

Date: 20080625

Docket: IMM-4554-07

Citation: 2008 FC 800

Ottawa, Ontario, June 25, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

RONALD CONSTANTINE BLAIR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of Immigration Officer, James Hogan, (the Officer), dated June 7, 2007, pursuant to subsection 72(1) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Act), in which the Officer refused an exemption from the permanent resident visa requirements on humanitarian and compassionate (H&C) grounds.

ISSUES

[1] One issue is raised in the present application: was the Officer's decision that there were insufficient H&C grounds unreasonable?

[2] The application for judicial review shall be allowed for the following reasons.

FACTUAL BACKGROUND

[3] The applicant is a 68 year old citizen of Jamaica. He first entered Canada in 1988 as a farm labourer, and then again as a visitor in 1990. He has been in Canada since the expiration of his visa without status.

[4] An inquiry was held in 1993 regarding his status because he did not have employment authorization. A warrant was issued for his arrest when he failed to attend the hearing. The applicant's irregular immigration status came to the attention of Citizenship and Immigration Canada (CIC) in 2004 when the Public Guardian and Trustee (PGT), who was the guardian of his property, made an inquiry as to his eligibility for medical coverage.

[5] The applicant came under the guardianship of the PGT in 2003 after suffering a cerebral haemorrhage as a result of an aneurysm, which left him with a cognitive impairment, described as mild memory loss, and chronic renal failure. He was determined to be incompetent to manage his financial affairs, which are therefore managed by the PGT.

[6] The applicant applied for an exemption from the permanent resident visa requirements on H&C grounds (H&C application) in July 2004.

[7] The applicant has no family in Canada, nor does he have family in Jamaica. He has a sister in the United States with whom he is in contact.

[8] The applicant's H&C application is based on the following grounds:

- a) He has no relatives in Jamaica. He has established strong friendships and community ties over the eighteen years he has been present in Canada.
- b) He has been seen on a consultation basis by nephrologists for his chronic renal failure. Although dialysis is available in Jamaica, his needs are unknown to specialists there and he may not meet the eligibility criteria.
- c) He may suffer setback due to relocation and renewal of care.
- d) He has worked and paid taxes throughout his time in Canada, and attempted to redress his status.

DECISION UNDER REVIEW

[9] The Officer reviewed the history of the applicant's file and offered the following reasons for his decision:

- a) The Officer noted that though the applicant has been in Canada for 17 years, there is little evidence of his activities in the 1990s. The Officer also noted that he spent his first 52 years in Jamaica.

- b) The Officer noted that the applicant had filed his income tax return between 1999 and 2007. However, the Officer noted the absence of letters from his employers. He also noted that the applicant received a small disability pension.
- c) The Officer found that the applicant's family members were located primarily in the United States, namely three of his sisters and his daughter. He has contact with his sister Daphne. Three other children live in the United Kingdom. The applicant had a girlfriend in 2003 at the time he was admitted to the hospital. The Officer concluded that the applicant had no family in Jamaica or in Canada. The Officer also noted the absence of letters of support and evidence of community involvement, despite the applicant's claim that he had established strong friendships and community ties.
- d) The Officer acknowledged the applicant's submission that he had supported himself, but ultimately concluded that the above-mentioned elements of establishment did not go beyond what is normally expected of someone in the applicant's situation. He therefore concluded that the applicant's degree of establishment did not warrant granting the H&C application.
- e) The Officer noted that, despite the applicant's claim that he attempted to regularize his status in Canada on numerous occasions, the application under review was the only attempt since his visa expired in the early 1990s.
- f) The Officer accepted that the applicant required dialysis three times a week for renal failure, and that he had cognitive impairments as a result of a cerebral haemorrhage in 2003. A letter from the Humber River Regional Hospital in August 2004 stated that dialysis is available in Jamaica, but that the applicant might not be eligible and

would suffer a setback from the relocation. The Officer contacted the Jamaican Ministry of Health; he was informed that the applicant might suffer a setback from relocation and renewal of care. He was also informed that public sector facilities are overwhelmed by demand, and private sector care is quite expensive. The applicant was given the opportunity to comment on this information.

- g) The Officer concluded that the situation the applicant would face in Jamaica would not be different from that faced by any other Jamaican with a similar complaint. The Officer noted that the care required by the applicant is both limited and expensive in Jamaica. He noted that care was also expensive in Canada, and the applicant failed to demonstrate that he could cover the costs in Canada.

[10] For the foregoing reasons, the Officer was not satisfied that the applicant would suffer unusual, undeserved or disproportionate hardship if he were required to apply for permanent residence from outside of Canada.

ANALYSIS

Standard of Review

[11] This Court has previously held that the review of H&C decisions should be afforded considerable deference, and that the applicable standard was reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[12] Following the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, review of H&C decisions should continue to be subject to deference by the Court, and are reviewable on the newly articulated standard of reasonableness (*Dunsmuir*, at paragraphs 55, 57, 62, and 64).

[13] For a decision to be reasonable there must be justification, transparency and intelligibility within the decision making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, at paragraph 47).

Was the Officer's decision unreasonable?

[14] The applicant takes issue with the following Officer's conclusion (Tribunal Record, page 5):

Although I sympathize with Mr. Blair in his medical problems I am not satisfied that the situation that he faces as a citizen in Jamaica would be other than what is faced by any other member of the country with a similar complaint. Although the type of service he requires is both limited and expensive it is available to him and provided by the Ministry of Health. I note that Mr. Blair's medical treatment in Canada is also expensive and there is insufficient information to indicate that he has the monies to pay for this service.

[15] The applicant contests two findings made by the Officer: first, the finding that his situation would not be other than that of other Jamaicans in need of renal care, and second, the finding that renal care would be available to him in Jamaica. It is submitted that the Officer drew conclusions about the availability of the medical services needed by the applicant which are contrary to the evidence before him.

[16] It is submitted that the applicant's limited financial means, his memory loss or cognitive impairment, the absence of family support, and his extended absence from Jamaica place the applicant in a significantly different situation from other Jamaicans seeking treatment for renal failure. The applicant argues that he is clearly disadvantaged vis-à-vis other Jamaicans, and as such would face unusual, undeserved or disproportionate hardship.

[17] Further, the applicant submits that the evidence shows that dialysis would not be available to the applicant, contrary to what was concluded by the Officer. He points to the information provided to the Officer that private sector dialysis care in Jamaica is "expensive", and public sector services are "overwhelmed". It is therefore advanced that the conclusion drawn by the Officer is unsupported by the evidence.

[18] The respondent disagrees and says that it is not open to the Court to reweigh the evidence before the Officer (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, at paragraph 11, [2002] F.C.J. No. 457) and that the Officer's conclusion was reasonably open to him.

[19] For a decision to be reasonable it must be justifiable, transparent and intelligible (*Dunsmuir*, above, at paragraph 47). In the case at bar, the Officer's decision lacks justification. The Officer clearly failed to address the applicant's personal circumstances when considering the availability of treatment in Jamaica. While it might be reasonable to conclude that someone with financial, emotional support, and high adaptability would be able to seek out the life-sustaining care needed by the applicant in this case, such a conclusion cannot be justified on the facts. The applicant, who

suffers from a cognitive impairment, and who has no means of financial or emotional support, would have little possibility of accessing the treatment he requires. For such a conclusion to be open to the Officer, factual justification is needed. The Court finds that this is a reviewable error in the context of *Dunsmuir*.

[20] No questions for certification were proposed and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review is allowed. The matter is sent back for redetermination by a different Officer. No question is certified.

“Michel Beaudry”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4554-07

STYLE OF CAUSE: **RONALD CONSTANTINE BLAIR
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 19, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** Beaudry J.

DATED: June 25, 2008

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