Federal Court  Cour fédérale

Date: 20130507

Docket: IMM-1594-12

Citation: 2013 FC 482

Edmonton, Alberta, May 7, 2013

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

JASMATTIE DE COITO

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Ms. De Coito, is 59 years-old and a citizen of Guyana of Indian ethnicity. She has lived in Canada with members of her family for over a decade. She left Guyana as a result of a brutal attack on her, her husband, daughter and niece. Thugs broke into their home, assaulted the applicant's husband and gang-raped Ms. De Coito, her daughter and niece. The applicant's husband died as a result of the attack. Tragically, this was the second instance of a similar attack; several years earlier, the applicant's first husband was also attacked and killed in Guyana.

[2] Ms. De Coito applied for refugee status in Canada based on her past experience and the risk to the Indo-Guyanese in Guyana, and her claim was denied. She also sought and was granted a pre-removal risk assessment, which was likewise denied. She made an application for humanitarian and compassionate [H&C] consideration under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA or the Act], which was denied on January 13, 2012 by a Senior Immigration Officer of Citizenship and Immigration Canada. The H&C decision is the subject of the present application for judicial review. Ms. De Coito argues that in rendering a negative decision in her application, the Officer committed several reviewable errors, namely that:

1. The Officer failed to give adequate consideration to the best interests of Ms. De Coito's step-grandson, with whom she is very close;
2. The Officer ignored critical pieces of submitted evidence, including a CD of news clips from Guyana, describing the attack on Ms. De Coito and her family and supplementary submissions from her counsel, containing additional information regarding the alleged hardship her step-grandson would experience if the applicant is removed; and
3. The Officer's treatment of the hardship that the applicant would be likely to suffer if returned to Guyana is unreasonable because the Officer's reasons show she copied from another file and assumed facts that were wholly foreign to Ms. De Coito's situation and because the result reached is unreasonable.

[3] I need only address the final point as in my view the Officer's treatment of the issue of hardship in this case is unreasonable and demands intervention by this Court.

[4] In coming to this conclusion, I recognize that the reasonableness standard of review applies to the Officer's decision and that, in the context of a discretionary decision like the present, the reasonableness standard mandates that considerable deference be given to the decision so that I cannot substitute my views for those of the Officer (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paras 18, 20). To borrow the words of Justice Binnie, writing for the majority in *Khosa v Canada (Minster of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 339 [*Khosa*] at para 62, whether I agree with the Officer's decision is "beside the point" because Parliament entrusted the Officer to make the decision. Put another way, the range of permissible outcomes for a discretionary decision is large (see *Abraham v Canada (Attorney General)*, 2012 FCA 266 at para 42; *Diabate v Canada (Minister of Citizenship and Immigration)*, 2013 FC 129 at para 24).

[5] That said, discretionary decisions are not immune from review if the results reached are unreasonable nor is the range of permissible outcomes without bounds. The Supreme Court of Canada's recent jurisprudence elucidating the content of the reasonableness standard makes clear that a reviewing court must examine both the reasoning process and the outcome reached in evaluating whether an administrative tribunal's decision is reasonable. As noted by the majority in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190, "A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes." Similarly, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14, Justice Abella, writing for the Court held that, "[T]he reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible

outcomes." Justice Abella recently confirmed in *Doré v Barreau du Québec*, 2012 SCC 12 that the requirement of a reviewing court to assess both reasons and outcome applies to discretionary decisions.

[6] The instances where review is warranted due to the unreasonable nature of the result reached by a tribunal in making a discretionary decision will be few and far between because it is not for the reviewing court to reweigh the factors considered by the tribunal, provided the factors it considered are the relevant ones (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 37, [2002] 1 SCR 3). Where, however, the tribunal fails to consider the relevant factors or considers irrelevant ones in coming to its decision, the case law has long recognised that such failure will provide the basis for intervention (see e.g. *Maple Lodge Farms Ltd v Canada*, [1982] 2 SCR 2, 137 DLR (3d) 558).

[7] In addition, if a tribunal merely lists a key relevant consideration but then ignores that factor so as to effectively denude it of content, review may be warranted. This, in fact, is what occurred in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39 where the Supreme Court set aside an H&C decision, in part because the officer who made the decision so diminished the interests of the affected children that he in effect ignored them. Writing for the majority in that case, Justice L'Heureux-Dubé wrote at para 66:

> The wording of s. 114(2) and of Regulation 2.1 requires that a decision-maker exercise the power based upon "compassionate or humanitarian considerations" (emphasis added). These words and their meaning must be central in determining whether an individual H & C decision was a reasonable exercise of the power conferred by Parliament. The legislation and regulations direct the Minister

> to determine whether the person's admission should be facilitated owing to the existence of such considerations. They show Parliament's intention that those exercising the discretion conferred by the statute act in a humanitarian and compassionate manner. This Court has found that it is necessary for the Minister to consider an H & C request when an application is made […] Similarly, when considering it, the request must be evaluated in a manner that is respectful of humanitarian and compassionate considerations.

[8] Here, the Officer's decision is unreasonable because she cut and pasted from reasons in another matter and used those reasons to justify rejecting Ms. De Coito's claim that she would suffer unusual, undeserved or disproportionate hardship if she were returned to Guyana. The Officer wrote as follows:

> […] I find that should the applicant need to re-establish herself in Guyana, it would be reasonable to assume that she would have the support and assistance of their other son and the principal applicant's siblings, and be able to apply their restaurant entrepreneur skills and/or their Canadian work experience to assist them in obtaining employment. Thus, I find that should he return to Trinidad, the elements assessed here would not contribute to a hardship that is unusual and undeserved or disproportionate.

[9] Ms. De Coito is a woman, is not from Trinidad, has never worked in a restaurant and does not have a son in Guyana. Thus, nothing in the preceding paragraph applies to her situation. The respondents argue that these are merely clerical errors as the Officer elsewhere accurately set out the facts pertaining to Ms. Ms. De Coito's claim. The respondents therefore assert that the errors made by the Board do not warrant intervention.

[10] I disagree. Contrary to the respondents' position, these factual errors are at the very heart of the Officer's reasoning in this case. The failure to accurately appreciate and analyze the applicant's situation renders the Officer's decision unreasonable.

[11] While the latter conclusion is determinative of this application, I would also note that the conclusion reached by the Officer appears to fall outside the range of reasonable outcomes. The purpose of H&C discretion is discussed in the respondents' Inland Processing Manual 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds, which provides (at s 2):

> The purpose of H&C discretion is to allow flexibility to approve deserving cases not covered by the legislation. This discretionary tool is intended to uphold Canada's humanitarian tradition. Use of this discretion should not be seen as conflicting with other parts of the Act or Regulations but rather as a complementary provision enhancing the attainment of the objectives of the Act.

[12] This purpose has likewise been recognized by Justice L'Heureux-Dubé in *Baker* where she noted at para 15:

> Applications for permanent residence must, as a general rule, be made from outside Canada, pursuant to s. 9(1) of the Act. One of the exceptions to this is when admission is facilitated owing to the existence of compassionate or humanitarian considerations. In law, pursuant to the Act and the Regulations, an H & C decision is made by the Minister, though in practice, this decision is dealt with in the name of the Minister by immigration officers […] In addition, while in law, the H & C decision is one that provides for an exemption from regulations or from the Act, in practice, it is one that, in cases like this one, determines whether a person who has been in Canada but does not have status can stay in the country or will be required to leave a place where he or she has become established. It is an important decision that affects in a fundamental manner the future of individuals' lives. In addition, it may also have an important impact on the lives of any Canadian

> children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections.

[13] The result reached in this case is difficult to reconcile with the purpose of the H&C provisions in the Act and the notion that consideration needed to be given to Canada's humanitarian tradition. If the applicant is not deserving of this exceptional treatment, it is hard to see who would be. As counsel for the applicant noted, if Ms. De Coito is not granted H&C consideration, she will not likely be able to return to Canada except, perhaps, on a temporary basis and thus will be required to live in Guyana, where she has no real roots and experienced significant trauma. It is difficult to imagine someone more deserving of compassionate consideration than a 59 year-old grandmother who lost two husbands in brutal murders, experienced gang-rape and witnessed her daughter and niece being gang-raped, and would be forced to return to the country these events occurred, where she has not lived for over 10 years and has few remaining connections. This would appear to be exactly the sort of case Parliament had in mind when it provided the Minister of Citizenship and Immigration discretion to waive compliance with the IRPA.

[14] For these reasons, the Officer's decision will be set aside and the matter remitted to the respondents for reconsideration in accordance with this decision. No question of general importance under section 74 of the IRPA was proposed and none arise in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This application for judicial review of the Officer's decision is granted and the Officer's decision of January 13, 2012 is set aside;
2. The applicant's H&C claim is remitted to the respondent, Minister of Citizenship and Immigration, for re-determination by a different officer;
3. No question of general importance is certified; and
4. There is no order as to costs.

"Mary J.L. Gleason"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1594-12
STYLE OF CAUSE:	*Jasmattie De Coito v The Minister of Citizenship and Immigration and The Minister of Public Safety and Emergency Preparedness*
PLACE OF HEARING:	Toronto, Ontario
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