Federal Court  Cour fédérale

Date: 20090520

Docket: IMM-4016-08

Citation: 2009 FC 505

Ottawa, Ontario, this 20th day of May 2009

Before: The Honourable Mr. Justice Pinard

BETWEEN:

AGHDAS NAJAFI ASL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), of an immigration officer's decision, dated June 16, 2008, refusing the applicant's application for permanent residence on the basis of humanitarian and compassionate ("H&C") considerations.

[2] The applicant, Aghdas Najafi Asl, is a citizen of Iran. She is a widow and mother of six adult children, five of whom have permanent resident status in Canada.

* * * * * * * *

[3] In a brief letter, dated June 16, 2008, the visa officer points out that, in making his decision, he took into consideration the fact that five of the applicant's children had permanent resident status in Canada. He indicates, however, that he is "of the opinion that the dependency in this case is strictly an emotional dependency" of a kind "that normally exists in the vast majority of families". It is therefore inadequate, on its own, to support a successful H&C application. The officer concludes that no disproportionate hardship would be suffered by the applicant because of separation from her children and grandchildren.

[4] The visa officer's Computer Assisted Immigration Processing System ("CAIPS") notes offer a more detailed picture of his reasons. Therein, he recounts the exchange with the applicant's counsel regarding his presence as an observer at the interview, and obtaining access to his CAIPS notes following the interview. After an extensive analysis of the applicant's circumstances, the visa officer concludes as follows:

> I am of the opinion that this application shall be refused for the following reasons:
>
> A – A decision under section 25 of the Act is an exceptional measure, not a routine procedure. An application for H&C considerations should be submitted by applicants who are inadmissible or who do not meet the requirements of the Act. Based on the evidence before me, I am of the opinion that this is not the case with the applicant. The applicant is a member of the family class

> and any of her 5 children who have permanent resident status could be in a position to sponsor her. Applying under section 25 of the Act appears premature in the current circumstances.
>
> B – Having considered all of the evidence before me, having weighed the different relevant factors and taken into account the applicant's personal circumstances, having considered the best interest of the children directly affected, I am not satisfied that there are sufficient humanitarian and compassionate considerations that would, under the provisions of section 25 of the Act, justify granting permanent resident status to the applicant or exempting the applicant from any applicable provision of the Act.

* * * * * * * *

[5] The applicant first argues that she was denied procedural fairness because the visa officer refused to allow her counsel to be present as an observer during her interview with the visa officer.

[6] The applicant relies on the Federal Court of Appeal's decision in *Ha v. Canada (M.C.I.)*, [2004] 3 F.C.R. 195, to support her position. The appellants in *Ha* were three Cambodian sisters whose application for permanent residence as Convention refugees seeking settlement ("CRSRs") under the former *Immigration Act* and *Immigration Regulations, 1978* had been denied. Justice Sexton set out the Court's task at paragraph 40 of the decision:

> . . . Since the content of the duty of fairness will always vary depending on the facts, the Court must instead answer the question of whether the duty of fairness was breached <u>in the particular circumstances of this case</u>. . . .
>
> [My emphasis.]

It is clear, then, that the decision in *Ha* did not displace the principle repeated in *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817, 243 N.R. 22, that "the concept of procedural fairness is eminently variable and its content must be decided in the specific context of each case".

[7] In my view, the present case can be distinguished in a number of significant ways. First, *Ha* concerned subsection 2(1) of the former Act, according to which a person could be considered a CRSR if four legal requirements were met. The Court in *Ha* concluded that an officer's discretion under the statutory scheme was not considerable. This is in contrast to subsection 25(1) of the Act, which provides broad discretion in determining whether to exempt an applicant from the requirements of the Act based on H&C considerations (*Baker*, *supra*, at paragraph 51; *Kolosovs v. Canada (M.C.I.)*, [2008] F.C.J. No. 211 (QL), 2008 FC 165, at paragraph 5). In addition, in *Ha* legal questions had been put to the appellants by the officer at their interview. Here, the applicant was asked whether her children had considered sponsorship, and towards the end of her interview, whether she had any additional H&C grounds to add. These were not, in my view, questions of a "legal or complex nature" which the applicant was unable to adequately engage absent the presence of her counsel. Finally, it is clear that the importance of the decision in the instant case is not equivalent to *Ha* where the applicants were seeking permanent residence on the basis that they were Convention refugees.

[8] Of most significance, however, is the fact that the visa officer in the present case – unlike *Ha* – did not categorically refuse to allow counsel to attend the interview. In fact, he explained that counsel could attend but that a written request was required, as a matter of office policy. The applicant herself, together with her counsel, opted to proceed with the interview without the latter's

presence, rather than accept the visa officer's offer to have it postponed in anticipation of a formal request. There was, therefore, no breach of procedural fairness, under the circumstances.

[9] The applicant further argues that the she was denied procedural fairness because the officer refused to allow counsel to attend the interview and, *further*, refused "counsel the opportunity to obtain and review the officer's notes in order to make submissions". The applicant has provided me with no jurisprudence to support her claim that she had a right to obtain the officer's notes prior to the rendering of a decision. Nor did the applicant or her representative request at any time that the visa officer postpone his decision until she had made an Access to Information request to obtain the CAIPS notes.

[10] The applicant further invokes a reasonable apprehension of bias on the part of the visa officer as a basis for quashing the decision.

[11] At paragraph 47 of her written submissions, the applicant states: "the visa officer's comments that the applicant could and should be sponsored created a reasonable apprehension of bias with respect to his decision on the *de facto* family member considerations". There is a presumption of impartiality (*Mugesera v. Canada (M.C.I.)*, [2005] 2 S.C.R. 91, at paragraph 13). The fact that the visa officer (in my view, properly) entertained the question of the applicant's eligibility for sponsorship in no way bears on his impartiality or independence. Indeed, in his submissions to the officer, dated April 1, 2008, the applicant's representative writes:

> [The applicant] is a member of each of the children's family class but is a *de facto* dependent [*sic*] of Mehdi. While it is true that in the fullness of time, Mehdi or any of her other children would be able to

> sponsor her to Canada, the processing of parental applications is a long process. . . .
>
> [My emphasis.]

[12] I find no support in the record for the applicant's allegation of bias.

[13] The applicant also claims that the visa officer erred in concluding that emotional dependence was not a sufficient basis for granting permanent residence on H&C grounds. Read in their entirety, however, the officer's reasons are more comprehensive in their treatment of the applicant's circumstances than her argument suggests.

[14] In his letter of June 16, 2008, the visa officer writes:

> . . . In reaching my conclusion, I weighed the different factors relevant to the assessment of *de facto* dependency, took into account your personal circumstances and considered the best interests of the children involved. On the one hand, based on the review of the evidence, you are a member of the family class and you have five children who have permanent resident status in Canada and could be in a position to sponsor you. On the other hand, I am of the opinion that the dependency in this case is strictly an emotional dependency. The review of all the evidence and circumstances of this case has not satisfied me that the emotional relation between you and your son Mehdi or your other children is any different or stronger than the bond that normally exists in the vast majority of families. Therefore, it does not suffice, by itself, to support a successful request for humanitarian and compassionate considerations.
>
> [My emphasis.]

[15] In his CAIPS notes, the officer elaborates further on his reasons:

> Regarding the documentary evidence of the relationship, I do not dispute that the family tie is genuine and that the applicant is the

> mother of Mehdi and of the other children who have been granted permanent residence status.
>
> The dependency is this case is strictly emotional. It has been clearly established that the applicant is financially independent. In her application, the applicant declared assets worth 30,758 million dollars including savings, real estate properties and business shares. She mentioned, at interview [*sic*], that she derives an income of 30 million toumans per month (equivalent to 33 900$/month or 406 800$/year) from her business shares. She confirmed that she has full authority to make any financial decision. The applicant has no medical condition that she is aware of and do [*sic*] not need any medical support or assistance. The applicant is active, travels regularly and at the interview, she came through as a very alert person. . . .

[16] The visa officer later acknowledges that there will be an emotional impact on the applicant if her children settle in Canada and she remains in Tehran. However, he notes that the separation need only be temporary while a sponsorship application is processed, and in the meantime the applicant and her children have the means to travel to see each other regularly. Moreover, the record shows that the applicant's daughter, Azam, has permanent resident status in the United States but in fact spends the majority of her time in Iran.

[17] It is clear from the officer's extensive notes that, in coming to his decision, he considered the applicant's dependency on her children, including Mehdi, among many other factors. I can find no error in his reasoning, in this regard.

[18] Finally, the applicant argues that the visa officer erred by "importing the undue or disproportionate hardship test into his consideration of this application".

[19] The applicant relies on Justice Douglas R. Campbell's decision in *Gill v. Minister of Citizenship and Immigration*, 2008 FC 613, in support of her position. However, in *Yue v. Minister of Citizenship and Immigration*, 2006 FC 717, Justice Barry Strayer, as in the latter case, considered an H&C decision made by a visa officer involving a child. In considering the best interests of the child, Justice Strayer determined that it was correct for the officer to find that the degree of hardship that might be involved in the applicant remaining in China was not sufficient when balanced against the clear non-compliance with the Regulations to warrant a favourable exercise of discretion under subsection 25(1) of the Act on H&C grounds (see also *Sandhu v. Minister of Citizenship and Immigration*, 2007 FC 156).

[20] In any event, the situation is different in the case here. The sole applicant is the mother of adult children whose interest was correctly considered by the visa officer in the context of emotional hardship due to separation from the applicant.

[21] Subsection 8.1 of Citizenship and Immigration Canada's manual entitled "Processing of Applications under Section 25 of the IRPA" provides the following general guidelines for officers assessing H&C applications for individuals applying from outside Canada:

> H&C applications must be reviewed on a case-by-case basis. Applicants are free to make submissions on any aspect of their personal circumstances that they feel would warrant being granted the exemption requested.
>
> Officers should ensure that humanitarian and compassionate assessments clearly demonstrate:
>
> - that all factors, including the positive H&C factors and any arguments raised with respect to the best interests of a child directly affected (BIOC), have been taken into account;

> - that the officer has considered and analyzed these factors, given them due weight, and explained the weight that they have given to each of these factors and why;
> - that the officer has conducted a balancing exercise between the positive H&C factors identified and those facts and circumstances which would weigh against granting an exemption under A25.
>
> It is important that all submissions and evidence are taken into account and that case notes reflect that the totality of evidence has been considered and that the balancing exercise described above has been included in the recorded decision.
>
> [My emphasis.]

[22] In my view, the visa officer's reasons amply reflect the above guidelines, taking into consideration as they do all relevant factors, including prospective hardship to the applicant due to separation from her family members. I find no basis on which to interfere with the decision.

* * * * * * * *

[23] For all the above reasons, the application for judicial review is dismissed.

[24] The applicant proposes the following question for certification:

> Is the duty of fairness breached when a visa officer at a visa office located outside Canada refuses to allow counsel to attend at the interview of an applicant seeking admission to Canada on humanitarian and compassionate grounds under s. 25 of the *Immigration and Refugee Protection Act* for the limited purpose of observing and taking notes without first applying in writing for and obtaining permission from the visa officer to attend the interview?

[25] I agree with the Minister that the question proposed by the applicant does not accurately reflect the actual circumstances in this case and therefore, the question is not dispositive of the case (see *Liyanagamage v. Canada (Minister of Citizenship and Immigration)* (1994), 176 N.R. 4 (F.C.A.)). As pointed out by the Minister, there was no refusal by the visa officer to allow counsel to attend at the interview without applying first in writing. The visa officer offered to adjourn the interview to allow counsel to make an application in writing to attend at the interview. Counsel and the applicant made the choice to proceed with the interview without counsel present. There was no breach of procedural fairness in view of the applicant's waiver of her right to have counsel attend at the interview. The applicant cannot now complain about the choice she made.

[26] Consequently, this is not a matter for certification.

JUDGMENT

The application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, of an immigration officer's decision, dated June 16, 2008, refusing the applicant's application for permanent residence on the basis of humanitarian and compassionate considerations, is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Mr. Adrian Huzel	FOR THE APPLICANT
Ms. Helen Park	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Embarkation Law Group Vancouver, British Columbia	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT