Federal Court  Cour fédérale

Date: 20110621

Docket: IMM-3401-10

Citation: 2011 FC 741

Ottawa, Ontario, June 21, 2011

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SWEE FATT KOK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is a citizen of Malaysia who suffers from a heroin addiction and is currently receiving treatment in Canada through a Methadone Replacement Therapy Program ("MRTP"). He came to Canada in September 1998. In April 2001, he was convicted of "possession of a break-in instrument" and two counts of mischief under $5, 000. He was also convicted in 2003 of theft under $5, 000. These convictions rendered him inadmissible to Canada pursuant to paragraphs 36(1) (a)

and 36(2) (a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA") for serious criminality and criminality.

[2] The applicant made a refugee claim in October 2002. The claim was rejected on March 4, 2004 and he became subject to a removal order. The applicant received a negative Pre-Removal Risk Assessment ("PRRA") on November 28, 2005. He was scheduled for deportation in October 2006 but removal has been repeatedly deferred due to his methadone treatment.

[3] In January 2006, the applicant applied for permanent residence from within Canada on humanitarian and compassionate ("H&C") grounds. He claimed the required dosages of methadone are not available if he were to return to Malaysia. Going back, he said, would put him at risk of a relapse into a full blown addiction.

[4] The H&C application was denied in May 2010. The applicant was scheduled for removal to Malaysia on Tuesday, July 27, 2010. His removal was stayed on July 26, 2010 pending the determination of his application for leave and for judicial review.

[5] This is an application for judicial review of the negative H&C decision. The Officer found that the applicant's hardship related to methadone availability in Malaysia, level of establishment in Canada, ties to Malaysia and the best interests of his child in Malaysia did not warrant an H&C exemption. The favourable H&C factors were found to be outweighed by his criminality and financial inadmissibility.

ISSUES:

[6] The sole issue is whether the officer's decision was reasonable.

ANALYSIS:

Standard of Review

[7] An exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy: *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358, at paras. 15-17, leave to appeal to the SCC dismissed, [2002] S.C.C.A. No. 220; *Hee Lee v. Minister of Citizenship and Immigration*, 2008 FC 368 at paras. 1-2; *Garcia De Leiva v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 717 at para. 15.

[8] Accordingly, the trier of fact is afforded much deference in reaching a decision: *Legault*, above, and *Baker v. Canada (Minister v. Citizenship and Immigration)***,** [1999] 2 S.C.R. 817 at para. 53. The standard of review is reasonableness. As stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.

Was the Officer's decision reasonable?

[9] The applicant is a heroin addict who is stabilized on a methadone maintenance program where he is monitored by a doctor and has a supportive network that is assisting him to regain a normal life. Because of the existing controversy surrounding methadone clinics and programs of

this kind in Malaysia, the applicant submits that to return to Malaysia would risk his relapse into a full-blown addiction.

[10] The Doctor managing the applicant's MRTP, Dr. Belluzzo, provided an opinion that without the applicant's current dose of approx. 110 mg of methadone per day, his medical condition will become unstable and he will face the risk of relapse. The applicant submits that the officer erred in not taking into account Dr. Belluzzo's opinion with respect to the amount of methadone needed to maintain his drug treatment. That opinion was based on the applicant's self-reported symptoms of the effects of lower dosages.

[11] In Malaysia, methadone became available for prescription treatment of addicts only in 2005 and quantities are limited. The applicant submits that he may not be able to access methadone at all or would not be able to receive the dose he needs. The applicant points to documentary evidence in the record including a letter from a Doctor at the Central Polyclinic in Kuala Lumpur to support this point.

[12] Further the applicant submits, the officer erred in noting that Dr. Belluzzo's opinion indicates that relapse is a concern, not a "certainty" or a "forgone conclusion". The officer is not a medical expert and has no grounds upon which to reject the opinion of an expert who has been treating the applicant for years. Moreover, the test of hardship is not whether it would be a certainty or a forgone conclusion but rather, whether on a balance of probabilities, there is a serious risk of unusual, undeserved or disproportionate hardship.

[13] The respondent's position is that the officer reasonably gave a low probative value to evidence suggesting that the availability of methadone in Malaysia is limited. The officer reviewed all of the evidence and found the applicant had failed to demonstrate that he would be unable to obtain treatment in Malaysia.

[14] Contrary to the applicant's submissions, the officer did not reject Dr. Belluzzo's opinion with respect to the amount of methadone needed to maintain the applicant's treatment program. She noted and accepted that the applicant had successfully weaned himself from 180 mg daily to between 100 and 110 mg daily. It was with this information in mind that the officer assessed the remaining evidence. This is particularly evident in reviewing the correspondence between the Officer and the Health Management Branch and the Immigration Program Officer at the Canadian Mission.

[15] The applicant suggests this correspondence demonstrates that the officer knew the correct questions to ask and knew that she did not have sufficient information to counter the applicant's evidence that adequate doses for his maintenance requirements are not available in Malaysia. In my view, the correspondence shows the officer exercised due diligence in obtaining the information she required in order to make a fair assessment of the issue before her. The correspondence further confirms that methadone is in fact available in dosages of 100+ mg in Malaysia.

[16] For example, the officer noted that information provided by the Malaysian Ministry of Health indicated that several government hospitals and health clinics provide methadone replacement therapy and that there was no specific dose range outlined by the Ministry. The

Ministry official stated that “in practice, the dose is determined by a recognized health practioner […]”. Thus, the officer inferred that the applicant would be able to receive his required dosage in order to maintain his current methadone levels.

[17] It was open to the officer to accord low probative value to a statistic in an article, “Clearing the Air over Methadone Therapy for Addicts” (May 09), which indicated that addicts in Malaysia are only given 30-80 mg of methadone. This statistic was second-hand and the source was not named in the article.

[18] The officer reasonably found that the 2007 study of Malaysia’s first methadone program did not indicate that doses are limited by availability. It indicated that dosages were determined by each participant’s individual requirements. The purpose of the study was to determine the average dose that users typically require in the local population. The authors concluded that the maintenance dose required was lower than that average.

[19] It was fair for the officer to give low probative value to the evidence from a Dr. Shanmuganathan in Malaysia because it was from 2006. It was open to the officer to find that the applicant had provided insufficient recent evidence to substantiate his allegation that in present-day Malaysia, i.e. in 2010, he would be limited from obtaining that which he required given that the program had only begun in 2005.

[20] The officer correctly noted statements made by an Australian physician but accorded them little weight as there was insufficient evidence to corroborate the statements, especially considering

that the Ministry of Health provided information as to the "several government hospitals and health clinics now providing Methadone Replacement Therapy". The source of the physician's information was unknown and there was no indication that he is an expert in the field of Methadone maintenance.

[21] In my view, the officer did not impose a higher standard of proof on the applicant when she noted that Dr. Belluzzo had expressed a concern rather than a certainty or a foregone conclusion. The Doctor's opinion was but one element of the evidence before the officer and she was entitled to take into account the fact that the doctor had characterized the risk of relapse as less than definitive. Reading the decision as a whole, I am satisfied that the officer applied the correct test with respect to hardship and came to a determination that was open to her to make and that this Court should not disturb.

[22] I recognize that the applicant has made a serious effort to turn his life around and to change the lifestyle as an addict which brought him in to conflict with the law. I also note that the offences he committed are not at the higher range of criminal misconduct. Nonetheless, his behaviour made him criminally inadmissible to this country and the onus was upon him to demonstrate that the discretion in s. 25 should be exercised in his favour.

[23] The thrust of the applicant's argument is that the officer failed to properly consider the evidence pointing to the limited availability of methadone in Malaysia. But, as the respondent correctly put it, that is an argument essentially about the weight of the evidence. It is not the function of the reviewing court to reweigh the evidence: *Canada (Citizenship and Immigration) v.*

Khosa, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 61; *Lupsa v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1054.

[24] The Court's task is only to determine whether the decision falls within a wide range of possible and acceptable outcomes: *Dunsmuir*, above, at para. 47. While this Court may have come to a different conclusion as to whether an exemption was justified on H&C grounds, decisions classified as discretionary may only be reviewed on limited grounds: *Baker*,above, at para. 53.

[25] It is clear from reading the decision that the officer considered all of the evidence before her and her reasons are justified, transparent and intelligible. She took into account all of the pertinent evidence, noted submissions by the applicant's counsel and conducted further research into whether the methadone dosages required by the applicant would be available if the applicant were to be returned to Malaysia. The decision thus falls within the range of acceptable outcomes defensible on the facts and the law.

[26] The parties proposed no questions for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3401-10
STYLE OF CAUSE:	SWEE FAT KOK and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 23, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	June 21, 2011

APPEARANCES:

Leigh Salsberg	FOR THE APPLICANT
Leila Jawando	FOR THE RESPONDENT

SOLICITORS OF RECORD:

LEIGH SALSBERG Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
MYLES J. KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT