Federal Court		Cour fédérale

Date: 20120828

Docket: IMM-7309-11

Citation: 2012 FC 1023

Ottawa, Ontario, August 28, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MICHAEL GORDON WESTMORE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act) for judicial review of the decision of an immigration officer (Officer), dated 9 September 2011 (Decision), which refused the Applicant's application for permanent residence on humanitarian and compassionate (H&C) grounds under subsection 25(1) of the Act.

BACKGROUND

[2] The Applicant is 70 years old and a citizen of the United Kingdom (UK). He currently lives in Toronto.

[3] The Applicant and his husband, Stennett, met in 1983. They lived together in a common-law relationship from 1985 until 2004. During their relationship, they split their time between the UK and Canada, spending part of each year abroad so the Applicant could maintain his visitor status in Canada. In 2003, the immigration regulations changed to permit same-sex spousal sponsorships, so Stennett and the Applicant married. They began a spousal sponsorship application on 15 June 2004. Unfortunately, Stennett fell ill and died on 25 October 2004.

[4] After Stennett died, the Applicant could no longer be sponsored to Canada as a spouse. He asked the Respondent to process his application as an H&C application. The Respondent did so and granted preliminary approval of the application on 5 August 2005. The immigration officer reviewing that application found that there was strong evidence of community support and ties to Toronto. The Applicant had also shown that he would not be in financial difficulty if he were granted permanent residence. After conditional approval, the Respondent asked the Applicant to provide an updated medical examination to complete the application. The Certified Tribunal Record (CTR) suggests a communication breakdown between the Applicant, his representatives, and the Respondent. For whatever reason, the Applicant did not submit updated medical information and the Respondent refused his first H&C application as incomplete on 27 March 2008.

[5] The Applicant submitted a second H&C application on 16 November 2009. This application was substantially similar to his initial application. The Applicant relied on his establishment in

Canada resulting from his long stay here with Stennett and his lack of links to the UK. He said he would not have access to services from the Canadian National Institute for the Blind (CNIB) if he could not stay in Canada. This would cause him unusual and undeserved or disproportionate hardship. To support his H&C application, the Applicant provided several pieces of financial information and several letters of support from friends in Toronto. He also said in his submissions that he had no friend or family in the UK because his parents and only sibling are dead.

[6] The Officer considered the Applicant's submissions and refused his application on 9 September 2011. The Officer notified the Applicant of the Decision by letter dated 21 September 2011. (Refusal Letter).

DECISION UNDER REVIEW

[7] The Decision in this case consists of the Refusal Letter and the H&C Reasons for Decision (Reasons) which the Officer signed on 9 September 2011.

[8] The Officer reviewed the Applicant's biographical data and immigration history. She noted his previous unsuccessful H&C application and outlined the bases for the new application. The Refusal Letter informed the Applicant that he bore the onus to establish the hardship he would suffer if he were not granted an H&C exemption.

[9] The Officer reviewed the positive factors the Applicant had set out in his application, noting his involvement in several community organizations, including the CNIB. She also noted he owned property in Canada and in the UK and had the support of friends in Canada who he has known for more than 25 years. He had also travelled extensively between Canada and the UK with Stennett,

and he had never requested an extension of his visitor status in Canada. When Stennett became ill, the Applicant spent as much time as he could in Canada to care for him.

[10] Although the Applicant had significant supports in Canada, he had not provided sufficient evidence that he would not have a support system in the UK. He had also not shown he could not access services in the UK similar to those provided by the CNIB in Canada. Further, the Applicant could continue to come to Canada as a visitor, as he had for many years.

[11] The Officer acknowledged the Applicant has no immediate family in the UK, but found there was insufficient evidence to show he did not have other family or friends in the UK who could support him there. The Applicant had provided insufficient evidence that he had spent any significant amount of time in Canada since Stennett had passed away, though he had maintained his status in Canada by leaving twice each year.

[12] The Applicant had not shown he would suffer unusual and undeserved or disproportionate hardship if he applied for permanent residence from outside Canada or if he were required to leave Canada twice each year. He had chosen to continue visiting Canada even after Stennett passed away, and even though he was given an opportunity for permanent residence with the conditional approval of his first H&C application.

