Federal Court  Cour fédérale

Date: 20140428

Docket: IMM-1641-13

Citation: 2014 FC 382

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, April 28, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DICKENS CHERY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary remarks

[1] It appears for a second time, from a second judgment of this Court reflecting the initial judgment, that a preoccupation with an exclusion from the family class under paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], has

prevented an officer, in the Court's view, from assessing the relevant humanitarian and compassionate factors as specified previously.

[2] The Court recognizes that the adequacy of reasons must be assessed in context and that an officer's reasons need not mention every detail or fact taken into consideration (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708). However, in this case, the officer's decision and CAIPS (Computer Assisted Immigration Processing System) notes contain no analysis of the humanitarian and compassionate factors raised by the applicant. It is impossible to determine what motivated the officer to find that these factors did not justify an exemption.

II. Introduction

[3] This is an application for judicial review brought pursuant to subsection 72(1) of the IRPA against a decision, rendered by a visa officer on December 12, 2012. The officer rejected the applicant's application for permanent residence on humanitarian and compassionate grounds as a member of the family class.

III. Facts

[4] The applicant, Dickens Chery, is a citizen of Haiti. His father, Pierre-Louis Chery, immigrated to Canada in 1988.

[5] On January 6, 2005, the latter filed an application to sponsor the applicant.

[6] This sponsorship application was rejected on April 18, 2005, on the grounds that the applicant was excluded from membership in the family class under paragraph 117(9)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [Regulations], his father having failed to declare him on his permanent residence application.

[7] The decision was appealed to the Appeal Division of the Immigration and Refugee Board [Board]. The Board dismissed the appeal, holding that it lacked jurisdiction to consider the application of humanitarian and compassionate considerations.

[8] On July 30, 2009, the applicant's father filed a second application for a permanent resident visa for the applicant, based strictly on compassionate and humanitarian grounds.

[9] On December 1, 2009, the applicant filed a permanent residence application on his own behalf and wrote [TRANSLATION] "other: humanitarian immigration" in response to the question [TRANSLATION] "Under which category are you applying?"

[10] On March 2, 2010, the applicant received a letter indicating that he met the eligibility criteria. After receiving a positive paternity test [DNA test], the immigration authorities began to analyze whether he met the other requirements.

[11] The applicant was called to an interview at the Canadian Embassy in Haiti on August 2, 2010. The officer conducting the interview told him that his application had been refused

because he had not received a DNA test or evidence proving dependence. There was no mention of humanitarian and compassionate considerations in the officer's CAIPS notes or the letter.

[12] After realizing that it had in fact received the DNA test, the Embassy asked the officer to reconsider the matter. The officer noted in his CAIPS notes that his decision was to be upheld because there was still no evidence of dependence and the applicant was excluded from the family class under paragraph 117(9)(*d*) of the Regulations. The officer also indicated that he had considered the humanitarian and compassionate considerations even though no request in that respect had been made. The applicant was informed of that decision on August 24, 2010.

[13] On August 31, 2010, the decision was appealed to the Board, which dismissed the appeal on the grounds that it was *res judicata*.

[14] On July 20, 2012, the Federal Court quashed the decision and remitted the matter to an officer of the Canadian Embassy in Haiti for reconsideration. The Court held that the matter was not *res judicata*, since the applicant's visa application was entirely based on humanitarian and compassionate grounds. The Court held that the issue of whether a person is excluded in accordance with paragraph 117(9)(*d*) of the Regulations is completely separate and independent from the issue of humanitarian and compassionate considerations" (*Chéry v Canada (Minister of Citizenship and Immigration)*, 2012 FC 922, 416 FTR 14 at para 21).

[15] In early December 2012, the applicant was called in for a new interview at the Canadian Embassy in Haiti.

[16] On December 12, 2012, the applicant's application for permanent residence was again rejected. The applicant is seeking a judicial review of that decision.

IV. Decision under review

[17] In his letter dated December 12, 2012, the officer begins his decision by determining that the applicant is excluded from the family class under paragraph 117(9)(*d*) of the IRPA.

[18] The officer then addressed the applicant's humanitarian and compassionate grounds. He assessed the humanitarian and compassionate considerations as follows:

> [TRANSLATION]
> Having considered and assessed all of the factors relating to your application, following your interview, I have concluded that there are no humanitarian and compassionate considerations justifying an exemption from any applicable criteria or obligations under the Act.

V. Issue

[19] Is the officer's decision rejecting the application for permanent residence reasonable?

VI. Relevant legislative provisions

[20] Section 25 of the IRPA applies in this case:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf

— or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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.	si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, 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.

[21] Paragraph 117(9)(*d*) of the Regulations also applies to this case:

117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	117. (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.

VII. Standard of review

[22] The standard of review for a decision rendered under subsection 25(1) of the IRPA is reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 FCR 360).

VIII. Analysis

[23] The applicant submits that the officer committed a reviewable error in failing to analyze or consider the humanitarian and compassionate factors applicable to his situation by providing inadequate reasons.

[24] The Court agrees with the applicant that the officer provided inadequate reasons with respect to the humanitarian and compassionate factors.

[25] The jurisprudence makes it clear that, in some cases, section 25 of the IRPA can mitigate the harshness of the requirements of the Act, including any harshness resulting from paragraph 117(9)(*d*) (*Liu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 917).

[26] Justice Yves de Montigny stated the following in *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533, [2010] 1 FCR 175:

> [25] . . . one must not forget that the presence of s.25 in the *IRPA* has been found to guard against *IRPA* non-compliance with the international human rights instruments to which Canada is

> signatory due to s.117(9)(d): *De Guzman v. Canada (Ministar of Citizenship and Immigration)*, 2005 FCA 436, at paras. 102-109. If that provison is to be meaningful, Immigration officers must do more than pay lip service to the H&C factors brought forward by an applicant, and must truly assess them with a view to deciding whether they are sufficient to counterbalance the harsh provision of s.117(9)(d). . . . [Emphasis added.]

[27] It was therefore not sufficient for the officer to state that [TRANSLATION] "there are no humanitarian and compassionate considerations justifying an exemption from any applicable criteria or obligations under the Act". The officer had to explain why the circumstances did not justify an exemption.

[28] The Court addressed a similar situation in *Bernard v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1121:

> [18] In this case, the female applicant did indeed raise humanitarian and compassionate considerations. Among other things, she mentioned in her affidavit that she would suffer emotionally from her father's absence, that she could not expect to continue her studies without his support and that she would be deprived of many opportunities for personal, social and academic development if she were to remain in Haiti rather than joining her father in Canada. It is true that Mr. Bernard's submissions to the immigration officer could have been more thorough. However, the fact remains that the officer completely disregarded elements raised by the female applicant and was content to find that the female applicant's situation was not different from that of all Haitians. This is clearly insufficient.
>
> [19] The officer needed to give more details for his decision, if only to indicate that he had truly taken into account the female applicant's specific situation, particularly the extreme deprivation of her mother and her emotional relationship with a father whom she had just discovered. The officer's terse comments do not make it possible to find that he carefully considered Fabiola's best interests and do not meet his obligation to give sufficient reasons in support of his decision (*VIA Rail Canada Inc. v. National*

> *Transportation Board (CA)*, [2001] 2 F.C. 25, [2000] F.C.J. No.1685 (FCA)(QL). [Emphasis added.]

[29] The Court reaches a similar conclusion in this case. The officer's "terse" comments in no way make it possible to find that he considered the humanitarian and compassionate factors raised by the applicant.

[30] The Court recognizes that the adequacy of reasons must be assessed in context and that an officer's reasons need not mention every detail or fact taken into consideration (*Newfoundland and Labrador Nurses' Union*, above). However, in this case, the officer's decision and CAIPS notes contain no analysis of the humanitarian and compassionate factors raised by the applicant. It is impossible to determine what motivated the officer to find that these factors did not justify an exemption.

[31] The Court is of the view that the officer's reasons, even when read together with the outcome, do not allow the Court to determine whether the result fell within the range of possible, acceptable outcomes. They do not show the applicant why his application was rejected or allow the Court to determine whether the officer's decision was justified (*Via Rail Canada Inc. v National Transportation Office*, [2001] 2 FC 25 (CA)). Accordingly, the decision is set aside.

IX. Conclusion

[32] For all of the above reasons, the applicant's application for judicial review is allowed and the matter referred back for redetermination by a different officer.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the applicant's application for judicial review is allowed and the matter is referred back for redetermination by a different officer with no question of general importance for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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