Date: 20070502

Docket: IMM-5130-06

Citation: 2007 FC 468

Ottawa, Ontario, the 2nd day of May 2007

Present: The Honourable Mr. Justice Maurice E. Lagacé

BETWEEN:

RICKY MAXWELL JOHN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of an immigration officer, dated August 10, 2006, refusing a request for exemption on humanitarian and compassionate grounds from the requirement of obtaining a permanent resident visa before coming to Canada (H&C application) and rejecting an application for a pre-removal risk assessment (PRRA). The application for judicial review was allowed by Lemieux J. on February 9, 2007.

FACTS

[2] The applicant, Ricky Maxwell John, is a citizen of Grenada. He entered Canada as a visitor to Canada on May 14, 1995, leaving behind his son and other family members. He claimed refugee status on September 24, 2001, alleging that he feared for his life because of the atrocities that his father, now deceased, had allegedly committed from 1971 to 1979 when he was a member of the secret police under the government of Prime Minister Eric Matthew Gary. The Refugee Protection Division (RPD) rejected his claim on February 4, 2003.

[3] In October 2001, the applicant made an initial H&C application in which he invoked the risks of return, his establishment in Canada, the best interests of his Canadian daughter born after his arrival in Canada and his financial support of her. The applicant alleges that the child's mother has disappeared. His H&C application was rejected on August 27, 2002.

[4] On February 21, 2005, the applicant made a second H&C application based on the same grounds and evidence as in his initial application. On February 8, 2006, he made a PRRA application, which was rejected on August 10, 2006, on the grounds that the applicant had not shown any risk of return. On the same day, his second H&C application was rejected by the same officer, who concluded that the applicant would not be subject to any unusual and undeserved or disproportionate hardship if he were required to apply for a permanent resident visa from outside Canada.

[5] On September 28, the applicant filed a motion in the Quebec Superior Court to obtain legal custody of his daughter. On October 16, the Federal Court dismissed an application for stay of removal. Following his removal, the applicant is outside Canada and is now asking the Court to order the respondent to bring him back to Canada to place him back in the same situation he was in before the immigration officer's negative decision.

IMPUGNED DECISION

[6] In the decision dated August 10, 2006, the officer concluded that the applicant did not show any risk of return in his PRRA application and that the grounds invoked in his second H&C application were insufficient to show that the applicant would face unusual and undeserved or disproportionate hardship if he were required to make his application for a permanent resident visa from outside Canada.

RELEVANT STATUTORY EXCERPTS

[7] The request for exemption from the visa requirement on humanitarian and compassionate grounds is provided for in subsection 25(1) of the Act, which reads as follows:

25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who 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	25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se 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 —

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.	compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

SUBMISSIONS BY THE PARTIES

Applicant

[8] The applicant submits that the immigration officer did not consider all the evidence in the file, particularly the evidence concerning the financial support of his daughter, and neglected the best interests of the child when rendering the decision.

[9] On this point, the applicant submits that the immigration officer failed to mention in the reasons for the decision whether he considered the impact that the rejection of the request for exemption from the visa requirement would have on his daughter's best interests. The applicant relies on the following decisions: *Hawthorne v. Canada (M.C.I.)*, [2003] 2 F.C. 555 (F.C.A.); *Mynor More London v. Canada (M.C.I.)*, 2003 FC 303; *Lidia Orellana Delcid v. Canada (M.C.I.)*, 2006 FC 326; and *Sepulveda Soto v. Canada (M.C.I)*, 2006 FC 1524.

[10] In addition, the applicant alleges that the officer erred in making no effort to allow him to obtain information which, in his opinion, was not in the file and which could have led to a

conclusion in favour of the child's best interests. The applicant bases this argument on the following decisions: *Lidia Orelland Delcid v. Canada (M.C.I.)*, 2006 FC 326 and *Bassan v. Canada (M.C.I.)*, 2001 FC 742.

[11] Finally, he criticizes the officer for having ignored the content of a letter from the Minister of Sports of Grenada, who concludes that the applicant would face hardship upon returning to Grenada because of the role previously played by his father as a member of the secret police under the Gary government.

Respondent

[12] The respondent submits that the grounds alleged by the applicant in support of his second H&C application were all considered in his initial H&C application and that no new evidence was submitted for his new application or regarding the support for his daughter.

[13] Although the applicant was entitled to make more than one H&C and more than one PRRA application, such new applications had to be based on new evidence, as was decided in *Kouka v. Canada (M.C.I.)*, 2006 FC 1236.

[14] In addition, since the applicant had the burden of satisfying the immigration officer, it was up to him to submit convincing evidence relating to the child's best interests (*Owusu v. Canada (M.C.I.)*, [2004] F.C.J. No. 158; *Anaschenko v. Canada (M.C.I.)*, [2004] F.C.J. No. 1602). The following decisions are to the same effect: *Legault c. Canada (M.C.I.)*, [2002] 2 F.C. 358,

application for leave to appeal to the Supreme Court of Canada dismissed on November 21, 2002, SCC 29221; *Hawthorne v. Canada (M.C.I.)*, [2003] 2 F.C. 555 (F.C.A.); *Bolanos v. Canada (M.C.I.)*, [2003] F.C.J. No. 1331 (F.C.).

[15] The respondent also argues that a request for exemption on humanitarian and compassionate grounds must not be used as an appeal or an opportunity to reassess allegations already considered and relied upon in the first decision, as was decided in *Hussain v. Canada (M.C.I.)*, [2000] F.C.J. No. 751.

[16] Finally, the respondent submits that the alleged risks had already been assessed by the RPD and by the officer when conducting the PRRA and that the immigration officer had to attach little weight to the letter from the Minister of Sports, since an identical letter had been submitted in support of the applicant's first H&C application. The respondent bases this argument on the following authorities: *Malhi v. Canada (M.C.I.),* 2004 FC 802; *Kouka v. Canada (M.C.I.),* 2006 FC 1236.

ISSUES

1. Did the immigration officer err in not considering all the evidence submitted?

2. Did the immigration officer err in not collecting all the additional information regarding the child's best interests?

STANDARD OF REVIEW

[17] In *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, the Supreme Court of Canada ruled that the standard of review for decisions rendered by immigration officers on applications made on humanitarian and compassionate grounds is reasonableness *simpliciter*. *Khosa v. Canada (M.C.I.)*, [2007] F.C.J. No. 139 (F.C.A.) is to the same effect.

[18] When the standard of review is reasonableness *simpliciter*, the Court may not substitute its own assessment of the facts for that of the decision-maker. Instead, the Court must ensure that "the reasons, taken as a whole, are tenable as support for the decision" (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at paragraph 56). As long as the officer considers the relevant, appropriate factors from an H&C perspective, the Court cannot interfere with the weight the officer gave to the different factors to conclude as he or she did, even if the Court would have weighed them differently (*Hamzai v. Canada (M.C.I.)*, [2006] F.C.J. No. 1408, 2006 FC 1108, at paragraph 24).

[19] However, if the Court were to conclude there was a breach of procedural fairness, the application for judicial review would be allowed. It is trite law that the standard of review applicable to questions of natural justice and procedural fairness is correctness (*Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, at paragraph 100).

ANALYSIS

Did the immigration officer err in not considering all the supporting evidence submitted?

[20] To satisfy an officer that there are humanitarian and compassionate grounds supporting his application, the applicant must prove that the requirement of obtaining a permanent resident visa from outside Canada would cause him unusual and undeserved or disproportionate hardship (*Uddin v. Canada (M.C.I.)*, 2002 FCT 937, at paragraph 22).

[21] In addition, for an officer to be able to render a positive decision concerning the risks, it is up to the applicant to submit the evidence required to support the alleged risks (*Owusu v. Canada (M.C.I.)*, 2003 FCT 94, [2003] F.C.J. No. 139; *Prasad v. Canada (M.C.I.)* (1996), 34 Imm.L.R. (2d) 91 (F.C.T.D.); *Patel v. Canada (M.C.I.)* (1997), 36 Imm.L.R. (2d) 175 (F.C.T.D.); *Agot v. Canada (M.C.I.)*, [2003] F.C.J. No. 607, 2003 FCT 436).

[22] Finally, the extension of the applicant's stay in Canada does not as such warrant a favourable conclusion (*Uddin v. Canada (M.C.I.)*, [2002] F.C.J. No. 1222).

[23] In this case, the Court concludes that the officer considered all the evidence before her. Furthermore, the applicant did not submit any additional evidence in support of his second H&C application. Accordingly, the officer was entitled, considering the insufficient evidence, to reject the second H&C application and the PRRA application.

[24] The applicant's written submissions in support of his second H&C application are identical to those in his initial H&C application. These submissions seem to be aimed at having the RPD's negative decision reviewed rather than at supporting the arguments in support of a positive H&C decision. It is true that the H&C decision contains a risk assessment, but it cannot be used to appeal against the RPD's risk assessment, which concluded in any event that the risks were not credible.

[25] For these reasons, with regard to the first issue, the Court cannot see how the officer's decision would be unreasonable.

Did the immigration officer err in not going to the trouble of collecting all the additional information regarding the child's best interests?

[26] First of all, it is useful to note that in *Chaudhry v. Canada (M.C.I.)*, [1998] F.C.J. No. 160, at paragraph 3, it was ruled that evaluations of the evidence by tribunals are not subject to re-evaluation by the Court on judicial review unless there is some unreasonableness about that evaluation.

[27] It should also be noted that the applicant has the burden of satisfying the visa officer of all of the favourable evidence on which the application relies. Furthermore, an officer reviewing an H&C application has no duty to elicit evidence or to warn the applicant of the weaknesses of his or her case (*Owusu v. Canada (M.C.I.)*, [2004] F.C.J. No. 158, 2004 FCA 38, at paragraphs 5 and 8; *Faid El Doukhi v. Canada (M.C.I).*, 2005 FC 1464, at paragraph 21). As the Court so rightly stated in

Prasad v. Canada (M.C.I.), (1996), 34 Imm. L.R. (2d) 91 (F.C.T.D.), "[i]t was not for the visa officer to wait and to offer the applicant a second, or several opportunities to satisfy the visa officer on necessary points which the applicant may have overlooked".

[28] On the question of determining the "best interests of the child", the following was stated in *Hawthorne v. Canada (M.C.I.),* [2003] F.C. 555 (F.C.A.) at paragraphs 4 and 5:

> The "best interests of the child" are determined by considering the **benefit to the child of the parent's non-removal from Canada as well as the hardship the child would suffer** from either her parent's removal from Canada or her own voluntary departure should she wish to accompany her parent abroad. Such benefits and hardship are two sides of the same coin, the coin being the best interests of the child.
>
> **The officer does not assess the best interests of the child in a vacuum**. The officer may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent. The inquiry of the officer, it seems to me, is predicated on the premise, which need not be stated in the reasons, that the officer will end up finding, absent exceptional circumstances, that the "child's best interests" factor will play in favour of the non- removal of the parent.

In answering the certified question in *Hawthorne*, the Court of Appeal had this to say at paragraph 11:

> The requirement that the best interests of the child be considered may be satisfied, depending on the circumstances of each case, by considering the degree of hardship to which the removal of a parent exposes the child.

[29] In addition, in *Legault*, at paragraph 12, the Federal Court of Appeal stated that a decision-maker must identify and define the best interests of a child so as to give those interests the appropriate weight in the circumstances of the case.

[30] When dealing with the initial H&C application, the officer, who was not satisfied with the evidence submitted, specifically asked the applicant for the following additional information:

> Please indicate what role you play in your daughter's life and how it is that you are supporting her. What role does her mother play in her life? It is imperative that you outline in detail the risk or hardship you will encounter if you had to go back to Grenada with supportive evidence. Please ensure that and all information you wish considered is provided.

[31] Furthermore, when dealing with the second H&C application in question, the officer asked the applicant to submit any document or information which could be relevant to his case. At that point, he could not ignore the specific request made on the occasion of the initial H&C application.

[32] In addition to the fact that the applicant did not take up the officer's offer to submit additional evidence in support of his allegations, it was obviously still difficult for the officer to reach a conclusion favourable to the applicant as far as the "best interests of the child" were concerned, hence the request that the applicant, to his detriment, chose to ignore.

[33] Considering the special circumstances of this case and considering all the evidence on record, the Court does not see any error warranting its intervention and the review of the officer's decision.

[34] On the contrary, the applicant has only himself to blame for not having followed up on the officer's request to supplement the evidence, which she considered to be insufficient, on the issue of the "best interests of the child".

[35] The parties did not suggest any question for certification; accordingly, no question will be certified.

JUDGMENT

The application for judicial review is dismissed, and no question is certified.

"Maurice E. Lagacé"
Deputy Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5130-06
STYLE OF CAUSE:	**JOHN RICKY MAXWELL** **v.** **MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 26, 2007
REASONS BY:	The Honourable Mr. Justice Maurice E. Lagacé, Deputy Judge
DATED:	May 2, 2007

APPEARANCES:

Lucrèce Joseph	FOR THE APPLICANT
Annie Van der Merchen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lucrèce Joseph Montréal, Quebec	FOR THE APPLICANT
John H. Sims Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT