Federal Court Cour fédérale

Date: 20130927

Docket: IMM-8827-12

Citation: 2013 FC 995

Ottawa, Ontario, September 27, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

SUZETTE ALICIA VASSELL-SAMUEL

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(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision rejecting the applicant's sponsorship appeal.

Background

[2] The Immigration Appeal Division [IAD or the Board] heard the applicant's case on August 1, 2012 and made its decision on August 12, 2012. The applicant, Ms. Vassell-Samuel, had been

denied a request to sponsor her husband Mr. Edmondo St Joseph Samuel for a permanent resident visa in the family class because he was found to be inadmissible to Canada under section 52(1) of IRPA.

[3] A visa officer had determined in February 2012 that a removal order had been enforced against Mr. Samuel in December 2000 and that he therefore required a Minister's written Authorization to Return to Canada [ARC], pursuant to section 226(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IRPR].

[4] Ms. Vassell-Samuel appealed on humanitarian and compassionate [H&C] grounds for special relief, taking into consideration the best interests of Mr. Samuel's son who was born in January 2000 from a short relationship with another woman with whom he continues to share custody in Jamaica. The biological mother apparently has consented to the son moving to Canada.

[5] Ms. Vassell-Samuel had married Mr. Samuel in July 2010 in Jamaica and wished to bring him and his dependent son to Canada.

[6] The circumstances of the removal in 2000 were that Mr. Samuel, then aged twenty-six, had entered Canada as a visitor in 1999 but overstayed his visitor's visa when it expired on February 28, 2000 and had worked without a work permit. On November 17, 2000, he was convicted of assault against a former girlfriend. On September 28, 2000 a removal order was issued. Mr. Samuel was deported from Canada on December 19, 2000.

[7] The applicant (the appellant before the IAD) met Mr. Samuel in 2006 while visiting Jamaica and a relationship developed. The IAD commented that the couple said they "kept in touch almost daily", but incorrectly stated that "during this almost daily communication with the appellant, the applicant fathered a son who was born on December 16, 2008 to a woman who is not the appellant." In fact, Mr. Samuel's application form had indicated that his son was born on January 15, 2000.

[8] In November 2009, the National Parole Board's Clemency and Pardons Division advised Mr. Samuel that he had been awarded a pardon under the *Criminal Records Act* for the convictions in 2000. The letter noted that this signified the intent of Parliament that he should "no longer be made to suffer any legal disabilities or penalties imposed as a result of a conviction."

[9] On July 3, 2010, Mr. Samuel and Ms. Vassell-Samuel married. On July 14, 2010, Mr. Samuel applied for permanent residence in Canada, giving false answers to whether he had ever been ordered to leave the country and whether he had ever been detained or jailed.

[10] On October 12, 2011, Mr. Samuel wrote to Citizenship and Immigration Canada to request permission to enter Canada, stating his regret for the incidents which gave rise to his convictions in 2000. A Justice of the Peace who had performed the marriage provided a reference letter indicating that she had known him for over 20 years and that he had expressed deep regret for his past mistakes. The Minister of Citizenship and Immigration indicated that he had paid back all of the deportation costs incurred on his behalf.

[11] However, the IAD found that, given the unexplained false statements in the 2010 application and the seriousness of the domestic assault in 2000, it was not satisfied that he was remorseful. It stated that Ms. Vassell-Samuel "views the applicant as a nice person who is gentle, soft-spoken and patient with his child", but "that is not the same person that is written about in the FOSS [*Field Operations Support System*] notes". It also found that there was no evidence that Mr. Samuel had undergone any courses or received any assistance involving anger management.

[12] The Board further found that Mr. Samuel was "doing a fine job of raising his son" and that the boy was not suffering any hardship by living in Jamaica. In fact, it was in his best interest to remain near his mother and his siblings by a different father. The Board noted that Ms. Vassell-Samuel had married Mr. Samuel knowing that he had been deported in the past. It was not satisfied that there were sufficient H&C considerations to warrant granting special relief.

[13] On September 25, 2012, counsel for Ms. Vassell-Samuel wrote to the immigration consultant who had represented the applicant in front of the IAD on August 1, 2012. Her counsel stated that "[f]rom a review of the materials it appears that you failed to competently represent Ms. Vassell-Samuels and her spouse [. . .]. Further you failed to either adequately communicate with Ms. Vassell-Samuel and her spouse the possible consequences in not calling the spouse to give evidence or abandoned Ms. Vassell-Samuel's right to call her spouse without her informed consent." Counsel noted that "[t]hese actions appears [*sic*] to be in direct conflict with Rules 3.01(1), 3.01(4)(e) and 4.01(c) of the Paralegal Rules of Conduct [. . .]."

[14] An affidavit in the record indicates that the Complaints and Discipline Department of the Immigration Consultants of Canada Regulatory Council (ICCRC) has confirmed by telephone that there are no complaints on file against this consultant. The Regulatory Inquiries of the Law Society of Upper Canada (LSUC) confirmed by e-mail that she has no past discipline history since public records have been kept (February 27, 1986) and is not the subject of any current disciplinary proceedings.

Issues

[15] The six issues raised by the applicant are:

a. Did the Board err in relying on the circumstances surrounding the pardoned prior convictions to impugn the Mr. Samuel's character?

b. Did the Board err in relying on charges which did not result in convictions and on a police report to impugn Mr. Samuel's character?

c. Did the Board breach the applicant's right to procedural fairness by relying on omissions in the application for permanent residence to impugn Mr. Samuel's character without putting these to the applicant?

d. Did the Board err in ignoring the period of time since the convictions occurred?

e. Did the Board base its decision on an erroneous finding of fact that it made without regard to the material before it?

f. Did incompetence by Ms. Vassell-Samuel's representative result in a miscarriage of justice?

Standard of Review

[16] Ms. Vassell-Samuel has submitted that the first issue (relying on the circumstance surrounding the pardon) concerns a question of law and that the third (relying on omissions in the application for permanent residence to impugn the sponsored spouse) and last (incompetence of the applicant's representative) issues are questions of procedural fairness, and thus that these three issues are reviewable on a standard of correctness.

[17] The respondent has argued that the first issue is rather a question of mixed fact and law, being the application of the effect of a pardon to the particular case, and thus is reviewable on a standard of reasonableness. It has also argued that the third issue calls for a standard of reasonableness, given the required judicial deference to "decisions which assess credibility, provided that the explanations given are rational or reasonable, or that the evidence on the record permits the Appeal Division to reach, as the case may be, a negative inference as to the credibility of an applicant" (*Singh v Canada (MCI)*, 2002 FCT 347 at para 18).

[18] I find that correctness applies to consideration of the first issue as it stood before the Board in August 2012, although I note that legislative changes since then have rescinded the National Parole Board's power to grant pardons under the *Criminal Records Act*. As Justice Tremblay-Lamer explained in *Boroumand v Canada (MCI)*, 2011 FC 643 at paras 18-19:

> **18** Determining the effect of a pardon on an outstanding application for protection under subsection 112(1) of the IRPA is largely a question of statutory interpretation. The Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 (*Khosa*), at paragraph 44, indicated that, "[e]rrors of law are generally governed by a correctness standard." However, deference will often result where an expert tribunal is interpreting its own statute (*Khosa*, above, at

> paragraph 44; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 54).
>
> **19** Although I accept that a PRRA officer-and in this case a PRRA coordinator-has significant experience interpreting and applying sections 112-114 of the IRPA, that experience does not extend to the interpretation and application of the pardon provisions found in the *Criminal Records Act*. As such, the appropriate standard of review to apply in this case is correctness.

[19] I find that correctness also applies to the third issue. In *Sidhu v Canada (MCI)*, 2012 FC 515, at para 38, Justice Russell explained of a similar issue:

> The first issue the Applicant has raised implicates her opportunity to respond to the case against her (see *Dios v Canada (Minister of Citizenship and Immigration)* 2008 FC 1322 at paragraph 22, *Adil v Canada (Minister of Citizenship and Immigration)* 2010 FC 987 at paragraph 17, and *Rukmangathan v Canada (Minister of Citizenship and Immigration)* 2004 FC 284 at paragraph 22). In Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour), 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that the "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in Sketchley v Canada (Attorney General) 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review with respect to the first issue is correctness.

[20] For the last issue, this Court has found that alleged incompetence by a representative is indeed an issue of procedural fairness, reviewable on a standard of correctness; see for instance *Galyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 250, at paras 26-27.

[21] For the other three issues, there is agreement that the standard is reasonableness. See generally *Andujo v Canada (Minister of Citizenship and Immigration)*, 2011 FC 731 at para.22; *Akbari v Canada (MCI)*, 2006 FC 1421 at para 11; *Chazaro v Canada (MCI)*, 2006 FC 966, at para 21.

Analysis

[22] As I understood this matter, the issue was whether, taking into consideration the best interests of a child directly affected by the decision, there were sufficient H&C considerations to overturn the refusal of an application for a permanent resident visa made by Mr. Samuel.

[23] At paragraph 36 of its decision, the Board found that the best interests of Mr. Samuel's son were that he continued to be with his father and near his siblings and biological mother in Jamaica. No challenge has been made to this finding which I find reasonable in all the circumstances. Nevertheless, the Board chose to examine the marriage as a factor and appears to have based its decision largely on whether Mr. Samuel had turned his life around and was a changed person from 12 years ago when deported from Canada.

[24] In this regard, the Board made some significant errors in its analysis and as such, the application must be allowed and the decision set aside. My reasons explaining this decision follow.

1. Did incompetence by Ms. Vassell-Samuel's representative result in a miscarriage of justice?

[25] I start with the last of the aforementioned issues, that of the alleged incompetence of Ms. Vassell-Samuel's representative, in particular the decision not to call Mr. Samuel as a witness. I find that the effect of the failure of Mr. Samuel to respond to certain points impacts on other issues in the case, such that this question needs to be resolved in advance of their consideration.

[26] The requirements for the granting of a new hearing on the grounds of the incompetence of counsel are set out in *Betesh v Canada (MCI)*, 2008 FC 173 at para 15 as follows:

> The applicants acknowledge that they must meet a very strict test in order to be granted a new hearing based on the incompetence of their advisor. Justice Marshall Rothstein stated that a new hearing should be granted only in the most exceptional cases: *Huynh* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 642 (T.D.) (QL). Further, they must show that there is a reasonable probability that the result would have been different: *Shirvan* v. *Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1864, 2005 FC 1509. Generally speaking, they must also show that the advisor was given notice of the allegation of incompetence and a chance to respond: *Shirvan*, above; *Nunez* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 555.

[27] Ms. Vassell-Samuel's previous representative, an immigration consultant, has been put on notice that her representation was deemed incompetent because:

a. She failed to canvass the particulars of the spouse's previous convictions so as to make a determination as to whether or not to call him as a witness;

b. She failed to make the applicant aware of the potential negative consequences of not calling the spouse to give evidence;

c. She failed to obtain the judge's reasons for sentencing in the assault case so as to dispel the negative impression left by the FOSS notes.

[28] The former representative indicated that these allegations were untrue and asked for an affidavit supporting them. Ms. Vassell-Samuel has not provided the affidavit, which to a certain extent leaves the ball in her court in providing an opportunity for the consultant to respond. However, I do not think any failure in this regard would be fatal to the court's consideration of the issue.

[29] With respect to the failure to obtain the judge's reasons for sentencing to dispel the negative impression left by the FOSS notes, I find that the consequences of any failure of this nature would depend on the content of the judge's reasons and likely the statement of facts accompanying the guilty plea, which are unknown. Moreover, as shall be seen below, the FOSS statement could not be entered into evidence. No prejudice therefore arises from the failure to have the guilty plea statement. I note however, that if the statement described more serious conduct than was provided by Ms. Vassell-Samuel to the Board, her situation would have been more advantageous by not having the court statement. It could have been used against Mr. Samuel in the context of his not testifying. Given his pardon, he had no onus to bring it forward.

[30] With respect to any alleged negligence in not calling Mr. Samuel, the starting point is to determine the appropriate standard of conduct that should be imposed on an immigration consultant in advising a client whether a party or witness should testify. No expert evidence was led on this issue, without which the appropriate standard is far from clear. It is certainly not the same standard

of care as required of a lawyer at the hearing. Having decided to engage a consultant, the client cannot seek to measure his competence by that of a lawyer.

[31] That is not to say that there are not aspects of the standard imposed on an immigration consultant similar to those of a lawyer (see *Brown v Canada (MCI)*, 2012 FC 1305). The issue is whether the alleged negligent conduct falls within the lower standard of care or is a matter that should be understood to fall only within the lawyers' professional norms.

[32] The decision whether to call a witness entails a large discretionary component involving a variety of factors depending on all the circumstances and is therefore in some respects challenging for experienced lawyers. As well, no jurisprudence was provided on the nature of circumstances attaching liability to a lawyer for not calling a witness. The matter apparently was discussed with the client and little in the way of evidence has been provided about the nature of those discussions, except an allegation that Ms. Vassell-Samuel should have been advised of the consequences of not calling her spouse.

[33] In *Valle Lopes v Canada (MCI)*, 2010 FC 403, where counsel completely failed to file final written submissions, this was not considered sufficient to prove incompetence resulting in a material difference in the outcome and a miscarriage of justice. In the present case, the applicant acknowledges that she and her former representative weighed the pros and cons of calling the spouse as a witness, and that the applicant ultimately accepted the representative's advice not to do so. I am not satisfied that Ms. Vassell-Samuel has demonstrated incompetence on the part of her representative at the hearing.

[34] In addition, I do not find that Ms. Vassell-Samuel has met the high onus of demonstrating that she was substantially prejudiced by an error on the part of counsel, or that this prejudice flowed from the actions or inactions of counsel, or that the prejudice brought about a miscarriage of justice (*Shirvan v Canada (MCI)*, 2005 FC 1509, at para 20). Ms. Vassell-Samuel argues that the majority of the IAD's decision was premised on the spouse not having been called to answer questions regarding the previous convictions and the omissions in his application forms. It is to be recalled that Ms. Vassell-Samuel complains that she was not advised of the Board's intention to use the incorrect information on the application form against Mr. Samuel. It is difficult therefore to blame the representative for not considering this issue in not calling Mr. Samuel.

[35] Regarding the FOSS notes, as already presaged and will be explained below, I find that the Board erred in using the notes for any purpose in the absence of Mr. Samuels testifying. Had he been called there is some scope for him to have been cross-examined using the notes. In the circumstances therefore, the likely prejudice to the appellant's case lay more in calling him than not. Accordingly, I reject the applicant's submission that any conduct of her representative has resulted in a miscarriage of justice.

2. Did the Board err in relying on the circumstances surrounding the pardoned spouse's prior convictions to impugn his character?

3. Did the Board breach the applicant's right to procedural fairness by relying on omissions in the application for permanent residence to impugn the sponsored spouse's character without putting these to the applicant?

4. Did the Board err in relying on charges which did not result in convictions and on a police report to impugn the sponsored spouse's character?

[36] The appellant argues that pursuant to section 5 of the *Criminal Records Act*, the effect of a pardon is that the conviction it applies to should no longer reflect adversely on a person's character, which she argues has occurred here. That provision, as it read until its repeal on June 13, 2012, by the *Safe Streets and Communities Act*, SC 2012, c 1, stated:

Effect of pardon	Effacement de la condamnation
5. The pardon	**5.** La réhabilitation a les effets suivants :
(*a*) is evidence of the fact that	*a*) d'une part, elle établit la preuve des faits suivants :
(i) the Board, after making inquiries, was satisfied that the applicant for the pardon was of good conduct, and	(i) la Commission, après avoir mené les enquêtes, a été convaincue que le demandeur s'était bien conduit,
(ii) the conviction in respect of which the pardon is granted should no longer reflect adversely on the applicant's character; and	(ii) la condamnation en cause ne devrait plus ternir la réputation du demandeur;
(*b*) unless the pardon is subsequently revoked or ceases to have effect, requires the judicial record of the conviction to be kept separate and apart from other criminal records and removes any disqualification or obligation to which the person so convicted is, by reason of the conviction, subject by virtue of the provisions of any Act of	*b*) d'autre part, sauf cas de révocation ultérieure ou de nullité, elle entraîne le classement du dossier ou du relevé de la condamnation à part des autres dossiers judiciaires et fait cesser toute incapacité ou obligation — autre que celles imposées au titre des articles 109, 110, 161, 259, 490.012, 490.019 ou 490.02901 du *Code criminel*, du

Parliament — other than section 109, 110, 161, 259, 490.012, 490.019 or 490.02901 of the *Criminal Code*, subsection 147.1(1) or section 227.01 or 227.06 of the *National Defence Act* or section 36.1 of the *International Transfer of Offenders Act* — or of a regulation made under an Act of Parliament.	paragraphe 147.1(1) ou des articles 227.01 ou 227.06 de la *Loi sur la défense nationale* ou de l'article 36.1 de la *Loi sur le transfèrement international des délinquants* — que la condamnation pouvait entraîner aux termes d'une loi fédérale ou de ses règlements.

[37] It is not possible to separate the issues of relying on circumstances surrounding a pardon, resort to the FOSS notes, and relying on omissions in Mr. Samuel's application for permanent residence, such that I will treat them together.

[38] I find that the Board did not rely upon Mr. Samuel's convictions. Rather, when faced with what it thought were inconsistencies between his application for permanent residence and his statements to Ms. Vassell-Samuel about the circumstances underlying his convictions, the Board concluded that it could go behind the convictions and consider the underlying events.

[39] Thus, in paragraph 32 of its reasons, the Board justifies its conclusion that Mr. Samuel has not matured and is not remorseful regarding his criminal conduct for which he was convicted because of the false statements in his application and because he did not dispute the serious nature of the domestic assault described in the FOSS notes due to his failure to testify.

[40] The applicant's first submission is that the Board breached procedural fairness in referring to the false statements in the application when they had not been raised during the hearing, nor otherwise drawn to her attention.

[41] On the side of the Board's rationale, I note that it was Mr. Samuel's application that contained the error and therefore it was his requirement to provide an accounting for the error on the face of the document. The fact that Ms. Vassell-Samuel could have provided an explanation for the omission would not impose an obligation on the Board to raise the matter in light of Mr. Samuel not testifying. There is no reason for the Board to have thought that Ms. Vassell-Samuel could comment on a document to which Mr. Samuel was the signatory and responsible for its contents.

[42] Nevertheless, I am in agreement that there has been a failure of procedural fairness. The problem arises from the respondent failing to give notice of the omission in the application or taking it up in any fashion during the hearing. When the appellant is not aware of a significant issue in the case that had to be met, either by way of evidence presented or argument by the adverse party, procedural unfairness occurs which cannot be remedied by the fact that the decision-maker raises the issue after the hearing. The failure of the spouse to testify is not relevant to this issue. If the Board wished to rely on the point after the hearing, it was required to give notice to the complainant. Otherwise, it has acted unilaterally to favour one party who did not give notice of the issue, while also denying the other a chance to respond.

[43] There is an equally serious problem with the Board's justification in attributing to Mr. Samuel the conduct described in the FOSS notes on the basis of his failure to testify. This issue only

came about because Ms. Vassell-Samuel testified in chief about Mr. Samuel's description of the facts underlying his assault and obstruction conviction. Upon comparing this version with that in the FOSS notes, the Board concluded that Mr. Samuel had not reformed and was not remorseful.

[44] The Board adverted to police notes being notorious for presenting just one side of events, no doubt being aware of Justice Mosley's comments in *Rajagopal v Canada*, 2007 FC 523 at para 43 that police notes "are not findings of fact reached by the court that convicted the applicant and imposed sentence." The Board nevertheless stated that "it [police notes] can be different [facts underlying the guilty plea], but usually it's similar". If by this comment the Board assumed that it could rely on the notes for the proof of their contents, it was in error. The best evidence of the circumstances underlying the conviction was that which was read into the record with the guilty plea. The onus was on the respondent to produce these or other reliable documents if it wished to use them to go behind the pardoned conviction. Those not being before the Board, the matter should have stopped there.

[45] The fact that Mr. Samuel did not testify cannot be used to justify the report being used to prove the truth of its contents. The police report has no factual value standing on its own without a witness to put it in as evidence or back it up in some fashion. Had Mr. Samuel testified and had the report been put to him, he might have admitted the truth of its contents, making it evidence for that purpose. The more likely scenario however, would have been a complete denial of its contents, in which case it would have no value to prove the truth of its contents. Otherwise, if it was used to attempt to undermine Mr. Samuel's credibility, Mr. Samuel could have rejected of the truth of its

contents with impunity. The Minister was in no position to prove otherwise the accuracy of the contents of a document created some twelve years ago.

[46] The Board relied heavily on the significant inconsistencies between the version of what Ms. Vassell-Samuel related Mr. Samuel told her about the circumstances of his conviction and that contained in the FOSS report to conclude not only that Mr. Samuel was not prepared to admit the truth of his past history, but that "he's a scary guy and he may even need anger management help". This evidence was crucial to the Board's findings that Mr. Samuel had not matured, was not remorseful and was "not the same person" (as described by Ms. Vassell-Samuel or the letters of recommendation). In my view, there is no foundation for these findings from the police report and Mr. Samuel's failure to testify.

[47] With the rejection of the foundation to go behind the convictions, I further find that the Board violated section 5 of the *Criminal Records Act* by referring to Mr. Samuel's conviction in respect of which a pardon was granted in a manner that reflected adversely on his character.

5. Did the Board base its decision on an erroneous finding of fact that it made without regard to the material before it?

[48] The Board stated in its reasons that in 2008, two years after the applicant met her sponsored spouse, he fathered a son with another woman. This was incorrect. As was set out in the materials, the spouse's son was born eight years earlier, in 2000 and presumably is the child whose best interests are those being considered in this matter.

[49] The respondent accepts that there was a factual error with respect to the sponsoree's son, but argues that it was only given little weight, that the *bona fides* of the marriage were not contested, and that the mistake was not material. It argues that the Court should exercise its discretion to refuse relief regarding inconsequential errors; particularly when a result is inevitable, an error may not require a decision to be set aside.

[50] The Board's reasons convey concern that Mr. Samuel has not changed from his previous character despite the pardon and the letter of recommendation. Indeed, the appellant complains with some justification that no consideration has been given to the number of years that have passed since 2000 when Mr. Samuel was convicted of the assault. In these circumstances, Mr. Samuel's respect and caring for Ms. Vassell-Samuel would normally be undermined by him having another child with another woman when in a relationship with the appellant. It is part of the narrative that the Board relies upon to ask Ms. Vassell-Samuel whether she thinks Mr. Samuel might be using her to come to Canada. Having a child by another woman while courting the appellant surely would be seen as probative evidence to support the conclusion that Mr. Samuel had not changed his ways. This was therefore a significant mistake of fact.

[51] For all of the foregoing reasons, I am not satisfied that the Board's decision was justified or reasonable in so far as it was based upon the Board's negative conclusions about Mr. Samuel's character and moral qualities.

[52] Accordingly, the application is allowed and the Board's decision is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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