Federal Court  Cour fédérale

Date: 20111212

Docket: IMM-3591-11

Citation: 2011 FC 1462

Toronto, Ontario, December 12, 2011

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

WAYNE ANTONY HILLARY

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant Wayne Antony Hillary is an adult male citizen of Jamaica. He came to Canada as a permanent resident in October 1981. He suffers from schizophrenia, and is HIV positive. He is receiving medical treatment in Canada for these conditions.

[2] The Applicant has an extensive criminal record in Canada. For that reason, he was ordered to be deported to Jamaica. That order was upheld by the Immigration Appeal Division and leave to apply for judicial review was denied by this Court by an Order dated July 3, 2007.

[3] The Applicant sought a pre-removal risk assessment (PRRA). He alleged that he would not be able to receive proper medical treatment in Jamaica and, being HIV positive, he would wrongly be perceived as a gay man and would likely be in danger of being killed due to social stigma. Evidence to support these allegations was submitted. In a written decision dated 31 October 2007, the PRRA Officer rejected this application. The Applicant did not apply to this Court for leave to seek judicial review.

[4] The Applicant was not removed immediately as he was facing further criminal charges, thus section 50(b) of the *Immigration and Refugee Protection Act* (IRPA), SC 2001, c 27, as amended, precluded removal. However, the Applicant filed a request for a second PRRA assessment on April 28, 2009. The grounds asserted were the same as in respect of the first PRRA assessment, but this time they were supported by more extensive and more forceful evidence. His Counsel's letter to the PRRA Office dated August 10, 2009 candidly states:

> *Mr. Hillary's first PRRA application, a copy of which is enclosed, was completed by his own hand and with no submissions and only one document of country condition evidence. While there have been no new risk developments since the first PRRA, we are now enclosing considerable evidence which clearly demonstrates he faces persecution in Jamaica on account of both his HIV status and his mental health problems.*

[5] The second PRRA application was rejected in a written decision dated April 28, 2011. That decision is the subject of this judicial review. For the reasons that follow, I find that the application is dismissed.

[6] The decision under review is carefully written and considers whether the evidence submitted on the second PRRA application was "new"; it was determined that it was not "new" and, in any event, even if the evidence was "new" it was determined that the Applicant would not be at risk. Thus, the application was refused on two grounds: the material was not "new", and, if it were, there was no "risk".

[7] The Applicant raises these issues in respect of the decision under review:

> *a. What is the appropriate standard of review?*
>
> *b. Did the Officer err by applying the incorrect legal test when she excluded evidence on the basis it was available at the time that a previous application for refugee protection was denied?*
>
> *c. If not, did the Officer err when she concluded that it would be in the interests of justice to apply issue estoppel as a matter of discretion in this case?*

[8] I will add a fourth issue as raised by the Respondent and ignored by the Applicant:

> *4. Was the Officer, nonetheless, correct in rejecting the application even when all the evidence, new or not, was considered?*

ISSUE #1: What is the appropriate standard of review?

[9] The Applicant submits that the exclusion of evidence as not being "new" by the Officer was based on an interpretation of section 113(a) of the IRPA and common-law principles of estoppel; therefore, a correctness standard should apply. The Applicant further submits that, in applying the

principles of estoppel, the standard is reasonableness as considered in *Dunsmuir v New Brunswick*, [2008] SCR 190. For the purposes of this judicial review, I will accept these standards.

[10] The Applicant does not make any submissions as to the standard of review to be applied to the decision of the Officer in which all of the evidence submitted in the second PRRA application, whether it was "new" or not, was taken into consideration. It is clear that the standard of review in this respect is reasonableness.

ISSUE #2: Did the Officer err by applying the incorrect legal test when she excluded evidence on the basis it was available at the time that a previous application for refugee protection was denied?

ISSUE#3: If not, did the Officer err when she concluded that it would be in the interests of justice to apply issue estoppel as a matter of discretion in this case?

[11] I will consider Issues #2 and #3 together, since the result in Issue #4 is dispositive, and any remarks made in respect of Issues #2 and #3 would be *obiter*.

[12] Applicant's Counsel has raised a number of issues as to the meaning and effect of subsection 113(a) of the IRPA and the interplay of that subsection with the doctrine of estoppel as developed by the Courts. It is clear from the decision under review that the PRRA Officer recognized that subsection 113(a) of the IRPA came into consideration only in dealing with a prior decision of a Convention Refugee application and not a prior PRRA decision. The Officer was correct in so doing.

[13] The Officer applied the principles of estoppel as developed by the Courts. Applicant's Counsel argues, in effect, that those principles must be modified by or at least informed by the jurisprudence respecting section 113(a) of IRPA. My views in this respect are unnecessary, since the Officer's decision taking into account all of the evidence is dispositive; and therefore, the matter is moot. While undoubtedly there are many aspects of IRPA and immigration and refugee jurisprudence more generally that would benefit from clarification by this or a higher Court, the Court should avoid unnecessary determinations and avoid simply making findings *in obiter*.

ISSUE #4: Was the Officer, nonetheless, correct in rejecting the application even when all the evidence, new or not, was considered?

[14] This issue is determinative. The Officer, as a basis for the decision under review, found that, even taking into account all the evidence in the record, the application should be rejected. Within the scope given in respect of such decisions by *Dusmuir,* supra, the decision was reasonable and will not be set aside.

CONCLUSIONS

[15] The application for judicial review will be dismissed. Given that this matter is dismissed with respect to Issue #4, there is no question for certification. There are no special grounds upon which to award costs.

JUDGMENT

FOR THE REASONS PROVIDED:

THIS COURT'S JUDGMENT is that:

1. This application is denied;

2. No question is certified; and

3. No Order as to costs.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3591-11
STYLE OF CAUSE:	WAYNE ANTONY HILLARY v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 12, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	HUGHES J.
DATED:	December 12, 2011

APPEARANCES:

John Norquay	FOR THE APPLICANT
Kristina Dragaitis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

HIV & AIDS Legal Clinic (Ontario) Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT