Federal Court  Cour fédérale

Date: 20161223

Docket: IMM-2092-16

Citation: 2016 FC 1412

Ottawa, Ontario, December 23, 2016

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

ASMA BUSHRA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review by Asma Bushra [the Applicant] pursuant to s. 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision made by a Visa Officer at the Canadian High Commission in Islamabad, Pakistan, dated March 17, 2016, in which the Applicant's application for permanent residence as a *de facto* dependent family member was denied [the Decision].

[2] The Applicant is a 29-year-old, high-school educated citizen of the Islamic Republic of Pakistan. She has two sisters, Uzma and Nadara. Both parents are deceased: her mother passed away in 2009 and her father in 1988, just a year after the Applicant was born. The Applicant has some family in Lahore, Pakistan but she is not close with them. Her sister Nadara lives in Pakistan as part of a 'joint family'; this means that she lives with her husband, his siblings and his parents. The Applicant's sister Uzma married Ghulam Murtaza Nadir Butt [Ghulam or Brother-in-Law] in 2002. The Applicant and her mother moved in with Uzma and Ghulam in 2002, when the Applicant was 15 years old; the Applicant has lived with her sister and Brother-in-Law since then. Her sister Uzma is like a mother to her.

[3] It is uncontested that the Applicant has never worked. Her Brother-in-Law has always taken care of her.

[4] The Applicant's Brother-in-Law is Ahmadiyya and fled from Pakistan to Sri Lanka in 2012 having been threatened with death by his brother because of his religion. He was accepted as a refugee in Canada on September 16, 2015, as a member of the Convention Refugee Abroad class. He submitted a request to allow his wife and child, who he left behind in Pakistan, to join him in Canada. He coupled that with a timely request the Applicant come to Canada as a continuing part of his family as a *de facto* dependent family member under the one-year window opportunity [OYW] provisions in the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*IRPR*].

[5] On December 8, 2015, the Applicant's Brother-in-Law received a letter from CIC's Resettlement Assistance Unit stating that the Applicant had been "found to meet the eligibility requirements of the One-Year Window of Opportunity provisions".

[6] Of particular relevance, the letter to the Brother-in-Law included the following two sentences:

> After a careful review of both your file and the information contained in the Request Form for Processing Non-Accompanying Family Members … completed by you, it has been determined that the following family members **have been found to meet** the eligibility requirements of the One-Year Window of Opportunity provisions:
>
> [names of wife and child omitted]
>
> **Asma BUSHRA DOB: 30APR1987 DEFACTO DEPENDENT**
>
> …
>
> **Final determination of eligibility will be completed by Visa office.**
>
> [all emphasis in original]

[7] A Toronto-based Visa Officer reviewed the file and noted that the Applicant is unmarried, that she has never worked, that her identity and her relationship with her sister has been confirmed and that her Brother-in-Law has always taken care of their financial expenses. That officer determined that an interview was warranted to assess the Applicant's dependency on her Brother-in-Law.

[8] On March 2, 2016, the Applicant received a letter from the High Commission's Visa Section informing her that her interview would take place on March 17, 2016 at the High Commission in Islamabad.

[9] This letter convoking the interview did not make any reference to Humanitarian and Compassionate [H&C] concerns or considerations: it informed her only of the date and time of the interview and the documents she had to bring.

[10] The Applicant and her sister Uzma attended as requested for their interviews. Both were interviewed by the same Visa Officer on the same day; Uzma, her sister, was interviewed first and the Applicant second.

[11] The Visa Officer's notes do not indicate that the Visa Officer raised the issue of H&C considerations either with the Applicant or her sister, although from what appear to be notes the Visa Officer made for his or her guidance, it is clear that H&C considerations was to be the purpose of the interview.

[12] The only reference to H&C in the notes is in the Decision dismissing her claim after the hearing was over. The Visa Officer denied the Applicant's application for status as a *de facto* dependent family member under the OYW.

II. Issues

[13] The only issue is whether the Applicant was denied procedural fairness in not being informed before her interview that the issue to be determined was whether or not she could establish a claim based on H&C grounds.

III. Standard of Review

[14] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." The standard of review on a challenge to a Visa Officer's assessment of an application is reasonableness: *Dhillon v Canada (Minister of Citizenship and Immigration)*, 2009 FC 614 at 19; *Li v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1284 at para 15. H&C decisions are also to be reviewed on a standard of reasonableness and considerable deference is afforded: *Okbai v Canada (Citizenship and Immigration)*, 2012 FC 229 at para 9 [*Okbai*].

[15] Procedural fairness on the other hand, requires that applicants be informed of concerns and given an opportunity to disabuse officers of those concerns: *Sidhu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 515 at paras 75-76, citing *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284 at para 22, Mosley J:

> In my view, the Federal Court of Appeal's endorsement in *Muliadi, supra*, of Lord Parker's comments in In re *H.K. (An Infant)*, [1967] 2 Q.B. 617, indicates that the duty of fairness may require

> immigration officials to inform applicants of their concerns with applications so that an applicant may have a chance to "disabuse" an officer of such concerns, even where such concerns arise from evidence tendered by the applicant. Other decisions of this court support this interpretation of *Muliadi, supra*. See, for example, *Fong v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 705 (T.D.), *John v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 350 (T.D.)(QL) and *Cornea v. Canada (Minister of Citizenship and Immigration) (2003)*, 30 Imm. L.R. (3d) 38 (F.C.T.D.), where it had been held that a visa officer should apprise an applicant at an interview of her negative impressions of evidence tendered by the applicant

[16] Questions of procedural fairness are reviewed on the correctness standard: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43. In *Dunsmuir* at para 50, the Supreme Court of Canada explained what is required when conducting a review on the correctness standard:

> When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

IV. Relevant Provisions

[17] In this case, the certified record contains an extract from the Respondent's intranet policy governing determining dependent *de facto* family members. This document is what the Visa officer relied upon in this matter and was placed in the record by the Respondent. Relevant extracts of this statement make it clear such persons need not be relatives or family members. In addition this document makes it clear that instead of being assessed as refugees in their own right, the *IRPA* permits claimants such as the Applicant to be assessed based on H&C

considerations. An example given is that of a sister-in-law, such as this Applicant, who has no means of support in a culture where it is normal that the principal applicant would take on responsibility for her care and support as appears to be the case in this matter:

> **Determining dependent de facto family members:**
>
> **▼Who is eligible?**
>
> The accompanying *de facto* family member:
>
> 1. must be dependent on the family unit in which membership is claimed and not meet the definition of family member. The relationship may be by blood, marriage or strictly through long association (i.e., may not necessarily be a relative). The dependency must be emotional or financial and will often be a combination of both factors. Such persons would normally, but not exclusively, live with the principal applicant as members of the same household, and, in many cases, face the same dangers of persecution as the principal applicant.
>
> …
>
> **▼A non-exhaustive list of examples of who may be found to be a de facto dependant family member:**
>
> …
>
> • A widowed sister or sister-in-law who has no means of support in a culture where it is normal that the principal applicant would take on responsibility for her care and support.
>
> ...
>
> **▼What if the de facto dependant does not meet the refugee definition in his or her own right?**
>
> In the refugee context, A25.1 (humanitarian and compassionate consideration) may sometimes be an appropriate tool to facilitate the resettlement of de facto dependants who do not meet the refugee definition in their own right but whom the officer believes should be resettled with the principal applicant.
>
> [emphasis added]

V. Analysis

[18] The only issue in this case is procedural fairness, which in this case is fact-driven and circumstance dependent.

[19] While undoubtedly the only substantive issue of concern to the Visa Officer was the Applicant's H&C eligibility, there is no reference to H&C in the letter convoking the interview. That her interview would turn on H&C considerations is clear from the Toronto-based Visa Officer's notes to file. Moreover, while the Visa Officer set out to explore the issue of H&C in the outline prepared for this interview, the Visa Officer did not inform the Applicant that the real purpose of the interview was to discuss her H&C eligibility. In fact, insofar as the Applicant is concerned, the first time H&C was mentioned in her interview, according to the system notes, was after the interview was finished.

[20] In my respectful view, the letter referred to above was ambiguous and disarming. It gave the sense that the Applicant's eligibility was met (as indeed was previously reported to her Brother-in-Law) when that was not the case. This would reasonably reduce the Applicant's expected level of preparedness for her interview. It is reasonable to expect the Applicant would have behaved differently in terms of preparation and expectations for the meeting had she known it would focus on her H&C factors.

[21] I acknowledge that the letter says that a final decision would be made by a Visa officer. But that misses the point. The issue is whether the Applicant should have been given some notice

either in the letters or during her interview that the issue to confront the Applicant and the reason for convoking the interview was to assess her H&C eligibility. In my respectful view, the Applicant was not treated fairly.

[22] There are other issues. One is that the Decision letter makes no reference to the Applicant's complete financial dependency on her Brother-in-Law, with whom she had lived for the past 14 or 15 years. While I appreciate that there is no obligation to deal with every fact, in my view this particular fact was the essence of the Applicant's H&C claim. In this case, the Applicant's entire "family" (for all practical purposes) was leaving the country while she was being left behind. In addition, the letter says her "work background" was considered, but the record is clear: she had no work background outside the house to consider: I am left to wonder if this was overlooked. Again, I appreciate that judicial review is not a treasure hunt for errors, but the fact the Applicant never worked outside the house is surely bound up with the essence of her H&C claim, which was in turn based on her complete dependency on her Brother-in-Law. I am not persuaded this was reasonably assessed. I will not say more, having regard to the redetermination to take place in this case.

VI. Certified question

[23] Neither party proposed a question to certify, and none arises.

VII. Conclusion

[24] The application for judicial review is granted and the matter remanded for redetermination, no question is certified and there is no order as to costs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision of the Visa Officer dated March 17, 2016 is set aside.
3. The matter is remanded to a different decision-maker for redetermination.
4. No question is certified.
5. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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