Federal Court Cour fédérale

Date: 20151215

Docket: IMM-1158-15

Citation: 2015 FC 1386

Ottawa, Ontario, December 15, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

FLAMUR VESELAJ
BENAZIRE VESELAJ
ARTUR VESELAJ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of a failed H&C application. The case fits well within the teachings of *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR 35, particularly paragraph 27 [*Cepeda-Gutierrez*]:

> Finally, I must consider whether the Refugee Division made this erroneous finding of fact "without regard for the material before it." In my view, the evidence was so important to the applicant's case that it can be inferred from the Refugee Division's failure to mention it in its reasons that the finding of fact was made without regard to it. This inference is made easier to draw because the Board's reasons dealt with other items of evidence indicating that a return would not be unduly harsh. The inclusion of the "boilerplate" assertion that the Board considered all the evidence before it is not sufficient to prevent this inference from being drawn, given the importance of the evidence to the applicant's claim.

II. Background

[2] The Applicants are from Kosovo. Flamur and Benazire are husband and wife and have two children, one of whom is Canadian.

[3] Their refugee claim was denied and leave to commence a judicial review of that decision was also denied.

[4] They then submitted an H&C application which contained the report of a psychologist, Dr. Davis [1st Report]. The application was later buttressed with a second set of submissions containing a statutory declaration of Benazire. The declaration described some of the horrors she witnessed in Kosovo, including genocidal killings, and the resulting psychological trauma she experienced.

[5] This second submission contained another report from Dr. Davis [2nd Report], which focused on Benazire's psychological problems. The 2nd Report detailed the potential impact of a

return to her home country given that the trauma and resulting depression and PTSD arose from her experiences in Kosovo.

[6] In the H&C decision, the Officer said that he considered the report of Dr. Davis that indicates that both Applicants suffer depression and that Benazire suffers from PTSD.

[7] The Officer deals with the other H&C criteria but the decision on those matters is less relevant to this judicial review.

[8] The Applicants argue:

1. that the Officer ignored key evidence, being the second submissions containing the statutory declaration and the 2nd Report;
2. if the Officer did see that evidence, he failed to adequately address it especially as it contradicts his findings; and
3. if the Officer did address the evidence, he failed to consider its relevance to the issue of hardship.

The overall result is an unreasonable decision.

III. Analysis

[9] The standard of review was agreed as "reasonableness".

[10] The critical issue in this judicial review was whether crucial information was ignored and if not, whether the decision was reasonable.

[11] Again, *Cepeda-Gutierrez* speaks to the first matter at paragraph 17:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": …

[12] The Officer never specifically addresses the statutory declaration or the 2nd Report. The Officer does refer to "the report" in reference to PTSD affecting the wife.

[13] Despite the fine efforts of Respondent's counsel to persuade me that, read in context, "the report" must be a reference to the 2nd Report, it is not sufficiently clear that it is.

It is equally plausible that the reference is to the 1st Report, which also discusses PTSD (albeit not as extensively as the 2nd Report). On such a critical matter, a court cannot be left guessing.

[14] Moreover, there is no real discussion of the details of the 2nd Report, particularly on areas where the Officer reached conclusions at odds with the contents of that report. This is suggestive of little or no focus on critical evidence.

[15] This finding is sufficient to grant the judicial review.

[16] The Respondent says that the Officer did pay attention to the 2nd Report when he concluded that Benazire had been able to live with PTSD in relative safety for a few years before coming to Canada.

[17] However, this finding was made in the context of physical risk considerations in the H&C application. The real purport of the 2nd Report and the related submissions is the psychological risk of return to the place of psychological trauma. That matter was not assessed and it ought to have been.

IV. Conclusion

[18] Therefore, this judicial review will be granted, the original decision quashed and the matter remitted to a different officer for a new determination of the H&C application as may be updated.

[19] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted, the original decision is quashed and the matter is remitted to a different officer for a new determination of the H&C application as may be updated.

"Michael L. Phelan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1158-15
STYLE OF CAUSE:	FLAMUR VESELAJ, BENAZIRE VESELAJ, ARTUR VESELAJ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	DECEMBER 9, 2015
JUDGMENT AND REASONS:	PHELAN J.
DATED:	DECEMBER 15, 2015

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