Federal Court  Cour fédérale

Date: 20150302

Dockets: IMM-2916-13
IMM-2918-13

Citation: 2015 FC 259

Ottawa, Ontario, March 2, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

VINCENT EVANS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matters and Background

[1] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], Mr. Evans [the Applicant] applies for judicial review of two decisions by the same immigration officer [the Officer]: one, denying his application for permanent residence because he was inadmissible and refusing to grant the exemptions requested by the Applicant under

subsection 25(1) of the *Act*; and the other, refusing to issue him a temporary resident permit [TRP] under subsection 24(1) of the *Act*. These two applications for judicial review were heard together pursuant to the orders of the Court dated October 15, 2014, granting leave to apply for judicial review.

[2] The Applicant asks the Court to set aside both decisions and return these matters to a different officer for re-determination. These reasons for judgment determine both applications for judicial review. Accordingly, I direct that a copy of this judgment and reasons be placed in each of Court files IMM-2916-13 & IMM-2918-13.

[3] The Applicant is a 35 year-old citizen of Saint Lucia who entered Canada on October 5, 2003. In September, 2010, after his refugee claim was denied and his application for a pre-removal risk assessment was refused, the Applicant attempted to regularize his status by applying for permanent residence as a member of the spouse or common-law partner in Canada class.

[4] However, on December 18, 2012, the Applicant was convicted of trafficking in cocaine and of obstructing a peace officer. The Officer sent him a letter two days later, advising that his application may have to be refused as it appeared that he was inadmissible to Canada under paragraphs 36(1)(a) and 36(2)(a) of the *Act*. The Applicant responded by a letter dated January 31, 2013, wherein he accepted that he was inadmissible but claimed that there were humanitarian and compassionate [H&C] grounds to let him stay in Canada. He asked for either a TRP or an exemption from the provisions of the *Act* that rendered him inadmissible.

II. The Decisions under Review

A. *The Spousal Sponsorship Decision* [the Sponsorship Decision]

[5] By letter dated April 9, 2013, the Officer refused the application for permanent residence, finding that the conviction for trafficking rendered the Applicant inadmissible for serious criminality under paragraph 36(1)(a) of the *Act*, and that the conviction for obstruction of a peace officer made him inadmissible for ordinary criminality under paragraph 36(2)(a) of the *Act*.

[6] Although the Officer accepted that the Applicant's relationship with his sponsor was genuine, she concluded that the H&C grounds cited by the Applicant were insufficient to overcome his inadmissibility. With respect to establishment, the Officer noted that the Applicant had been continuously employed as a barber in Saint Lucia for four years before coming to Canada, and so rejected his submission that he would not be able to find a job if he was deported to Saint Lucia.

[7] The Officer recognized that the Applicant had four minor children whose interests were affected: Misha and Inika, who were born in Saint Lucia and still live there; Malachi, who was born in Canada but returned to Saint Lucia with his mother when she was removed from Canada; and Amai, who was born in Canada and who is the daughter of the Applicant and the partner who is trying to sponsor him. The sponsor also has two other daughters who view the Applicant as their father.

[8] The Applicant had argued that his children in Saint Lucia would be disadvantaged by his removal and consequent loss of income. However, the Applicant supplied insufficient proof that he supported those children financially, and the Officer was not satisfied that he would be unemployed in Saint Lucia. As for Malachi, the Officer noted that he has a language disorder that requires a speech therapist. A medical letter submitted by the Applicant stated there were no permanent speech therapists in Saint Lucia and an appropriate school is difficult to find, but the Officer found that this letter did not say whether there were any temporary therapists or that a school would be impossible to find. As there was no other evidence on this issue, the Officer said that she could not determine what resources were available to Malachi in Saint Lucia. Moreover, the Applicant had not explained the reason why Malachi's mother was removed or whether there was any possibility that she could return to Canada.

[9] The Officer did consider the impact of the Applicant's removal on Amai to be a significant and compelling positive factor, but noted nonetheless that there was little information to show that the Applicant could neither support her financially from Saint Lucia nor bring her with him if he is removed. The Applicant's removal would also negatively affect his partner, but the Officer noted that she was at least partially aware that the Applicant had no status when she began a relationship with him. There was also no proof that she could not visit him in Saint Lucia.

[10] The Officer also accepted that his partner's other two children, Cheyelle (now 22 years old) and Chamaul (now 19 years old), both view the Applicant as their father. However, there

was no reason to believe that he supported them financially or that he could not maintain a relationship with them if he was removed.

[11] Finally, the Officer weighed the positive factors against the gravity of the crime and the court's decision to confine him to his residence for six months as punishment. These were his first convictions, but the Officer noted that the Applicant had been charged with crimes before. Despite expressing remorse and an intention to improve, the Applicant had not attended any rehabilitation program. Ultimately, the Officer decided that the hardships in this case were not unusual and undeserved or disproportionate, and added that "the gravity of the PA's [Applicant's] crime does not outweigh the positive factors" (emphasis added).

B. *Temporary Resident Permit Decision* [the TRP Decision]

[12] In separate reasons also dated April 9, 2013, the Officer refused to issue a TRP to the Applicant (although the letter communicating this decision to him is incorrectly dated October 3, 2012). In refusing the TRP, the Officer gave essentially the same reasons with respect to the H&C considerations as she did in the Sponsorship Decision.

[13] The only significant difference in this decision was in how the Officer treated the circumstances surrounding the Applicant's convictions. To her earlier observations, the Officer added that the fact that the Applicant served his sentence in the community was a positive factor insofar as it showed that the court did not consider the Applicant to be a danger to society. Nevertheless, the Officer noted that the Applicant's conduct was still tightly restricted by the court and that his alleged interest in rehabilitation programs seemed self-serving. Similar to the

Sponsorship Decision, the Officer concluded that "the grave nature of the PA's [Applicant's] crime does not outweigh the humanitarian and compassionate factors put forth by the PA. He has not provided sufficient evidence of his remorse nor that he will not reoffend" (emphasis added).

III. The Parties' Arguments

A. *The Applicant's Arguments*

[14] The Applicant argues that the Officer failed to consider probative evidence when rendering her decision on his establishment in Canada (citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at para 17, 157 FTR 35 (TD)). The Applicant says that the Officer's decision was unreasonable because it failed to properly consider his evidence that he had to abandon his barbershop in Saint Lucia because of threats from drug dealers. Furthermore, he says that the Officer ignored the high rate of unemployment in Saint Lucia as evidenced by the fact that his brothers had been unemployed in Saint Lucia ever since they returned, and failed to properly consider other indicia of establishment such as the family support that he has in Canada: *Raudales v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 385 at para 19; *Jamrich v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804, 29 Imm LR (3d) 261.

[15] As to the best interests of the children, the Applicant says the Officer's finding was ambiguous since she said that he did not financially support his family and yet found there was no evidence he could not continue to support his family from Saint Lucia. As for Malachi, the Applicant says that the Officer drew unwarranted inferences from the doctor's letter, and that

there was no basis for the Officer to find that Malachi's mother might be able to return to Canada.

[16] The Applicant also contends that the Officer did not fulfill her duty to explain her findings about the gravity of his crime in clear and unmistakable terms (citing *Hilo v Canada (Minister of Employment and Immigration)* (1992), 130 NR 236, 15 Imm LR (2d) 199 (CA)). The Applicant argues that the Officer's conclusion with respect to his criminality is ambiguous, as she states in both decisions that the gravity of his crime did "not outweigh" the positive factors but nevertheless refused the applications. According to the Applicant, this is not necessarily just a typographical error.

[17] With respect to the TRP decision, the Applicant repeats many of his arguments with respect to the Sponsorship Decision, but also argues that it was unreasonable for the Officer to dismiss his interest in rehabilitation as self-serving; he had the obligation to establish his case and the Officer would have likely found his chances of rehabilitation to be minimal had he not shown interest in such programs. In this regard, the Applicant relies upon the decision in *Diaz v Canada (Citizenship and Immigration)*, 2010 FC 319 at para 37.

B. *The Respondent's Arguments*

[18] The Respondent emphasizes that decisions with respect to both the TRP and the H&C application deserve deference as they are exceptional and highly discretionary, and require a balancing of various factors by the Officer. The Respondent argues that the Officer adequately considered all of the positive factors but was entitled to give more weight to the Applicant's

criminality. The Respondent argues that this Court should not reweigh evidence before the Officer.

[19] According to the Respondent, the Applicant could return to Saint Lucia and work as a barber and possibly other positions since he now has additional experience here in Canada. The fact that better employment opportunities may be available to the Applicant here in Canada is not sufficient reason to grant an exemption from the *Act* or a TRP.

[20] The Respondent argues that the best interests of the children is not a determinative factor, and the Applicant's disagreement with the weight that factor was assigned does not disclose an error. The Respondent says that the letter from the Applicant's mother is insufficient evidence as to the Applicant's support of his children in Saint Lucia. The Applicant did not provide any corroborative evidence in this regard.

[21] As to the doctor's letter concerning Malachi, the Respondent says that the Officer's conclusion that there may be temporary services is plausible. The letter upon which the Applicant relied did not conclude that such services would be impossible to obtain but, rather, only implied that they may be difficult to obtain for the Applicant's son.

[22] The Respondent says that when one reads the Officer's decisions as a whole, it is clear that she made a typographical error when she said that the gravity of the Applicant's crime did "not" outweigh the positive factors. The Respondent says that such an error should not attract relief, since it is clear from the rest of the decision that the Officer meant the opposite (citing

Cartier v Canada (AG), 2002 FCA 384 at paras 32-33, [2003] 2 FCR 317). The Respondent also points out that the quality of the Officer's reasons is not an independent ground of review (citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 22, [2011] 3 SCR 708).

[23] As to the TRP, the Respondent repeats some of the same arguments with respect to the Sponsorship Decision and emphasizes that the Applicant's interest in rehabilitation is self-serving and supported by nothing but the Applicant's say-so; there is no corroboration such as a letter from the John Howard Society.

IV. Issues and Analysis

A. *Standard of Review*

[24] The parties agree in their written memoranda that the standard of review for both decisions is reasonableness, so the only issues in these applications are whether the Officer's decisions were reasonable.

[25] The appropriate standard of review for an H&C decision is that of reasonableness since it involves questions of mixed fact and law: see, e.g., *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18, [2010] 1 FCR 360; *Kanthasamy v Canada (Citizenship and Immigration)*, 2014 FCA 113 at paras 30, 32-33, 37, 372 DLR (4th) 539 [*Kanthasamy*]; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53, [2008] 1 SCR 190 [*Dunsmuir*]. In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at

para 62, 174 DLR (4th) 193, the Supreme Court of Canada stated that, when reviewing an H&C decision, "considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language."

[26] Issuance of a TRP under subsection 24(1) of the *Act* is also a highly discretionary decision, and it too attracts the reasonableness standard of review (see: e.g., *Ali v Canada (Citizenship and Immigration)*, 2008 FC 784 at para 9, 73 Imm LR (3d) 258; *Vidakovic v Canada (Citizenship and Immigration)*, 2011 FC 605 at para 15, [2011] FCJ No 808 (QL); and *Alvarez v Canada (Citizenship and Immigration)*, 2011 FC 667 at para 18; *Dunsmuir* at para 53).

[27] Accordingly, the Court should not interfere if each of the Officer's decisions is intelligible, transparent, and justifiable and falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law. It is not up to this Court to reweigh the evidence that was before the Officer, and it is not the function of this Court upon judicial review to substitute its own view of a preferable outcome: *Dunsmuir* at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61, [2009] 1 SCR 339.

B. *Were the Officer's Decisions Reasonable?*

(1) The Sponsorship Decision

[28] The Officer in this case did not ignore the evidence before her or otherwise err in finding that the Applicant had not proven that he would be unable to find employment in Saint Lucia. It was reasonable for the Officer to conclude that the Applicant could return to Saint Lucia and work as a barber. The fact that the Applicant's brothers had apparently remained unemployed in Saint Lucia following their removal from Canada was reasonably found by the Officer to be insufficient evidence as to his inability to be employed upon return.

[29] Also, it cannot be said that the Officer here was not alert and sensitive to the best interests of each of the Applicant's several children as well as his sponsor's two children. For example, the Officer specifically noted that the emotional and financial impact upon his biological child in Canada was a compelling positive factor to forestall the Applicant's removal. However, there was little evidence to show that the Applicant could not support this child from Saint Lucia or that he could not live with her there. In this regard, the Federal Court of Appeal's decision in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5, [2004] 2 FCR 635, deserves note, where the Court stated that: " … an applicant has the burden of adducing proof of any claim on which the H & C application relies. Hence, if an applicant provides no evidence to support the claim, the officer may conclude that it is baseless."

[30] I agree with the Respondent that when one reads the Officer's Sponsorship Decision as a whole, and in view of her reasons as to the Applicant's establishment and the best interests of the

children affected by the Applicant's removal, it is clear that the word "not" in the last paragraph of this decision, with reference to the gravity of the Applicant's crime, is a typographical error. Such an error does not negate the rest of the Officer's analysis and reasons for her decision. It is clear from her reasons as well as the decision letter itself that the Officer intended to state that the Applicant's criminality "does" outweigh the positive factors, and this sort of error should not attract relief.

[31] For example, in *Lu v Canada (Citizenship and Immigration)*, 2007 FC 159 [*Lu*], Mr. Justice Simon Noël dealt with a situation where a word had been inserted in the officer's decision letter. Justice Noël stated:

> [29] … The fact that Officer Tsang wrote in her letter to the Applicant that "you are therefore criminally inadmissible to Canada" is in my opinion an error which can be associated to a typographical error and it is not of a conclusive nature. … Officer Tsang, although she makes reference to the "inadmissibility" provisions of IRPA, did not conclude that the Applicant was inadmissible due to criminality under section 36 of the Act.
>
> [30] Justice Russell in *Petrova v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 506, addressed the implications of a typographical error in a decision's makers reasons under review by the Court. At paragraph 51 of *Petrova*, above, Justice Russell writes:
>
> > When a mistake is typographical in nature, the Court should not interfere with the decision, especially if the error does not appear to have been a misunderstanding of the evidence. Nadon J. in *Sandhu v. M.C.I.* stated the following regarding a typographical error in that case:
> >
> > > ... It is clear from reading the record that the Refugee Division did not misunderstand the situation regarding the visit of two men noted by the plaintiff. The plaintiff testified that two men visited Pritam Singh's room. He did not testify that those individuals visited him, and I feel sure

> that the word "claimant" contained in the sentence:
>
> The claimant told the police that on two occasions he saw two individuals whom he could not identify visiting the claimant in his room...
>
> is a typographical mistake. In any case, if there is an error it is not a conclusive error and certainly could not justify intervention by the Court.
>
> *Sandhu v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 134
>
> In my view, there is no reason why the error made by Officer Tsang should result in the Court intervening in the case at bar. There is no indication in Officer Tsang's letter that she misunderstood the evidence … [Emphasis in *Lu*]

[32] In view of the foregoing, therefore, I find that the Officer's Sponsorship Decision is understandable and justifiable and, also, falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

(2) The TRP Decision

[33] The objectives and exceptional nature of an exemption under subsection 24(1) of the *Act* have been described in detail by my colleague Justice Shore in *Farhat v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1275, 302 FTR 54 [*Farhat*]:

> [22] The objective of section 24 of IRPA is to soften the sometimes harsh consequences of the strict application of IRPA which surfaces in cases where there may be "compelling reasons" to allow a foreign national to enter or remain in Canada despite inadmissibility or non-compliance with IRPA. Basically, the TRPs allow officers to respond to exceptional circumstances while meeting Canada's social, humanitarian, and economic

> commitments. (Immigration Manual, c. OP 20, section 2; Exhibit "B" of Affidavit of Alexander Lukie; *Canada (Minister of Manpower and Immigration) v. Hardayal*, [1978] 1 S.C.R. 470 (QL).)
>
> [23] Before a TRP is issued, consideration must be given to the fact that TRPs grant their bearer more privileges than do visitor, student or work permits. Like the foreign nationals from those two categories, a TRP bearer becomes a temporary resident after being examined upon his entry to Canada, but may also be eligible for health or social services and can apply for a work or student permit from Canada. Furthermore, he may obtain, without discretion, permanent resident status if he resides in Canada throughout the validity period and does not become inadmissible on other grounds than those for which the TRP was granted. (Immigration Manual, c. OP 20, section 5.7; Exhibit "B" of Affidavit of Alexander Lukie.)
>
> [24] TRPs should thus be recommended and issued cautiously. Parliament was aware of the exceptional nature of TRPs and has retained a supervisory function in their regard; thus the Minister includes in the annual report to Parliament the number of TRPs granted under s. 24 of IRPA, "categorized according to grounds of inadmissibility, if any." (Immigration Manual, c. OP 20, s. 5.2 (paragraph 2) and 5.22; Exhibit "B" of Affidavit of Alexander Lukie; Subsection 94(2) of IRPA.)

[34] Furthermore, although an officer is not expressly compelled to look at the best interests of any children affected in a TRP application (*Farhat* at para 36), the Officer here did so anyway. The Officer's assessments in this regard show that she was alive and attentive to the Applicant's whole situation.

[35] In refusing the TRP application, the Officer provided essentially the same reasons as she had with respect to the Sponsorship Decision. The only significant difference in the TRP Decision was in how the Officer treated the circumstances surrounding the Applicant's criminal convictions. The Officer added to her earlier observations that the fact the Applicant had served

his sentence in the community was a positive factor insofar as it showed that the court did not consider the Applicant to be a danger to society. However, the Applicant's inquiries into rehabilitation courses were found by the Officer to be self-serving, and she noted that he had not actually attended or completed any rehabilitation of his own volition. In light of that, it was reasonable for the Officer to determine that the Applicant had provided insufficient evidence of his remorse or as to whether he would not reoffend.

[36] It is implicit in the TRP Decision that the Officer refused the Applicant's request for a TRP since she was not "of the opinion that it is justified in the circumstances" (*Act*, s 24(1)), nor were there sufficiently "compelling reasons" (*Farhat* at para 22). The Officer considered the negative and positive factors as presented by the Applicant. Her reasoning was understandable and justifiable and, also, her decision falls within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law.

[37] The best interests of the Applicant's children were undoubtedly positive considerations, but ultimately those were outweighed by the seriousness of the Applicant's crimes and lack of rehabilitative efforts. It is not for this Court to engage in an exercise of reweighing those factors. While a different decision could have been made, it has not been established that the decision made was not available to the Officer under the law or lacks a proper factual foundation so as to be unreasonable.

V. Conclusion

[38] In the result, therefore, the Applicant's applications for judicial review should be and are hereby dismissed. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review in each of Court files IMM-2916-13 and IMM-2918-13 is dismissed;

2. no question is certified; and

3. a copy of this judgment and reasons shall be placed in each of Court files IMM-2916-13 and IMM-2918-13.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2916-13 and IMM-2918-13
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