Federal Court  Cour fédérale

Date: 20170126

Docket: IMM-1833-16

Citation: 2017 FC 98

Toronto, Ontario, January 26, 2017

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

DANIEL AUGUST MACK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant has applied for judicial review of a decision of an Immigration Officer [the Officer] dated April 22, 2016 [the Decision], denying his application for permanent residence on humanitarian and compassionate [H&C] grounds. This application is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SCC 2001, c 27 [the IRPA].

[2] The Applicant is a 30 year old gay citizen of the United States. He entered Canada in 2004 just after completing high school. His affidavit shows that when he arrived, he was aware that he needed status as a permanent resident. However, he made no effort to regularize his status until 2012.

[3] The Applicant initially lived in Montreal and moved to Toronto in 2011. He has lived and worked at multiple jobs in Canada, such as gardening, bike repair, woodworking and art workshops / exhibitions. However, he only had a work permit for a two year period from 2014 to 2016. He has never received social assistance.

[4] In December 2012, the Applicant's partner applied to sponsor him for permanent residence. However, their relationship broke down and approximately two years later, the sponsorship application was withdrawn.

[5] While in Canada, the Applicant's affidavit shows that he has had a variety of living arrangements. He has formed many close friendships and has enriched his friends' lives by helping them advance their careers. He has also contributed to the welfare of young people in the LGBT community. His letters of support are impressive. During his time in Toronto, the Applicant formed especially close friendships with two single mothers [the Mothers] and their young sons [the Sons]. The Applicant cares for them at no charge, but is not their primary or even secondary caregiver and does not provide direct financial support.

[6] His application for permanent residence on H&C grounds was made in 2015 and is based primarily on his establishment in Canada and the best interests of children [BIOC].

I. The Decision - H&C Relief Refused

[7] The Officer noted that the Applicant had declared a "relatively continuous occupational history" but had not provided documentary evidence to validate his work history or financial stability. The Officer appreciated the Applicant's extensive volunteer work, including with children, and his numerous character endorsements. However, the Officer was concerned that the Applicant's establishment was "based on wilful disregard of Canadian immigration law. Namely, by remaining continuously and working in Canada without authorization for 10 years."

[8] The Officer accepted the Applicant's close relationship with his "chosen family", which includes members of the LGBT community and the Mothers and their Sons. The Officer acknowledged that the chosen family is "in essence de facto family members" and that for them his removal would be "emotionally unsettling". However, the Officer concluded that this separation was an inherent consequence of removal. The Officer noted that the Sons and other children he knew would continue to live with their primary caregivers and that none are wholly dependent on the Applicant.

II. Issues

A. *Was there a breach of procedural fairness?*

B. *Is the Decision reasonable?*

III. Standard of Review

[9] The Officer's discretionary decision not to grant H&C relief is reviewable on a reasonableness standard. Issues of procedural fairness attract review on a "correctness" standard.

IV. Discussion and Conclusions

A. *Was there a breach of procedural fairness?*

[10] The Applicant submits that the Officer's observation that there was no evidence to validate employment earnings was a negative credibility finding, and that the Officer's failure to alert the Applicant to this concern was a violation of procedural fairness.

[11] The Officer did not believe or disbelieve the Applicant. The Officer simply stated that there was no documentary evidence to validate any employment earnings. Accordingly, in my view, the Officer did not make a credibility finding, and no procedural fairness issue arose.

B. *Is the Decision reasonable?*

[12] The Applicant submits that the Officer's analysis of both his establishment in Canada and the BIOC were unreasonable.

[13] The first question is whether it was open to the Officer to discount the Applicant's establishment in Canada because he chose to remain here without status. Immigration, Refugees and Citizenship Canada's Guideline entitled the Humanitarian and Compassionate Assessment,

Establishment in Canada suggests that an applicant's establishment may be discounted on that basis. In *Canada (MCI) v Legault*, 2002 FCA 125, the Federal Court of Appeal stated:

> [19] In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions. [Emphasis added]

[14] Accordingly, in my view, it was open to the Officer in the exercise of his or her discretion to minimize the Applicant's establishment in Canada in light of his choice to remain here without status.

[15] The Applicant relied on the decision of Madam Justice Mactavish in *Heniz Klein v Minister of Citizenship and Immigration*, 2015 FC 1004. In that case, the applicant had overstayed a visitor's visa which expired in 1986. The fact that he had been in Canada illegally was a significant factor in the officer's decision to refuse H&C relief. Justice Mactavish expressed concern and in allowing a redetermination said:

> [9] The officer further appears to have dismissed all of the evidence regarding the important role that Mr. Klein plays in his community solely on the grounds that he remained in Canada without proper immigration authorization.

[16] The Applicant argues that this decision is on point. However, the background is entirely different. The applicant was disabled by significant mental health issues which at times required hospitalization. He was also estranged from his family in Germany and had no friends or support systems in that country. Justice Mactavish concluded that, in these exceptional circumstances, the officer's analysis was unreasonable.

[17] The Applicant further submits that the Officer failed to appreciate the meaning and importance of his "chosen family" in Canada. Further, the Officer's conclusion that the Applicant's removal would be "emotionally unsettling" for his de facto chosen family demonstrates a failure to appreciate that it would constitute "a permanent separation from his family members."

[18] I am not persuaded by this submission. The Decision shows that the Officer clearly accepted the Applicant's chosen family as his de facto family and considered the impact on them of his removal. Since he did not provide any members of his chosen family with financial support or shelter, the Officer considered their feelings and found that they would be "emotionally unsettled" by his removal. This may have understated their level of distress but it was not unreasonable. Families are often devastated by removals but they occur nonetheless.

[19] The second issue is whether the BIOC was adequately addressed. The Applicant submits that although he does not provide direct financial support, he is an important role model and caregiver for the Sons. He says that the Officer's bald statement that "there is insufficient

objective evidence to suggest his returning to the USA would be detrimental to their social and emotional development" shows that the Officer failed to appreciate the impact of his removal.

[20] The BIOC analysis is brief, but I find it is reasonable in the circumstances of this case in which the Applicant is not a parent, does not reside with either Son, is not a full-time care giver and is not a source of financial support. His role as a friend and periodic care giver is valuable, but his removal does not create a concern about the children's best interests.

V. Conclusion

[21] For all of these reasons, the application will be dismissed.

VI. Certification

[22] No question was certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is hereby dismissed.

"Sandra J. Simpson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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