Date: 20090127

Docket: IMM-2492-08

Citation: 2009 FC 79

Ottawa, Ontario, January 27, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CHI FAT ALFRED LAW

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of an Immigration Officer, dated April 24, 2008, denying the applicant's application for permanent resident status from within Canada on humanitarian and compassionate (H&C) grounds.

FACTS

[2] The applicant is a citizen of China. He has two children, aged 15 and 13 respectively. The applicant originally entered Canada in 1997 as a permanent resident. He returned to Hong Kong in 1998 and lived apart from his family until he returned to Canada in 2006. He states that he returned for business reasons and maintained constant communication with his family, particularly his children, although he and his wife eventually separated.

[3] The applicant's wife, and children's mother, died in October 2007. At the time of her death, she was separated from the applicant and had custody of their children, although there was ongoing litigation between her and the applicant in relation to custody and access. Her will appointed her mother to have custody of their children in the event of her death. The children currently reside with their maternal grandparents.

[4] The applicant filed an H&C application on February 12, 2008. He states that at the time, he was involved in the litigation relating to his children's custody. He indicated that further detailed submissions and documentation would be forthcoming and requested that Citizenship and Immigration Canada (CIC) not render a decision until these were filed.

[5] CIC rendered its decision on April 24, 2008, before receiving any further submissions from the applicant. The applicant was not notified before the decision was made.

Decision under review

[6] The Immigration Officer states at page 12 of the Applicant's Record that the applicant's application was not complete:

> The applicants' humanitarian and compassionate grounds are not specified in this application or in the letter from counsel. The application guide provides instruction and warning related to stating circumstances that are to be considered and the requirement to provide supporting information.
>
> Although the subject sated [sic] in February that he intended to send additional submissions, none have been received in the ensuing months.
>
> In making my decision in this case I reviewed the submissions made by the subject and his counsel the last dated received on 15 February 2008. I also reviewed information available on the Foss [sic] system.

[7] The Officer then considered the best interests of the children. She concluded that they would not be adversely affected by the applicant's removal:

> [The applicant] returned to Hong Kong in 1998 and lived apart from his family until he returned to Canada in 2005…At the time of his return his now deceased spouse told Immigration officials that she did not want him to come into her home. She was providing for the children. Since then the subject's spouse is deceased and left a will that awarded full custody of the two children to her parents. They have and still are residing with their grandparents. I have been given no reason to believe that the children's best interests are not being attended to and that a further separation from their natural father would likely present an excessive hardship. It is not established in these submissions that there is a strong bond with his children. There is evidence that he would like to be in their lives.

[8] The Officer concluded that the best interests of the children were not negatively affected and, as the applicant had not at that time made any submissions, rejected the application.

ISSUES

[9] The applicant raises two issues in this application:

1. whether the Immigration Officer breached the principles of natural justice by failing to provide the applicant with the opportunity to present further submissions and evidence; and

2. whether the Immigration Officer erred in failing to properly consider the best interests of the children involved.

STANDARD OF REVIEW

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[11] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada established that reasonableness is the appropriate standard of review for H&C application decisions. The Court stated at paragraph 62:

> ¶ 62 … I conclude that 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. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court – Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*. [Emphasis added]

[12] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at paragraph 47). On a pure issue of natural justice, the correctness standard applies.

ANALYSIS

Issue No. 1: Did the Immigration Officer breach natural justice principles by rendering a decision before the applicant had an opportunity to make further submissions?

[13] In the cover letter accompanying his H&C application, the applicant's counsel informed the CIC that he would be providing submissions and further evidence. Applicant's counsel stated:

> Please note that we will be sending to you, detailed submissions and further documentation addressing the issues relating to this application. We therefore request that you do not make a final decision in this matter until you have received and reviewed the said submissions and documentation.

[14] The immigration officer noted this request in her decision but stated that no further submissions had been forthcoming in the two months that had passed since the applicant filed the H&C application. The applicant submits that CIC breached his right to natural justice by failing to notify him of its intent to render a decision, or giving him an opportunity to file the additional materials.

[15] The respondent submits that while an Immigration Officer is obligated to consider all the evidence submitted by the applicant, she does not have any duty to elicit additional information. The onus is on the applicant to provide all relevant evidence to make his case, and the Officer has only a duty to make a reasonable decision on the basis of that evidence.

[16] The applicant relies on *Pramauntanyath v. Canada (MCI)*, 2004 FC 174, and *Skripnikov v. Canada (MCI)*, 2007 FC 369, wherein the Court ruled that a decision made on the basis of an incomplete record constitutes a denial of natural justice. In *Pramauntanyath*, however, the officer did not consider evidence that had been timely submitted by the applicant, while in *Skripnikov*, there was a question as to when the evidence had been submitted. In this case, of course, there is no allegation that any evidence that was submitted at the time of the decision was not considered by the Officer.

[17] The applicant submits that given the "unusual" speed with which the application was processed and the request of the applicant on the record, the officer had at the least a duty to notify the applicant that a decision would be rendered soon so that the applicant could provide the materials he had indicated would be forthcoming. The applicant submits that the CIC has a general practice of notifying H&C applicants before a decision is made, and giving them an opportunity to update their applications and that, given the applicant's particular request in this case, he had a legitimate expectation that he would have this chance before a decision was made.

[18] In *Melchor v. Canada (MCI)*, 2004 FC 1327, 39 Imm L.R. (3d) 79, the applicants argued that they had relied on the practice of immigration officers in Vancouver of always requesting an updated file before making a decision. In that case, Justice Gauthier found at paragraphs 8-9 that affidavits from two immigration lawyers were insufficient to establish that a request was sent in every file, and found that in any case, there was no evidence that the applicants or their counsel were aware of or relied on such a practice. She therefore concluded at paragraph 12 that there was no legitimate expectation that such a request would be made before a decision was rendered. The respondents also cite *Zambrano v. MCI*, 2008 FC 481, 167 A.C.W.S. (3d) 165, in support of their argument that immigration officers are not required to request information before making a final decision. In *Zambrano*, Madam Justice Eleanor Dawson held, and I paraphrase, at paragraphs 35 to 39 that:

> a. the applicant bears the burden of supplying all of the documentation necessary to support their claim and an officer is not required to request updated information;
>
> b. the applicant does not have any legitimate expectation that he will be able to present updated information before the decision is made, and there is no breach of procedural fairness if he is are not afforded that opportunity; and
>
> c. the immigration policy manual for H&C applications instructs officers that they are not required to elicit information on H&C factors and the onus is on the applicant to put forward the factors that they feel exist in their case. There is no basis for an applicant suggesting that he or she will be contacted and asked to provide further information.

Issue No. 2: Did the officer fail to properly consider the best interests of the children?

[19] The applicant submits that the Immigration Officer failed to consider the best interests of the children. The Court disagrees. The Immigration Officer reviewed the situation with the two children and found that the children are residing with their grandparents and there is no reason to believe that their best interests are not being attended to. There is no recent evidence that the children have any bond, or wish to live, with their father. The one sentence notes from the two children are out of date, and do not warrant substantive weight that they want to live with their father who left them 10 years ago.

[20] For these reasons, this application must be dismissed. The Court advised counsel that the applicant can always file a new H&C application immediately and provide the proper evidence and submissions. There is a possibility (depending on the discretion of the respondent) that the applicant may not be removed pending his Ontario Court proceeding for custody of his children if the custody matter proceeds quickly.

[21] Both parties advised the Court that they do not consider that this case raises a serious question which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2492-08
STYLE OF CAUSE:	CHI FAT ALFRED LAW v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 14, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	KELEN J.
DATED:	JANUARY 27, 2009

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