Federal Court  Cour fédérale

Date: 20140204

Docket: IMM-1747-13

Citation: 2014 FC 112

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, February 4, 2014

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

OLUSHOLA ADEWOLE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] This is an application for judicial review brought under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] against the decision rendered on February 7, 2013, by an immigration officer from Citizenship and Immigration Canada [CIC], refusing an application for permanent residence on humanitarian and compassionate grounds [H&C application].

II. Facts

[2] The applicant is a Nigerian citizen born on December 29, 1967.

[3] He filed an initial H&C application on July 17, 2000, but this was refused in January 2002 after his then-spouse, a Canadian, decided that she would no longer sponsor the application following their divorce.

[4] In 2002, he entered into a relationship with a permanent resident, Foluke Olowe, who became his common-law spouse, and with whom he had three children born in Canada.

[5] He filed a second H&C application in March 2004. The application was sponsored by his new common-law spouse. The application was refused in May 2006 because the applicant had been found guilty of impaired driving in 2004.

[6] On January 16, 2007, the applicant obtained a temporary resident permit issued on humanitarian and compassionate grounds, which was valid until January 16, 2010. In September 2011, it was decided that the permit would not be renewed given the absence of humanitarian and compassionate grounds.

[7] The applicant filed the H&C application under review on November 14, 2008. In order to do so, he retained the services of a lawyer, Stéphane Handfield.

[8] In 2008, when he was eligible to apply for a pardon for his 2004 conviction, the applicant was again found guilty of impaired driving.

[9] In 2009, the applicant was charged with the attempted murder of his common-law spouse. He was then sent to the Institut Philippe-Pinel de Montréal.

[10] In February 2010, the Institut Philippe-Pinel contacted CIC to inquire about the applicant's immigration status. CIC informed the Institut Philippe-Pinel that the applicant's temporary resident permit was valid until January 16, 2010.

[11] In April 2011, CIC sent a letter to the applicant and his counsel, Mr. Handfield, asking for an update of the applicant's circumstances with respect to his H&C application. The Institut Philippe-Pinel responded that the applicant was hospitalized in its facilities and that he had been receiving psychiatric treatment since September 2009. There was no date set for his release. Counsel for the applicant did not respond.

[12] The applicant had based his most recent H&C application on his ties with Canada, the best interests of his children and the risk in his country of origin.

III. Impugned decision

[13] The immigration officer began by noting that, unlike for his 2004 H&C application, the applicant had not provided any documents in support of his application regarding his income, employment, living arrangements or community or family involvement.

[14] The immigration officer reviewed the applicant's arguments and provided separate reasons for each of the factors that he had raised. Ultimately, she concluded that these factors, whether taken alone or together, did not establish that the applicant would face unusual, undeserved or disproportionate hardship if he were required to apply for permanent residence from outside Canada.

[15] With respect to the difficulties associated with the applicant's ties to Canada and the best interests of the children, the immigration officer recognized that several factors had indeed supported the H&C application at the time it was filed, but concluded, on the basis of the evidence before her, that the positive circumstances had since changed considerably. Relying on the letter from the Institut Philippe-Pinel and on a report aired by the CTV network in Montréal, the officer noted that the applicant had been charged with the attempted murder of his common-law spouse in July 2009 and that he had been hospitalized ever since. The children were placed in protective custody. Although CIC had instructed him to update his file, the applicant had provided no information about these unfortunate events, their consequences for his relationships with his family members—particularly his children—or his employment. In the absence of evidence to the contrary, the immigration officer concluded that the applicant remained cut off from his family and that he was not providing them with any financial or emotional support. Accordingly, she assigned very little weight to the applicant's ties with Canada and noted that there was insufficient evidence to support a finding that his continued presence in Canada would be in the best interests of his children.

[16] As for the difficulties relating to risk factors or discrimination, the immigration officer held that the applicant had not cited any particular fears. After analyzing the country documentation on Nigeria, she acknowledged that the country continued to have many serious problems. However, the applicant did not come from one of the most seriously affected regions, and, given the lack of evidence, there was nothing to indicate that he would be at risk or would suffer from problems related to discrimination. The immigration officer assigned very little weight to this factor as well.

[17] The immigration officer finally dealt with another important factor of the H&C application, which was the applicant's criminal inadmissibility to Canada, holding that, in addition to the inadmissibility relating to the 2004 and 2008 convictions, the applicant had been charged with attempted murder in 2009, and that it was therefore unlikely that he would be able to file a new application for a pardon in the near future. This factor was so significant that it outweighed all of the positive factors in the applicant's file.

IV. Applicant's submissions

[18] The applicant is challenging the decision rendered in his file on the basis of one principal argument: the immigration officer's decision relied on extrinsic evidence, namely, the letter from the Institut Philippe-Pinel and the report aired on the CTV network.

[19] The applicant submits that this constitutes extrinsic evidence because he was unaware of its existence. Moreover, these two pieces of evidence form the basis for the immigration officer's negative decision in his file, and he was not given the opportunity to reply to this new evidence.

V. Respondent's submissions

[20] The respondent submits that the immigration officer committed no error in this case because the decision was not based on any evidence of which the applicant had been unaware.

[21] On one hand, the immigration officer sent a letter requesting an update of the file to both the applicant and his counsel. It was the Institut Philippe-Pinel that replied to the letter sent to the applicant, but the applicant had consented to communications between the Institut and CIC. Furthermore, counsel for the applicant did not send a response, and because the facts and acts of counsel cannot be distinguished from those of the client, the applicant was given an opportunity to explain himself but failed to take it. On the other hand, the second piece of evidence being challenged—the report—was taken from the Internet, is widely available and concerns the applicant himself. He is therefore deemed to have been aware of it.

[22] The applicant also had an obligation to be honest and to provide CIC with any information relating to his file, including that which could have a negative impact on his application, which he did not do. Ultimately, the burden of proving that an H&C exemption should be applied in this case rested with the applicant.

[23] Finally, the respondent submits that the applicant's awareness of the evidence has very little relevance. This evidence has no impact on the outcome of the case, given the almost total lack of evidence in the record and that fact that the applicant is—and will continue to be—inadmissible to Canada.

VI. Issue

[24] Did the immigration officer err in relying on extrinsic evidence of which the applicant was unaware?

VII. Standard of review

[25] The issue in this case is one of procedural fairness and must therefore be reviewed on a standard of correctness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339).

VIII. Analysis

[26] For the reasons that follow, this Court is of the view that the immigration officer committed no breach of procedural fairness in this case and that the decision rendered is correct.

[27] It would be appropriate to begin by providing the legal background to this case. When a tribunal must determine whether a particular document should have been disclosed to a party, it is no longer appropriate to ask whether it constitutes "extrinsic evidence". The Federal Court of Appeal has held that the proper question is whether the disclosure of the evidence at issue was necessary to provide the person to whom it would have been disclosed with a reasonable opportunity to participate in a meaningful manner in the decision-making process (see *Haghighi v Canada (Minister of Citizenship and Immigration)* (CA), [2000] 4 FC 407 at paras 26-27, [2000] FCJ no 854; see also *Bhagwandass v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 49 at para 22, [2001] FCJ no 341).

[28] However, as the respondent has pointed out, this Court noted that this issue comes down to determining whether the person was aware or was deemed to have been aware of the evidence in question (*Chen v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 266 at paras 36, 44-45, [2002] FCJ no 341). Therefore, a decision maker would be breaching procedural fairness by basing his or her decision on evidence the disclosure of which was necessary to provide the person concerned with a reasonable opportunity to participate in a meaningful manner in the decision-making process, or, in other words, on evidence of which the person was unaware.

[29] The two pieces of evidence at issue in this application for judicial review, namely, the letter from the Institut Philippe-Pinel and the report aired on the CTV network, will be dealt with in turn.

