Federal Court  Cour fédérale

Date: 20100201

Docket: IMM-5406-08

Citation: 2010 FC 109

Ottawa, Ontario, February 1, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

DANIEL JOHNSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to s. 72 of the *Immigration and Refugee Protection Act*, R.S.C. 2001, c. 27, of an officer's decision rejecting the applicant's application for permanent residence based on humanitarian and compassionate (H&C) grounds. The officer concluded that the applicant had only minimally established himself in Canada and that he had

failed to lead sufficient documentary evidence to support a finding of unusual and undeserved or disproportionate hardship if returned to his country of nationality.

[2] For the reasons that follow, this application is dismissed.

BACKGROUND

[3] Daniel Johnson is a dual citizen of the United States of America and of Israel. He was born in New Orleans, Louisiana, and became a professional basketball player. Mr. Johnson first came to Canada in 1992. He has two Canadian born children, Don, aged 16, and Wendy, aged 12.

[4] Following the birth of his children, Mr. Johnson pursued his professional basketball career overseas, playing in Ireland and Israel. Unfortunately, his children were apprehended from their mother and placed in the custody of the Jewish Family and Child Services.

[5] The date of Mr. Johnson's return to Canada is unclear. His H&C application states that he has lived in Etobicoke, Ontario, from April 2002 to the present date, but his H&C application also states that he was employed in Gonzalez, USA, from April 2002 to March 2005, and that his Canadian "employment" only began in April 2005. In any event, at some point Mr. Johnson returned to Canada and undertook legal proceedings to gain custody of his children. He was successful, but is currently in a family law dispute with his ex-wife over his ability to remove the children from Canada should he be ordered to leave.

[6] In December 2005, Mr. Johnson filed a refugee claim on the grounds that his house and economic livelihood in Louisiana were destroyed in Hurricane Katrina. In March 2006, Mr. Johnson's refugee claim was dismissed. An application for leave and judicial review of this decision was dismissed by this Court on August 24, 2006.

[7] In July 2006, Mr. Johnson submitted an H&C application with the assistance of an immigration consultant. In his application Mr. Johnson sets out his significant community and church involvement. Most of that involvement relates to basketball and his letters in support speak favourably of his involvement. In fact, the officer quotes from one letter from the International Charity Association Network that speaks to his contribution and to his involvement in the Mentoring Basketball Camp with the Cabbagetown Youth Centre in the most glowing terms:

> Daniel has been a key part in both developing and operating programs for at risk youth. His absence would be a huge loss to not only the program but to the many youth who have benefited and those who stand to benefit from working with him.

[8] The application noted his educational achievements including the fact that he had a Bachelors Degree from Alabama State University. The application states that "with all his qualifications and professional basketball competence, Mr. Daniel Johnson has potentials (*sic*) for future continuous employment in Canada." The application itself discloses that Mr. Johnson had not had remunerative employment in Canada. In response to the question asking how he supported himself financially before coming to Canada, he stated that it was from income from professional employment. In response to the question that asked "How do you, and will you, support yourself

financially in Canada?" he answered "Presently I support myself through social services, and I intend to support myself in future through income from my employment".

[9] Lastly, Mr. Johnson sets out in his application the hardship he will experience if he is required to apply for Canadian residency from abroad. In addition to the loss of his friends and his loss to the community activities in which he is involved, he states that he and his children will suffer hardship because his house had been destroyed by Hurricane Katrina, accordingly, he alleged that "he and all these dependants would suffer considerable economic, financial and emotional hardships" if returned to the United States of America.

[10] On June 5, 2008, Mr. Johnson's H&C application was rejected.

[11] The officer notes that the applicant bears the onus of proving that he will face unusual and undeserved hardship or disproportionate hardship if required to apply for permanent residence from outside Canada. The officer went on to consider a number of factors including hardship or sanctions upon return to the United States, spousal, family or personal ties that would create hardship if severed, degree of establishment in Canada, best interests of the children, establishment, ties or residency in any other country, and return to country of nationality.

[12] The officer analyzed the applicant's prior refugee claim, including the claims contained therein that his home and economic livelihood had been wiped out by Hurricane Katrina. The officer observed that the applicant was not living in Louisiana at the time of the hurricane. The

officer noted that the applicant "would have access to numerous services in the United States and in particular New Orleans, Louisiana" stemming from Federal disaster relief funds made available in response to Hurricane Katrina. The officer also noted that the United States generally has very high quality medical care. The officer concluded that the applicant had led insufficient evidence to prove that he would suffer hardship if returned to the United States:

> The applicant has not provided sufficient documentation to indicate that he would be unable to maintain himself and his family in the United States. Similar to Canada, the United States provides social services which include access to a variety of agencies that could provide assistance to the applicant in maintaining himself and his children. The applicant has provided insufficient documentation to support that he would be unable to find suitable housing and employment in the United States. Further, the documentation does not suggest that the applicant would be denied access to the necessary services available in the United States. The applicant is well-educated and it is reasonable to assume that he would seek out services to support his family. I am not of the opinion that the hardships as described by the applicant constitute an unusual and undeserved or disproportionate hardship.

[13] The officer noted that the applicant is divorced and that he had numerous personal relationships in Canada, but concluded that there was "insufficient evidence to establish that severing these ties would have a significant negative impact on the applicant that would constitute an unusual and undeserved or disproportionate hardship."

[14] The officer noted that the applicant had not led any evidence of his paid employment in Canada, and that he was currently unemployed and on social assistance. The officer stated that the applicant "has not displayed sound financial management while residing in Canada." The officer

concluded that the applicant's voluntary record amounted to some evidence of integration into Canadian society, but determined that this establishment was not of the level "that his departure would cause an unusual and undeserved, or disproportionate hardship."

[15] The officer reviewed the best interests of the applicant's two children. The officer noted the lack of submissions made in support of the children's best interests, such as their academic or extra-curricular activities. The officer noted that the children, as Canadian citizens, had the right to remain in Canada and that they had an aunt in the United States. The officer noted that the children would have basic services available to them in the United States, even if it was not of the standard available in Canada. The officer concluded that given the similarity between Canadian and American cultures, and the children's young ages, removal to the United States "would not be detrimental" to them. The officer stated that the evidence led did not support the finding of a "negative impact on the children which would amount to an unusual and undeserved or disproportionate hardship."

[16] The officer noted that the applicant had a Bachelor of Arts degree, that he had resided in a number of different countries, that he had family in the United States, and that he had been employed in the United States, all of which lessened the negative impact of returning to the United States. The officer also noted that there were neither impediments to the applicant's return nor impediments to the accompaniment of his children if returned. The officer concluded:

> The evidence before me does not support that returning to the United States would be an unusual and undeserved or disproportionate hardship for the applicant. With the evidence before me, the applicant has not demonstrated that his personal circumstances are

> such that the hardships of not being granted the requested exemption would be unusual and undeserved or disproportionate, and not anticipated by the legislation.

ISSUE

[17] The applicant raises a single issue: Whether the officer's determination of the applicant's H&C application was unreasonable.

ANALYSIS

[18] The applicant submits that the decision was unreasonable for the following reasons: (1) the officer displayed confusion over the basis for applicant's negative refugee claim, (2) the officer cited no evidence to support the finding that the applicant had exhibited poor financial management, (3) the officer's conclusion regarding level of establishment does not withstand a somewhat probing analysis given the evidence on record, (4) the officer's conclusion regarding the applicant's ability to re-establish himself in the United States was inconsistent with the finding of minimal establishment, and (5) the officer unjustifiably relied on self-serving reports of support by the Louisiana State Government regarding the availability of disaster relief services and improperly used these reports to ignore the applicant's submission that he would suffer hardship through "the loss of his home, in the context of his having to support two minor children as a single parent."

[19] The respondent submits that the officer's decision is "largely based on the insufficiency of evidence" provided by the applicant. The respondent contends that the applicant is asking this Court to reweigh the evidence. The respondent submits that the finding of poor financial management was self-evident given the applicant's own submissions, and that this conclusion was

reasonably available to the officer to make. The respondent submits that the applicant's sole establishment factor was his voluntary record, and that the officer's conclusion on establishment was reasonable given that fact. The respondent submits that the finding of resourcefulness is not inconsistent with the finding of minimal establishment. The respondent contends that the applicant led scant evidence to support the best interests of his children or the economic loss that he allegedly suffered from Hurricane Katrina. The respondent relies on *Buio v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 157 at para. 32 for the proposition that the "applicant bears the onus of bringing both the information relevant to his claim, and the evidence supporting that information to an officer's attention." The respondent submits that the applicant simply did not lead sufficient evidence to reasonably lead to a positive decision. The respondent also submits that the officer's alleged error regarding the applicant's refugee claim was immaterial to the outcome reached.

[20] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47, the Supreme Court held that the reasonableness inquiry in judicial review:

> … is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[21] It is clear, from reading the decision as a whole that the officer's primary concern was with the lack of evidence presented by the applicant in support of his application. In *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para. 8, the Court of Appeal stated that H&C "applicants have the onus of establishing the facts on which their claim rests, they omit

pertinent information from their written submissions at their peril". At paragraph 5, the Court of Appeal also held that "an applicant has the burden of adducing proof of any claim on which the H&C application relies." In *Buio* at para. 32, Justice de Montigny interpreted the Court of Appeal's pronouncement to mean that "written submissions alone may not be sufficient for an application to succeed." There may need to be additional documentary evidence provided to support the otherwise bald claims made in written submissions. In this case, such documentary evidence was lacking.

[22] The applicant submitted that he would face hardship if returned to the United States because of the impact of Hurricane Katrina. However, he provided no documentation on the economic loss that he suffered. He provided no evidence that his house was destroyed. He provided no evidence that social services would not be available to him and his children in the United States. He provided no evidence that he would be destitute. In contrast, the officer's research suggested that social services would be available. Given the lack of evidence submitted by the applicant, the officer's preference for her independent research was justifiable. Absent contrary evidence, it was reasonable to rely on the information provided by the Louisiana State Government. The officer did not ignore the loss of the applicant's house, even though this submission was completely undocumented; rather, the officer held that there was not enough evidence to establish the requisite level of hardship for a positive H&C decision. The conclusion that the applicant would not suffer unusual and undeserved or disproportionate hardship if returned to the United States was reasonably available to the officer given the facts presented.

[23] The applicant challenges the officer's conclusion regarding degree of establishment as well as her comment on the applicant's poor financial management. The applicant was not working and was in receipt of social assistance. Though a single father, the applicant's children are of school age and do not require daycare during the day. The applicant is well educated and has a history of employment elsewhere. However, the applicant provided no explanation as to why he was unable to work in Canada. The applicant provided no documentation of his financial resources. The officer was justified in concluding that the applicant had "not displayed sound financial management" given the applicant's reliance on social services when the evidence showed that he was able to work. Further, this comment must be taken in the context of the officer's conclusion that "there is insufficient evidence to confirm [the applicant's] financial stability in Canada."

[24] The officer's conclusion regarding degree of establishment was also justifiable. The applicant has an extensive and commendable voluntary record. However, voluntary service is but one factor in assessing establishment in Canada. Other relevant factors include a history of stable employment, a pattern of sound financial management, involvement in community organizations or other activities, education or training integration, and a good civil record. It was open to the officer to balance the applicant's commendable voluntary record against his lack of employment and his reliance on social assistance. It cannot be said that the officer's conclusion, regarding the applicant's degree of establishment in Canada was unreasonable.

[25] The applicant also challenges the officer's conclusion regarding his ability to re-establish himself in the United States. The applicant reasons that if the officer concluded that he had not

established himself in Canada to a sufficient degree then it did not make sense that the officer also concluded that he would be able to re-establish himself in the United States. However, a finding that an applicant has the requisite skills necessary to re-establish themselves in their country of nationality does not lead to the conclusion that the applicant must have established themselves in Canada.

[26] In my view, there is nothing illogical or inconsistent with the officer stating on the one hand that the applicant has demonstrated only minimal establishment in Canada, and on the other hand that he has certain traits that would facilitate his re-establishment in the United States. On the contrary, it may be that the applicant has a greater chance of finding employment in the United States, where he has family, where his degree is from, and where he has a history of employment. The officer's conclusion on the prospects for the applicant's successful return to the United States was not unreasonable.

[27] Finally, the applicant challenges the officer's inaccurate treatment of the applicant's refugee claim and the Refugee Protection Division's negative determination of that claim. I do not agree with the respondent that this was a mere clerical error. However, I agree with the respondent that the error was immaterial to the decision under review, and therefore it does not amount to a reviewable error.

CONCLUSION

[28] For all these reasons, this application is dismissed. No question was proposed for certification and on the facts of this case, there is no question that meets the test for certification.

JUDGMENT

THIS COURTORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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