Date: 20080103

Docket: IMM-3556-06

Citation: 2008 FC 2

Ottawa, Ontario, January 3, 2008

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

CEYMOUR JOHNSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Ceymour Johnson's inland application for permanent residence in Canada was refused because he was found to be inadmissible on grounds of serious criminality. The criminal convictions that led to the finding of inadmissibility were later set aside. Mr. Johnson brings this application for judicial review of the decision refusing his application for permanent residence.

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

[3] The issues raised in this application arise out of the following facts.

[4] Mr. Johnson is a citizen of Jamaica who was without legal status in Canada when he married a Canadian citizen on November 11, 2000. In early 2001, he submitted an inland application for permanent residence on humanitarian and compassionate grounds.

[5] On November 6, 2002, his application for humanitarian and compassionate relief was approved in principle. He was advised that this did not exempt him from meeting the other statutory requirements of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), as set out in subsection 72(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). Mr. Johnson was advised that a separate decision would be made with respect to his compliance with the other statutory requirements.

[6] On November 6, 2002, Mr. Johnson filed an updated humanitarian and compassionate form in which he declared, among other things, that:

- He had not been charged with a crime or offence in Canada.

- He understood that the government would contact police authorities in order to obtain records that would be used in evaluating whether he was admissible to Canada.

- He would report to a Canada Immigration Centre (CIC) if the answer to any question he had answered on his updated humanitarian and compassionate form changed.

[7] Thereafter, the relevant chronology unfolds as follows.

[8] In March of 2004, a number of criminal charges were laid against Mr. Johnson.

[9] On September 16, 2004, CIC asked Mr. Johnson to provide details concerning all criminal charges laid against him.

[10] On October 15, 2004, counsel for Mr. Johnson informed CIC that Mr. Johnson had been charged with assault, forcible confinement, and sexual assault.

[11] On June 20, 2005, Mr. Johnson was convicted of sexual assault and forcible confinement. Mr. Johnson was sentenced to seven months of imprisonment, to be served concurrently.

[12] On August 26, 2005, Mr. Johnson was advised by an immigration officer that his application for permanent residence was refused on the basis that he was inadmissible on account of serious criminality, pursuant to paragraph 36(1)(*a*) of the Act. That provision is set out in the schedule to these reasons.

[13] On July 24, 2006, Mr. Johnson’s convictions were set aside and a new trial was ordered. The appellate judge noted that the Crown might consider not pursing a new trial because Mr. Johnson had already served his sentence.

[14] The Crown later advised that it would not be proceeding with a new trial.

[15] On January 14, 2007, Mr. Johnson was charged with assault with a weapon.

[16] On May 27, 2007, Mr. Johnson was charged with carrying a concealed weapon, possession of a weapon obtained by crime, unauthorized possession of a firearm in a motor vehicle, careless storage of a firearm with ammunition, possession of a firearm with ammunition without a certificate, and possession of a dangerous weapon.

[17] On July 11, 2007, Mr. Johnson was fined for possession of open liquor in a motor vehicle.

The Issues

[18] Mr. Johnson raises the following two issues on this application for judicial review:

1. Did the officer err by refusing Mr. Johnson's application for permanent residence when the officer knew, or ought to have known, that Mr. Johnson's conviction was under appeal?
2. Did the officer breach the duty of fairness he owed by failing to provide Mr. Johnson with an opportunity to respond to his criminal convictions?

Did the officer err by refusing Mr. Johnson's application for permanent residence when the officer knew, or ought to have known, that Mr. Johnson's conviction was under appeal?

[19] Mr. Johnson argues that the officer erred in reaching the decision to refuse his permanent residence application by ignoring relevant evidence. That evidence is said to be that Mr. Johnson's convictions were under appeal. Mr. Johnson further submits that, now that the convictions have been set aside, it would be contrary to logic, unjust, and unfair to allow the decision to stand.

[20] In my view, the jurisprudence of this Court supports neither submission.

[21] As for the obligation to consider the existence of the pending appeal, in *Kalicharan v. Canada (Minister of Manpower and Immigration)*, [1976] 2 F.C. 123 (T.D.), Mr. Justice Mahoney considered the situation where a deportation order had issued as a result of a conviction under the *Criminal Code*, R.S.C. 1970, c. C-34. On the appeal of the sentence imposed in respect of that conviction, a conditional discharge was substituted for the original sentence. At paragraph 3 of his reasons, Mr. Justice Mahoney wrote:

> […] Whatever the practical considerations that ought to have prevailed, the Special Inquiry Officer was under no legal obligation to await the result of the appeal before issuing the deportation order. A person convicted at trial is a convicted person notwithstanding that he may have an unexhausted right to appeal that would render him otherwise. The applicant was, on February 5, 1976, a person described in subparagraph 18(1)(e)(ii) and, thus, subject to deportation. [footnote omitted and emphasis added]

[22] A deportation order has a clear and imminent effect upon a person's right to remain in Canada. If, in that context, there is no obligation to await the result of an appeal of a criminal conviction, it is my view that there can be no obligation to defer consideration of a humanitarian and compassionate application because of an outstanding appeal. This is so because one may file a new inland application for permanent residence if circumstances later change as a result of a successful appeal.

[23] As for the fact that it may appear to be illogical to allow the decision to stand when the criminal conviction has been set aside, in *Smith v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 144 (T.D.), my colleague, Mr. Justice MacKay, considered the situation where Mr. Smith had been found to be inadmissible because two criminal convictions and a deportation order issued. Shortly thereafter, Mr. Smith was granted a pardon. Justice MacKay found that, since the deportation order was issued before the pardon, the adjudicator did not err by issuing the deportation order. The pardon was to be given prospective, not retrospective, effect.

[24] By analogy, in the present case, the officer did not err by refusing Mr. Johnson’s application for permanent residence. The convictions were in force when the negative decision was made and they remained in force until set aside on appeal. Again, I note that the consequence of upholding a deportation order on the basis that the conviction giving rise to it was valid at the time that the order was issued is of much more imminent effect than upholding, on the same basis, a negative decision on an inland application for permanent residence. A new inland permanent residence application can be filed if a subsequent appeal is successful. This makes the analogy with the decision in *Smith* apt.

[25] Moreover, while an officer cannot exercise bad faith in deciding when to make a decision about inadmissibility, there must be some discretion in an officer as to when a decision may be rendered. Otherwise, long periods of time could go by awaiting the outcome of appeals or pending criminal charges. As Mr. Johnson's circumstances show, the state of a criminal record is not always static. In my view, in the absence of compelling circumstances, it would be contrary to the scheme of the Act to require decisions about inadmissibility, made in the context of a humanitarian and compassionate application, to be delayed until all criminal proceedings, including all rights of appeal, are exhausted.

[26] Mr. Johnson relies upon the decision of my retired colleague, Mr. Justice Muldoon, in *Nagra v. Canada (Minister of Citizenship and Immigration)*, [1996] 1 F.C. 497 (T.D.), to argue that the decision on inadmissibility cannot continue to stand in the face of the decision overturning the underlying criminal conviction. In my view, this decision does not assist Mr. Johnson.

[27] Mr. Nagra had arrived in Canada as a visitor and subsequently married a Canadian citizen. Like Mr. Johnson, Mr. Nagra was granted an exemption from the requirement that he apply for a resident's visa from abroad. However, before landing, Mr. Nagra was convicted of two criminal offenses. An adjudicator determined that Mr. Nagra was a person described in paragraph 27(2)(*d*) of the *Immigration Act*, R.S.C. 1985, c. I-2, which at the time provided:

27(2) An immigration officer or a peace officer shall, unless the person has been arrested pursuant to subsection 103(2), forward a written report to the Deputy Minister setting out the	27(2) L'agent d'immigration ou l'agent de la paix doit, sauf si la personne en cause a été arrêtée en vertu du paragraphe 103(2), faire un rapport écrit et circonstancié au sous-ministre

details of any information in the possession of the immigration officer or peace officer indicating that a person in Canada, other than a Canadian citizen or permanent resident, is a person who	de renseignements concernant une personne se trouvant au Canada autrement qu'à titre de citoyen canadien ou de résident permanent et indiquant que celle-ci, selon le cas :
[…]	[…]
(*d*) has been convicted of an offence under the *Criminal Code* or of an indictable offence, or of an offence for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction, under any Act of Parliament other than the *Criminal Code* or this Act;	*d*) a été déclarée coupable d'une infraction prévue au *Code criminel* ou d'un acte criminel ou d'une infraction dont l'auteur peut être poursuivi par mise en accusation ou par procédure sommaire en vertu d'une loi fédérale autre que le *Code criminel* ou la présente loi;

[28] The adjudicator then issued a conditional removal order. The Immigration Appeal Division of the Immigration Refugee Board (IAD) granted a motion to dismiss an appeal to it on the ground that the IAD lacked jurisdiction. Subsequently, the criminal convictions were set aside and a new trial was ordered.

[29] While, on the application for judicial review of the decision of the IAD, the Court incidentally set aside the removal order, the Court noted, at paragraph 27, that pending the new criminal trial "the applicant is not shown to have completed the second stage for obtaining permanent residence, because of the then quite legitimate report under subsection 27(2)" of the Act. I take from this that the setting aside of the criminal conviction did not affect the validity of the report about inadmissibility.

Did the officer breach the duty of fairness he owed by failing to provide Mr. Johnson with an opportunity to respond to his criminal convictions?

[30] Mr. Johnson argues that, because the officer never told him that his application was being rejected on the basis of his criminal convictions, the officer deprived him of a meaningful opportunity to address the officer's concerns.

[31] In my view, the officer did not breach the duty of fairness for the following reasons.

[32] First, while Mr. Johnson argues that the officer erred by failing to advise him that information had been received in respect of his criminal convictions, it was Mr. Johnson who had signed a form in which he agreed to notify CIC of any changes to the information he had provided to it, including changes to his answer that he had not been charged or convicted of a crime in Canada. His failure to meet that obligation should not shift the onus to the officer to communicate with Mr. Johnson about his convictions.

[33] Further, in that same form, Mr. Johnson acknowledged his understanding that his criminal records would be obtained to verify his admissibility.

[34] Second, to the extent that Mr. Johnson argues that the officer was under an obligation to advise him not of the fact of the convictions but rather of the officer’s concerns as to his inadmissibility, Mr. Justice MacKay, in *Parmar v. Canada (Minister of Citizenship and Immigration)* (1997), 139 F.T.R. 203 (T.D.), wrote at paragraph 36 of his reasons that "there is no requirement for notice of an officer's concerns where these arise directly from the Act and

Regulations that the officer is bound to follow in his or her assessment of the applicant." This principle has been applied in a number of decisions of this Court, including the recent decision of *Ayyalasomayajula v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 320, and the cases cited therein. In the present case, the officer's concerns arose directly from the Act and Regulations.

[35] Finally, it was always open to Mr. Johnson to advise the officer of both his convictions and his appeal, and to request a deferral of the officer's decision until the appeal had been decided. Mr. Johnson requested no postponement of the officer's decision.

[36] For these reasons, the application for judicial review will be dismissed.

[37] Counsel for Mr. Johnson posed the following questions for certification:

1. Is there some discretion in the second stage of a humanitarian and compassionate application?

2. Given the length of time it takes to complete humanitarian and compassionate applications and the ongoing variability of such applications is there not some duty on the officer to advise the applicant of information he relies upon in coming to his decisions?

[38] The Minister opposed certification of either question.

[39] In my view, both questions are too vague. Further, the answer to the second question will vary with the facts of each case. Accordingly, no question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed.

"Eleanor R. Dawson"

Judge

SCHEDULE

Paragraph 36(1)(*a*) of the Act reads as follows:

36(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	36(1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

FEDERAL COURT

SOLICITORS OF RECORD

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