Federal Court Cour fédérale

Date: 20120110

Docket: IMM-6746-10

Citation: 2012 FC 31

Ottawa, Ontario, January 10, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

DEVON JERMAINE GARNETT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of an immigration Officer's decision dated November 5, 2010, refusing to exempt Mr. Devon Jermaine Garnett (the Applicant) from filing for his immigration visa from outside Canada on humanitarian and compassionate grounds [H & C].

[2] For the reasons that follow, this application for judicial review is dismissed.

II. Facts

[3] The Applicant is a 32 years old citizen of Guyana who arrived in Canada on April 22, 2005, using improperly obtained documents.

[4] He subsequently filed a claim for protection on January 30, 2006. That claim was rejected by the Immigration and Refugee Board on June 2, 2006.

[5] The Applicant is presently asking the Court to review the Immigration Officer's decision denying his visa exemption based on H & C grounds.

[6] The Applicant is rightfully employed in Canada as a barber since March 2006. He also worked as a barber in Georgetown, Guyana, prior to his arrival in Canada.

[7] Several letters corroborating his involvement in the community were submitted by the Applicant. All of the signatories support the Applicant's H & C application.

[8] The Applicant listed no family members in Canada and his spouse and daughter are still living in Guyana.

[9] He has always maintained a good civil record since his arrival in Canada.

[10] In his original H & C application the Applicant stated that he feared returning to Guyana. Two written requests for updates, related to that allegation were sent by the immigration Officer, J. Trottier, on July 9, 2010, and then on August 18, 2010. They were left unanswered by the Applicant.

[11] The Officer concluded there was insufficient information to explain how his particular circumstances would place him at risk if he were to apply for a permanent visa from Guyana.

[12] The Officer also concluded that he was not satisfied that the hardship associated with an overseas application, as required under the *IRPA*, would be disproportionate considering the circumstances of the present case.

III. Legislation

[13] Section 25(1) of the *IRPA* provides as follows:

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	**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

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.	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.

IV. Issues and standard of review

A. Issues

1. Did the Officer breach his duty of procedural fairness?

2. Did the Officer fail to consider the evidence or did he base his decision on extrinsic evidence?

B. Standard of review

[14] Questions of procedural fairness are reviewable on a standard of correctness (see *Ahmad v Canada (minister of Citizenship and Immigration)*, 2008 FC 646 at para 14 [*Ahmad*]).

[15] As for the other issue, the Officer's decision is reviewable on a standard of reasonableness. In *Paz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 412, [2009] ACF no 497 at paras 22-25 [*Paz*], Justice Noël clearly explains that:

> [22] In Dunsmuir v. New Brunswick, 2008 SCC 9, 372 N.R.1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."
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> [23] In *Baker* v *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada established that reasonableness is the appropriate standard of review for H&C application decisions. The Court stated at paragraph 62:
>
> > para. 62 ... I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division, [1995] F.C.J. No. 1411, and the Federal Court of Appeal, [1996] F.C.J. No. 1726, in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.
>
> [24] The standard of review of reasonableness has been recently confirmed by this Court. (*Barzegaran* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 681, at paragraphs 15-20; *Zambrano* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, at paragraph 31).
>
> [25] In reviewing the officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (Dunsmuir at paragraph 47).

V. Parties' submissions

A. Applicant's submissions

[16] The Applicant raises a first issue related to procedural fairness claiming the Officer failed to seek further clarification on the evidence adduced before him. The Applicant argues that the Officer should have afforded him the opportunity to respond to his concerns instead of relying on assumptions.

[17] Relying on *Ogunfowora v Canada (Minister of Citizenship and Immigration)*, 2007 FC 471, the Applicant submits that it was impossible to know on which factors the Officer rejected his H & C application.

[18] The Applicant also claims that the Officer relied on irrational assumptions and extrinsic evidence in coming to his conclusions.

[19] The Officer falsely assumed that the Applicant had a social network in Guyana in addition to his family. This, according to the Applicant, constitutes a fatal assumption since it is not supported by any evidence.

[20] The Officer would have also erred in concluding that the Applicant's wife and daughter were his support system in Guyana. Where an administrative tribunal applies the wrong test in assessing the evidence, his decision should be reviewed immediately, according to the Applicant.

B. Respondent's submissions

[21] The Respondent alleges, relying on the jurisprudence of this Court, that Applicant bears the burden of demonstrating that he would suffer unusual, undeserved or disproportionate hardship should he be compelled to return to his country of origin to file his application (see *Paul v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1300 at para 5; *Paz* at paras 15-18; *Jakhu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 159 at para 20).

[22] The Respondent also notes that the difficulties inherent in having to leave Canada are not *per se* sufficient (*Xie v Canada (Minister of Citizenship and Immigration)*, 2010 FC 580 at para 41; *Paz* at para 21; *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11 at para 20; *Ahmad* at para 49).

[23] Moreover, the Respondent submits that the immigration Officer had no obligation to inform the Applicant of his concerns about the insufficiency of evidence adduced. The Federal

Court of Appeal, in *Owusu v Canada (Minister of Citizenship and Immigration)*, [2004] FCJ No 158 at para 5 [*Owusu*], states that the onus is on the Applicant to provide evidence to support his allegations. The Respondent alleges that in the case at bar the Applicant failed to establish any unusual, undeserved or disproportionate hardship having provided evidence to that effect.

[24] The Respondent also underlined before the Court, paragraph 24 of the *Wazid* decision, where Justice Gauthier wrote: "it is important to keep in mind that the Applicants were seeking a privilege by applying for an exemption under section 25(1) of the IRPA. They had the burden of putting their best case forward thereby ensuring that their personal situation and the risks they faced were clearly understood by the officer reviewing their application" (see *Wazid v Canada (Minister of Citizenship and Immigration)*, [2006] FCJ No 1769 at para 24 [*Wazid*]).

[25] The immigration Officer did request for updates from the Applicant. The Respondent submits that, at no time, did he adduce any pertinent evidence that would permit the Officer to allow this H & C application.

[26] The Respondent claims that an Applicant "[…] has the burden of establishing [his] case. Generally, an applicant is to do that once, rather than on the basis of some sort of rolling story of reply, sur-reply and so forth […]" (see *Thandal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 489 at para 9).

[27] The Respondent also alleges that it was open to the Officer to draw conclusions from the lack of evidence provided in this instance compared to what can reasonably be expected in an H & C application.

[28] In the case at hand, the Respondent underlines it was reasonable for the Officer to conclude that his family would be there for him upon his return to Guyana and that their support was not solely financial.

VI. Analysis

1. Did the Officer breach his duty of procedural fairness?

[29] The Officer did not breach his duty of procedural fairness.

[30] An immigration Officer is under no obligation to inform the Applicant of his concerns about the lack of evidence. The jurisprudence of this Court clearly establishes that an Applicant bears the onus of demonstrating that he would face a disproportionate hardship if forced to return to his country of origin to file his application (see *Owusu* at para 5 and *Wazid* at para 24).

[31] The leading cases on the use of extrinsic evidence, in administrative decisions related to immigration, are *Muliadi v Canada (Minister of Employment and Immigration)*, [1986] 2 FC 205 (C.A.) and *Haghighi v Canada* (*Minister of Citizenship and Immigration*), [2000] 4 FC 407 (C.A). "[…] Both of these cases found a breach of procedural fairness where meaningful facts essential or potentially crucial to the decision had been used to support an administrative decision without providing an opportunity to the affected party to respond to or comment upon these facts […]" (see *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at para 22).

[32] There clearly was no need for the Officer to conduct an inquiry since all of the evidence brought forward by the Applicant was before him and duly considered. The Officer decided on the basis of all the evidence adduced by the Applicant. That evidence was found insufficient on crucial aspects of the application. This finding was fatal to the Applicant's claim. This Court cannot find any deficiencies in the Officer's treatment of the evidence.

2. Did the Officer fail to consider the evidence or did he base his decision on extrinsic evidence?

[33] The Officer did not fail to consider the evidence or base his decision on extrinsic evidence.

[34] It is important to note that “the H&C decision-making process is highly discretionary it considers whether a special grant of an exemption is warranted (*Quiroa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 495 at para 19). “Hardship that is inherent in having to leave Canada is not enough [to constitute disproportionate hardship]” (see *Doumbouya v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186 at para 10).

[35] It is also clear from the applicable jurisprudence that “… the legislator has chosen not to prescribe a particular test to be applied by the decision-maker when determining whether an applicant should be granted [H & C] relief. This was confirmed by the Supreme Court of Canada in *Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3 at para 36… The lack of official test or strict parameters is not justification for a judicial review of the decision of a Minister's delegate; it is simply the nature of a discretionary decision” (see also *Paz* at para 28).

[36] The Officer did not base his decision on extrinsic facts. It was open to the immigration Officer to conclude that the Applicant would still find a job as a barber in Guyana since that was his livelihood there prior to his arrival in Canada.

[37] Furthermore, no evidence was adduced by the Applicant to establish that he supports his wife and daughter in Guyana. The Officer writes: “One of the support letter provided made mention of PA using his Canadian income to financially support his wife and daughter back in Guyana. Insufficient evidence was submitted however to support this statement such as money

transfer receipts for instance" (see page 4 of the Tribunal Record). Furthermore, the Applicant failed to provide any evidence that he cannot support his family if forced to return to Guyana to file his application.

[38] The Officer reasonably concluded that the Applicant has a social network in Guyana. His family, even if they do not provide any financial support can nonetheless provide other forms of support in Guyana.

[39] Finally the Court notes that Applicant was afforded opportunities by the Officer to substantiate his claim that he would suffer hardship if his application had to be filed from Guyana. He chose not to respond, he must therefore accept the consequences.

[40] The Officer's decision is reasonable considering the evidence adduced and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

VII. Conclusion

[41] The Officer's decision refusing to exempt the applicant pursuant to section 25(1) of the *IRPA* is reasonable. The Officer correctly assessed all of the evidence filed by the Applicant. This application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. this application for judicial review is dismissed; and

2. there is no question of general interest to certify.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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