural fairness, is correctness: *Foroogh v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1171, at paras 16-17. The standard of review of the third issue is reasonableness, because the section of the Regulations to be interpreted is neither of central importance to the legal system as a whole nor outside the specialized expertise of an immigration officer: *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678,at para 21.

[9] Each party filed an affidavit in the application and each object to the other's affidavit. A party cannot introduce new evidence which was not before the decision-maker: *Lemiecha v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 1333. As a result, paragraph 9 of the applicant's affidavit and the annexed exhibits I and J, being a letter from Mr. Ahumada Rojas' lawyer in Costa Rica and a money order, are inadmissible in these proceedings. Similarly, a decision-maker cannot tender new evidence relating to his or her decision in an attempt to bootstrap the decision: *Kalra v Canada (Minister of Citizenship and Immigration)*, 2003 FC 941,at para 15. In my view, that is what the officer does in his affidavit and, to the extent that it contains information not in the CAIPS notes or decision letter, it is rejected as evidence in this proceeding.

Analysis

1. Failure to Have Regard for the Evidence as a Whole

[10] Mr. Ahumada Rojas submits that the officer failed to have regard to the evidence as a whole. He points to the fact that there is no mention made in the refusal decision of (i) the signed declarations he provided confirming his understanding that failure to have his children examined would lead to their exclusion from the family class in the future, (ii) two separate confirmations from his former immigration consultant that he had not been able to contact the children, and (iii) the fact that the Canadian visa office was equally unsuccessful in locating the children.

[11] He says that the officer approached the application with a closed mind, considering only the fact that the children were not examined, and gave no consideration to the documentary evidence that showed that this was not feasible. He further submits that the custody arrangement was

irrelevant, as his signed declarations made it very clear that he had no contact with the children and no intention of sponsoring them in the future.

[12] There is no dispute that Mr. Ahumada Rojas did not provide proof that he did not have custody of his children. None of the evidence before the officer contains a statement that Mr. Ahumada Rojas does not have custody, or that his ex-wife or some other person has custody. The absence of such evidence or an explanation why it is not available is shocking in light of the fact that the respondent sent two letters informing the applicant of this requirement. In its letter dated July 20, 2011, which was sent after the applicant provided statutory declarations indicating that he understood the consequences of his children not being examined, the respondent wrote: "As you have not been able to provide **documentary** evidence that your child(ren) are in the sole custody of another person, examination of the following family member(s) must continue …[emphasis in original]." In its letter dated December 21, 2011, the respondent wrote: "you have not provided documentary evidence of your attempts to contact your children and you have not been able to provide **documentary** evidence that your child(ren) are in the sole custody of another person. Therefore examination for the following family member(s) must continue [emphasis in original]."

[13] Mr. Ahumada Rojas simply says directly and through his representative that he has lost contact with the children. Given the importance for his application of establishing custody and the efforts made to contact them for examination, it was within the range of acceptable outcomes for the officer to find that the applicant had failed to meet his burden of proof.

[14] I agree with the submission of the respondent that an officer must be satisfied that an applicant's family members are not inadmissible. Section 23 of the Regulations creates an exception regarding the admissibility requirements for applicants when their children are in the sole custody of a separated or former spouse. In order to take the benefit of that exception, applicants must provide documentary proof of custody arrangements for non-accompanying dependent children. The applicant failed to do this even after repeated requests.

[15] Section 23(b)(iii) of the Regulations renders a foreign national inadmissible if, by virtue of a court order, a written agreement, or the operation of law, he or she has custody of the non-accompanying dependent children and they are not confirmed to be admissible. In this case, as a result of the applicant's failure to adduce the necessary evidence, there was no finding by the officer that he did not have custody of these three children. It is only when and if an officer makes such a finding and determines that the children need not be examined, that a request would be made for the declarations which the applicant submitted, purporting to exclude his children from the family class.

2. Procedural Fairness

[16] The applicant submits that he was not provided with a reasonable opportunity to respond to the officer's concerns. I am simply unable to accept that submission. The applicant was repeatedly made aware of the precise issue and he was given over a year to provide the requested information or a satisfactory answer as to why it could not be provided. He provided neither. There was no breach of procedural fairness by the officer.

3. Failure to Consider Respondent's Policy

[17] The respondent's IP8 Manual specifies that if family members are "genuinely unavailable" an officer may proceed to a statutory declaration. It requires officers to be "open to the possibility that a client may not be able to make a family member available for examination." They are advised to decide on a case-by-case basis, but the IP8 Manual specifies that proceeding without the examination of all family members is to be a "last resort" and the applicant cannot himself choose not to have a family member examined.

[18] Absent evidence that the applicant had no custody of the children, I am unable to find that the officer erred or reached an unreasonable decision in finding that the applicant had not arrived at the point of last resort. It was reasonably open to the officer, given the evidence before him or her, to find that the applicant had not exhausted all avenues and to decline to proceed as provided for in IP8.

[19] For these reasons, the application is dismissed. Neither party proposed a question for certification.

JUDGMENT

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

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Devilka Penekelapati	FOR THE APPLICANT
Tamrat Gebeyehu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BORDERS LAW FIRM Barristers& Solicitors Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT