Federal Court  Cour fédérale

Date: 20130404

Docket: IMM-5383-12

Citation: 2013 FC 315

Ottawa, Ontario, January 28, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SABRI KHADER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Based on *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, this Court cannot find otherwise but to consider it reasonable to find credible and to place weight on the Applicant's spouse's April 5, 2012 statement that the Applicant was verbally abusive to her and his daughter. In light of the

Applicant's daughter's behaviour and her spontaneous declaration that she wanted the Applicant to go away because he shouted at her mother, it falls within the range of possible, acceptable outcomes to accept as credible the Applicant's spouse's statement that her husband was verbally abusive.

[2] It would be reasonable to find that the absence of an effective link and a relationship of psychological and emotional support between the Applicant and his daughter outweighed the Applicant's evidence that he performed household tasks. In *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, [2002] 4 FC 358, the Federal Court of Appeal held that "[i]t is not the role of the courts to reexamine the weight given to the different factors by" decision-makers in an H&C context (at para 11).

II. Introduction

[3] The Applicant sought an exemption on humanitarian and compassionate [H&C] grounds under subsection 25(1) of *the Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] from the subsection 11(1) requirement to apply for permanent residence from outside Canada [H&C Application]. The H&C Application was unsuccessful as an immigration officer found that unusual and undeserved or disproportionate hardship would not result from requiring him to apply for permanent residence from outside Canada, even considering the best interests of his daughter.

III. Judicial Procedure

[4] This is an application under subsection 72(1) of the *IRPA* for judicial review of the decision of an immigration officer, dated May 4, 2012.

IV. Background

[5] The Applicant, a citizen of Tunisia, was born in 1974. The Applicant's spouse and his daughter, who has special needs, are Canadian citizens.

[6] On May 27, 1999, the Applicant was admitted to Canada on a visitor's visa that expired after 6 months. The Applicant is currently without legal status in Canada.

[7] The Applicant was first married to another woman who was not Tunisian or Muslim. In a previous application for permanent residence on H&C grounds, the Applicant stated that problems would arise from his marriage to a non-Muslim in Tunisia. The Applicant's first marriage ended in divorce on February 16, 2007.

[8] The Applicant married his spouse on February 2, 2008.

[9] In his H&C Application, the Applicant stated that he did not want his spouse to sponsor an application for permanent residence, that the principal basis for his H&C Application was his relationship with his daughter that he cared for his daughter at home for approximately eight (8) months while his wife worked.

[10] In interviews with the immigration officer, in November 2011, the Applicant's spouse described the Applicant as a good husband and parent while the marriage was not always happy but he performed household tasks and gave his all to his family.

[11] On February 10, 2012, the Applicant submitted to the immigration officer: (i) proof of marriage; (ii) proof of contribution to the household and his daughter's nursery school costs; (iii) photographs of the Applicant at his daughter's birth, with her in the park, and at her birthday; and, (iv) a report from the Institut de réadaptation en déficience physique de Quebec [IRDPQ] identifying his daughter's special needs as a language problem.

[12] On February 13, 2012, the immigration officer initially found that the Applicant should receive an exemption on H&C grounds since requiring him to apply for permanent residence from outside Canada would not be in his daughter's best interests.

[13] On April 5, 2012, the Applicant's spouse informed the immigration officer that her statements in November 2011 with respect to the Applicant were false. She stated that she wanted to separate from him, that he was uninvolved with his daughter and that he was verbally abusive, that his daughter feared him and refused to be alone with him, that she begged him to visit his daughter in the hospital, and that he told her he could not return to Tunisia. She claimed she made false statements in November 2011 out of fear of the Applicant.

[14] On April 16, 2012, the Applicant's spouse contacted the immigration officer to dispute her April 5, 2012 statements.

[15] The Applicant alleges that his spouse was paranoid that he would kidnap their daughter to Tunisia to convert her to Islam, asked him to sign documents making her legal guardian of his daughter, and asked him to permit her to baptize his daughter. When he refused, she allegedly made false statements to the immigration officer on April 5, 2012.

[16] On May 2, 2012, the immigration officer interviewed the Applicant and his spouse. The immigration officer found that the Applicant responded vaguely to questioning. According to the immigration officer's interview notes, he (i) consistently described his daughter as "[Translation] the child"; (ii) stated that he did everything for his daughter but could not specify any particular measures addressing her special needs apart from reading to her; (iii) explained that he did not accompany his daughter to nursery school because he did not have a car; (iv) stated that his mother-in-law did not like him because he could not find steady work; and, employment in Montreal kept him from his family in Quebec City; (v) explained that he shouted at his spouse and daughter but was not violent and that he was aware of his spouse's statements of April 5, 2012 but that she had forgiven him. The interview notes also state that his daughter would not stay with her father while her mother was being interviewed, clung to her mother, and declared several times that she wanted him to go away because he always shouted at his spouse.

[17] In the May 2, 2012 interview, the immigration officer asked the Applicant if he had problems since his spouse was a black non-Muslim, stating that it was uncommon in Maghreb culture to marry a black non-Muslim. He denied any problems, stating that his wife was very beautiful.

[18] On May 4, 2012, the Applicant's spouse informed the immigration officer that the Applicant served her with divorce papers on May 2, 2012, after the May 2, 2012 interview; however, the Court has no conclusive evidence on this matter as it was never formally submitted within deadlines.

[19] The Applicant claims he was unaware of the whole content of his spouse's statements on April 5, 2012 and April 16, 2012 before the interview on May 2, 2012. He alleges that (i) he told the immigration officer that he did all household tasks, changed his daughter's diapers, and read her stories; (ii) the immigration officer did not ask him if he only visited his daughter in the hospital at his spouse's begging; (iii) he referred to his daughter by her name and "[Translation] the little one"; (iv) that his daughter stated at the interview that she wanted to see her father from time to time; and, (v) after the interview, his daughter told him that his mother urged her to say that she wanted him to go away. According to the immigration officer, the Applicant did not state that his daughter still required diapers at the May 2, 2012 interview.

[20] The Applicant denies that he served divorce papers on his spouse at any time.

[21] The Applicant alleges that, at the May 2, 2012 interview, the immigration officer responded to his claim that he was not violent, stating: "[Translation] I know Arabs; I lived seven years in Morocco; I know how they express themselves there" (Applicant's Affidavit at para 27). The immigration officer denies this comment and it does not appear in her interview notes.

[22] On May 4, 2012, the immigration officer rejected the H&C Application. While the decision is dated May 1, 2012, an extract from Citizenship and Immigration Canada's information system shows that the immigration officer refused the H&C Application on May 4, 2012 (Affidavit of Marie-Geralde Georges [Georges Affidavit] at Annex A).

V. Decision under Review

[23] The immigration officer denied the Applicant's H&C Application, finding that the Applicant did not demonstrate that denying his request would result in unusual and undeserved or disproportionate hardship. In particular, the immigration officer determined that the Applicant did not satisfactorily establish that it was in his daughter's best interests that he be exempted from the requirement to apply for permanent residence from outside Canada.

[24] The immigration officer reasoned that the Applicant did not explain his involvement in his daughter's life, that he could not describe the specific measures required to address his daughter's special needs, that his daughter declared at the interview that she wanted him to go away, and that his daughter's verbal and non-verbal conduct at the interview demonstrated little attachment between the Applicant and his daughter.

[25] The immigration officer also noted that the key person in the development of the Applicant's daughter was her maternal grandmother. According to a letter, dated April 27, 2012, the Applicant's mother-in-law dropped off and picked up his daughter from nursery school and accompanied her to her weekly appointments with specialists.

VI. Issues

[26] (1) Was the decision based on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before the immigration officer?

(2) Does a reasonable apprehension of bias arise?

(3) Did the immigration officer unreasonably fail to assess the duration of the Applicant's stay in Canada or his degree of establishment in Canada?

VII. Relevant Legislative Provisions

[27] The following legislative provisions of the *IRPA* are relevant:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
…	[...]
25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent	**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa

resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent 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.	de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou 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.

VII. Analysis

Standard of review

[28] The Officer's findings of fact and refusal to grant the H&C Application are assessed on the standard of reasonableness (*Achahue v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1210; *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356). Whether an administrative decision raises a reasonable apprehension of bias is reviewable on a standard of correctness (*Azziz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 663, 368 FTR 281).

[29] Where the standard of reasonableness applies, this Court may only intervene if an officer's reasons are not "justified, transparent or intelligible". To meet the standard, the decision must also fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

(1) Was the decision based on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before the immigration officer?

[30] The Applicant submits that the decision was based on erroneous findings of fact made in a perverse or capricious manner or without regard to the material before the immigration officer because: (i) the immigration officer considered his H&C Application on the basis of his relationship with his spouse and daughter despite his intention to base it on his relationship with his daughter alone; (ii) the immigration officer's decision was premised on widely-varying statements of his spouse, which lack credibility; (iii) it was improbable that he was verbally-violent since his spouse is an educated citizen of Canada with financial means who would have complained to police while he is a citizen of a foreign country without legal status in Canada; (iv) the immigration officer ignored his claims that he performed most household tasks, changed his daughter's diapers, and read her stories; (v) the immigration officer ignored his explanation as to why he did not accompany his daughter to nursery school; (vi) his spouse moved away from Quebec City for employment purposes; (vii) his daughter had stated at the May 2, 2012 interview that she wanted to see him occasionally; and, (viii) the report from IRPDQ indicated that his daughter had an intellectual disability and did not always understand complex questions posed to her.

[31] The Respondent argues that the immigration officer's findings of fact are reasonable because: (i) it was reasonable to conclude that the key figure in the development of the Applicant's daughter was her maternal grandmother; (ii) the Applicant's daughter repeated several times that she wanted her father to go away; (iii) the record shows that the Applicant's daughter does not have an intellectual disability but rather a problem with language; and, (iv) whether the Applicant was verballyabusive was a finding of fact within the immigration officer's expertise.

[32] In *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2003] 2 FC 555, the Federal Court of Appeal held that the best interests of the child test, under subsection 25(1) of the *IRPA*, is applied "by considering the benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad" and "weigh[ing] this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent" (at para 4 and 6). While decided in a child sponsorship context, the Federal Court of Appeal's decision in *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360 (at para 33), is instructive in identifying factors that may be considered to determine if hardship arises from the removal of a parent. These include: (i) the effective links of family members in terms of an ongoing relationship; (ii) any previous period of separation; (iii) psychological and emotional support; (iv) any option to be reunited elsewhere; (v) financial dependence; and, (vi) the child's particular circumstances.

[33] The immigration officer's finding of fact that the Applicant did not have an effective link with his daughter and did not provide psychological and emotional support was reasonable, given her declarations and behaviour at the May 2, 2012 interview. *Hawthorne*, above, holds that a reasonable decision on the best interests of the child, under subsection 25(1) of the *IRPA*, is "alert, alive and sensitive" to the child's best interests (at para 10). On the requirement of being alive, Justice Douglas Campbell has stated that "in order to be alive to a child's best interests, it is necessary for a visa officer to demonstrate that he or she well understands the perspective of

each of the participants in a given fact scenario, including the child if this can reasonably [be] determined" (*Kolosovs v Canada (Minister of Citizenship and Immigration)*, 2008 FC 165, 323 FTR 181 at para 11). The perspective of the Applicant's daughter could be reasonably obtained from her behaviour and declarations at the May 2, 2012 interview. The immigration officer sought to clarify if her actual perspective coincided with her declarations by asking her to repeat her statements several times (Certified Tribunal Record [CTR] at pp 9-10). The immigration officer explained to her the consequences of her declaration, asking her if she liked to see her father and telling her that she would not be able to see him if she wanted him to go away (CTR at p 10).

[34] The immigration officer could reasonably obtain the perspective of the Applicant's daughter from her declarations and behaviour, notwithstanding her age and language difficulties. Although the Applicant's daughter has difficulties with language and understanding complex questions, the report from IRDPQ states that she can express simple demands (CTR at p 99). Moreover, the Applicant's daughter's initial declaration that she wanted her father to go away was not made in response to a question at all. The immigration officer's interview notes record that the Applicant's daughter interrupted the interview between the immigration officer and the Applicant's spouse to tell the spouse that she wanted the Applicant to leave (CTR at p 10). Since the Applicant's daughter's initial declaration was not even made in response to a question, it is less likely that her difficulty with complex questions detracts from the immigration officer's findings of fact. The Applicant's daughter's occasional difficulty with understanding complex questions, moreover, does not speak to her general behaviour. The immigration officer's interview notes state several times that the Applicant's daughter refused to be left alone with her

father while her mother was being interviewed and that she clung to her mother (CTR at pp 9-10).

[35] The Applicant's explanations for not accompanying his daughter to nursery school or his mother-in-law's alleged consideration of her son-in-law do not detract from the reasonableness of the immigration officer's conclusions on the effective link and relationship of psychological and emotional support between the Applicant and his daughter. As for the Applicant's allegation that his daughter informed him that his wife instructed her to declare that she wanted her father to go away, this information was not before the immigration officer. Since "judicial review involves a review of the record before the original decision-maker," this information cannot be considered in reviewing the immigration officer's decision (*Tikhonova v Canada (Minister of Citizenship and Immigration)*, 2008 FC 847 at para 11).

[36] It was also reasonable to find credible and to place weight on the Applicant's spouse's April 5, 2012 statement that the Applicant was verbally-abusive to her and his daughter. In light of the Applicant's daughter's behaviour and her spontaneous declaration that she wanted him to go away because he shouted at her mother, at the May 2, 2012 interview, it falls within the range of possible, acceptable outcomes to accept as credible the Applicant's spouse's April 5, 2012 statement that her husband was verbally abusive.

[37] It would be reasonable to find that the absence of an effective link and a relationship of psychological and emotional support between the Applicant and his daughter outweighed the Applicant's evidence that he performed household tasks, changed his daughter's diapers, and

read to her. In *Legault*, above, the Federal Court of Appeal held that "[i]t is not the role of the courts to reexamine the weight given to the different factors by" decision-makers in an H&C context (at para 11).

(2) Does a reasonable apprehension of bias arise?

[38] The Applicant submits that a reasonable apprehension of bias arises from the immigration officer's preference of his spouse's April 5, 2012 statements and failure to give him an opportunity to respond to those statements. The Applicant argues that the immigration officer's alleged racist comments, discussed in paragraph 21, above, demonstrated that she was predisposed to prefer the Applicant's spouse's statements. According to the Applicant, the immigration officer's purported acceptance of his spouse's fabrication that he served divorce papers on her on May 2, 2012 without attempting to verify this report further shows bias. The Applicant also observes that the decision of the immigration officer is dated May 1, 2012, before the interview of May 2, 2012.

[39] The Respondent counters that a reasonable apprehension of bias does not arise because the Applicant's allegation is not supported by material evidence but rather by his mere suspicion, pure conjecture, insinuations or impressions. According to the Respondent, the record does not show that the immigration officer stated that she had lived in Morocco for seven years, knew Arabs, and knew how they expressed themselves. The Respondent further submits that the immigration officer could question the Applicant on problems arising from his marriage to a black non-Muslim without raising a reasonable apprehension of bias because he had already alleged that problems arose from his previous marriage to a non-Tunisian Catholic.

[40] According to *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the test for reasonable apprehension of bias is whether an "informed person, viewing the matter realistically and practically -- and having thought the matter through -- [would] conclude" that the decision-maker "consciously or unconsciously, would not decide fairly" (at para 46). The Federal Court of Appeal has stated, in *Arthur v Canada (Attorney General)*, 2001 FCA 223, that a reasonable apprehension of bias "cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel [and must] be supported by material evidence demonstrating conduct that derogates from the standard" (at para 8).

[41] It would be troubling if the immigration officer responded to the Applicant's claim that he was not verbally-abusive by stating that she lived in Morocco and knew how Arabs expressed themselves. This alleged remark, however, does not appear in the transcript of the May 2, 2012 interview that constitutes the immigration officer's interview notes. In an Affidavit, the immigration officer denies making this comment (Georges Affidavit at para 16).

[42] In *Wang v Canada (Minister of Citizenship and Immigration)*, 2003 FC 833, Justice Danièle Tremblay-Lamer addressed an applicant's and a decision-maker's conflicting accounts of what occurred at an interview in assessing a question of reasonable apprehension of bias. After the Applicant was cross-examined on his account of the interview, Justice Tremblay-Lamer found that a reasonable apprehension of bias did not arise because neither the decision-maker's notes nor reasons gave rise to a reasonable apprehension of bias, the alleged improper conduct was only reported after the decision-maker issued the decision, the applicant was

medicated during the interview, the application's perceptions may have been coloured by other emotions, and the applicant left the interview with the expectation of a positive decision.

[43] This Court does not accept the Applicant's allegation that the immigration officer actually stated that she had lived for Morocco for seven (7) years and knew how Arabs expressed themselves. The immigration officer's detailed and contemporaneous interview notes contain a transcript of the interview; the alleged remarks are not contained in this record of the May 2, 2012 interview. A reasonable apprehension of bias does not arise elsewhere in the decision. The Applicant failed to report such a statement until the immigration officer's decision had been actually issued.

[44] The immigration officer's alleged acceptance of the Applicant's spouse's account of the divorce papers does not lead to a reasonable apprehension of bias. Since the decision was predicated on the effective link and relationship of psychological and emotional support between the Applicant and his daughter rather than the Applicant and his spouse, it was not necessary to determine if his spouse's account of their divorce was correct.

[45] A reasonable apprehension of bias does not arise from questioning about whether the Applicant's marriage to a black non-Muslim created problems because the Applicant had previously discussed such problems in his first marriage to another non-Muslim.

[46] Finally, a reasonable apprehension of bias cannot be inferred because the decision was dated a day before the May 2, 2012 interview. As discussed above, an extract from Citizenship

and Immigration Canada's information system shows that the immigration officer refused the H&C Application on May 4, 2012.

(3) Did the Officer unreasonably fail to assess the duration of the Applicant's stay in Canada or his degree of establishment in Canada?

[47] The Applicant submits that the immigration officer's decision is unreasonable because it did not consider his other ties to Canada and lack of connection to Tunisia arising from the thirteen (13) years he has lived in Canada and away from Tunisia.

[48] The Respondent counters that the duration of the Applicant's illegal stay in Canada, his alleged ties to Canada, and establishment in Canada are insufficient to justify an exemption on H&C grounds.

[49] In the H&C context, applicants have the burden of providing evidence to establish that H&C grounds warrant an exception to the general requirements of the *IRPA* (*Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2012 FC 943 at para 16). The Applicant chose to base his H&C Application on his relationship with his daughter and did not present evidence on his other ties to Canada or his lack of ties in Tunisia. The duration of an applicant's stay in Canada is not "in itself sufficient to warrant issuing a permanent resident visa on [H&C] grounds" (*Mpula v Canada (Minister of Citizenship and Immigration)*, 2007 FC 456 at para 30).

VIII. Conclusion

[50] For all of the above reasons, the Applicant's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed. No question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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