Federal Court  Cour fédérale

Date: 20120504

Docket: IMM-7144-11

Citation: 2012 FC 538

Ottawa, Ontario, May 4, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

B. L.

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of the decision dated September 14, 2011 refusing his application for permanent residence on humanitarian and compassionate grounds.

[2] Initials have been substituted for the name of the applicant in the style of cause due to the sensitive nature of information in these reasons and the privacy interests of the applicant and his family.

[3] For the reasons that follow, this application is granted.

BACKGROUND:

[4] The applicant is a 42-year-old citizen of China. He came to Canada in 2000 sponsored by his wife. They divorced in 2002 and the applicant was granted custody of their child, a son. In May 2003 the applicant was convicted of sexual assault on his then girlfriend. The sentence imposed was time served plus one year probation.

[5] As a result of the conviction, the applicant was found to be inadmissible for serious criminality and a deportation order was issued in September 2004. Leave for judicial review of that decision was denied in January 2008.

[6] A negative pre-removal risk assessment was completed in July 2007. Leave for review of that decision was granted. The application was dismissed in May 2008. A second negative pre-removal risk assessment decision was rendered on May 27, 2011.

[7] In August 2009, the applicant applied to remain in Canada on humanitarian and compassionate (hereafter H&C) grounds. The application was considered by the same Senior Immigration Officer who had decided the second pre-removal risk assessment. A negative decision was rendered on May 30, 2011. Among other reasons, the officer refused the application on the ground that the seriousness of the applicant's criminal conviction was not outweighed by the other positive H&C factors.

[8] Before the negative H&C decision was delivered to the applicant, the officer was informed that the applicant had received a pardon for the 2003 sexual assault conviction. For some reason, this information had not been provided to the officer when the applicant was given opportunities to update the information on his file. The officer reconsidered his decision as a result of this information but concluded in an addendum to the May H&C decision that the refusal should stand.

ISSUES:

[9] The issues raised on this application are as follows:

a. Did the officer err by using the "hardship" test instead of the "best interests" test in assessing the impact of the decision on the applicant's children?

b. Did the officer err in assessing the effect of the pardon?

ANALYSIS:

Standard of Review:

[10] The parties and this Court are agreed that, in general, the review of an H&C decision attracts the standard of reasonableness: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 57-62.

[11] The standard for determining the issue of whether the proper legal test was applied by the H&C officer has been said to be correctness in several decisions of this Court: *Sinniah v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1285 at para 26; *Osegueda Garcia v Canada*

(Minister of Citizenship and Immigration), 2010 FC 677 at para 7; and *Khalil Markis v Canada (Minister of Citizenship and Immigration)*, 2008 FC 428 at para 19.

[12] As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 50, when applying the standard of correctness "a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer."

[13] Counsel for the applicant withdrew an argument that would have required the Court to consider whether the applicant had been denied procedural fairness by the officer.

Did the officer err in applying the best interest test?

[14] In reviewing an H&C application, the officer must be "alert, alive and sensitive" to the children's interests: *Baker*, above, at para 75. The best interest of the child will be an important but not determinative factor in the review. Rather, an officer will identify the relevant interests to consider and weigh this factor along with other favourable and unfavourable H&C factors: *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 11.

[15] According to the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 4:

> The "best interests of the child" are determined by considering the benefit to the child of the parent's non-removal from Canada as well

> as the hardship the child would suffer from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.

[16] This test does not include consideration of whether the child will experience "unusual, undeserved or disproportionate" hardship as that standard is applicable only to the situation of the applicant who may be required to apply for admission to Canada from overseas: *Shchegolevich v Canada (Minister of Citizenship and Immigration)*, 2008 FC 527 at paras 11-12; *Arulraj v Canada (Minister of Citizenship and Immigration)*, 2006 FC 529 at para 14; and *Beharry v Canada (Minister of Citizenship and Immigration)*, 2011 FC 110 at para 13.

[17] The inclusion of these words will not necessarily render an H&C decision unreasonable. The court must review the decision as a whole to see if the officer nevertheless applied the correct test and conducted a proper analysis: *Lopez Segura v Canada (Minister of Citizenship and Immigration)*, 2009 FC 894 at para 29; *Beharry*, above, at para 12.

[18] At the hearing, counsel for the respondent fairly acknowledged that the Court would find in favour of the applicant if it determined that the officer had, in substance rather than form, applied the hardship test to the children's interests. That is my conclusion.

[19] In his decision, the officer's review of the applicant's son included a mention of his age, the fact that his father has sole custody of him and that they reside together along with his common law-spouse and infant daughter. He noted that there was no evidence of the location of his biological mother. He stated that the applicant would be able to choose whether his son returned to China with

him or whether he would stay in Canada. The son's permanent resident status permitted him to leave the country and return once he was eighteen should he wish to do so. The officer acknowledged that the son was doing very well in school and had no physical or mental disabilities.

[20] With respect to the infant daughter, the officer stated that she is a citizen of Canada and as such was permitted to leave and return to Canada, that she lived with the family and also did not have any physical or mental disabilities. He mentioned that there were photographs that showed a positive family atmosphere. In concluding his analysis, the officer stated that:

> Despite the photographs, I have not been presented with sufficient evidence to demonstrate that either [the son] or [the daughter] would be subjected to unusual and undeserved hardship, or that either minor would be subjected to disproportionate hardship, should either be physically separated from [B.L.] (by remaining in Canada, at the discretion of his father, or at the discretion of her parents) or should either minor accompany [B.L.] to the People's Republic of China (with or without the company of [the spouse]).
>
> [Names have been removed]

[21] I am satisfied that the officer's reasons do not demonstrate that he conducted an adequate analysis of the best interests of the children using the correct test. In relation to the son, the reasons consist of factual statements but do not review his relationship with or emotional or financial dependency upon his father or any other consideration relating to the benefit of having his father remain in Canada or the disadvantages he would experience should his father be removed. There is no discussion of the potential difficulties he would encounter with respect to language of schooling or other challenges he would face if he accompanied his father other than the fact that he would be able to return to Canada once he reached the age of majority.

[22] The reasons provided in relation to the daughter are equally problematic as the officer merely mentions that she resides with her parents, is a Canadian citizen and that her parents would decide her future residence and schooling. There is no analysis regarding her relationship with and dependency upon her father as discussed in *Hawthorne,* above, at paragraph 50.

[23] Accordingly I am satisfied that in substance the evidence does not disclose that the officer applied the correct test in this case.

Did the officer err in considering the effect of the pardon?

[24] While it is not strictly necessary for me to consider this question given the conclusion I have reached on the previous issue, I will provide my views for the benefit of the next officer who will consider this matter.

[25] In the initial May 2011 H&C decision, the officer concluded that the positive H&C factors were insufficient to outweigh the serious crime committed eight years previously. This was despite the evidence mitigating the seriousness of that offense and the evidence of the applicant's rehabilitation with the help of his common law spouse and his pastor.

[26] When informed that the applicant had received a pardon, the officer quite properly acknowledged that it was necessary to reconsider his first decision. He did so in the form of an addendum appended to the first decision. In the introduction to the addendum, the officer stated that he had “conducted another full assessment of the application”.

[27] However, the two decisions are substantially the same with the only real difference being the deletion of references to the criminal conviction and resulting inadmissibility. There is no analysis to support the officer's statement that he dealt with the issue of the pardon and conducted a new assessment. He does not explain why, given the important weight he had attributed to the "serious criminal inadmissibility" which was no longer at issue, the application was still rejected.

[28] In my view, therefore, the officer's reasons for denying the application the second time were inadequate.

[29] Neither party proposed a serious question of general importance for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the style of cause is amended to substitute the initials B.L. for the applicant's name;
2. the application is granted and the matter is remitted for reconsideration by a different immigration officer; and
3. no question is certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7144-11
STYLE OF CAUSE:	B. L. and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 2, 2012
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