Federal Court  Cour fédérale

Date: 20120221

Docket: IMM-4194-11

Citation: 2012 FC 236

Ottawa, Ontario, February 21, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

ARLINE TINDALE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks to set aside a decision of an Immigration Officer at Citizenship and Immigration Canada (CIC), refusing the applicant's application under section 25 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) for permanent residency on humanitarian and compassionate (H&C) grounds. The CIC Immigration Officer (the Officer) found that the applicant would not face unusual, undeserved or disproportionate hardship by having to apply for a permanent resident visa outside of Canada. For the reasons that follow this application for judicial review is granted.

Facts

[2] The applicant is originally from Jamaica. Her first husband abused her. She fled from him to Canada taking only her youngest son with her leaving behind several other children. She is estranged from these children and claims she has no one to return to even though her mother and seven siblings still live in Jamaica.

[3] The applicant has been in Canada for over twenty years without legal status. Her attempts at regularizing her status are many and storied: in October 2003, thirteen years after she entered the country, her application for permanent residency on humanitarian and compassionate grounds (H&C application) was refused; in September 2004, her refugee claim was refused; in December 2004, her application for judicial review of the refugee claim decision was denied; in November 2006, her first Pre-Removal Risk Assessment (PRRA) application was decided negatively; in April 2007 her application for judicial review of the PRRA decision was dismissed; in October 2009, her sponsor withdrew the sponsorship application for permanent residency; in May 2011, her second PRRA application was decided negatively, a decision in respect of which she sought judicial review in *Arline Tindale v MCI*, 2012 FC 237 (IMM-4197-11); and in June 2011, her second H&C application was refused. Justice James Russell granted a stay of the applicant's removal pending judicial review of the decision in the present case, and pending judicial review of a negative PRRA. The decision in that matter was released contemporaneous with this decision.

Issue

[4] The issue in this case is whether the decision of the Officer to refuse the applicant's H&C application is reasonable per *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190.

Analysis

[5] It is axiomatic that it is not the role of the Court to replace the findings and decision of an officer with its own findings and decision but rather to review the decision rendered by the officer to ensure that it accords with the law. In consequence, the Court cannot disturb decisions by administrative decision-makers provided these are reasonable, even if they are in themselves decisions which the Court in exercising its discretion would not have reached.

[6] The Officer organized her analysis of the claim under the following headings: hardship or sanctions upon return to Jamaica, family or personal ties that would create hardship if severed, degree of establishment in Canada, establishment, ties or residency in any other country, return to country of nationality. The applicant takes issue with specific finding of the Officer under the "degree of establishment in Canada" analysis. That finding is the following:

> While recognize that leaving Canada after more than twenty years may be difficult, the evidence before me does not support that the applicant has become established in Canada to the extent that her leaving Canada amounts to an unusual and undeserved, or disproportionate hardship.

[7] The applicant argues that the above finding leaves it "…unclear what was required to satisfy the officer that the Applicant was sufficiently established."

[8] The applicant relies on *Cobham v Canada (Minister of Citizenship & Immigration)*, 2009 FC 585 for this argument. In *Cobham*, Justice John O'Keefe allowed the application for an exemption on H&C grounds from the normal requirement to apply for permanent residence from outside of Canada because "…the applicant's degree of establishment is an important factor in this

case and therefore, the inadequacy of the reasons on this point bear on the fairness of the overall decision." Here, while the Officer identified some of the relevant factors which bear on establishment, there is no analysis as to why the conclusion was reached. Indeed, any fair and objective reading of the reasons points in the opposite direction from the conclusion reached.

[9] Decisions on H&C applications are discretionary, not "arbitrary and procedurally unfair." As was held in *Jurado Tobar v Canada (Citizenship and Immigration)*, 2011 FC 1111:

> It is well-settled that the grant of an H&C application is reserved for exceptional cases. As well, given the highly discretionary element in an H&C decision, significant deference is afforded by this Court to the decision and a wider scope of possible reasonable outcomes may be present: *Inneh v Canada (Citizenship and Immigration)*, 2009 FC 108 at para 13; and *Del Melo Gomes v Canada (Citizenship and Immigration)*, 2009 FC 98 at para 9. To succeed on judicial review, an applicant must demonstrate that the officer either ignored or misconstrued evidence, or made a reviewable error in the analysis of factors relevant to the discretion.

[10] In *Adu v Canada (Minister of Citizenship & Immigration)*, 2005 FC 565 Justice Anne Mactavish held at paras 14-20:

> In my view, these "reasons" are not really reasons at all, essentially consisting of a review of the facts and the statement of a conclusion, without any analysis to back it up. That is, the officer simply reviewed the positive factors militating in favour of granting the application, concluding that, in her view, these factors were not sufficient to justify the granting of an exemption, without any explanation as to why that is. This is not sufficient, as it leaves the applicants in the unenviable position of not knowing why their application was rejected.
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> […]
>
> In contrast, in this case, the officer reviewed the evidence of establishment in Canada offered by the applicants in support of their applications, and then simply stated her conclusion that this was not enough. We know from the officer's reasons that she did not think

> that the applicants would suffer unusual, undeserved or disproportionate harm if they were required to apply for permanent residence from abroad. What we do not know from her reasons is why she came to that conclusion.

[11] This reasoning applies with equal force in this case. There is a disconnect between the factors indentified by the Officer and the conclusion reached, such that the Court does not know why the Officer reached the conclusion that he did. There is "no line of analysis" within the reasons that could reasonably lead the Officer from the evidence before him to the conclusion: *Law Society of New Brunswick v Ryan*, 2003 SCC 20, [2003] 1 SCR 247, at para 55. In consequence, the application for judicial review is granted.

[12] There is no question for certification and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back for re-determination before a different Officer at Citizenship and Immigration Canada. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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