Federal Court  Cour fédérale

Date: 20100827

Docket: IMM-4719-09

Citation: 2010 FC 852

Ottawa, Ontario, August 27, 2010

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

VAN THANH NGUYEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, a citizen of Vietnam, came to Canada in January 1988 as a permanent resident. In 1992, the Applicant was convicted of robbery with a weapon, and imprisoned for four years, from 1992 to 1996. As a result, he lost his permanent resident status on December 15, 1993 and a deportation order against him became effective. Since that time, he has been living in Canada without status, and has acquired another four criminal convictions in Canada. He has recently married and is the father of a Canadian-born child and two step-daughters.

[2] An important factor in the Applicant's case is his ongoing health concerns as a result of a kidney transplant that he received in 1998. In 1999, his removal order was suspended due to his medical issues. He alleges that he is currently unable to work and is on a provincial disability allowance. Since his kidney transplant, the Applicant has been on numerous medications, including cyclosporine, an anti-rejection drug, without which he would suffer rejection of his kidney and renal failure. The cost of the Applicant's medications is currently covered by provincial drug plans.

[3] In December 2006, the Applicant applied for permanent residence status from within Canada on humanitarian and compassionate (H&C) grounds pursuant to s. 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (*IRPA*). In a decision dated September 16, 2009, an Immigration Officer rejected the H&C application on the basis that there was insufficient evidence to show that the Applicant would face unusual, undeserved or disproportionate hardship in obtaining a permanent resident visa from outside Canada. The Officer examined four relevant factors in coming to his conclusion: establishment, medical history, best interest of the children, and criminal history.

[4] The Applicant seeks judicial review of the decision.

II. Issues

[5] The determinative issue raised by this application is whether the Officer's decision was unreasonable, in that it was made without regard to all of the evidence. In particular, the Applicant

raises this issue with respect to the Officer's conclusion that: (a) he could work in Vietnam and be in a position to buy the necessary medication; and (b) his wife could help support him in Vietnam.

III. Analysis

[6] The parties both submit that the appropriate standard of review of an H&C decision is reasonableness. I agree. Given the discretionary nature of the H&C decision and its factual intensity, the deferential standard of reasonableness is appropriate. On this standard, the Court should not intervene where the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 47). In addition, the Court may grant relief if it is satisfied that the tribunal made its decision without regard for the material before it (*Federal Courts Act* R.S.C. 1985, c. F-7, s. 18.1(4)(d)).

[7] Briefly stated, the key argument of the Applicant is that the Officer's decision is unreasonable because it failed to consider the inability of the Applicant to afford to buy anti-rejection medication in Vietnam. The Respondent, in turn, submits that, based on the information before the Officer, the decision was not unreasonable. An analysis of these arguments requires that I assess the information that was before the Officer and determine whether the Officer had regard to that evidence. Unfortunately, on this Certified Tribunal Record (CTR), I am unable to do so and must, accordingly, allow the judicial review.

[8] The Respondent refers to much information and documentary evidence in the CTR that would support a conclusion that the Applicant simply failed to meet his burden. After all, in the context of an H&C application, it is the Applicant's burden to adduce proof of any claim on which the H&C application relies (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635 at para. 5). In *Owusu*, at para. 8, the Federal Court of Appeal stated that:

> [S]ince applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril.

[9] To a certain point, I agree with the Respondent. There is no question that the Applicant could have provided better information to support his claim that he was unable to work or to afford the cost of medication in Vietnam. Were it not for the problem described in the following, I would have dismissed this application. Many of the submissions made on behalf of the Applicant were heavy on rhetoric and light on evidence.

[10] However, the Applicant refers to evidence in the CTR that indicates that an interview was scheduled for the Applicant on March 30, 2009 (subsequently postponed to April 10, 2009). In his affidavit, filed with this application for judicial review, the Applicant describes the areas of discussion with the Officer during the one-hour interview. According to the Applicant, many of the matters raised at the interview were relevant to the very question of whether the Applicant could afford to pay for anti-rejection medication if he were deported to Vietnam. The Applicant was not cross-examined on his affidavit. The Applicant's responses during the interview appear to address many of the concerns raised by the Officer, in his decision, about the insufficiency of evidence on the Applicant's ability to pay for medication in Vietnam. The problem is that the CTR, which would

normally contain the Officer's interview notes, does not do so. Further, the interview is not referred to in the Officer's decision. Nor did the Respondent obtain an affidavit from the Officer to explain the absence of the notes. In short, I cannot be satisfied that the Officer had regard to the evidence obtained from the interview. On this basis, I will allow the judicial review.

[11] I would, as a final note, observe that difficulty in accessing medical care in Vietnam is not determinative in an H&C application. The medical condition of the Applicant is only one factor that must be weighed with all of the relevant factors, including his lengthy criminal record. However, it is important that the Officer's decision be made with regard to all of the evidence, including the results of any interview.

[12] Neither party proposes a question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision quashed;

2. The matter is remitted to the Minister for reconsideration by a different Officer, with an opportunity provided to the Applicant to make further submissions; and

3. No question of general importance is certified.

"Judith A. Snider"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4719-09
STYLE OF CAUSE:	VAN THANH NGUYEN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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