**Date: 20090304**

**Docket: IMM-3069-08**

**Citation: 2009 FC 236**

**Ottawa, Ontario, March 4, 2009**

**PRESENT: The Honourable Mr. Justice Kelen**

**BETWEEN:**

**RONALD LIONEL**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision by an Immigration Officer dated June 25, 2008, denying the applicant's application for an exemption on humanitarian and compassionate grounds (H&C).

## FACTS

[2] The applicant is a citizen of Guyana. He came to Canada on August 18, 1998 on a six-month visa. He then made a refugee claim, which was denied in December 2001.

[3] The applicant has four siblings in Canada. The applicant also has a spouse and child in Guyana, although he has all severed ties with Guyana and is not aware of his family's location. The applicant has been employed as a Shipper/Receiver with Eagle Global Logistics in Mississauga since February 2000.

**Decision under review**

[4] The Immigration Officer made note of the applicant's family members in Canada, but found that the applicant had not established that he would suffer unusual, undeserved or disproportionate hardship if he were removed to Guyana. The officer held in his decision, at page 10 of the Application Record:

> The applicant states that his three (3) siblings reside in Canada and the submissions indicate that they are willing to support him. I note that the applicant also has a spouse and child in Guyana although their current location is unknown. The applicant's submission includes the statement that he has cut ties with Guyana, however the applicant was fully aware of the fact that he was not a permanent resident of Canada. While it would pose a degree of hardship, I am not satisfied that the separation of the applicant from his family in Canada would pose unusual and undeserved or disproportionate hardship to justify an exemption under humanitarian and compassionate grounds.

[5] The officer also held that the applicant's employment history in Canada, while positive, did not warrant an H&C exemption.

> The applicant has been employed with Eagle Global Logistics since February 2000. However I note that he has been under a removal order since June 29, 1999 and this removal order has been in effect since December 17, 2001 when he was found not to be a Convention Refugee, which the applicant would have been aware of. I note that the applicant will be able to use his skills and experience to assist him in seeking new employment if he were to leave Canada. I also

> note that the applicant would be eligible to apply for permanent residence from outside of Canada through the Economic Class...

[6] Finally, the officer held that the applicant did not face any risk warranting an H&C exemption.

> I note that the applicant did refer to the current situation in Guyana, however no reference has been made to any specific risk that the applicant would face if he were to return to Guyana.

[7] For these reasons, the Immigration Officer rejected the applicant's application.

**ISSUES**

[8] The applicant has raised two issues in this case:

1. Did the Immigration Officer err in the exercise of his or her discretion by ignoring evidence, misconstruing evidence, and fettering his or her discretion?

2. Was the applicant denied natural justice?

**STANDARD OF REVIEW**

**[9]** 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."

[10] 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:

> **¶ 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 and the Federal Court of Appeal 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.*
>
> [Emphasis added]

[11] In reviewing the Board'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).

**ANALYSIS**

[12] Although the applicant raised two separate issues in this case, his submissions do not distinguish between these issues. Rather, the submissions contend that the officer erred in the following ways:

1. the immigration officer should have notified the applicant about his concerns with the application and given the applicant a chance to provide additional information;
2. the immigration officer did not satisfactorily assess the criteria in the Immigration Manual Guidelines in concluding that the applicant's establishment in Canada was not such as to create undeserved, disproportionate or unusual hardship if removed;
3. the immigration officer erred in finding that the applicant would be eligible to apply for permanent residence from abroad;

4. the immigration officer did not provide complete and clear reasons for his or her decision; and

5. the immigration officer fettered his discretion by failing to refer the applicant's application to the PRRA unit.

[13] The first reason listed above pertains to natural justice, while the remaining reasons relate to the officer's exercise of his discretion and the reasonableness of the decision. The Court will therefore first consider whether the applicant was denied natural justice and then turn to the reasonableness of the officer's exercise of his discretion.

**Issue No. 1: Was the applicant denied natural justice?**

[14] The applicant states that the officer's reasons evinced "concerns about the separation of family in Canada" and that "the immigration officer was concerned about the Applicant not providing sufficient information about his four children or the Applicant's relationship with them." (Applicant's Memorandum of Fact and Law, p. 54 of the Applicant's Record). The applicant therefore submits that the immigration officer should have notified the applicant of these concerns and given the applicant an opportunity to provide a response, and that the officer's failure to do so constitutes a breach of his duty of fairness to the applicant. The applicant relies on *Bayoyo v. Canada (Minister of Employment and Immigration)*, (1994) 89 F.T.R. 79, wherein Justice Rouleau stated at paragraph 6:

> …The principles of natural justice and fairness require the Immigration Officer to convey to the applicant sufficient information so as to enable him to know the reasons for the refusal and to provide the applicant with an opportunity to respond to those reasons.

The applicants also rely on Justice Reid's decision in *Parihar v. Canada (Minister of Employment and Immigration)*, (1991) 50 F.T.R. 236, wherein she stated at paragraph 4:

> …the decision is flawed because a breach of the duty to act fairly occurred, - the applicants were not given an opportunity to comment on the alleged inconsistencies…

[15] In this case, however, the officer's reasons do not establish that the officer had "concerns" or "doubts" about any information pertaining to the applicant's family in Canada or his estranged family in Guyana. The officer merely stated:

> The applicant states that his three (3) siblings reside in Canada and the submissions indicate that they are willing to support him. I note that the applicant also has a spouse and child in Guyana although their current location is unknown. The applicant's submission includes the statement that he has cut ties with Guyana, however the applicant was fully aware of the fact that he was not a permanent resident of Canada. While it would pose a degree of hardship, I am not satisfied that the separation of the applicant from his family in Canada would pose unusual and undeserved or disproportionate hardship to justify an exemption under humanitarian and compassionate grounds

[16] While the applicant correctly notes that the officer misstated the number of siblings the applicant has in Canada as three rather than four, this does not substantially affect the officer's reasons, namely that separation from his siblings did not constitute undeserved, undue or disproportionate hardship. With respect to the applicant's family in Guyana, there is no indication that the fact that the applicant has family in Guyana weighed against the applicant. Rather, the decision merely indicates that the applicant's estrangement was not considered a positive factor weighing in favour of the application because the applicant was always aware of the possibility of

removal. Unlike in the cases relied upon by the applicant, in the case at bar, the officer did not rely on any alleged inconsistencies or omissions in the application in denying the application.

[17] There is no general obligation to provide an applicant with an opportunity to respond to the reasons for decision or make more fulsome submissions. The onus is on the applicant to provide sufficient persuasive evidence in the application: *Owusu v. Canada (MCI)*, 2004 FCA 38, 318 N.R. 300; *Liniewska v. Canada (MCI),* 2006 FC 591, 152 A.C.W.S. (3d) 500. A duty to raise concerns with the applicant only arises where there is some ambiguity that must be clarified or where the officer relies upon extrinsic evidence. In *Singh v. Canada (MCI)* 2006 FC 315, 146 A.C.W.S. (3d) 707, Justice Russell stated at paragraphs 27-28:

> **27** Generally speaking, the jurisprudence suggests that a duty to raise concerns with the Applicant only arises where there is some ambiguity that needs to be clarified or where the Officer relies upon extrinsic evidence. See, for example, *Heer* at paras. 19-28; *Bellido* at para. 35; and *Dodia v. Canada (Minister of Citizenship and Immigration)* 2003 FC 1107, [2003] F.C.J. No. 1397 (QL) at paras. 12-14.
>
> **28** The duty of procedural fairness does not require an officer to notify an applicant as to why the evidence provided is not sufficient to fulfil the statutory criteria. The onus is on an applicant to provide that evidence… There was no real ambiguity in the evidence presented and there was no reliance on extrinsic evidence. An officer is not required to discuss shortcomings in the evidence before a decision is made and to give an applicant an opportunity to rectify those shortcomings.

[18] Similarly, in the case at bar, there was no ambiguity or reliance on external evidence, and thus the officer did not breach a duty of fairness to the applicant by failing to provide the applicant with an opportunity to provide additional information.

**Issue No. 2: Did the officer err in the exercise of his discretion by ignoring or misconstruing evidence, or fettering his discretion, in denying the applicant's application?**

[19] The applicant's first submission under this issue is that the officer did not properly assess the criteria in the Guidelines relating to establishment in finding that the applicant's establishment was such that the applicant would face unusual, undeserved or disproportionate hardship if removed from Canada. The applicant relies on *Pramauntanyath v. Canada (Minister of Citizenship and Immigration)*, where Justice Phelan held at paragraphs 16-17:

> ¶16 The Officer appears to have given favourable consideration to the establishment of the restaurant business, his social and economic integration, his Canadian experience, his volunteer work, letters of recommendation and his establishment in Canada. Despite all this, the Officer finds: "I am not satisfied that his business venture and integration is compelling."
>
> ¶17 Given the "reasonableness" analysis quoted earlier, the Court cannot find the evidentiary foundation or the logical process which supports the Officer's conclusion.

[20] However, in that case, the applicant was a partner in a restaurant and an employer of 15-20 employees. The evidence was that the business could not carry on without him and therefore his business partners would be adversely affected and his employees would lose their jobs. None of this evidence had been mentioned by the officer in his assessment of the applicant's establishment. Here, there is no omission of material facts, nor is there a similarly high degree of establishment. The officer recognized the applicant's employment history and that he has family members in Canada. It was reasonable for the officer to conclude that separation from siblings is not the hardship of a level warranting an H&C exemption. Moreover, it was reasonable for the officer to note that the applicant had obtained his employment after his refugee claim had been refused, while under his current removal order. While the applicant was legally entitled remain in Canada while

pursuing his H&C application, the elapsed time cannot be a basis for him to remain in Canada as a permanent resident.

[21] Second, the applicant states that the officer "unfairly" stated that he would be eligible to apply from abroad, as the applicant would not receive the necessary points to meet the assessment criteria and could have demonstrated this to the officer if he had been given a chance to respond. The respondent submits the fact that an applicant may not qualify as a skilled worker is contemplated by the legislation, is inherent in being asked to leave Canada after having lived here for a period of time, and does not rise to the level of unusual or undeserved hardship. The Court agrees. The officer's statement that the applicant could apply for permanent residence from outside Canada was not a determinative factor in the reasons, nor did it imply that the applicant would be successful.

[22] Third, the applicant submits that the reasons were not clear and complete. The basis for this submission is an incomplete sentence in the officer's reasons. At p. 10 of the Applicant's Record, the officer states:

> The applicant has been employed with Eagle Global Logistics since February 2000. However I note that he has been under a removal order since June 29, 1999 and this removal order has been in effect since December 17, 2001 when he was found not to be a Convention Refugee, which the applicant would have been aware of. I note that the applicant will be able to use his skills and experience to assist him in seeking new employment if he were to leave Canada. I also note that the applicant would be eligible to apply for permanent residence from outside of Canada through the Economic Class. While it would pose a degree of hardship, I am not satisfied that the applicant's

[23] The final sentence in this paragraph remains incomplete. In *Dunsmuir,* supra, the Supreme Court held that in order to be reasonable, the reasons for a decision must be intelligible. Although one sentence is incomplete in the reasons, the reasons are adequate in that they indicate the various factors were considered and why the officer found them insufficient. The incomplete sentence is insufficient basis for the Court to find the decision unreasonable or disturb the immigration officer's findings.

[24] Finally, the applicant submits that the immigration officer fettered his discretion by taking on the role of a Pre-Removal Risk Officer in assessing the alleged risk of the applicant returning to Guyana. The applicant made the submission relating to risk in his H&C application, rather than a PRRA application. However, the Immigration Manual *IP5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* provides a procedure for an officer to refer an H&C application to the PRRA unit when there is a personal risk alleged.

[25] In this case, however, no personalized risk was alleged. There were only two submissions relating to risk in the applicant's H&C application. The first, at p. 17 of the Applicant's Record, states:

> Moreover, given the current political situation in Guyana and the tremendous rise in incident s of sectarian violence and terrorism in that country, it will be very difficult for our Client to return to that country in order to process his Immigration documents at this time.

[26] The second statement relating to risk was at p. 28 of the Applicant's Record, wherein the applicant stated:

> I also do not have a safe place [to] reside in that country.

[27] These submissions do not provide any evidence of personalized risk to the applicant. There was therefore no reason for the officer to refer the application to the PRRA unit.

[28] The applicant has not submitted that there are any questions for certification. The Court agrees.

[29] For these reasons, this application for judicial review is dismissed.

## **JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3069-08 |
| **STYLE OF CAUSE:** | RONALD LIONEL v. MCI |
| **PLACE OF HEARING:** | Toronto, Ontario |
| **DATE OF HEARING:** | February 18, 2009 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | KELEN J. |
| **DATED:** | March 4, 2009 |

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| Jennifer Dagsvik | FOR THE RESPONDENT |

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