Date: 20080723

Docket: IMM-1990-07

Citation: 2008 FC 896

BETWEEN:

KITTS WHITE by his
Litigation Guardian, Juline White

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

HENEGHAN J.

[1] Mr. Kitts White by his Litigation Guardian (the "Applicant") seeks judicial review of the decision of N. Stocks, a Pre-Removal Risk Assessment Officer (the "PRRA Officer"). In that decision, dated April 25, 2007, the PRRA Officer refused the Applicant's application for permanent residence on humanitarian and compassionate ("H & C") grounds, which application had been made pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act").

[2] The Applicant was born in Jamaica on November 22, 1973. He came to Canada with his family on December 21, 1980, and has lived in Canada since that date. At the age of 14, while a passenger in a car, the Applicant was seriously injured in a motor vehicle accident. His injuries included significant Traumatic Brain Injury ("TBI") and damage to his left arm. At the time of this accident, the Applicant was 18-years-old and was scheduled to start university studies, as a scholarship student, at York University.

[3] As a result of the severe and permanent brain damage, the Applicant underwent significant personality and behavioural changes. These changes were described in detail in a Case Summary prepared in 1997 by Dr. R. Van Reeken, F.R.C.P.C. of the Baycrest Centre for Geriatric Care in Toronto.

[4] Between 1993 and 1998, the Applicant was convicted of several criminal offences, the most serious of which was a conviction of aggravated sexual assault in 1998. He was sentenced to an eight-year term of imprisonment for that offence in June 1998.

[5] The Officer's "Notes to File" record the details of the Applicant's arrival in Canada, the occurrence of the accident and the Applicant's subsequent criminal convictions.

[6] The Officer recorded that the information submitted with the Applicant's application was outdated, in particular information about the lack of adequate medical facilities in Jamaica that

could be accessed by the Applicant. The Officer noted that this information had been created several years earlier.

[7] The Officer commented on the availability of mental health services in Jamaica, according to his own research from the U.K. Home Office. Reference was also made to a World Health Organization document from 2005 and to a publication in a Jamaican newspaper for 2005. He acknowledged that while he had considered the Applicant's case "with great sympathy," he had also considered the "immigration objective of protecting the health and safety of Canadians". He determined that the Applicant had failed to meet his onus of providing sufficient evidence, concluding that "his personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside of Canada would be unusual, undeserved or disproportionate hardship."

[8] As a closing note to his decision, the Officer said that the Applicant had presented further submissions on April 23, 2007, advising that a further report was pending from a specialist and this report would be forwarded upon receipt. The Officer said that no further time would be granted for further submission and that the decision was made on the basis on the information at hand.

[9] The decision here in issue was made by the Officer in the exercise of the discretionary authority provided by subsection 25(1) of the Act which provides 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 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.	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 — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

[10] According to the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, administrative decisions by statutory decision-makers are to be reviewed upon one of two standards, that is, the standard of correctness or the standard of reasonableness *simpliciter*. In the present case, the standard of reasonableness will apply.

[11] A decision made pursuant to subsection 25(1) of the Act is an extraordinary remedy conferring upon an applicant the opportunity to apply for fuller status in Canada while remaining in the country; see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. In the exercise of the statutory discretion, a decision-maker is to have regard to the evidence submitted, as informed by the legislation; see *Vidal v. Canada (Minister of Employment and*

Immigration) (1991), 13 Imm. L.R. (2d) 123 at para. 9 (F.C.T.D.). The discretion is to be exercised on the basis of relevant considerations; see *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2.

[12] The Act requires the Officer to consider the particular circumstances of an applicant and to assess those circumstances in light of the Act and relevant guidelines. In *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, the Supreme Court of Canada decided the words "in all circumstances on the case" as found in paragraph 70(1)(b) of the *Immigration Act*, R.S.C. 1985, c.I-2 (the "former Act") are to be interpreted in the grammatical and ordinary sense, with regard to the legislative intent and statutory purposes. Those words require attention to the factual circumstances of an individual applicant.

[13] The benefit of applying for permanent resident status from within Canada is an extraordinary remedy and it follows that such an application focuses on the individual circumstances at play. The Act regulates the admission of non-citizens into Canada. Admission into Canada is a privilege, not a right; see *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711 at 733.

[14] I am satisfied that the decision here in issue does not meet the standard of reasonableness. In my opinion, the Officer ignored or misunderstood the evidence concerning the Applicant's personal circumstances, in particular the nature of his disability. The Applicant suffers from a several brain injury, not mental illness.

[15] The "sympathetic" nature or otherwise in a particular case is not the determinative factor. The officer is to pay attention to the individual circumstances of a particular applicant and determine if the consequences of requiring the compliance with the requirement to obtain a permanent resident visa from outside Canada will cause "an unusual, undeserved or disproportionate hardship," that consideration arising from jurisprudence developed under the former Act in relation to H & C applications. Again, I refer to the decision of the Supreme Court of Canada in *Baker*.

[16] In my opinion, the Officer also failed to consider the fact that the Applicant has no immediate family in Jamaica. He has been living in Canada for a longer period than he ever resided in Jamaica. The Applicant was formerly a permanent resident but as a result of his conviction in 1998, a deportation order was issued against him in February 1999. That conviction arose from behaviour that is inextricably related to the Applicant's impaired cognitive ability resulting from a motor vehicle accident in 1991. The Applicant has served his sentence.

[17] I refer to the decision of the Federal Court of Appeal in *Lau v. Minister of Employment and Immigration*, [1984] 1 F.C. 434 at 438 when Justice Heald said the following:

> ... the Adjudicator has given undue weight to the circumstances of a breach of provisions of the *Immigration Act, 1976*. If Parliament had intended that circumstance to be the dominating and determining circumstance, then there would have been no point in conferring the subsection 32(6) discretion on the Adjudicator. By so conferring a discretion, Parliament must have intended the Adjudicator to look at all the circumstances and implied in that discretionary power is the power to grant departure notices where all the circumstances warrant it, notwithstanding that breaches of the *Immigration Act, 1976* have

> occurred. Accordingly, I have concluded that the Adjudicator misconceived the parameters of the discretion conferred upon him pursuant to subsection 32(6) of the Act, which misconception represents an error in law reversible by the Court under section 28 of the *Federal Court Act*.

[18] In *Drame v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1232, Justice Nadon allowed an application for judicial review of an immigration officer's refusal of an H & C application. Having reviewed that decision on the standard of reasonableness, the Court determined that the decision failed to meet that standard. At paragraph 50, Justice Nadon said the following:

> It is hard to understand why Miss Barnabé's notes made no mention of the applicant's pregnancy nor of the birth of her child in April 1993, in view of the significance attached to that information by the applicant. I can only conclude that Miss Barnabé did not consider the applicant's application as a reasonable person would have done. Accordingly, I consider that in the circumstances of the case at bar Miss Barnabé did not exercise her discretion in good faith.

[19] In my opinion, the same observations apply here. The Officer in the present case mischaracterized the Applicant's disability and ignored the particular circumstances of his family relationships. In these circumstances, I am satisfied that the statutory discretion was not exercised in good faith and the decision of the Officer will be quashed. The matter will be remitted to a different officer for re-determination.

[20] Counsel shall have five (5) days from the date of these reasons to submit a question for certification.

"E. Heneghan"
Judge

Vancouver, BC
July 23, 2008

FEDERAL COURT

SOLICITORS OF RECORD

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