Federal Court  Cour fédérale

Date: 20111214

Docket: IMM-1062-11

Citation: 2011 FC 1417

Ottawa, Ontario, this 14th day of December 2011

Before: **The Honourable Mr. Justice Pinard**

BETWEEN:

Amol Devon TESHEIRA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] On February 18, 2011, Amol Devon Tesheira (the "applicant") filed the present application for judicial review of the decision of R. Choo Quan, a Designated Immigration Officer at the High Commission of Canada in Port-of-Spain, Trinidad and Tobago (the "officer"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"). The officer rejected the applicant's visa application for permanent residence as a member of the family

class. Moreover, it should be noted at the outset that his brother Romario Leonardo Tesheira's application was also dismissed for the same reasons.

[2] The applicant was born on June 13, 1996, in St. Vincent and the Grenadines, where he is a citizen and currently resides, allegedly with his aunt and brother Romario. His father resides in St. Vincent as well, but claims to have never lived with his sons, the applicant stating that they do not have a close relationship. The applicant's mother left St. Vincent in 1999 and became a permanent resident of Canada in 2002. The applicant and his brother stayed in St. Vincent, supposedly with their grandmother, because she could not bare the thought of being separated from all of her grandchildren, the applicant's three other siblings having gone to Canada with their mother. However, his grandmother passed away in 2007, which he claims left him and his brother under the care of his aunt who now suffers from cervical cancer.

[3] When the applicant's mother applied for permanent residence in Canada, in 2002, sponsored by her husband at the time, from whom she divorced in 2006, she failed to mention the applicant and her other son Romario, who remained in St. Vincent, on her application. Having completed the application form on her own and having a very limited education, she did not know that she needed to mention all of her children as dependents: she only mentioned those with her. As a result, she was unaware that she would lose the right to sponsor them in the future.

[4] In his decision dated November 17, 2010, the officer assessed the applicant's visa application for permanent residence as a member of the family class (subsections 12(1) of the Act and 117(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended

[the “Regulations”]) and based on humanitarian and compassionate grounds under section 25 of the Act.

[5] The officer rejected the applicant’s application as a member of the family class, specifically as a dependent child of his mother, the sponsor, on the basis of paragraph 117(9)(*d*) of the Regulations: “when [his mother] submitted her application for landing in Canada, she did not declare [him] as her dependant and [he] therefore, did not meet immigration requirements as her dependant”.

[6] The officer went on to consider the humanitarian and compassionate grounds raised in the applicant’s application, specifically, his best interests as a child, the reunification of his family, his close relationship with his mother, the illness of his aunt and the lack of family to care for him in St. Vincent. Nonetheless, the officer concluded that the applicant had not demonstrated undue hardship would be incurred if he remained in St. Vincent and that it was in the applicant and his brother Romario’s best interests to stay in St. Vincent together with their father and other relatives: they never resided with their mother in Canada and have been separated from her for the past eleven years, having also been separated from their other siblings for five years.

[7] The relevant portions of the Act are as follows:

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 may be issued if, following an	**11.** (1) L’étranger doit, préalablement à son entrée au Canada, demander à l’agent les visa et autres documents requis par règlement. L’agent peut les délivrer sur preuve, à la suite d’un contrôle, que

examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

Family reunification

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

Humanitarian and compassionate considerations — request of foreign national

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

Regroupement familial

12. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[8] The relevant portion of the Regulations is as follows:

Member	Regroupement familial
117. (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117.** (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
(*b*) a dependent child of the sponsor;	*b*) ses enfants à charge;
Excluded relationships	Restrictions
(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	(9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[9] At the hearing before me, counsel for the applicant essentially argued that the appreciation of the facts made by the officer was sufficiently wrong to justify the intervention of the Court. I do not agree, for the following reasons.

[10] The applicable standard of review to an officer's factual determinations is reasonableness (*Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 [*Khosa*]; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 [*Dunsmuir*]). This same standard of reasonableness applies to the officer's assessment of the best interests of a child, being a question of mixed fact and law (*Legault v. Canada (Minister of Citizenship and Immigration) (C.A.)*, [2002] 4 F.C. 358 at para 9 [*Legault*]). Considerable deference is owed to such determinations made by the officer, since visa applications

are discretionary decisions (section 11 of the Act; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 [*Baker*]). Therefore, the weighing of the relevant factors, whether it be in the assessment of the visa application by the officer, or whether it be in evaluating the best interests of a child, is not a function of this court: "a reviewing court should not disturb a decision made based on a "broad discretion" unless the [officer] has made some error in principle in exercising [his] discretion or has exercised [his] discretion in a capricious or vexatious manner" (see, for example, *Legault* at para 9; *Suresh v. Canada (Minister of Citizenship and Immigration*), [2002] 1 S.C.R. 3 at para 9; *Woldeselassie v. The Minister of Citizenship and Immigration*, 2006 FC 1540 at para 14). Hence, it was the role of the officer to determine the appropriate weight to be given to the humanitarian and compassionate grounds raised by the applicant and the factors that go into this analysis (*Suresh*; *Legault* at para 9).

[11] In the case at bar, the officer's analysis with respect to the humanitarian and compassionate grounds, including the best interests of the child, appears in the Computer Assisted Immigration Processing System ("CAIPS") notes and reads as follows:

> . . . I have considered all factors, including the positive H&C factors and all arguments raised with respect to the best interests of a child, have given them due weight and have considered the positive factors against the facts that weight against granting an exemption under section 25 and have found the following: - Mother (sponsor) left St. Vincent when applicant was 3yrs old. Became a PR in 2002. The applicant was now 6yrs old. – Sponsor has never returned to St. Vincent to visit or care for applicant since leaving for Canada. – Applicant was left in the care of his gr-mother as stated by sponsor, no documentary evidence of same has been submitted. Gr-mother is now deceased and sponsor states applicant now lives with his aunt, Janet Adams who has since been diagnosed with cancer and can no longer care for the applicant. The sponsor has submitted no satisfactory evidence to confirm that the applicant in fact resides with Janet Adams. – Sponsor states that children's father cannot care for

> them as he is unemployed, however, the applicant's address listed on both the previous application of 2008 and the current application, is the same as the address listed for the applicant's father. I am not satisfied that the applicant does not continue to reside with his father in St. Vincent. – The sponsor states that she has continuously sent financial support for the upkeep of her children since she left for Canada. It is noted that seven Western Union money transfers were submitted in support of this claim for 2009 only. No other evidence of financial support has been submitted. The recipient of these funds is listed as Conrod Tesheira, the applicant's father, which further compounds the suggestion that the applicant remains in his care. – No other documentary evidence has been submitted in support of a continued relationship between the applicant and the sponsor. In the last 10yrs, the applicant has had two trips to Canada in Jul2006 & 2008 for minimal periods. The sponsor has not returned to St. Vincent. I find it unreasonable to believe that any strong bond or parent child relationship could have been established on these two visits. CONCLUSION: From the documents presented by the sponsor's lawyer in support of consideration under Sec25, I am satisfied that I have sufficient documentation to make an assessment and that I find no H&C factors exists. The applicant is now 14yrs old and continues to reside in St. Vincent with his father, one sibling and other family members. The applicant is currently attending High School and has not demonstrated any undue hardship will be incurred by remaining in St. Vincent. The applicant has never resided in Canada with his mother and has been separated from his mother for the last 11yrs and his other siblings for the last 5yrs. I am satisfied that remaining in St. Vincent with his father, sibling and other family members will be in the best interest of the child. Refused.

[12] Upon hearing counsel for the parties and upon reviewing the relevant evidence, I conclude that the applicant has failed to satisfy me that the officer based his decision on an erroneous finding of fact that he made in a perverse or capricious manner or without regard for the material before him (paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7). In my view, the officer reasonably weighed the evidence, relying on the humanitarian and compassionate factors specified in the Guidelines and mentioned in *Hawthorne v. Canada (Minister of Citizenship and*

Immigration) (C.A.), [2003] 2 F.C. 555 [*Hawthorne*]. Rather, the applicant merely did not provide sufficient evidence in support of his application.

[13] As mentioned in his CAIPS notes, the officer concluded that the applicant had failed to provide evidence in support of many of his allegations, specifically his current residence and his current relationship with his mother. Hence, it was reasonable for the officer to conclude that the applicant resided with his father: the officer chose, as he is empowered to, to give more weight to the same addresses of the applicant and his father and that the money transfers were addressed to Conrod Tesheira, despite the applicant supposedly having a very limited relationship with him. Therefore, the officer's conclusion that it was in the applicant and his brother's best interests to remain in St. Vincent with their father was reasonable, being based on the officer's assessment of the evidence before him.

[14] Moreover, it is trite law that the officer had an obligation to consider the best interests of the applicant and to be sensitive, alert and alive to the latter's best interests (see *Hawthorne* and *Legault*). In my view, the officer, in the present case, met this obligation and, in addition, his best interest analysis was proportionate to the applicant's submissions and the evidence he provided (*Pillai v. The Minister of Citizenship and Immigration*, 2008 FC 1312). In the CAIPS notes, the officer specified that he considered all factors, in addition to the best interests of a child, in refusing to grant the applicant humanitarian and compassionate relief, and then went on to identify which facts he relied on in making this negative decision, highlighting a lack of evidence to support the applicant's application. Therefore, the officer's assessment of the applicant's best interests was reasonable and it is not for this Court to reweigh the best interest factors.

[15] Consequently, I find that the officer's conclusions fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir* at para 47), and are, therefore, reasonable.

[16] For the above mentioned reasons, the application for judicial review is dismissed.

[17] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1062-11
STYLE OF CAUSE:	Amol Devon TESHEIRA v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 19, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Pinard J.
DATED:	December 14, 2011

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