Federal Court Cour fédérale

Date: 20220712

Docket: IMM-334-19

Citation: 2022 FC 1024

Ottawa, Ontario, July 12, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

KIBA SHAKES

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Kiba Shakes, seeks judicial review of the decision of a Case Processing Officer ("Officer") of Immigration, Refugees and Citizenship Canada ("IRCC"), dated January 15, 2019, refusing the Applicant's request to re-open his application for permanent residence within Canada on humanitarian and compassionate ("H&C") grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 ("*IRPA*").

[2] The Applicant's original H&C application received Stage 1 approval ("Stage 1 approval"), but was refused on January 8, 2014 for non-compliance with IRCC's request for documentation. On January 11, 2019, the Applicant submitted a request to re-open his H&C application. After considering the Applicant's request, the Officer decided not to re-open the Applicant's H&C application.

[3] The Applicant submits that the Officer fettered their discretion by not considering all relevant circumstances in his case and conducted an unreasonable assessment of whether the Applicant received notice of the Stage 1 approval of his H&C application. The Applicant further submits that the Officer breached procedural fairness by relying on extrinsic evidence in their decision and not convoking an oral hearing.

[4] For the reasons that follow, I find that the Officer fettered their discretion by failing to consider all relevant circumstances in the Applicant's case. This application for judicial review is allowed.

II. **Facts**

A. *The Applicant*

[5] The Applicant is a 49-year-old citizen of Jamaica and a former permanent resident of Canada. He first arrived in Canada in 1976, when he was three years old and has spent the last 46 years living in Canada.

[6] The Applicant and his partner of 19 years have three Canadian-born children together. The Applicant has another three Canadian-born children from other relationships. The Applicant claims to have no contacts or family in Jamaica.

[7] The Applicant grew up in the Regent Park neighbourhood in Toronto. His submissions outline how, as a child, he was physically abused by his father and spent time in the care of the Children's Aid Society. The Applicant explains that he was surrounded by substance use growing up, began using alcohol at a young age, and developed a dependency on crack cocaine, which led to related criminal convictions beginning in 1999. The Applicant states that he no longer uses drugs, but continues to struggle with alcoholism.

[8] Since 2010, the Applicant has allegedly lived at the same address, with his mother and eldest son, who is 26 years old. He is the live-in caregiver for his mother, who is diabetic and requires dialysis three times a week.

[9] In June 2003, the Applicant was convicted of a drug-related offence. As a result of his criminality, the Applicant was found inadmissible to Canada and issued a removal order on October 18, 2004. Unrepresented by counsel at the time, he appealed the removal order to the Immigration Appeal Division (the "IAD") and it was stayed following a hearing held on September 22, 2006. In an IAD decision dated May 29, 2009, the stay was extended for another year.

[10] On August 17, 2010, the IAD declared the Applicant's appeal abandoned because the Applicant did not show up for his appeal scheduled for August 13, 2010. The Applicant states that he was present at the hearing, but due to his spiritual beliefs at the time, he had changed his name and wanted to be recognized by the name he had been given by the Moorish Science Temple of America: El Afif Hetep-bey, and not Kiba Shakes.

[11] The Applicant then hired Mr. Matthew Tubie ("Tubie") as legal counsel to apply to re-open his IAD appeal. Mr. Tubie filed a single letter, with no supporting evidence, to the IAD requesting a re-opening. In a decision dated January 28, 2011, the IAD denied the Applicant's application to reopen the appeal.

[12] The Applicant states that he filed an H&C application on or around February 23, 2011, with Mr. Tubie's assistance.

[13] On October 14, 2011, IRCC sent a call-in notice to the Applicant, care of Mr. Tubie, requesting that the Applicant attend an interview regarding the H&C Application on November 8, 2011. According to IRCC's Field Operations Support System notes ("FOSS notes"), the Applicant did not attend the interview. The FOSS notes indicate that when an IRCC representative called the Applicant, he stated that he was not informed by Mr. Tubie that he had an appointment on November 8, 2011. The Applicant attended a re-scheduled interview on December 1, 2011.

[14] On June 19, 2013, the Applicant was granted Stage 1 approval on his H&C application. On July 16 2013, IRCC sent the Applicant a positive H&C decision letter requesting that he submit medical and travel document information. The Applicant claims he did not receive this letter, was not notified of the Stage 1 approval, and did not receive any communications from Mr. Tubie regarding any further obligations in relation to his H&C application.

[15] The FOSS notes state that IRCC attempted to contact the Applicant on August 20, 2013, and again on October 7, 2013 via telephone on his home and cellphone numbers with no response. A FOSS note from January 8, 2014 states:

> 08JAN2014 - File review - Non-Compliance - We have lost contact with the client. Multiple letters have been sent to the client's home, phone calls were attempted to no avail. Client has a pst [sic] history of not responding to letters and phone calls. H&C File closed for non-compliance. Letter sent this date to advice [sic] client of file closure.

[16] On January 8, 2014, the Applicant's H&C application was refused for non-compliance with an immigration officer's request for documents.

[17] The Applicant claims that he did not learn of the Stage 1 approval or any subsequent document requests until December 8, 2018, when he was informed by a Canada Border Services Agency ("CBSA") officer during a CBSA call-in appointment.

[18] On January 11, 2019, the Applicant submitted a request to re-open the processing of his H&C application ("Stage 2"), in light of the fact that he was not given proper notice of the Stage 1 approval and the strong H&C factors that remain present in his case.

[19] Through an email communication on January 11, 2019, a manager at IRCC provided the Applicant's counsel with FOSS note entries related to the processing of the Applicant's H&C application. The FOSS notes received by the Applicant's counsel were dated from July 16, 2013 to January 8, 2014. The IRCC manager confirmed that IRCC had destroyed the Applicant's H&C file, but noted that IRCC records list Mr. Tubie as counsel of record on the H&C Application and that there is no record of any change in counsel or change of address information in the application. The IRCC manager's email states that it is "[…] reasonable to assume that Mr. Tubie continued to be the recipient of Mr. Shakes' correspondence as he was the authorized representative on record for the application."

[20] On January 13, 2019, the Applicant filed additional submissions in support of his re-opening request.

[21] The Applicant states that his counsel wrote to Mr. Tubie to inform him that information from IRCC and CBSA suggests that he received important correspondence on the Applicant's behalf but did not inform the Applicant. Mr. Tubie did not respond.

B. *Decision Under Review*

[22] By letter dated January 15, 2019, the Officer declined the Applicant's request to re-open his H&C application. The Officer stated that the decision involved reviewing the circumstances of the refusal of the H&C application, which was closed on January 8, 2014 for non-compliance with requests for documents, and deciding whether it should be re-opened. The Officer's decision notes:

> As per records in FOSS, IRCC attempted to contact Mr. Shakes from June 2013 to December 2013 for a period of 6 months to request documents required for the admissibility portion, "stage 2," of his application for permanent residence in Canada. I note that lRCC's attempts to contact Mr. Shakes were not limited to mail, we have also attempted to contact him via phone and cellphone using the contact information provided. All attempts to contact Mr. Shakes relating the stage 2 processing were unanswered. I find that we have given Mr. Shakes ample opportunities to communicate with us and provide us with information to complete the assessment.

[23] The Officer further noted that the Applicant's submissions outlined how his former counsel, Mr. Tubie, had not relayed information regarding his H&C application to him, causing him to miss IRCC's document requests. However, the Officer found little evidence to indicate that Mr. Tubie would not have forwarded IRCC's letters to the Applicant:

> I note that according to our records Mr. Tubies had previously forwarded the interview call-in notice from Etobicoke to Mr. Shakes in November 2011. Mr. Shakes attended the interview on 1 December 2011. There is little evidence provided to indicate that our letters to counsel would not be forwarded to Mr. Shakes.

[24] The Officer also noted that the onus was on the Applicant to keep in touch with IRCC, including providing IRCC with up-to-date contact information and inquiring about the status of his H&C application between late 2013 to early 2019.

[25] In his request to re-open his H&C application, the Applicant made submissions on the H&C factors to be considered in his case, including his family ties in Canada, the best interest of his children ("BIOC") – two of whom were born since the initial H&C application was submitted, country conditions in Jamaica, and the Applicant's substance abuse and risk of relapse. The Officer determined that the Applicant had failed to demonstrate how these factors affected the circumstances surrounding the refusal of his H&C application for non-compliance.

III. **Issues and Standard of Review**

[26] The Applicant raises the following issues in this application for judicial review:

A. *Whether the Officer fettered their discretion by refusing to consider all the relevant circumstances in the Applicant's case.*

B. *The Officer's assessment of whether the Applicant received notice of his Stage 1 approval was reasonable.*

C. *Whether the Officer breached procedural fairness by relying on extrinsic evidence and not convoking an oral hearing.*

[27] With respect to the first issue, the Applicant submits that a decision resulting from a fettered discretion falls outside the range of possible, acceptable outcomes and must *per se* be unreasonable (*Gordon v Canada (Attorney General),* 2016 FC 643 ("*Gordon*") at paras 25-28;

Fatola v Canada (Public Safety and Emergency Preparedness), 2018 FC 479 ("*Fatola*") at paras 13-14). The Respondent submits that the reasonableness standard applies to the first issue.

[28] I agree with the Applicant that the fettering of discretion is a reviewable error that would result in the decision being quashed. As noted by this Court, issues of fettered discretion are not particularly amenable to a standard of review and are best resolved by asking whether the decision arose from a fettered discretion (*Matharoo v Canada (Citizenship and Immigration),* 2020 FC 664 at para 21; *Yanasik v Canada (Citizenship and Immigration)*, 2021 FC 1319 at para 25).

[29] Both parties submit that the second issue is to be reviewed on the reasonableness standard. I agree. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*") confirmed that reasonableness is the presumptive standard when reviewing the merits of an administrative decision (at paras 10, 16).

[30] The Applicant submits that the third issue is to be reviewed on the standard of correctness. The Respondent submits that the issue of whether the Officer relied on extrinsic evidence is subject to the standard of correctness, but the issue of whether an oral hearing should have been convoked is assessed on the reasonableness standard. I agree with the Applicant that the applicable standard of review for the third issue is correctness because it concerns an issue of procedural fairness (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[31] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[32] For a decision to be unreasonable, the applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep" (*Vavilov* at para 100; *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 at para 36).

[33] Correctness, in contrast, is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paragraphs 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

IV. **Analysis**

A. *Whether the Officer fettered their discretion by refusing to consider all the relevant circumstances in the Applicant's case.*

[34] In *Canada (Citizenship and Immigration) v Kurukkal*, 2010 FCA 230 ("*Kurukkal*"), at paragraph 5, the Federal Court of Appeal noted that in a re-opening application, an officer is required to take into account all relevant circumstances of an applicant's case:

> [5] The judge directed the immigration officer to consider the new evidence and to decide what, if any, weight should be attributed to it. In our view, that direction was improper. While the judge correctly concluded that the principle of functus officio does not bar a reconsideration of the negative section 25 determination, the immigration officer's obligation, at this stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider.

[35] Most recently in *Samtra v Canada (Public Safety and Emergency Preparedness),* 2022 FC 282 ("*Samtra*")*,* this Court reiterated at paragraph 24:

> […] the exercise of discretion about whether to reconsider must involve a full assessment of any new evidence, including its source, its credibility, and its relevance. It was therefore unreasonable of the Officer in this case to refuse to reconsider the Report without considering Counsel's H&C Submissions.

[36] As noted in *A.B. v Canada (Citizenship and Immigration),* 2021 FC 1206 ("*A.B.*") at paragraph 22, an applicant has the onus of demonstrating whether a reconsideration request is in the interest of justice or presents unusual circumstances:

> [22] There is no general obligation on officers to reconsider their decisions; the onus is on the applicant to show that this is warranted in the interests of justice or because of the unusual circumstances of the case (*Hussein* at para 57, citing *Ghaddar v Canada (Citizenship and Immigration)*, 2014 FC 727 at para 19 [*Ghaddar*]).

[37] The Applicant submits that the Officer fettered their discretion by refusing to consider all the relevant circumstances in the Applicant's case – including the lack of notice of the Stage 1 approval, the continued strength of his H&C factors, and the BIOC of his two youngest children. The Applicant notes that, unlike in *Kurukkal, Samtra* and *A.B.* where the reconsideration concerned applications that were initially refused, the Applicant's H&C application received Stage 1 approval. The Applicant thus argues that his request to re-open his H&C application presented unique circumstances that were relevant to the "interest of justice" because his H&C application was refused for non-compliance with a request for documentation, and not on the basis of the H&C factors in his case. In restricting the analysis to what was 'relevant' to the circumstances of the refusal of the H&C application (the Stage 2 non-compliance), the Officer failed to consider all of the evidence and relevant circumstances in the Applicant's case. The Applicant asserts that this is contrary to *Kurukkal,* and relies on this Court's application of *Kurukkal* in *Bhuiyan v Canada (Citizenship and Immigration),* 2012 FC 117 at paragraph 27:

> To use the words of the Court of Appeal in *Kurukkal*, above, how can an officer "[take] into account all relevant circumstances" without even a preliminary vetting of the further documentation submitted? In my opinion, it follows that the decision was unreasonable, and must be sent back to another immigration officer for re-determination.

[38] The Applicant further submits that the Officer's refusal to consider his H&C evidence was particularly problematic given the BIOC of his two youngest children who were born in the intervening period, and whose best interests had therefore never been considered. This, the Applicant argues, is not in accordance with the approach advanced by the Supreme Court in *Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61, which requires that the BIOC be a "singularly significant focus and perspective" in an H&C application (at para 40). The Applicant submits that the same can be said of reopening applications, given an officer's obligation to consider "all relevant circumstances".

[39] The Respondent contends that the January 8 2014 refusal of the Applicant's H&C application is not the subject of this judicial review. A review of a reconsideration request consists of two steps: 1) a determination on whether the original decision should be reconsidered, and 2) the actual reconsideration of the decision and the filing of new evidence in support of the reconsideration application. In this case, the Respondent maintains that the Officer's analysis stopped at step one and the Officer was not required to conduct a full review of the submissions and evidence. The Respondent argues that the Applicant failed to meet his onus to demonstrate that his circumstances warranted the exercise of the Officer's discretion to reopen the H&C application in "the interest of justice" and "in unusual circumstances" (*Pierre Paul v Canada (Citizenship and Immigration),* 2018 FC 523 at paras 27-29).

[40] Nonetheless, the Respondent affirms that the Officer did consider all of the Applicant's additional evidence and found that it failed to explain why the Applicant did not comply with the requirements for a Stage 2 approval, or demonstrate how it was relevant to his non-compliance.

The Respondent submits that this finding aligns with *Kurukkal,* which requires a decision-maker to take into account all relevant circumstances (at para 3).

[41] While I agree with the Respondent that the Officer was only required to determine whether to exercise the discretion to reconsider the H&C application, I do not find that the Officer's decision meets the standard set out in *Kurukkal*. The Applicant's request presented unique circumstances that were relevant to the interest of justice. As noted by the Applicant, his case is unusual since his H&C application did in fact receive Stage 1 approval and was never refused on its merits, but rather because of the Applicant's failure to answer a request for documentation – which he claims he was not made aware.

[42] The Officer's decision states:

> [The Applicant's] current representative has submitted a package of submissions with factors for consideration such as family ties, best interest of his children, country conditions in Jamaica and the Applicant's substance abuse and possible relapse […] In this decision I am reviewing the circumstances of the refusal of his H&C application and deciding whether to re-open his H&C application. I note that neither the representative nor the Applicant has demonstrated how these factors raised affected the circumstances surrounding the refusal of Mr. Shakes [sic] H&C application for non-compliance.
>
> […]
>
> Having reviewed the circumstances of the Applicant for his non-compliance to our requests, I have decided not to re-open his application […]

[43] I agree with the Applicant that the Officer's sole focus on the circumstances surrounding the non-compliance with Stage 2 reflects an unduly narrow analysis. Regardless of whether the additional evidence showed a connection to the initial reason for the refusal of the H&C application, the jurisprudence required that the Officer review "all relevant circumstances" in the Applicant's case, and whether it would be in the interest of justice to grant his request. This includes considering the new evidence related to the BIOC of his two youngest children as well as the hardship the Applicant would face in Jamaica, particularly in relation to his history of substance abuse and the risk of relapse in Jamaica. The Officer dismissed the H&C factors raised by the Applicant because they were seen as not relevant to the circumstances of the Stage 2 non-compliance. In doing so, I find that the Officer failed to adequately turn their mind to all the relevant circumstances raised by the Applicant (*Memon v Canada (Citizenship and Immigration),* 2016 FC 182 at para 24; *Kurukkal* at para 5).

[44] In my view, the Applicant met his onus of demonstrating that a reopening of his application is warranted in the interests of justice and because of the unusual circumstance of his case, particularly since his H&C application received Stage 1 approval (*A.B.* at para 22). I therefore find that the Officer fettered their discretion by refusing to consider all the relevant circumstances in the Applicant's case.

[45] Since the fettering of discretion is a reviewable error that results in the decision being quashed (*Gordon* at para 28; *Fatola* at para 14), I find it unnecessary to address the remainder of the Applicant's arguments with respect to procedural fairness and the reasonableness of the Officer's decision.

V. **Conclusion**

[46] For the reasons above, I find that the Officer fettered their discretion in rendering their decision. Accordingly, this application for judicial review is allowed. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-334-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed. The decision under review is set aside and the matter is referred back for redetermination.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-334-19
STYLE OF CAUSE:	KIBA SHAKES v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	APRIL 26, 2022
JUDGMENT AND REASONS:	AHMED J.
DATED:	JULY 12, 2022

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