Federal Court  Cour fédérale

Date: 20100930

Docket: IMM-5485-09

Citation: 2010 FC 974

Ottawa, Ontario, September 30, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

EDWARD AMPONSAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision of Visa Officer Karen Salloum (the Officer) dated July 7, 2009, wherein the Officer refused the applicant's application for permanent residence as a member of the family class based on humanitarian and compassionate grounds (H&C).

Factual Background

[2] The applicant is a 22-year-old citizen of Ghana. His mother and sponsor, Ms. Georgina Asante (the sponsor), is a Canadian citizen. She first arrived in Canada in 1996 after being sponsored by her parents, who had immigrated to Canada a number of years earlier.

[3] At the time of her application for permanent residence, she did not disclose the fact that she had a son. She states that she did not do so because she was embarrassed, since the applicant was conceived when the sponsor was 12 years old. She also states that her parents were not aware of her pregnancy. She allegedly did not disclose the existence of the applicant because she did not want her parents to withdraw their sponsorship. She claims that she told her parents about the applicant just a few days after her arrival in Canada, despite the fact that her lawyer mistakenly wrote in the written submissions to the Officer that her parents only found out about the applicant a year ago.

[4] The sponsor's first application for sponsorship was rejected on March 22, 2006 because the applicant was not considered a member of the family class under section 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 due to the sponsor's failure to declare him on her permanent residence application. The sponsor did not pursue a consideration of humanitarian and compassionate request at that time because she was not aware that she could do so.

[5] The sponsor submitted another sponsorship application in February 2008 requesting consideration of H&C factors. The Officer interviewed the applicant and the sponsor, and

concluded on July 7, 2009 that there were insufficient H&C grounds on which to grant the applicant permanent residence. The applicant seeks judicial review of this decision.

Impugned Decision

[6] In the letter of rejection, the Officer stated that after interviewing the applicant and the sponsor, it became apparent that the H&C request was "not the true reality of the situation". She also noted that the sponsor had requested an opportunity to revise her request, but the revision had not been forthcoming. The Officer concluded that relief on H&C grounds was not warranted.

[7] In the Computer Assisted Immigration Processing System (CAIPS) notes, the Officer noted that the sponsor had not provided any new information since she was interviewed on January 28, 2009. Thus, the Officer assessed the information that was before her and concluded that the H&C considerations were questionable.

[8] The Officer accepted the DNA evidence demonstrating that the applicant was the biological son of the sponsor. However, the Officer questioned the applicant's statement that said he had never met his father since his birth was registered by his claimed father in 2001. The Officer also found that there was little evidence of communication or support from the sponsor.

[9] The Officer noted that the applicant was attending university in Ghana and that he was being cared for by his extended family. The Officer concluded that the applicant's motivation to come to Canada appeared to be more for his own benefit, for a better chance of success. The Officer

acknowledged the applicant's statement that he missed his mother. The Officer also noted that his mother, the sponsor, had not made an effort to go and see him in Ghana.

[10] The Officer also found that the sponsor stated that her parents knew about the applicant "early on" and she did not believe that they had only found out about him recently.

[11] Finally, the Officer found that the H&C request was not consistent with the applicant and the sponsor's accounts. Thus, she concluded that there were insufficient humanitarian and compassionate grounds upon which to grant the applicant permanent residence.

Issues

[12] This application raises the following issues:

1- *Did the Officer err by failing to properly assess the relevant evidence before her with regard to the humanitarian and compassionate considerations?*

2- *Did the Officer err by failing to provide the sponsor with an opportunity to respond to a concern?*

3- *Did the Officer breach the duty of fairness by failing to provide the sponsor with a fair hearing?*

Statutory provisions

[13] The following provision of the Act is applicable in these proceedings:

Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, 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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**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, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[14] The following provision of the Immigration and Refugee Protection Regulations (IRPA) is also applicable in these proceedings:

Excluded relationships	Restrictions
117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	**117.** (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
[…]	[…]
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet

permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

Standard of Review

[15] Since *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, issues relating to a visa officer's treatment and consideration of the evidence on an H&C application arising outside of Canada are reviewable on a standard of reasonableness (*Odicho v Canada (Minister of Citizenship and Immigration*, 2008 FC 1039, 341 FTR 18). According to the Supreme Court, the factors to be considered are justification, transparency and intelligibility within the decision-making process. The outcome must be defensible in respect of the facts and the law (*Dunsmuir*, above, at para 47).

[16] The applicant also raised issues of procedural fairness. It has been decided that the standard of review applicable to issues of procedural fairness is correctness (*Dunsmuir*, above, at para 129; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 43).

Analysis

1- *Did the Officer err by failing to properly assess the relevant evidence before her with regard to the humanitarian and compassionate considerations?*

[17] The applicant raised a number of issues regarding the Officer's treatment of the evidence. First, the applicant claims that the Officer erred by failing to consider the fact that he was not

inadmissible for any reason at the time of his refusal other than his exclusion under paragraph 117(9)(*d*) of the Regulations. He alleges that the purpose of paragraph 117(9)(*d*) is to prevent applicants from failing to disclose what would result in the exclusion of the applicant.

[18] It is trite law that the applicant bears the burden of putting all relevant evidence before the officer. In *Madan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1198, 172 FTR 262, at para 6, the Court stated:

> [6] It is well established that it is the responsibility of a visa applicant to put before the officer all the material necessary for a favourable decision to be made. Hence, visa officers are under no general legal duty to ask for clarification or for additional information before rejecting a visa application on the ground that the material was insufficient to satisfy the officer that the applicant had met the relevant section criteria.

[19] In the case at bar, the applicant did not make any submissions to the Officer indicating that he would have been granted permanent residence (*Mei v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1044, 85 Imm LR (3d) 99), but for the fact that his mother had failed to disclose his existence on her permanent resident application. Since the applicant bears the responsibility of submitting all relevant evidence, it was not an error for the Officer to fail to consider a factor on which no submissions had been made.

[20] The applicant further alleges that the Officer erred in her notes of the interview conducted with the sponsor. The CAIPS notes state that the sponsor said that her parents met the applicant in 1998. In her affidavit, the sponsor maintains that she did not make such a statement because her parents have never met the applicant. The applicant submits that this mistake was critical, relevant

and material because the basis of the Officer's refusal was that the sponsor had misrepresented. Consequently, the applicant asserts that the Officer's view and interpretation of the file was tainted from the outset.

[21] The applicant also refers to *Nazir v Canada (Minister of Citizenship and Immigration)*, 2010 FC 553, [2010] FCJ No 655, where the Court held that absent an affidavit from the Officer attesting to the truth of the contents of the CAIPS notes, the sponsor's version of what transpired during an interview is to be preferred.

[22] However, the Court is unconvinced that this was a material error that affected the Officer's decision. In the Court's view, there is nothing in the reasons provided by the Officer to indicate that she relied heavily on this information in rendering a negative decision. The only statement from the Officer regarding the sponsor's parents' knowledge of the applicant is when she writes that the "sponsor's parents knew about the app [applicant] early on and it is not true that they just found out about him recently" [see CAIPS notes].

[23] With respect to the statement that the sponsor's parents knew about the applicant "early on", there is nothing to indicate that the Officer relied on the sponsor's alleged admission that her parents met him in 1998. Indeed, there were a number of other discrepancies between the information provided by the sponsor and the information provided by the applicant. For instance, the applicant stated in his interview that the sponsor's parents knew about her pregnancy. In contrast, the sponsor stated that her parents did not know about the pregnancy and that they first found out about the

applicant after she arrived in Canada. In light of the other inconsistencies between the applicant and the sponsor's accounts, this Court cannot conclude that the alleged error was a critical, relevant or material mistake that would warrant an intervention from this Court.

[24] The applicant further submits that the Officer ignored evidence that he and the sponsor miss each other and improperly concluded that the applicant wanted to come to Canada for his own benefit. The applicant notes that, in a handwritten letter submitted with the application, the sponsor indicated her desire to be reunited with her son. The applicant further notes that he stated in his interview that he misses his mother. Thus, the applicant submits that there was no evidentiary basis on which the Officer could conclude that he wanted to come to Canada "more for his benefit".

[25] On that point, the applicant refers to *Krauchanka v Canada (Minister of Citizenship and Immigration)*, 2010 FC 209, [2010] FCJ No. 245, in which the Court allowed an application for judicial review because the Officer failed to consider that the sponsor clearly loved his wife and child and that they wanted to be together. The applicant submits that the Officer made the same error in this case.

[26] The Court cannot agree because *Krauchanka* is distinguishable from the case at bar. In *Krauchanka*, the sponsor had left Canada and returned to Belarus to be with his wife and child. After eight months of unsuccessfully searching for a job, the sponsor had to return to Canada because his money had run out.

[27] However, in the present case, the Officer noted that the sponsor had made no attempt to come and visit her son since she came to Canada in 1996, that there was very little evidence of communication between the sponsor and the applicant, and that there was no evidence that the sponsor was providing any support for the applicant. In his interview, the applicant also stated that his mother took a long time to sponsor him because she wanted him to complete his graduate studies in Ghana before he would complete a Master's degree in Canada. He further stated that he wished to come to Canada because he misses his mother and because he knows he will have a better chance for success in Canada. Based on the evidence, the Officer's conclusion that the applicant's motivation for coming to Canada "appears to be more for his own benefit so he can have a better chance at being successful" is reasonable.

[28] The applicant also submits that the Officer drew a negative inference from the fact that the sponsor failed to provide an amendment to her H&C request. The CAIPS notes state that she requested an opportunity to amend her H&C request during her telephone interview. The applicant submits that he should not have been penalized because the sponsor did not do so, particularly if the amendment was simply to correct an error in the written statement, of which the Officer was aware.

[29] The Officer noted that no new information had been provided by the sponsor despite her request, and she then went on to consider the H&C factors that had been put before her. This Court sees nothing indicating that the Officer drew a negative inference from the sponsor's failure to provide an amended H&C request.

[30] Finally, the applicant alleges that the Officer erred by assessing ongoing communication and support between the sponsor and the applicant. The applicant submits that these considerations are relevant to an assessment of the legitimacy of a relationship, but are not relevant in this case because the legitimacy of the relationship was established through accepted DNA evidence.

[31] The applicant's H&C application was based on the reunification of the sponsor with her son. Although a biological relationship was established through DNA evidence, the lack of communication and support was a relevant factor for determining the legitimacy of the H&C request based on a loving relationship between the sponsor and the applicant. The Officer's decision is this regard was reasonable.

2- Did the Officer err by failing to provide the sponsor with an opportunity to respond to a concern?

[32] The applicant submits that the Officer erred by failing to communicate some of her concerns to the sponsor during her telephone interview. Specifically, the applicant claims that the Officer should have asked the sponsor why the applicant stated in his interview that her parents knew about her pregnancy. The sponsor has clearly stated in her affidavit that if she had been told that the applicant made such a statement, she would have denied it completely.

[33] The Court does not agree. In the context of an H&C application, the onus lies on the applicant. Recently, in *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360, at para 45, the Federal Court of Appeal stated the following:

> [45] It is trite law that the content of procedural fairness is variable and contextual […]. The ultimate question in each case is whether the person affected by a decision "had a meaningful opportunity to present their case fully and fairly" […]. In the context of H&C applications, it has been consistently held that the onus of establishing that an H&C exemption is warranted lies with an applicant; an officer is under no duty to highlight weaknesses in an application and to request further submissions […]

[34] Moreover, the information at issue here is not related to an extrinsic source, but was provided by the applicant himself. While there may be a duty upon officers to disclose extrinsic information and provide an applicant with an opportunity to respond, there is no corresponding duty when the information provided is provided by or readily available to the applicant. Thus, the Officer's non disclosure of the discrepancy between the applicant and the sponsor's accounts does not amount to a breach of procedural fairness.

3- Did the Officer breach the duty of fairness by failing to provide the sponsor with a fair hearing?

[35] Finally, the applicant asserts that the Officer breached the duty of fairness when interviewing the sponsor. The sponsor stated in her affidavit that the Officer interviewed her by telephone at approximately four (4) o'clock in the morning. She states that she had worked late the night before and was fast asleep when the Officer called. She indicates that the Officer never asked if this was a good time to call, and that she was exhausted and unprepared for such an important interview. The applicant claims that he was significantly prejudiced by this breach of procedural fairness, as statements made by the sponsor during that interview were relied upon in rendering the negative decision.

[36] The applicant makes reference to *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, where the Supreme Court of Canada listed five factors to consider when evaluating an issue of procedural fairness. These factors include:

1) The nature of the decision being made and process followed in making it;

2) The nature of the statutory scheme and the terms of the statute pursuant to which the body operates;

3) The importance of the decision to the individual or individuals affected;

4) The legitimate expectations of the person challenging the decision; and

5) The choices of procedure made by the agency itself.

[37] The applicant further submits that the stakes were high in this case, as it would result in his reunion with his mother. The applicant also notes that his mother cannot sponsor him a third time because he is now over 22 years of age and is no longer able to be sponsored as a member of the family class. Finally, the applicant submits that the Officer chose to phone the sponsor very early in the morning, a choice which deprived the applicant of fairness to which he feels he was entitled.

[38] While the Court sympathizes with the fact that the sponsor was expected to answer questions regarding her son's, the applicant, permanent resident application quite early in the morning, the Court remains unconvinced that there was a breach of procedural fairness that caused the applicant significant prejudice.

[39] In *Baker*, above, the Supreme Court discussed the general notion behind the duty of fairness. When discussing the five factors identified by the applicant above, the Court stated at para 22:

> [22] I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-makers.

[40] In the present case, the applicant alleges that he was significantly prejudiced because of the timing of the sponsor's interview. However, he has not specified the manner in which he was prejudiced, apart from the fact that the Officer relied partly on information obtained in that interview when rendering her decision. It is also worth noting that the applicant himself has relied on statements made by the sponsor during that interview. The sponsor provided an affidavit regarding what transpired during the interview, demonstrating that she was sufficiently alert at the time to recall the details of the conversation. Further, neither the sponsor nor the applicant has sworn an affidavit or submitted evidence to the effect that the sponsor was unable to present her case fully and fairly because of her exhaustion, apart from a general, unsubstantiated assertion that the applicant suffered severe prejudice.

[41] The Court also notes that, during the call, the sponsor requested to amend her H&C request. Yet she did not take advantage of that opportunity. Thus, while the timing of the interview was not ideal, this Court cannot find that the applicant was prejudiced or that the sponsor was deprived of an opportunity to fully and fairly present her case to the Officer.

[42] This Court finds that the Officer did not breach the duty of procedural fairness.

[43] In conclusion and based on the evidence, the Court finds that the Officer's decision falls within a range of possible, acceptable outcomes which are defensible in fact and in law *(Khosa*). This application is therefore dismissed.

[44] Counsel for the applicant suggested the following proposed questions for certification:

> Does a visa officer or immigration officer err (for the purpose of applying H& C consideration) in requiring ongoing communications and / or whether financial support was provided between parent and child, when DNA results establish the parent child relationship?

[45] An H&C application determined solely on the basis of a familial relationship conflicts with paragraph 117(9)(*d*) of the IRPA Regulations which provided that a foreign national cannot be considered a member of a family class if he or she was a non-accompanying family member of the sponsor and was not examined when the sponsor previously made an application for permanent residence. Hence, and the Court agrees with the respondent, when considering an H&C exemption, the Visa Officer's role is to determine "whether there is a sufficiently strong bond between parent and child that it would be inhumane or uncompassionate to not allow them to be reunited in spite of a violation of the IRPA or IRPA Regulations".

[46] This Court is accordingly of the view that the question proposed for certification does not raise any issue of general importance. It shall not be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review be dismissed. No question is certified.

"Richard Boivin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5485-09
STYLE OF CAUSE:	EDWARD AMPONSAH v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 9, 2010
REASONS FOR JUDGMENT:	BOIVIN J.
DATED:	September 30, 2010

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