Date: 20081008

Docket: IMM-319-08

Citation: 2008 FC 1139

Ottawa, Ontario, October 8, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROMAN DOROSHENKO

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a visa officer (Officer) dated November 13, 2007 (Decision) refusing the Applicant's application for permanent residence from within Canada on humanitarian and compassionate grounds.

BACKGROUND

[2] The Applicant is a married, male citizen of the Ukraine and has been living in Canada since his arrival in October 1997 at the age of 25. The Applicant had valid visitor's status until September 30, 1998, but continued to remain in Canada past the time allowed by his visitor's visa.

[3] The Applicant is a trained teacher in the Ukraine and works as a musician in Canada. The Applicant's parents reside in the Ukraine.

[4] While in Canada as a visitor, the Applicant met and married his wife, a Canadian Citizen.

DECISION UNDER REVIEW

[5] The Officer found that the Applicant did not present sufficient evidence to establish that he would not be able to find employment to support himself in Ukraine as he had the skills to teach and practise as a musician. The Applicant had also previously worked in Ukraine performing deacon duties. The Officer also found that the Applicant has reasonable savings to assist his integration back into Ukrainian society and still speaks Ukrainian. The Officer concluded that there would be no reason why the Applicant could not apply for permanent residence from outside of Canada.

[6] Although the Applicant has some establishment in Canada, has upgraded his skills, and has found gainful employment, the Officer found that this took place while he remained in Canada illegally of his own accord, and not due to circumstances beyond the Applicant's control.

[7] The Officer concluded that the Applicants case did not warrant an exemption under s. 25(1) because the Applicant would not be subjected to unusual, undeserved or disproportionate hardship should he apply from outside Canada.

STATUTORY PROVISIONS

[8] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11. (1)** L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.
Humanitarian and compassionate considerations	**Séjour pour motif d'ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who	**25. (1)** Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se

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.	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.

ISSUES

[9] The issue raised by the Applicant is whether the Officer erred in his assessment of whether there were sufficient humanitarian and compassionate grounds to grant the Applicant an exemption under subsection 25(1) of the *Immigration and Refugee Protection Act* by failing to take into account the medical issues that were raised by the Applicant.

STANDARD OF REVIEW

[10] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of

review" (*Dunsmuir* at para. 44). Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[11] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[12] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 61, the Supreme Court of Canada held that the standard of review applicable to an officer's decision of whether or not to grant an exemption based on humanitarian and compassionate considerations was reasonableness *simpliciter*. That standard has subsequently been applied in a long line of cases in which the need for significant deference in this context has been recognized. Thus, in light of the Supreme Court of Canada's decisions in *Baker* and *Dunsmuir*, and the previous jurisprudence of this Court, I find the standard of review applicable to this issue to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para. 47). Put another way, the Court should only intervene if the Officer's decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*ibid).*

ANALYSIS

[13] This application raises a narrow issue: was it reasonable for the Officer not to take into account the medical issues that were raised before him?

[14] In his affidavit, the Officer says that, with regard to the letters about the Applicant's arrest, detention, and medical diagnosis "I did not find that the letters had any relevance or probative value in establishing what degree of hardship would be faced by Mr. Doroshenko should he have to apply for permanent residence from outside Canada."

[15] The Officer also says that the Applicant's "counsel did not make any argument in her submissions regarding why [the Applicant's] medical condition would constitute undue, disproportionate, or undeserved hardship."

[16] The Applicant admits that the issues he is now raising were not properly "crystallised" before the Officer, but he says that the evidence was there and should have been taken into account as part of the Decision. Quite apart from the hardship issue, the Applicant says such evidence is relevant to the establishment considerations that are part of the Decision. In his reasons, the Officer points out that the Applicant's stay in Canada in breach of the immigration regulations was purely a matter of choice. The Applicant disputes this and says that his medical condition was material to this issue.

[17] The Applicant is not a refugee claimant and there is nothing to suggest he could not have returned to Ukraine. He stayed in Canada as a matter of choice.

[18] If I look at the evidence before the Officer concerning the Applicant's medical condition, I see there is a letter from Dr. Kuhlmann dated March 10, 2006. Dr. Kuhlmann says that to his knowledge "this patient never had any symptoms from this condition."

[19] There is also a note from the Applicant himself on the file in which he explains that the diagnosis for T.B. was wrong: "it became clear that I did not have any illness."

[20] In his affidavit, the Applicant provides after-the-fact explanations and makes several uncorroborated assertions about his medical condition. But none of this was before the Officer when he made his Decision.

[21] The Officer was never made aware of how the events surrounding the misdiagnosis might have impacted the decision he had to make in any way. There were no submissions by Applicant's counsel on this point.

[22] If I look at what was before the Officer, it is difficult to say that there was anything with which to gauge the relevance of the Applicant's medical condition to the application. It is too vague and flimsy. The kinds of implications which the Applicant now says the Officer should have drawn cannot be supported by the facts in this case.

[23] As this Court has pointed out on numerous occasions, it is up to applicants to specify the grounds upon which their applications are based and to adduce the necessary evidence. See *Ahmed v. Canada (Minister of Citizenship and Immigration)* 2008 FC 646 at paragraph 37. In the present case, it was incumbent upon the Applicant to raise and support with evidence the issue which he thought gave rise "not just to hardship, but to hardship which is unusual and undeserved or disproportionate," to use Justice Dawson's words from *Ahmed*.

[24] The Applicant not only adduced little in the way of evidence as to the nature of his medical condition, he also failed to raise any issues based upon it, or to say how it might impact in any way the decision the Officer had to make.

[25] The Officer's Decision that the letters had no relevance or probative value was entirely understandable and reasonable. And even if the Officer's affidavit is left entirely out of account, it was not unreasonable for the Officer not to mention or address in his Decision the letters which, on their face, appear to have no probative value and the relevance of which the Applicant failed to explain to the Officer.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This application for judicial review is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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