Federal Court  Cour fédérale

Date: 20181011

Docket: IMM-890-18

Citation: 2018 FC 1018

Ottawa, Ontario, October 11, 2018

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

SHAUN MICHAEL REECE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Reece, a citizen of St. Vincent and the Grenadines, applied for permanent residence from within Canada. The rule is that such applications are to be made from outside Canada. The exception is that Section 25 of the *Immigration and Refugee Protection Act (IRPA)* provides that the Minister may examine the circumstances and grant permanent resident status if of the opinion that such is justified on humanitarian and compassionate considerations, taking into account the best interests of any child directly affected.

[2] The Officer charged with the application dismissed it. Essentially, she was of the view that insufficient evidence had been presented to satisfy her that humanitarian and compassionate relief is warranted. This is the judicial review of that decision.

I. Background

[3] Mr. Reece came to Canada in 2009 on a six month visitor visa. Thereafter he filed a claim for refugee protection which was rejected. He has also been convicted of one count of assault in Canada for which he was later pardoned.

[4] He twice applied for permanent residence from within Canada, through the sponsorship of his then wife, under the spouse or Common-Law Partner in Canada Class. The first application was refused. His wife withdrew the second application after she and Mr. Reece legally separated in March 2016. They are now divorced. Mr. Reece is said to have a good relationship with her children from a previous relationship.

[5] More recently Mr. Reece is in a common law relationship with a Canadian citizen and fathered her child, born in December 2016.

[6] During his time in Canada Mr. Reece has been gainfully self-employed as a construction worker.

II. The Decision Under Review

[7] The Officer did not grant significant weight to Mr. Reece's length of time in Canada, noting how he got here. She was of the view that he would be able to re-establish himself in St. Vincent, where some family members reside, and that he would be able to continue his work as a construction worker there.

[8] She was also of the view that the best interests of the directly affected children were not jeopardized. To support his submissions about the step-children, Mr. Reece submitted a letter of support from one step-son and proof that he acted as a contact person with the police following the arrest of a different step-son. Both of these documents were issued before Mr. Reece's daughter was born. In the Officer's view, his three step-children would have the support of their mother and insufficient evidence was provided as to the extent of Mr. Reece's involvement in their lives now that he and their mother are divorced. She was of the view that there was little evidence of his financial, emotional or physical support.

[9] With respect to his biological child who is less than two years old, she noted that a Canadian born child with a parent subject to a removal order is not in a unique situation. Mr. Reece submitted letters of support from his common law spouse to support his submissions about his daughter's best interests. This was not enough to satisfy the Officer that the young child would suffer emotionally or psychologically if Mr. Reece were to apply for normal processing from overseas.

[10] Although separation is always difficult, and hardship is involved, she was of the view that his relationship with his common law spouse did not warrant an exception.

[11] She also took note of the fact that he has been under an enforceable removal order since 2010.

III. Mr. Reece's Submissions

[12] Mr. Reece forcefully argues that the decision is out of step with the dictates in *Kanthasamy v Canada (Citizenship and Immigration)*, [2015] 3 SCR 909, 2015 SCC 61and is therefore unreasonable. That case held that the Ministerial Guidelines issued under Section 25 of *IRPA* were unduly restrictive, and fettered the decision-maker's discretion. The Guidelines, as they then were, called upon the decision-maker to consider whether a return to one's homeland would result in hardship that was unusual and undeserved or disproportionate. The Court pointed out that that language was not to be found in *IRPA* itself. While useful, the Guidelines are not legally binding. The words "unusual and undeserved or disproportionate hardship" should be treated as descriptive. The Application should not be considered through the lens of these adjectives in a way that would limit his or her ability to give weight to all relevant humanitarian and compassionate considerations.

[13] Counsel for Mr. Reece submits that the Officer assessed every factor through a hardship lens and that she jumbled together establishment in Canada with the consequences of being removed. There should have been a separate analysis.

IV. Disposition

[14] As Mr. Justice Iacobucci stated in *Canada (Director of Investigation and Research, Competition Act) v Southam Inc*, [1997] 1 SCR 748, the case which introduced the reasonableness standard of judicial review:

> 80 I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness simpliciter, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

[15] I have referred to *Southam* because in all likelihood I would have come to a different conclusion. The Officer's decision was based on a paper record. One might think a reviewing court is in just as good a position to assess the facts as a trier of fact who did not have the benefit of hearing witnesses. Indeed, this was more or less the position taken by the Federal Court of Appeal in *NV Bocimar SA v Century Insurance Co*, (1984) 54 NR 383. However, the Supreme Court reversed that decision [1987] 1 SCR 1247. Relying on *Stein v The Kathy K*, [1976] 2 SCR 802, it held that the findings of a trial judge, even based on a paper record, are not to be disturbed unless clearly wrong, arising from a palpable and overriding error.

[16] The Officer noted that Mr. Reece's second application for permanent residence within the Spousal Class had tentatively been granted, but was then withdrawn by the spouse. There was a great deal of material relating to the Ontario divorce proceedings. One measure of establishment within Canada would be a spousal relationship. I would have analyzed the situation in greater

detail, but then I would be re-weighing the evidence, which is not the function of a court in judicial review.

[17] One must keep in mind that this judicial review is grounded in Section 18.1 of the *Federal Courts Act*. I find there was no error in law and that there was no erroneous finding of fact made in a perverse or capricious manner or without regard to the material before the decision-maker as set out in ss. 4 thereof. In a sense, Mr. Reece calls for an edit of the reasons. Would they have been reasonable to him if they had been reassembled?

[18] Counsel has zeroed-in on narrow passages, rather than taking into account the decision as a whole. As Mr. Justice Joyal put it in *Miranda v Canada (Minister of Employment and Immigration)*, (1993), 63 FTR 81 at para 5:

> It is true that artful pleaders can find any number of errors when dealing with decisions of administrative tribunals …

Miranda is one of many many cases which warn us about overzealous, microscopic examination. In my view, the Officer did not limit herself to hardship, but rather broadly followed *Kanthasamy*.

[19] A further argument is that the decision was unreasonable because it took some seven years for Mr. Reece's Pre Removal Risk Assessment application (PRRA) to be dismissed. No mention is made of the PRRA in the decision, and it does not form part of the Certified Tribunal Record. However, the Officer who dismissed the H&C application also dismissed the PRRA, on the very same day, and so she must be taken to be aware of the delay. Although a delay can be a circumstance pertaining to the degree of one's establishment in Canada, during Mr. Reece's stay

in Canada there were many other applications pending. It may be that those delays led to the withdrawal of the spousal application and to his subsequent common law relationship and birth of a child. However, those facts were dealt with, and not in a perverse or capricious manner.

[20] In summary, my opinion is there is no error which would justify a reconsideration.

JUDGMENT in IMM-890-18

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

There is no serious question to certify.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-890-18
STYLE OF CAUSE:	SHAUN MICHAEL REECE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 27, 2018
JUDGMENT AND REASONS:	HARRINGTON J.
DATED:	OCTOBER 11, 2018

APPEARANCES:

Richard Wazana	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Richard Wazana Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Canada Ontario Regional Office Toronto, Ontario	FOR THE RESPONDENT