Federal Court  Cour fédérale

Date: 20121030

Docket: IMM-855-12

Citation: 2012 FC 1268

Ottawa, Ontario, October 30, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ALLAN ALLARD
BIBI KHADIJA ALLARD
BIBI SHAMEEZA ALLARD

Applicants

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 December 2, 2011, wherein the applicants' permanent residence application was refused. 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 applicants' permanent residence application to be made from within Canada.

[2] The applicants request 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 principal applicant, Allan Allard, is a citizen of both Guyana and Grenada while his wife and daughter are solely citizens of Grenada. They arrived in Canada on December 18, 2000 on visitors' visas.

[4] The applicants made a first H&C application which was rejected on August 31, 2005.

[5] The principal applicant made a refugee claim based on the fear of retribution from criminals in Grenada. This claim was rejected on November 1, 2006. The principal applicant went on to make a pre-removal risk assessment (PRRA) application which was denied on July 13, 2009. Leave from this Court was denied in judicial review applications for both applications.

[6] The principal applicant submitted an H&C application on June 8, 2007. The principal applicant alleged his family would suffer hardship due to being removed from Canada after years of becoming established in this country and that the best interests of the child, his daughter, required allowing her to continue her university studies in Canada and to avoid the harm that would come to her if removed to Grenada. The principal applicant alleged his daughter was a victim of sexual assault during the family's time in Grenada and would not be protected by the state from further

violence. The applicants also provided proof of establishment in Canada, including letters from family and friends, employment history and community involvement.

Officer's Decision

[7] In a letter dated December 2, 2011, the officer informed the applicants of the negative decision. The officer noted that a previous negative decision had been sent to the applicants on July 6, 2011, but that the application had been reconsidered after the applicants' new submissions were received on July 22, 2011.

[8] The July 2011 negative decision was not received by the applicants as it was sent to their former counsel who denies having received it.

[9] The officer's reasons began by summarizing the correspondence between CIC and the applicants' counsel leading up to the decision. The officer went on to list the applicants' family within and outside of Canada.

[10] The officer listed the applicants' financial resources. The supporter of the application, the principal applicant's son, claimed to have a 2010 income of $46,000, but no evidence was provided of this claim. The applicants submitted May 2011 bank statements, but these did not show daily transactions, therefore, the officer turned to 2010 statements which contained this level of detail. The officer noted no explanation was provided as to why current statements were not submitted in the July 22, 2011 submission. There were also several unexplained deposits in the 2011 statements.

[11] The officer summarized the principal applicant's employment history, noting that he was now working as a packager at Northdale Trading Ltd. and that his wife was currently unemployed.

[12] The officer considered other connections to Canada, including character reference letters from family members, a community member and the principal applicant's daughter's teacher. The officer included information from a publicly available website relating to the principal applicant's brother and his charitable foundation which appeared to have given a scholarship to the principal applicant's daughter (his brother's niece).

[13] On the issue of hardship, the officer noted the applicants' submission that Grenada was in a state of emergency and plagued with violence, but also the lack of supporting evidence for this claim.

[14] The officer considered the best interests of the child, the principal applicant's daughter. The principal applicant alleged she was a victim of sexual assault before coming to Canada and feared retribution and that harsh and unwarranted treatment would be expected upon removal. The principal applicant's daughter's education would be compromised by forcing her to withdraw from studies at York University, where she had earned a scholarship and a place on the honour roll.

[15] In considering the risk of harm to the principal applicant's daughter, the officer noted the evidence and findings from the applicants' Personal Information Form, the hearing at the Refugee Protection Division, the PRRA and the July 6, 2011 H&C decision. In the first three, the harm

alleged related to the fear of retribution from a criminal gang and no harm was alleged in the earlier H&C decision.

[16] The officer's analysis began by noting that the principal applicant's employment letters and notice of assessment were not current at the time of the final submission. The officer calculated the applicants' family income to be below the low income cutoff (LICO) for a family of three. While the sponsor's income would be sufficient to support a family of five, there was no financial documentation provided to confirm this number.

[17] The applicants' bank statements were also a year old and no explanation was provided for how the family acquired its savings, given their consistently low salaries. Their employment situation has not improved substantially in their eleven years in Canada. Therefore, the officer found their establishment in Canada to be marginal and gave little weight to this H&C factor.

[18] The officer gave credit to the family's community involvement, lack of criminal involvement and fluency in English. The officer determined, however, that these attributes would be expected of anyone who had been in Canada for that period of time and did not amount to unusual hardship for the applicants if they left Canada.

[19] The officer considered the relationships of family and friends of the applicants. The officer noted that while the principal applicant's nephew provided a letter indicating he and his family were close to the applicants, the officer found this factor insufficient to warrant an exemption since the nephew had his own immediate family. The officer concluded the majority of the applicants' family

reside outside of Canada, with some members living in Guyana and Grenada. In regards to the principal applicant's two sons who are permanent residents of Canada, the officer noted the purpose of an H&C application is not to unite families but to determine whether there are sufficient H&C factors to warrant an exemption. There were no reference letters from the sons or any indication of why hardship would result from the applicants' removal. The applicants' length of stay in Canada is due to normal immigration processing and not beyond their control. For these reasons, the officer found that the factor of having family and friends did not amount to making the applicants' removal unusual or undeserved or a disproportionate hardship.

[20] In analyzing the best interests of the child, the officer acknowledged the principal applicant's daughter's educational success but determined that the fact that Canada would be a more desirable place to continue education is not determinative of an H&C application. The officer found that she could apply to a medical school in Grenada or apply to study in Canada after removal. The officer found that the continuance of her education was not sufficient to warrant an exemption.

[21] While the officer acknowledged there would be some difficulty in the applicants returning to Grenada, he did not find it rose to the level of justifying an exemption.

[22] On the fear of harm in Grenada, the officer noted there had been no mention of sexual assault of the principal applicant's daughter until July 22, 2010. Given that the daughter was eight years of age upon arrival in Canada, this would have been central to the family's refugee claim.

[23] The officer also reviewed country conditions evidence relating to state protection from domestic violence in Grenada and noted there was no evidence the perpetrator of sexual assault still lived in Grenada or has continued to threaten harm. Therefore, the officer was not satisfied the principal applicant's daughter faced unusual or undeserved hardship upon removal.

[24] The officer reviewed country conditions evidence relevant to the applicants' claims of violence and a state of emergency in Grenada. The officer concluded that current independent sources confirmed Grenada is not overcome by serious crime and the population at large is not at risk of serious harm by criminal elements. The principal applicant's family would have recourse to state protection and therefore did not face unusual and undeserved hardship.

[25] For all of these reasons, the officer did not find any compelling reason to change the July 6, 2011 decision rejecting the application.

Issues

[26] The applicants submit the following points at issue:

1. Whether the officer's findings were unreasonable.
2. Whether the officer breached the duty of fairness.

[27] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer breach procedural fairness?

3. Did the officer err in denying the application?

Applicants' Written Submissions

[28] The applicants submit the standard of review for the officer's decision is reasonableness and the standard of review for procedural fairness is correctness.

[29] The applicants argue they never received notice of the July 6, 2011 decision and that the officer likely reassessed the application due to realizing this was the case. Although the applicants' counsel added new submissions on July 22, 2011, on his initiative, the officer ought to have alerted the new counsel to the July 6, 2011 decision and indicated a reassessment would follow. As the July 6, 2011 decision was never received, an opportunity should have been granted to the applicants to update their application before the December 2, 2011 decision. The opportunity to update one's application is required by the duty of fairness.

[30] The applicants further argue the officer failed to have proper regard to the available evidence. The unidentified deposits were from a refund for airline tickets and a transaction at a bank machine. There was no foundation for the conclusion this was employment income. The officer found there were no bank account statements less than a year old, but the applicants submitted statements from May 2011. The officer failed to address all information submitted in this case. The more important the evidence, the more willing a court may be to infer from silence that the agency made an erroneous finding of fact.

[31] The officer failed to adequately assess the establishment factors. Self-sufficiency is subjective and what may be sufficient for the principal applicant's family is not necessarily the same as another family of the same size. The officer failed to take into consideration financial support from family members in Canada. The applicants have never received social assistance, have a stable history of employment and their family members have attested to financial support. The principal applicant's son is not a sponsor, as the officer believed, since there is no provision under the Act for family class sponsorship from within Canada. Therefore, there is no requirement that the son's income be within LICO. The fact that the principal applicant and his wife earned only the minimum wage is not relevant to the stability of their employment.

[32] The applicants argue the officer relied on irrelevant factors. The officer's examination of the applicants' integration into Canadian society was cursory, while his finding on family members erroneously stated some of them resided in Guyana and Grenada. Only one family member lived in Guyana, not "some". The officer's statement that the application was not about whether the family should be reunited is in error, as family reunification is an objective of the Act, emphasized in the IP 5 Manual and confirmed in this Court's decisions.

[33] The officer did not adequately assess establishment, as he did not properly consider the financial stability, stable employment history, the length of residence in one community, the relevance of family reunification and a good civil record.

[34] The officer's finding with respect to the principal applicant's daughter's education is also unreasonable. The officer's conclusion that she is no different than a huge majority of H&C

applicants is unfounded given that she has spent eleven of nineteen years studying in Canada and has had such success in post-secondary education. The officer's assumption she could go to medical school in Grenada or easily apply for a Canadian study permit was not established by the evidence.

[35] The officer's reliance on country conditions evidence was a serious error given that they were not disclosed to the applicants. The documents became available after the filing of the applicants' submissions and the applicants had no way of knowing that the officer would rely on this evidence. The applicants were denied an opportunity to respond to the evidence. Non-extrinsic evidence must be shared if it was only made available after the filing of submissions and extrinsic evidence must always be disclosed. The reports are considered extrinsic evidence since they were from a source other than the applicants and the applicants were not aware of their use.

[36] In conclusion, the applicants argue that the officer's decision provided no justification, transparency or intelligibility and must therefore be put aside.

Respondent's Written Submissions

[37] The respondent argues the onus is on the applicants to prove their case and submit all relevant information to the officer. This Court has rejected the argument that an H&C officer is required to request documents from an applicant. The applicants have failed to indicate what documentation would have been put before the officer had further submissions been invited and how the outcome would have changed. The respondent argues there is no breach of procedural fairness with respect to the use of publicly available country conditions evidence. It was open to the

officer to assess current country documentation relevant to the applicants' identified hardships. The respondent points out the applicants failed to offer any country conditions evidence.

[38] The officer relied on non-extrinsic evidence when considering the educational opportunities available in Grenada, as the information was publicly available. The officer was not required to provide the applicants with an opportunity to respond to this information.

[39] The officer properly stated the H&C test, which is not focused on the sole question of family reunification. The applicants claimed it would be difficult for the family to be separated from two sons but provided no letters from them. It was open to the officer to find that the majority of the applicants' family live outside Canada and the officer did not err in stating "some" of the applicants' family lives in Guyana as the applicants have both a sister and a daughter-in-law there.

[40] The applicants' establishment in Canada was reasonably assessed by the officer. The officer noted there was no financial documentation confirming the principal applicant's son's income and the LICO requirement was a relevant factor to consider. The officer had the discretion to weigh the other factors cited by the applicants. The officer drew no negative inference from the unidentified payments and was merely attempting to discern the bank statements. The May 2011 statements were not helpful because they did not show daily transactions and that is why the officer turned to the 2010 statements.

[41] In regard to the principal applicant's daughter's education, the officer did not state she was no different than the majority of H&C applicants; instead, he stated that Canada would be a

desirable place to pursue education for everyone in that group. In any event, the officer considered her personal circumstances.

Analysis and Decision

[42] **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 at paragraph 57, [2008] 1 SCR 190).

[43] 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).

[44] It is well established that assessments of an officer's decision on H&C applications for permanent residence from within Canada is 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).

[45] 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).

[46] **Issue 2**

Did the officer breach procedural fairness?

The applicants first argue that the officer violated procedural fairness by not making the applicants aware of the negative decision of July 6, 2011 and the decision to reassess the application. The applicants argue this notice is required to allow the applicants proper participation in the decision.

[47] Given that the applicants made further submissions on July 22, 2011, it is unclear to me how the submissions would have changed had the applicants known of the July 6th decision. The applicants argue that they should have been given the chance to make further submissions but do not articulate why this opportunity was not granted by the officer's acceptance of the July 22nd submissions. Even without notice of the July 6th decision, the applicants were still in the same position as any other H&C applicant who had a pending decision. The applicants provided updated submissions in the manner common to H&C applicants with longstanding applications. Since the applicants cannot identify any prejudice they suffered as a result of this alleged failure to give notice, I do not find a breach on this issue.

[48] The applicants rely on a passage from *Chen v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 266 at paragraph 33, [2002] FCJ No 341 for the argument that procedural fairness was breached through the non-disclosure of country conditions evidence released after the H&C application was submitted:

> Fairness […] will not require the disclosure of non-extrinsic evidence, such as general country conditions reports, unless it was made available after the applicant filed her submissions and it satisfies the other criteria articulated in [*Mancia*]. (emphasis added)

[49] In the decision referred to, *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, [1998] FCJ No 565, the Court of Appeal did not indicate that all evidence published after the filing of an application must be disclosed. Rather, that evidence must show a change in conditions the applicant would not otherwise have been aware of (at paragraph 26):

> It is only, in my view, where an immigration officer relies on a significant post-submission document which evidences changes in the general country conditions that may affect the decision, that the document must be communicated to that applicant.

This would be one of the "other criteria" mentioned in the *Chen* above, passage quoted above.

[50] This approach was recently applied by this Court in a decision dealing with similar country conditions evidence (see *Millette v Canada (Minister of Citizenship and Immigration)*, 2012 FC 542 at paragraph 39, [2012] FCJ No 564):

> In this case, the Applicant last made submissions in October 2010. The 2011 version of the yearly DOS Report was published on 8 April 2011 and the Officer's decision on the H&C application was rendered on 17 May 2011. The Officer cited the report in the decision and found that the documentary material showed that "the

> government of Granada is committed to protecting the rights of victims of violence." I agree with the Respondent that the Applicant has not provided any evidence to the Court suggesting that the information in the DOS Report had not been published in other sources available to her prior to her October 2010 submissions. Nor has the Applicant adduced any evidence or made any arguments as to how the information in the DOS Report can be said to demonstrate a change in the general country conditions in Granada. I agree with the Respondent that the DOS Report does not evidence such a change. While the Report references certain amendments to the Grenadian domestic violence legislation, the Applicant has failed to demonstrate that those amendments constitute a significant change in the context of her personal circumstances. As a result, as per the test set out in *Mancia*, it is my view that the duty of fairness did not require the disclosure of the DOS Report to the Applicant.

[51] As the applicants in this case have previously filed a refugee claim, a PRRA and an update to this H&C application, it is appropriate for them to be deemed to be familiar with the kind of country conditions evidence the officer could rely on (see *Mancia* above, at paragraph 22).

[52] Here, the applicants have the onus of establishing a breach of procedural fairness, but cannot identify change in country conditions revealed by the officer's country conditions documents. Given that the impugned evidence relied upon mostly consisted of annual reports by organizations such as the United States Department of State, the United Kingdom Foreign and Commonwealth Office and Freedom House, the applicants should be easily able to compare their content to the reports of previous years and identify any relevant changes. As they have not, I do not find the officer violated procedural fairness.

[53] **Issue 3**

Did the officer err in rejecting the application?

The applicants argue that the officer misapprehended numerous pieces of evidence and came to unreasonable conclusions. After reviewing the officer's reasons, I conclude that the officer reasonably considered the evidence submitted by the applicants on each H&C factor and did not come to an unreasonable conclusion. It is not this Court's function to reweigh the evidence.

[54] The officer did not state that family reunification was irrelevant to the H&C application, rather, he correctly stated that the test is whether H&C factors (of which family reunification is only one) justify the relevant exemption.

[55] Similarly, the officer's determination that the applicants' income was below the LICO benchmark was not singularly determinative of his finding on financial stability, given that the officer reviewed all of the applicants' employment history evidence. It is open to the officer to consider LICO information and it is the officer's role to weigh that factor against other relevant factors.

[56] While the applicants object to the officer's reliance on older bank statements, the reasons clearly indicate this was because of the lack of daily transaction information in the more recent statements.

[57] The applicants may not be satisfied with the officer's decision on establishment factors, but it is not accurate to say that the officer did not consider all the evidence put before him. The officer

considered each of the extended family members in turn and assessed their relevance to establishment. Whether the officer was correct that "some" family lives in Guyana is hardly determinative given the thorough consideration of this factor.

[58] The officer's identification of a medical school in Grenada where the principal applicant's daughter could study was not unreasonable, given the applicants specifically raised the hardship issue of post-secondary education and for the procedural fairness reasons described above. While it is certainly not guaranteed that the principal applicant's daughter could continue her studies at York University as an international student, it was a possibility open to the officer to consider given that the hardship alleged by the applicants related to the effect of removal on the principal applicant's daughter's studies there. In my view, the officer properly considered the evidence that was submitted by the applicants with respect to the best interests of their daughter. The officer considered the academic accomplishments of the daughter, her scholarship and the fact that Canada might be a more desirable place for her to continue her education.

[59] The officer's consideration of the threat of violence in relation to the daughter was reasonable, given that it was open to him to rely on country conditions documents, as described above, and it was also reasonable of him to question why the sexual assault was not mentioned at any time during the applicants' previous claims.

[60] The applicants have not successfully argued that there is a significant conflict between the officer's decision and the *Dunsmuir* above, values of transparency, justification and intelligibility. As for whether the decision is substantively within the range of acceptable outcomes, I cannot find

that it lies outside of that range. While I commend the applicants on their positive contribution to Canadian society during their time in this country, it was open to the officer to conclude that the hardships they allege amount to those that are inherently connected to deportation.

[61] Based on the above findings, I must dismiss the application for judicial review.

[62] 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 dismissed.

"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

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