Federal Court  Cour fédérale

Date: 20110412

Docket: IMM-4898-10

Citation: 2011 FC 451

Ottawa, Ontario, April 12, 2011

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

ZULQUANAIN HUSAIN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Zulquanain Husain (the "Applicant") seeks judicial review of the decision of Visa Officer Kristin L. Erickson (the "Officer") of the High Commission of Canada in New Delhi, India. In her decision, the Officer rejected the Applicant's application for permanent residence in Canada as a *de facto* member of the family class, pursuant to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"). The Applicant applied for the exercise of discretion on humanitarian and compassionate grounds pursuant to subsection 25(1) of the Act which provides as follows:

25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[2] The Applicant is a citizen of India. She is the sister of Riyaz Husain. In November 1999, Riyaz Husain and his wife Arjumand became the parents of triplets, all daughters. The Applicant travelled to Dubai, United Arab Emirates to assist her sister-in-law in caring for the three children and remained with her extended family for a few months. She became attached to Husaina, one of the children, and when she returned to India her brother and sister-in-law allowed her to take the baby with her. At this time, the Applicant was married but no children had been born of her marriage.

[3] The Applicant and her husband raised their niece as their own child.

[4] In 2001, the Applicant's brother and sister-in-law applied for permanent resident status in Canada. The child Husaina was included in this application.

[5] On February 6, 2002, the Applicant's brother and sister-in-law swore an Affidavit making the Applicant Husaina's guardian.

[6] On May 6, 2005, the Applicant's brother and sister-in-law and all their children were granted permanent residence in Canada. They immigrated to Canada shortly thereafter and left their daughter Husaina in the custody of the Applicant.

[7] In July 2008, the Applicant's husband died. She was left with significant debt and relied upon Husaina's parents for financial support.

[8] The Applicant's brother and sister-in-law applied to sponsor the Applicant on September 1, 2009. On April 20, 2009, Dr. V. Raut, a psychiatrist had written a letter, stating that the best interests of Husaina would be met if she immigrated to Canada accompanied by the Applicant.

[9] The Applicant's submissions in support of her application for permanent residence, on humanitarian and compassionate ("H & C") grounds, included submissions concerning the best interests of the child Husaina.

[10] The Officer's reason for refusing the Applicant's application are set out in the Computer Assisted Immigration Processing System ("CAIPS") notes. She concluded that the child's parents

must bear the “inevitable consequences” of their decision to “give” their child to the Applicant and that Husaina’s best interest would be satisfied by leaving her in the custody of the Applicant in India. The Officer declined to positively exercise the discretion conferred by subsection 25(1) of the Act in favour of the Applicant.

Discussion and Disposition

[11] In light of the decisions of the Supreme Court of Canada in *Dunsmuir v. New Bruinswick*, [2008] 1 S.C.R. 190 and *Canada (Minister of Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 the Officer’s decision is reviewable upon either the standard of reasonableness or correctness. The decision here in issue is one involving the exercise of discretion having regard to the statutory purpose of the Act.

[12] In its decision in *Dunsmuir*, the Supreme Court also observed that where prior jurisprudence has established the standard of review that should apply in a particular case, that standard can be followed. In this regard, I refer to paragraph 57.

[13] In *Paz v. Canada (Citizenship and Immigration)*, 2009 FC 412, this Court held that the standard of review applicable to H & C applications is reasonableness. That standard will be applied in this case.

[14] The Officer made the following entry in the CAIPS notes:

> THERE IS NO COMPULSION ON SPONSORS TO REMOVE HUSAINA FROM INDIA OR FROM THE CARE OF THE APPLICANT; IF THE SPONSORS CHOOSE TO TAKE THAT ACTION, THEY ARE ONLY REACHING THE INEVITABLE

> RESULT OF THEIR DECISION TO LEAVE HUSAINA IN THE APPLICANT'S CARE AS A BABY. THEY CHOSE TO GIVE HUSAINA TO HER AUNT AS A DE FACTO CHILD BUT THEY NOW SEEK TO REVERSE THAT DECISION AND TURN TO US TO AVOID THE INEVITABLE CONSEQUNCES OF THEIR DECISION. THERE IS NO COMPULSION OR OBLIGATION TO REMOVE THE CHILD HUSAINA. IF MATTERS ARE LEFT AS THEY ARE, THERE IS NO GROUND FOR H&C; IF THE SPONSORS CHOOSE TO REMOVE HUSAINA, THE RESPONSIBILITY FOR THE EFFECT ON HUSAINA AND THE APPLICANT RESTS WITH THEM
>
> THE INTERESTS OF THE CHILD, HUSAINA, ARE BEST SERVED BY REMAINING IN THE FAMILIAR SURROUNDINGS AND WITH THE FOSTER MOTHER SHE HAS KNOWN AND CONSIDERED AS HER MOTHER SINCE INFANCY, AND BY REMAINING IN HER FAMILIAR SURROUNDINGS. THERE IS NO EVIDENCE THAT REMOVING HER FROM HER FAMILIAR SURROUNDINGS, FROM THE SCHOOL WHERE SHE HAS BEEN STUDYING, FROM THE HOME SHE HAS KNOWN AND PLACING HER IN A COMPLETELY DIFFERENT FAMILY DYNAMIC, AS ONE OF FOUR CHILDREN INSTEAD OF AN ONLY CHILD, AS ONE OF TRIPLETS INSTEAD OF ALONE, IN A NEW SCHOOL IN AN UNFAMILIAR ENVIRONMENT AND WITH PARENTS SHE HAS KNOWN AS HER BIOLOGICAL PARENTS BUT NOT AS HER DE FACTO PARENTS, WITH THE APPLICANT'S POSITION ALTERED TO BEING HER AUNT RATHER THAN HER MOTHER, IN A LARGER, MIXED FAMILY WOULD SERVE HER BEST INTERESTS.

[15] As noted above, the Officer's decision is reviewable on the standard of reasonableness. That standard applies both to the decision-making process and the result. The reasonableness of the result will be assessed relative to the purposes and aims of the Act in general and of subsection 25(1) in particular.

[16] The purposes of the Act are set out in section 3.

[17] Subsection 3(1) sets out the statutory objectives with respect to immigration. Paragraph 3(1)(d) addresses family re-unification, as follows:

3. (1) The objectives of this Act with respect to immigration are	3. (1) En matière d'immigration, la présente loi a pour objet :
…	…
(d) to see that families are reunited in Canada;	d) de veiller à la réunification des familles au Canada;

[18] Subsection 12(1) of the Act provides that immigrants may be granted entry on the basis of family relationships and provides as follows:

Family reunification 12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.	Regroupement familial 12. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

[19] Subsection 117(1) of the Regulations defines membership in the family class. The Applicant is not a member of the "family" class as defined in subsection 117(1) of the Regulations. This impediment can be waived by the Minister of Citizenship and Immigration (the "Respondent") by the positive exercise of discretion pursuant to subsection 25(1) of the Act.

[20] The exercise of discretion pursuant to subsection 25(1), to overcome non-compliance with the statutory and regulatory requirements of the current immigration statutory regime, is not limited to consideration of the best interests of a child. Section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, reads as follows:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[21] As discussed above, one of the objects of the Act is family re-unification.

[22] The Officer's decision, and her reasons for same, demonstrate disregard for the purposes of the Act, including family re-unification in Canada. The Officer adopted a narrow-minded approach to the Applicant's application. In taking this narrow-minded approach, the Officer did not address the possibility of the Applicant, Husaina and Husaina's parents being re-unified in Canada.

[23] The Officer unreasonably characterized the parents' action as "giving" their child to the Applicant. The Applicant is the caregiver, not the "owner" of Husaina. It is obvious that her parents did not intend to relinquish their family bonds and responsibilities, since Husaina was included in the family's application for permanent residence in Canada.

[24] For the foregoing reasons I am satisfied that the decision fails to meet the relevant standard of review. The application for judicial review is allowed, the decision of the Officer set aside and

the matter is remitted to a different officer for re-determination. There is no question for certification arising.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed, the decision of the Officer set aside and the matter is remitted to a different officer for re-determination. There is no question for certification arising.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ZULQUANAIN HUSAIN v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

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