Date: 20020326

Docket: IMM-606-01

Neutral citation: 2002 FCT 342

BETWEEN:

MARIA IZILDA ROCHA CARREIRO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>REASONS FOR ORDER</u>

<u>NADON J.</u>

[1] This is an application for judicial review of a decision made by Karen G. Gordon, an immigration officer, on January 24, 2001. The immigration officer refused to exempt the applicant from the requirement, set forth at subsection 9(1) of the *Immigration Act* (the "Act"), that every immigrant must apply for and obtain an immigration visa prior to coming to Canada. Subsection 9(1) of the Act reads as follows:

9. (1) Except in such cases as are prescribed, and subject to subsection (1.1), every immigrant and visitor shall make an application for and obtain a visa before that person appears at a port of entry.	**9. (1)** Sous réserve du paragraphe (1.1), sauf cas prévus par règlement, les immigrants et visiteurs doivent demander et obtenir un visa avant de se présenter à un point d'entrée.

[2] The applicant, prior to coming to Canada, did not comply with subsection 9(1) of the Act. While in Canada, she applied for an exemption on humanitarian and compassionate grounds, pursuant to subsection 114(2) of the Act.

[3] In *Anastassia Tartchinska and Alexandre Tartchinski v. M.C.I.*, March 20, 2000, IMM-6104-98, the applicants were seeking an order setting aside a decision made by an immigration officer with respect to whether they should be exempted, on humanitarian and compassionate grounds, from making their visa application from outside Canada. At paragraphs 18 and 19, I made the following remarks:

[18] It is clear that exemptions for humanitarian and compassionate reasons are discretionary and that an applicant is not entitled to a particular outcome. In order to successfully attack a negative decision, an applicant must show that the decision-maker erred in law, acted in bad faith, or proceeded on an incorrect principle: *Baker v. Canada (Minister of Citizenship and Canada)*, (1999) 174 D.L.R. (4th) 193 (S.C.C.); *Shah v. M.E.I.*, (1994) 23 Imm. L.R. (2d) 82 (F.C.A.); *Ogunfowora v. M.C.I.*, 41 Imm. L.R. (2d) 75 (F.C.T.D.).

[19] The Supreme Court in *Baker, supra* made it clear that the standard of review in humanitarian and compassionate ground applications is reasonableness. Accordingly, if the impugned decision is based on reasons that can withstand [sic] somewhat probing examination, this Court is not empowered to alter that decision. In my view, the immigration officer's decision withstands a somewhat probing examination and is reasonable in light of all the circumstances discussed below.

[4] After a careful review of all of the evidence and consideration of counsel's submissions, both oral and written, I have come to the conclusion that the applicant has not demonstrated that the immigration officer erred in law, acted in bad faith, or proceeded on an incorrect principle. My reasons are as follows.

[5] I will begin by setting out the relevant facts as they were summarized by the immigration officer in her "Report to File", dated January 24, 2001. The summary appears under the heading "Case Details as provided by counsel in his submissions dated 17 February 2000" and reads as follows:

Family in Canada:

- The applicant has been reliant on her family in Canada for support and now she contributes back to the family by taking care of her mother

- Most of her family is residing in Canada - including her mother, two brothers and two sisters. They are all Canadian citizens

- Her mother resides with the applicant's sister in Port Coquitlam. The applicant lives in a separate basement suite of the house

- The applicant's sister Maria Angela Young and her husband own the house and are happy to have the applicant live with them. Ms. Young and her husband have signed an Undertaking to Assist the applicant

- The applicant's brother Angelo da Rocha Carreiro and his wife live in New Westminster and have signed an Undertaking to Assist the applicant

- The applicant's sister Maria Rosa Bettencourt-Pinto and her husband live in Pitt Meadows and have signed an Undertaking to Assist the applicant

Background:

- The applicant grew up in the Azores and was only able to attend school until the age of eleven because of the family's financial situation

- At age eleven started working cleaning in a factory. At age fifteen she started work in a maternity ward of a hospital looking after the babies. At age seventeen she began working in an office doing general secretarial work. She has received training in this area

- The applicant was married to David Taylor, a British citizen, on 15 December 1975. Their first child Michelle was born in Canada on 16 August 1980. Her family in Canada wanted her to be with them when she had the child. She remained in Canada for one month after the birth of her daughter

- For the next eight years the applicant lived in England with her husband. She was employed as a cleaner in a bank. They had their second child, Michael, on 20 May 1986 in England

- The marriage broke down in 1988. The breakdown was emotionally traumatic and the applicant returned to Portugal where some of her family members remained. She left her children with her husband, hoping to get custody of them later through the British courts. In 1990 her husband began divorce proceedings and was able to obtain the divorce and custody of the children. She did not have the financial resources to challenge the divorce and she was not awarded any maintenance or support. They applicant has not seen her children since she left England.

- The applicant lived with her sister Conceicao in Portugal. The house was very crowded and the applicant had to sleep on the floor, as she could not have a room to herself. She worked around the house to help out. Her family in Canada sent money to her for support - her mother would send her money every month and her siblings would send money periodically

- The applicant came to Canada in 1995 for a three month visit

- The applicant moved away from her sister's house in Portugal in 1998, as it was not a good environment to live in. Her sister and her sister's boyfriend would fight and drink all of the time.

- The applicant then moved in with her sister Goretti but this did not work out either. Her sisters [sic] had three daughters and grandchildren living with her as well and there was no room in the house for the applicant

- The applicant moved in with her aunt before coming to Canada but her aunt could not accommodate her for a lengthy period

- The applicant's sister Rosa was visiting Portugal in July 1999 and invited the applicant to come back [sic] her to Canada for a visit

Reasons for humanitarian and compassionate application as provided by counsel in his submissions dated 17 February 2000:

- After the applicant came to Canada in August 1999 her family here decided that it would be better if the applicant lived here in Canada with them

- They are a close family and love the applicant very much

- The family in Canada are in a much better position to help the applicant

- The applicant can continue to live with her sister Angela and all of the family members are willing to assist in supporting the applicant financially

- The applicant also receives a pension of her own from the Portuguese government

- The applicant needs to remain to take care of her mother, who has been diagnosed with hypertension, type 2 diabetes, obesity, angina pectoris, osteoarthritis, depression and congestive heart failure. She is not able to manage most of her daily personal care and requires strict supervision in the administration of her medication.

- In the opinion of the mother's doctor, Peter Chung, MD, "*she would greatly benefit from personal care best delivered by her daughter currently residing in Portugal as she speaks her language and understands her needs"*.

- The applicant's brothers and sisters all have families of their own and are working full time jobs. They are not able to provide the daily personal care that their mother needs.

[6] In January 2000, the applicant applied, pursuant to section 114 of the Act, for an exemption on the basis of humanitarian and compassionate grounds and on November 6, 2000, the immigration officer wrote to the applicant in the following terms:

I write concerning your application for permanent residence in Canada. I am currently reviewing your application. As your application was received in February 2000, I am now inquiring as to whether you wish to submit any additional information in support of your application.

If circumstances have changed since February 2000, or you wish to have additional information in support of your application considered, please submit this information no later than **15 December 2000.** **Please note that an interview may or may not be scheduled.**

[7] As it appears from the above letter, the immigration officer gave the applicant six weeks to submit additional information in support of her application for an exemption. No further information was provided by the applicant.

[8] On January 24, 2001, the immigration officer wrote to the applicant, advising her that her application had been refused. The January 24, 2001 letter reads, in part, as follows:

This refers to your request for processing from within Canada on humanitarian and compassionate grounds.

In order for your request to be approved, humanitarian and compassionate considerations are assessed to determine whether an exemption from subsection 9(1) of the *Immigration Act*, the requirement to apply for and obtain an immigrant visa prior to coming to Canada, will be granted.

I, as a delegate of the Minister of Citizen and Immigration, reviewed the individual circumstances of your request for an exemption from the requirement of subsection 9(1) and decided that an exemption **will not** be granted for your application.

[9] In his Memorandum of Fact and Law, Mr. Elgin, counsel for the applicant, sets forth, as follows, the issue to be determined: "Did the Immigration Counsellor err in failing to give the Applicant an opportunity to respond to her concerns?" More particularly, Mr. Elgin's position is that the immigration officer ought to have interviewed his client before reaching a decision, so as to allow her an opportunity to clarify the issues which may not have been "clear" to her. Mr. Elgin also submits, in the alternative, that when writing to his client on November 6, 2000, the immigration officer ought to have posed questions to the applicant, in order to clarify matters in regard to which she had concerns or in regard to which she felt clarification was required.

[10] The respondent, relying on the Supreme Court of Canada's decision in *Baker v. Canada (MCI)*, [1999] 2 S.C.R. 817, takes the position that the immigration officer was under no duty nor obligation to interview the applicant. Specifically, the respondent relies on paragraph 34 (pages 843-844) of Madam Justice L'Heureux-Dubé's reasons in *Baker, supra*, where she states:

I agree that an oral hearing is not a general requirement for H & C decisions. An interview is not essential for the information relevant to an H & C application to be put before an immigration officer, so that the humanitarian and compassionate considerations presented may be considered in their entirety and in a fair manner. In this case, the appellant had the opportunity to put forward, in written form through her lawyer, information about her situation, her children and their emotional dependence on her, and documentation in support of her application from a social worker at the Children's Aid Society and from her psychiatrist. These documents were before the decision-makers, and they contained the information relevant to making this decision. Taking all the factors relevant to determining the content of the duty of fairness into account, the lack of an oral hearing or notice of such a hearing did not, in my opinion, constitute a violation of the requirements of procedural fairness to which Ms. Baker was entitled in the circumstances, particularly given the fact that several of the factors point toward a more relaxed standard. The opportunity, which was accorded, for the appellant or her children to produce full and complete

written documentation in relation to all aspects of her application satisfied the requirements of the participatory rights required by the duty of fairness in this case.

[11] The respondent also relies on a number of cases for the proposition that an immigration officer is under no duty to provide to an applicant an opportunity to clarify or explain the information submitted in support or his or her application. In *Dhillon v. MCI*, [1998], F.C.J. No 574, Court File No. IMM-3098-97, dated May 5, 1998, at paragraphs 3-4, Rothstein J. (as he then was) stated that:

[3] [...] A visa officer may offer assistance, counselling or advice or obtain clarification. However, there is no obligation that is imposed upon visa officers by law to do so. There was no duty on the visa officer to give the applicant a further opportunity to clarify or explain the evidence that had been submitted.

[4] I conclude that the visa officer did not err in not giving the applicant an opportunity for further clarification. The judicial review must be dismissed.

[12] In her Report to File, dated January 24, 2001, the immigration officer sets forth both the positive and negative factors in regard to the exemption sought by the applicant. She then sets out the reasons which lead her to conclude that the applicant ought not to be exempted from the requirement of subsection 9(1) of the Act. I have carefully read, on a number of occasions, the immigration officer's reasons and, in my view, they certainly withstand a probing examination. In light of all the evidence, the immigration officer's decision is not unreasonable.

[13] The applicant argues that the immigration officer ought to have interviewed her. The law is clear that as a general rule, there is no duty on immigration officers to interview applicants. Nor is there a duty upon immigration officers to seek clarification of information provided by an applicant. In *Bara v. MCI*, [1998], F.C.J. 992, Court File No. IMM-32986-97, dated July 6, 1998, Richard A.C.J. (as he then was) made the following remarks at paragraph 15:

[15] The officer is not required to put before the applicant any tentative conclusions he may be drawing from the material before him, not even as to apparent contradictions that concern him. However, if he relies on extrinsic evidence, not brought forward by the applicant, he must give him a chance to respond to the evidence.

[14] In the present matter, the immigration officer did not rely on extrinsic evidence, but rather on the evidence provided both by the applicant and her counsel. She made a thorough analysis of that evidence and concluded that sufficient humanitarian and compassionate grounds did not exist to warrant an exemption from the normal visa requirement. A reading of the immigration officer's Report to File makes it abundantly clear that she was not persuaded by the evidence submitted that an exemption was justified. On a number of occasions in her reasons, the immigration officer uses the words "insufficient evidence".

[15] The applicant seems to be under the impression that the immigration officer was "unclear" regarding some of the issues raised by her application. It is on that assumption that the applicant argues that the immigration officer ought to have interviewed her or, at the very least, ought to have posed questions for her to answer. That, in my view, is a mistaken view of the decision rendered by the immigration officer.

[16] The applicant was, no doubt, afforded an opportunity to be heard. Following her initial application for an exemption, Mr. Elgin sent a letter dated February 17, 2000, enclosing his submissions on behalf of the applicant, with regard to her humanitarian and compassionate application. The applicant was provided with a further opportunity to provide information when the immigration officer wrote to her on November 6, 2000, indicating that additional information would be considered if submitted no later than December 15, 2000.

[17] How can it be said, in these circumstances, that the applicant was not afforded a full opportunity to present her case? In my view, it cannot be so said.

[18] I agree entirely with the respondent that the applicant's submissions herein amount to an argument that exemptions from subsection 9(1) of the Act should be granted, unless the immigration officer can somehow justify his or h er denial. That, in my view, is a mistaken view of the law. At page 852, para. 51, of her Reasons in *Baker, supra*, Madam Justice L'Heureux-Dubé makes the following remarks:

As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that "[t]he Minister <u>is ... authorized to</u>" grant an exemption or otherwise facilitate the admission to Canada of any person "<u>where the Minister is satisfied</u> that" this should be done "owing to the existence of compassionate or humanitarian considerations". This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries.

[...]

Administrative law has traditionally approached the review of decisions classified as discretionary separately from those seen as involving the interpretation of rules of law. The rule has been that decisions classified as discretionary may only be reviewed on limited grounds such as the bad faith of decision makers, the exercise of discretion for an improper purpose, and the use of irrelevant considerations: [...] In my opinion, these doctrines incorporate two central ideas - that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the

scope of the decision-maker's jurisdiction. These doctrines recognize that it is the intention of a legislature, when using statutory language that confers broad choices on administrative agencies, that courts should not lightly interfere with such decisions, and should give considerable respect to decision makers when reviewing the manner in which discretion was exercised. However, discretion must still be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, [...], in line with general principles of administrative law governing the exercise of discretion, [...]

[19] As Madame Justice L'Heureux-Dubé makes clear in *Baker, supra*, an applicant is not entitled to a particular outcome. As long as the decision-maker makes his or her decision within "the bounds of the jurisdiction conferred by the statute", that decision will not be interfered with, unless there is evidence that the decision was made in bad faith, that the discretion was exercised for an improper purpose, or that the decision-maker took into account irrelevant considerations. The applicant has not satisfied me of the existence of any grounds which would justify the setting aside of the impugned decision.

[20] Counsel for the applicant concludes his Memorandum of Fact and Law, at paragraph 26, in the following terms:

26. Although there is no requirement for an interview as part of the process towards making a decision on a humanitarian and compassionate application, providing an interview would have been the fairest way for the Immigration counsellor to give the Applicant an opportunity to clarify those matters that were not "clear" to the Immigration Counsellor. In the alternative, a few simple questions posed to the Applicant in the Immigration Counsellor's letter of November 6, 2000, could have clarified matters immensely. For example, since the Immigration Counsellor was not willing to accept counsel's submissions that the Applicant could not live with her sisters in Portugal, she could have requested independent confirmation of this from the Applicant or her sisters. If the reason that the Applicant could not live on her own in Portugal was not clear to the Immigration Counsellor, she could have requested further information about the Applicant's available income in Portugal. Furthermore, if the Immigration Counsellor required further letters of support from the Applicant's family in Canada, in addition to the strong evidence of support already provided, the Immigration Counsellor could have asked for it.

[21] As I have already indicated, that submission rests, in my view, on a misconception. If some matters were "unclear", as far as the immigration officer was concerned, that is because of the quality of the evidence submitted. In those circumstances, the immigration officer was under no duty to seek out the applicant for purposes of obtaining better evidence to support the applicant's case.

[22] I am therefore of the view that this application should be dismissed.

Marc Nadon

JUDGE

O T T A W A, Ontario

March 26, 2002

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