Federal Court  Cour fédérale

Date: 20121025

Docket: IMM-9565-11

Citation: 2012 FC 1240

Ottawa, Ontario, October 25, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

TANA GEORGE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by a Citizenship and Immigration Canada officer (the officer) dated February 16, 2011, wherein the applicant's permanent residence application was refused (the decision). This conclusion was based on the officer's finding that there were insufficient humanitarian and compassionate (H&C) grounds to warrant an exception allowing the applicant's permanent residence application to be made from within Canada.

[2] The applicant requests that the officer's decision be set aside and the application be referred back to Citizenship and Immigration Canada (CIC) for redetermination by a different officer.

Background

[3] The applicant was born in St. Lucia in 1994. She does not know who her father is and only met him once at 11 years of age. She had a difficult childhood in Ciceron due to her mother leaving her at home alone while working, difficulty with schooling and fear of crime.

[4] She arrived in Canada on September 10, 2005. Her mother remained in St. Lucia and the applicant does not know her whereabouts. In Canada, she lived with her grand uncle and aunt. These relatives have provided her with every need and ensured that she gets the best education possible.

[5] She has a sister who filed a successful H&C application, but no remaining family in St. Lucia. She does not know how she would survive alone upon a return to that country.

[6] The applicant filed an H&C application on March 3, 2010.

Officer's Decision

[7] In a letter dated February 16, 2011, the officer denied application for an exemption from the requirement to apply from within Canada on H&C grounds.

[8] The officer listed the applicant's immigration history and briefly summarized the applicant's submissions. The officer noted the applicant's position that she would experience hardship if returned to St. Lucia due to not knowing the whereabouts of her parents and the applicant's statement that her grand uncle and aunt had filed adoption papers in St. Lucia. He also noted the applicant's submissions that her grand uncle and aunt are prepared to be her guardian and that she would be deprived of her education in St. Lucia.

[9] In providing the rationale for rejecting the application, the officer noted that the applicant's grand uncle and aunt were both retirees and had a combined income of $24,000 in 2008. The officer noted that "[the applicant] has been attending school here in Canada and therefore her demands would be much greater in terms of finances than that of her grand uncle and aunt". Therefore, the applicant's relatives were not in a financial position to provide for her care and support in Canada. The officer found there was insufficient information to indicate that the applicant's adoption papers were in process or that her grand uncle and aunt have legal rights to be her guardian.

[10] The officer did not see the credibility of the applicant being under the care of a distant relative when still a minor and due to the low income of her grand uncle and aunt. The officer noted the lack of other financial information such as a bank statement. The officer noted that the applicant has no close family ties in Canada upon whom she can depend for financial or emotional support and that she has her mother still residing in St. Lucia.

[11] In assessing all the factors cumulatively, the officer was not satisfied the applicant would suffer hardship if returned to St. Lucia. The applicant had no close family ties in Canada and no one

in Canada has legal custody of her. The officer was not satisfied that her grand uncle and aunt in Canada would be able to provide for her long term care and support.

Issues

[12] The applicant submits the following points at issue:

1. Did the officer err in fact and law in failing to have any or proper regard to the relevant facts?

2. Was procedural fairness violated by the failure of the respondent to ensure the applicant's application was considered by the same officer as her sister's?

3. Was procedural fairness violated by the two sisters' applications coming to opposite results?

4. Did the officer violate procedural fairness by failing to communicate with the officer who decided the applicant's sister's application?

5. Did the officer err by failing to consider the best interests of the child?

6. Was the applicant's H&C application denied because of the incompetence of the applicant's representative and is it a reviewable error?

[13] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer err in denying the application?

3. Did the officer breach procedural fairness?

Applicant's Written Submissions

[14] The applicant submits that because the personal circumstances and hardship of she and her sister were substantially the same, they should have had the same outcome.

[15] The applicant submits that the officer's finding that the applicant's grand uncle and aunt could not financially support the applicant is unreasonable because they had already been supporting the applicant since 2005. The officer's claim that there were no documents supporting the guardianship of the applicant, the applicant supplied a statutory declaration by her mother giving full custody to the applicant's grand uncle and aunt.

[16] The applicant submits it is clear that the applicant's mother cannot support her and that she has a close bond with her grand uncle and aunt. There was no evidence that they could not support themselves. The officer drew an unreasonable conclusion without any analysis of income and expenses. Given that the applicant's mother cannot support her, the applicant should be with her grand uncle and aunt. If the officer did not request any further information about the income or expenses of the grand uncle and aunt, he should not have made the unreasonable inference they could not support the applicant.

[17] It should have been clear to the officer that the applicant's grand uncle and aunt had provided long term care of the applicant for over six years and that the applicant had no contact with her mother during the same period. Returning a 17 year old to a country where she has no family to stay with and no means of support would be unusual, undeserved and disproportionate hardship.

[18] The applicant's sister also submitted an H&C application. It is clear from the reasons for decision that the officer who made that decision recognized that her grand uncle and aunt were providing proper support to the applicant's sister and that she would not be able to live with her parents in St. Lucia. The applicant came to Canada at a younger age than her sister, making her case even stronger.

[19] The applicant relies on several cases where this Court has quashed H&C decisions based on an officer's failure to properly consider all evidence. The applicant submits in this case the officer failed to consider the statutory declaration made by the applicant's mother and the fact that the applicant's grand uncle and aunt have supported her for seven years. This failure to consider relevant facts has resulted in a reviewable error of law.

Respondent's Written Submissions

[20] The respondent submits that the applicant has not established that CIC was ever informed that the two sisters filed contemporaneous applications, as neither cover letter mentioned this issue. The two applications used different surnames. Neither sister listed each other on the portion of the application form for providing details of family members. The applicant's sister lists her adoptive mother and makes no mention of her biological mother. CIC therefore had no reason to join the applications. Therefore, the applicant's procedural fairness rights were not violated.

[21] The respondent submits that an officer's assessment of an H&C application is reviewable on a standard of reasonableness, a deferential standard. Such assessments are highly discretionary and

no particular outcome out of a wide scope of possible outcomes is guaranteed. When applications are not joined, they constitute individual assessments. The applicant has not given notice of the incompetency allegations to her former counsel so the Court cannot consider that argument.

[22] The respondent argues that the officer's decision is reasonable on its face. The statutory declaration of the mother was not before the officer and only permitted the applicant to travel to Canada with the grand aunt and uncle and reside with them for the period of time required to meet adoption requirements. There was no formal granting of custody or guardianship.

[23] The officer had concerns about the credibility of the applicant's statement that her mother abandoned her to the care of distance relatives who were retired and had low income. The officer focused on elements of the application that were problematic. No one had legal custody or guardianship of the applicant in Canada and the grand aunt and uncle provided little information about their finances. The respondent argues the applicant is asking the Court to reweigh the evidence but this is not the object of a judicial review.

[24] While the applicant argues it was irrational to find that the relatives could not provide long term care, the respondent submits that the applicant provided limited financial information to establish that they could continue to provide such support. The onus was on the applicant to provide all evidence and information necessary. The onus does not shift to the officer to request further evidence.

[25] The officer did not ignore the statutory declaration as it was not part of the application. Even if it had been in evidence, it does not indicate custody, only consent to the applicant travelling and residing with them temporarily. The officer was not incorrect in finding that custody had never been awarded.

[26] The officer properly assessed the best interests of the child as his entire analysis was concerned with the applicant's interests. Therefore, the application should be dismissed.

Applicant's Further Written Submissions

[27] The applicant submits the conduct of her representative was prejudicial to the applicant and that prejudice amounted to a violation of procedural fairness. If the officer had known that the applicant's mother had allowed the applicant's sister to be adopted in Canada, the applicant's own evidence would have been more credible. The representative was also incompetent by failing to inform the applicant that financial documents would be necessary to support her H&C claim. The applicant provided notice to the former immigration consultant.

Respondent's Further Written Submissions

[28] The respondent argues the response provided by the applicant's former immigration consultant does not corroborate the applicant's evidence. Therefore, there is an insufficient factual basis for this Court to find the applicant was prejudiced by the actions of this consultant.

Analysis and Decision

[29] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[30] It is trite law that the appropriate standard of review for issues of procedural fairness is correctness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2008 FC 798 at paragraph 13, [2008] FCJ No 995; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at paragraph 43, [2009] 1 SCR 339). No deference is owed to decision makers on these issues (see *Dunsmuir* above, at paragraph 50).

[31] It is well established that assessments of an officer's decision on H&C applications for permanent residence from within Canada are reviewable on a standard of reasonableness (see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, [2009] FCJ No 713; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at paragraph 14, [2009] FCJ No 1489; and *De Leiva v Canada (Minister of Citizenship and Immigration)*, 2010 FC 717 at paragraph 13, [2010] FCJ No 868).

[32] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible

and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Khosa* above, at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[33] **Issue 2**

Did the officer err in denying the application?

The applicant argues that the officer's decision was unreasonable because it did not properly consider the evidence of the applicant's dependence on her relatives since 2005 and her inability to provide for herself upon return to St. Lucia. Conversely, in arguing that the officer's decision was reasonable, the respondent relies predominantly on the significant deference owed to H&C decisions on judicial review. In considering the officer's decision, I examine it against the criteria of reasonableness: transparency, justifiability and intelligibility (*Dunsmuir* above, at paragraph 47). H&C decisions are discretionary and have a large range of possible outcomes (*Holder v Canada (Minister of Citizenship and Immigration)*, 2012 FC 337 at paragraph 18, [2012] FCJ No 353).

[34] The officer's reliance on the family's low combined income in rejecting their ability to provide for the applicant is not transparent. There is no indication of why $24,000 per year is an inadequate amount, what amount would be adequate, or a reference to evidence on the cost of living in Toronto. This reasoning is completely opaque.

[35] The officer also appears to treat the scenario of the applicant living with her relatives as a hypothetical: "[the applicant] has been attending school here in Canada and therefore her demands

would be much greater in terms of finances" (emphasis added). The applicant's reliance on her relatives is not a hypothetical, since by her evidence she has been successfully living with them for six years. This evidence is clearly relevant to whether her relatives can support her financially and the officer gives no justification for why the applicant living with her relatives is analyzed as a change of course instead of a continuation of the status quo.

[36] The officer is correct that there is no evidence of guardianship of the applicant by her relatives. That issue, however, is not determinative of this application. The applicant's evidence is that she does not know the whereabouts of her mother, so would be a completely abandoned minor if removed. Therefore, she argues that her situation in Canada should not be considered in absolute terms but in reference to the hardship she would faced if removed.

[37] In response to this alleged hardship, the officer did "not see the credibility" of the applicant being sent from St. Lucia to Canada. Therefore, her application was only considered as if removal to St. Lucia would simply mean a return to the care of her mother. The officer offers no rationale for what makes the applicant's evidence implausible.

[38] The officer's finding that the applicant has "no close family ties in Canada" is unintelligible, as is the repeated reference to the applicant's grand uncle and aunt as distant relatives. The officer does not set out what level of familial relation qualifies as sufficiently close or why these relatives, who have lived with and provided for the applicant for six years, fail this criterion.

[39] For each of these findings, the evidence does not dictate a particular outcome and that is why it is the officer's role to consider the evidence and make findings. Even with due deference to that role, the reasons in this case simply do not explain why the officer came to these conclusions.

[40] It is not the Court's role to reweigh the evidence in this application. It is, however, the Court's proper role to evaluate the decision for transparency, intelligibility and justifiability. In this case, the ability of the applicant's relatives to provide for her and whether she would be in the care of her mother if returned to St. Lucia were the two central factual issues of her application. On both issues, the officer offered only a bare finding and inadequate explanation. Even considering the decision in its totality and without isolating these individual issues, the decision fails to meet the *Dunsmuir* test.

[41] Therefore, I find that the decision of the officer was unreasonable.

[42] I need not deal with Issue 3 because of my finding on Issue 2.

[43] The application for judicial review is allowed and the matter is referred to a different officer for redetermination.

[44] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9565-11
STYLE OF CAUSE:	TANA GEORGE - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 16, 2012
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	October 25, 2012

APPEARANCES:

Raj Napal	FOR THE APPLICANT
Nicole Rahaman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

NLC Lawyers Brampton, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT