Federal Court  Cour fédérale

Date: 20200407

Docket: IMM-1856-19

Citation: 2020 FC 497

Ottawa, Ontario, April 7, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BUSHRA SHAKEEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of an immigration officer (the "Officer") to deny the Applicant's application for permanent residence based on humanitarian and compassionate ("H&C") grounds.

[2] The Applicant is a citizen of Pakistan, who married the Sponsor a few months after the Sponsor had applied for permanent residence. When the Sponsor informed his former representative of the change in his marital status, the representative incorrectly advised him that it was not necessary to inform the immigration officer about the change, and that it would be easier to sponsor his spouse once his application was finalized. However, when the Sponsor tried to sponsor the Applicant, the sponsorship application was refused because the Applicant was not considered part of the family class, as a result of the Sponsor's failure to declare her at the time that he landed as a permanent resident.

[3] The Applicant sought an exemption pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") through an H&C application, which was refused. The Applicant is now seeking judicial review of the Officer's refusal decision.

[4] The Applicant submits that the Officer fettered their discretion by fixating on the Sponsor's "choice" not to declare his spouse and failing to properly consider H&C grounds. The Applicant also submits that the Officer disbelieved the Sponsor's explanation for his conduct and breached procedural fairness by failing to give the Applicant a chance to respond to this adverse credibility finding.

[5] For the reasons that follow, this application for judicial review is dismissed.

II. **Facts**

[6] Ms. Bushra Shakeel ("the Applicant") is a 36-year-old citizen of Pakistan. The Applicant is married to Mr. Shakeel Shad ("the Sponsor"), a 46-year-old citizen of Canada who was born in Pakistan. The couple does not have any children.

[7] In early 2008, the Sponsor applied for permanent residence in Canada under the Alberta Immigrant Nominee Program ("AINP"), based on his familial relationship with his uncle.

[8] On December 21, 2008, the Applicant and the Sponsor became married.

[9] The Sponsor stated that he informed his former immigration consultant of the change in his marital status, and was advised, incorrectly, that there was no need to inform the visa office regarding this change because he was being sponsored by his uncle under the AINP. The former consultant advised the Sponsor that it would be quicker for him to sponsor his wife as a permanent resident after finalizing his permanent residence application.

[10] On March 6, 2011, the Sponsor landed as a permanent resident. After arriving in Canada, he worked at a Dollarama store in Calgary as a key holder or assistant manager.

[11] Following his former counsel's advice, the Sponsor then applied to sponsor his wife under the family class in 2012. However, the sponsorship application was refused due to the Sponsor's failure to disclose his spouse at the time that he landed as a permanent resident. The

Sponsor sought to appeal this refusal to the Immigration Appeal Division ("IAD") in 2015, but then withdrew the appeal. No explanation was provided for the withdrawal.

[12] On September 30, 2016, the Sponsor became a Canadian citizen.

[13] In 2017, the Sponsor retained his current counsel, who helped him submit an H&C application in May 2017 (the "H&C Application"). As the H&C Application failed to meet the requirements for processing, it was resubmitted in July 2017 with additional documents.

[14] On December 20, 2018, the visa office in London issued a procedural fairness letter, to which the Sponsor's counsel responded on January 11, 2019.

[15] On February 11, 2019, the Officer issued a letter refusing the H&C Application.

III. **Issues and Standard of Review**

[16] There are two issues for consideration on judicial review:

A. Did the Officer violate the Applicant's right to procedural fairness by failing to provide her with an opportunity to respond to an adverse credibility finding?

B. Did the Officer fetter their discretion?

[17] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard applied to the review of an immigration officer's decision on H&C applications under section 25 of the *IRPA: Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII) at para 44; *Douti v Canada (Citizenship and Immigration)*, 2018 FC 1042 (CanLII) at para 4; *Chen v Canada (Citizenship and Immigration)*, 2019 FC 988 (CanLII) at para 24. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[18] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

[19] Post-*Vavilov*, the correctness standard continues to apply to breaches of procedural fairness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

IV. **Preliminary Issue**

[20] The Respondent submits that the Applicant failed to comply with the Court's procedural protocol regarding allegations of incompetence. More specifically, the Respondent submits that *Procedural Protocol re Allegations against Counsel or Other Authorized Representative in*

Citizenship, Immigration and Protected Person Cases before the Federal Court (March 7, 2014, Notice to the Legal Profession) ("the Allegations Protocol") was not followed in this case.

[21] The Respondent notes that the Court does not have the benefit of relevant evidence from the previous representative, and submits that the Applicant failed to follow the protocol, as there is no indication that the former representative was ever notified of the allegations made against him or given an opportunity to address them.

[22] I note that this is not a case where the Applicant seeks judicial review on the basis that the former counsel's incompetence led to a breach of procedural fairness. In other words, this is not a case where the Applicant pleads incompetence "as a ground for relief in an application for leave and for judicial review under [*IRPA*]," (*Allegations Protocol* at para 2(i)). Therefore, I am not convinced that this protocol applies in the circumstances.

V. **Analysis**

A. *Did the Officer violate the Applicant's right to procedural fairness by failing to provide her with an opportunity to respond to an adverse credibility finding?*

[23] The Applicant submits that the Officer's comments regarding the Sponsor's "choice" was an adverse credibility finding. The Applicant submits that the Officer did not believe the that the Sponsor's decision was influenced by his previous representative's bad advice, and viewed the Sponsor's decision as an active, informed choice rather than a decision based on misinformation that he innocently believed.

[24] The Applicant argues that the Officer breached procedural fairness by failing to provide her with an opportunity to respond to the Officer's disbelief of the Sponsor's explanation for not declaring his spouse.

[25] The Respondent submits that the Officer did not make any negative credibility findings against the Sponsor. The Respondent argues that the Officer set out the concerns in a procedural fairness letter dated December 20, 2018, and that the Applicant and Sponsor were provided with a clear opportunity to respond prior to a decision being rendered.

[26] In my view, the Officer did not breach their duty of procedural fairness. The record does not suggest that the Officer disbelieved the Sponsor, but that the Officer concluded that the Sponsor's reliance on incorrect advice was not a sufficient factor justifying an exemption under section 25 of the *IRPA*. I am not persuaded that the Officer's comment can be properly described as an adverse credibility finding, and that the failure to provide the Sponsor with an opportunity to respond to the Officer's alleged disbelief of his explanation amounted to a breach of procedural fairness.

B. *Did the Officer fetter their discretion?*

[27] The Applicant submits that the Officer fettered their discretion by fixating on the Sponsor's "choice" not to declare the Applicant as his spouse, and argues that this fixation is unreasonable. The Applicant emphasizes that "it is clear that the Sponsor's decision not to declare the Applicant as his spouse was borne out of the bad advice he received from his

previous representative". The Applicant submits that there was no intention to deceive the immigration officials or to gain some kind of advantage, and that the Sponsor indeed reaped no benefit from his omission to declare the Applicant as his spouse.

[28] The Applicant submits that the Officer failed to properly consider the fact that the Sponsor had received poor advice; instead, the Officer simply fixated on the fact that the Sponsor was ultimately responsible for the accuracy of the information provided in his permanent residence application.

[29] The Applicant submits that the facts of *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533 (CanLII) [*Sultana*] are highly similar to the case at bar, and that the reasoning should be applied. In *Sultana*, the sponsor had not disclosed the existence of his wife and son at his immigration interview or upon landing in Canada. Pursuant to subsection 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*"), as the family members did not accompany the sponsor at the time that he applied for permanent residence and were not examined, they could not be considered part of the family class. As a result, the officer denied the request for an H&C exemption.

[30] On judicial review, the Court found that the fixation on the sponsor's failure to disclose his family members prevented the officer from genuinely assessing the H&C consideration, which led the officer to overlook key factors: the genuineness and stability of the relationship with the sponsor's wife and children, the sincere remorse of the sponsor, the likely impact of the

decision on any future prospect for the family's reunion, and the best interests of the children (*Sultana* at para 30).

[31] The Applicant submits that the Officer did not consider the impact of the continued separation of the couple. The Applicant argues that the couple's hardship was evident from the application, and that the Officer's failure to consider this factor is indicative of the Officer's assessment of the H&C factors through the prism of the sponsor's conduct—which undermined the purpose of the H&C Application.

[32] The Respondent submits that the Officer did not err in considering the reasons for the Sponsor's non-disclosure in the consideration of H&C grounds. The Respondent argues that this is permitted, as long as it is not the "overriding consideration" (*Weng v Canada (Citizenship and Immigration*, 2014 FC 778 (CanLII) at para 35).

[33] The Respondent emphasizes that the Applicant has a duty of candour to provide complete, honest, and truthful information in every manner when seeking entry into Canada, and that the Applicant is responsible for the content of an application, which they sign *(Bodine v Canada (Citizenship and Immigration)*, 2008 FC 848 (CanLII) at para 41; *Baro v Canada (Citizenship and Immigration)*, 2007 FC 1299 (CanLII) at para 15). The Respondent points to *Cao v Canada (Citizenship and Immigration)*, 2010 FC 450 (CanLII) at para 31, where the Court held that a misrepresentation resulting from an error of the applicant's travel agent did not bar the application of subsection 40(1)(a) of the *IRPA*.

[34] The Respondent submits that the Officer did not give undue weight to the Sponsor's misrepresentation or failure to declare the spouse, or otherwise fetter their discretion, unlike the errors identified in *Sultana*. The Respondent submits that the Officer considered the limited evidence and submissions related to the H&C grounds raised by the Applicant. Moreover, the Respondent argues that the Officer's conclusion—that the evidence was minimal and insufficient to overcome the H&C exemption—is supported by the record *(Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 (CanLII) at para 5).

[35] I find that the Officer did not fetter their discretion. The Officer reasonably considered the H&C factors and was aware that they had to look beyond the Sponsor's failure to declare his wife.

[36] Although I agree with the Applicant that the marriage was found to be genuine by two different officers, I am not persuaded that the Officer was presented with sufficient evidence on H&C considerations. As the Respondent aptly pointed out, there were a mere three thin pages submitted by the Applicant's counsel. There were no submissions made on the Applicant's establishment in Canada, or on dangerous country conditions in Pakistan. There was minimal evidence, and certainly, a lack of submissions on the evidence provided in the record.

[37] The only identified "misfortunes" or H&C considerations were the Applicant's reliance on incorrect advice and the resulting long-term separation of the couple. Although I agree with the Applicant that the hardship resulting from the continued separation of two people who have been married for a decade could be self-evident, in my view, the Officer was provided with little

(if any) evidence and scant summary submissions on the specific ways in which the Sponsor's ineligibility to sponsor the Applicant caused them hardship.

[38] It was incumbent on the Applicant to explain the hardship and suffering caused as a result of being separated from her husband, for that to be assessed by the Officer. The Applicant failed to clearly articulate the hardship, and did not provide the Officer with the foundation to grant the relief requested. The Applicant's counsel stated that the suffering was "obvious" from a "fulsome record". However, the hardship cannot be "obvious" to the Officer who lacks submissions on why the application deserves a consideration based on H&C grounds.

[39] Moreover, the case at bar can be distinguished from *Sultana* on the facts. Unlike in *Sultana*, where the best interests of the child was an important consideration, there were no best interests of the child involved in the present case.

[40] In the case at bar, the evidence was simply insufficient, and it was reasonable for the Officer to have concluded as such.

VI. **Certified Question**

[41] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[42] For the foregoing reasons, the Officer's decision is reasonable. The Officer did not breach the duty of procedural fairness. This application for judicial review is dismissed.

JUDGMENT IN IMM-1856-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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