[30] First, with respect to the letter, it should be recalled that the Institut Philippe-Pinel contacted CIC in January 2010 to inquire about the applicant's immigration status. For this purpose, the applicant had filled out and signed CIC Form IMM-5475, *Authority to Release Personal Information to a Designated Individual*, allowing CIC to disclose personal information about him to the Institut Philippe-Pinel. Suspecting that the applicant's circumstances might have changed, the immigration officer requested that his file be updated, and the evidence shows that, on April 14, 2011, she sent a letter to this effect to both the applicant and his counsel at the time, Mr. Handfield. An official from the Institut Philippe-Pinel replied to this letter on the applicant's behalf, confirming that he was hospitalized in their facilities and that he had been receiving

psychiatric treatment since September 2009. However, counsel for the applicant did not reply to the letter from the CIC officer. It has been established that only in rare circumstances can a client disassociate himself from the facts and acts of his or her counsel on his or her behalf:

> **[9]** . . . In the great majority of cases, we do not distinguish the facts and acts of counsel from those of the client. Counsel is his client's agent and, as severe as it may seem, if the client retains the services of mediocre counsel (which, in passing, was not established here by the applicant), he must suffer the consequences. However, in exceptional cases, counsel's incompetence may raise a question of natural justice. The incompetence and the alleged prejudice must therefore be clearly established. . . . (*Dukuzumuremyi v Canada (Minister of Citizenship and Immigration)*, 2006 CF 278 at para 19, [2006] FCJ no 349; see also *Hussain v Canada (Minister of Citizenship and Immigration)*, 2010 FC 334 at para 19, [2010] FCJ no 601).

In this case, there is nothing in the Court record to explain why counsel, who did respond to various requests from CIC on his client's behalf in other circumstances, did not reply to the letter at issue that CIC had sent him directly by fax, and there is no evidence whatsoever in this file relating to the competence of the applicant's counsel. In such a situation, the silence of counsel must be taken at face value. No information was sent.

[31] Accordingly, the applicant's claim that he had not been given an opportunity to provide information about the new elements in his file is false: he could indeed have been heard in this respect, through his counsel, but he did not take advantage of the opportunity offered to him. In such circumstances, even without the letter, the applicant was invited to participate in the decision-making process, but by refusing to update his file, he declined the invitation. It would therefore be inappropriate to conclude that the immigration officer breached procedural fairness with respect to the first piece of evidence being challenged.

[32] As for the report aired on the CTV network, it is so obvious that it constituted evidence that the applicant could have easily found on the Internet—particularly given that he is the primary person involved—that he is deemed to have been aware of it (see *Chandidas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 257 at paras 26-28, [2013] FCJ no 257 and *Beggs v Canada (Minister of Citizenship and Immigration)*, 2013 FC 903 at para 7, [2013] FCJ no 931). The applicant cannot claim to be surprised by the use of this report in the decision. The report provides the facts relevant to the case at hand committed by the applicant himself. He was therefore aware of these facts. Moreover, the applicant had the obligation to disclose these facts to CIC, and although they were invited to do so, he and his counsel decided not to. No explanation was provided that could shed additional light on the matter. The immigration officer therefore committed no breach of procedural fairness in basing her decision on this piece of evidence.

[33] Furthermore, as pointed out by the respondent, the applicant had an obligation to complete his application honestly and to disclose to CIC any new information likely to influence it, whether positive or negative. In such an application, the burden rests with the applicant. Accusing the officer of failing to disclose the information to the applicant represents an attempt to reverse the burden that falls on him. CIC does not have to accept the consequences of this.

[34] The parties were invited to submit a question for certification, but none was proposed.

ORDER

THIS COURT ORDERS that the application for judicial review be dismissed. No question is certified.

"Simon Noël"

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Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1747-13
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APPEARANCES:

Éric Taillefer	FOR THE APPLICANT
Lynne Lazaroff	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Éric Taillefer Counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT