Date: 20060516

Docket: IMM-4567-05

Citation: 2006 FC 605

Toronto, Ontario, May 16, 2006

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JOHN JEFFREY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Jeffrey's application for an exemption from visa requirements on humanitarian and compassionate grounds was refused by an immigration officer on July 18, 2005. He has sought judicial review on the ground that the officer did not provide adequate reasons to explain his decision that a waiver was not justified. These are my reasons for concluding that the application must be dismissed.

[2] Mr. Jeffrey is a citizen of Grenada who arrived in Canada as a visitor in 1999 and then decided to stay. He married a landed immigrant and lived with her for seven months. Their marriage broke down and they remain separated. The applicant's only child, his 8 year-old daughter, lives in Grenada along with his mother. His only relative in Canada is his sister. He has been steadily employed while in Canada and has no criminal record in Grenada or in Canada.

[3] In 2001, Mr. Jeffrey came to the attention of Citizenship and Immigration at which point he was arrested and later released on bond. When he was released he filed a claim for refugee status which, in due course, was refused. An order for his removal from Canada was issued.

[4] The applicant filed an application to be permitted to remain in Canada based on humanitarian and compassionate (H&C) grounds in November 2003. His representative, an immigration consultant, filed four paragraphs of submissions on his behalf. The submissions stated that Mr. Jeffrey had been working since he came to Canada as an automotive technician and had never been the recipient of social assistance, he had attended Centennial College, was a member of St. Matthew's Church and had opened a bank account.

[5] In May, 2005, due to the delay in considering the application, the officer requested that a current application be completed "and all submissions Mr. Jeffrey wished to be considered" in his case. An up-dated application form was submitted together with additional information about his training and registration as an automotive service apprentice from Centennial College and the Ontario Ministry of Training. There is no indication on the Certified Record of any further

submissions having been made to the immigration officer. A pre-removal risk assessment was conducted and he was found not to be at risk if he returns to Grenada.

[6] In her file notes the officer reviewed Mr. Jeffrey's history in Canada and the evidence of establishment submitted in 2003 and 2005. She then concluded as follows:

> I make a negative decision in this case. While I note he works and has taken continuing education, he has been under removal from Canada since April 2003, and should have effected his removal at that time. As per foss [sic] he is no longer married to his landed immigrant wife. He has a mother and daughter in Grenada and only a sister in Canada. Establishment on it's [sic] own is insufficient grounds to warrant a waiver from the exemption of legislative requirements. While he appears to be working in Canada, he appeared to be working 3 years prior to coming to Canada in Grenada. He has provided very little information and or evidence. Based on the evidence before me I find there to be insufficient evidence to warrant the waiver in this case. This application is refused.

I. Issues

[7] In his application for leave and for judicial review and memorandum of fact and law, the applicant raised three issues:

1. Whether the immigration officer breached principles of fairness in failing to issue adequate reasons;

2. Whether the officer erred in rendering an unreasonable decision;

3. Whether the applicant was denied natural justice and fairness through the incompetence of his counsel.

[8] At the hearing, counsel for the applicant advised the Court that his client has left the country and that counsel had been unable to make contact with the applicant for the past six months. Thus

he had not been able to obtain instructions from his client as to the arguments to advance at the hearing. However, having reviewed the jurisprudence in preparation for the hearing, counsel advised that he was no longer advancing incompetence of counsel as a ground of review.

[9] As stated by Justice Max M. Teitelbaum in *Shirvan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1509, [2005] F.C.J. No. 1864 (QL) the test for incompetent counsel is very high. The party making the allegation of incompetence must show substantial prejudice to the individual and that prejudice must flow from the actions or inaction of the incompetent counsel. It must be shown that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would be different.

[10] I am satisfied from a review of the record and the applicable jurisprudence that the applicant would not have established that he was denied natural justice or fairness through the incompetence of his immigration consultant when his H&C application was submitted.

[11] Accordingly, the sole remaining issue in these proceedings was whether the immigration officer breached procedural fairness in failing to issue adequate reasons.

II. Statutory Framework

[12] Subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) provides as follows:

The Minister shall, upon request of a foreign national	Le ministre doit, sur demande d’un étranger interdit de

who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[13] Ministerial guidelines require that an applicant demonstrate that s/he would suffer "undue, undeserved or disproportionate hardship" if forced to leave Canada: *IP-5 Guidelines for Immigrant Applicants in Canada on Humanitarian and Compassionate Grounds*, s.12.1. The guidelines define unusual or disproportionate hardship as hardship not anticipated by IRPA or the *Immigration and Refugee Protection Regulations*, S.O.R/2002-227 (IRPR), the result of circumstances beyond the applicant's control and which cannot be justified by the conduct of the applicant: *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1041, [2001] F.C.J. No. 1441 (F.C.T.D.) (QL) aff'd [2003] 2 F.C. 555, 2002 FCA 475.

III. Standard Of Review

[14] The standard of review governing decisions of immigration officers in relation to H&C applications is reasonableness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193. The decision overall must, therefore, be able to withstand a "somewhat probing examination": *Canada (Director of Investigation and Research, Competition) v. Southam Inc.*, [1997] 1 S.C.R. 748, [1996] S.C.J. No. 116 (QL). A question as to the sufficiency of reasons raises an issue of procedural fairness to be decided against a standard of correctness: *Attorney General v. Fetherston*, 2005 FCA 111, [2005] F.C.J. No. 544 (QL).

[15] While an H&C decision must be supported by reasons (see *Baker*, above) it is inappropriate to require administrative officers to give as detailed reasons for their decisions as may be expected of an administrative tribunal that renders its decisions after an adjudicative hearing: *Ozdemir v. Canada (Minister of Citizenship and Immigration)* (2001), 282 N.R. 394 , 2001 FCA 331; *Agot v. Canada (Minister of Citizenship and Immigration)* (2003) 232 F.T.R. 101, 2003 FCT 436 (F.C.T.D.).

IV. Adequacy Of The Officer's Reasons

[16] The applicant submits that the officer erred in failing to issue adequate reasons for her decision. In particular, it is submitted, she failed to identify why she came to the conclusion that the applicant would not suffer "undue, undeserved or disproportionate hardship" if his application were refused. The Officer merely reviews the facts as put forward in the applicant's application, then states that "[e]stablishment on it's [sic] own is insufficient grounds to warrant a waiver from the

exemption of legislative requirements." That underlined statement, the applicant submits, should be ground in itself for a finding of reversible error as a misapprehension of the test for H&C consideration. Evidence of establishment may be sufficient to demonstrate undue hardship in some circumstances.

[17] Relying on the decision of Justice Anne L. Mactavish in *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, [2005] F.C.J. No. 693 (QL)[*Adu*], the applicant contends that it is not enough that reasons be provided to fulfil the requirements of *Baker*, but that the reasons must also adequately explain the decision rendered. At no time does the officer explain why the applicant's six years of residency in Canada, school upgrading and work history were insufficient to establish undue hardship if he is forced to leave Canada.

[18] The respondent submits that the officer's reasons afforded the applicant the opportunity to know why his application was denied. As such, the reasons withstand a somewhat probing examination. The officer gave logical, rational reasons for refusing the application. With the exception of the applicant's sister, the applicant's family, including his eight year-old daughter are in Grenada. The applicant's evidence was that he had been steadily employed in Grenada before coming to Canada. On the facts before the officer, this was a sufficient reason to deny the application.

[19] In *Adu*, Justice Mactavish held that the reasons of the officer were inadequate as they offered no explanation that could be considered by the Court on review. The officer reviewed the evidence of establishment in Canada offered by the applicants and then simply stated her conclusion

that this was not enough. The Court was unable to subject the officer's reasons to a somewhat probing examination as there was no explanation of how she had arrived at that conclusion.

[20] In *Kim v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 244, [2006] F.C.J. No. 318 (QL), a case in which there was substantial evidence of establishment, I concluded that the officer's reasons were inadequate because of a failure to address the submissions advanced by the applicants. There was evidence of the effect a return to Korea would have on the family which the officer did not address in any meaningful way. There was no line of analysis that could lead the reader from the evidence to the conclusion reached that no hardship would be suffered.

[21] These decisions draw on the principles respecting the adequacy of reasons outlined by Justice Sexton for the Federal Court of Appeal in *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, 193 D.L.R. (4th) 357 [*Via Rail*] and cited with approval by this Court on numerous occasions: *Abdollahi-Ghane v. Canada (Attorney General)* (2004), 259 F.T.R. 9, 2004 FC 741; *Alexander v. Canada (Solicitor General)* (2005), 49 Imm. L.R. (3d) 5, 2005 FC 1147; *Demirovic v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284, [2005] F.C.J. No. 1560 (QL).

[22] As stated by Justice Sexton, in *Via Rail* at para.21, the duty to give reasons is only fulfilled if the reasons provided are adequate. What constitutes adequate reasons is a matter to be determined in light of the particular circumstances of each case. As a general rule, Justice Sexton noted, adequate reasons are those that serve the functions for which the duty to provide them was imposed. At paragraph 22 of his reasons he added the following comments:

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather, the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors. [Footnotes omitted].

[23] In *Adu*, Justice Mactavish referred to several decisions of the Court in which the officer's reasons were found to be sufficient. In each of those cases, the applicants had raised issues in their H&C submissions as to why a return to their country of origin would cause them unusual, undeserved or disproportionate harm, which the officer had addressed: *Irimie* v. *Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206, [2000] F.C.J. No.1906 (F.C.T.D.) (QL); *Mohammed* v. *Canada (Minister of Citizenship and Immigration)* (2000), 100 A.C.W.S. (3d) 121, [2000] F.C.J. No. 1508 (F.C.T.D.) (QL); *Nazim* v. *Canada (Minister of Citizenship and Immigration)* 2005 FC 125, [2005] F.C.J. No. 159 (QL).

[24] In this case, the applicant's difficulty is that virtually nothing was submitted to the officer in the nature of justification to demonstrate why an exception to the normal visa requirements should be made, beyond minimal evidence of establishment. The submissions dated November 4, 2003 contain four brief paragraphs declaring the applicant's determination to make a life in Canada, his work history and lack of criminality.

[25] The applicant blames his former immigration consultant for failing to include information about the applicant's child in Grenada and the support he was providing to the child and his mother from his Canadian employment. He does not explain why he did not take advantage of the second

opportunity to provide the information when his application was updated in 2005. In any event, the consultant was acting merely as the applicant's agent and it was the applicant's personal responsibility to ensure that the officer had all of the evidence necessary to make an informed decision.

[26] I agree with the applicant that in so far as the officer's reasons may be interpreted as stating that evidence of establishment alone will never be enough to justify an exception, that is a misunderstanding of the discretion afforded the Minister to waive visa requirements on humanitarian and compassionate grounds. However, in the context in which it was made, the statement may also be interpreted as expressing the officer's conclusion that the evidence of establishment was insufficient in this case.

[27] The applicant's submission that the reasons in this case are inadequate ultimately comes down to this: that the officer must explain why the applicant's removal will not cause him unusual, undeserved or disproportionate hardship. That is what he appears to take from *Adu* which he describes as being on all fours with this application. With respect, I cannot agree. In *Adu*, the applicant could not have understood the reasons why his H&C application was refused, as the officer only pointed to the strengths of his position. In this case, the officer pointed to the inadequacies of the application. The applicant would not be left in any doubt as to why it was refused.

[28] The officer was obliged to make a decision based on the evidence submitted and her reasons, while terse, reflect an analysis based on the evidence produced. As Justice Frederick E.

Gibson stated recently in *Dhillon v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1067, 2005] F.C.J. No. 1336 (QL) at paragraph 24:

> …the onus on [the officer] was simply to demonstrate by her reasons that she had taken into account all of the evidence before her and had not taken into account irrelevant factors. It was not incumbent upon her to seek out additional evidence that might have influenced her decision.

[29] I am satisfied that the officer's reasons, while brief, serve the purpose for which they are provided. On the evidence, the decision was reasonable and does not warrant intervention by the Court. No questions of general importance were proposed and none are certified.

JUDGMENT

IT IS HEREBY ORDERED AND ADJUDGED that the application for judicial review in this matter is dismissed. No questions of general importance are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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