Federal Court  Cour fédérale

Date: 20120720

Docket: IMM-7190-11

Citation: 2012 FC 922

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, July 20, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

PIERRE-LOUIS CHÉRY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act), of a decision by the Immigration Appeal Division of the Immigration and Refugee Board (panel) dated August 29, 2011, dismissing the applicant's appeal.

[2] For the following reasons, the application is allowed.

BACKGROUND

[3] The applicant, Pierre-Louis Chéry, is originally from Haiti. He immigrated to Canada on April 12, 1998. On January 6, 2005, his son, Dickens Chéry, filed an application for permanent residence as a foreign national member of the family class under the sponsorship of his father. Because the applicant did not declare his son upon his arrival in Canada, the application was rejected on the ground that Dickens Chéry was excluded from the family class under paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations).

[4] The immigration officer's decision was appealed. The panel rejected the appeal on July 14, 2005. The panel indicated that, in accordance with section 65 of the Act, it did not have jurisdiction to assess humanitarian and compassionate considerations even though they may exist in the record.

[5] In June 2009, the applicant appeared at the Canadian Embassy in Haiti and asked whether there was another way to sponsor his son. An officer told him that he could reapply by raising humanitarian and compassionate considerations. The applicant therefore filed a second application on July 30, 2009, based strictly on humanitarian and compassionate considerations, as indicated in the application. On December 1, 2009, Dickens Chéry applied for permanent residence and wrote [TRANSLATION] "other: humanitarian immigration" in response to the question [TRANSLATION] "under which category are you applying?"

[6] On March 2, 2010, the applicant received a letter indicating that he met the eligibility criteria. After receiving a positive paternity test, the immigration authorities began to analyze whether Dickens met the requirements of dependent child. He was called to an interview at the Canadian Embassy in Haiti on August 2, 2010. The officer conducting the interview told him that his application had been refused because he had not received a DNA test or evidence proving his dependence. There was no mention of humanitarian and compassionate considerations in the officer's CAIPS notes or the letter.

[7] After realizing its error with respect to the DNA test, the Embassy asked the officer to reconsider the matter. The officer noted in his CAIPS notes that his decision was to be upheld because there was still no evidence of dependence and Dickens was not a member of the family class under paragraph 117(9)(*d*) of the Regulations. The officer also indicated that he had considered the humanitarian and compassionate considerations even though no request in that respect had been made. The applicant was informed of that decision on August 24, 2010.

[8] The applicant appealed the decision on August 31, 2010.

DECISION UNDER REVIEW

[9] The panel dismissed the appeal based on the doctrine of *res judicata*. The panel indicated that the issue had already been decided in the first appeal before the panel in 2005 because the officers' decisions were based on the same grounds of dismissal, that the decision dated July 14, 2005, was final because it was not the subject of judicial review before the Federal Court,

and that the parties were the same. The panel noted that it had the discretionary authority to hear the appeal, but refused to recognize its use given the lack of special circumstances making it possible to ignore the doctrine.

[10] The panel also stated that, despite the fact that the applicant did not appeal the humanitarian and compassionate considerations, it would not have had jurisdiction to hear the appeal on that point pursuant to section 65 of the Act. The panel stated that the appropriate avenue for appealing humanitarian and compassionate consideration issues was the Federal Court.

ISSUES

[11] The issues are as follows:

a. Did the panel err in its assessment of the facts?

b. Did the panel err by applying the doctrine of *res judicata*?

LEGISLATION

[12] Sections 25, 63 and 65 and XX of the Act state the following:

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent	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, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou

resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.

63. (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

65. Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

(*a*) the decision appealed is wrong in law or fact or mixed law and fact;

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;

(*b*) a principle of natural justice has not been observed; or

b) il y a eu manquement à un principe de justice naturelle;

(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.	*c*) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

[13] Subsection 117(9) of the Regulations states the following:

117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	117. (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
. . .	. . .
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.
. . .	. . .

STANDARD OF REVIEW

[14] Because the application of the doctrine of *res judicata* is a question of law outside the panel's expertise, the standard of review is correctness: *Rahman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1321 at paragraph 12. However, the exercise of the panel's discretionary authority allowing it to ignore the doctrine is reviewable on the reasonableness standard: *Rahman*, *supra*, at paragraph 13. That standard also applies to the assessment of the facts by the panel: *Shah v Canada (Minister of Citizenship and Immigration)*, 2008 FC 708 at paragraph 8.

[15] A reasonable decision is one that is justified, transparent and intelligible, and one that falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59.

ANALYSIS

Did the panel err in its assessment of the facts?

[16] The applicant alleges that the panel erred by indicating that the interview with the officer took place on August 2, 2009, instead of on August 2, 2010. That error apparently affected the panel's decision because the panel believed, given the error, that the humanitarian and compassionate applications had not yet been received by the officer.

[17] It is clear that the panel improperly assessed the evidence and based its decision on erroneous dates. The Tribunal Record clearly indicates that the interview took place on August 2, 2010. That led the panel to believe that the officer did not have the humanitarian and compassionate applications sent on July 30 and August 3, 2009, in his possession when he made the decision. Furthermore, the panel erroneously believed that the applicant had filed his application on June 6, 2010, whereas, in reality, the application was filed on July 30, 2009. The date of June 6, 2010, is in fact that of the reopening of the file when the officer realized his error with respect to the DNA test.

[18] Those errors led the panel to believe that no humanitarian and compassionate grounds were before the officer and that, as a result, the officer's decision was identical to the one made in 2005. The panel's decision is therefore unreasonable: *Rathnayaka v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1243.

Did the panel err by applying the doctrine of res judicata?

[19] The applicant maintains that the panel erred by refusing to consider the appeal of the officer's decision. He argues that the panel committed an error by finding that the issue, the exclusion of his son pursuant to paragraph 117(9)(*d*) of the Regulations, had already been determined despite the fact that the second application was based on humanitarian and compassionate considerations knowing that Dickens was excluded. The applicant merely wanted

the panel to correct the obvious breach of procedural fairness caused by the officer's failure to consider the humanitarian and compassionate submissions.

[20] The panel correctly cited the applicable test for the doctrine of *res judicata*, that is "(1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies": *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44 at paragraph 25.

[21] However, it is my opinion that the first step in the test was not met in this case. It appears from the Tribunal Record that the applicant's second application was based entirely on humanitarian and compassionate considerations. The issue of whether a person is excluded in accordance with paragraph 117(9)(*d*) of the Regulations is completely separate and independent from the issue of humanitarian and compassionate considerations under section 25 of the Act (see Operational Manual OP 4 — Processing of Applications under Section 25 of the IRPA, at section 5.3). Furthermore, the exclusion issue was not even included in the second application.

[22] It also appears that the panel, in 2005, did not consider the humanitarian and compassionate considerations because section 65 of the Act prevented it from doing so: "[t]he panel is of the opinion that, in this case, humanitarian and compassionate considerations may exist; however, . . . the panel must respect the applicable law and cannot consider the humanitarian and compassionate considerations" (Immigration Appeal Division Decision dated July 14, 2005).

[23] The panel's errors of fact therefore affected the panel's judgment in its application of the doctrine. It is clear that the issue before the panel in 2011 was not the same as the one of July 2005. The first appeal dealt exclusively with Dickens' exclusion from the family class whereas the second appeal dealt with a breach of procedural fairness in an application based solely on humanitarian and compassionate considerations.

[24] Consequently, the application is allowed. The matter will be referred back to the panel with directions as specified in paragraph 18.1(3)(*b*) of the *Federal Courts Act*, RSC (1985), c F-7 to ensure a quick redetermination (see also *Kaur v Canada (Minister of Employment and Immigration)*, [1990] 2 FC 209). The panel must determine whether there was a breach of procedural fairness as set out in paragraph 67(1)(*b*) of the Act (see also Lorne Waldman, *Immigration Law and Practice*, loose leaf (Toronto: Butterworths, 2011) at pages 10-167; and *Shao v Canada (Minister of Citizenship and Immigration)*, [2004] IADD No 548). If there was a breach, like the applicant alleges, the panel must refer the matter back to an immigration officer at the Canadian Embassy in Haiti.

[25] No question was submitted for certification and consequently none will be certified.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1) the application for judicial review is allowed; and

2) the matter is referred back to a differently constituted panel on the following directions:

   a. the panel must determine whether the immigration officer breached procedural fairness; and

   b. if the panel determines that there was a breach, it must refer the matter to an immigration officer at the Canadian Embassy in Haiti for reconsideration;

3) no question is certified.

"Richard G. Mosley"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7190-11
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