Date: 20090612

Docket: IMM-4025-08

Citation: 2009 FC 624

Ottawa, Ontario, June 12, 2009

PRESENT: The Honourable Frederick E. Gibson

BETWEEN:

LEON GRIFFITHS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

Introduction

[1] These reasons follow the hearing at Toronto, on the 14th of May, 2009, of an application for judicial review of a decision of an Immigration Officer (the "Officer"), dated the 27th of August, 2008, whereby the Officer denied the Applicant an opportunity, on humanitarian and compassionate grounds, to return from Jamaica to Canada to apply for permanent residence from within Canada. The Applicant sought the opportunity pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act* [1]. At the close of the hearing, I advised counsel that this application for judicial

[1] S.C. 2001, c. 27.

review would be dismissed. Counsel for the Applicant requested leave to provide written submissions on certification of a question to allow for an appeal of my conclusion and decision. I acceded to that request. In preparing these reasons, I have had regard, not only to the brief explanation provided at the close of hearing for my conclusion, but also to the extensive written submissions on certification provided by counsel for the Applicant, to responding written submissions provided by counsel for the Respondent and to a reply to those written submissions.

Background

[2] The Applicant is a citizen of Jamaica where he was born on the 19th of November, 1970. The Applicant entered Canada in November, 1976, at the age of five or six. He was removed back to Jamaica in September, 2006, almost 30 years after his arrival in Canada. That being said, a deportation order was issued against the Applicant on the 15th of August, 1994 following his conviction in Canada for criminal activity. A negative Pre-Removal Risk Assessment was issued against the Applicant on the 17th of February, 2005.

[3] The Applicant's mother, two brothers and sister live in Canada and are Canadian citizens. The Applicant has three Canadian born children who, at the date of the decision under review, were 13, 12 and 7 years of age respectively. The Applicant has no known relatives outside of Canada. At the date of his removal from Canada, the Applicant was not married.

[4] On the 30th of November, 1992, the Applicant was convicted in Canada of robbery, disguise with intent to commit an offence and possession of a dangerous weapon. He was sentenced to a term of imprisonment of two years, less one day. As earlier noted, in the result, a deportation order was issued against the Applicant. Implementation of that deportation order was stayed on

conditions, including good behaviour, but the stay was subsequently revoked. The Applicant was convicted on the 18th of November, 1994 on a charge of obstruction of justice. Submissions before the Officer on behalf of the Applicant indicate that he was charged with conspiracy to traffic and obstruction of justice in 1996. In January of 2001, he was acquitted of the conspiracy charge and pled guilty to the obstruction charge. The Applicant was also convicted in 1996 on a charge of assault.

[5] The Officer's notes to file in support of the decision under review indicate that: "Information about any pardons has not been provided". While the foregoing might be considered to be technically accurate since no information regarding the grant or denial of any pardon or pardons to the Applicant was before the Officer, the Officer did have before him written information indicating that a pardon or pardons had been applied for on behalf of the Applicant.

[6] The Applicant's criminal activities would appear from the information that was before the Officer to have ended in 1996. From that year, the Applicant worked as an auto mechanic, as location support for a security company and as a shipper and receiver for a moving company. Between 1993 and 2004, the Applicant studied at Seneca College in the fields of accounting/finance, fashion merchandising and fashion design.

[7] A letter from a psychiatrist in Jamaica that was before the Officer indicates that the Applicant has had great difficulty in adjusting to life in Jamaica since his return to that country. The letter indicates that the Applicant suffers from chronic depression in Jamaica.

The Decision under Review and the Supporting Reasons

[8] The Officer notes at the commencement of his Decision And Reasons that:

> Mr. Griffiths bears the onus of satisfying the decision-maker that his personal circumstances are such that a hardship of not being granted the requested exemption would be i) unusual and undeserved or ii) disproportionate.

[9] The Officer notes that the stay of removal that was granted to the Applicant following his November, 1994 conviction was lifted in December, 1998 because of subsequent criminal charges and a breach of the terms and conditions imposed with the stay.

[10] The Officer further notes that the Applicant lived in Canada for 30 years, that is to say until the time of his removal back to Jamaica in 2006, and that he was only six years old when he arrived in Canada. The Officer notes the Applicant's work and study record from 1996 until the time of his removal.

[11] The Officer reviews the Applicant's criminal record and reiterates that: "Information about any pardons has not been provided." The Officer further notes that the Applicant's submissions indicate that he has had no criminal charges laid against him since 1996 and concludes with regard to the Applicant's establishment in Canada in the following terms:

> I accept the time the applicant has spent in Canada and that he arrived at an early age. I also acknowledge his Canadian employment and his upgrading of skills. However, considering his establishment and his inadmissibility for serious criminality and his other separate criminal convictions I am not satisfied that an A25(1) exemption is warranted to facilitate processing the applicant for permanent residence within Canada on the basis of a hardship that is unusual and undeserved or disproportionate.

[12] The Officer then goes on to consider humanitarian and compassionate factors in the Applicant's background under the headings "Best Interests of the Children", "Family Related Factors" and "Challenge of Returning to Jamaica".

[13] With regard to the best interests of the Applicant's Canadian born children, the Officer notes their ages, a letter from the mother of the two elder children indicating that: … "the children need their father in Canada for guidance." and a letter dated in 2002 from the mother of the youngest child "…..stating the applicant's deportation would cause great stress to her and her daughter;". The Officer notes that no "updated reference letter" from the mother of the youngest child was before him or her.

[14] With regard to the bests interests of the Applicant's children, the Officer concludes:

> … I accept that the applicant's absence from Canada is a source of sadness for his children though I am not satisfied that an A25(1) exemption is warranted to facilitate processing the applicant for permanent residence within Canada on the basis of a hardship that is unusual and undeserved or disproportionate.

[15] The Officer, under the heading "Family Related Factors" merely states:

> The applicant emigrated to Canada in 1976 with his mother, his two brothers and his sister. The applicant listed living with his mother until he was deported and he still uses her address as a Canadian mailing address. The applicant's father died when the applicant was 13, which he states affected him profoundly. Reference letters were provided from his Canadian family members and I accept their relationship.

[16] Finally, under the heading "Challenge of Returning to Jamaica", the Officer notes that the Applicant last lived in Jamaica before his removal back to that country when he was six years old, that he has no close family members in Jamaica, that he alleges that he has no future in Jamaica and acknowledges the letter that was before him or her from a psychiatrist in Jamaica who comments on

the Applicant's difficulty in adjusting to the lifestyle and culture in Jamaica and to what the psychiatrist refers to as the Applicant's "chronic depression". In this regard, the Officer concludes:

> … However, the Applicant found work in Jamaica providing carpentry services immediately after his return there in September 2006.
>
> I acknowledge the applicant's concern about violence and crime in Jamaica and I have reviewed the newspaper articles that were submitted for consideration. I accept the applicant's concerns about living in Jamaica; however the applicant has not satisfied me that crime and violence in Jamaica would necessarily affect him personally. The applicant's 2006 submissions stated that the Jamaican government was imposing restrictions on Jamaican nationals deported back to Jamaica and that deportees faced barriers to opportunities there. However, the applicant's 2008 submissions did not state that he faced restrictions and barriers imposed by the government after his return. The applicant has not satisfied me that the challenge of returning to Jamaica would be hardship that is [un]usual and undeserved or disproportionate. <u>There are other immigration programs and relief mechanisms that the applicant can explore if he wishes to apply to return to Canada</u>.
>
> [emphasis added]

[17] In the two final paragraphs of the Officer's notes, he or she writes:

> I have considered all information regarding this application as a whole. Having reviewed and considered the grounds Mr. Griffiths has forwarded as grounds for an exemption, I do not find they constitute as unusual and undeserved or disproportionate hardships. Therefore, I am not satisfied sufficient humanitarian and compassionate grounds exist to approve this exemption request.
>
> The application is refused.

[18] While the two foregoing paragraphs are not separated from the portion of the Officer's notes under the heading "Challenge of Return to Jamaica", I am satisfied that they constitute a general conclusion and represent a balancing of the Officer's conclusion regarding the impact of the

Applicant's inadmissibility for serious criminality in Canada and the positive humanitarian and compassionate considerations put forward by and on behalf of the Applicant.

The Issues

[19] In the Memorandum of Fact and Law filed on behalf of the Applicant, the issues on this application for judicial review are identified as first, standard of review, secondly, whether the Officer erred in identifying criminal inadmissibility as a bar to the Applicant's success on this application, thirdly, whether the Officer erred in failing to be alert, alive and sensitive to the evidence before him regarding the best interests of the Applicant's children in Canada, and fourthly, whether the Officer erred in failing to give full weight to the evidence before him or her regarding the "undue" hardship that the Applicant was experiencing in Jamaica. While not specifically identified in the Applicant's Memorandum, before the Court, counsel urged that the Officer failed to have full regard to the evidence before him or her from the Applicant's mother, from the mother of the Applicant's two older children and to an extensive Psycho-Social Process Assessment and Culturally/Racially Sensitive Opinion provided by Dr. Ralph Agard, dated the 19th of December, 2003.

Analysis

a) Standard of Review

[20] Except with respect to questions of pure law, it is now well settled that the standard of review of a decision such as this, reflecting as it does a conclusion that humanitarian and compassionate relief is not warranted in favour of the Applicant, is "reasonableness" with substantial deference being owed to the decision-maker in respect of his or her weighing of the evidence that is before the Officer. It is further well settled that, for a decision to be reasonable,

there must be justification, transparency and intelligibility within the decision-making process and the decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. The Supreme Court of Canada has recently clarified in *Khosa*[2] that it is possible that there may be more than one reasonable outcome and what is important is that the process and the outcome demonstrate justification, transparency and intelligibility and that, if the foregoing test is satisfied, a reviewing Court should not substitute its own view of a preferable outcome.

b) Application of the Appropriate Standard of Review to the Facts of this Application

[21] It is trite law that applications for permanent residence in Canada are to be made from outside Canada and that permission to apply for permanent residence from within Canada is a highly discretionary exception to the general rule. Such permission may be granted only on an application such as that here before the Court, made pursuant to subsection 25(1) of the *Act*. Generally speaking, applications pursuant to subsection 25(1) are made by persons who are within Canada and who have been here for a considerable period of time. That is not here the case. Although the Applicant resided in Canada for a very considerable period of time, he was removed from Canada by reason of his own misconduct and now seeks to return, not on the basis of an approved visa application, bur rather, for the purpose of seeking such a visa from within Canada, based on his long period of residence in Canada, during the latter portion of which, it is urged, his conduct was beyond reproach, his family support in Canada from his mother and siblings, and the best interests of his three children in Canada. There is no question regarding his family support in Canada and the evidence regarding the best interests of his Canadian children based on the evidence

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[2] 2009 S.C.C. 12, at paragraph 59.

that was before the Officer and is now before the Court. That being said, at the time of the decision under review, pardon for his criminal conduct in Canada remained at issue and the course of consideration whether or not the Applicant should be pardoned for his past criminal conduct goes directly to the question of whether the Applicant has in fact remained free of criminal conduct since his last conviction in Canada.

[22] The Officer summarized the Applicant's conduct during the long period that he resided in Canada, including his criminal conduct and what would appear to be his positive conduct since his last conviction. The Officer took into account the Applicant's employment record since his last known criminal activity, his study to upgrade his education, the positive support of his family members, and evaluated the "best interests" of the Applicant's three Canadian born children. The Officer weighed the negative aspects of the Applicant's conduct in Canada and, I am satisfied, weighed those considerations against the positive considerations flowing from the Applicant's later conduct in Canada, based on the evidence that was before him or her, and against the best interests of the Applicant's children in Canada. He or she reached a conclusion on the basis of that weighing or balancing that, based upon the submissions of the Applicant's counsel that were before me, both in writing and presented orally at hearing, were not the conclusions that counsel would have drawn. That is not the test. Indeed, whether they were the conclusions that the Court itself might have drawn is not the test. Rather, the test is whether or not the conclusions drawn by the Officer were reasonably open to him or her, having regard to the guidance as to "reasonableness" provided by the Supreme Court of Canada.

[23] In *Ramotar*[3], my colleague Justice Kelen cited our colleague Justice Shore in *Lee v. Canada (Minister of Citizenship and Immigration)*[4] where Justice Shore wrote:

> In essence, positive H&C decisions are for circumstances sufficiently disproportionate or unjust, such that the persons concerned should be allowed to apply for landing from within Canada, instead of returning home and joining a long queue in which many others had been waiting patiently. ...

The foregoing applies with only one modification on the facts of this matter. Here, the Applicant is not seeking to be allowed to apply for landing from within Canada instead of returning home. Rather, he is already "at home", as tenuous as his connection to Jamaica might be.

[24] Against the appropriate standard of review, that of reasonableness, I am satisfied that the Officer made no reviewable error in arriving at the decision here under review.

Conclusion

[25] For the foregoing reasons, this application for judicial review will be dismissed.

Certification of a Question

[26] As indicated earlier in these reasons, at the close of the hearing of this application for judicial review, I advised counsel that the application would be dismissed and provided counsel with an opportunity to provide the Court with written submissions on certification of a question.

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3 2009 FC 362, April 9, 2009 (not cited before the Court).
4 [2008] F.C.J. No. 470 (not cited before the Court).

[27] Counsel for the Applicant urged the certification of the following two questions, supported by very extensive written argument:

> 1. Does subsection 25(1) of IRPA permit the Minister's delegate to override criminality and if so, what is the process by which such could be done?
>
> 2. In applying the *Dunsmuir* test, is the fact that the legal error as in this case, the misapplication of 25(1) of the IRPA, require that the Court not to interfere even when the Court is of the view that the application of the subsection is incorrect? Or alternatively, what is the Standard of Review in a case where there is a misapplication of the subsection 25(1) of the IRPA?

[28] In responding submissions, counsel for the Respondent urged that neither of the proposed questions meets the criteria for certification. Counsel for the Applicant, without leave of the Court, and apparently on the assumption that he was entitled as of right to provide responding submissions, did so.

[29] In general, counsel appearing before the Court on an application for judicial review in an immigration matter where certification of a question is a condition precedent to a right of appeal are expected to appear before the Court ready to speak to the issue of certification of a question. I regard that as particularly appropriate where the Court, as here, advised counsel with brief reasons, and at the close of hearing, of the Court's conclusion as to the appropriate outcome of the application for judicial review.

[30] Where the Court is requested at close of hearing to provide an opportunity for written submissions, I am satisfied that it is within the Court's sole discretion as to whether it will do so. Equally, I am satisfied that it is within the Court's sole discretion where it provides an opportunity for written submissions to provide a timetable for those submissions. On the facts of

this matter, counsel for the Applicant and the Respondent were provided more than a week to make written submissions. It was made clear to counsel that that period of time was to accommodate a reasonable opportunity for submissions to be made on behalf of both parties. Counsel for the Applicant only served and provided to the Court his submissions on the afternoon of the last day provided for submissions. Counsel for the Respondent requested of the Court an extension of time to reply and that was provided. No request was made on behalf of the Applicant for any time to respond.

[31] Notwithstanding the foregoing, as earlier noted, I have considered all of the originating submissions on certification on behalf of the Applicant, the Respondent's responding submissions and the Applicant's reply submissions.

[32] I am in agreement with the submissions made on behalf of the Respondent. Neither of the proposed questions meets the criteria for certification of a question. In this regard, I refer counsel to the recent decision of the Federal Court of Appeal in *Carrasco Varela v. Canada (Minister of Citizenship and Immigration)*[5] where there is an extensive discussion on the issue of certification of questions in immigration matters.

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[5] 2009 FCA 145, May 6, 2009.

ORDER

THIS COURT ORDERS that this application for judicial review is dismissed. No question is certified.

"Frederick E. Gibson"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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