

Federal Court



Cour fédérale

Date: 20150416

Docket: IMM-1331-14

Citation: 2015 FC 476

Ottawa, Ontario, April 16, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

FITZROY BARRINGTON WHITELY

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is the judicial review of an Immigration Officer [Officer] on behalf of the Minister denying an exemption which would have permitted the Applicant's application for permanent residence to be processed from within Canada on humanitarian and compassionate [H&C] grounds. The governing provision is s 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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.

...

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, 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.

...

(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

Notwithstanding the excellent pithy argument by Mr. Eisenberg, this judicial review will be dismissed.

II. Background

[1] The Applicant has been in Canada periodically as a temporary farm worker since 1990 and on a long-term basis since 2005. He will be 55 years old in a matter of days.

[2] The Applicant has five (5) children in Jamaica and he has contributed financially to them from his Canadian earnings. He also has six (6) grandchildren in Jamaica.

[3] His H&C application was based on the lack of employment opportunity in Jamaica, age discrimination against seniors in terms of employment and on the prevalent high crime rate in Jamaica. All of these factors constitute hardship.

[4] The H&C application was also based on the Applicant's "establishment" in Canada. Among the indicia of establishment, he is experienced in farming and employed in the food services business. He has an extensive network of friends here and is very active in his local church.

[5] The Officer decided that the Applicant, whatever his level of establishment was (and the Officer accepted the indicia of establishment put forward), would be returning to a country where he had spent the majority of his life and where he had children and grandchildren, which provided a "rich network of family members to provide emotional support".

[6] The Officer acknowledged problems with age discrimination in Jamaica but noted that there were general laws against discrimination. Further, the Applicant had not provided sufficient evidence that he would personally face that hardship. As to crime in Jamaica, which was acknowledged as a problem, the Officer found that there was little evidence that the Applicant would be targeted by criminal activity. The hardship faced by the Applicant was related to general country conditions.

[7] The Officer held that based on the totality of the evidence, the Applicant had not shown sufficient evidence that he would face an unusual and undeserved or disproportionate hardship if he was returned to Jamaica.

III. Analysis

[8] The issue of whether the discretion under s 25 was exercised properly is governed by the reasonableness standard (*Lemus v Canada (Citizenship and Immigration)*, 2012 FC 1274, 221 ACWS (3d) 966). As to whether the Officer applied the correct test for hardship, that matter is governed by the correctness standard (*Ambassa v Canada (Citizenship and Immigration)*, 2012 FC 158, 211 ACWS (3d) 434).

[9] Applicant's counsel asserted that the finding on "establishment" was the primary error in the decision. It was also argued that the Officer slipped into a s 97 type analysis when addressing hardship.

[10] With respect to the first point, while not everyone would have arrived at the same conclusion on establishment, the essence of the “reasonableness” standard of review is that reasonable people may reasonably disagree on decisions.

[11] With respect, I cannot see what was unreasonable about the Officer’s analysis and conclusion. The Officer covered all the relevant points with respect to establishment as he did with regard to hardship. There is no requirement to go through each question or issue raised in the Guideline IP5. As the Court of Appeal in *Kanthisamy v Canada (Citizenship and Immigration)*, 2014 FCA 113, 372 DLR (4th) 539, held, the Guidelines are just that, a source of guidance – the Guideline IP5 is not law.

[12] It is evident that the Officer found that despite the positive elements of establishment, the negative impact of loss of establishment is ameliorated by the rich network of family members in Jamaica. In that way, the Officer engaged in the very balancing of relevant factors called for by the legislation.

[13] With respect to hardship, the Officer did not stray into a s 97 analysis of risk nor did he conclude that the Applicant faced a generalized risk faced by all members of Jamaican society.

[14] The Officer applied the correct legal test. He noted the absence of a direct connection between crime/discrimination and the Applicant, such that he would not experience hardship other than that of returning and living in Jamaica.

[15] The Officer balanced this hardship against more positive factors (much as he had done with “establishment”) and concluded that to the extent there was hardship, it was not unusual and undeserved or disproportionate.

I can find no error in the Officer’s conclusion which warrants this Court’s intervention.

IV. Conclusion

[16] Therefore, this judicial review will be dismissed.

[17] There is no question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Michael L. Phelan"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1331-14

STYLE OF CAUSE: FITZROY BARRINGTON WHITELY v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: APRIL 14, 2015

JUDGMENT AND REASONS: PHELAN J.

DATED: APRIL 16, 2015

APPEARANCES:

Howard P Eisenberg

FOR THE APPLICANT

Christopher Crighton

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Eisenberg & Young
Barristers and Solicitors
Hamilton, Ontario

FOR THE APPLICANT

William F. Pentney
Deputy Attorney General of
Canada
Toronto, Ontario

FOR THE RESPONDENT