Date: 20071001

Docket: IMM-6170-05

Citation: 2007 FC 986

Ottawa, Ontario, October 1, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

LASZLO PINTER, KATALIN PINTER, BETTINA PINTER
LASZLO PINTER AND DORINA PINTER

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision by an immigration officer dated September 27, 2005, which denied the applicants' application for permanent residence on humanitarian and compassionate (H&C) grounds.

[2] The applicants seek an order setting aside the decision of September 27, 2005, and remitting the matter for redetermination by a different officer.

Background

[3] The applicants are Laszlo Pinter and Katalin Pinter, their son Laszlo Pinter and two daughters, Dorina and Bettina Pinter. The applicants are citizens of Hungary. Katalin Pinter is of Roma ethnicity. The circumstances which caused the applicants to seek refuge in Canada were set out in the affidavit of Laszlo Pinter.

[4] The applicants experienced discrimination and harassment due to Katalin Pinter's Roma background. The children were allegedly beaten up at school, and their home was broken into. As the threats faced by the applicants grew in intensity, they chose to flee Hungary and seek asylum in Canada. On September 4, 2000, the applicants entered Canada with temporary visitor permits. The applicants claimed refugee protection on October 11, 2000. Their refugee claim was dismissed by decision dated March 14, 2003.

[5] On June 5, 2003, the applicants applied for a Pre-Removal Risk Assessment (PRRA). The applicants applied for permanent residence on H&C grounds on July 31, 2003. The applicants' PRRA application was rejected on February 16, 2004, and their H&C application was refused on March 8, 2004. On March 11, 2004, the applicants attended at a Citizenship and Immigration

Canada (CIC) office and were advised that both applications had been rejected. The enforcement officer, Kathy Galloway, gave the applicants their removal orders during this meeting.

[6] The applicants applied for leave to seek judicial review of the negative H&C decision, and by order dated April 7, 2004, Justice Kelen granted a stay of proceedings for the execution of the removal orders, pending the determination of their application for judicial review. Leave for judicial review was granted on July 29, 2004. On February 25, 2005, Chief Justice Lutfy granted the application for judicial review and ordered that the decision of March 8, 2004 be set aside and remitted for redetermination by a different officer.

[7] The applicants submitted a second H&C application on March 31, 2005. On June 23, 2005, a PRRA officer issued a risk opinion with respect to the H&C application. The PRRA officer was not satisfied that on a balance of probabilities, the applicants faced a risk to their lives or a risk to the security of their persons if they were to return to Hungary. The risk opinion was provided to the applicants, who submitted a rebuttal to the risk opinion.

[8] A response to the applicants' rebuttal of the risk opinion was prepared by the PRRA officer and forwarded to Kathy Galloway, who had become the officer responsible for determining the applicants' H&C application. This document was not provided to the applicants. On September 27, 2005, the applicants' H&C application was refused by Kathy Galloway. This is the judicial review of the negative H&C decision.

Officer's Reasons

[9] The officer set out the allegations by the claimants:

> Their children have had to change schools repeatedly because of bullying and abuse from other students and students' parents.
>
> Although the government is trying to improve things, Gypsies in Hungary are still persecuted.
>
> "it is not normal to be in fear of leaving home because you may be threatened on the street…you expect to see your car tires slashed or the walls of your home defaced with graffiti".

[10] The Board considered that the applicants were self supporting, had improved their English, and had provided many letters of support.

[11] The applicants had been in Canada since 2000, and had been employed most of that time. They were volunteers for many organizations and the children were involved in scouts and dancing. It was expected that a certain level of establishment would occur given that the applicants had been allowed to remain in the country while their claims were heard. Here, the establishment was not significant. Although Mrs. Pinter's brother and cousin were in Canada, they had more family ties in Hungary.

[12] The officer also considered the best interests of the children. The children were 1/8 Roma. The adult applicants stated that they had left Hungary so that their children could continue to attend school and would not be forced to drop out because of constant harassment. Both adult applicants

managed to complete school, and were able to support themselves. There was insufficient evidence to conclude that the children's education would suffer on their return, although the officer acknowledged that there would be a significant period of readjustment.

[13] The officer gave little weight to the applicants' evidence that they would be unable to correspond with the Canadian Embassy because they would be forced to move repeatedly.

[14] The officer considered the evidence of risk faced by the applicants and concluded as follows:

> I have been mindful that there may be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment. In this regard, I have considered the evidence put forward by the PA's; the risk opinion; and the PA's response to the risk opinion. I have reviewed and considered the PA's submissions regarding the risk they would face in Hungary as well as the risk opinion and the PA's rebuttal. I have also reviewed and considered the IRB and PRRA decisions and I adopt them. The evidence is insufficient to satisfy me that there is a risk to the lives or the security of the PA's if they were to return to Hungary.

[15] The officer concluded that there were insufficient H&C grounds to justify the exemption in this case.

Issues

[16] The applicants submitted the following issues for consideration:

1. Did the officer err in assessing the risk threshold and in considering the risk and non-risk factors in isolation?

2. Did the officer breach procedural fairness by not disclosing post-application evidence?

3. Was there a reasonable apprehension of bias?

Applicants' Submissions

Affidavit of K. Galloway

[17] The applicants submitted that the affidavit of Kathy Galloway should be struck from the record, since it included statements made after the decision was rendered. It was submitted that the Minister could not respond to an application for judicial review by procuring an affidavit from the officer who rendered the decision containing what she considered, the weight she gave to the evidence, and the reasons for the decision (see *Aduengov* v. *Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 468, (1997) 132 F.T.R. 281m (T.D.)).

Risk Analysis

[18] The applicants noted that the officer referred to the threshold for risk as "risk to their lives or to the security of their persons." It was submitted that the officer erred in conflating the risk standards found in the context of refugee, PRRA and H&C claims, thereby raising the standard of

"undue and underserved or disproportionate hardship" found in the H&C context, to the higher standards applicable in PRRA and refugee proceedings.

[19] The applicants submitted that despite the cursory statement made by the officer regarding the different standards of risk applicable to H&C, PRRA and refugee claims, the officer was confused about the nature of the standards. In *Beluli* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 898, the Court noted that hardship could flow from risk, even where the risk was insufficient to justify refugee protection.

[20] The applicants submitted that the standard of "undue and undeserved or disproportionate hardship" included both risk and non-risk factors, which should be considered in concert, not in a mutually exclusive manner.

Procedural Fairness

[21] The applicants submitted that the officer breached the duty of fairness by failing to disclose the PPRA officer's response to the applicants' rebuttal of the risk opinion, dated July 28, 2005. It was submitted that the officer substantially relied upon the undisclosed submissions of the PRRA officer.

[22] The applicants submitted that in *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999) 174 D.L.R. (4th) 193, the Supreme Court of Canada

recognized that H&C applicants were owed more than a minimal duty of procedural fairness. In *Haghighi* v. *Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407, (2000) 189 D.L.R. (4th) 268, the Court found that the duty of fairness had been breached when the officer considering an H&C application failed to disclose a negative risk assessment.

[23] The applicants submitted that the test for a reasonable apprehension of bias turns on whether a reasonable person, who is reasonably informed of the facts, viewing the matter realistically and practically and having thought it through, would think it more likely than not that a decision-maker was biased (see *Ahumada* v. *Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 605, 2001 FCA 97). The applicants submitted that the question hinged upon whether there was a reasonable apprehension of bias from the perspective of the unsuccessful refugee claimant.

[24] The applicants noted that Kathy Galloway was the enforcement officer who issued a deportation order against them on March 11, 2004. It was noted that Ms. Galloway also rejected their H&C application. The applicants submitted that it was reasonable to assume that the officer was frustrated that the removal order she had issued had not been carried out. It was submitted that it was also reasonable to assume that a reasonable person in the applicants' shoes might expect the officer to use her new position to again attempt to have them deported from Canada. The applicants noted that the officer's H&C decision highlighted that they were the subjects of enforceable removal orders.

Respondent's Submissions

Affidavit of K. Galloway

[25] The respondent submitted that *Aduengov* above only stood for the proposition that an applicant may not supplement his or her case on judicial review with facts which were not presented to the tribunal. In the case at hand, the affidavit of Kathy Galloway addressed procedural fairness arguments raised by the applicants upon judicial review. It was submitted that jurisprudence has consistently held that an affidavit from an officer is acceptable to address such issues (see *Qazi* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 1667).

Risk Analysis

[26] The respondent submitted that the officer did not err in subdividing the factors that were considered in the assessing the H&C application. It was also submitted that the officer clearly took into account both the risk assessments done for the refugee and PRRA determinations, and the expanded consideration of risk which might fall under undue hardship. The officer's reasons indicated that risk for H&C purposes might be broader than for PRRA or refugee purposes. It was submitted that the officer considered the evidence to see whether any such risk, falling short of persecution, would constitute undue hardship in the case.

Procedural Fairness

[27] The respondent relied upon the cases of *Monemi* v. *Canada (Solicitor General)* (2004), 266 F.T.R. 31, 2004 FC 1648, and *Bhallu* v. *Canada (Solicitor General)*, 2004 FC 1324, which held that there is no bias in the process simply because the same decision-maker makes both decisions. It was submitted that the applicants must be able to point to an actual or perceived event which gave rise to an apprehension of bias; they have failed to do so. It was submitted that in the case at hand, there was no unfairness in the process.

[28] The respondent noted that Kathy Galloway had issued a removal order against the applicants, which constituted informational communication rather than an actual decision (see *Daniel* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FC 392). It was submitted that the claim that the officer had acted out of frustration was offensive and unsupported by any evidence.

[29] The respondent conceded that the PRRA officer's response to the applicants' rebuttal of the risk opinion was provided to the H&C officer, but was not forwarded to the applicants. It was noted that the officer had reviewed the response, but found that it did not provide any new facts regarding risk. It was submitted that the response was not substantively considered in arriving at the H&C decision, and did not affect the outcome of the application (see *Nazim* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 125). The respondent submitted that the response did not provide any new facts regarding risk, nor challenge any statements in the applicants' rebuttal. It was submitted that the officer did not commit a reviewable error in failing to disclose it.

Analysis and Decision

Standard of Review

[30] The standard of review applicable to decisions made with respect to applications for permanent residence on H&C grounds is reasonableness (see *Baker* above). Breaches of procedural fairness are subject to review on the standard of correctness.

[31] I propose to first deal with Issue 2.

[32] **Issue 2**

Did the officer breach procedural fairness by not disclosing post-application evidence?

The officer received a response to the applicants' rebuttal of the risk opinion, but she did not provide a copy of the response to the applicants. I am satisfied that the officer did consider the response as her decision states the following:

> **Items given my consideration include the following:**
>
> . . .
>
> - Risk opinion, rebuttal and response to rebuttal
>
> . . .
>
> **Case Summary**
>
> **Date** **Event**
>
> . . .

11 Aug 2005 – response to PA's rebuttal made

(Emphasis Added)

[33] The officer, in her affidavit, stated that " . . . The response did not make any difference to the ultimate decision and was not considered as part of the substantive decision."

[34] I agree with the respondent that affidavit evidence may be submitted on judicial review when the evidence deals with procedural fairness issues. However, I am of the view that the affidavit evidence in this case serves to justify the officer's decision and is not admissible.

[35] The response should have been disclosed to the applicants as the officer stated in her decision that the response was considered in rendering her decision.

[36] In my opinion, the failure to provide a copy of the response to the applicants is a breach of the duty of procedural fairness. On this basis, the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

[37] Because of my finding on this issue, I need not deal with the remaining issues.

[38] The applicants submitted seven proposed serious questions of general importance for my consideration for certification. I am not prepared to certify any of the questions as the resolution of this case is specific to the facts of this case.

JUDGMENT

[39] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

11.(1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11.(1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.
25.(1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	25.(1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

FEDERAL COURT

SOLICITORS OF RECORD

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