Date: 20071029

Docket: IMM-6110-06

Citation: 2007 FC 1113

BETWEEN:

BERTHA PRESIDENT BRANDFORD
ANDISHA CELESTE BRANDFORD
MISIA KRYSTAL BRANDFORD
AISIA VICTORIA LAMBERT
NATHAN SEAN LAMBERT

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow a brief hearing of an application for judicial review of a decision that is described in the application for leave and for judicial review as a refusal of the Applicants' application for permanent resident status on humanitarian and compassionate grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act.* In the view of the Court, it is more accurately described as a denial of a waiver of a medical inadmissibility determination. That denial in turn resulted in a denial of the application by the first three named Applicants for landing from within Canada on humanitarian and compassionate grounds. The decision under review was made by a Minister's Delegate and is dated the 11th of July, 2006.

BACKGROUND

[2] The first three named Applicants are a mother and 2 of her daughters who are all citizens of St. Lucia. The fourth and fifth Applicants are a third daughter and a son of the same mother. They are Canadian citizens and are therefore perhaps improperly named as Applicants on this application, but nothing turns on that. All five Applicants are resident together in Canada and constitute a single parent family unit.

[3] The first three named Applicants applied for landing from within Canada on humanitarian and compassionate grounds. Sufficient humanitarian and compassionate grounds were identified to justify their landing from within Canada. However, one of the St. Lucian daughters was determined to be medically inadmissible and, in the result, the application for landing from within Canada was denied. An application for judicial review of the denial of landing from within Canada on grounds of medically inadmissibility was commenced but was discontinued when the respondent agreed to "re-open", "re-consider", or "consider waiving the medical inadmissibility determination". The decision now under review followed.

THE DECISION UNDER REVIEW

[4] The decision under review is brief. Following two introductory paragraphs, it reads as follows:

> …..
> Ms. President Brandford is seeking a medical waiver for her daughter Andisha Celeste Brandford due to issues surrounding developmental delays and hearing loss. While I have not been provided with the medical assessment itself, I am satisfied, based on the material before me that these are the issues that have given rise to the medical inadmissibility. I note that Ms. Brandford replied in the negative in section L of the form entitled "Request for Exemption from Immigrant Visa

> requirement" dated December 4, 2000 that neither she nor any of her listed dependants, which included Andisha Celeste Brandford "Had or still have any serious disease or mental or physical illness".
>
> **HUMANITARIAN AND COMPASSIONATE CONSIDERATIONS:**
>
> Having reviewed the material before me, I agree that there are sufficient humanitarian and compassionate considerations present in the case to warrant favourable consideration. This decision is based, among other things, on my assessment of the best interests of the four children mentioned – two of which are Canadian citizens. Clearly, in this instance, it is not in the best interests of the Canadian citizen children to be separated from either their siblings or their biological mother. I would note that this refers to the circumstances in this particular case and this decision is not to be extrapolated to other cases.
>
> **WAIVER OF MEDICAL INADMISSIBILITY:**
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> In addition to various Charter arguments (section 7 and 15 in particular), the essential reason for seeking the waiver of medical inadmissibility for Andisha Celeste Brandford is outlined in the letter from the Parkdale Community Legal Services dated February 15, 2006 as follows:
>
> > While Ms. President Brandford was pleased to have been granted the TRP [Temporary Resident Permit] for herself and her daughters, it is our position that there is no need in this case for a **further three year delay** before she and her daughters are landed in Canada. As we pointed out in our argument to the Federal Court, while on a TRP, Andisha Celeste would continue to access the same support services that she would have access to as a permanent resident so there is absolutely no saving of provincial education costs by delaying the family's landing application due to her medical condition.
>
> Mention is also made of the non-OHIP coverage and the additional costs (presumably by private medical coverage) at an annual cost of $850 per annum. In my view, the above reasons requesting a waiver pursuant to 25(1) of the *IRPA* do not justify the requested exemption. The fullest consideration of the material before me fails to demonstrate to me that there would be any unusual, undeserved or disproportionate hardship in allowing the affected persons to remain in Canada under the authority of Temporary Resident Permits until such time as they are able to qualify under the Permit Holders Class as described in Regulation 64 of the *Immigration and Refugee Protection Regulations.*

[5] In summary, the Minister's Delegate found there to be "sufficient humanitarian and compassionate considerations" to warrant favourable consideration of the first three named Applicants' application for landing from within Canada. He nonetheless went on to deny the waiver

of the medical inadmissibility determination on the ground that no unusual, undeserved or disproportionate hardship would flow because the "affected persons" are in Canada and were, at the time of the decision, entitled to remain in Canada under a Temporary Resident Permit. That Permit, at the time of the decision, would continue to be valid barring a drastic change in circumstances, for more than two years, following which, once again barring a dramatic change in circumstances, the "affected persons" would qualify to apply for landing from within Canada as members of the Permit Holders Class, as described in section 64 of the *Immigration and Refugee Protection Regulations.*

ANALYSIS

[6] Counsel for the Applicants raised three issues on this application for judicial review, in the following terms:

> a. Whether the negative redetermination of the Applicants' application for permanent residence is in error because the decision that the Applicants are inadmissible pursuant to section 38(1)(c) of the *Immigration and Refugee Protection Act* is wrong in law since it failed to properly consider the particular circumstances of the Applicants' case.
>
> b. Whether [the Minister's Delegate's] decision to refuse a medical waiver in the Applicants' case is an unreasonable decision.
>
> c. Whether refusing to grant permanent resident status to the Applicants based on the inadmissibility finding under section 38(1)(c) of the *Act*, and instead, placing them on a Temporary Resident Permit for three years under Section 65(b)(i) of the *Regulations* constitutes discrimination on the enumerated ground of disability contrary to section 15(1) of the *Charter of Rights and Freedoms*, deprives the Applicants of their right to security of the person contrary to section 7 of the *Charter* and does not constitute a reasonable limit prescribed by law in accordance with section 1 of the *Charter* and is therefore unconstitutional.

[7] By Agreement, the first and third issues were not pursued at hearing and the second issue was expanded to focus on the issue of "adequacy of reasons".

[8] The Minister's Delegate had before him evidence that, on the facts of this particular case, the Applicants were struggling, not only with the universal difficulties of a single parent family unit of limited means, but with the medical difficulties of one of the St. Lucian born children, medical difficulties of one of the Canadian born children and the troubled personality of the other Canadian born child. Further, the Minister's Delegate had evidence before him that living in Canada under a Temporary Resident Permit imposed on the Applicants financial burdens and uncertainty that would have been greatly relieved if the waiver that the Applicants sought had been granted. In short, the challenges that the Applicants faced at the time of the decision under review, and continue to face, would have been significantly reduced if the waiver had been granted. There is no indication whatsoever on the face of the Minister's Delegate's reasons for decision that any of this was taken into account or given weight.

[9] In *Baker v. Canada (Minister of Citizenship and Immigration)*[1], Madam Justice L'Heureux-Dubé wrote at paragraph 43 of her reasons:

> …It is now appropriate to recognize, that in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in other circumstances, some form of reasons should be required.

[1] [1999] S.C.R. 817.

[10] In *Aowan v. Canada (Minister of Citizenship and Immigration)*[2], my colleague Justice Harrington wrote at paragraph 11 of his reasons:

> Although a criminal case, ***R v. Sheppard*,** [2002] 1 F.C.R. 869, is nevertheless a useful guide [regarding reasons]. Mr. Aowan was entitled to know why his claim was rejected. Justice must not only be done, it must be seen to be done. A reviewing Court must know the basis of a decision before it can determine if it was unreasonable.

[11] The closing paragraph of the Minister's Delegate's "reasons" quoted above is not "reasons" at all, it is simply the statement of a conclusion without meaningful explanation as to how that conclusion was arrived at. It provides no assurance whatsoever that the Minister's Delegate was "alert", "alive" and "sensitive" to the best interests of the four children directly affected by the decision. Further, it provides no basis upon which the Applicants, their counsel, or, indeed, this Court, can determine whether the decision under review is reasonable. Put another way, the decision as provided denied the Applicants procedural fairness.

[12] None of the foregoing is to say that the decision under review might not have been reasonably open to the Minister's Delegate. It is simply to say that whether it was reasonably open cannot be determined.

CONCLUSION

[13] For the foregoing brief reasons, this application for judicial review will be allowed. The decision under review will be set aside and the Applicants' application for waiver of the medical

[2] [2006] F.C.J. No. 846.

inadmissibility determination in respect of one of the St. Lucian born Applicants will be referred back to the Respondent for re-determination by a different officer.

[14] It is, of course, not for this Court to impose priorities on the Respondent in the absence of a successful application for *mandamus.* That being said, the evidence before the Court in this matter and the conclusion of the Minister's Delegate with respect to the humanitarian and compassionate considerations here at issue cry out for an early re-determination of this matter.

CERTIFICATION OF A QUESTION

[15] At the close of the hearing of this matter, counsel were advised of the Court's conclusion. Neither counsel recommended certification of a question. The Court itself is satisfied that no serious question of general importance arises in this matter that would be determinative of an appeal herein.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario
October 29, 2007

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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