Date: 20090109

Docket: IMM-202-08

Citation: 2009 FC 26

OTTAWA, ONTARIO, JANUARY 9, 2009

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

BARRY ROGERS

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

REASONS FOR ORDER AND ORDER

[1] The applicant, Barry Rogers, brings this application pursuant to s. 72(1) of the *Immigration and Refugee Protection Act* (*IRPA*), S.C. 2001, c. 27, to judicially review the decision of Jerome Lapierre, immigration officer, CIC Gatineau, refusing his application for permanent residence from within Canada on humanitarian and compassionate grounds.

[2] For the reasons that follow, I have come to the conclusion that this application for judicial review must be granted.

THE FACTS

[3] The applicant is a 51 year old citizen of the United Kingdom. He arrived in Canada as a visitor in November 2001, and submitted an in-status application for permanent residence on the basis of humanitarian and compassionate (H&C) factors on March 4, 2002.

[4] The applicant's mother, father and aunt live in Canada and are respectively 68, 73 and 85 year old. They need help with getting to medical appointment, maintaining their house, buying groceries, making meals and managing their finances. The applicant asked to remain in Canada to care for his aging relatives.

[5] The applicant submitted his H&C application himself, without the assistance of a legal representative. He did not retain legal counsel until January 2008, after his application was refused.

[6] The first step of the process was completed on 11 March 2003, when sufficient humanitarian and compassionate factors were found to exist and the applicant received approval in principle. The case then proceeded to the second step, so that it could be determined whether the applicant meets the requirements of *IRPA* and is not inadmissible.

[7] On September 15, 2004, the applicant was arrested and charged with assaulting his ex-girlfriend contrary to s. 266 of the *Criminal Code*. He was released on an undertaking with conditions. He was found not guilty of the assault charge.

[8] On March 1, 2007, the applicant was convicted of failure to comply with the conditions of an undertaking given to an officer as described in s. 145(5.1) of the *Criminal Code*. He was also convicted of failure to comply with conditions of judicial release as described in s. 145(3) of the *Criminal Code*. These convictions arose from the applicant's failure to abstain from communicating directly or indirectly with his ex-girlfriend and not to attend within 500 metres of her place of employment or residence. The applicant pleaded guilty to these two offences and received a suspended sentence and two years' probation.

[9] The application for permanent residence was refused in a letter dated 30 November 2007. The applicant's criminal convictions rendered him inadmissible pursuant to s. 36(2) of the *IRPA*, notwithstanding that an H&C exemption had been granted in regard to the first step of the process.

[10] After receiving that letter, the applicant retained counsel. He then learned that there was a policy change at Citizenship and Immigration Canada in June 2006 concerning the processing of H&C applications.

[11] An Operational Bulletin, dated 22 June 2006, informs officers considering such applications that, when clearly requested to do so, they must consider exempting the applicant from any applicable criteria or obligation under the *IRPA*, including the requirement that one not be inadmissible to Canada. Officer may also act on their own initiative and put a case forward for H&C consideration.

[12] In December 2006, CIC issued a new H&C application form which allows applicants to request such an exemption. The form the applicant completed in 2003 did not advise applicants of the need to request an exemption to overcome inadmissibility.

THE IMPUGNED DECISION

[13] As mentioned in the preceding paragraph, the CIC officer attending to the applicant's file found that he was inadmissible on account of his two criminal convictions, and therefore refuse his application for permanent residence.

[14] In the FOSS notes entered on 29 November 2007, the day before the refusal letter is dated, the officer entered the following remarks:

> Client was given suspended sentences for failure to comply with undertaking as per article 145.5.1 of the Criminal Code and for breach of recognizance as per article 145(3) of the Criminal Code. Those convictions happened after client was approved in principle. Client is criminally inadmissible as per section 36(2)(a) of the *Immigration Act*. We haven't received a request for an exemption from client. Therefore, we can refuse client's application for permanent residence because he is criminally inadmissible. Refusal letter sent. J. Lapierre/2104

ISSUES

[15] The applicant raised a number of issues with respect to the decision to refuse his application for permanent residence. They can be summarized as follows:

- Did the officer breach the rules of procedural fairness in assessing the applicant's application for permanent residence, either by denying him a meaningful opportunity to request an exemption or by fettering his discretion in giving no consideration to the

discretion he had to put the case forward for consideration in the absence of an exemption request?
- Was the officer's discretion under s. 25(1) of the *IRPA* fettered by a combination of the *Immigration and Refugee Protection Regulations* (the Regulations), the Chapter 5 of the Inland Processing Manual (the Manual), and the 2002 application form provided to the applicant?
- Did the officer err by failing to consider granting the applicant a Temporary Resident Permit?

ANALYSIS

[16] Before addressing the issues as identified in the previous paragraph, I must identify the appropriate standard of review. There is no dispute between the parties that the appropriate standard of review with respect to the ultimate decision of the H&C officer is reasonableness. Indeed, courts have historically accorded considerable deference to immigration officers exercising their discretion in deciding H&C applications: see *Baker* v. *Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 62.

[17] The Supreme Court recently held in *Dunsmuir* v. *New Brunswick*, 2008 SCC 9 (paras. 54-57 and 62) that the first step of the analysis in assessing the appropriate standard of review requires the Court to determine if prior jurisprudence has already decided the level of deference owed in a particular context. Accordingly, I see no reason to depart from *Baker*. Indeed, this Court has continued to measure the exercise of discretion by immigration officers against a standard of reasonableness: see, for example, *Zambrano* v. *Canada (Citizenship and Immigration)*, 2008 FC 481, at par. 31. As a result, the Court must inquire into the qualities that make a decision reasonable, both in terms of the process followed and of the outcome reached. If the decision in

question "…falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law", it will be upheld as reasonable.

[18] To the extent that the issues raised by the applicant pertain to procedural fairness, the standard is different. The Supreme Court has reiterated in *Dunsmuir* (at paras. 129 and 151) that it is not necessary to conduct a pragmatic and functional analysis. Instead, the Court must examine the specific circumstances of the case and determine whether the decision-maker adhered to the rules of natural justice and procedural fairness. If the Court concludes that there has been a breach of procedural fairness, no deference is due and the Court should set aside the decision.

[19] The first issue raised by the applicant goes both to the substantive outcome of the decision and the way it was made. In effect, the applicant contends that the officer was blind to the discretion conferred upon him and did not exercise it, or that if he did exercise it, he was unreasonable in denying him an opportunity to put his case forward with respect to the inadmissibility issue. Both the standards of correctness and reasonableness must therefore be applied, depending on how the issue is framed and analysed.

[20] As to the second question, it is not properly speaking a judicial review of the decision made by the officer as he did not consider it. It is essentially an issue of legislative construction, and I need not therefore determine the appropriate standard of review.

[21] Finally, the third question goes to the merit of the decision and it attracts a standard of reasonableness.

[22] Section 25(1) of *IRPA* is an exceptional measure that gives the Minister the authority to grant a foreign national permanent resident status or an exemption from any applicable criteria or obligation of *IRPA* if the Minister is of the opinion that the exemption is justified by humanitarian or compassionate considerations.

[23] Neither the Act nor the Regulations specify what constitutes humanitarian and compassionate grounds. Administrative guidelines are provided to the officers designated to exercise this discretion. For applications made from within Canada the applicable guidelines are found in Manual IP 5 ("Immigrant Applications in Canada on Humanitarian or Compassionate Grounds").

[24] The policy manual directs that an application to remain in Canada on humanitarian or compassionate grounds be assessed in two steps:

> 5.5 Two-step assessment (H & C decision/Permanent residence)
>
> An application for consideration to remain in Canada on H & C grounds is comprised of two assessments:
>
> - H & C assessment; and
> - Assessment of application for permanent residence in Canada.

[25] The first step consists of the officer determining whether sufficient H & C factors exist. If so, the applicant is granted approval in principle and can apply from within Canada. The second step requires the officer to determine whether the applicant meets the requirements of *IRPA* and is not inadmissible. The applicant does not dispute that he was inadmissible to Canada on grounds of criminality pursuant to s. 36(2) of *IRPA* for having been convicted of an offence under an Act of Parliament punishable by way of indictment. This inadmissibility, it must be remembered, emerged subsequent to the positive H & C assessment but prior to the applicant being granted permanent residence.

[26] In the meantime, that is, in June 2006, a new CIC policy concerning the assessment of H & C applications in the case of inadmissibility was implemented (CIC Operational Bulletin 021). According to that new policy, CIC officers may grant an exemption from inadmissibility if:

> - They are of the opinion that it is justified by humanitarian and compassionate considerations; and
> - They have the delegated authority to grant the exemption.

[27] On its face, the policy change appears to be of restrictive application. The bulletin indicates that it only affects those H & C applications containing a specific request for an exemption due to inadmissibility. Applications that do not contain such requests are assessed in the usual manner:

> CIC officers assessing applications for humanitarian and compassionate (H&C) consideration must consider exempting any applicable criteria or obligation of the *Immigration and Refugee Protection Act*, including inadmissibilities, when the foreign national has specifically requested such an

> exemption, or it is clear from the material that the foreign national is seeking such an exemption.
> (…)
> These changes affect only those H&C applications containing a request for an exemption due to inadmissibility; applications for H&C consideration that do not contain such requests may be assessed in the usual manner.

[28] However, the bulletin goes on to provide that an immigration officer may consider whether to put forward a case on his own initiative, in the absence of a request from an applicant to do so:

> 6. **Granting exemptions on one's own initiative**
>
> In some cases, an officer may consider it appropriate to grant an exemption on his or her own initiative due to, for example, a change in the applicant's circumstances. These types of situations may involve new inadmissibilities that emerge subsequent to a positive H&C assessment, but prior to the applicant being granted permanent residence.
>
> (…)
>
> Where an officer decides to put forward a case for consideration of H&C in the absence of a specific request from the applicant, the applicant should be informed that H&C is being considered and should be provided with an opportunity to present his or her own reasons for H&C consideration. This is procedurally fair and ensures that the decision-maker has all the information necessary before making a decision.

[29] The applicant argued that the officer's discretion under s. 25(1) of *IRPA* was fettered by a combination of the *Immigration and Refugee Protection Regulations*, the Immigration Manual and the application form provided to the applicant. In my view, this allegation has no merit for the following reasons.

[30] First of all, the applicant contends that section 72 of the *Regulations* contravenes section 25 of the *Act* in limiting to the three classes described in s. 72(2) (live-in caregiver, spouse or common-law partner in Canada and protected temporary residents) those that can be exempted from the requirement to apply for permanent residence from within Canada.

[31] These classes, however, are not an exhaustive list of the persons to whom an exemption may be granted under the broad discretion of immigration officers to grant exemptions under s. 25 of *IRPA*. The fact that the Regulations do not contemplate every situation in which an exemption may be granted by an immigration officer does not constitute a fetter on the discretion of the officer to grant exemptions in other situations pursuant to section 25 of *IRPA*. This is precisely what section 4.1 of the Manual explains:

> The classes described in [IRPR] 72(2), whose members are eligible to apply for permanent residence in Canada, reflect the objectives of the Act but do not cover all circumstances. Thus, [IRPA Section] 25(1) gives the Minister the authority to use discretion to grant an exemption to these requirements.

[32] The applicant further argues that the Manual does not contemplate an exemption from the admissibility requirement of the Act either. In his view, the language of the Immigration Manual is mandatory, n that it does not allow officers the flexibility to grant permanent resident status to an applicant who is inadmissible except in the very limited circumstance where the inadmissibility is due to the applicant being out of status, pursuant to s. 41 of the Act. He relies for that submission on the following excerpt of the IP 5 Manual:

> 5.9 **Second-step assessment: Toward the decision to confirm permanent residence**
> (…)
> In order to become a permanent resident, the applicant must meet the requirements for permanent residence in R68, including that the applicant and their family members, whether accompanying or not, are not inadmissible and otherwise meet the requirements of the Act and Regulations.
>
> 5.12 **Inadmissible applicants**
>
> Although foreign nationals who are inadmissible may submit an H&C application, **a positive H&C** decision to waive certain selection criteria **does not overcome admissibility requirements**. If after the H&C decision is made, it is determined that the foreign national is inadmissible, the application for permanent residence **must** be refused. (…)
> [Emphasis in the original]

[33] It is well established that ministerial guidelines are permissible so long as they are not meant to bind administrative officers or to fetter their discretion. There is nothing wrong with a general policy designed to bring some consistency in the exercise of discretion. As Professor J.M. Evans (as he then was) stated in his Fourth edition of *de Smith's Judicial Review of Administrative Action,* at p. 312:

> …a factor that may properly be taken into account in exercising a discretion may become an unlawful fetter upon discretion if it is elevated to the status of a general rule that results in the pursuit of consistency at the expense of the merits of individual cases.
>
> See also: *Yhap* v. *Canada (Minister of Employment and Immigration)*, (1990), 1 F.C.R. 722 (F.C.); *Mittal (Litigation Guardian of)* v. *Canada (Minister of Citizenship and Immigration)* (1998), 147 F.T.R. 285, at para. 2; *Thamotharem* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 16.

[34] It has been held consistently that the Minister and his agents are not bound by the guidelines set out in the Manual: *Leagult* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, at para. 20; *Vidal* v. *Canada (Minister of Employment and Immigration)* (1991), 41 F.T.R. 118, at p. 5. It is also clear from a careful reading of the Manual that the guidelines are not intended to supersede the discretion of an immigration officer to decide H&C applications. This intention is explicitly expressed in section 2.1 of the Manual, which provides:

> **2.1 Balance between discretion and consistency**
>
> The legislation does not provide any explanation or guidance about what constitutes humanitarian and compassionate grounds. Delegated persons have full authority to make this decision. At the same time, to be fair to clients and to avoid just criticism, there must be as much consistency as possible in the use of this discretion.
>
> As much guidance as possible is given to assist officers in striking a balance between the two seemingly contradictory aspects of discretion and consistency. However, the discretion of the decision-maker takes precedence over guidance when decisions are made.

[35] This does not strike me as a fetter upon the discretion to be exercised by immigration officers. The Manual conveys to these officers that its guidelines for the consideration of H&C applications are not to be regarded as exhaustive or definitive. When looking at the previous version of these guidelines, which were very similar to the current ones, my colleague Justice Dawson wrote:

> It can be seen that repeated emphasis is placed on the need for officers to use their best judgment. Officers are told that in the end their discretion is to take precedence and they are to approve deserving cases

> the circumstances of which were not anticipated in the Act.
> *Lim* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956, at para. 8.

[36] Much the same can be said of the guidelines found in the current Manual. There are many indications throughout that officers are to use their best judgment, and need not follow slavishly and blindly the various statements found in the Manual. As for section 5.12 of the Manual, with which the applicant takes exception, it has to be read in conjunction with the June 2006 Bulletin, which confirms that immigration officers have the discretion to grant an exemption to overcome an inadmissibility, either upon request by an applicant or on their own initiative.

[37] Finally, I cannot accede to the applicant's argument that the silence of the 2002 application form with respect to requesting an exemption from an inadmissibility fettered the discretion of the immigration officer to consider granting an exemption in his case. The language of the application form has no impact on the discretion of the immigration officer to grant an exemption from "any applicable criteria or obligation" under section 25 of the Act. As section 25 provides, this discretion may be exercised "on the Minister's own initiative". The immigration officer therefore had the discretion under section 25 of *IRPA* to consider granting the applicant an exemption in the absence of a request from the applicant on his application form to do so. No fetter of the immigration officer's discretion ensues from the 2002 application form.

[38] To conclude on this point, I am of the view that neither the *Regulations*, the Manual, the Bulletin nor the 2002 application form impermissibly fettered the immigration officer's discretion to

grant exemptions from inadmissibilities pursuant to section 25 of *IRPA*. I must therefore conclude that question 2 must be answered in the negative.

[39] One word only need be said about the third question. I completely agree with the respondent that the officer did not err in not considering whether to grant a Temporary Resident Permit in the circumstances of this case. There is no indication in the applicant's materials that he ever made a request for such a permit, and there was consequently no obligation on the immigration officer to consider issuing that kind of permit to the applicant. The Bulletin admittedly contemplates situations in which an immigration officer may consider granting a Temporary Resident Permit in the absence of a request from an applicant, but it cannot mandate the immigration officer to do so. The mere fact that he did not exercise his discretion to grant the permit to the applicant, without more, cannot constitute a reviewable error.

[40] That brings me to the first question, having to do not so much with the legislative and administrative scheme itself but with the assessment by the officer of the applicant's H&C application itself. The applicant argued both that the officer has fettered his discretion by limiting his consideration to whether the applicant had specifically requested an exemption or not, and that even if it could be demonstrated that he did exercise his discretion and determined that it was not an appropriate case to grant an exemption, he erred in coming to that conclusion. I agree with the applicant on both counts.

[41] The respondent is no doubt correct in stating that no breach of procedural fairness is established on the mere basis that the immigration officer did not put the applicant's case forward for consideration for an exemption on his own initiative. Although the Bulletin contemplates situations in which an immigration officer may consider putting an applicant's case forward for an exemption in the absence of a request from an applicant, it cannot mandate an officer to do so.

[42] The problem in this case is that it is not at all clear that the officer was aware or put his mind to the fact that the absence of a request for an exemption was not determinative. A careful reading of the FOSS notes (as reproduced above, at para. 14) does not reveal that the officer paid any attention to the possibility of putting the case forward for an exemption in the absence of an exemption request. It is true that he used the word "can" instead of "must", which could be an indication that he was aware of his ultimate discretion. But in the absence of any hint as to why he decided not to grant the exemption on his own initiative, it cannot be assumed that he did exercise his discretion as mandated by section 25 of the *IRPA*. Quite to the contrary, the officer appears to have been content to move directly to refuse the application because there was no exemption request, thus closing his mind to giving further H&C consideration to the case. To that extent, I would be prepared to hold that he fettered his discretion.

[43] But even if I were to presume that he did exercise his discretion and decided not grant the exemption on his own initiative, I agree with the applicant that his decision was unreasonable in the circumstances. Even if the officer had no duty to advise the applicant of the policy change, he had to take into consideration that he war unrepresented. The officer knew there was no legal counsel

on record; had there been one, the applicant would have been made aware of the policy change and may have requested an exemption to overcome the new inadmissibility.

[44] The immigration officer also had evidence before him in the H&C application of Mr. Rogers' age, education and work history such that he could form a view of his abilities. Mr. Rogers, who is 50, left school at 16 and had worked as a tradesman thereafter. He was not the sort of person who would be able to navigate the CIC website to locate information about this policy change himself.

[45] The policy change of June 2006 is now reflected in the new application form and guide for H&C applicants, dated December 2006. The guide now tells applicants that they must clearly indicate that they wish to be considered for an exemption to overcome an inadmissibility. By contrast, the application form completed by the applicant in 2002 contained no such advice. The application form itself did not present the applicant with an opportunity to request an exemption from inadmissibility. An unrepresented applicant who applied in 2002 using the old forms would therefore be unaware that he must now specifically request an exemption from inadmissibility for it to be considered.

[46] It is interesting to note that the applicant's situation is precisely one of the situations contemplated in the June 2006 Bulletin where it may be appropriate for an officer to grant an exemption on his own initiative. I have already quoted, at paragraph 28 of these reasons, the section of the Bulletin dealing with the granting of exemptions on the officer's own initiative. Here is one

of the two examples given to illustrate when exercising initiative on the part of the officer might be appropriate:

> - A member of the applicant's family becomes inadmissible subsequent to the initial positive assessment; however, in the officer's opinion, the offence is not significant enough to outweigh the initial H&C assessment. The officer may wish to exercise his or her discretion and grant an exemption, if he or she is of the opinion that an exemption is warranted by the existing H&C grounds.

[47] In the present case, it was determined in 2003 that H&C grounds existed in this case and that the applicant's need to remain in Canada to care for aging relatives was compelling. When the officer was considering the admissibility issue in 2007, he must have been aware that the applicant's aging relatives were now 4 years older and likely in need of more care.

[48] Moreover, the officer was also aware of the circumstances of the criminal convictions. The applicant had not been convicted of assault but, rather, had been convicted of offences of a much less serious nature, namely, breach of conditions of an undertaking.

[49] It may well be that there were counterbalancing factors in the mind of the officer, but we are left to speculate as to what they can be, if he turned his mind at all to this question. As importantly, the applicant would have been given the opportunity to raise H&C considerations that had arisen since 2003 had the officer decided to put the applicant's case forward for consideration of an exemption. As the policy puts it, this would have been "procedurally fair".

[50] For all of the foregoing reasons, I find that it was unreasonable and procedurally unfair to reject the applicant's H&C application on the basis of his inadmissibility. The decision of the immigration officer refusing the application for permanent residence must therefore be set aside. The matter is referred back for reconsideration by a different immigration officer, so that a new decision can be made taking into account the reasons for this Order.

[51] Counsel proposed no question for certification purposes, and none will be certified.

ORDER

THIS COURT ORDERS that this application for judicial review is granted.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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