

Date: 20070731

Docket: IMM-5343-06

Citation: 2007 FC 806

Ottawa, Ontario, July 31, 2007

PRESENT: The Honourable Madam Justice Simpson

BETWEEN:

THI THIET TRAN

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated August 24, 2006 (the Decision) by an Immigration Officer (the Officer) denying Thi Thiet Tran's application for permanent residence which she made from within Canada on humanitarian and compassionate grounds (the H&C Application) pursuant to section 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

I. Background

[2] Mrs. Thi Thiet Tran (the Applicant) is a 42-year-old citizen of Vietnam who, before coming to Canada, worked as a farm labourer. She is married and has four children. One is an adult. Her husband and children are in Vietnam.

[3] On April 26, 2004, the Applicant entered Canada on a visitor's visa for the purpose of donating a kidney to her brother, Mr. Hoa Than Tran. He is a Canadian citizen who by 2004 had been on British Columbia's transplant waiting list for two years and was suffering from acute renal failure.

[4] The Applicant says and it is not disputed, that as a result of donating her kidney, she developed a severe case of psoriasis which, at the time of the Decision, had not responded to treatment. In this regard, the Applicant submitted two medical opinions in support of her H&C Application. One from her general practitioner, Dr. Benjamin Chou, M.D. dated January 4, 2005 (in error, it was actually written in January 2006) and a second from a dermatologist, Dr. Nhiem Nguyen, M.D. dated October 4, 2005.

[5] Dr. Chou first saw the Applicant in April 2005 because she had developed a rash on her scalp. He examined her a total of four times – the last visit was in mid-June 2005. During that period, the rash worsened significantly and extended on a widespread basis to the rest of her body.

[6] Dr. Chou's letter concluded as follows:

Ms. Tran's condition could seriously limit her in a physically demanding occupation such as farming and unquestionably this disease would be much better managed here in Canada rather than in rural Vietnam.

[7] Dr. Nguyen first saw the Applicant on August 5, 2005, in connection with what he described as a recent and extensive skin eruption. The lesions which covered almost her entire scalp, and which were numerous on her back, arms and legs, were treated with steroid injections. However, when Dr. Nguyen next saw the Applicant on October 4, he noted only a slight improvement.

[8] Dr. Nguyen concluded that the Applicant had psoriasis and described the disease as follows:

This patient's skin manifestations were consistent with psoriasis. This is a common genetically determined proliferative disease of the skin, characterized by seven times too fast epidermal cell turnover. Its duration may vary from a few weeks to a whole life-time; it may pursue an unpredictable course with spontaneous improvement or exacerbation of the lesions without discernable [discernible] causes, or under the influence of environment factors, seasonal variations, cutaneous injuries or adverse life events and psychologic distress.

[9] He then spoke of the Applicant's future in the following terms:

If her current skin condition continues to progress and to possibly extend to [a] generalized psoriatic erythroderma, her life as a farm worker in [a] hot climate would be impossible.

[10] Finally, he described her treatment:

Mrs. Tran's current treatment includes topical steroid lotion to her scalp and a combination of steroid and vitamin D analogues ointment to the rest of her body skin. Trials of supervised photo-therapy at the UBC Skin Care Centre, systemic anti-metabolites, or Retinoids would be considered in the next follow-up visit.

[11] In a letter dated January 10, 2006 (the H&C Submission) counsel for the Applicant noted that the Applicant's brother (the one who received her kidney) and his wife were prepared to sponsor the Applicant and her family.

[12] The H&C Submission also described the Applicant's prospects as a farm worker in rural Vietnam in the following terms:

Once capable of handling the toil and vigorous duties of working in a farm in the heat and humidity of rural Vietnam, she now finds herself weakened and in a very much diminished condition. She is stricken by persistent anxiety, listlessness, depression and fatigue. She is unfit to resume the physically demanding jobs required of farm workers....

II. Standard of Review

[13] The parties agree and I accept that in light of the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*) at para. 57 and following, the Officer's Decision is reviewable on the standard of reasonableness *simpliciter*. The question is whether the Decision was reasonable or "tenable". That is, after a "somewhat probing examination", can the Officer's reasons, when taken as a whole, support his decision to deny the H&C Application. As long as the Decision is "tenable", the reviewing court is not to substitute its own decision merely because it would have decided differently. It is not the role of the court to re-weigh the evidence.

III. The Context

[14] The Decision was made under section 25(1) of the Act. It provides for an exemption from the provisions of section 11(1) of the Act and reads as follows:

Humanitarian and compassionate considerations Séjour pour motif d'ordre humanitaire

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.

[my emphasis]

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.

[je souligne]

[15] The Ministerial Guidelines, found in Citizenship and Immigration Canada's Manual IP 5 entitled "Immigrant Applications in Canada made on Humanitarian and Compassionate Grounds" (2005-06-09) (the Guidelines), describe humanitarian and compassionate grounds. The pertinent passages read as follows:

6.5 Humanitarian and compassionate decision

A positive H&C decision is an exceptional response to a particular set of circumstances. An H&C decision is more complex and more subjective than most other immigration decisions because officers use their discretion to assess the applicant's personal circumstances.

Applicants must satisfy the decision-maker that their personal circumstances are such that they would face unusual, undeserved, or disproportionate hardship if required to apply for a permanent resident visa from outside Canada.

6.7 Unusual and undeserved hardship

...

The hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would face should be, in most cases, unusual, in other words, a hardship not anticipated by the Act or Regulations; and

the hardship (of having to apply for a permanent resident visa from outside Canada) that the applicant would face should be, in most cases, the result of circumstances beyond the person's control.

6.8 Disproportionate hardship

Humanitarian and compassionate grounds may exist in cases that would not meet the "unusual and underserved" criteria but where the hardship (of having to apply for a permanent resident visa from outside of Canada) would have a disproportionate impact on the applicant due to their personal circumstances.

IV. The Decision

[16] The gravamen of the Decision appears in the following passage:

...I note the unpredictable nature of psoriasis, as presented by her physician (Dr. Nguyen). This condition could last for a few weeks or up to a lifetime. The applicant is currently receiving treatment for this condition. The treatment is in the form of steroids and vitamin creams. It was reported by her physician that if this treatment is unsuccessful then they would consider an alternate remedy of photo light treatment to control the symptoms associated with psoriasis. While it may be desirable to remain in Canada to complete treatment, the applicant has not demonstrated that she would not be able to receive treatments in Vietnam. While I accept that the physician's

report that the applicant's skin condition may worsen if returned to Vietnam, I expect there are medical facilities in Vietnam that could provide the applicant with the appropriate medical care. I am not satisfied that this factor is sufficient to warrant an exemption from applying outside of Canada.

[my emphasis]

VI. Discussion

[17] The following facts were not in issue when the Decision was made:

- The Applicant's organ donation and the associated stress triggered the outbreak of psoriasis. The Applicant had never before suffered from psoriasis.
- The outbreak was extensive and not responding to treatment at the time the Decision was made.
- The Applicant suffered a large number of itchy sores which had practically covered her head and which were present on most parts of her body. Some sores were open.
- When the Decision was made, it was not known how long the disease would last or how severe it would be.
- Further it would have been highly unpleasant, if not impossible, for the Applicant to resume work as a farm labourer in the tropical heat of rural Vietnam with the disease as it was at the time of the Decision.
- The medical evidence showed and the Officer acknowledged that the heat in Vietnam would worsen the Applicant's condition.

[18] Simply stated, the Decision to deny the H&C Application meant that, a woman who had donated her kidney to save her brother and who was covered with sores as a result, would be sent back to rural Vietnam where her condition which was not responding to treatment, would be exacerbated and where it would be highly unpleasant, if not impossible, for her to work as a farm labourer. In my view, it is difficult to imagine a more compelling case of unusual, undeserved and disproportionate hardship.

[19] However, the Respondent says that, because the Applicant adduced no evidence about the availability of treatment in Vietnam, the Officer's Decision was reasonable. With respect, I do not agree. The Officer's Decision was not entirely based on the Applicant's failure to adduce evidence about treatment in Vietnam. In the absence of such evidence, the Officer said that he "expected" that there would be medical facilities in Vietnam that could provide the Applicant with the appropriate medical care. Being unable to find unusual, undeserved or disproportionate hardship because an applicant has adduced insufficient evidence is one thing; speculating as to the quality of a distant nation's medical facilities and care in the absence of any evidence is another. In my view, this speculation was an important component of the Decision and since it was not supported by any evidence, it is untenable.

VII. Conclusion

[20] For all these reasons, I have concluded that the Decision was not reasonable.

JUDGMENT AND DIRECTION

UPON noting that no questions were posed for certification pursuant to section 74 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and for the reasons given above;

THIS COURT ORDERS THAT the application for judicial review is allowed and the H&C Application is to be re-determined by a different immigration officer who is hereby directed to grant the H&C Application.

“Sandra J. Simpson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5343-06

STYLE OF CAUSE: THI THIET TRAN
v.
MINISTER OF CITIZENSHIP
AND IMMIGRATION

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