Date: 20061026

Docket: IMM-7593-05

Citation: 2006 FC 1268

Ottawa, Ontario, October 26, 2006

Present: The Honourable Mr. Justice Shore

BETWEEN:

KHALID LAABOU

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that "[t]he Minister is . . . authorized to" grant an exemption or otherwise facilitate the admission to Canada of any person "where the Minister is satisfied that" this should be done "owing to the existence of compassionate or humanitarian considerations." This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.

. . .

The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.

(*Baker v. Canada* (*Minister of Citizenship and Immigration*), [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL), at paragraphs 51 and 59.)

NATURE OF THE PROCEEDING

[2] This is an application for leave and judicial review of a decision by a Citizenship and Immigration Canada (CIC) officer, dated December 14, 2005, refusing the applicant's request for exemption from the permanent visa requirement on humanitarian and compassionate grounds. This decision was made pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

FACTS

[3] The applicant, Khalid Laabou, is a 32-year-old man and a citizen of Morocco. He arrived in Canada in November 2003. On December 1, 2003, he applied for refugee status. His claim was denied by the Refugee Protection Division of the Immigration and Refugee Board on May 26, 2004. The Federal Court dismissed the applicant's application for leave and judicial review of the decision.

[4] On March 7, 2004, Mr. Laabou married Ms. Hayat El Mouda, who is a permanent resident of Canada. Their son was born on June 6, 2005.

[5] On July 5, 2004, Mr. Laabou submitted a request for exemption from the permanent resident visa requirement in the "Humanitarian and Compassionate Considerations Class" (APR made on

Humanitarian and Compassionate grounds), together with an application to sponsor and undertaking signed by his wife.

[6] According to Mr. Laabou, he was informed in July 2005 that his request would be processed in the prescribed class of spouse or common-law partner in Canada under the new departmental policy of February 2005; Mr. Laabou's wife signed a new sponsorship application to that effect. Based on that, Mr. Laabou signed a form indicating he would not apply for a Pre-Removal Risk Assessment (PRRA).

[7] On July 25, 2005, his APR on humanitarian and compassionate grounds was processed, a new sponsorship undertaking was signed, and a selection certificate was issued to him.

[8] On October 13, 2005, Mr. Laabou's wife left the matrimonial home with their child, and did not indicate where she was going. Her reasons for doing so were blocked out in the panel record. Mr. Laabou states that he had to file a complaint with the police to find his son; they located the child on November 4, 2005, but could not provide the applicant with the new address.

[9] A little more than a month later, Mr. Laabou filed a motion for separation from bed and board before the Québec Superior Court, but it appears that the motion has not been heard. Mr. Laabou and his wife have not cohabited since then.

[10] The Minister submits that on October 14, 2005, the applicant's wife sent a written request to CIC to withdraw her sponsorship. Mr. Laabou claims that he was never informed about this written request.

[11] Mr. Laabou's wife did not attend the meeting with CIC on October 26, 2005, to finalize the sponsorship matter.

[12] Mr. Laabou submits that he was informed on November 1, 2005, that his application for permanent residence had not been refused, but had been transferred to the PRRA to assess the humanitarian grounds and the risks of removal.

[13] The Minister argues that the sponsorship application filed by Mr. Laabou's wife had been withdrawn, and that Mr. Laabou was informed of this on November 22, 2005.

[14] On December 14, 2005, the PRRA officer assessed Mr. Laabou's request in accordance with general procedures to determine whether Mr. Laabou would encounter unusual and undeserved or disproportionate hardship if he were required to leave Canada to submit his APR on humanitarian and compassionate grounds from outside the country.

[15] On December 14, 2005, the immigration officer concluded that requiring Mr. Laabou to return to Morocco to submit an application for permanent residence would not result in unusual and undeserved or disproportionate hardship for Mr. Laabou, and accordingly, his request was refused.

IMPUGNED DECISION

[16] The decision that Mr. Laabou seeks to set aside was made under section 25 of the Act.

[17] Section 25 of the Act is an exceptional measure and a discretionary one. As noted by Mr. Justice Frank Iacobucci in *Chieu v. Canada* (*Minister of Citizenship and Immigration*), [2002] 1 S.C.R. 84, [2002] SCC 3 (QL):

> [64] … an application to the Minister under s. 114(2) is essentially a plea to the executive branch for special consideration which is not even expressly envisaged by the Act.

(See also *Legault v. Canada* (*Minister of Citizenship and Immigration*), 2002 FCA 125, [2002] F.C.J. No. 457 (QL), at paragraphs 15 and 16.)

[18] Subsection 11(1) of the Act requires that an immigrant visa be obtained from outside Canada, and granting an exemption under s. 25 of the Act remains an exceptional process.

[19] In this case, the CIC officer considered all the grounds put forward by Mr. Laabou, thoroughly analyzed them, and found there were no humanitarian or compassionate grounds to justify exempting Mr. Laabou from the statutory obligation in subsection 11(1) of the Act to apply for an immigrant visa before coming to Canada.

[20] The CIC officer refused the APR on humanitarian and compassionate grounds for the following reasons:

(a) According to Mr. Laabou's medical file, his depression was caused by the departure of his wife and their child. Requiring Mr. Laabou to submit his APR from Morocco instead of Canada will not change Mr. Laabou's situation, since he no longer lives with his wife;

(b) Although the applicant has a brother in Canada, the rest of his family still lives in Morocco. Mr. Laabou did not develop many friendships during his stay in Canada. Accordingly, Mr. Laabou would be no more on his own in Morocco than he would be in Canada;

(c) As for the best interests of his Canadian child, he could live with his mother in Canada and, given his very young age, would not be affected by the absence of one parent.

(d) Mr. Laabou's wife withdrew her sponsorship.

[21] Thus, the CIC officer concluded that requiring Mr. Laabou to return to Morocco to submit his APR on humanitarian and compassionate grounds would not result in unusual and undeserved or disproportionate hardship.

ISSUE

[22] Did the CIC officer make a reviewable error in refusing Mr. Laabou's application for exemption?

STANDARD OF REVIEW

[23] First, it is well established that an application for exemption is an exceptional measure and, by its nature, purely discretionary. As such, the standard of review on applications for visa exemptions is reasonableness *simpliciter*. This standard was articulated by Iacobucci J. in *Canada (Director of Investigation and Research) v. Southam Inc*., [1997] 1 S.C.R. 748, [1996] S.C.J. No. 166 (QL) as follows:

> …An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court

> reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. . . .

[24] This same Court held in *Baker*, above, that the discretion conferred on an immigration officer should be accorded a certain degree of deference:

> [51] As stated earlier, the legislation and Regulations delegate considerable discretion to the Minister in deciding whether an exemption should be granted based upon humanitarian and compassionate considerations. The Regulations state that "[t]he Minister is . . . authorized to" grant an exemption or otherwise facilitate the admission to Canada of any person "where the Minister is satisfied that" this should be done "owing to the existence of compassionate or humanitarian considerations." This language signals an intention to leave considerable choice to the Minister on the question of whether to grant an H & C application.
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> [59] The second factor is the expertise of the decision-maker. The decision-maker here is the Minister of Citizenship and Immigration or his or her delegate. The fact that the formal decision-maker is the Minister is a factor militating in favour of deference. The Minister has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply.
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> . . .
>
> [62] These factors must be balanced to arrive at the appropriate standard of review. I conclude that considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language. Yet the absence of a privative clause, the explicit contemplation of judicial review by the Federal Court -- Trial Division and the Federal Court of Appeal in certain circumstances, and the individual rather than polycentric nature of the decision, also suggest that the standard should not be as deferential as "patent unreasonableness". I conclude, weighing all these factors, that the appropriate standard of review is reasonableness *simpliciter*.

ANALYSIS

[25] Mr. Laabou challenges the CIC officer's decision based on the following:

(a) The CIC officer failed to consider the difficulties Mr. Laabou is encountering with his proceeding in the civil courts for separation from bed and board and for custody of his child;

(b) The CIC officer failed to consider how the separation from his child is affecting Mr. Laabou in light of his medical condition;

(c) The CIC officer failed to consider Mr. Laabou's depressive crisis and his need to be near his brother who resides in Canada;

(d) The CIC officer failed to consider that the sponsorship had been withdrawn.

[26] The onus rests on Mr. Laabou to raise and prove the humanitarian and compassionate grounds in support of his application:

> [8]…And, since applicants have the onus of establishing the facts on which their claim rests, they omit pertinent information from their written submissions at their peril. In our view, Mr. Owusu's H & C application did not adequately raise the impact of his potential deportation on the best interests of his children so as to require the officer to consider them.

(*Owusu v. Canada (Minister of Citizenship and Immigration*), 2004 FCA 38, [2004] F.C.J. No. 158 (QL)).

[27] In this context, Mr. Laabou cannot criticize the CIC officer for a less than thorough review of the humanitarian and compassionate grounds that Mr. Laabou himself addressed very generally in his submissions.

The officer exercised his discretion properly

(a) The difficulty alleged in Mr. Laabou's civil proceeding

[28] First, apart from Mr. Laabou's originating motion against his wife for separation from bed and board, nothing in the CIC file indicates that he has taken any concrete steps to exercise his rights regarding his minor child.

[29] In the same vein, there is nothing to indicate that Mr. Laabou will be unable to exercise his custodial, visitation or access rights – which have not yet been determined – or to continue the proceeding that he began to request another access visit with his child.

[30] Moreover, the Federal Court has consistently reiterated as in *Legault*, above, that the presence of a Canadian child cannot prevent the removal of a parent residing illegally in Canada:

> [12]…the presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada (see *Langner v. Minister of Employment and Immigration* (1995),184 N.R. 230 (F.C.A.), leave to appeal refused, [1995] S.C.C.A. No. 241, SCC 24740, August 17, 1995).

[31] Therefore, the mere fact that the parent residing illegally in Canada has commenced a proceeding to obtain custody of his or her child cannot, in itself, defeat the clear intention of Parliament that all foreign nationals must obtain an immigrant visa outside of Canada before arriving in Canada, pursuant to subsection 11(1) of the Act. If it were otherwise, a foreign national who has begun a proceeding to obtain custody of his or her child would, de facto, have an unfair advantage over the foreign national who is not divorced.

[32] In any event, even if we assume that it would be difficult for Mr. Laabou to exercise his rights, that temporary situation does not justify granting permanent residency, which is the practical result of allowing an application for exemption.

[33] For all these reasons, the CIC officer was not required to deal with this factor in Mr. Laabou's APR on humanitarian and compassionate grounds. Thus, the officer made no serious error in this respect.

(b) Mr. Laabou's separation from his child, his medical condition and his need to be near his brother

[34] Mr. Laabou's allegations against the CIC officer regarding points (b), (c) and (d), in particular the officer's failure to consider or properly assess the effects of his separation in light of his medical condition, his need to be near his brother who resides in Canada and the best interests of his child, are without merit.

[35] The officer reviewed the humanitarian and compassionate grounds from two angles: the applicant's family situation and the interests of the child who lives in Canada with his mother in an undisclosed location.

[36] First, the CIC officer reviewed the state of Mr. Laabou's psychological health and, after this analysis, concluded as follows:

> [TRANSLATION]
>
> According to the applicant's medical file, this depression was caused by the departure of his wife and their child to an unknown location . . . in my opinion, requiring him to submit his APR from Morocco instead of Canada would not change the applicant's situation since he no longer lives with his wife, and has had no contact with her or his son since October 13, 2005.

[37] Even if the CIC officer had not conducted an exhaustive analysis of Mr. Laabou's psychological health, which is not the case here, it certainly appears that Mr. Laabou's grounds do not, in themselves, amount to unusual, excessive or undeserved hardships calling for an exception to

the general scheme that requires all foreign nationals to apply for permanent residence outside Canada.

[38] Second, the CIC officer considered Mr. Laabou's depressive crisis and his need to be near his brother who resides in Canada. On this point, Mr. Laabou indicated that, other than his brother in Canada, the rest of his family still lives in Morocco. There is nothing to indicate that he will not benefit from the help he claims to need, surrounded by his family in his native country. Moreover, Mr. Laabou admits he has not developed any friendships in Canada. On this point, the CIC officer's finding that Mr. Laabou has not assimilated into Canada was justified on the evidence.

[39] Third, it is clear from the CIC officer's reasons that he considered the best interests of the child, despite the fact that Mr. Laabou presented little or no evidence regarding the child's interest that his father not be removed from Canada.

[40] On this issue, the CIC officer found that removing Mr. Laabou would not lead to unusual or excessive hardship for his minor child since the child benefits from his mother's presence in Canada. The CIC officer also found that, given the child's very young age, he would not be too affected by his father's absence.

[41] It is quite clear that, fundamentally, it is in a child's interest to either remain in Canada or to not have his parents, or one of them, be deported. However, this factor is not determinative (*Hawthorne v. Canada* (*Minister of Citizenship and Immigration*), 2002 FCA 475, [2002] F.C.J. No. 1687, at paragraphs 2 and 5; *Baker*, above, at paragraph 75; *Legault,* above, at paragraph 12).

[42] Finally, Mr. Laabou’s submissions express his disagreement with the CIC officer’s assessment of the evidence. It is not for the Court to re-evaluate the weight assigned by the CIC officer to the various factors that he considered in deciding whether or not to grant the application for visa exemption. On this issue, Mr. Justice Frederick Gibson stated the following in *Mann v. Canada* (*Minister of Citizenship and Immigration*), 2002 FCT 567, [2002] F.C.J. No. 738 (QL):

> [11] I wish to note the able submissions of counsel for the applicant and the sympathy that, in my view, the applicant's case attracts. The sympathy evoked flows particularly from the length of time that the applicant has been in Canada, the difficulties that he has encountered and, it would appear, overcome while in Canada, his new relationship in Canada and the Canadian born child of that relationship, and, what I conclude must be an obvious reality, that the applicant is now closer to his relatives and friends in Canada than he is likely to be to his family members in India, particularly having regard to the length of time he has been absent from India and the divorce proceedings that he has instituted in India. That being said, I cannot conclude that the Immigration Officer ignored or misinterpreted evidence before her, took into account irrelevant matters or failed to consider the best interests of the applicant's Canadian born child. I am satisfied that the Immigration Officer's notes, quoted earlier in these reasons, reflect consideration of all of the factors placed before her by the applicant and that she was bound to consider. That I might have weighed those factors differently is not a basis on which I might grant this application for judicial review.

[43] Based on all the foregoing, the conclusions of the CIC officer are not unreasonable.

CONCLUSION

[44] In light of all the foregoing, none of Mr. Laabou’s arguments establish serious grounds for believing that the CIC officer erred in law or based his decision on erroneous findings of fact.

[45] For all these reasons, the application is dismissed.

JUDGMENT

THE COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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