

Federal Court



Cour fédérale

Date: 20100224

Docket: IMM-272-09

Citation: 2010 FC 206

Ottawa, Ontario, February 24, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

KITTS WHITE

By his Litigation Guardian, Juline White

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION and
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by an Immigration Officer dated January 2, 2009, denying the applicant's application for permanent residence on humanitarian and compassionate grounds (H&C) pursuant to section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] The decision under review is a re-determination of the applicant's first H&C application, dated April 25, 2007, pursuant to the Order of Madam Justice Heneghan dated July 23, 2008 and reported in *White (Litigation Guardian of) v. Canada (MCI)*, 2008 FC 896.

FACTS

Background

[3] The thirty-six (36) year old applicant is a citizen of Jamaica. He entered Canada at the age of seven on December 21, 1980 to join his father and became a permanent resident on July 17, 1985. The applicant was ordered removed following his conviction for aggravated sexual assault in 1998. His application for a pre-removal risk assessment (PRRA) was denied, as was his application for leave to apply for judicial review of that decision by this Court. The applicant is currently designated as a danger to the public.

[4] On April 25, 2007 a PRRA Officer denied the applicant's first H&C application. On judicial review, Justice Heneghan set out the evidentiary basis of the applicant's first H&C application at paragraphs 2-4 of her Judgment dated July 23, 2008:

¶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 [17], 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 17 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.

...

¶16 ...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.

[5] Following the completion of his eight-year sentence, the applicant was placed in immigration hold pending removal and has been there ever since. His only source of income is an insurance settlement from the accident which pays out \$6000 a month. The same settlement has also set aside funds in trust for the purchase of a house.

[6] Justice Heneghan held that the decision before her was unreasonable because the Officer mischaracterized the nature of the applicant's disability and failed to consider the circumstances of the applicant's family ties.

[7] On August 21, 2008 the applicant was informed that he could file a second H&C application and was invited to make submissions and file new evidence.

Decision under review

[8] On January 2, 2009 the applicant's second H&C application was refused. The H&C decision considered the matter under the following headings:

- a. Background;
- b. Establishment;
- c. Family ties;
- d. Medical Considerations;
- e. Risk in Jamaica; and
- f. Criminality and danger to the public.

[9] I will highlight under each of the headings pertinent quotes from the decision.

Background

He arrived in Canada as a child and grew up here along with his father and sister, who are both now Canadian citizens. The applicant had been doing well in his life – both at school and sports – until he was tragically involved in a serious car accident in 1991 that left him in a coma for more than one month. After regaining consciousness, the applicant remained severely affected by the accident, both physically and behaviourally. Although he was receiving therapy, he began to develop behaviour problems to the point of committing criminal acts. After a series of convictions culminating in his most serious charge of aggravated sexual assault, a removal order was issued against the applicant, and he lost his status in Canada. ... The applicant receives medication in detention – most recently indicated in April 2007 as a total of nine medications. There is no indication of ongoing counselling/ therapy/ treatment, as the April 2007 letter indicates that there is no group or rehabilitative therapy available at the facility where the applicant is detained.

Establishment

The applicant has lived in Canada for most of his life. ...

Family ties

The applicant's immediate family members are all Canadian citizens living in Canada. He has submitted letters from his family, supporting his H&C application and requesting that he be allowed to stay in Canada. It has been argued that the applicant requires his family ties to keep him on track and that he requires their support. I note that the applicant has not lived with his family in over ten years,

as he has been in detention since June 1998. Prior to his detention in 1998, since the accident in 1991, the applicant had been in treatment facilities, in supervised community living, as well as in his family's care....

As for family ties in Jamaica, it is submitted that the applicant has no family there. ...

While I find that the applicant does have much stronger family ties to Canada than to Jamaica, where he has not lived since his childhood, I note that the applicant has been detained for the past 10 years and has not lived with his family during this time. Though it is submitted that the applicant has daily communication with his father and almost daily communication with his sister, it is not clear how this is carried out, for example by telephone or by visits. ... I note that the applicant could well maintain this type of contact with his family from Jamaica, as given his sizeable monthly settlement payment, he could reasonably afford long distance charges to maintain phone contact, or to even cover the costs of visits from his family to Jamaica from time to time. Related to this I note that the applicant's father and sister are Canadian citizens who could reasonably travel to Jamaica as they have not indicated that such visits would be unreasonable or impractical.

I find that while the applicant's family indeed cares about him, and he about them, their ties/relationship is not such that their daily lives would be impacted by his removal.

Medical Conditions

Following a serious car accident, the applicant was in a coma for just over one month, after which he continued to suffer ongoing health concerns related to the brain injury he acquired, for which he participated in rehabilitation programs at various facilities. It is submitted that the applicant would not receive adequate care in Jamaica.

...

Risk in Jamaica

It has been submitted that the applicant faces a risk from the crime and violence in Jamaica, augmented by his mental disability. Looking at this risk in terms of potential hardship to the applicant, it has not been established that returning to Jamaica given the current conditions and the personal circumstances of the applicant, would

present the applicant with an unusual and undeserved or disproportionate hardship. ...

While crime and violence are problems in Jamaican society, this general problem faces all in the country. ...

Although the general conditions in Jamaica leave much to be desired in terms of public safety and security due to high crime rates, I do not find the general risk from the country conditions to be such that the applicant is faced with unusual and undeserved or disproportionate hardship in returning to such conditions.

Criminality and danger to the public

It is submitted that the applicant's criminality is the result of behavioural changes stemming from the brain injury the applicant suffered at the age of 17, which I accept given the applicant's lack of criminal or violent behaviour prior to the injury, and the record he accumulated after the injury. While this is another unfortunate outcome of the accident for the applicant, it does not exonerate him for his crimes. ...

I note that the applicant has been detained for the past 10 years, serving an eight year sentence for sexual assault with a weapon, following which he remains to this date in detention on immigration hold, as he is considered a danger to the public. While counsel and his family have put together a plan for his release which would allow for around-the-clock family and community care, I note that to date this has not been approved and the applicant remains in detention. ...

LEGISLATION

[10] Section 25 (1) of IRPA allows the Minister to exempt an applicant from any of the requirements of the Act:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on

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, de sa propre initiative ou sur demande d'un

<p>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 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.</p>	<p>étranger se trouvant hors du Canada, 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.</p>
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[11] Sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 grant the following rights to individuals:

<p>7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.</p> <p>...</p> <p>12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.</p>	<p>7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale</p> <p>...</p> <p>12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.</p>
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ISSUES

[12] The applicant raises the following issues:

1. Whether the Officer erred in law in speculating and in ignoring relevant factors and evidence?

2. Whether the Officer erred in law in applying the wrong test for risk of return to his country of origin?
3. Whether the Officer's conclusion is unreasonable?
4. Whether the Officer's decision is in breach of section 7 and section 12 of the *Canadian Charter of Rights and Freedoms*?

STANDARD OF REVIEW

[13] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question”: *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at paragraph 53.

[14] The Federal Court of Appeal recently held in *Kisana v. Canada (MCI)*, 2009 FCA 189, per Justice Nadon at paragraph 18 that the standard of review of an immigration officer's H&C decision is reasonableness: see also my decisions in *Ramotar v. Canada (MCI)*, 2009 FC 362, at paragraphs 9-11; *Ebonka v. Canada (MCI)*, 2009 FC 80, at paragraphs 16-17; *Ruiz v. Canada (MCI)*, 2009 FC 1175, at paragraphs 22-24.

[15] The issues concerning the *Canadian Charter of Rights and Freedoms* are questions of law: *Laranjo v. Canada (MCI)*, 2007 FC 1778 per C.J. Lutfy at paragraph 12.

[16] In reviewing the Officer's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir, supra* at paragraph 47, *Khosa, supra*, at paragraph 59.

ANALYSIS

Madam Justice Heneghan's Judgment

[17] The Reasons for Judgment and Judgment of Justice Heneghan dated July 23, 2008 set aside the applicant's first H&C decision for the following reasons:

1. at paragraph 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 severe brain injury, not mental illness.

2. at paragraph 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.

3. also at paragraph 16:

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.

4. at paragraph 19:

The Officer in the present case mischaracterized the Applicant's disability and ignored the particular circumstances of his family relationships.

For these reasons Justice Heneghan set aside the first H&C decision and remitted it to another Officer for redetermination. That second decision is now before this Court on judicial review.

Judicial Comity

[18] The Court has a duty to show respect for the Judgment of Madam Justice Heneghan dated July 23, 2008 with respect to the same matter. This principle of judicial comity will be followed unless the Court has reason for disagreeing with the previous Judgment. Justice Heneghan found that the first H&C decision did not meet the standard of reasonableness and that the Officer ignored the evidence concerning the applicant's personal circumstances, in particular, the nature of his disability. Moreover, the Officer failed to consider that the applicant has no immediate family in Jamaica, has been living in Canada for a longer period than he ever resided in Jamaica, and that the only reason he lost his permanent resident status in Canada was because of a conviction which 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".

[19] In the case now before me, the second H&C Officer also recognized that the applicant "was tragically involved in a serious car accident in 1991 that left him in a coma for more than one month. After regaining consciousness, the applicant remained severely affected by the accident,

both physically and behaviourally”. The H&C Officer recognized that his behavioural problems from the tragic accident led to him committing the criminal acts.

[20] However, I find that the second H&C decision before me is also unreasonable, for the same reason that Justice Heneghan found that the first H&C decision did not meet the standard of reasonableness because it gives no weight to this tragic accident as being a reason to extend humanitarian or compassionate weight to the applicant. Similarly, the second H&C decision gives no weight to the fact that the applicant has lived in Canada for most of his life, that the applicant is in daily contact with his father and sister in Canada and has no relatives in Jamaica. Moreover, there is no evidence the applicant could arrange for proper supervision and health care for himself in Jamaica considering his major disability caused by the severe brain injury. There is also a real concern that the applicant would probably experience a specialized risk of crime and violence in Jamaica because he is more vulnerable than members of the general public. I see nothing in the second H&C decision to not follow the conclusion of Justice Heneghan that the decision to refuse the H&C application “does not meet the standard of reasonableness”. While the H&C decision before me is different than the H&C decision before Justice Heneghan, the facts are the same with respect to reasonableness. In view of my finding, it is not necessary to separately consider the other issues raised by the applicant.

CERTIFIED QUESTION

[21] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is allowed, the decision of the H&C Officer is set aside, and this matter is referred back to another H&C Officer for redetermination in accordance with these Reasons for Judgment.

“Michael A. Kelen”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-272-09

STYLE OF CAUSE: KITTS WHITE By his Litigation Guardian, Juline White
v. THE MINISTER OF CITIZENSHIP AND
IMMIGRATION and THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 16, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** KELEN J.

DATED: February 24, 2010

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