Federal Court  Cour fédérale

Date: 20100610

Docket: IMM-5291-09

Citation: 2010 FC 629

Toronto, Ontario, June 10, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

MAXIMIN DONELLY HERMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant is a citizen of St. Lucia. In August 2006, she applied under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for an exemption, on humanitarian and compassionate (H&C) grounds, from the general requirement to apply for permanent residence in Canada from outside Canada.

[2] In a decision dated September 1, 2009, a Pre-Removal Risk Assessment (PRRA) Officer, rejected her application.

[3] The Applicant seeks to have the PRRA Officer's decision set aside on the basis that she erred by:

i. rejecting the H&C application without granting the Applicant an interview to address alleged credibility concerns;

ii. failing to apply and follow section 13.10 of Guideline IP 5, issued by the Department of Citizenship and Immigration Canada, entitled *Immigration Applications in Canada made on Humanitarian and Compassionate Grounds*;

iii. failing to reasonably apply those guidelines, to reasonably assess the best interests of the Applicant's child, and to reasonably assess the nature of the hardship that she claims she will face if required to return to St. Lucia; and

iv. applying an incorrect test in the assessment of her application.

[4] For the reasons that follow, this application is dismissed.

I. Background

[5] The Applicant arrived in Canada in 1999 and married a permanent resident of Canada, Mr. Servulus Dennehy, in 2002.

[6] In April 2003, Mr. Dennehy submitted a sponsorship application for the Applicant. However, the application was returned because there was a missing signature. The Applicant then

briefly returned to St. Lucia in June 2003 to renew her visitor's visa. While she was away, she was apparently informed by Mr. Dennehy that he had completed and resubmitted the application and that he had attended an interview in support of the application. The Applicant subsequently learned that her application had not in fact been resubmitted.

[7] Later that same year the Applicant and Mr. Dennehy separated, after he was convicted of assaulting her and sentenced to one day in jail, having regard to the time he spent in custody prior to his trial.

[8] Subsequent to his arrest, Mr. Dennehy telephoned the Applicant and promised her that he would complete her application if she agreed to drop the charges against him. She refused and submitted her first H&C application. That application was rejected in early January 2006. Her application for leave to seek judicial review of that decision was subsequently denied.

[9] Later in January 2006 the Applicant applied for refugee protection based on a fear that Mr. Dennehy, who is from St. Lucia, would return to that country to harm her should she return there. That application was rejected in June 2006 on the basis of the availability of adequate state protection in that country.

[10] In August 2006, the Applicant submitted a second H&C application.

II. The decision under review

[11] The Applicant's second H&C application was rejected after the PRRA Officer concluded that the Applicant had not adduced sufficient evidence to demonstrate that:

i. Mr. Dennehy had a continued interest in harming her, let alone pursuing her to St. Lucia;

ii. she would face a risk of unusual and undeserved, or disproportionate, hardship in St. Lucia, particularly given the availability of adequate state protection and a network of family in that country who are in a position to assist with her reintegration there;

iii. she would face a risk of such hardship as a result of having to sever her various relationships with friends and her boyfriend in Canada;

iv. she would face a risk of such hardship as a result of having to sever her ties to Canada; and

v. it would not be in the best interests of her daughter, who attends a private school in St. Lucia, for the Applicant to give up her job in Canada and return to St. Lucia.

III. The standard of review

[12] The issues raised by the Applicant with respect to procedural fairness and whether the PRRA Officer applied the correct test in assessing her application are reviewable on a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 55 and

90; and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 44).

[13] The remaining two issues that have been raised by the Applicant are reviewable on a standard of reasonableness (*Dunsmuir*, above, at paras. 53 and 54; and *Khosa*, above, at para. 46).

[14] In *Khosa*, at para. 59, reasonableness was articulated by Justice Ian Binnie as follows:

> Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

IV. Analysis

A. *Did the Officer err by failing to grant an interview?*

[15] The Applicant submitted that the PRRA Officer made a number of credibility findings that were simply couched in the language of “insufficiency of evidence”. She further submitted that the failure to give her an opportunity to respond to the Officer’s credibility concerns was contrary to the principles of procedural fairness.

[16] In support of her submission on this issue, the Applicant cited a number of cases in which this Court found that the PRRA Officer’s findings of “insufficient evidence” were actually negative credibility findings (*Liban v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252 at

para. 14; *Haji v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 889, at paras. 14 to 16; *Begashaw v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1167, at paras. 20 and 21; and *Agbor v. Canada (Minister of Citizenship and Immigration)*, IMM-2924-09).

[17] In my view, those cases do not stand for the proposition that a PRRA Officer in essence makes an adverse credibility finding every time he or she concludes that the evidence adduced by an Applicant is not sufficient to meet the Applicant's evidentiary burden of proof. In each of those cases, it was clear to the Court that the PRRA Officer either had made a negative credibility finding, or simply disbelieved the evidence presented by the Applicant. This is very different from not being persuaded that an Applicant has met his or her burden of proof on the balance of probabilities, without ever having considered whether the evidence is credible. As this Court held in *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, at para. 26:

> It is open to the trier of fact, in considering the evidence, to move immediately to an assessment of weight or probative value without considering whether it is credible. Invariably this occurs when the trier of fact is of the view that the answer to … [the question as to whether the evidence is credible] is irrelevant because the evidence is to be given little or no weight, even if it is found to be reliable evidence.

[18] I am satisfied that in the case at bar, the PRRA Officer was not cloaking adverse credibility findings in conclusions that the evidence adduced by the Applicant was not sufficient. In each instance, it was reasonably open to the PRRA Officer to conclude, without making an adverse credibility finding, that the evidence adduced was not sufficient to establish, on a balance of probabilities, the claims advanced by the Applicant.

[19] Specifically, while the Applicant may sincerely believe that Mr. Dennehy is likely to follow her to St. Lucia and harm her there, there was objective evidence that he had not attempted to contact her since 2004. On this evidentiary record, it was reasonably open for the Officer to conclude that there was insufficient evidence that Mr. Dennehy had a continued interest in the Applicant.

[20] With respect to the Applicant's other alleged risks of hardship, the Officer in each case reasonably considered the Applicant's evidence and concluded that she had not provided sufficient information to establish her claims. Relying on this Court's decision in *Davoudifar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 316, the Officer correctly noted that it was not sufficient for the Applicant to simply demonstrate that she has developed personal and community ties and that she and her supporters or loved ones would be far happier and better off if she remained in Canada. That should not be particularly difficult to demonstrate for anyone who has lived in Canada for a significant period of time and developed strong personal relationships and other ties to Canada. The test is whether an Applicant has adduced sufficient evidence of likely unusual and undeserved, or disproportionate, hardship to warrant the exceptional grant of Ministerial discretion that is contemplated by section 25 of the IRPA.

[21] Unfortunately, in contrast to the Applicants in *Raudales v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385, [2003] F.C.J. No. 532, at para. 18; and *Jamrich v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804, [2003] F.C.J. No. 1076 at para. 24, the Applicant in the case at bar did not meet her burden in that regard.

[22] As to the best interests of her daughter, the Applicant's submissions were focused on her ability to continue to support her daughter's attendance at a prestigious school. However, the Applicant adduced no evidence regarding the costs of her daughter's schooling and the extent to which the Applicant's return to St. Lucia might impact upon her daughter's ability to stay in that school. On the basis of this evidentiary record, and considering that the Applicant will be reunited with her daughter when she returns to St. Lucia, I am unable to conclude that the Officer erred in her consideration of the interests of the Applicant's daughter.

[23] In summary, I am unable to agree with the Applicant that the Officer breached the rules of procedural fairness by cloaking adverse credibility findings in findings of insufficient evidence, and then not according the Applicant an opportunity to respond to the Officer's concerns. The opportunity for the Applicant to "put her best foot forward" by providing full written representations in relation to all aspects of her application was accorded. This satisfied the participatory rights required by the duty of fairness in this case (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 34). The Officer was not required to accord the Applicant an interview merely because she did not find the Applicant's representations to be persuasive.

B. *Did the Officer err by failing to follow and apply section 13.10 of Guideline IP 5?*

[24] At the time the decision under review was made, the provisions of Guideline IP 5 dealing with persons in abusive relationships were set forth in section 13.10. Those provisions were subsequently moved to section 12.7. The language of the current section 12.7 is essentially the same

as the language of the former section 13.10, although some of the factors that were listed in section 13.10 have been deleted. I will assess the Applicant's submission in terms of the guidelines as they stood at the time of the decision (the "Guidelines").

[25] The Guidelines stated the following:

> **Immigration Manual, IP 5, Section 13.10**
>
> Family members in Canada, particularly spouses, who are in abusive relationships and are not permanent residents or Canadian citizens, may feel compelled to stay in the relationship or abusive situation in order to remain in Canada; this could put them at risk.
>
> Officers should be sensitive to situations where the spouse (or other family member) of a Canadian citizen or permanent resident leaves an abusive situation and, as a result, does not have an approved sponsorship.
>
> Officers should consider the following factors:
>
> – Information indicating there was abuse such as police incident reports, charges or convictions, reports from shelters for abused women, medical reports, etc.;
>
> – Whether there is a significant degree of establishment in Canada (see Section 11.2, Assessing the applicant's degree of establishment in Canada);
>
> – The hardship that would result if the applicant had to leave Canada;
>
> – The customs and culture in the applicant's country of origin;
>
> – Support of relatives and friends in the applicant's home country;
>
> – Whether the applicant is pregnant;
>
> – Whether the applicant has a child in Canada;
>
> – The length of time in Canada;
>
> – Whether the marriage or relationship was genuine; and

- Any other factors relevant to the H&C decision.

[26] The Applicant claims that the Officer erred by failing to explicitly state that she had considered the Guidelines and by failing to consider the various factors set forth therein. I do not agree.

[27] As noted in *Baker*, above, at para. 72, in respect of a different section of the Guidelines: "The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by" section 25 of the IRPA, and the fact that a decision may be "contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H&C power." Thus, even where a decision is contrary to the Guidelines, it is not necessarily unreasonable. This is at least in part because the power conferred by section 25 is "highly discretionary and fact-based" (*Baker*, at para. 61).

[28] More generally, administrative guidelines are not binding and cannot be applied in a manner that unduly fetters a decision maker's discretion (*Canada (Minister of Citizenship and Immigration) v. Thamotharem*, 2007 FCA 198 at paras. 62-72). A decision maker must always be free to reach a decision that appropriately reflects the particular facts of the matter before him or her. However, if the decision is contrary, in a substantively important way, to the decision-maker's own guidelines a reasonable explanation should be provided.

[29] It follows that merely omitting to specifically mention the Guidelines and to explicitly address each factor in the Guidelines also does not, *per se*, constitute an error of law. The issue is whether the decision as a whole is unreasonable. As briefly discussed in section IV.C. below, I am unable to conclude that the decision as a whole is unreasonable.

[30] However, for the record, I will note that the Officer in this case did in fact give reasonable consideration to the Guidelines, as she addressed many of the factors that were set forth in the Guidelines, even though she did not explicitly state that she was doing so.

[31] In particular, she explicitly noted the fact that the Applicant left an abusive relationship with Mr. Dennehy, lost his sponsorship, and therefore submitted an H&C application. Then, after noting that the Applicant feared revenge or retribution from Mr. Dennehy, the Officer addressed the issue of the adequacy of state protection in St. Lucia, should it be required.

[32] With respect to the list of factors that were set out in the Guidelines, the Officer explicitly addressed most of the ones that were relevant, namely, the fact that Mr. Dennehy had been convicted and sentenced for assaulting the Applicant; her degree of establishment and length of time in Canada; the hardship that would result if she had to leave Canada; and her family network in St. Lucia who could assist with her reintegration there. There was no need to address the issue of pregnancy or the interests of a Canadian child, although the Officer did address the interests of the Applicant's daughter in St. Lucia. As to the genuineness of the Applicant's marriage, this was never questioned by the Officer. Finally, as to the customs and culture factor, the Officer noted that the Applicant claimed that she would be ostracized by family and friends in St. Lucia due to the fact that she pursued charges against Mr. Dennehy. It was at this point that the Officer then turned to the issue of state protection.

[33] The Applicant submitted that where an applicant loses the sponsorship of an abusive partner by leaving the relationship, there should be a rebuttable presumption that the Applicant's H&C

application will be granted. She claims that, in the absence of such a presumption, the Guidelines will have little practical value for Applicants in abusive situations.

[34] I am unable to agree. The Guidelines effectively provide a special opportunity to Applicants to draw to the attention of the person reviewing their H&C application any considerations relating to their abusive relationship and the listed factors that may be relevant to their application. In addition, they require a PRRA Officer to be particularly sensitive to the Applicant's situation and to the fact that she may have lost the sponsorship of her former partner by leaving the abusive situation.

[35] In essence, the Guidelines ensure that appropriate consideration is given to factors that might not otherwise be given the weight they merit in the overall assessment of an Applicant's H&C application. However, it is still necessary to demonstrate that the application as a whole warrants the exceptional grant of discretion contemplated by section 25 of the IRPA, due to a likely risk of unusual and undeserved, or disproportionate, hardship, if the application is not granted.

[36] To elevate the special opportunity contemplated by the Guidelines to a rebuttable presumption would place Applicants from abusive relationships in a better position than all other H&C Applicants, and would be inconsistent with the highly discretionary nature of the power conferred by section 25. I am unable to agree that this result was intended when section 13.10 was inserted into the Guidelines.

C. *Was the Officer's decision unreasonable?*

[37] The Applicant submits that the Officer's alleged "failure" to assess her situation in light of the Guidelines rendered the Officer's decision unreasonable. As discussed in section IV.B. above, the Officer did in fact assess the various factors set forth in the Guidelines that were relevant to the

Applicant's situation. The fact that she did not explicitly state that she was doing so does not render her decision unreasonable. Given the evidence before the Officer, I am satisfied that the conclusions reached by the Officer in respect of those factors, particularly regarding the insufficiency of the Applicant's evidence, were reasonably available to the Officer. The Officer did not ignore any evidence that might reasonably have led her to reach a different conclusion.

[38] The Applicant also submits that the Officer did not reasonably assess the best interest of her daughter or the nature of the hardship that the Applicant claimed she will face upon her return to St. Lucia. However, for the reasons discussed in part IV.A. above, I am satisfied that both of these matters were reasonably assessed in the course of the Officer's assessment.

[39] Accordingly, I am unable to agree with the contention that the Officer's decision was unreasonable. In my view, the Officer's decision was certainly well within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). The decision was transparent, intelligible and appropriately justified.

D. *Did the Officer apply an incorrect test in assessing the H&C application?*

[40] Finally, the Applicant submits that because certain paragraphs in the Officer's decision were virtually identical to corresponding paragraphs in the Officer's PRRA decision, the Officer applied the test applicable to PRRA applications, rather than the test applicable to H&C applications.

[41] I do not agree. The paragraphs in question were in the section of the Officer's decision that addressed the hardship that the Applicant claimed she would face upon her return to St. Lucia. At the outset of that section, the Officer specifically stated: "I recognize that the threshold is one of

hardship for an H&C application and not section 96 or 97 of the [IRPA]. This H&C application has been assessed on the basis of unusual and undeserved, or disproportionate hardship."

[42] The Officer also explicitly articulated the applicable hardship test at the outset of her analysis, in the prior section of her decision, as well as in all but one of the subsequent sections of her decision. Those sections addressed the various factors that typically are addressed in H&C decisions and that were not considered in the Officer's PRRA decision.

[43] Based on the foregoing and my reading of the Officer's decision, I am satisfied that she did not apply an incorrect test in assessing the Applicant's application.

[44] There is nothing wrong with a PRRA Officer, who makes the decision on an Applicant's PRRA and H&C applications, using material from one application in her analysis of the other application, so long as she in fact applies the correct test in each application.

V. Conclusion

[45] This application for judicial review is dismissed.

[46] The Applicant suggested that consideration be given to certifying a question as to whether it is necessary for a PRRA Officer to apply the Guidelines in a manner that will encourage sponsored immigrants who are experiencing abuse in their relationship to separate from their sponsor, by recognizing the situation of abuse as grounds for granting the Applicant permanent resident status on H&C grounds. As an alternative to this question, the Applicant suggested that I certify the following question:

> Whether in assessing a humanitarian and compassionate application under section 25(1) of the IRPA, the failure to apply the guidelines on “Family Violence” in IP 5 in a manner that would encourage a sponsored applicant to separate from an abuser, rather than continue to endure abuse in order to continue the sponsorship arrangement, is contrary to the policy objective of the “Family Violence” guidelines, and is therefore an unreasonable exercise of discretion under section 25(1) of the IRPA.

[47] Each of these variations of the proposed question is problematic for at least two reasons.

[48] First, assessments of domestic abuse by a sponsor, as well as the broader H&C assessments in which claims of spousal abuse would be made under section 25 of the IRPA, invariably are highly dependent on the specific facts and context of each particular case.

[49] Second, as noted by counsel the Respondent, both variations of the Applicant’s suggested questions are unduly vague. In short, it would be difficult to describe the precise manner in which the Guidelines should be applied to encourage sponsored immigrants to separate from an abusive sponsor, without decreeing outright that all Applicants in such situations should be granted permanent resident status on H&C grounds. Indeed, the latter approach appears to be precisely what the first variation of the Applicant’s question suggests. With the greatest respect to the Applicant, as discussed in the reasons above, such an approach to the Guidelines would be entirely inconsistent with “the highly discretionary and fact-based nature of” H&C assessments under section 25 of the IRPA (*Baker*, above, at para. 61).

[50] Given the foregoing, I do not believe that the proposed questions raise “a serious question of general importance”, as contemplated by paragraph 74(d) of the *Immigration and Refugee Protection Act*.

[51] Accordingly, there is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT this application for judicial review is dismissed.

"Paul S. Crampton"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5291-09
STYLE OF CAUSE:	MAXIMIN DONELLY HERMAN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 25, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	Crampton J.
DATED:	June 10, 2010

APPEARANCES:

Geraldine Sadoway	FOR THE APPLICANT
Suranjana Bhattacharyya	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Geraldine Sadoway Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT