Federal Court Cour fédérale

Date: 20140124

Docket: IMM-2898-13

Citation: 2014 FC 81

Ottawa, Ontario, January 24, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

PHYANG

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Phyang (the "Applicant") of a decision made by a Visa Officer, Mick Chong (the "Visa Officer") of the Canadian High Commission in Singapore, dated March 28, 2012 and received by the Applicant in April 2012, wherein the Visa Officer determined that the Applicant and her daughter were not members of the "family class" according to s 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*" or "*Regulations*"), and that there were insufficient humanitarian and compassionate ("H&C") grounds

to exempt the application from the requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*” or the “*Act*”).

[2] For the reasons that follow, I have found that this application for judicial review must be granted.

Facts

[3] The Applicant, Phyang, is a 32-year old Montagnard (Jarai) person from the Central Highlands of Vietnam. She does not speak, read or write English. She met her husband and sponsor Brak in 2005 in her village. Brak is also a 28-year old Jarai person. He does not speak, read or write much, if any, English. He currently resides in Vancouver.

[4] Phyang and Brak married on February 9, 2006. Phyang was two-months pregnant at the time and had a baby girl, H’Soanh, on October 29, 2006.

[5] Brak, his mother and three siblings arrived in Canada on July 25, 2007 as permanent residents. Brak came as a dependent of his father, Saih Ksor, who was a Convention Refugee and was able to sponsor his family under the One Year Window of Opportunity program. Brak claims that his father had fled Vietnam sometime in 2004 prior to his marriage to Phyang and the birth of his daughter. The father then applied from Canada to sponsor Brak, his mother and siblings without knowledge that Brak was then a married man and had a daughter.

[6] On February 25, 2009, an application for permanent resident visa under the family class was submitted by Phyang in Singapore. Phyang and her daughter were sponsored by Brak. The application was denied on May 27, 2009 as it was determined that Brak did not disclose nor declare in his application for permanent residency that he was married and had a child. He also failed to disclose this information upon his arrival in Canada. As such, Phyang and her daughter were excluded for consideration as members of the family class pursuant to s 117(9)(d) of the *Regulations.*

[7] On June 21, 2011, another sponsorship application was submitted by Brak in Canada and a second permanent resident visa application was submitted by Phyang in Singapore (with the assistance of a volunteer with the Immigrant Services Society in Vancouver). This second application included a request for exemption from the requirements of the *Act* and the *Regulations* on H&C grounds pursuant to s 25 of the *IRPA*.

[8] In his declaration and statements in support of the H&C application, Brak outlined in detail, and with objective supporting documentary evidence, the continuing human rights abuses that the Jarai people are being subjected to by the Vietnamese authorities, such as religious persecution, restrictions on their movement, interrogations and assault.

[9] The sponsorship and permanent resident applications were denied on March 28, 2012 and both Brak and Phyang were notified accordingly. A further package of documents was submitted by the Applicant on March 5, 2012 but was brought to the attention of the Visa Officer after the decision was rendered. Following a review of the package, the Visa Officer concluded that no

additional information was submitted and the refusal decision was maintained. A notice in that regard was sent to the Applicant and sponsor on April 18, 2012.

[10] The decision of the Visa Officer was appealed to the Immigration Appeal Division ("IAD") of the Immigration and Refugee Board. The IAD dismissed the appeal on December 27, 2012. The IAD found that pursuant to s 117(9)(d) of the *Regulations*, the Applicant is not a family member and pursuant to s 65 of the *Act*, the IAD may not consider H&C considerations if the Applicant (the "foreign national") is not a member of the family class.

The impugned decision

[11] In the refusal letter dated March 28, 2012, the Visa Officer first noted that the Applicant did not meet the requirements for immigration to Canada. The Visa Officer indicated that according to s 117(9)(d) of the *Regulations*, the Applicant is not a member of the family class. The Applicant and her daughter were not "examined" when the sponsor, Brak, made an application for permanent residence in Canada or when he became a permanent resident on July 25, 2007. The sponsor had failed to declare his dependents both on the permanent resident application and upon his arrival in Canada. As for the H&C application, the Visa Officer concluded that there were insufficient grounds to warrant an exception.

[12] The CAIPS/GCMS notes provided greater details on the reasons for the refusal of the H&C application. First of all, the Visa Officer noted that there was no factual dispute concerning the sponsor's failure to declare the dependents, and that the reasons for H&C consideration were his failure to declare the dependents and the issue of their safety in Vietnam. Even if it is accepted that

the sponsor was ignorant of the immigration program or category under which he was applying and did not appreciate that non-declared dependents would be ineligible, the Visa Officer found that it was reasonable to expect that Brak would be truthful concerning his background, including but not limited to the existence of his dependents.

[13] Concerning the safety of Brak's dependents in Vietnam, the Visa Officer indicated that neither Brak nor his wife provided reliable and convincing evidence pertaining to their personal experience with the Vietnamese police on the allegations of mistreatment and "severe interrogations for receiving support".

[14] Finally, the Visa Officer found that it would be in the best interests of the child to remain in Vietnam as she was born there, lives there with her biological mother, is financially supported by the sponsor and has maternal relatives living within approximately 2 kilometers from the sponsor's home.

Issue

[15] The only issue for consideration on this application for judicial review is whether the Visa Officer's consideration of the best interests of the child is reasonable.

Analysis

[16] The H&C exemption in s 25 of the *IRPA* provides an exceptional and discretionary relief from Canada's usual immigration law requirements. The assessment of hardship in an H&C

application is a means by which Citizenship and Immigration Canada decision-makers determine whether there are sufficient H&C grounds to justify granting the requested exemption.

[17] The person making an H&C application has the onus of satisfying the officer that, because of the applicant's personal circumstances, the hardship of having to obtain a permanent resident visa from outside of Canada in the normal manner would cause the applicant unusual, undeserved or disproportionate hardship: *Legault v Canada (MCI)*, 2002 FCA 125 at para 23 [*Legault*].

[18] As the Visa Officer's eligibility determination is undoubtedly one of mixed fact and law, I agree with both the Applicant and the Respondent that the decision of the Visa Officer is subject to review on a reasonableness standard: see, for example, *Kobita v Canada (MCI)*, 2012 FC 1479, at paras 14-16 [*Kobita*]; *Sultana v Canada (MCI)*, 2009 FC 533, at para 17 [*Sultana*].

[19] In reviewing an officer's decision on a standard of reasonableness, the Court should not interfere if the officer's decision is transparent, justifiable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and law. It is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence that was before the officer: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47; *Canada (MCI) v Khosa*, 2009 SCC 12, at para 59.

[20] I agree with the Applicant that the consideration of the best interests of the child in the case at bar was not reasonable, as the Visa Officer was not "alert, alive and sensitive" to the best interests of the child: *Baker v Canada (MCI)*, [1999] 2 SCR 817; *Hawthorne v Canada (MCI)*, 2002 FCA

475; and *Legault*. As this Court confirmed in *Cordeiro v Canada (MCI)*, 2004 FC 1231, and more recently in *Kobita*, a visa officer may weigh the pros and cons or the impacts of different scenarios on a child, but the officer should not ignore or fail to consider one of those scenarios, i.e. how the best interests of the child could also be addressed by reuniting the family in Canada.

[21] In the case at bar, the Visa Officer only considered how the Applicant's child's best interests would be met in Vietnam, and did not consider how the child's best interests could be met through the other alternative or option, i.e. living in Canada with both her parents and her paternal relatives. Given that this family's goal in pursuing the permanent residence application was to be together in Canada, that scenario should have been considered to determine if the best interests of the child could be met, and then weighed or balanced against other scenarios.

[22] Counsel for the Respondent responded that there is almost no reference to the child and no submissions specifically relating to the best interests of the child. As the onus was on the Applicant seeking an exemption from the requirements of the *Act* on H&C grounds to provide adequate support for the application, the Applicant omitted that information from his written submissions, at his own peril.

[23] I disagree with that submission. In his declaration and statements in support of the H&C request, Brak outlined, in great detail and with supporting documentary evidence, the continuing human rights abuses the Jarai/Montagnard people in Vietnam – to which group he, his wife and their daughter H'Soanh belong – are subjected to by the Vietnamese authorities. These include religious persecution, restrictions on their movement, interrogations and assault. Even though the

Applicant and the sponsor did not submit evidence of their personal experience with the Vietnamese police, this does not make the allegations of abuse of the Jarai people in Vietnam any less serious. An applicant can show that "the fear he had resulted not from reprehensible acts committed or likely to be committed directly against him but from reprehensible acts committed or likely to be committed against members of a group to which he belonged", as stated in *Salibian v Canada (MCI)*, [1990] 3 FC 250.

[24] I agree with the Respondent that the onus lies upon the Applicant to make the case for the children's best interests. I would also agree that the Applicant's submission in that respect could have been more explicit. That being said, Brak repeatedly referred to his daughter in his statements and also specifically requested the Visa Officer to "…also consider the ongoing human rights abuses toward my family personally and toward my people as a whole. I ask that my wife Phyang (age 29) and our baby girl H'Soanh – (age 4), be reunited with me here in Vancouver, Canada". There is no evidence that the Visa Officer did consider, in conducting the best interests of the child analysis, that the child is a Jarai person and would likely continue to experience or face human rights abuses, religious persecution and harassment in the future if she was to stay in Vietnam, and, conversely, that she would be free from cultural or other types of oppression or abuses in Vancouver and would have social, familial and other support services available in this country. As I stated in *Sultana*, at para 36:

> While an immigration official should not be left to speculate as to how a child will be impacted by his or her decision, it would be preposterous to require from an applicant a detailed and minute demonstration of the negative consequences of such a decision when they can be reasonably deducted from the facts brought to his or her attention.

[25] The Respondent further submitted that the Applicant and her daughter are separated from Brak as a consequence of the choices and actions of Brak, who failed to disclose the marriage and child when he obtained permanent residence in Canada. According to the Respondent, it is well established that a misrepresentation on an application for permanent residence is a relevant public policy consideration in an H&C assessment.

[26] It is not entirely clear whether Brak disclosed his marriage to Phyang and his daughter H'Soanh when he arrived at the Vancouver airport in 2007. In the CAIPS notes dated 2012/01/13, the Visa Officer stated: "I believe he [Brak] was questioned about the existence of dependants and he answered negatively to this question more than once". However, a note entered on July 12, 2007 (12 days before the sponsor entered Canada) records the following:

> Just a heads up. We have one OYW [one-year window] arrival, a 22 year old son who was included as a dependent with his mother and siblings, who has declared to us that he has a fiancé (sic) and child. He did not include them on his application and he did not tell anyone about the fiancé (sic) and child.
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> Certified Tribunal Record, p 58

[27] Moreover, both Brak and his mother filed affidavits wherein they affirm that Brak's marriage was disclosed, as well as the fact that he had a daughter. This issue is therefore not free from doubt.

[28] Furthermore, there is no evidence before this Court that the Visa Officer considered the Applicant's and her daughter's alleged non-disclosure as a relevant public policy consideration in rejecting their application. The Visa Officer also does not confirm in his/her affidavit that he/she indeed did so. In any event, public policy considerations have been removed from the factors that

can be taken into consideration when assessing an H&C application when section 25(1) was amended in 2010. Finally, the Visa Officer's comment reveals that he/she was perhaps unduly influenced by the Applicant's exclusion under s 117(9)(d), which could explain why he/she failed to properly analyze whether or not the personal circumstances of the Applicant warranted exemption for H&C reasons. As Justice Kelen noted in *Hurtado v Canada (MCI)*, 2007 FC 552 (at para 14), "if the applicant's misrepresentation were the only factor to be considered, there would be no room for discretion left to the Minister under section 25 of the Act".

[29] Counsel for the Respondent also argued that the test for determining whether an exception should be made under H&C grounds was set out in *Irimie v Canada (MCI)* (2000), 10 Imm LR (3d) 206, at para 26, where Justice Pelletier held that the H&C exemption process "is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship". This is the wrong test to apply, however, in the analysis of the best interests of the child. The correct test is that of being alert, alive and sensitive to the child's circumstances. Incorporating the "unusual, undeserved or disproportionate hardship" threshold into the analysis of the best interests of the child has been characterized in a number of decisions of this Court as an error in law: see, *inter alia*, *Arulraj v Canada (MCI)*, 2006 FC 529; *Mangru v Canada (MCI)*, 2011 FC 779; *Shchegolevich v Canada (MCI)*, 2008 FC 527; *Williams v Canada (MCI)*, 2012 FC 166.

Conclusion

[30] For all the above reasons, I am of the view that this application for judicial review ought to be granted, and that the application for an exemption from inadmissibility pursuant to s 25 of the *IRPA* should be re-determined by another immigration officer. I believe that the Visa Officer

committed a reviewable error in law and in fact, and applied the wrong test for the determination of the best interests of the child and failed to consider all the relevant evidence. More particularly, the Visa Officer took the status quo as the starting point and determined that it would not be unduly harsh for the child to remain in Vietnam with her mother, without considering how the best interests of that child could also be addressed by reuniting her with both parents in Canada.

[31] Counsel for the Applicant urged the Court to consider the possibility of certifying a question as to whether or not the Visa Officer should take it for granted that the situation of a child is better in Canada. This issue has been canvassed by this Court in a number of prior decisions, and would not be dispositive of the application for judicial review.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review is allowed, and the application for an exemption from inadmissibility pursuant to s 25 of the *IRPA* should be re-determined by another immigration officer; and

2. No question of general importance is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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