Date: 20090827

Docket: IMM-2709-08

Citation: 2009 FC 850

BETWEEN:

MELITA BELLO SABANAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT
ISSUED AUGUST 4, 2009

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 (the Act) for leave and judicial review of a decision of an immigration officer (the officer), dated June 21, 2007, which determined that Melita Bello Sabanal (the applicant) did not meet the statutory requirements to apply for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds.

[2] The applicant requests that the application for judicial review be granted and the decision set aside.

Background

[3] The applicant is a citizen of the Philippines. The applicant came to Canada in March of 1991 as a live-in caregiver but did not qualify for permanent residence through the live-in caregiver program because she had not applied within the 36 month period of arrival in Canada.

[4] The applicant applied for permanent residence on H&C grounds. The application was based on the importance of her ties to Canada including a common-law relationship and two children of that relationship and the hardship that the applicant would have suffered if she were required to return to Singapore and apply at a visa office.

[5] In May 2003, the applicant received an approval in principle on her inland application for permanent residence status, subject to an assessment of the applicant's admissibility on medical and criminality grounds. The applicant was issued an open work permit at this time.

[6] On March 10, 2004, the applicant was advised that Citizenship and Immigration Canada were still waiting for overseas police clearance certificates from the Philippines and Singapore.

[7] The applicant "passed" the medical examination for the purposes of the application. The applicant obtained police clearance documents from the Royal Canadian Mounted Police and the

police authorities in Singapore where she had also lived. These clearances disclosed no reason that she was inadmissible for criminality.

[8] The applicant was also required to provide documentation from the Philippines since she had resided there. In July 2006, this police clearance was outstanding; the last requirement outstanding. By July of 2007, the applicant had not provided police clearance from the National Bureau of Investigation (NBI) in the Philippines.

Officer's Reasons

[9] The following are the salient matters related to the rejection of the applicant's application for permanent residence as stated in a letter to the applicant on June 21, 2007:

> As indicated in our previous letter, a decision about whether you meet all requirements of the Immigration and Refugee Protection Act has been made based upon the information on your file. On June 21, 2007, a representative of the Minister of Citizenship and Immigration reviewed your file and decided to refuse your Application to Remain in Canada as a Permanent Resident. This refusal was based upon insufficient information to make a proper decision about whether you met all the admissibility requirements of the Immigration and Refugee Protection Act due to your lack of response for more information on this matter. Requests for additional information were mailed to you on October 30 2006, January 16 2007 and March 30 2007.

[10] **Issues**

The applicant submitted the following issues for consideration:

1. The officer made an erroneous finding of fact, in that the decision maker had ignored evidence and came to a conclusion that is not consistent with the evidence.

2. Has there been a breach of natural justice in that the applicant had sent all of the materials requested and had complied with all requests and requirements, including the NBI police clearance, but the decision maker failed to consider the materials before making a decision, and concluded instead that the applicant had not complied with the request to submit the NBI police clearances?

[11] I would rephrase the issues as follows:

1. What is the appropriate standard of review for the officer's June 21, 2007 decision?

2. Did the officer commit an error of fact in coming to a conclusion that was not consistent with the evidence?

3. Did the officer breach principles of natural justice when he rejected the applicant's claim because she had failed to comply with requests to file the required documentation for permanent residency status?

Applicant's Submissions

[12] The applicant submits that she obtained clearances from the police in the city of Zamboanga in the Philippines and that these documents were submitted at the immigration office. She alleges that the immigration office was not satisfied with these documents. Although they raised more than

one concern, the primary concern was that it did not come from the central Filipino police authorities: the National Bureau of Investigation (NBI).

[13] The applicant alleges that she was delayed in responding because she was confused about the documentation required. She sent the correct NBI police clearance to the immigration office in early 2007 which she alleges showed that she had no criminal record in the Philippines.

[14] The applicant alleges that she did not have news for many months after submitting the documentation in early 2007. She said that in July 2007 her work permit was renewed leading her to conclude that her application for permanent residence had been accepted because she understood that unless she was eligible for permanent residence she would not be entitled to a work permit.

[15] By May 2008, the applicant alleges that she became increasingly concerned that she had not heard from the immigration authorities. The applicant consulted a lawyer to provide assistance in bringing the matter to a conclusion. The immigration office responded with a note that the applicant had been rejected. The applicant alleges that this was the first time that the applicant had been informed that a decision had been made on her application.

[16] The applicant submits that she saw a copy of her file when her lawyer asked for a copy under a *Privacy Act* request. Her file contained a copy of a letter to the applicant dated June 21, 2007 stating that her application had been rejected on the basis that the NBI police clearances had

not been received. She alleges that she sent the appropriate NBI police clearances well before June 2007.

[17] The applicant submits that a document was issued by the NBI in December 2006 for the purposes of a police clearance. She submits that she retained a “personal copy” of the document for her records and sent the official copy to the immigration officer as she had been requested to do. A photocopy of the “personal copy” as provided to this Court, confirms that the document was issued in December 2006.

[18] The applicant submits that she sent the document to the immigration office in early 2007 and the applicant submits that “there is no good reason” to doubt this evidence as it is consistent with the following alleged facts:

- she obtained the document at the end of 2006
- she had previously tried, in good faith, to provide Filipino police clearances but had simply submitted the wrong ones
- she had tried, in good faith, to cooperate with the immigration office and provide all appropriate documents up to that point
- the document confirms that she has no criminal record in the Philippines and she had no reason to hide it
- it was the sole remaining requirement before she obtained her permanent residence status.

[19] The applicant submits that the decision maker overlooked it or the document did not find its way into the decision maker's file. The applicant submits that it is "impossible for the applicant to know or prove exactly where the police clearance went astray" and whether it was lost in the mail, lost by immigration authorities given the size of their "operation", and/or whether it was misfiled.

Respondent's Submissions

[20] The respondent submits that the applicant's inland application for permanent residence status was refused because she failed to provide an appropriate police clearance certificate from the Philippines despite repeated attempts to do so. The respondent acknowledges that the applicant wishes to challenge the refusal because she alleges that she did submit the document but for some reason it was not received. The respondent submits that the applicant was treated fairly at all times and the applicant failed to exercise due diligence in the application process.

[21] The respondent submits that the applicant was asked approximately eight times to provide a police clearance from the Philippines. The last letter sent to the applicant in March of 2007 was registered and stated that if the applicant did not provide the requested document; a final decision would be rendered based on the information that was in her file.

[22] On June 21, 2007, the officer reviewed the applicant's file and refused the application for non-compliance.

[23] The respondent notes the applicant's submission that the document was sent in January 2007 and crossed in the mail with the letter from immigration authorities. The respondent submits that even if this were true, the applicant has not provided any explanation as to why she failed to respond to the registered mail sent to her in March 2007. No reasonable explanation, such as a change of residence during this time period or even failure to receive the registered letter was suggested by the applicant. Finally, the respondent submits that even if she did not receive the letter, this does not explain why she did not check the status of her application on-line or make further inquiries following the letter she says was submitted in early January 2007. Ultimately, the respondent does not find the applicant's explanation adequate.

Analysis and Decision

[24] **Issue 1**

What is the appropriate standard of review for the officer's June 21, 2007 decision?

There are two different standards to apply in this review. Issue one deals with findings of fact which are assessed on the standard of reasonableness in accordance with *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190. This Court has consistently recognized the specialized nature of immigration officers' decisions tasked with evaluating evidence in accordance with the Act. The decision under review in this case was administrative in nature. This further solidifies the need for deference on questions of fact finding. *Khakh v. Canada (Minister of Citizenship and Immigration),* [2008] F.C.J. No. 904, suggests that factors such as reliance on irrelevant or extraneous considerations and unlawful exercise of or fettering of discretion can lead to a finding that an

impugned finding of fact was unreasonable (see *Scislowicz v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 991).

[25] Procedural fairness, in issue two, is subject to the standard of correctness (see *Khakh* above) because of the undermining inviolate legal principles involved. As stated in *Khakh* above:

> In such cases, the Court must "examine the specific circumstances of the case and determine whether the [decision maker] in question adhered to the rules of natural justice and procedural fairness" (*Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 16, [2006] 3 F.C.R. 168 at paragraph 15). In the event that a breach is found, no deference is due and the decision will be set aside (*Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392).

[26] The Court in *Dunsmuir* above, also noted that the analysis of the appropriate standard of review need not by undertaken where courts have arrived at consensus in similar cases.

[27] **Issue 2**

Did the officer commit an error of fact in coming to a conclusion that was not consistent with the evidence?

The applicant submitted that the officer failed to take into consideration all the evidence before her and as such breached the requirements of procedural fairness. The respondent in reply submitted that there is a presumption that the officer took into account all the evidence before her (see *Sidhu v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 741 at paragraph 15). The respondent further submitted that the applicant has failed to show otherwise.

[28] I agree with the respondent that as per *Sidhu* above, that there exists a presumption that immigration officers have considered all the information before them and I further accept that the police clearance from NBI in the Philippines was not in front of the officer and not in the file. In *Quiroa v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 661 at paragraph 38, this Court held that there is no requirement that an officer reference every piece of evidence. The Court went on to say: "If the reasons, when taken as a whole, indicate that the Officer was alive to the issue, they will survive a somewhat probing examination and will not be found to be unreasonable."

[29] In this case, the immigration officer did not have a key piece of information that was necessary, namely the police clearance from the NBI for a successful application. As such, the officer made a decision based on what was included in her file. It was not unreasonable for the officer to make a decision of non-compliance as Immigration and Citizenship Canada required police clearances in accordance with paragraph 3(1)(h) of the Act which includes the objective "to maintain and protect the health, safety and good order of Canadian society". I cannot accept that the officer committed an error of fact in evaluating the evidence before him.

[30] **Issue 3**

Did the officer breach principles of natural justice when he rejected the applicant's claim because she had failed to comply with requests to file the required documentation for permanent residency status?

It is my opinion that the applicant was given full and fair opportunity to meet the requirements under the Act for permanent residency. For whatever reason, she decided not to attend to the requests for documentation diligently and I agree with the respondent that her explanations are inadequate.

[31] Paragraph 3(1)(f) of the Act outlines the many objectives of our immigration legislation including the need for "consistent standards and prompt processing" in attaining Canadian immigration goals. Included in these goals is the protection of Canadians from a security perspective. Subsection 21(a) of the Act conveys a statutory requirement of applicants to meet obligations. Finally, *Chang v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 132, stands for the proposition that notice of sanction clauses are important, and procedural fairness requires notice be given if sanctions are intended to be enforced. In my view, the applicant in this case was adequately informed of the consequences of failing to provide documentation in a timely manner as well as the consequences of not communicating back to immigration officers within 30 days of receiving a notice from them.

[32] The applicant first received a letter on December 20, 2002 outlining the process of applying for permanent residency from within Canada on humanitarian and compassionate (H&C) grounds. The letter also advised that an application for permanent residency could be refused if "you receive a letter asking for a reply within 30 days and do not respond". A letter of December 1, 2003, March 10, 2004 and December 23, 2004, requesting the outstanding police certificates again noted that if the applicant did not reply within 30 days of the date of the letter, "and the decision is to refuse your application for permanent residence, there is no authority to re-examine or reopen this decision".

[33] Although the applicant did at times write back immediately after receiving letters including on April 30, 2005 and March 12, 2004 requesting more time to provide the documentation from the Philippines and Singapore, she was not consistent in her replies. In particular, she did not respond to three letters sent in the 12 months leading up to the decision to refuse for non-compliance including the registered letter sent to her in March 2007.

[34] The duty of procedural fairness as it applies to discretionary administration decisions was most comprehensively set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 which stated that the duty varies according to the circumstances of each case. As enunciated in *Khakh* above, these factors include, *inter alia*, the importance of the decision to the individual, the nature of the decision and the process followed, the legitimate expectations of the individual, the public interest, and the factual context.

[35] In *Singh v. Canada (Minister of Citizenship and Immigration)*, 2008 CanLII 51693 (I.R.B.), the Immigration Review Board finds that the applicant's best intentions to comply with the requirements under the Act, does not change the fact that the immigration officer acted fairly in fulfilling his duties under the Act.

[36] In this case, the explanation by the applicant as to why she did not follow up with Citizenship and Immigration Canada after sending a form that had been requested so many times is problematic. I am not convinced that a granting of review will rectify the issue of non-compliance

with this applicant. The Court is not aware of any other efforts to obtain an original copy of the police clearance by the NBI having just been provided with a “personal copy”. The possibility of a further delay in obtaining the police certificates and the extended unnecessary use of immigration resources suggest that the decision must stand despite the unfortunate outcome involving young children.

[37] As I cannot come to the conclusion that the officer committed an error of fact or that the officer breached the principles of natural justice, I have no choice but to dismiss the application for judicial review.

[38] Neither party wished to submit a proposed question of general importance for my consideration for certification.

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

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

Federal Courts Act, R.S.C., 1985, c. F-7

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :
. . .	. . .
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

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

3.(1) The objectives of this Act with respect to immigration are	3.(1)En matière d'immigration, la présente loi a pour objet :
. . .	. . .
(f) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;	f) d'atteindre, par la prise de normes uniformes et l'application d'un traitement efficace, les objectifs fixés pour l'immigration par le gouvernement fédéral après consultation des provinces;
(h) to protect the health and safety of Canadians and to maintain the security of Canadian society;	h) de protéger la santé des Canadiens et de garantir leur sécurité;

21.(1)A foreign national becomes a permanent resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(a) and subsection 20(2) and is not inadmissible.

21.(1) Devient résident permanent l'étranger dont l'agent constate qu'il a demandé ce statut, s'est déchargé des obligations prévues à l'alinéa 20(1)a) et au paragraphe 20(2) et n'est pas interdit de territoire.

(2) Except in the case of a person described in subsection 112(3) or a person who is a member of a prescribed class of persons, a person whose application for protection has been finally determined by the Board to be a Convention refugee or to be a person in need of protection, or a person whose application for protection has been allowed by the Minister, becomes, subject to any federal-provincial agreement referred to in subsection 9(1), a permanent resident if the officer is satisfied that they have made their application in accordance with the regulations and that they are not inadmissible on any ground referred to in section 34 or 35, subsection 36(1) or section 37 or 38.

(2) Sous réserve d'un accord fédéro-provincial visé au paragraphe 9(1), devient résident permanent la personne à laquelle la qualité de réfugié ou celle de personne à protéger a été reconnue en dernier ressort par la Commission ou celle dont la demande de protection a été acceptée par le ministre — sauf dans le cas d'une personne visée au paragraphe 112(3) ou qui fait partie d'une catégorie réglementaire — dont l'agent constate qu'elle a présenté sa demande en conformité avec les règlements et qu'elle n'est pas interdite de territoire pour l'un des motifs visés aux articles 34 ou 35, au paragraphe 36(1) ou aux articles 37 ou 38.

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

(2) The following provisions govern an application under subsection (1):

(2) Les dispositions suivantes s’appliquent à la demande d’autorisation :

(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;

a) elle ne peut être présentée tant que les voies d’appel ne sont pas épuisées;

(b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court (“the Court”) within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;

b) elle doit être signifiée à l’autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l’alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;

(c) a judge of the Court may, for special reasons, allow an extended time for filing and serving the application or notice;

c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

(d) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and

d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d’un juge de la Cour, sans comparution en personne;

(e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d’appel.

Immigration and Refugee Protection Regulations, SOR/2002-227

10.(1) Subject to paragraphs 28(b) to (d), an application under these Regulations shall	10.(1) Sous réserve des alinéas 28b) à d), toute demande au titre du présent règlement :
(a) be made in writing using the form provided by the Department, if any;	a) est faite par écrit sur le formulaire fourni par le ministère, le cas échéant;
(b) be signed by the applicant;	b) est signée par le demandeur;
(c) include all information and documents required by these Regulations, as well as any other evidence required by the Act;	c) comporte les renseignements et documents exigés par le présent règlement et est accompagnée des autres pièces justificatives exigées par la Loi;
(d) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations; and	d) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;
(e) if there is an accompanying spouse or common-law partner, identify who is the principal applicant and who is the accompanying spouse or common-law partner.	e) dans le cas où le demandeur est accompagné d'un époux ou d'un conjoint de fait, indique celui d'entre eux qui agit à titre de demandeur principal et celui qui agit à titre d'époux ou de conjoint de fait accompagnant le demandeur principal.
(2) The application shall, unless otherwise provided by these Regulations,	(2) La demande comporte, sauf disposition contraire du présent règlement, les éléments suivants :
(a) contain the name, birth date, address, nationality and immigration status of the applicant and of all family members of the applicant, whether accompanying or not,	a) les nom, date de naissance, adresse, nationalité et statut d'immigration du demandeur et de chacun des membres de sa famille, que ceux-ci l'accompagnent ou non, ainsi

and a statement whether the applicant or any of the family members is the spouse, common-law partner or conjugal partner of another person;

que la mention du fait que le demandeur ou l’un ou l’autre des membres de sa famille est l’époux, le conjoint de fait ou le partenaire conjugal d’une autre personne;

(b) indicate whether they are applying for a visa, permit or authorization;

b) la mention du visa, du permis ou de l’autorisation que sollicite le demandeur;

(c) indicate the class prescribed by these Regulations for which the application is made; and

c) la mention de la catégorie réglementaire au titre de laquelle la demande est faite;

(c.1) include the name, postal address and telephone number of any person who represents the applicant, and the person's fax number and electronic mail address, if any;

c.1) le nom, l’adresse postale, le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l’adresse électronique de toute personne qui représente le demandeur;

(c.2) if the person who represents the applicant is charging a fee for representation, include

c.2) si la personne qui représente le demandeur le fait contre rémunération :

(i) the name of the organization referred to in the definition "authorized representative" of which the person is a member, and

(i) le nom de l’organisation visée à la définition de «représentant autorisé» dont elle est membre,

(ii) the membership identification number issued by that organization to the person; and

(ii) le numéro de membre qui lui a été délivré par l’organisation;

(d) include a declaration that the information provided is complete and accurate.

d) une déclaration attestant que les renseignements fournis sont exacts et complets.

66. A request made by a foreign national under subsection 25(1) of the Act must be made as an application in writing accompanied by an application to remain in Canada as a permanent resident or, in the case of a foreign national outside Canada, an application for a permanent resident visa.

66. La demande faite par un étranger en vertu du paragraphe 25(1) de la Loi doit être faite par écrit et accompagnée d'une demande de séjour à titre de résident permanent ou, dans le cas de l'étranger qui se trouve hors du Canada, d'une demande de visa de résident permanent.

68. If an exemption from paragraphs 72(1)(a), (c) and (d) is granted under subsection 25(1) of the Act with respect to a foreign national in Canada who has made the applications referred to in section 66, the foreign national becomes a permanent resident if, following an examination, it is established that the foreign national meets the requirements set out in paragraphs 72(1)(b) and (e) and

68. Dans le cas où l'application des alinéas 72(1)a), c) et d) est levée en vertu du paragraphe 25(1) de la Loi à l'égard de l'étranger qui se trouve au Canada et qui a fait les demandes visées à l'article 66, celui-ci devient résident permanent si, à l'issue d'un contrôle, les éléments ci-après, ainsi que ceux prévus aux alinéas 72(1)b) et e), sont établis :

(a) in the case of a foreign national who intends to reside in the Province of Quebec and is not a member of the family class or a person whom the Board has determined to be a Convention refugee, the competent authority of that Province is of the opinion that the foreign national meets the selection criteria of the Province;

a) dans le cas où l'étranger cherche à s'établir dans la province de Québec, n'appartient pas à la catégorie du regroupement familial et ne s'est pas vu reconnaître, par la Commission, la qualité de réfugié, les autorités compétentes de la province sont d'avis qu'il répond aux critères de sélection de celle-ci;

(b) the foreign national is not otherwise inadmissible; and

b) il n'est pas par ailleurs interdit de territoire;

(c) the family members of the foreign national, whether accompanying or not, are not inadmissible.	c) les membres de sa famille, qu'ils l'accompagnent ou non, ne sont pas interdits de territoire.

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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