Federal Court  Cour fédérale

Date: 20171123

Docket: IMM-21-17

Citation: 2017 FC 1064

Ottawa, Ontario, November 23, 2017

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

DUY KHANH DO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Mr. Duy Khan Do (the "Applicant") had applied from outside Canada for a permanent residence visa and an exemption to his criminal inadmissibility on Humanitarian and Compassionate grounds under subsection 25(1) of *IRPA* (the "H&C Application"). An Immigration Officer of the High Commission of Canada in Singapore (the

"Officer") rejected the H&C Application in a decision made on November 18, 2016 (the "Decision").

[2] The Applicant and Respondent have both agreed that this application should be returned for redetermination by a different officer.

[3] Prior to leave being granted the Respondent brought a motion requesting the judicial review be granted and the matter sent for redetermination before a new decision-maker, with costs awarded against the Applicant as he refused to discontinue the matter and consent to a redetermination. This motion was dismissed on June 19, 2017 by Justice Heneghan (2017 FC 608, unreported) with no order as to costs.

[4] The Respondent chose not to file any materials on leave, and the material filed in support of their motion did not particularize any grounds for allowing it. In response to the finding of Justice Heneghan that they failed to identify grounds for finding an error in the Officer's Decision, the Respondent now submits the Officer erred by: misinterpreting the research studies cited; the Officer's finding that the children would not suffer a disadvantage by being raised by only their mother is not supported by the research studies; the Officer did not conduct a fulsome analysis of the Best Interest of the Children ("BIOC"); and, the Officer breached the Applicant's right to procedural fairness.

I. Facts

[5] Both the Applicant and his wife, Kim Yen Lieu, are of Vietnamese descent and met in September 2010. They were married on January 18, 2012, followed by both a traditional Vietnamese engagement ceremony held February 12, 2012 and a wedding reception with many guests on March 31, 2012.

[6] Two daughters were born to their marriage, Madison born September 14, 2012 and Vivienne born March 5, 2015.

[7] The Applicant came to Canada in 2005 under a temporary resident visa to study and attended high school in Alberta, followed by vocational training in meat cutting and CNC operation, eventually becoming trained as a CNC technician. In addition to his wife and two daughters the Applicant has a sister, aunt, uncle and cousins who reside in Alberta.

[8] The Applicant was convicted on November 30, 2011 of trafficking in a controlled substance and possession of proceeds of crime under $5,000, resulting in 22 months imprisonment. Due to these convictions the Applicant was found inadmissible under paragraph 36(1)(a) of *IRPA* and an inadmissibility report under subsection 44(1) of *IRPA* was made on December 29, 2011. A deportation order was issued against him on February 1, 2012.

[9] In 2012, the Applicant made a spousal sponsorship application for permanent residency within Canada which was refused. In July 2013, he submitted a spousal sponsorship application

for permanent residency from outside Canada seeking an exemption to his criminal inadmissibility, based on H&C considerations, or that he be issued a Temporary Residence Permit ("TRP") to allow him to return to Canada while waiting to apply for rehabilitation to remove his criminal inadmissibility. This application was refused on November 18, 2016 and is now before this Court for judicial review.

[10] In refusing the Applicant's permanent residency application, the Officer relied on several grounds as follows: he was not satisfied that the Applicant's marriage is genuine; the Applicant provided inconsistent statements; the Applicant appeared apathetic and without remorse during the interview; there were "research studies" questioning "the idea that 'fatherless' children are necessarily at a disadvantage"; there was limited evidence of the Applicant's bond with his children; and the Applicant would not face hardship in re-establishing himself in Vietnam.

II. Issues

[11] The Court views the issues as follows:

A. Whether the Officer erred in his findings of fact and in law when he refused the Applicant's application based on H&C grounds?

B. Whether there was a breach of procedural fairness?

C. Whether the Officer's conduct meets the criteria of special reasons, giving rise to costs being awarded against the Respondent?

III. Analysis

A. *Standard of review*

[12] The standard of review when considering whether to grant relief on H&C grounds is reasonableness (*Ndlovu v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 878 at paras 8-9, [2017] FCJ No 939 (QL)). (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190) [*Dunsmuir*] provides the standard of reasonableness is met when a decision was justified, transparent, intelligible and within the range of possible acceptable outcomes defensible on the facts and law. (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 15, [2011] 2 SCR 708) further permits the Court, when necessary, to look beyond the reasons under review and examine the record to assess the reasonableness of the decision.

[13] On issues of procedural fairness, such as the reliance on extrinsic evidence without providing an applicant the ability to respond, the standard of review is correctness (*Begum v Canada (Citizenship and Immigration)*, 2013 FC 824 at para 20, [2013] FCJ No 896 (QL)).

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

[14] The Officer in rendering his Decision relied on extrinsic evidence, the internet article from “sciencedaily.com”, which is a summary of a study published in the Journal of Marriage and Family. The journal article cited by the Officer states in part:

> The family type that is best for children is one that has responsible, committed, stable parenting. Two parents are, on average, better

> than one, but one really good parent is better than two not-so-good ones. The gender of parents only matters in ways that don't matter.

[15] The second study cited by the Officer is a journal article titled "Are both parents always better than one? Parental conflict and young adult well-being." It examines the influence of arguing between married biological parent couples compared to those of step-parent couples and single parents and "conclude[s] that while children do better, on average, living with two biological married parents, the advantages of two-parent families are not shared equally by all."

[16] The research, as outlined in these two articles, concludes in general that two-parent households are better than a single-parent household which contradicts the Officer's conclusion that the Applicant's daughters are not disadvantaged by the removal of the Applicant from their home. This is blatant misuse of the Officer's own research in his assessment of the BIOC. It is conspicuous that the Officer never turned his mind to the BIOC in any detail. The Respondent argues that the Officer was simply wrong. I am not persuaded by this argument. The Officer's Decision and misuse of such research goes beyond simply being wrong. The Officer reached a decision and stuck to that decision irrespective of the evidence before him. The BIOC, as argued by the Applicant, is not about disadvantage but is about what is in a child's best interests. As Justice Zinn put it in *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at para 13, 10 Imm LR (4th) 321: "Children are not separately represented in these proceedings [H&C Applications] and the role of the officer is akin to that of parens patria. This is particularly true when the child is a Canadian citizen and his or her parents are not."

[17] It is trite law that reliance upon extrinsic evidence deprives applicants of transparency in the decision-making process, particularly when an Applicant is not informed of the intent to rely upon such extrinsic evidence or given the opportunity to respond to this evidence. This Officer failed to maintain transparency by allowing the unilaterally selected articles to govern the Decision resulting in a breach of procedural fairness.

[18] The Officer states, when addressing the analysis of the BIOC and assessing the hardship threshold, “it would not be detrimental for the children and they would not suffer undue hardship if they are under the care of one parent.” The Officer’s conclusion that it is in the children’s best interests to remove the Applicant from their home is a contradiction of the research studies the Officer misuses which have a general finding that children are best served by a two-parent family. This contradiction renders the Officer’s Decision unintelligible and unreasonable.

[19] The Officer did not note or analyze any issues of discord, stress or bad parenting in the family unit, which might justify a departure from the articles general findings that the presence of two parents is, on average, better than one. Thus, the Officer’s BIOC assessment, not only lacked a fulsome analysis as admitted by the Respondent, but also failed to provide justifiable reasons for his Decision.

[20] The Officer also relied on the Applicant’s criminal convictions, alleged apathy and lack of remorse, and further asserted that the Applicant comes from a middle-income family in Vietnam enabling him to re-establish easily in Vietnam. The Officer did not consider the facts mitigating the criminal convictions, such as his youthfulness at the time of the offence, the

relatively small value of the substance, that this was his only offence and his clean record since his conviction.

[21] The Officer further stated the Applicant "worked illegally while he was a student and soon after his arrival in Canada. This is another sign of his disregard for the immigration law in Canada." This is not a justifiable finding by the Officer as it is a result of a breach of procedural fairness. The Officer never put this to the Applicant during his interview or at any point of the process. I find it troublesome that the Officer failed to put the question to the Applicant as to whether he worked illegally in Canada, but rather chose to rely on evidence that had not been brought to the Applicant's attention. This is an obvious failure to comply with the Officer's duties as prescribed by the policy and procedures that govern him. The Respondent agreed that the Officer committed a breach of procedural fairness.

[22] Based on the aforementioned, I find that the Officer's Decision failed to meet any of the criteria required pursuant to *Dunsmuir*. All of the three elements of justifiability, transparency, and intelligibility are missing from the Officer's Decision and in reaching the Decision there were breaches of procedural fairness.

C. *Costs*

[23] In dealing with the issue of costs, rule 22 of the *Federal Courts Citizenship, Immigration and Protection Rules*, SOR/93-22, provides that costs should not be awarded unless the Court finds "special reasons." Jurisprudence makes it clear that being wrong is not enough to warrant costs.

[24] (*Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at para 7, 423 NR 228) provides that an award of costs is appropriate when a Minister wastes significant time by taking inconsistent positions, an officer circumvents a court order, there is misleading or abusive conduct of an officer, there exists unreasonable and unjustified delay, or the Minister opposes an obviously meritorious judicial review application.

[25] The Applicant argued costs should be awarded as the Officer's conduct amounted to being unfair, improper and a breach of procedural fairness, in his use of research studies, which the Applicant states amounts to bad faith. The Respondent conceded the Officer erred but submits that the errors do not amount to bad faith, abuse or oppression. The Respondent also argued they have taken such measures as are within their control to remedy the Officer's errors.

[26] After considering the submissions of both counsel and the evidence before me, with great reluctance, I am unable to award costs against the Respondent. However, had it not been for the Respondent seeking to have the judicial review allowed prior to leave being granted, I would have found it necessary to award costs against the Respondent. The conduct of this Officer in his many breaches of procedural fairness, in relying upon and even misusing extrinsic evidence that had no relevance to this case, and his failure to reasonably apply the principles of the BIOC constitutes special reasons under the law. I am not persuaded by the Respondent's argument that the Officer was simply wrong.

[27] In fact, I find the Officer's conduct displays a reckless disregard for procedural fairness. The Officer went out of his way to find faults with this application rather than relying on the evidence before him. Further, he ignored the conclusion of his own research in handing this case.

IV. Certification

[28] Counsel for both parties was asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

JUDGMENT in IMM-21-17

THIS COURT'S JUDGMENT is that

1. Both parties agree that the Decision should be sent back for redetermination by a different officer, and I concur. The application is allowed.
2. No costs are awarded.
3. I order the following direction:
    a. This redetermination will be made no later than 60 days from the date of this Order.
    b. Although it is to be expected and it ought not to be necessary for me to say so, I wish to emphasize the necessity and importance of the requirement of the Officer to rely on the evidence before him or her when dealing with this application, particularly given the consequence to the very young children in this case.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-21-17
STYLE OF CAUSE:	DUY KHANH DO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	NOVEMBER 8, 2017
JUDGMENT AND REASONS:	AHMED J.
DATED:	NOVEMBER 23, 2017

APPEARANCES:

Mr. Raj Sharma	FOR THE APPLICANT
Mr. David Shiroky	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Stewart Sharma Harsanyi Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Calgary, Alberta	FOR THE RESPONDENT