Federal Court  Cour fédérale

Date: 20100312

Docket: IMM-3962-09

Citation: 2010 FC 284

Ottawa, Ontario, March 12, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

JANE DOE, KATE DOE, BILLY DOE, JIM DOE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision (the decision) of a Pre-Removal Risk Officer (the Officer) not to grant the Applicants' application for permanent residence from within Canada on humanitarian and compassionate grounds.

[2] For the reasons set out below the application is allowed.

I. Background

[3] The principle Applicant (the Applicant) is a 46-year old citizen of a European Union (EU) country. The Applicant has four children under the age of 15, three whom are citizens of the EU country and one who was born in Canada. The three children born in the EU country are parties to this Application. The Applicants are all Muslim.

[4] The Applicants fled the EU country and came to Canada in 2004. At the time the Applicant was fleeing a situation of sexual violence. In the summer of 2004, the Applicants made a claim for refugee protection which was rejected in 2005. After the claim was rejected the Applicants applied for permanent residence in Canada on humanitarian and compassionate grounds (the H&C application). The Applicants did not have legal assistance with the H&C application. Before the H&C application could be considered, the Applicants returned to their EU country.

[5] Upon her return to the EU country, the Applicant was again harassed by the same person. The Applicant began to have mental difficulties and consulted both a psychiatrist and a religious leader in her community. At this time the Applicant and her husband divorced.

[6] In July 2007, the Applicant and her children returned to Canada. The Applicants made a Pre Removal Risk Assessment application (PRRA) and retained the services of a lawyer, Ms. Rwigamba, to assist with the PRRA. In February 2008, the Applicant terminated her

relationship with the lawyer. The Applicant states that beyond communication with regard to fees and some silent calls from the lawyer's office, she did not hear from the lawyer again.

[7] On February 12, 2008, the Applicant was sent a letter from Citizenship and Immigration Canada (CIC) requesting that she update the H&C application, including medical information. The Applicant responded to CIC in the form of a letter in March 2008. The letter detailed, *inter alia*, the Applicant's medical condition.

[8] On February 19, 2009, unknown to the Applicant, the Officer assessing the H&C application sent Ms. Rwigamba a letter requesting further information from the Applicant, with a deadline for receiving the information of March 6, 2009 (the request). The Officer assessing the H&C was the same Officer assessing the PRRA application. The information requested was with regard to the fact that the Applicants were citizens of a EU Country and therefore had a viable Internal Flight Alternative (IFA) as they could reside in any EU nation. No medical information was requested. This letter was not forwarded to the Applicant and the Applicant did not become aware of the request until after the H&C decision was made.

[9] By a decision dated March 10, 2009, the Officer refused the Applicants' H&C application. In the decision, the Officer erroneously indicated that Ms. Rwigamba was the Applicant's Counsel.

[10] It was not until August 24, 2009, when the Applicant was provided with the reasons for the decision in the form of the Officer's notes, that the Applicant became aware of the request for further information.

II. Issue

[11] The Applicants raise the following issue in this matter: were the Applicants denied procedural fairness by not being notified that further evidence had been requested?

III. Standard of Review

[12] The issue in this matter is that of procedural fairness and will be assessed on the standard of correctness (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12; [2009] 1 S.C.R. 339; *Zambrano v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 481; 326 F.T.R. 174). I note that the appropriate standard of review for a humanitarian and compassionate decisions as a whole has been previously held to be reasonableness (*Zambrano* at paragraph 31).

IV. Analysis

[13] To appropriately address the issue raised by the Applicants, I have broken the question down into sections, as set out and argued in the Applicants' and Respondent's Memorandums of Fact and Law.

A. *Was a Legitimate Expectation Created?*

[14] The Applicants argue that they had a legitimate expectation that if CIC required further information, they would be contacted.

[15] The doctrine of legitimate expectation was recently addressed by the Supreme Court in *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R 539; 2003 SCC 29. At paragraph 131, Justice Ian Binnie, for the majority, set the doctrine out as such:

> 131 The doctrine of legitimate expectation is "an extension of the rules of natural justice and procedural fairness": Reference *re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at p. 557. It looks to the conduct of a Minister or other public authority in the exercise of a discretionary power including established practices, conduct or representations that can be characterized as clear, unambiguous and unqualified, that has induced in the complainants (here the unions) a reasonable expectation that they will retain a benefit or be consulted before a contrary decision is taken. To be "legitimate", such expectations must not conflict with a statutory duty. See: *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170; *Baker*, *supra; Mount Sinai*, *supra*, at para. 29; Brown and Evans, *supra*, at para. 7:2431. Where the conditions for

> its application are satisfied, the Court may grant appropriate procedural remedies to respond to the "legitimate" expectation.

[16] In my view, the conditions precedent to the application of the doctrine are not established in this case. It is well established that an applicant bears the burden of supplying all of the documentation necessary to support their claim and that an officer is not required to request updated information (see *Zambrano*, above; *Melchor v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1327; 39 Imm. L.R. (3d) 79). Therefore, it cannot be said that the Applicant's stated expectation was clear, unambiguous and unqualified.

[17] I am mindful of the decision of Justice Anne Mactavish in *Pramauntanyath v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 174; 39 Imm. L.R. (3d) 243. In *Pramauntanyath*, the PRRA Officer requested that the Applicant make submissions on a specific issue. Once the reasons where released it was apparent that the Applicant's submissions on the issue had not been considered. In that case, Justice Mactavish found that having given the Applicant the opportunity to provide this additional information, CIC created the legitimate expectation on the part of Mr. Pramauntanyath that whatever new information he provided would be considered, as long as it was sent to CIC within the specified time frame.

[18] *Pramauntanyath* is distinguishable from this case. In *Pramauntanyath*, the expectation created was that the requested material would be considered, not that the request would be made in the first place.

B. *Was the Issue Addressed in the Letter Relevant to the Decision?*

[19] The Applicant argues that the request of February 19, 2009, included a request for updated medical information. The Respondent argues that the information requested was only with regard to a viable IFA. Based on the contents of the February 19, 2009 letter, it is clear that the request was only for information with regard to an IFA. The Applicant argues that the medical information was highly relevant to the issue of an IFA. Having read the submissions, including the requested letter, I find that the letter was with regard to an IFA and did not directly or indirectly link an IFA with a medical issue.

[20] The Respondent argues that there is no indication that the oversight by the Officer, and the result that the Applicant did not provide submissions on the IFA issue, materially affected the H&C decision. They state that the issue of a viable IFA was not pivotal to the decision.

[21] I cannot agree. In the conclusion of the reasons, the Officer wrote:

> I have considered the issues presented by the applicants including their risk factors, establishment and best interests of the children, and the medical issues of the PA. The evidence before me does not support that returning to the [European Country], or another EU Member State, would be a hardship. With the evidence before me, the applicants have not demonstrated that their personal circumstances are such that the hardships of not being granted the requested exemption would be unusual and undeserved or disproportionate, and not anticipated by the legislation. This application is refused.
>
> [Emphasis added]

[22] Based on this conclusion, it is clear that the issue of a viable IFA to another EU country was relevant to the decision.

C. *Was the Applicant Denied Procedural Fairness?*

[23] In this case, the Officer erred by sending the request with regard to the H&C to Ms. Rwigamba. The Applicant argues that by not learning of the request until after the decision was rendered, she was not able to participate fully in the decision.

[24] The Respondent agrees that the request was misdirected, but argues that there is no evidence that this oversight materially affected the decision.

[25] H&C decisions are subject to a duty of fairness (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; 174 D.L.R. (4th) 193 at paragraph 20). In *Baker*, the Supreme Court reviewed the content of the duty and stated that it included providing those affected by the decision with the opportunity to put forward their views and evidence fully and have them considered by the decision maker (see paragraph 22).

[26] As the Applicant did not receive the request, she was not able to participate and provide input.

[27] It is clear that there were two errors made in this case. First, the Officer erred in sending the H&C letter to the Applicants' stated Counsel for the PRRA. Second, the Applicants' former Counsel should have forwarded the letter to the Applicant upon its receipt. Neither of these errors was due to actions of the Applicant and were beyond her control. In her affidavit, the Applicant states that had she received the request, she would have responded to it. As she was not cross-examined on her affidavit and her previous actions had demonstrated that she did respond to requests for information, I find this to be the case.

[28] The Court has previously found that the negligence of counsel should not cause an Applicant, who has acted with care, to suffer (see *Gulishvili v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1200; 225 F.T.R. 248, *Mathon v. Canada (Minister of Employment and Immigration)*, (1988), 28 F.T.R. 217; 38 Admin. L.R. 193; *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51; [1993] F.C.J. No. 1345).

[29] While the cases referred to above involved the misconduct or negligence of counsel retained on that specific file, I see no reason not to apply the same principle to this case, where Counsel had been retained, albeit for a different application.

[30] I note that the Record contains no information from Ms. Rwigamba and I confine my decision and reasons to this matter.

[31] Therefore, the Applicants were denied procedural fairness by not being notified that further evidence was requested.

D. *What is the Appropriate Remedy?*

[32] The Respondent argues that even if a breach of natural justice did occur, the Courts have recognized that a new hearing may be waived where remitting the matter for reconsideration would not change the outcome. They rely on three cases for this position: *Mobil Oil Canada, Ltd. et al. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202; [1994] S.C.J. No. 14, *Yassine v. Canada (Minister of Employment and Immigration)* (1994), 172 N.R. 308; Imm. L.R. (2d) 135 (F.C.A.) and *Zambrano*, above.

[33] In *Mobil Oil*, the majority of the Supreme Court held that while there had been a breach of natural justice, it would be nonsensical to compel the Board to re-consider the matter. This was due to the fact that as a result of the Court's decision on the cross-appeal the Board would be bound in law to reject the application (see paragraph 51).

[34] In *Yassine*, the Federal Court of Appeal relied on *Mobile Oil*, and held:

> [9] Even if the new information was improperly received and this impropriety was not waived, there would still appear to be no purpose for remitting the matter to the Refugee Division provided, as I have concluded, the adverse finding of credibility was properly made. I do not suggest that a breach of natural justice does not normally require a new hearing. The right to a fair hearing is an independent right. Ordinarily the denial of that right will void the hearing and the resulting decision.6 An exception to this strict rule

> was recognized in Mobile Oil Canada Ltd. et al. v. Canada-Newfoundland Offshore Petroleum Board, [1994] 1 S.C.R. 202 where, at page 228, the Supreme Court of Canada quoted the following views of Professor Wade:
>
> > A distinction might perhaps be made according to the nature of the decision. In the case of a tribunal which must decide according to law, it may be justifiable to disregard a breach of natural justice where the demerits of the claim are such that it would in any case be hopeless.
>
> While recognizing that natural justice or procedural fairness had been denied, the Supreme Court gave effect to Professor Wade's distinction by withholding a remedy because the outcome was "inevitable", in that the decision-maker "would be bound in law to reject the application" of the appellant therein.

[35] In *Zambrano*, above, the Applicants argued that they had been denied fairness because they had not been contacted to update the information in their application. Justice Eleanor Dawson, then of the Federal Court, stated that the applicants had advanced no evidence to support the position that the decision would have been different had they been afforded the opportunity to update their submissions and declined to intervene.

[36] What these cases have in common is that the Court found that even if the matter was sent back, the outcome was inevitable.

[37] In David J. Mullen, *Administrative Law, Cases, Text, and Materials*, 5th ed (Toronto: Emond Montgomery Publications Ltd, 2003) at page 1255, the author discussed the

Supreme Court's position in *Mobil Oil*, above. Mullen cautions refusal of relief on pragmatic grounds. At pages 1255-1256, he stated:

> Those pragmatic grounds are, of course, that the evidence before the courts in such cases has as its primary focus the alleged procedural effects, not the merits. Anything that the court learns about the merits occurs incidentally and possibly very incompletely. It may therefore be very dangerous for the court to speculate about what the outcome would have been had the procedural decencies been observed. Moreover, the acceptance of such a discretion in cases of this kind would act as a spur to the parties to try to present the court with as much evidence on the merits as they could. Not only would this increase the costs of judicial review but it also entails the arrogation to itself by the court of a function that properly belongs to the decision maker whose procedure have been brought into question. Thus, respect for legislative allocation of functions as well as limits on judicial competence may be seen as dictating this self-denial of remedial discretion.

[38] In this case, the outcome of the matter is not inevitable and the court should not substitute its opinion for that of the Officer. The Applicant could have submitted information on the viability of an IFA to another EU country that may have resulted in a different outcome.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is allowed, the decision is set aside and the matter is to be re-determined; and

2. there is no order as to costs.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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