Date: 20080304

Docket: IMM-2136-07

Citation: 2008 FC 295

Ottawa, Ontario, March 4, 2008

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

SABERABANU MY KAZI

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 two decisions of a visa officer (the officer) both dated April 25, 2007, wherein the officer denied the applicant's applications for permanent residence as a member of the family class and under humanitarian and compassionate (H&C) grounds.

[2] The applicant requested the following relief:

1. An order quashing the decision of the designated immigration officer of the Immigration Section of the Canadian High Commission in New Delhi, India whereby the applicant's application for permanent residence as a member of the family class was refused pursuant to paragraph 117(1)(f) of IRPA;

2. An order quashing the decision of the designated immigration officer of the Immigration Section of the Canadian High Commission in New Delhi, India whereby the applicant's application for permanent residence was refused pursuant to subsection 11(1) of IRPA; and

3. An order that the application be reassessed under H&C grounds by keeping in mind the extraordinary circumstances faced by the applicant in India.

Background

[3] Saberabanu My Kazi (the applicant) is a citizen of India. In June 1998, Mohammed Jahed Yusuf Kazi (the applicant's brother) submitted an application to sponsor the applicant's father and the applicant (as the father's dependent) to Canada as members of the family class (the first application). This first application was refused on the basis that the applicant's father was medically inadmissible as per subparagraph 19(1)(a)(ii) of IRPA. Moreover, in refusing the application, an issue regarding the establishment of the relationship between the applicant and her father arose. A DNA test was conducted establishing the relationship between the applicant and her father. Unfortunately, the applicant's father passed away on December 16, 2001.

[4] Instead of continuing with the first application, it appears that after the death of the father, the applicant's brother and his wife submitted a fresh application to sponsor the applicant alone as a member of the family class (the second application). The second application was submitted in September 2002 at which time the applicant was 21 years old. In December 2002, officials at Citizenship and Immigration Canada (CIC) informed the applicant by way of letter to her counsel that the applicant did not meet the selection criteria under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) because she was not less than 18 years of age at the time the application was submitted. By letter dated May 2003, the applicant's counsel wrote to CIC officials stating "although the applicant cannot clearly qualify under IRPR [….] she can certainly qualify under humanitarian and compassionate (H&C) grounds. We therefore request that you grant her application for permanent residence under H&C grounds."

[5] On February 13, 2007, the applicant received a letter from CIC informing her that an interview had been scheduled for April 19, 2007. The applicant attended the interview. On April 25, 2007, the applicant received two letters; one refusing her application for permanent residence in Canada as a member of the family class and the other refusing her H&C application. This is the judicial review of the officer's decisions.

Officer's Decision

[6] In the April 25, 2007 decision on the application as a member of the family class, the officer stated that she had carefully and thoroughly considered the applicant's application and the supporting information and documentation, and had determined that the applicant did not meet the requirements for a permanent resident visa as a member of the family class. The officer referred to paragraph 117(1)(f) of the Regulations, which deals with orphaned siblings as dependents under the family class, and stated that as the applicant was over the age of 18 years when the application was submitted, she did not qualify. As such, the officer concluded that the applicant was not a member of the family class whose application could be sponsored pursuant to paragraph 117(1)(f) of the Regulations.

[7] In the second April 25, 2007 decision, the officer denied the applicant's request for humanitarian and compassion consideration. The officer stated that she had reviewed all the circumstances of the applicant's case in accordance with subsection 25(1), but had determined that humanitarian or compassionate considerations were not justified.

Issues

[8] The applicant submitted the following issues for consideration:

1. Did the officer arrive at her decision by acting arbitrarily or capriciously in refusing the applicant's application for permanent residence in Canada under the family class?

2. Did the officer err in her decision by failing to take into consideration humanitarian and compassionate considerations that prevail in the applicant's circumstances?

3. Did the officer err in not reviewing the file of the applicant on a full and proper basis in accordance with the applicable guidelines keeping in mind the principles of natural and fundamental justice and procedural fairness thereby reflecting the appearance of bias?

[9] I would rephrase the issues as follows:

1. Does this application for judicial review include the decision of the officer dated April 25, 2007 refusing the applicant's application for permanent residence on H&C grounds?

2. What is the appropriate standard of review?

3. Did the officer err in rejecting the applicant's application for permanent residence as a member of the family class?

4. Did the officer err in rejecting the applicant's application for permanent residence on H&C grounds?

Applicant's Submissions

[10] The applicant submitted that the appropriate standard of review is one of reasonableness *simpliciter* (*Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). It was submitted that in rendering her decision, the officer failed to consider the fact that the applicant originally made her application on or about June 1998 and at that time, she was under the age of 18 years as required by the Regulations to be a dependent. Moreover, the applicant's relationship to her

father had been proven through DNA evidence. It was also noted that the applicant must only prove the relationship between her father and herself on a “preponderance of evidence”, and not “conclusively” (*Mendoza* v. *Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 99 (Imm. App. Bd.), at l03).

[11] The applicant noted a number of cases involving situations where the applicant was under the age of 18 when the application process was commenced, but over 18 when the application process was concluded. The applicant submitted that these cases provide insight into her situation as she too was under the age of 18 years when she originally applied for permanent residence as a member of the family class.

[12] The applicant also made submissions as to her situation in India in the wake of her father’s passing. The applicant submitted that she was left in a state of total shock due to her father’s sudden death. It was submitted that the applicant is solely dependent on her brother in Canada for financial, moral and emotional support. Although she has other brothers and sisters residing close to her in India, they have families of their own to take care of. The applicant also submitted that as a single Muslim woman alone in India, she is in a very vulnerable position. For these reasons, the applicant submitted that the interests of justice and humanitarian and compassionate considerations are best met in allowing this application for judicial review.

Respondent's Submissions

[13] With regards to the refusal of the applicant's application under the family class, the respondent submitted that the applicant was 21 years old when her application was filed. As such, the officer had no choice but to deny her application. To be a successful applicant under paragraph 117(1)(f) of the Regulations, the applicant must be under the age of 18 years. The respondent submitted that even the applicant's counsel stated in his May 2003 letter to CIC officials that "although the applicant cannot clearly qualify under IRPA, […] she can certainly qualify under humanitarian and compassionate (H&C) grounds". It was submitted that the applicant's argument that she was under 18 years of age when her application was submitted in 1998 can simply not be accepted. The application submitted in 1998 was the applicant's first application and is a different application from the within application. The officer in the second application properly refused the application on the basis of age.

[14] Regarding the applicant's submissions on H&C grounds, the respondent noted in their written submissions that the applicant did not seek leave to judicially review the officer's decision on this matter. The respondent noted the wording of the application for leave and the fact that the applicant did not include the H&C decision in her record.

[15] In any event, the respondent submitted that the officer did not err in refusing the applicant's request for H&C relief. A decision on H&C grounds is an exceptional measure and, moreover, a discretionary one (*Legault* v. *Canada (Minister of Citizenship and Immigration)*, (2002) 212 D.L.R.

(4th) 139). H&C decisions are only granted where the officer is satisfied that compliance with the requirements of IRPA would result in either unusual and undeserved or disproportionate hardship to the applicant. H&C exceptions are not designed to eliminate hardship (*Owusu* v. *Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 158 (C.A.)). The respondent submitted that the officer's decision was in no way unreasonable and therefore should not be interfered with by the Court (*Baker* above).The officer considered the applicant's H&C grounds, her personal circumstances in India and her family relationships and interdependencies with her relatives in India and her brother in Canada, and ultimately determined that the applicant would not suffer undue, undeserved or disproportionate hardship if not granted an exemption of the requirements of IRPA.

Applicant's Reply

[16] The applicant submitted she should have received credit for being under 18 at the time of her first application submitted in 1998. When her original application was submitted, she met the age requirement and the officer should have considered this and allowed her second application.

[17] With regards to the respondent's argument that the applicant did not seek leave for judicial review of the officer's H&C decision, the applicant submitted that the applicant is only seeking review of the officer's decision in respect of permanent residence in Canada under the family class.

Analysis and Decision

[18] **Issue 1**

Does this application for judicial review include the decision of the officer dated April 25, 2007 refusing the applicant's application for permanent residence on H&C grounds?

In their written submissions, the respondent argued that the application for leave only sought review of the family class decision.

[19] However, at the hearing counsel for the respondent noted that the application for judicial review likely contained requests to review the two separate decisions; the family class decision and the H&C decision. As such, the respondent chose not to pursue this issue. Consequently, I will review both decisions.

[20] **Issue 2**

What is the appropriate standard of review?

The appropriate standard of review for a visa officer's decision on whether or not the applicant is a member of the family class is that of patent unreasonableness (*Abdilahi* v. *Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1431 and *Sharief* v. *Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 386 (F.C.T.D.)).

[21] Decisions of H&C officers are reviewable on a standard of review of reasonableness *simpliciter* (*Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

[22] **Issue 3**

Did the officer err in rejecting the applicant's application for permanent residence as a member of the family class?

In the first application, the applicant's brother made an initial application to sponsor the applicant and her father but this application was denied. The applicant's brother submitted a second application to sponsor the applicant in September 2002. At that time, the applicant was 21 years of age. Pursuant to paragraph 117(1)(f) of the Regulations, the applicant must be under 18 years of age in order to qualify to be sponsored as a family class member. Since she was 21 years of age at the time of the second application, she does not qualify and the officer made no error in this respect. The fact that the applicant was the subject of an earlier failed application, when she was under 18 years of age, is not relevant to this application.

[23] **Issue 4**

Did the officer err in rejecting the applicant's application for permanent residence on H&C grounds?

I have carefully reviewed the officer's CAIPS notes with respect to the interview for the H&C application. The officer carefully questioned the applicant on all aspects of the H&C application. For example, the following exchange took place between the officer and the applicant at the interview:

> Your sponsor brother's representative has written to say that even though you do not qualify for a permanent residence visa according to the Act and Regulations, you should still be allowed to go to Canada under Humanitarian and Compassionate considerations.

> What do you have to say to that? It will be good if I am allowed to go. Otherwise, I will consider it as my fate.
>
> Do you face any hardships living here in Rander? No. But I got really scared when the floods came. At that time, my maternal uncle's son came and took me with him. I also get scared when I hear about earthquakes.
>
> Are you otherwise facing any hardships living all by yourself? No. I have been living alone for the last six years.
>
> Who cooks food at home? I do. I can cook.
>
> Do you have anything else to say with regard to your application? No.
>
> (certified tribunal record at page 4)

[24] I have also made reference to the officer's reasons for her decision which are contained at page 5 of the certified tribunal record and her reasons support the conclusion she reached.

[25] I have reviewed the file and I do not find any evidence to support a finding of a breach of natural justice.

[26] I am of the opinion that the officer did not make a reviewable error when the H&C application was denied.

[27] The application for judicial review is therefore dismissed.

[28] Based on my decision, neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[29] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Regulations*, SOR/2002-227:

117(1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	117.1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
. . .	. . .
(f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is	f) s'ils sont âgés de moins de dix-huit ans, si leurs parents sont décédés et s'ils n'ont pas d'époux ni de conjoint de fait :
(i) a child of the sponsor's mother or father,	(i) les enfants de l'un ou l'autre des parents du répondant,
(ii) a child of a child of the sponsor's mother or father, or	(ii) les enfants des enfants de l'un ou l'autre de ses parents,
(iii) a child of the sponsor's child;	(iii) les enfants de ses enfants;

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

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.	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.

FEDERAL COURT

SOLICITORS OF RECORD

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