ISSUES

[13] The Applicant formally raises the following issue in this application:

i. Whether the Officer's reasons are adequate.

[14] He also raises the following issues in his argument:

i. Whether the Decision was reasonable;

ii. Whether he had a legitimate expectation an H&C exemption would be granted.

STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick* 2008 SCC 9 held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[16] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada held that when reviewing an H&C decision, "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" (paragraph 62). Justice Michael Phelan followed this approach in *Thandal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 489, at paragraph 7. The standard of review on the second issue is reasonableness.

[17] In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, the Supreme Court of Canada held at paragraph 14 that the adequacy of

reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." With respect to the first issue, the adequacy of the reasons will be analysed along with the reasonableness of the Decision as a whole.

[18] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[19] In *Baker*, above, at paragraph 26, the Supreme Court of Canada held that the doctrine of legitimate expectations is part of the doctrine of fairness or natural justice. Where a party has a legitimate expectation, this will affect the content of the duty of fairness, but that expectation cannot create a substantive right. In *Canadian Union of Public Employees (C.U.P.E.) v Ontario (Minister of Labour)* 2003 SCC 29, the Supreme Court of Canada held at paragraph 100 that "It is for the courts, not the Minister, to provide the legal answer to procedural fairness questions." Further, the Federal Court of Appeal in *Sketchley v Canada (Attorney General)* 2005 FCA 404 at paragraph 53 held that the "procedural fairness element is reviewed as a question of law. No deference is due. The decision-maker has either complied with the content of the duty of fairness appropriate for the particular circumstances, or has breached this duty." The standard of review on the third issue is correctness.

STATUTORY PROVISONS

[20] The following provision of the Act is applicable in this proceeding:

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.

ARGUMENTS

The Applicant

Reasons Inadequate

[21] The Officer's reasons are inadequate because they do not sufficiently inform the Applicant about why his application was refused. His first application was approved in principle on similar grounds as those advanced in his second application. However, the Officer did not adequately explain why the result of his second application was different from the first. The two applications

were substantially the same, except the Applicant was more established in Canada by the time of the second application. The Officer should have explained how the two applications were different. The Applicant cannot know why his application was rejected, so the Decision must be returned. See *Adu v Canada (Minister of Citizenship and Immigration)* 2005 FC 565.

[22] The Officer also did not address the claim as put forward by the Applicant. He said he would face hardship in the UK from being disconnected from the CNIB. However, the Officer looked at whether he would be able to access similar services in the UK. The reasons do not show the Officer considered hardship flowing from disconnection, so they are inadequate.

Decision Unreasonable

[23] When she concluded there was insufficient evidence that the Applicant did not have a support network in the UK, the Officer required the Applicant to prove a negative. This was unreasonable because the only way he could meet the Officer's test would be to interview everyone in the UK. There was also evidence before the Officer, in the Applicant's statements on the H&C application form and the submissions he made, which showed he did not have family or friends in the UK. The Officer ignored this evidence, so the Decision is unreasonable.

[24] When she found there was "insufficient evidence that he has spent any significant amount of time in Canada since the passing of his spouse," the Officer also ignored evidence. The Applicant said in his submissions that he had lived in Canada since January 2001, which includes the time after Stennett died. He also listed Canadian residences on the application form dating back to January 2001.

[25] The Applicant also provided extensive evidence of his establishment in Canada, but the Officer did not consider it. He pointed out that he owns property here, has a support network of friends, and depends on the services of the CNIB. However the Officer did not consider this evidence. The Applicant's stay in Canada was beyond his control, so a positive H&C decision was warranted in his case.

The Respondent

Reasons Adequate

[26] Under section 11 of the Act, all foreign nationals must seek a visa before coming to Canada. H&C consideration under subsection 25(1) allows for special and additional consideration; it is not a back-door into Canada when all other avenues have been exhausted. In this case, the Officer considered all the evidence which was before her and concluded the Applicant would not face unusual and undeserved or disproportionate hardship if he had to seek a permanent resident visa through the normal process. She provided adequate reasons, so the Decision should stand.

[27] A decision-maker's reasons are adequate when "the losing party knows why he or she has lost. Informed consideration can be given to grounds for appeal. Interested members of the public can satisfy themselves that justice has been done, or not, as the case may be." See *R v Sheppard* 2002 SCC 26 at paragraph 24. In an administrative context, reasons need not be as comprehensive as in an adjudicative context. See *Fabian v Canada (Minister of Citizenship and Immigration)* 2003 FC 1527 at paragraph 34. The reasons do not need to refer to every piece of evidence. See *Newfoundland Nurses*, above, at paragraph 14. *Dunsmuir*, above, at paragraph 47 shows that two officers could consider the same arguments and evidence, arrive at opposite conclusions, and both be upheld on judicial review.

[28] It was open to the Officer to come to a different conclusion from that of the first officer, so long as her findings were reasonable. The Applicant has challenged the Officer's finding that he provided insufficient evidence he did not have a support network in the UK. However, his submissions only said he did not have a community of friends in the UK who know he is homosexual.

[29] The Applicant relied heavily on his long residence in Canada to show his establishment. However, throughout this time he was always a visitor to Canada and made frequent visits to the UK. It was open to the Officer to conclude from these visits that he could continue doing so and maintain his friendships in Canada. There was no reason his application for permanent residence could not be processed while he waited in the UK. Further, the ten years the Applicant spent in Canada could not outweigh the sixty years he spent outside of Canada before he began to reside here.

[30] The Applicant has not challenged the Officer's finding that he had not shown equivalent services were not available in the UK. No unusual and undeserved or disproportionate hardship can flow from having to access equivalent services in one's home country. The Applicant simply prefers the Canadian services, but this does not amount to hardship.

[31] It is true that counsel's statements, such as the submissions the Applicant says the Officer ignored, can be relied on as evidence. However, *Ferguson v Canada (Minister of Citizenship and Immigration)* 2008 FC 1067 shows that these statements must be treated as unsworn statements from the Applicant. The Officer did not ignore the Applicant's submissions. She found they were not sufficient to show he could not obtain the care and assistance he required in his daily life. The Officer did not ignore evidence of his establishment.

[32] The Applicant has also not provided any authority for his assertion that awaiting the outcome of a visa application is a circumstance beyond his control such that establishment should be considered favourably. On the contrary, Justice Yves de Montigny held in *Serda v Canada (Minister of Citizenship and Immigration)* 2006 FC 356 at paragraph 21 that:

> It would obviously defeat the purpose of the Act if the longer an applicant was to live illegally in Canada, the better his or her chances were to be allowed to stay permanently, even though he or she would not otherwise qualify as a refugee or permanent resident. This circular argument was indeed considered by the H & C officer, but not accepted; it doesn't strike me as being an unreasonable conclusion

[33] The Applicant did not satisfy the Officer that he would face unusual and undeserved or disproportionate hardship, even though he bore the onus to do so. The Court cannot intervene simply because the Officer did a poor job of expressing herself.

The Applicant's Reply

[34] The evidence before the Officer was that the Applicant has effectively resided in Canada for more than ten years. It is not relevant to the reasonableness of the Decision that the Applicant was a temporary resident during this period. What matters is that he would face hardship from having to apply for a visa from outside Canada.

[35] *Newfoundland Nurses*, above, does not change the requirement that reasons adequately explain the basis for the Decision. The Officer did not explain why two applications on the same evidence did not lead to the same results. The Applicant had a legitimate expectation the results of the two applications would be the same. This expectation obligated the Officer to explain the reasons for the contrary conclusion. The Officer was not bound by the result in the first application,

but she was required to explain why she reached a different conclusion. Reasonableness does not allow decisions to be made arbitrarily; it is arbitrary to reach a different conclusion on the same evidence without explaining why. The Decision was inconsistent with the values which underlie ministerial discretion, so it must be reconsidered. See *Baker*, above, at paragraph 74.

ANALYSIS

[36] The Applicant is relatively elderly and blind. On the other hand, he is comfortably well-off financially. He has visitor status in Canada but says that for many years now he has spent significant amounts of time here. He has property here, he pays taxes, and he has a community in Toronto where he is also attached to the CNIB. Naturally, he is emotionally attached to his present way of life and, after many years of remaining a visitor, he would now like the security of permanent residence in Canada.

[37] The Officer concluded that the Applicant had not established unusual and undeserved or disproportionate hardship if he was required to submit an application from outside Canada and that, in fact, there was little to suggest he could not continue doing what he has been doing for many years now. Even though he is technically a visitor, he has been able to become quite well established in Toronto and to acquire a community of friends, an active life, and the services of CNIB.

[38] The Applicant has raised several grounds for review. The only ones which, in my view, require consideration are the allegations that the Decision lacks transparency and intelligibility because the Officer failed to explain why she came to a negative conclusion when the Applicant's previous H&C application was positive, and that the Officer's various conclusions regarding

insufficient evidence about support systems in the UK, and his ability to replace what he has at CNIB in the UK, are simply unreasonable given the evidence that was before the Officer.

[39] In my view, when the Decision is read as a whole, it does make clear that the Officer considered the previous positive decision, and she gives reasons why she does not simply follow it. Essentially, her reasoning is that the Applicant failed to avail himself of a previous opportunity to acquire permanent residence in Canada and has shown by his actions over many years that he can function well enough as a visitor. His prior application was converted from a sponsorship after the Applicant's spouse died before the application was completed. An approval letter was sent (we do not know if he received it) and the Applicant or his representative were "contacted a number of times with reminders." Eventually a refusal letter based upon non-compliance was issued.

[40] Since that time, and according to his own evidence, the Applicant has succeeded in making Canada his principal residence while maintaining his visitor status. There is no evidence that this cannot continue, even though it is possible that his visitor status might not be renewed at some time in the future. In my view, this explains why the Officer did not find the previous positive decision determinative. What is different from the previous H&C application is that the Applicant, for whatever reasons, did not perfect the previous application after repeated attempts by the consulate in London to get him to do so, and he has continued to use his visitor status ever since to move between the UK and Canada, even though he has eventually concluded that he would like to obtain permanent resident status here.

[41] The focus of the Applicant's submissions on his H&C Application was the hardship he faced from having to relocate to the UK, where he had no family or friends. He would also experience hardship from being disconnected from the services provided by the CNIB.

[42] A significant portion of the Officer's reasoning relates to her finding that "there is insufficient evidence showing whether [the Applicant] has any other family in the United Kingdom or that he may have friends or acquaintances from his previous travels home that may be able to provide support." Had the Applicant established to the Officer's satisfaction that he had no one to return to, the outcome of the Decision might well have been different.

[43] I think the Officer's treatment of the evidence establishing his support system, or lack thereof, was unreasonable. She found there was insufficient evidence that other family in the UK – the Officer accepted that his mother and brother were both deceased – could support the Applicant. However, it seems the Officer ignored the evidence in the Applicant's H&C application form. Part C of the application form called on the Applicant to list his family members who were living in Canada. He listed no one. He also wrote in his Supplementary Information Form that "I have no family or friends remaining in my country of citizenship, the United Kingdom." Further, the Applicant said that "All of my friends and support networks are in Canada," which necessarily implies he has no support network in the UK. On both of these forms, the Applicant declared that the information he gave was true and correct.

[44] The Officer had before her sworn evidence which established a crucial aspect of the Applicant's request for an H&C exemption. However, she concluded there was insufficient evidence to establish the lack of support. In doing so, the Officer failed to give the Applicant's sworn statement the presumption of truthfulness which *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 establishes.

[45] There was no evidence before the Officer to show the Applicant's statements were not true. She also does not explain why this sworn evidence was insufficient to establish the lack of support

in the UK. Looking at the Decision and the record together, as *Newfoundland Nurses'*, above, directs, I am left wondering how the Officer arrived at this conclusion. As such, I think the Decision must be returned for reconsideration.

[46] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different officer.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-7309-11
STYLE OF CAUSE:	**MICHAEL GORDON WESTMORE** - and - **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 27, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	August 28, 2012

APPEARANCES:

Michael F. Battista	**APPLICANT**
Michael Butterfield	**RESPONDENT**

SOLICITORS OF RECORD:

Jordan Battista LLP Barristers and Solicitors Toronto, ON	**APPLICANT**
Myles J. Kirvan, Q.C. Deputy Attorney General of Canada	**RESPONDENT**