Federal Court  Cour fédérale

Date: 20120207

Docket: IMM-6874-10

Citation: 2012 FC 164

Ottawa, Ontario, February 7, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

VICTOR HUGO MORALES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review filed under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], from a decision of the immigration officer (Officer) refusing to grant permanent residence status to Victor Hugo Morales (Mr. Morales) or an exemption from any applicable criteria or obligation for an application on humanitarian and compassionate considerations under subsection 25(1) of the *IRPA*.

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] Mr. Morales, a citizen of Chile, is a professional musician. He immigrated to Canada in 1978, shortly before he turned 8 years old and became a permanent resident.

[4] He is the father of three children. His eldest son is from his first marriage; he lives in Ontario and has little or no relationship with his father.

[5] His two younger sons, aged 14 and 15, are from a second marriage. Mr. Morales was divorced on February 23, 2004. The divorce decree granted custody of the children to his spouse. Mr. Morales claims that he is actively involved with his sons; he ensures that he is present in their lives.

[6] Mr. Morales has had a troubled past because he was both a witness to and a victim of violence at the hands of his father. As a teenager, he developed a dependency on alcohol and drugs until 2004. Since then, has allegedly been rehabilitated, with only one temporary relapse in 2008.

[7] Between 1994 and 2004, Mr. Morales pled guilty to 12 criminal offences, including possession of drugs with the intent to traffic, possession of drugs, possession of break-in instruments, accessory to robbery, impaired driving and threats and assault.

[8] A deportation order was issued against Mr. Morales on March 26, 1997, because of his criminal offences. Consequently, he lost his permanent resident status, which he received after he arrived in Canada.

[9] Mr. Morales appealed this decision. On February 24, 1998, the Immigration and Refugee Board's Immigration Appeal Division [IRB-IAD] dismissed his appeal and upheld the removal order.

[10] Between 1998 and 2008, Mr. Morales had four arrest warrants issued against him for failing to appear for investigation and removal from Canada.

[11] In February 2009, Mr. Morales filed an Application for Pre-Removal Risk Assessment [PRRA], which was refused on November 4, 2010.

[12] On April 29, 2009, Mr. Morales applied under humanitarian considerations [H&C] to be exempt from the inadmissibility affecting him and from the obligation to file his application for permanent residence from outside Canada.

[13] The H&C application was refused on October 28, 2010. The Officer concluded that Mr. Morales failed to establish on a balance of probabilities that he would experience any unusual, undeserved or disproportionate hardship if he were required to file his application for permanent

residence abroad, taking into consideration the best interests of his children who are directly affected.

III. Legislation

[14] Subsection 25(1) of the *IRPA* reads as follows:

Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

IV. Issue and standard of review

A. Issue

[15] This application for judicial review only raises a single issue:

- ***Did the Officer err by finding that the applicant would not experience any unusual, undeserved or disproportionate hardship if he were required to file his application for permanent residence for humanitarian and compassionate considerations abroad?***

B. Standard of review

[16] In *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 [*Dunsmuir*], the Supreme Court of Canada found that, at paragraph 62 of its decision, when determining the appropriate standard of review, the first step 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".

[17] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62, the Supreme Court explained that the appropriate standard of review for humanitarian and compassionate considerations is reasonableness (see also *Paz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 412, [2009] FCJ No 497 at paras 22-25).

[18] Therefore, the Court must consider “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” (*Dunsmuir*, at para 47).

V. Position of the parties

A. Position of Mr. Morales

[19] Mr. Morales submits that he has been well integrated in Canada since 1978, that his entire family lives there and that he does not know his country of birth, Chile.

[20] He states that the Officer’s decision violates the Canada’s international commitments on children’s rights. Mr. Morales points out that in enacting the *IRPA*, Canada adopted, among others, the objective of encouraging family reunification. Therefore, the Officer had to take into account the best interests of his children, which she did not do. He submitted that his two minor sons depend on him because he takes care of their education, their health—in short, their well-being.

[21] Mr. Morales alleges that the Officer’s decision was in excess of her jurisdiction since she failed to comply with the principle of proportionality, an important principle in international law.

[22] He further submitted that the Officer ignored, disregarded without reason and refused to consider several pieces of evidence filed in support of the application on humanitarian and compassionate grounds.

[23] Mr. Morales believes that the decision was without merit and arbitrary since it was contrary to the *Canadian Charter of Rights and Freedoms*, Part 1 of The *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982*, (UK), 1982, c 11 [*Charter*]. He claims that removing him would violate his rights to life and security under section 7 of the *Charter* since it would lead to a disproportional situation for his family, in particular for his mother for whom he is the primary informal caregiver and his two minor children.

B. Respondent's position

[24] The respondent relies on the Officer's decision. He submits that it carefully reviews all aspects of the H&C application filed by Mr. Morales. All the documents and information provided were considered. Contrary to what Mr. Morales argues, the Officer was not disregarding the letters written by his family. She weighed their relevance as evidence.

[25] The Officer considered Mr. Morales's immigration and criminal history. She then reviewed his children's situation to determine what is in their best interests. She also considered the degree to which Mr. Morales is established in Canada. The respondent submitted that the Officer is alert, alive and sensitive to the best interests of the children.

[26] The respondent submitted that the best interests of the children do not automatically result in a favourable response to an H&C application. This criterion is one of many.

[27] The respondent alleges that Mr. Morales is attempting to minimize his criminal past. It cannot be said that these crimes were only minor and without violence. The respondent submits that the Officer had to pay careful attention to Mr. Morales's criminal past, which she did.

[28] The respondent also notes that it cannot be said that Mr. Morales has been a good citizen for six years since a warrant was issued for his arrest in August 2008. In addition, he did not file an income tax return for several years, which shows his lack of respect toward the Canadian authorities.

VI. Analysis

[29] "In applications for exemption based on H&C considerations, the decision-making procedure is entirely discretionary and is used to determine whether an exemption is justified" (see *Doumbouya v Canada* (*Minister of Citizenship and Immigration*) 2007 FC 1186, [2007] FCJ No 1552 at para 7; *Kawtharani v Canada* (*Minister of Citizenship and Immigration*), 2006 FC 162, FCJ No 220 at para 15[*Kawtharani*]). Thus, the onus is on the applicant to demonstrate that the hardship that he would face, if he had to file his application for permanent residence abroad, are unusual, undeserved or disproportionate (see *Legault v Canada* (*Minister of Citizenship and Immigration*), 2002 FCA 125, [2002] FCJ No 457 at para 23).

[30] In *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, [2006] FCJ No 425, Justice de Montigny explained the meaning of the words “unusual and undeserved or disproportionate”. In paragraph 20 of the decision, he wrote:

> In assessing an application for landing from within Canada on Humanitarian and Compassionate grounds made pursuant to section 25, the Immigration Officer is provided with Ministerial guidelines. Immigration Manual IP5 – Immigration Applications in Canada made on Humanitarian or Compassionate Grounds, a manual put out by the Minister of Citizenship and Immigration Canada, provides guidelines on what is meant by Humanitarian and Compassionate grounds …
>
> ...
>
> The IP5 Manual goes on to define “unusual and undeserved” hardship and “disproportionate” hardship. It states, at paragraphs 6.7 and 6.8:
>
> **6.7 Unusual and undeserved hardship**
>
> Unusual and undeserved hardship is:
>
> - the hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would have to face should be, in most cases, unusual, in other words, a hardship not anticipated by the Act or Regulations; and
>
> - the hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would face should be, in most cases, the result of circumstances beyond the person’s control.
>
> **6.8 Disproportionate hardship**
>
> Humanitarian and compassionate grounds may exist in cases that would not meet the “unusual and undeserved” criteria but where the hardship (of having to apply for a permanent resident visa from outside of Canada) would have a disproportionate impact on the applicant due to their personal circumstances.

[31] Hardship that is inherent in having to leave Canada is insufficient in itself to exempt an applicant under subsection 25(1) of the *IRPA* (see *Kawtharani* at para 16).

[32] Mr. Morales submitted that the Officer erred by failing to consider the evidence before her. The respondent takes the opposite position.

[33] There is a presumption that the Officer considered the evidence as a whole before making a decision (*Townsend v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 371, [2003] FCJ No 516).

[34] In this case, the Court finds that the Officer considered all the evidence before her. She wrote: "Applicant submitted a letter from his youngest son [and from] ex wife and her sister … I grant little weight to these documents as they constitute interested proof as they were probably written in the sole goal of supporting the Application for permanent residence" (page 18 of the Tribunal Record). The Officer considered the evidence filed by Mr. Morales, but she gave them little probative value, given that they came from interested parties. Indeed, the Court recognized that the Officer's wording was not very good, but she exercised her discretion as mandated to her under the law.

[35] In addition, Mr. Morales submitted that the Officer ignored the best interests of his children. The Court wishes to reiterate that the case law establishes that the best interests of the child are certainly an important factor, but are not determinative (*Hawthorne v Canada* (*Minister of Citizenship and Immigration*), 2002 FCA 475 at para 2).

[36] The Court believes that the Officer is alert, alive and sensitive to the child's situation. She devoted part of her decision to analyzing the best interests of the children and found that the evidence submitted does not establish that the hardship alleged by Mr. Morales would be unusual and undeserved or disproportionate. The Officer pointed out "the information before me does not demonstrate that neither the Applicant's level of implication nor that it would cause his children harm if ties were severed … No evidence [were] submitted as to whether or not the Applicant provides financial support for any of his 3 children" (page 18 of the Tribunal Record).

[37] The Officer reviewed Mr. Morales's immigration history and his criminal record. She noted that Mr. Morales "has a Criminal History over many years which resulted in his Permanent residence being revoked" (page 20 of the Tribunal Record). She also noted that four arrest warrants were issued against him in 1998 and 2008 for failing to appear for investigation and removal from Canada. She points out that Mr. Morales has only filed four income tax returns since he has been in Canada, during the years 2006 to 2009, reporting an income of $0. The Officer gave some weight to this evidence, which shows a limited degree of establishment in Canada. The Officer has broad discretion when assessing the evidence before her (see *Baker v Canada* (*Minister of Citizenship and Immigration*), [1999] 2 SCR 817, [1999] FCJ No 39 at paras 57 to 62). She may determine the relevance of the evidence for the purposes of the H&C application.

[38] Mr. Morales pointed out his role as primary informal caregiver for his mother since his brothers and sisters are working full time and cannot take care of their mother. However, the Officer

found that it was reasonable to believe that the applicant's brothers and sisters could help their mother during his absence.

[39] The Officer acknowledges that after 30 years in Canada, Mr. Morales has been able to integrate in certain respects. However, she found that the evidence in the file do not support Mr. Morales's claims that the hardship that he would encounter, if he had to apply for permanent residence from Chile, are not unusual and undeserved or disproportionate. The Officer's assessment seems to be reasonable.

[40] "This Court is not to lightly interfere with the discretion given to an H&C officer … As long as the H&C officer considers the relevant, appropriate factors from an H&C perspective, the Court cannot interfere with the weight the H&C officer gives to the different factors, even if it would have weighed the factors differently" (*Hamzai v Canada* (*Minister of Citizenship and Immigration*), 2006 FC 1108, [2006] FCJ No 1408 at para 24).

[41] Mr. Morales also submitted that his removal to Chile is inconsistent with section 7 and sections 12, 15 and 27 of the *Charter*. In *Thiara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 151, [2008] FCJ No 668, the Court explained: "Paragraph 3(3)(*f*) of the IRPA does not require that an officer exercising discretion under s.25 of the IRPA specifically refer to and analyse the international human rights instruments to which Canada is a signatory. It is sufficient if the Officer addresses the substance of the issues raised", which she did in this case.

[42] In *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539 at para 46, the Supreme Court of Canada wrote: “The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v Canada* (*Minister of Employment and Immigration*), [1992] 1 SCR 711 … Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*”. The Officer’s decision is not inconsistent with Mr. Morales’s rights to liberty and security. Furthermore, no evidence was submitted to the Officer to establish that Mr. Morales would be a victim of cruel and unusual treatment if he had to file his permanent residence application from his country of origin.

[43] Mr. Morales also based his objection on section 15 of the *Charter*. The Supreme Court of Canada wrote on this topic at paragraph 105 of *Gosselin v Québec (Attorney General)*, 2002 SCC 84, [2002] 4 SCR 429 [*Gosselin*]: “A majority of this Court has held that the objective of s. 15 is to affirm the dignity of individuals and groups by protecting them from unfair governmental action, which differentiates on the basis of characteristics that can be changed, if at all, only at great personal cost”. This excerpt from *Gosselin* is a reminder that removal of a person does not constitute unfair government action that differentiates on the basis of characteristics that can be changed, especially when this person has a serious criminal past (see *A.M.M. v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 809, [2009] FCJ No 920 at para 36). Mr. Morales failed to establish that he has suffered an injustice under section 15 of the *Charter*.

VII. Conclusion

[44] Mr. Morales failed to establish that the Officer erred in assessing the evidence or the applicable law when she reviewed his application under subsection 25(1) of the *IRPA*, which would warrant this Court's intervention. Therefore, this application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed; and

2. There is no question of general interest to certify.

"André F.J. Scott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6874-100
STYLE OF CAUSE:	VICTOR HUGO MORALES v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 12, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	SCOTT J.
DATED:	February 7, 2012

APPEARANCES:

Stewart Istvanffy	FOR THE APPLICANT
Isabelle Brochu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Istvanffy Law Firm Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT