Date: 20061219

Docket: IMM-1756-06

Citation: 2006 FC 1498

BETWEEN:

IQBBAL AQEEL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT

Pinard J.

[1] This is an application for judicial review of a decision dated March 21, 2006, by a pre-removal risk assessment officer (the PRRA officer) refusing an in-country application for permanent residence on humanitarian and compassionate grounds, originally submitted on August 25, 2003.

[2] The applicant, Mr. M. Aqeel Iqbal, is a citizen of Pakistan and was admitted to Canada as a visitor on September 21, 2001, for a period of six months to visit his brother who lives in the Montréal area.

[3] On October 12, 2001, the applicant claimed refugee status, but his application was refused on December 27, 2002, on the grounds that he was not a Convention refugee or a person in need of protection as defined in sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

[4] The Immigration and Refugee Board found that the applicant was not credible because of numerous inconsistencies, and therefore, that his life would not be in danger if he were to return to Pakistan. An application for judicial review of this decision was also filed, then dismissed on May 8, 2003.

[5] The applicant subsequently made an in-country permanent residence claim on humanitarian and compassionate grounds. He states that he cannot submit his application for permanent residence from outside Canada because he fears for his life should he return to Pakistan.

[6] The application was received on August 25, 2003, and denied by the PRRA officer on March 21, 2006. The officer reminded the applicant that he is currently without status in Canada, and that a removal order had been issued against him on November 21, 2001, in Montréal. Consequently, his file was transferred to the Canada Border Services Agency.

[7] In this case, it is important to bear in mind the general principles that apply to applications on humanitarian and compassionate grounds (HC applications) in order to better assess some of the applicant’s arguments.

[8] First, in *Agot v. Minister of Citizenship and Immigration,* 2003 FCT 436, Madam Justice Layden-Stevenson reviews some of the general principles:

> [8] It is useful to review some of the established principles regarding H&C applications. The decision of the ministerial delegate with respect to an H&C application is a discretionary one: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (*Baker*). The standard of review applicable to such decisions is that of reasonableness *simpliciter*: *Baker*. The onus, on an application for an H&C exemption, is on the applicant: *Owusu v. Canada (Minister of Citizenship and Immigration*), 2003 FCT 94, [2003] F.C.J. No. 139 per Gibson J. citing *Prasad v. Canada (Minister of Citizenship and Immigration)* (1996), 34 Imm.L.R. (2d) 91 (F.C.T.D.) and *Patel v. Canada (Minister of Citizenship and Immigration)* (1997), 36 Imm.L.R. (2d) 175 (F.C.T.D.). The weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 (*Suresh*); *Legault v. Canada (Minister of Citizenship and Immigration)*, [2002] 4 F.C. 358 (C.A.) (*Legault*). The ministerial guidelines are not law and the Minister and her agents are not bound by them, but they are accessible to the public and the Supreme Court has qualified them as being of great assistance to the court: *Legault*. An H&C decision must be supported by reasons: *Baker*. It is inappropriate to require administrative officers to give as detailed reasons for their decisions as may be expected of an administrative tribunal that renders its decisions after an adjudicative hearing: *Ozdemir v. Canada (Minister of Citizenship and Immigration)* (2001), 282 N.R. 394 (F.C.A.)).

[9] Next, in *Krotov v. Minister of Citizenship and Immigration*, 2005 FC 438, at paragraph 8, Mr. Justice Blais affirms the principle laid down in *Zolotareva v. Minister of Citizenship and Immigration*, 2003 FC 1274, that a PRRA officer has the authority under the Act to represent the Minister of Citizenship and Immigration and to act on an application for permanent residence in Canada on humanitarian and compassionate grounds under subsection 25(1) of the Act.

[10] The applicant first challenges the PRRA officer's assessment of his application on humanitarian and compassionate grounds.

[11] In order to convince the officer that humanitarian and compassionate grounds exist to support his or her claim, the applicant has the onus of proving that the requirement to obtain a permanent resident visa from outside Canada would amount to unusual, undue or disproportionate hardship (*Uddin v. Minister of Citizenship and Immigration*, 2002 FCT 937). After assessing the facts, the officer makes a finding.

[12] The onus is also on the applicant to set out the relevant factors that must be considered on the assessment in order for the officer to find that relevant humanitarian and compassionate grounds exist (IP 5 Manual: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds (the Manual), Citizenship and Immigration Canada, 5.29). In *Owusu v. Minister of Citizenship and Immigration*, 2004 FCA 38, Mr. Justice Evans, for the Federal Court of Appeal, wrote at paragraph 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.

[13] In this case, the applicant made only brief and general statements that did not really assist the officer with her assessment:

> "I am unable to get a visa for a country where I can deposit my application and wait for the result. My life is in danger in Pakistan. Therefore I cannot return to Pakistan." (Question 3, part A: Special reasons to exempt you from the requirement to apply from outside Canada).

> "I am working in Montreal and I am living with my brother who is a Canadian citizen. I cannot return to Pakistan because my life is in danger overthere." (Question 3, part B: disproportionate hardship)

[14] Moreover, I agree with the respondent that it is well settled that the degree of establishment in Canada is not sufficient to justify accepting a claim on humanitarian and compassionate grounds.

[15] Moreover, in order for the risks to be assessed, the applicant has the burden of providing the evidence necessary to support his or her allegation on this issue (see *Owusu*, above, *Joseph v. Minister of Citizenship and Immigration*, 2004 FC 344 and *Nguyen v. Minister of Citizenship and Immigration*, 2005 FC 236). The applicant herein submitted no evidence that he has been targeted or that his life would be particularly at risk.

[16] It is well established that an applicant may make written submissions to meet the requirements of procedural fairness. In this case, the applicant did not do so. Although he submits that the officer failed to consider all the grounds in his application, I agree with the respondent that the officer considered what was before her, as well as documents that had not been submitted to her.

[17] I also agree with the respondent that this HC assessment, which includes a risk assessment, cannot serve as an appeal of the risk assessment made by the Refugee Protection Division, a risk that was found not to be credible.

[18] Thus, in accordance with the reasonableness *simpliciter* standard of review, I conclude that the officer's finding was not unreasonable based on the information before her.

[19] The applicant also disputes the PRRA officer's interpretation and application of subsection 25(1) of the Act, which reads as follows:

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

[20] Since statutory interpretation is a question of law, the applicable standard of review is correctness (*Pushpanathan v. Canada (M.C.I.)*, [1998] 1 S.C.R. 982, *Chieu v. Canada (M.C.I.)*, [2002] 1 S.C.R. 84).

[21] Subsection 25(1) refers to two types of considerations: humanitarian and compassionate, and public policy. In an application for permanent residence, it is settled law that if there are no public policy reasons to refuse an exemption, the next step is to see if there are humanitarian and compassionate grounds to grant an exemption (*Legault*, above, at paragraph 17).

[22] In *Vidal v. Canada (M.E.I.)*, [1991] F.C.J. No. 63 (T.D.)(QL), Mr. Justice Strayer held that the words "humanitarian and compassionate" have an objective meaning, which each immigration

officer is entitled to interpret. However, the term “public policy” has no objective content and cannot be interpreted by an officer:

> . . . While it is plausible to say, as seems to have been implicit in the *Yhap* case that the words "humanitarian and compassionate" have some kind of objective meaning intended by Parliament which must not be artificially narrowed through the fettering of the discretion of immigration officers in applying those words, the same cannot be said for the term "public policy". Subject to certain very broad limitations, the content of "public policy" must be defined by those having the authority to fix public policy and the political responsibility for its content.
>
> . . .
>
> . . . As I have suggested earlier, the rationale of *Yhap* is based on the proposition that the words "humanitarian and compassionate" have some objective meaning which each immigration officer is entitled to interpret. But the term "public policy" has no objective content and must be defined by those having authority to define public policy. I cannot accept that every immigration officer has the right and the obligation to define his own "public policy". That is surely a matter for the Governor in Council to determine in the exercise of his authority under subsection 114(2) and it is perfectly legitimate for the Minister to indicate through guidelines what she will recommend to the Governor in Council as "public policy" (based, presumably, on what the Governor in Council is likely to accept). The guidelines may therefore prescribe the situations in which, for reasons of public policy, the Governor in Council will by regulation exempt an individual from other regulations or otherwise facilitate his admission. (Emphasis added.)
>
> . . .
>
> . . . It is accepted that those guidelines may not fetter the discretion of immigration officers to consider any factor which could arguably be embraced by the terms "humanitarian and compassionate", but it is quite in order for the Minister on behalf of the Governor in Council to indicate definitively to immigration officers what elements of public policy she is prepared to recommend to the Governor in Council as a basis for favourable action. It is surely within the expectation of Parliament and of most Canadians that the Minister will try to ensure that the discretionary powers granted by subsection 114(2) are exercised with some coherence and consistency and that in matters of public policy Parliament can rightly look to the

> Governor in Council and the Minister to be responsible for the content of that policy.

[23] Thus, public policy considerations, whether in the Manual or elsewhere, are left to the discretion of the Minister. "These public interest considerations [referring to illegal entry into Canada] need not have been, I believe, put on paper since they are necessarily associated with the role and responsibilities of the Minister of Immigration." (*Legault*, at paragraph 20). Public policy considerations include a criminal conviction, the separation of parents and dependent children and whether the applicant has lived in Canada for a significant period of time due to circumstances beyond his or her control (*Legault*, at paragraphs 24, 26 and 27).

[24] Like the respondent in this proceeding, I would rely on Mr. Justice Cullen's remarks in *Dawkins v. Canada (M.E.I.)*, [1992] 1 F.C. 639 (T.D.), at page 651:

> I accept the distinction drawn by Strayer J. between considerations of public policy and humanitarian and compassionate concerns. In my opinion, he is correct in stating that concerns of public policy should not be modified or extended by immigration officers. As public policy is the province of those constitutionally entrusted with the power to set policy, allowing immigration officers to make exceptions to definitions adopted in the formulation of public policy would amount in effect to the immigration officer usurping the legislative role. . . .

[25] Although this analysis was made under the former provision of the Act (subsection 114(2)), I believe it is still valid in interpreting subsection 25(1). In addition, this provision confers directly on the Minister the discretion to determine both public policy considerations and humanitarian and compassionate considerations without having to go through the Governor in Council.

[26] Although it is true, as the applicant says, that the Manual has no legal value, it nonetheless assists immigration officers and the Court in determining whether a decision is reasonable (*Baker*, at paragraph 72, *Legault*, at paragraph 20, *Lee v. Canada (M.C.I.)*, 2005 FC 413).

[27] As for the economic factors raised by the applicant before this Court, it should be noted that subsection 25(1) comprises an exceptional, discretionary procedure, limited to cases where there would be unusual or disproportionate hardship (*Chieu*, above, and *Legault*, at paragraphs 15 and 16).

[28] Accordingly, I am of the view that the applicant's personal situation, i.e. the fact that he is a skilled worker in an occupation that has a shortage of workers in Canada, does not constitute a public policy consideration. In addition, none of the applicant's forms indicated that certain public policies applied to him; instead, he submitted his application on simple humanitarian and compassionate grounds (see page 99 of the tribunal record).

[29] Therefore, the applicant has not persuaded me that the officer erred in interpreting and/or applying subsection 25(1) of the Act.

[30] Finally, to the extent that the applicant's argument is based on procedural fairness, it should be noted that the correctness standard of review applies to allegations of a breach of natural justice or procedural fairness *(C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539). The Court must determine the circumstances of the matter in question and decide whether the duty of fairness has been met.

[31] Whether the applicant likes it or not, according to the Manual and *Krotov*, above, a PRRA officer has the power to assess an HC application with risk allegations. Therefore, there was no breach of procedural fairness in this case because the application was assessed by the right person.

[32] Nor was there a breach of procedural fairness in the steps taken to assess the exemption request.

[33] Assessing an application for exemption from the requirement to apply for permanent residence from outside Canada is a two-step process (*Egbejule v. Minister of Citizenship and Immigration*, 2005 FC 851). First, the officer determines whether there are sufficient humanitarian or compassionate grounds to grant an exemption under section 25. Next, if those grounds exist, the applicant has to meet all the other requirements of the Act (*Mutanda v. Minister of Citizenship and Immigration*, 2005 FC 1101).

[34] If the exemption is refused, there is no reason to assess the application for permanent residence. However, that does not bar the applicant from applying for permanent residence from abroad at a later time.

[35] In this case, since the exemption was not granted, there was no need to send the application to the appropriate authorities in Quebec to assess whether the applicant met the selection criteria for an application for permanent residence. The officer's decision is consistent with the procedures in the Manual and the principles of fairness.

[36] For all the foregoing reasons, since the applicant has failed to prove an error warranting the intervention of the Court, the application for judicial review is dismissed.

[37] Counsel for the applicant submitted the following question for certification:

> [TRANSLATION]
>
> -Having regard to the provisions of the IRPA, is it incumbent on the Minister:
>
> to establish categories of persons whose application for permanent residence may be considered and dealt with as a "public policy case" under section 25 of the IRPA;
>
> - If so, can the Minister determine on his own or by directive that only these categories can be considered as relevant to "public policy" under section 25 of the IRPA;
>
> - If not, and considering that this power has not been delegated, is the applicant entitled to ask the Minister for a supplementary assessment with respect to the public policy grounds in section 25 of the IRPA.

[38] The requested certification is refused because the case law does not support the applicant's position (see *Vidal v. Canada (M.E.I.)*, [1991] F.C.J. No. 63 (TD) (QL); *Dawkins v. Canada (M.E.I.)*, [1991] F.C.J. No. 505 (TD) (QL); and *Egbejule v. Canada (M.C.I.)*, 2005 FC 851, [2005] F.C.J. No. 1072 (QL)).

[39] I also concur with counsel for the respondent that, without a factual foundation, the proposed question would not be determinative of an appeal.

"Yvon Pinard"
Judge

Ottawa, Ontario
December 19, 2006

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Michel Le Brun	FOR THE APPLICANT
Patricia Deslauriers	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Michel Le Brun Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT