Federal Court Cour fédérale

Date: 20240702

Docket: IMM-2177-23

Citation: 2024 FC 1034

Toronto, Ontario, July 2, 2024

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

DELON EVERAD CHESTERFIELD JOSEPH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Delon Everad Chersterfield Joseph, is a citizen of Saint Lucia. He entered Canada in October 2004 to visit his son. He has remained in Canada ever since, much of that time without valid temporary resident status. The Applicant has four children, all of whom were born and reside in Canada.

[2] In July 2022, the Applicant submitted an application for permanent residence on Humanitarian and Compassionate [H&C] grounds. In a decision dated January 27, 2023, the H&C application was refused. After having considered the Applicant's establishment and the best interests of the children [BIOC] impacted by the decision, the Immigration Officer [Officer] concluded the evidence and circumstances did not warrant an exemption, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] The Applicant applies under subsection 72(1) of the IRPA for judicial review of the Officer's decision. The Applicant submits that the errors and omissions of his representative in advancing submissions on the BIOC issue resulted in a breach of natural justice. He further argues the Officer's BIOC assessment was unreasonable and the Officer failed to conduct a holistic assessment of his establishment in Canada.

[4] In addressing the alleged breach of natural justice, I shall consider all of the circumstances to determine whether the proceeding before the Officer was fair (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[5] The presumptive standard on judicial review, reasonableness, applies to the review of the Officer's establishment and BIOC analyses. A reasonable decision is one that is based on an internally coherent and rational chain of analysis that can be justified by the facts and the law that constrained the decision maker. A reasonable decision is transparent, intelligible and justified (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 9-10, 15, 85-86).

II. Analysis

A. *No breach of natural justice*

[6] The incompetence of a representative will only constitute a breach of natural justice in "extraordinary circumstances." The party alleging incompetence must be sufficiently specific in identifying the incompetence and the incompetence alleged must be clearly supported by the evidence (*Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at para 15 [*Yang*], citing *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36). The party alleging incompetence must satisfy the following tripartite test:

A. The representative's alleged acts or omissions constituted incompetence [the performance component];

B. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different [the prejudice component]; and

C. The representative be given notice and a reasonable opportunity to respond.

(*Yang* at para 16, citing *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 11; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 25; and *Zdraviak v Canada (Citizenship and Immigration)*, 2013 FC 640 at para 25).

[7] The Applicant has provided notice to the former representative and provided the representative with an opportunity to respond. I am satisfied that the third element of the test has been met.

[8] With respect to elements one and two of the test, the Court will normally first consider the prejudice component, element two. Where prejudice has not been established, the Court will generally not address the performance component, as it is not the Court's role to assess a representative's performance or conduct (*R v GDB*, 2000 SCC 22 at para 29).

[9] The Applicant argues that, although the BIOC was the central issue in his H&C application, the BIOC section of the representative's submissions amounts to one line and the remainder of the submissions make only fleeting references to the children. He submits it was incumbent on the representative to canvass the BIOC factors listed in Immigration, Refugees and Citizenship Canada Guidance [IRCC Guidance] with the Applicant, which the representative failed to do. He submits that, as a result, evidence that his middle child had been diagnosed with Attention Deficit Hyperactivity Disorder [ADHD] and Oppositional Defiant Disorder, conditions seriously affecting his education, were not included in the H&C application, nor was the Applicant's central role in helping the child manage his symptoms, including a plan to have the child move in with him. The Applicant also submits that additional photos of himself with his children and INTERACT receipts further evidencing monthly financial support provided to the representative were not included with the H&C application. He contends that there is a "reasonable probability that this evidence would have altered the outcome had it been tendered."

[10] Although the Applicant reports that his representative failed to canvass BIOC factors listed in IRCC Guidance with him, and that the representative's BIOC submissions were limited, this does not establish the prejudice component of the test. Instead, the alleged errors and omissions must be considered within the broader context of the information before the decision maker and any other relevant circumstances.

[11] A review of the Certified Tribunal Record [CTR] discloses that the Applicant's affidavit, which was before the Officer, identifies his children, speaks to his desire to support his eldest son upon entering Canada in 2004, describes his relationship with his children, and reports his active involvement with them. There are also affidavits and letters from the children's mothers that speak to the Applicant's role in supporting his children and address the impact removal may have on the children. There are letters provided by the Applicant's two oldest children. In addition, there was financial evidence and photographs before the Officer. While the Officer expressed the view that additional financial evidence would have been beneficial, the Officer nonetheless attributed some positive weight after having considered this factor.

[12] It is argued that the representative's failure to canvass the factors identified in the IRCC Guidance prevented the Applicant from communicating his son's mental health issues and from placing before the Officer a 2018 letter from a pediatrician who had assessed the child. The pediatrician's letter makes reference to the child's mother, expresses the pediatrician's "hope that we can work together at this time to support [the child]" and states that the pediatrician "feel[s] [the child] meets diagnostic criteria for Attention Deficit Hyperactivity Disorder combined

subtype (both inattentive and hyperactive) as well as having features of Oppositional Defiant Disorder." The letter also references a follow-up with the child and his family.

[13] It is unfortunate that the record before the Officer did not include the pediatrician's letter or the Applicant's general and non-specific evidence that it was intended to have the child live with the Applicant full-time due to a return of behavioral problems. However, the letter is dated and there is no evidence of any follow-up or ongoing treatment having been pursued. The Applicant's assertions that his son's behavioral issues had retuned and that there was an intent to have the child reside with the Applicant lack detail, are not reflected in the evidence before the Officer, and are not otherwise addressed in the evidence advanced to demonstrate the alleged breach of natural justice.

[14] The Applicant has failed to demonstrate that, but for the reported errors and omissions of his chosen representative, there is a reasonable probability that the outcome of the H&C application would have been different. Substantial prejudice has not been established. I am unable to conclude there was a breach of natural justice.

B. *The Officer's decision was reasonable*

(1) BIOC assessment

[15] The Applicant submits that the Officer misapplied the legal test in assessing the BIOC because the Officer did not assess what was in the best interests of the children. Instead, the

Officer focused on the impact of separation from their father on the children and identified factors that could help the children cope and adapt. I disagree.

[16] It was not a misapplication of the law, nor was it unreasonable for the Officer to address the impact of the Applicant's removal on the children and to consider factors that would mitigate those consequences. The Officer did not engage in an assessment of the degree of suffering as argued. Instead, the Officer reasonably assessed whether the impact on the children's best interests was such that either the BIOC on its own or when considered globally with other factors, justified the granting of H&C relief. In undertaking this analysis, the Officer expressly acknowledged, "refusal of this application would affect the best interests of the children to an extent."

[17] The Applicant further argues that the Officer failed to account for the degree of dependency between the Applicant and his children and unreasonably substituted a conclusion that the Applicant is not the primary caregiver for an assessment of the level of dependency between the Applicant and his children. He submits the Officer therefore discounted the evidence of close dependency between the Applicant and his children and the impact of the loss of that care.

[18] Again, I disagree. The Officer acknowledged and engaged with the evidence of dependency, acknowledged the Applicant was part of the children's lives and noted the time they spent together. The Officer also acknowledged the absence of evidence relating to his involvement with the children prior to 2019. The Officer did engage with the evidence, the

reasons are responsive to the submissions made and the conclusions reached were reasonably open to the Officer in light of the submissions, evidence and applicable law.

[19] Similarly, the Officer's consideration of the issues of financial support, the availability of communications by phone and internet, and the possibility of future visits from the children or from the Applicant to allow the Applicant to maintain his relationship with his children was reasonable. The Parties cite numerous decisions of this Court in support of their respective positions on these issues. While the outcomes in the cases cited differ, they all stand for the principle that the facts and circumstances in individuals' cases determine whether an Officer's treatment of the evidence and the conclusions reached are reasonable. In this instance, the Applicant's arguments are, at their core, based upon disagreement with the Officer's assessment of the evidence and the conclusions reached. Disagreement does not invite intervention on judicial review.

(2) Establishment

[20] On the issue of establishment, the Applicant argues the Officer erred by failing to conduct a holistic assessment, failed to adequately engage with the context surrounding the Applicant's failure to regularize his status, and failed to address the evidence demonstrating the Applicant is a hard-working, dependable and ambitious individual with a history of sustained employment.

[21] The Officer did attribute negative weight to the Applicant's lengthy period in Canada without valid status. However, this finding was reached on the basis that the Applicant "did not

appear to [make] attempts to regularize his status in Canada" prior to making the H&C application. The Officer accurately noted the sole explanation provided was an inability to find genuine legal representation, an explanation that was unsupported by details as to when efforts were made and why they were not continued.

[22] The Officer then canvassed the Applicant's circumstances, noting the completion of a truck driving course, his work history, his family ties to Canada, including the letters of friends and family in support of the H&C application and the absence of ties to Saint Lucia. The Officer did address the Applicant's evidence demonstrating his work ethic, dependability and history of employment.

[23] Having considered the Applicant's establishment evidence, it was open to the Officer to rely on *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 and conclude that the lengthy period of time in Canada without valid immigration status would result in limited weight being given to the Applicant's establishment.

III. Conclusion

[24] For the above reasons, the Application is dismissed.

[25] The Parties have not identified a question of general importance for certification, and none arises.

JUDGMENT IN IMM-2177-23

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.

2. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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