Date: 20071001

Docket: IMM-1280-06

Citation: 2007 FC 987

Ottawa, Ontario, October 1, 2007

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

OSCAR ALEX DIAZ RIVERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) for judicial review of a decision of an immigration officer dated February 20, 2006, wherein the applicant was found to be ineligible to apply for permanent residence under the permit holder class.

Background

[2] The applicant, Oscar Diaz Rivera is a citizen of Honduras. He entered Canada in September 1987 and claimed refugee status upon arrival. In 1988, he was examined and found to have a claim with a credible basis and in 1992, was accepted under the *Backlog Clearance Regulations* on humanitarian and compassionate (H&C) grounds. He passed the required criminality and security checks in 1993, but his application for permanent residence was stalled as a result of the applicant being charged with a number of criminal offences in February 1993.

[3] The charges were withdrawn in April 1995, but by that time the applicant's medical exam had expired, and he was required to have another exam. The applicant's medical report was issued in May 1996, and it showed that the applicant had been diagnosed with HIV. Consequently, the applicant was found to be medically inadmissible under paragraph 19(1)(a) of the *Immigration Act*, R.S.C. 1985, c. I-2, (the former Act).

[4] The applicant requested Ministerial relief and in 1998, Citizenship and Immigration Canada (CIC) recommended that the applicant be issued a Minister's permit. Despite the positive recommendation, which was approved by a visa officer, the officer's supervisor and the officer's manager, the applicant never received a permit because his file was referred for further review.

[5] A second positive recommendation was issued on December 21, 2000. In a letter dated January 4, 2001, the applicant received notice that his application for a Minister's permit had been

approved, but he did not receive the actual permit until April 2001. The permit was signed on April 23, 2001, and was valid until January 4, 2004. The permit was in force as of January 5, 2001. The letter dated January 4, 2001 also informed the applicant that foreign nationals with at least five years of continuous residence in Canada on a Minister's permit may request landing by the Governor-In-Council under subsection 38(1) of the former Act.

[6] The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) came into force in July 2003. Under IRPA, Minister's permits are referred to as temporary resident permits (TRP). A TRP holder may apply for permanent residence if he or she is a member of the permit holder class pursuant to section 65 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations). Paragraph 65(b)(a) of the Regulations states that in order to qualify as a member of the permit holder class, a foreign national who is inadmissible on health grounds must have continuously resided as a permit holder in Canada for a period of at least three years.

[7] In April 2004, the applicant submitted an application for permanent residence as a member of the permit holder class. In a decision letter dated February 20, 2006, the applicant was informed that he was not eligible to apply as a member of the permit holder class. This is the judicial review of that decision.

Officer's Reasons

[8] The officer's decision, dated February 20, 2006, found that the applicant was not eligible to apply for permanent residence under the permit holder class. The relevant portion of the decision states:

> In order to be eligible under this class you must have been in possession of a Temporary Resident Permit for a period of 3 years or 5 years depending on the circumstance. A review of your case history indicates that on 23/4/01 you were issued a Temporary Resident Permit for a medical inadmissibility. This permit was valid until 4/1/04. According to our records, no extension was applied for, nor granted and as such you are not eligible to apply for permanent residence under this class, as you have not completed the required time period.

[9] The relevant portion of the CAIPS notes read as follows:

> A REVIEW OF THE CASE INDICATES THAT PERMIT WAS ISSUED 23/4/01 AND VALID UNTIL 4/1/04. FOR A MEDICAL INADMISSIBLITY. NO EXTENSION WAS REQUESTED, NOR GRANTED. THEREFORE HE HAS NOT SERVED THE REQUIRED TIME PERIOD ON THE PERMIT.

[10] On May 29, 2007, the parties informed the Court that both parties agreed that the application for judicial review should be granted but they could not agree on the form of the order to be issued.

[11] **Issue**

What order should issue?

Parties' Submissions

[12] The applicant requested an order with the following terms:

i) the February 20th 2006 decision denying the Applicant's application for permanent residence in the Temporary Resident Permit Holders Class be set aside;

ii) the Applicant's permanent residence application be re-assessed by a different Immigration Officer on the basis that the Applicant is a member of the Permit Holders Class under ss. 64 and 65 of the Immigration and Refugee Protection Regulations;

iii) the Applicant's permanent residence application be re-assessed within 6 months of the date of This Honourable Court's Order allowing the application for judicial review;

iv) The Court remain seized of this matter, and should the Applicant's application for permanent residence not be re-assessed within six months, The Court will re-consider the need to set a further deadline;

v) The Applicant shall be issued a Temporary Resident Permit pending the re-assessment of his permanent residence application; and

vi) Costs shall be awarded and assessed by This Honourable Court at the hearing;

The applicant requested costs on a solicitor and client basis.

[13] The respondent agreed to the inclusion of paragraph i) in the order, but disagreed with the remaining proposed terms.

Decision

[14] With respect to paragraph ii), I am only prepared to include the following in the order, "The applicant's permanent residence application be re-assessed by a different immigration officer." I am not prepared to include the remainder of the paragraph as I believe further findings must be made by an officer to determine whether the applicant is a member of the permit holder's class.

[15] I am not prepared to include paragraph iii) in the order as I am not aware how long such a reassessment should take, but I would urge the respondent to do the reassessment in a timely manner.

.

[16] I am not prepared to remain seized of the matter as I have not imposed the six month time limit requested by the applicant. In any event, the applicant can apply to the Court if he believes his reassessment is not being dealt with in a timely manner.

[17] With respect to paragraph v), I am not prepared to order the inclusion of this paragraph as this is not the role of the Court, but the role of the immigration officer.

[18] The applicant has requested costs on a solicitor and client basis in this matter. Pursuant to Rule 22 of the *Federal Court Immigration and Refugee Protection Rules*, S.O.R./93-22, special reasons must exist before costs can be awarded. I am not satisfied that special reasons exist in this case so as to allow an award of costs. It seems to me that the officer simply made an error in dealing

with the document. The record would appear to indicate that neither party noticed the error until late in the proceedings. As no costs are awarded, it follows that the applicant cannot be awarded costs on a solicitor and client basis.

[19] The application for judicial review is allowed (consent of the parties) and the matter is referred to a different officer for redetermination.

[20] The applicant submitted the following proposed serious questions of general importance for my consideration for certification:

> Does the Federal Court Trial Division have jurisdiction to direct the Minister to declare an applicant to be member of the Permit Holders Class pursuant to s. 18.1 of the *Federal Court Act*?
>
> Where the Minister has ignored a previous Order of this Court on a related immigration proceeding, is this a "special reason" for an order of costs pursuant to the *Federal Court Immigration and Refugee Protection Rules*?

[21] I am not prepared to certify either question because they do not raise serious issues that transcend this case.

JUDGMENT

[22] **IT IS ORDERED that:**

1. The application for judicial review is granted.

2. The February 20, 2006 decision denying the applicant's application for permanent residence in the temporary resident permit holders class be set aside.

3. The applicant's permanent residence application be reassessed by a different immigration officer.

4. No costs shall be awarded in this case.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The *Immigration and Refugee Protection Regulations*, S.O.R./2002-227:

64. The permit holder class is prescribed as a class of foreign nationals who may become permanent residents on the basis of the requirements of this Division.	64. La catégorie des titulaires de permis est une catégorie réglementaire d'étrangers qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.
65. A foreign national is a permit holder and a member of the permit holder class if	65. Est un titulaire de permis et appartient à la catégorie des titulaires de permis l'étranger qui satisfait aux exigences suivantes:
(a) they have been issued a temporary resident permit under subsection 24(1) of the Act;	a) il s'est vu délivrer un permis de séjour temporaire au titre du paragraphe 24(1) de la Loi;
(b) they have continuously resided in Canada as a permit holder for a period of	b) il a résidé sans interruption au Canada au titre de ce permis, pendant une période minimale:
(i) at least three years, if they	(i) de trois ans, dans le cas de l'étranger qui, selon le cas:
(A) are inadmissible on health grounds under subsection 38(1) of the Act,	(A) est interdit de territoire pour motifs sanitaires aux termes du paragraphe 38(1) de la Loi,
. . .	. . .
(c) they have not become inadmissible on any ground since the permit was issued; and	c) il n'est pas devenu interdit de territoire aux termes de la Loi depuis la délivrance du permis;

The *Federal Courts Immigration and Refugee Protection Rules*, S.O.R./93-22:

22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.	22. Sauf ordonnance contraire rendue par un juge pour des raisons spéciales, la demande d'autorisation, la demande de contrôle judiciaire ou l'appel introduit en application des présentes règles ne donnent pas lieu à des dépens.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1280-06
STYLE OF CAUSE:	OSCAR ALEX DIAZ RIVERA - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	May 30, 2007
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	October 1, 2007

APPEARANCES:

Timothy Wichert	FOR THE APPLICANT
Martin Anderson	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Timothy Wichert Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT