Federal Court  Cour fédérale

Date: 20110513

Docket: IMM-5639-10

Citation: 2011 FC 550

Ottawa, Ontario, May 13, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

GILBERT MOORE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72 of *The Immigration and Refugee Protection Act* (the Act), of a decision dated September 16, 2010, refusing the applicant's application for permanent residence from within Canada on humanitarian and compassionate grounds [H&C].

A. Facts

[2] In June 1997, the applicant arrived in Canada, at Vancouver International Airport, and obtained refugee status in May 1999. Shortly thereafter, he applied for permanent residence on humanitarian and compassionate grounds. The documents submitted with his application were analysed and deemed false. In January 2009, there was an application to the Refugee Protection Division [RPD] for vacation of the applicant's refugee claim, on the basis that Canada Border Services Agency [CBSA] for Citizenship and Immigration Canada [CIC] had intercepted a package, received in 1997, containing false identification documents. In December 2009, the applicant's claim was deemed to be rejected and the decision that had lead to the conferral of refugee protection was nullified.

[3] The applicant submitted another H&C application in April 2009.

[4] The applicant married a Canadian citizen in 2002 and has three young children living in Canada.

B. Decision of the review tribunal

[5] The immigration officer rejected the applicant's H&C application.

[6] The immigration officer studied the spousal relationship and the best interests of the children. The officer notes that the applicant son's behavioural problems in school might be related to his anxiety over the uncertainty of his father's immigration status. However, as he has the support of his mother and school, he would be able to adjust to being separated from his father. After reviewing a report from a psychologist, the immigration officer recognizes that Mrs. Moore and her children would experience emotional and financial hardship, but he notes that the children would have the support of their mother and other members of the family. Furthermore, the officer mentions that it is an option for Mrs. Moore and the children to move to Liberia, should the applicant be deported.

[7] The officer then analysed the establishment factors. He notes that the applicant has held several different jobs since 2007, that he completed college courses, and that he is involved in his community. The officer concludes that the applicant shows a significant degree of establishment in Canada. However, as the degree of establishment in Canada is not determinative of a positive H&C decision, the officer concludes that it does not constitute sufficient humanitarian and compassionate grounds to merit visa exemption, considering that he has misrepresented himself on several occasions throughout the process.

[8] With regards to post-traumatic stress disorder developed after the trauma experienced in Liberia, the officer notes that the psychologist relied on documents provided by the applicant and did not conduct a formal psychological assessment. The officer assigns little weight to Dr. Williams' opinion on consequences, should the applicant return to Liberia.

[9] Concerning the applicant's identity, the officer states that the documents used by the applicant to prove his identity at the beginning of the immigration process (when he arrived and later in front of CIC) were deemed false. Passports obtained in 1999 and 2005 were "probably authentic." The officer concludes that the applicant had, to date, presented insufficient credible evidence of his identity and that his statements with regards to the ability of Liberia to produce such documents were speculative.

[10] The officer concludes that the applicant has not satisfied him that he would suffer unusual and undeserved, or disproportionate hardship, if required to apply for permanent residence from outside Canada. He adds that the applicant has not presented enough documents to satisfy him of his identity and that the misrepresentation in this regard is such a significant negative factor that it cannot be overcome by the positive humanitarian and compassionate factors.

C. Questions in issue

[11] The following issues are raised by this application

(1) What is the standard of review?

(2) Did the officer err in rejecting the H&C application on the basis that the applicant had not established his identity?

D. Analysis

(1) What is the standard of review?

[12] The applicant states that the applicable standard of review is that of reasonableness.

[13] Justice Dawson discusses this issue in *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, 167 ACWS (3d) 974 (QL), where she mentions, at paragraph 11:

> The appropriate standard of review for a humanitarian and compassionate decision as a whole had previously been held to be reasonableness *simpliciter*. See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraphs 57 to 62. Given the discretionary nature of a humanitarian and compassionate decision and its factual intensity, the deferential standard of reasonableness is appropriate. See: *Dunsmuir* at paragraphs 51 and 53.

[14] The appropriate standard of review is that of reasonableness.

(2) Did the officer err in rejecting the H&C application, on the basis that the applicant had not established his identity?

[15] The main issue in this case concerns the identity of the applicant. The officer based her decision on the fact that the applicant had misled the authorities in this regard.

[16] The applicant argues that the officer's conclusion that his identity had not been established is not supported by the CBSA's removal order that seeks to deport the applicant back to Liberia as they are satisfied that he is a Liberian citizen. As such, the officer's conclusion is contrary to the principles of fundamental justice. The applicant also argues that the officer fettered her discretion by treating the applicant's identity as a paramount factor which precludes the possibility of a positive

decision despite positive H&C factors. This issue was addressed in *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533 [*Sultana*].

[17] The respondent states that a significant positive factor for an inland H&C application is a good civil record and compliance with immigration authorities. He adds that his nationality is not questioned, but his personal identity is. Without evidence to establish the applicant's true identity, appropriate security and other verifications cannot be carried out. The respondent argues that the officer duly considered all of the positive factors that were submitted to her and concluded that there were insufficient to outweigh the significant negative factor that immigration authorities still do not know who the applicant is and that the applicant has not clarified this situation. The respondent states that the *Sultana* case does not apply.

[18] Justice Mactavish discussed the issue of identity in a H&C application in *Singh v Canada (Minister of Citizenship and Immigration)*, 2004 FC 187, 39 Imm LR (3d) 208 (QL), where she mentions at paragraph 25 that:

> Once again, I am not persuaded that the immigration officer acted unreasonably in considering issues relating to Mr. Singh's identity. While the identity of an applicant will be a central issue in the admissibility phase of the process, it does not mean that it is necessarily irrelevant at the first stage. The Ministerial guidelines governing H&C applications mandate that immigration officer should consider an application in light of all of the information known to the Department. In my view, it was not unreasonable for the immigration officer to do so.[…]

[19] As such, it was appropriate for the officer to address issues relating to the applicant's identity.

[20] A similar factual situation was recently addressed by this Court in *Ebebe v Canada (Minister of Citizenship and Immigration)*, 2009 FC 936, [2009] FCJ No 1146 (QL) [*Ebebe*], where the applicant had misled immigration authorities and his family with regards to his identity, to finally admit his true identity before the H&C process began. At paragraphs 14 to16, Justice Barnes states that:

> [14] Mr. Ebebe also contends that the Officer was fixated on the issue of his misconduct to the exclusion of other relevant considerations and, in particular, the best interests of his child. This decision, it is argued, suffers from the same frailties that were identified in *Sultana v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 533, [2009] F.C.J. No. 653 (QL).
>
> [15] *Sultana*, above, was a case where important evidence was overlooked and where there was not a proper weighing of the competing evidence by the decision-maker. This is evident from Justice Yves de Montigny's finding at paragraph 29:
>
> > [...] A careful reading of the CAIPS notes reveals that the Immigration officer, on more than one occasion, considers the failure to disclose as a paramount factor precluding any possibility that H&C factors could overcome the exclusion mandated by s.117(9)(d)...
>
> [16] I am not satisfied that the decision under review contains an error of the sort recognized in *Sultana*, above. Instead, what the Court is being asked to do in this case is to reweigh the evidence and to effectively reconsider the Officer's decision on its merits. That is not the proper role of the Court on judicial review: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at paragraph 38.

The same analysis is applicable in this case. The applicant has misled immigration authorities since his arrival in Canada and, as mentioned by the H&C officer, his personal identity is still not established. As such, it is an element that could be taken into account by the officer when rendering her decision.

[21] The applicant argues that the officer assigned too much importance to the issue of his identity and should have given more weight to the best interests of the children. The applicant argues that the officer erred in assessing the best interest of the children. Citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, he states that the decision-maker should consider children's best interests as an important factor and that he should be alert, alive and sensitive to them. The applicant submits that the officer's analysis of the best interests of the children is deficient on a number of accounts and as such, the officer was not alive, alert and sensitive to them. He notes many errors of the officer, such as the fact that the interests of the younger children are barely assessed, that she did not address the advantages of the non-removal of the applicant on the children, that she did not address the financial situation of the family nor did she consider the hardship should the applicant's family move to Liberia.

[22] The respondent argues that the best interests of the children were addressed and taken into consideration by the officer. He notes the absence of an expert's report about the eldest son's alleged actions after he learnt about his father's situation and that the officer took into consideration the scant evidence regarding the two younger children. The respondent analyses the various income tax information provided by the applicant and notes that the applicant's spouse is shown to have earned an income. Finally, the respondent argues that the officer did not err when he considered the option for the family to move to Liberia, as it is the applicant's own evidence that his wife and children would move to Liberia, should he be removed.

[23] In *Ebebe*, Justice Barnes mentions that the officer was alert, alive and sensitive to the best interests of the child. After reviewing the conclusions of the officer in this regard, he concludes at para 21, that:

> All of the above confirms that the Officer carried out a thorough and thoughtful assessment of the best interests of the child. What is essentially being advanced on behalf of Mr. Ebebe is that this decision must be irrational because, in the end, the Officer's concerns about Mr. Ebebe's misconduct overwhelmed the evidence supportive of maintaining family unity. While a different decision could certainly have been reached on this record, it was not an error to give great and, indeed, overriding weight to Mr. Ebebe's misconduct. This was, after all, a case of serious and prolonged misrepresentation of the sort that was of concern to the Court in *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358 at paragraph 19:
>
> > In short, the Immigration Act and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.

[24] In this case, the applicant does not come to the Court with clean hands. He has used false identity documents to support his refugee claim when he arrived in Canada. He submitted new passports which are alleged to have been issued on the presentation of a false birth certificate. Even

if the documents were deemed “probably authentic,” the applicant has failed to provide any additional documents to clear the uncertainties surrounding his identity.

[25] It is not this Court’s duty to reweigh the evidence that was before the officer. The conclusion reached by the officer to give weight to the issue of identity and to conclude that the H&C considerations, even though positive, were not sufficient to grant the application, was reasonable in this instance since the actual identity of the applicant was not clearly and definitively established. As such, the judicial review should be dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance to certify.

"André F.J. Scott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5639-10
STYLE OF CAUSE:	GILBERT MOORE
	Applicant
	and
	THE MINISTER OF CITIZENSHIP AND IMMIGRATION
	Respondent
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