Federal Court  Cour fédérale

Date: 20130723

Docket: IMM-2972-12

Citation: 2013 FC 811

Toronto, Ontario, July 23, 2013

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SABANAYAGAM KATHIRGAMATHAMBY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] Mr. Sabanayagam Kathirgamathamby (the "Applicant") seeks judicial review of the decision of an officer (the "Officer") at Citizenship and Immigration Canada at the Case Processing Centre in Vegreville, Alberta, dated March 6, 2012, denying his application for permanent residence. The application was refused because the Applicant was found to be inadmissible to Canada pursuant to paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

BACKGROUND

[2] The Applicant is a citizen of Sri Lanka. On September 25, 2007, he landed at the Los Angeles airport, from Sri Lanka, in possession of a fraudulent passport. He was arrested and charged with fraud under the *United States Code*, particularly 18 U.S.C. §1028(a)(4). He pleaded guilty to the charge on December 13, 2007. He was held in immigration custody from September 2007 until April 2009.

[3] In May 2009, the Applicant entered Canada and applied for refugee protection. A report was prepared, pursuant to section 44 of the Act, on October 2, 2009. On February 1, 2011, the Applicant was found to be a Convention refugee.

[4] On February 18, 2011, the Applicant, his wife and two children applied for permanent residence in Canada. On November 21, 2011, Citizenship and Immigration Canada ("CIC") asked the Applicant to explain his criminal charge in the United States and to amend his application to reflect his conviction. By letter dated November 30, 2011, the Applicant explained that because his life was in danger in Sri Lanka, he "had to obtain a fraudulent passport to escape Sri Lanka."

[5] By letter dated March 6, 2012, the Officer informed the Applicant that he was found inadmissible under subsection 36(1) of the Act for the offence of fraud in the United States in 2007. The Officer found the offence under the United States Code 1028(a)(4) to be equivalent to section 403 of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "Criminal Code"), an offence punishable by imprisonment for a term not exceeding ten years. Accordingly, the Officer refused the Applicant's permanent residence application.

SUBMISSIONS

[6] The Applicant focused his initial arguments upon the equivalency assessment conducted by the Officer. He argued that he could not be charged or convicted in Canada, in the face of section 133 of the Act. He submits that there cannot be equivalency in the circumstances of a Convention refugee who was convicted of any offence equivalent to those set out in section 133.

[7] Further, the Applicant submits that the Officer erred in the equivalency analysis. He argues that section 403 of the Criminal Code relates to the use of documents relative to identity theft. He says that since this essential element of section 403 was not established, the Officer erred in finding equivalency between the American offence of which he was convicted and section 403.

[8] The Applicant also argues that the Officer unreasonably failed to consider the availability of humanitarian and compassionate ("H&C") factors, pursuant to section 25 of the Act, when rejecting his permanent residence application.

[9] The Minister of Citizenship and Immigration (the "Respondent") disputes the Applicant's view of section 133 of the Act and submits that section 133 does not apply to his situation because he was not a refugee claimant in Canada when he was charged and convicted.

[10] The Respondent initially argued that the Officer reasonably concluded that section 403 was equivalent to the offence for which the Applicant was convicted in the United States.

[11] The Respondent also argues that the Officer reasonably did not consider H&C factors, on the basis that the Applicant had not requested such consideration and had failed to disclose his conviction of an offence.

[12] In the course of the hearing of this application for judicial review further arguments arose as to the evidentiary basis for the Officer's equivalency analysis and the parties were given the opportunity to file further submissions, first by the Respondent with submissions to be filed by the Applicant in reply. The Respondent, by further submissions filed on February 15, 2013, argued that the Officer had not been authorized to conduct an equivalency analysis because the Applicant had already been found inadmissible for his conviction in the United States. As well, the Respondent sought to file the affidavit of Helen Medeiros, together with exhibits, in support of its further submissions.

[13] By reply submissions dated March 7, 2013, Counsel for the Applicant objected to the Respondent's attempts to introduce further evidence and argued that the Respondent's defence had been based on the Officer's purported equivalency exercise, and not on a prior inadmissibility finding.

DISCUSSION AND DISPOSITION

[14] The dispositive issue in this application for judicial review is the Officer's finding of inadmissibility on the basis of subsection 36(1), specifically paragraph 36(1)(b). This finding depends on the equivalency analysis conducted by the Officer. The inadmissibility finding then is a

question of mixed fact and law reviewable on the standard of reasonableness; see the decision in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 51.

[15] In the present case, the three issues raised by the Applicant are subject to review on the standard of reasonableness. The issues of the availability of a section 133 defence and the Officer's equivalency analysis involve questions of mixed fact and law, while the issue of the Officer's failure to consider H&C factors relates to the exercise of his discretion.

[16] In *Dunsmuir*, *supra*, para. 47, the Supreme Court of Canada stated:

> …A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[17] I agree with the Respondent that the application of section 133 does not arise here. The decision in *Uppal v. Canada (Minister of Citizenship and Immigration)* (2006), 289 F.T.R. 196 is determinative. The Applicant used a fraudulent document to enter the United States, not Canada. At paragraphs 21-25, Justice Layden-Stevenson made it clear that section 133 could shield a person from a finding of inadmissibility only if the fraudulent document was used for the purpose of entering Canada.

[18] However, in my opinion, there is a problem with the Officer's treatment of the equivalency issue and with the Respondent's submissions concerning the same.

[19] In his initial submissions, the Respondent took the position that the Officer had reasonably concluded that there was equivalency between the American offence and section 403 of the Criminal Code but in the supplementary submissions, he argues that the Officer was not authorized to conduct an equivalency assessment because the Applicant had already been found to be inadmissible.

[20] In my opinion, those two positions advanced by the Respondent are inconsistent and diametrically opposed. The basis for the inadmissibility finding was the alleged equivalency between the offence in the United States and the offence described in section 403 of the Criminal Code. Further, in any event, in my view the equivalency finding is flawed because the Certified Tribunal Record ("CTR") does not contain evidence that would support that finding. This evidentiary defect is not cured by the affidavit which the Respondent sought to file with his further submissions of February 15, 2013.

[21] The Respondent seeks to rely on the material contained in the response to the request made under Rule 9 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 as constituting the evidence for the equivalency analysis. In my opinion, this argument cannot succeed.

[22] The Rule 9 response, according to the terms of Rule 9, is the decision and the reasons for that decision. The decision itself cannot be the "evidence" in support of the decision.

[23] In any event, neither the Rule 9 response nor the CTR contain evidence as to the constituent elements of the American offence for the purpose of conducting the tests for equivalency as set out

in the decision in *Hill v. Canada (Minister of Employment and Immigration)* (1987), 73 N.R. 315 (F.C.A.). The absence of a reliable evidentiary foundation for the equivalency analysis means, in my opinion, that that analysis is not reasonable.

[24] The Officer committed a reviewable error in the conduct of the equivalency analysis. The Officer's decision simply states that the American offence is equivalent to section 403 of the Criminal Code. However, there is neither any evidence in the record to support this finding, nor any reasoning from the Officer explaining how he reached this conclusion. The decision accordingly fails to meet the criteria of transparency and intelligibility.

[25] In my opinion, the Officer further erred in declining to consider H&C factors. Although the Applicant did not explicitly request consideration of H&C factors, he did point out that he used a fraudulent passport in order to escape danger to his life. He provided an explanation.

[26] This fact, together with the fact that he was recognized in Canada as a Convention refugee, invites consideration of all relevant factors that could promote the continuing protection of the Applicant. The H&C discretion conferred by section 25 of the Act is such a relevant factor, a point recognized by Justice Snider in *Abid et al. v. Canada (Minister of Citizenship and Immigration)* (2011), 384 F.T.R. 74 at paras. 35 and 39, as follows:

> [35] The first error made by the Officer, in my view, is that he incorrectly found that no submissions on H&C grounds were made. While the submissions of the Applicants' consultant leave much to be desired, there are a number of references to H&C grounds (albeit without use of the term "humanitarian and compassionate grounds"). The consultant refers to the status of the Principal Applicant as a

> Convention refugee. Moreover, the letter of January 26, 2010 from the consultant contains the following:
>
> > It is also important to understand my client is a very decent, honest and credible person... . It is true that he made a mistake 17 years ago and he paid for that mistake and he is now a family man and a licensed technician in Canada. He has no criminal records in Canada or anywhere in the world after 1993.
>
> In my view, these were clear H&C submissions.
>
> […]
>
> [39] The H&C Guidelines provide that, when assessing criminal inadmissibility and an exemption for it, an officer is required to take into account a series of factors. One of the key factors is the likelihood of re-offending.
>
> > 11.4. Criminal inadmissibilities
> > When considering the H&C factors, officers should assess whether the known inadmissibility, for example, a criminal conviction, outweighs the H&C grounds. They may consider factors such as the applicant's actions, including those that led to and followed the conviction. Officers should consider:
> > * the type of criminal conviction;
> > * what sentence was received;
> > * the length of time since the conviction;
> > * whether the conviction is an isolated incident or part of a pattern of recidivist criminality; and
> > * any other pertinent information about the circumstances of the crime

[27] In the result, this Application for judicial review is allowed, the decision is set aside and the matter remitted to a different officer for re-consideration, no question for certification arising.

ORDER

THIS COURT ORDERS that this Application for judicial review is allowed, the decision is set aside and the matter remitted to a different officer for re-consideration, no question for certification arising.

"E. Heneghan"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2972-12
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