

Date: 20071220

Docket: IMM-5924-06

Citation: 2007 FC 1343

Ottawa, Ontario, December 20, 2007

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

NGOC UYEN NHI NGO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ngoc Uyen Nhi Ngo is a citizen of Vietnam who applied for permanent residence in Canada. While her application was treated as an application in the skilled worker class, Ms. Ngo requested humanitarian and compassionate consideration because she was the last member of her nuclear family remaining in Vietnam.

[2] Ms. Ngo's application was refused because she did not meet all of the criteria of the skilled worker class and because, in the officer's words, "I am satisfied that she is not experiencing any

undue hardship in Vietnam. She has no impediments to working and is supporting herself.

Separation from the rest of the family is not unusual and she has relatives in Vietnam.”

[3] The Minister agrees that this application for judicial review should be allowed because the officer who rejected Ms. Ngo's application did not assess her as a *de facto* family member as set out in the Ministerial guidelines contained in section 8.3 of chapter 4 of the Overseas Processing Manual (OP 4). As well, it is not clear from the record that the officer considered certain written submissions made on Ms. Ngo's behalf.

[4] The parties could not, however, agree on the terms upon which the matter is to be sent back for reconsideration or on whether special circumstances justify an award of costs. These reasons deal with these two issues.

[5] I preface these reasons by observing that this is the second time that the Court has set aside a negative decision regarding Ms. Ngo's application for permanent residence. What is troubling, and causes dismay, is that the first negative decision was set aside because it was "not responsive to the emotional and financial dependency argument submitted on behalf of" Ms. Ngo. This is the very error committed by the officer in the decision now under review.

[6] It is because the visa post has made the same fundamental error twice that I will be remitting this matter back with a number of directions intended to assist the new decision-maker. To be clear, the decision is to be made by a qualified visa officer and not by the Court. But, to be equally clear, the reasons for the next decision should demonstrate that the officer is aware of, and has considered,

all of the relevant circumstances. The reasons should also demonstrate how the officer applied the relevant legislative and regulatory provisions, and the ministerial guidelines to the circumstances of this case.

[7] Turning to the directions to be given to the new decision-maker, they are made pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Subsection 18.1(3) of the *Federal Courts Act* is set out in the schedule to these reasons.

[8] The following directions were discussed with, and agreed upon by, both counsel at the hearing.

[9] First, the matter is to be remitted for redetermination by an officer who has had no prior involvement in the previous decisions.

[10] Second, any interview required of Ms. Ngo should be conducted by the officer who will decide the humanitarian and compassionate aspect of the application.

[11] Third, the officer's decision shall be made with express regard to paragraph 3(1)(d) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and section 8.3 of OP 4.

[12] Fourth, the reasons for the decision shall explicitly set out the officer's reasons for finding that there are, or are not, sufficient humanitarian and compassionate factors to warrant an exemption from the requirements of the skilled worker class.

[13] Fifth, if the officer considers it to be a relevant fact that Ms. Ngo's family immigrated to Canada without her, the reasons for the decision must demonstrate that the officer expressly considered all of the facts surrounding the departure of Ms. Ngo's family.

[14] Finally, the decision is to be made within 30 days of the date of the Court's judgment.

[15] A comment, in the unique circumstances of this case, is warranted with respect to the first direction. Concern was expressed during the hearing by Ms. Ngo's counsel as to whether the visa post in question had sufficient staff to allow a fresh decision-maker to be found. I accept, without hesitation, counsel for the Minister's assurance that a qualified and fair officer will be found to make the decision. On reflection, however, I think it would be wise for such officer to be specifically told that he or she is to have no regard to the fact that Ms. Ngo's application has been refused previously. The officer should be advised that the reason that this is not a relevant consideration is that those prior refusals were based upon a failure to properly consider the relevant legislation and ministerial guidelines.

[16] I think this instruction is prudent in the present case because of an unfortunate entry in the Computer Assisted Immigration Processing System notes, where the officer who made the first decision expressed not only her disappointment with the Court's order that set aside her initial decision, but also her dissatisfaction with the Court's reasons. The new decision-maker would normally be expected to have access to that note. Hence, the salutary nature (at least in my view) of

the advice above. Accordingly, the first direction, as it appears in the judgment that follows, will be revised to address my concern.

[17] Turning to the issue of costs, Ms. Ngo seeks costs on a solicitor-client basis in light of the failure of the officer to follow the prior direction of this Court. The Minister responds that no special circumstances warrant an award of costs, let alone an award of solicitor-client costs. The Minister also notes that she made a timely offer to settle this matter and that Ms. Ngo's counsel has advanced arguments that have already been rejected on two prior occasions by this Court. In the Minister's view, the actions of Ms. Ngo have unnecessarily delayed the redetermination of this matter.

[18] Three facts are relevant to the issue of costs. First, the second officer ignored the Court's order and made a second decision without proper consideration of the emotional and dependency factors outlined in section 8.3 of OP 4. Second, Ms. Ngo was required to bring an application for judicial review of that decision. Third, the Minister opposed the granting of leave in Ms. Ngo's application.

[19] In my view, those facts constitute special reasons that warrant an award of costs.

[20] That said, once leave was granted and the certified tribunal record was delivered, the Minister promptly attempted to settle this application. At that point in time, I am satisfied that no special reasons existed that would justify any further award of costs.

[21] Orally, counsel for the Minister suggested that costs in the amount of \$750.00 would be reasonable. Ms. Ngo's counsel argued that if solicitor-client costs were not available, an award of \$3,000.00 would be appropriate.

[22] An award of costs in the all-inclusive amount of \$1,000.00 is, in my view, appropriate having regard to all of the circumstances.

[23] The application for judicial review is therefore allowed as set out more particularly in the judgment that follows. As everything but the quantum of costs was agreed upon by the parties, there is no question to certify.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed, and the decision of the Immigration Program Manager dated October 2, 2006, is hereby set aside.

2. The matter is remitted for redetermination on the following terms:
 - a. The application is to be decided by an officer who has had no prior involvement in the making of the previous decisions. Such officer is to be specifically told that he or she is to have no regard to the fact that Ms. Ngo's application has previously been refused. This is because those refusals were based upon a failure to properly consider the relevant legislation and ministerial guidelines.

 - b. Any interview of Ms. Ngo that is required shall be conducted by the officer who will decide the humanitarian and compassionate aspect of her application.

 - c. The officer's decision shall be made with express regard to paragraph 3(1)(d) of the *Immigration and Refugee Protection Act* and section 8.3 of OP 4.

 - d. The reasons for the decision shall explicitly set out the officer's reasons for finding that there are, or are not, sufficient humanitarian and compassionate factors so as to warrant an exemption from the requirements of the skilled worker class.

 - e. If the officer considers it to be a relevant fact that Ms. Ngo's family immigrated to Canada without her, the reasons for the decision must demonstrate that the officer

expressly considered all of the factors surrounding the departure of Ms. Ngo's family.

- f. The decision is to be made within 30 days of the date of this judgment.
3. The Minister shall pay costs to Ms. Ngo fixed in the all-inclusive sum of \$1,000.00.

“Eleanor R. Dawson”

Judge

APPENDIX

Subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 reads as follows:

18.1(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other

18.1(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office

tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5924-06

STYLE OF CAUSE: NGOC UYEN NHI NGO, Applicant

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION, Respondent

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 12, 2007

**REASONS FOR JUDGMENT
AND JUDGMENT:** DAWSON, J.

DATED: DECEMBER 20, 2007

APPEARANCES:

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