Federal Court  Cour fédérale

Date: 20140915

Docket: IMM-2357-13

Citation: 2014 FC 872

Ottawa, Ontario, September 15, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ANTON VULEVIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] **UPON** an application for judicial review of a decision of an Immigration Officer denying the application for an exemption on humanitarian and compassionate grounds for the requirement to apply for permanent residence from outside Canada [H&C decision];

[2] **AND UPON** reviewing the record and receiving the representations of counsel;

[3] For the reasons that follow, the application for judicial review is granted.

[4] The applicant alleges that the record on which the H&C decision was made was incomplete. The Certified Tribunal Record [CTR] produced in this case has barely 50 pages. The applicant alleges that the Application Record was much more extensive than the CTR. Indeed, counsel for the respondent did not dispute before this Court that such was the case.

[5] It will suffice, for the purpose of this application, to reckon that an incomplete file ended up before the Respondent in the face of an absence of explanation for the incomplete record. In the best tradition of the bar, counsel for the respondent chose to avoid arguing that which should not be argued without a strong evidentiary basis. There was no attempt, and appropriately so, to show that the more than 100 pages missing from the CTR carried little weight. In the circumstances of this case, the Court can only come to the conclusion that a significantly incomplete record was presented to the decision-maker.

[6] As a result, the application for judicial review, made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, is granted. At its most basic, procedural fairness requires that an applicant be heard (*audi alteram partem*). When the complete application is not before the decision-maker, it can hardly be argued that the party has been heard (*Nicholson v Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311). The five factors of *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 which are used to determine the content of the duty of fairness leave the Court closer to the judicial end of the spectrum than the political or legislative end. The standard of review on procedural

fairness in most cases is correctness (see generally Brown and Evans, in *Judicial Review of Administrative Action in Canada* (Toronto, On: Carswell, 2013) at 7:1620) and, in this case, the process of adjudication followed was deficient in that the applicant was not heard if the full application was not before the decision-maker. Those who decide must hear. As a result, the matter is sent back to a different officer who will conduct a complete redetermination.

ORDER

THIS COURT ORDERS that the application for judicial review is granted and the matter is sent back to a different officer for redetermination.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2357-13
STYLE OF CAUSE:	ANTON VULEVIC v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 9, 2014
ORDER AND REASONS:	ROY J.
DATED:	SEPTEMBER 15, 2014

APPEARANCES:

Joseph R. Young	FOR THE APPLICANT
Brad Gotkin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT