Federal Court  Cour fédérale

Date: 20141003

Docket: IMM-1200-14

Citation: 2014 FC 943

Vancouver, British Columbia, October 3, 2014

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

IVAN SIMKOVIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Having been convicted of tax evasion in Slovakia, Ivan Simkovic is inadmissible to Canada due to his serious criminality. Mr. Simkovic applied for permanent residence on humanitarian and compassionate grounds in 2011. However an immigration officer concluded that the humanitarian and compassionate considerations advanced by Mr. Simkovic did not outweigh his inadmissibility for serious criminality.

[2] Mr. Simkovic has not persuaded me that the officer's decision was unreasonable or that he was denied procedural fairness in this matter. Consequently, the application will be dismissed.

I. Background

[3] Mr. Simkovic came to Canada as a visitor in 1992, but he did not leave the country when his visa expired. He is married to a Canadian citizen and has a Canadian-born son named Samuel, who was 13-years-old at the time of the H&C decision in issue. Mr. Simkovic has been employed since he arrived in Canada, although he has only been working legally since 2007.

[4] Mr. Simkovic's wife attempted to sponsor him in 2008, but that application was refused in 2010 when Mr. Simkovic failed to provide documentation with respect to his criminal conviction in Slovakia. Although Mr. Simkovic sought leave of this Court to judicially review that decision, his application for leave was subsequently withdrawn.

[5] Mr. Simkovic then sought refugee protection, claiming to have a well-founded fear of persecution in Slovakia based upon his political opinion or perceived political opinion. He further claimed to face risks contemplated by section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

[6] The Minister intervened in Mr. Simkovic's refugee claim, and the Refugee Protection Division found him to be excluded from the protection of the *Refugee Convention* under Article 1F(b) of the Convention and section 98 of *IRPA* by reason of his serious criminality. An application for judicial review from the Board's decision was subsequently dismissed by this Court: *Simkovic v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 113, [2014] F.C.J. No. 152.

[7] In the meantime, in November of 2011, Mr. Simkovic filed his application for permanent residence on humanitarian and compassionate grounds. In support of his application, Mr. Simkovic relied on the best interests of his son and his establishment in Canada. He also cited unfavourable conditions in Slovakia, and made submissions with respect to the alleged unfairness of his criminal trial in that country.

[8] After considering Mr. Simkovic's submissions, an immigration officer determined that Mr. Simkovic would not suffer unusual and undeserved or disproportionate hardship if he were required to obtain a permanent resident visa from outside Canada. The officer was further satisfied that the H&C considerations put forward in support of Mr. Simkovic's application did not outweigh his inadmissibility for serious criminality.

[9] Mr. Simkovic contends that the immigration officer made a number of errors in assessing his application. Each of these alleged errors will be addressed below.

II. The Assessment of Samuel's Best Interests

[10] The primary focus of Mr. Simkovic's argument is the alleged deficiencies in the immigration officer's "best interests of the child" (or BIOC) analysis. In particular, Mr. Simkovic asserts that the officer failed to apply the approach to the assessment of the best interests of children described in *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166, [2012] F.C.J. No. 184.

[11] In *Williams*, Justice Russell held that in assessing the best interests of a child, officers "must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, … determine

the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application": at para. 63.

[12] According to Mr. Simkovic, the officer's failure to follow the *Williams* formulation means that her BIOC assessment in this case was fatally flawed. I disagree.

[13] The "formula" described in *Williams* "need not be mechanically applied in every case": *Hoyos v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 998 at para. 33, [2013] F.C.J. No. 1096. *Williams* provides "a useful guideline" for assessing a child's best interests, but this guideline is not one mandated by Supreme Court or Federal Court of Appeal jurisprudence: *Webb v. Canada (Citizenship and Immigration)*, 2012 FC 1060 at para. 13, 417 F.T.R. 306.

[14] As noted by the respondent, the Federal Court of Appeal held in *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at para. 4, [2003] 2 F.C. 555, that the best interests of a child are to be determined by assessing the benefit that would accrue to a child if the parent were to remain in Canada, and the hardship that the child would suffer from the parent's removal from Canada.

[15] The Court explained that the officer's task is to weigh the likely degree of hardship caused by removal "together with other factors, including public policy considerations that militate in favour of or against the removal of the parent": *Hawthorne*, at para. 6. That is precisely what the officer did here.

[16] Officers are "presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with [his] parent is better off than a child living in Canada without [his] parent". The Federal Court of Appeal was clear that

absent exceptional circumstances, the officer need not expressly state "that the 'child's best interests' factor will play in favour of the non-removal of the parent": both quotes from *Hawthorne*, above at para. 5.

[17] Mr. Simkovic's H&C submissions addressed the impact his removal would have on Samuel. It was thus reasonable for the officer to focus on this eventuality. The officer did not, however, limit her analysis in this way, but also considered the impact on Samuel if the family were to relocate to Slovakia.

[18] Mr. Simkovic also takes issue with the officer's treatment of a 2010 psycho-educational report regarding Samuel's learning challenges. This report indicated that although Samuel was very bright, his ability to express knowledge in written applications showed relative weakness. While he was "not considered to present significant risk of failing to meet required learning outcomes", he did qualify for adaptations "such as use of a calculator and spellchecker".

[19] The officer was concerned that no information regarding the qualifications of the author of the report had been provided. Mr. Simkovic says that this concern was unreasonable, given that the author is identified in the report as a "school psychologist". Even if I were to accept Mr. Simkovic's submission on this point, the officer had a second, independent basis for according little weight to the report: namely that it was prepared in 2010, and did not reflect Samuel's situation at the time Mr. Simkovic's H&C application was assessed in 2014. This was an entirely reasonable observation.

[20] Mr. Simkovic also says that it was unfair for the officer to question the credibility of the psycho-educational report without giving him an opportunity to respond. To the extent that the

officer was concerned the report was out of date, the onus is on an applicant for H&C relief to ensure that his submissions are kept up to date. The officer was not obligated to ask Mr. Simkovic for an updated report regarding Samuel's progress. No breach of procedural fairness has thus been established.

[21] The officer was, moreover, not satisfied that Samuel would be unable to obtain whatever learning support that he may require in Slovakia. Mr. Simkovic has not directed me to any evidence in the record that would undermine that finding.

[22] Mr. Simkovic submits that the officer's observation that he had left his young son from his first marriage behind when he left Slovakia was something of a "gratuitous shot" at him. I do not disagree that the comment could be interpreted in that way, but read in context, the officer seems to be observing that Mr. Simkovic was nevertheless able to maintain a relationship with that son despite the geographical distance between them.

[23] Finally, Mr. Simkovic contends that the officer did not pay sufficient attention to the financial hardship that his wife and son would experience, were he required to leave Canada. The officer found that there was insufficient evidence to show that Mr. Simkovic would be unable to obtain alternate employment in Slovakia. Mr. Simkovic says this finding was unreasonable, given that the Slovakian Court had barred him from performing business activities for a period of five years.

[24] There are two difficulties with this submission. The first is that it was not made to the officer. While a copy of the Slovakian Court judgment was in the material filed in support of Mr. Simkovic's application, these materials were voluminous, and the officer could not be

expected to scour the documents to see if they revealed an argument that had not been advanced by Mr. Simkovic himself. The more fundamental problem with Mr. Simkovic's argument is that even if he were barred from performing business activities for five years, it does not mean he could not accept employment during that period.

III. Assessment of H&C Factors Relating to Mr. Simkovic's Conviction

[25] Mr. Simkovic submits that the officer further erred in failing to consider that his criminal conviction was his first offence, that it did not involve a crime of violence, and that the sum involved in the tax fraud was only $180,000 in Canadian money. Mr. Simkovic acknowledges that he did not make these submissions to the officer. He says, however, that the officer had a copy of the Refugee Protection Division's decision in his case, and that these facts were disclosed in that decision.

[26] Insofar as his serious criminality was concerned, Mr. Simkovic's H&C submissions all focussed on the alleged unfairness of his Slovakian trial. These submissions were squarely addressed by the officer, who held that it was not her role to sit as a court of appeal from a judgment of a Slovakian court. Mr. Simkovic does not allege that the officer erred in this regard. Given that the Refugee Protection Division had already found that Mr. Simkovic had committed a serious non-political crime, I am not persuaded that the officer's treatment of Mr. Simkovic's conviction was unreasonable.

[27] Once again, it was incumbent on Mr. Simkovic to put forward the H&C factors that he wished to have considered. Applicants have no right or legitimate expectation that they will be afforded a hearing in order to advance their claims, with the result that they omit pertinent information from their applications at their peril: *Owusu v. Canada (Minister of Citizenship and*

Immigration), 2004 FCA 38 at para. 8, [2004] 2 F.C.R. 635. The officer can hardly be faulted for failing to consider submissions that were not made to her.

IV. Conclusion

[28] At the end of the day, we are left with the weight that the officer ascribed to the factors favouring the positive exercise of her discretion and the weight ascribed to Mr. Simkovic's serious criminality. In the absence of a reviewable error on the part of the officer, it is not the task of this Court to reweigh the evidence on judicial review. The application for judicial review is thus dismissed. I agree with the parties that the case does not raise a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Anne L. Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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