Federal Court of Appeal | Cour d'appel fédérale

Date: 20100706

Docket: A-276-09

Citation: 2010 FCA 177

CORAM: **NOËL J.A.**
DAWSON J.A.
TRUDEL J.A.

BETWEEN:

JEREMY DEAN HINZMAN
NGA THI NGUYEN and
LIAM LIEM NGUYEN HINZMAN

Appellants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on May 25, 2010.

Judgment delivered at Ottawa, Ontario, on July 6, 2010.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: NOËL J.A.
DAWSON J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

Introduction

[1] Mr. Hinzman is an American soldier who holds strong moral and religious beliefs against "all participation in war" (Hinzman's affidavit, appeal book, volume 1, page 143, at paragraphs 18 and 44). He left the United States upon learning that his unit would be deployed to Iraq and has been absent without leave [AWOL] from the United States Army since his arrival in Canada on 3

January 2004. He was accompanied by his wife Ms. Nguyen and their son Liam, also United States citizens [together the appellants].

[2] The appellants unsuccessfully claimed refugee status, asserting that they had a well-founded fear of persecution in the United States, based upon Mr. Hinzman's political opinion (see: *Hinzman v. Canada (Minister of Citizenship and Immigration); Hughey v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 leave to appeal to the Supreme Court of Canada refused, [2007] S.C.C.A. No. 321.

[3] Then, the appellants filed a Pre-Removal Risk Assessment (PRRA) application and an application for permanent residence from within Canada under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) on humanitarian and compassionate (H&C) grounds. Subsection 25(1) provides:

Humanitarian and compassionate considerations	Séjour pour motif d'ordre humanitaire
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, 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	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, 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.

> directly affected, or by public policy considerations.

[4] PRRA Officer S. Parr (the Officer or H&C Officer) issued negative decisions in both applications, respectively on 25 and 22 July 2008. The appellants did not pursue judicial review of the negative decision in their PRRA application. They were granted a stay of removal pending the disposition of their application for leave and for judicial review of their H&C application.

[5] This appeal arises from a judgment by Russell J. (the Applications Judge) of the Federal Court, issued on 2 June 2009 (Docket: IMM-3813-08) following the release of reasons on 24 April 2009 (Reasons) (2009 FC 415). The Applications Judge dismissed the application for judicial review of the Officer's H&C decision refusing the appellants' application for permanent residence from within Canada.

The certified question

[6] This appeal comes to our Court by way of paragraph 74(*d*) of the Act because the Applications Judge, in rendering judgment, certified that a serious question of general importance, that is one which would be dispositive of the appeal, was involved:

> Can punishment under a law of general application for desertion, when the desertion was motivated by a sincere and deeply held moral, political and/or religious objection to a

> particular war, amount to unusual, undeserved or disproportionate hardship in the context of an application for permanent residence on humanitarian and compassionate grounds?

[7] The appellants invite this Court to give a favourable answer to the certified question and to find that the H&C Officer failed to have regard to Mr. Hinzman's personal circumstances, including his sincerely held moral, political and religious objections to service with the United States Army in Iraq (appellants' memorandum, at paragraph 60).

[8] The respondent argued that the certified question is not dispositive of the appeal because the H&C Officer did not, in her reasons, preclude the possibility that punishment under a law of general application could warrant H&C relief under subsection 25(1) of the Act. The H&C Officer, upon a careful analysis of the facts, simply found no hardship in this case. The respondent submitted that the appeal should be dismissed on this basis. In any event, the respondent adds that the H&C Officer considered all relevant factors, including Mr. Hinzman's motivations.

[9] We indicated in open Court that the question whether the appeal should be dismissed on the basis that the question was deficient would be decided after hearing all the arguments raised as appeal.

[10] It is trite law that the absence of a serious question that is dispositive of the appeal means that the "pre-condition to the right of appeal has not been met" (*Varela v. Canada (Citizenship and Immigration*, 2009 FCA 145, at paragraph 43).

[11] In the same vein, our Court has held that:

> The corollary of the fact that a [certified] question must be dispositive of the appeal is that it must be a question which has been raised and dealt with in the decision below. Otherwise, the certified question is nothing more than a reference of a question to the Court of Appeal. If a question arises on the facts of a case before an applications judge, it is the judge's duty to deal with it. If it does not arise, or if the judge decides that it need not be dealt with, it is not an appropriate question for certification (*Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, at paragraph 12) [*Zazai*].
>
> [Emphasis added.]

[12] At the same time, once a question has been properly certified, the Court of Appeal may consider all aspects of the appeal (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[13] In this matter, the certified question clearly arose on the facts of the case and its subject matter was a live issue between the parties.

[14] Throughout the proceedings, the appellants submitted that Mr. Hinzman risked facing unusual, undeserved and disproportionate hardship if returned to the United States. It was argued that if Mr. Hinzman were subjected to a court-martial proceeding and charged with being AWOL or desertion, that he would receive a more severe punishment than other deserters because of his political opinion regarding the war in Iraq and his choice to speak out publicly about it.

[15] Also, the appellants argued that any additional incarceration that Mr. Hinzman receives, because of his political opinion, be it even one additional day, constitutes the application of a law of general application in a persecutory manner, regardless of any due process or state protection available to him (see counsel submissions on the PRRA and H&C applications, appeal book, volume 1, at pages 307 and 139). International human rights organizations would consider him a prisoner of conscience if returned to the United States and imprisoned for his desertion.

[16] Nonetheless, the Applications Judge, neither attempted to, nor dealt with these arguments leaving this Court to address them in first instance by way of the certified question.

[17] In *Zazai*, cited above, the certified question was also not dealt with by the Applications Judge. Our Court found that the parties would be best served by having the matter addressed at first instance in the Federal Court and therefore returned the file for redetermination on that basis.

[18] I would be inclined to do the same in this case were it not for the fact that regardless of the answer to the question, I have found that the Applications Judge committed an independent error in not holding that the H&C Officer had failed "to have regard to the evidence concerning [Mr. Hinzman's] sincere moral, political and religious objections to service with the U.S. Military in Irak" (appellants' memorandum of facts and law, at paragraph 12).

[19] As I agree with the appellants and conclude that the Applications Judge erred in finding that the H&C Officer committed no error and that she went beyond risk to consider hardship in the

context of the appellants' H&C application (Reasons, at paragraph 79) I propose to allow this appeal and to return the matter for redetermination by a different officer.

Analysis

The PRRA decision

[20] The H&C Officer was also the decision-maker for the appellants' PRRA application, which she dismissed because she was not satisfied that the risk factors alleged existed or were serious enough to grant protection (PRRA decision, appeal book, volume 3, at pages 931-952).

[21] Before dismissing the PRRA application, the Officer analyzed the evidence adduced by the appellants in light of "common considerations applicable to both sections 96 (Convention Refugee) and 97 (person in need of protection) of [the Act]: Law of General Application; and State Protection" (*ibidem*, at page 940).

[22] As far as the law of general application was concerned, the Officer looked, in particular, at the *Uniform Code of Military Justice* (UCMJ, 64 Stat. 109, 10 U.S.C. Chapter 47) and its punitive articles relating to desertion and AWOL (articles 85-87) and ultimately found:

> … that the possibility of prosecution under a law of general application is not, in and of itself, sufficient evidence that an applicant has a well-founded fear of persecution. The PRRA application is not an avenue to circumvent lawful and legitimate prosecutions commenced by a democratic country" (PRRA decision, s*upra*, at page 943).

[23] Regarding state protection, the Officer, while affording some weight to Amnesty International's statement that Mr. Hinzman, if removed and imprisoned, would be considered a prisoner of conscience, concluded:

> … based on my analysis of the available state protection for the principal applicant in the military justice system, I do not find… convincing evidence that the United States is unable or unwilling to provide protection to [Mr. Hinzman] (*ibidem*, at page 948).

[24] The appellants did not seek leave to apply for judicial review of the PPRA decision and therefore its merits are not before our Court. However, these findings read in the context of the PRRA decision are important as they are repeated in and constitute the basis of the H&C decision (H&C decision, appeal book, volume 1, tab 4, at page 59).

The H&C decision

[25] There lies the difficulty with the Officer's H&C decision. While dealing with the PRRA application, the Officer had to (a) give consideration to any of the appellants' (then failed refugees) new, credible, relevant and material evidence of facts that might have affected the outcome of their refugee claim hearing if this evidence had been presented and, (b) assess the risk against the country of removal (*Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385).

[26] However, when dealing with the appellants' H&C application, the H&C Officer needed to have regard to public policy considerations and humanitarian grounds, including family-related

interests (*Baker, supra*, at paragraphs 14-17 and 75; *Okoloubu v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 326, at paragraphs 46 and 48-49).

[27] In my view, the appellants are right when they state that "the Officer's analysis is really nothing more than a risk assessment which stops short at the availability of state protection and due process" (appellants' memorandum, at paragraph 69).

[28] At the outset of her reasons, the Officer declares that "the appellants' H&C application has been assessed on the basis of unusual and undeserved, or disproportionate hardship" (H&C decision, *ibidem*). It is common ground that this is the appropriate test.

[29] She then reasserts her previous findings made in the PRRA decision regarding the law of general application and state protection. She writes:

> It is important to note that the possibility of prosecution for a law of general application is not, in and of itself, sufficient evidence that an applicant will face unusual and undeserved, or disproportionate hardship. The H&C application is not an avenue to circumvent lawful and legitimate prosecutions commenced by a democratic county (*ibidem*, at pages 62-63; see also Applications Judge's Reasons, at paragraph 73).

[30] However, she never turns her mind to the thrust of the H&C application: will Mr. Hinzman be subjected to disproportionate hardship if returned to the United States, regardless of the existence of a law of general application or state protection and notwithstanding other findings on differential

treatment and due process? [the key issue] (see counsel's submissions in the H&C application, appeal book, volume 1, at pages 125 and following).

The Federal Court decision

[31] The Officer's failure to address Mr. Hinzman's motivations was a formal ground of complaint by the appellants. See paragraph 57 of the Applications Judge's Reasons:

> [57] The Applicants also submit that the Officer failed to address the motivations of the Principal Applicant in coming to Canada or the fact that he would be a prisoner of conscience if returned to the U.S. and incarcerated upon returning to the U.S.

[32] Yet, the Applications Judge provides no further comments on the alleged error or key issue except implicitly, as counsel for the respondent contends, citing paragraphs 76 and 77 of the Reasons where the Applications Judge expresses his view that it cannot "be said that the Officer's analysis stops at risk assessment and the availability of state protection and due process."

[33] Paragraphs 76 and 77 of the Applications Judge's Reasons read as follows:

> [76] When read in the context of the whole Decision it is clear to me that the Officer considers hardship from two perspectives:
>
> 1. She looks at the prosecutorial and military processes that the Principal Applicant will face and concludes that they cannot be considered unusual, undeserved or disproportionate hardship because the United States is merely applying laws of general application and the Principal Applicant will be able to

> avail himself of due process. Lawful and legitimate prosecution cannot, *per se*, be unusual, undeserved or disproportionate hardship; and
>
> 2. She considers and concludes that accessing due process and state protection will not be a hardship.
>
> [77] In other words, I do not think it can be said that the Officer's analysis stops at risk assessment and the availability of state protection and due process.

[34] Then, the Applications Judge, at paragraph 81 of his Reasons, goes on, finding that the Officer:

> … comes to the conclusion that the hardships attached to laws of general application in a democratic state cannot be considered as unusual and undeserved or disproportionate under Canadian law. She appropriately addresses hardship for both judicial and non-judicial punishment. I have no authority before me to suggest that she was wrong or unreasonable in these conclusions.

[35] Considering hardship from the point of view or judicial and non-judicial punishment failed to resolve the key issue. The result of that failure is that an entire and central H&C factor raised by the appellants in their application was overlooked by the Officer as well as by the Applications Judge.

[36] The beliefs and motivations of Mr. Hinzman were of important significance to the ultimate decision, given the context of an H&C application. The appellants had also provided some evidence that the right to conscientious objection "is an emerging part of international human rights law" (*Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (FCA),

at paragraph 15). The Officer had given some weight in her PRRA decision to the views of Amnesty International. Still, there is no assessment of these factors in her H&C decision.

[37] The Minister's policy and judicial guidelines for processing applications to remain in Canada based on H&C grounds clearly provide that when assessing a request, officers "must … indicate that all factors have been analysed and explain the weight given to each of these factors and why" before conducting "a balancing exercise between the positive H&C factors identified and the facts that weight against granting an exemption" (Inland Processing Policy Manual, Chapter 5, Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds, Appendix B.)

[38] I adopt the reasoning of my colleague Evans J., then a judge of the Federal Court, that:

> … the more important the evidence that is not mentioned specifically and analyzed in the … reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence"" (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] A.C.F. no 1425, at paragraph 17).

Conclusion

[39] My conclusion should not be seen as altering the discretion of officers making decisions on section 25 applications, nor as giving the appellants a "right to a particular outcome or to the application of a particular legal test" (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1; [2002] 1 S.C.R. 3).

[40] However, the H&C Officer had the duty to look at all of the appellants' personal circumstances, including Mr. Hinzman's beliefs and motivations, before determining if there were sufficient reasons to make a positive H&C decision (*ibidem*, Chapter 5, section 11.3). She did not. Had the Applications Judge addressed the appellants' ground of complaint, as stated at paragraph 57 of his Reasons, I am convinced that he would have concluded as I do and found that the H&C decision was significantly flawed and therefore unreasonable.

[41] Consequently, I propose to allow the appeal and, rendering the judgment that the Federal Court ought to have rendered, I would set aside the decision of the Officer denying the appellants' H&C application and I would refer the application back for redetermination by a different officer in accordance with these reasons.

"Johanne Trudel"

J.A.

"I agree
Marc Noël J.A."

"I agree
Eleanor R. Dawson J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-276-09
STYLE OF CAUSE:	JEREMY DEAN HINZMAN, NGA THI NGUYEN and LIAM LIEM NGUYEN HINZMAN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 25, 2010
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	NOËL J.A. DAWSON J.A.
DATED:	July 6, 2010

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