Federal Court

Cour fédérale

Date: 20100819

Docket: IMM-5903-09

Citation: 2010 FC 824

Ottawa, Ontario, August 19, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MOHAMED AZAD KARIMULLAH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The anatomy of humanitarian and compassionate (H&C) grounds is based on exceptional criteria in a differently constituted framework. That framework is established to examine extenuating (or extraordinary) circumstances. It is Canada's unique response to the fragility of the human condition.

[2] In this case, the officer erred by only narrowly focusing on the material well-being of the Applicant and without demonstrating an understanding of his emotional health. H&C applications

are designed to consider all forms of hardship, from the tangible to the intangible. The intangible hardships, such as losing contact with one's family, which represent deprivation of a significant category, are no less relevant to an H&C than the deprivation stemming from a fatal tragedy; this is especially true in this case given the type of illness the Applicant suffers from as well as the evidence showing the importance of family support.

[3] It is to be recalled that, just as it is publicly or notoriously recognized that infants without emotional bonds most often stop eating and drinking and eventually die; those who are severely emotionally handicapped often suffer the same fate. Reference is made to the medical evidence on record, coupled with the recognition that the future does look bleak for the Applicant should his remaining parent be unable to extend the emotional bond which is an essential tether to the sustenance of life.

[4] It is acknowledged by this Court that the <u>financial-medical and practical situation with available guarantees</u> is necessary to ensure that a burden does not fall on the Canadian public. That having been said to be available through the Applicant's closest of family ties, any impediment appears to dissipate in the Applicant's favour, if, in fact, that is the case. The matter of guarantees, however, is not for this Court to determine, but is entirely in the bailiwick of the first-instance decision-maker who is the finder of fact, as it is only that decision-maker who is best suited to determine such guarantees.

II. Judicial Procedure

[5] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision of a visa officer refusing to grant permanent resident status to the Applicant on H&C grounds pursuant to subsection 25(1) of the IRPA.

III. Background

[6] The Applicant, Mr. Mohamed Azad Karimullah, is a 56 year old citizen of Guyana. He is the last member of his immediate family living in Guyana, as his mother and five of his nine siblings live in Canada (the Applicant has nine siblings; the remaining four live in various locations throughout the world).

[7] The Applicant suffers from schizophrenia. The evidence shows that he receives medication for his illness and his condition is under control. In spite of this, the Applicant is stated to be incapable of being self-sufficient.

IV. Decision under Review

[8] The Applicant applied for permanent residence through the Skilled Worker Class (which was denied) and submitted an application for permanent resident status pursuant to subsection 25(1) of the IRPA.

[9] The Applicant's claim was based on being the last remaining family member in Guyana and being dependent on his family for support due to his mental illness.

[10] The officer denied the Applicant's request on the grounds that his family members willingly left him in Guyana, that his family has been able to visit him regularly and has been able to financially support him in Guyana.

[11] The officer presumed that the Applicant is able to find employment in Guyana or, at the very least, care for himself because his disability is not so severe as to render him inadmissible to Canada on health grounds. The officer also noted that the Applicant is receiving medical treatment in Guyana.

V. Issues

[12] 1) Did the officer make unreasonable findings of fact?

2) Did the officer err by failing to apply the guidelines for a *de facto* family member?

VI. Pertinent Legislative Provisions

[13] Subsection 25(1) of the IRPA states:

Humanitarian and compassionate considerations	Séjour pour motif d'ordre humanitaire
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi,

Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

VII. Positions of the Parties

Applicant's Position

[14] The Applicant argues the officer ignored medical evidence emphasizing that he is unable to support himself financially. The Applicant submits the officer erred by presuming he can support himself in the face of evidence to the contrary.

[15] The Applicant also submits the officer ignored evidence showing his emotional dependency on his family members.

[16] The Applicant argues that the officer's inference that his family abandoned him in Guyana is contradicted by evidence showing he lived in Canada for three years before his illness manifested itself.

[17] The Applicant further submits the officer erred by failing to consider him as a *de facto* family member, as laid out in the Overseas Processing Manual 4 (OP4). The Applicant argues he meets the criteria which may allow him to be deemed a *de facto* family member.

[18] In addition, the Applicant specifies that all of the letters and documentation in the context of the entire evidence of the family in regard to the financial means must be shown to be considered by the officer in a significant manner for the decision to be reasonable.

[19] The Applicant has also emphasized that his mother is 78 years of age and spends six months a year with him but, due to her age, her travel will become less and less possible with her advancing years.

[20] The Applicant also noted, as demonstrated in the evidence with respect to the financial means of the family, that siblings are gainfully employed and have families of their own and therefore will not be able to spend lengthy periods of time outside of Canada with their brother.

Respondent's Position

[21] The Respondent submits H&C decisions are discretionary and are to be afforded deference by the reviewing court.

[22] The Respondent argues the officer took the relevant considerations, including the factors which apply to *de facto* family members, into account and did not make any reviewable errors.

[23] The Respondent submits any hardship faced by the Applicant is the result of his family moving outside of Guyana and, as a result, any hardship caused by continued separation cannot be considered undue.

Applicant's Reply

[24] The Applicant replies that the officer made an unreasonable finding by presuming he can find employment when there is evidence showing that the opposite is true. The Applicant reiterates that the officer ignored evidence of his emotional dependency.

VIII. Standard of Review

[25] It is well-established that H&C decisions are exceptional remedies which are to be reviewed on the deferential standard of reasonableness. In the case of *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Supreme Court of Canada held that "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47).

IX. Analysis

[26] The Applicant's representative asked the officer to consider him as a *de facto* family member. The OP4 Manual discusses *de facto* family members in the following terms:

***De facto* family members**

De facto family members are persons who do not meet the definition of a family class member.

They are, however, in a situation of dependence that makes them a *de facto* member of a nuclear family that is either in Canada or that is applying to immigrate. Some examples: a son, daughter, brother or sister left alone in the country of origin without family of their own; an elderly relative such as an aunt or uncle or an unrelated person who has resided with the family for a long time.

Also included may be children in a guardianship relationship where adoption as described in R3(2) is not an accepted concept. Officers should examine these situations on a case-by-case basis and determine whether humanitarian and compassionate reasons exist to allow these children into Canada.
Consider:

• whether dependency is *bona fide* and not created for immigration purposes;

• the level of dependency;

• the stability of the relationship;

• the length of the relationship;

• the impact of a separation;

• the financial and emotional needs of the applicant in relation to the family unit;

• ability and willingness of the family in Canada to provide support;

• applicant's other alternatives, such as family (spouse, children, parents, siblings, etc.) outside Canada able and willing to provide support;

• documentary evidence about the relationship (e.g., joint bank accounts or real estate holdings, other joint property ownership, wills, insurance policies, letters from friends and family);

• any other factors that are believed to be relevant to the H&C decision.

[27] In the case of *Yu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 956, 298 F.T.R. 82, the Court noted that “[g]uidelines and policy directives do not constitute law and, as

such, immigration agents and the Minister himself or herself are not bound by them. They are, however, important and useful to decision-makers and the courts, in this case in order to determine the factors to consider in an H&C application" (*Yu* at para. 19).

[28] The *de facto* family member guidelines explain that officers must be aware of every facet of dependency, from financial to emotional in order to render a reasonable decision. This must be done in conjunction with an explanation by officers of the ability of the family to provide financial guarantees, all of which must be shown, to have been considered in relation to the entire evidentiary record of detailed documents of the financial means of family members as to their earnings. Without such a specific demonstration, the decision would not be reasonable. Recognizing that the criterion of the unification of family members is a hallmark of the Canadian immigration system, due consideration must be given to this key intention of the very values which the Canadian immigration system has legislated into effect in its legal framework of guiding principles.

[29] In this case, the officer devotes the entirety of her decision to the Applicant's material well-bring, yet does not demonstrate an understanding of his mental and emotional health. This is significant because the *de facto* family member guidelines state that the officer is to have regard to the emotional needs of an applicant. Also, there was evidence before the officer, such as the letters from the Georgetown hospital and from the Applicant's siblings, advising of his emotional needs.

[30] The Court recognizes the obligations imposed by the standard of reasonableness; however, in the seminal case of *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264, the court held the following:

> [15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.

[31] It is the Court's conclusion that, given the guidelines advising the officer to consider the Applicant's emotional needs, the submissions by his representative, the medical evidence about his condition and treatment for depression, and the evidence provided by his family, the officer unreasonably ignored his emotional needs and, as such, the decision cannot stand.

X. Conclusion

[32] For all of the above reasons, the matter is remitted to another decision-maker, a different officer who will consider the entire matter anew in conjunction with the specific family guarantees that have been offered.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be granted and that the assessment be remitted for consideration anew by a different officer;
2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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