

Date: 20070706

Docket: IMM-324-06

Citation: 2007 FC 719

BETWEEN:

KAYODE ZAHEED KASSIM

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT

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 (IRPA) for judicial review of the decision of an immigration officer, dated January 12, 2006, wherein the officer refused the applicant's application for permanent residence on humanitarian and compassionate (H&C) grounds.

[2] The applicant seeks:

(a) an order quashing the decision refusing the applicant's application brought pursuant to subsection 25(1) of IRPA for exemption from section 11 of IRPA in order to have an application for permanent residence processed from within Canada on H&C grounds, or in the alternative;

(b) a declaration that he meets the requirements of subsection 25(1) of IRPA for exemption from the application of section 11 of IRPA and that his application for permanent residence be processed from within Canada on H&C grounds, or in the alternative; an order referring the matter back for redetermination with a direction that the decision maker declare that the applicant meets the requirements of subsection 25(1) of IRPA for exemption from section 11 of IRPA, and that his application for permanent residence be processed from within Canada on H&C grounds; or

(c) an order referring the matter for redetermination by a different officer.

Background

[3] The applicant, Kayode Zaheed Kassim, is a citizen of Nigeria. He entered Canada in March 2001 and claimed refugee protection alleging a fear of persecution for his religious beliefs. This claim was denied in August 2001. The applicant married his wife, who is a permanent resident of Canada, in October 2001. The couple have two children together, and live with two children from his wife's previous relationship. The applicant also has two children still residing in Nigeria. The applicant received a negative Pre-Removal Risk Assessment and was removed from Canada in February 2003. The applicant re-entered Canada without proper authorization on June 21, 2003, and a warrant for his arrest was executed on January 2, 2004.

[4] The applicant applied for permanent residence on H&C grounds in September 2004. His application for an exemption in order to apply for permanent residence from within Canada was approved on May 13, 2005. In September 2005 the applicant was convicted of fraud, sentenced to eighteen months probation and made to pay \$4,000 in restitution. By decision dated January 12, 2006, the applicant's application for permanent residence was denied because he was unable to meet the statutory requirements of IRPA, specifically on the basis of criminal inadmissibility, pursuant to paragraph 36(1)(a) of IRPA. This is the judicial review of the officer's decision to deny the applicant's application for permanent residence on H&C grounds.

Officer's Reasons

[5] By letter dated January 12, 2006, the applicant was informed that H&C factors were assessed to decide whether to grant him an exemption from certain legislative requirements to allow the processing of his application for permanent residence from within Canada. The officer noted that on May 13, 2005, his request for an exemption from these requirements was granted. However, this fact did not exempt him from the second step of the process, which was to meet all of the other statutory requirements of IRPA.

[6] The officer made a separate decision regarding the applicant's ability to meet the other statutory requirements for permanent residence, and determined that he was inadmissible to Canada. The applicant was criminally inadmissible under paragraph 36(1)(a) of IRPA, and his application

for permanent residence was therefore refused. The officer's notes constitute reasons for the decision.

The officer noted the following:

Outstanding requirements: the RPRF fee, CSIS, RCMP and medical checks...

On September 19 2005 Mr. Kassim was convicted of attempting to obtain credit by false pretences, uttering forged documents, possession of stolen property and personation with intent. He was given a suspended sentence and probation for 18 months. Step 2 decision pending...

Mr. Kassim's application for permanent residence was refused today as he is criminally inadmissible under section 36(1)(a) of the Immigration and Refugee Protection Act.

Issues

[7] The applicant submitted the following issues for consideration:

1. Was the officer's assessment of the evidence patently unreasonable?
2. Did the officer err in law or fact by not weighing the applicant's criminality against other H&C factors that favoured the applicant?
3. Did the officer err by not providing the applicant with an opportunity to address the criminality issue via an interview or in writing?
4. Did the officer pay enough attention to the best interests of the children, including the child with a heart condition?
5. Did the officer's notes and letter provide sufficient reasons?
6. Did the officer err in failing to recommend the applicant for a Minister's permit?

[8] I would restate the issue as follows:

Did the officer err in refusing the applicant's application for permanent residence on H&C grounds on the basis of criminal inadmissibility?

Analysis and Decision

Standard of Review

[9] The decision of an immigration officer with respect to an H&C application is reviewable on the standard of reasonableness (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, (1999) 174 D.L.R. (4th) 193).

[10] **Issue 1**

Did the officer err in refusing the applicant's application for permanent residence on H&C grounds on the basis of criminal inadmissibility?

There was no dispute at the hearing that an application for permanent residence on H&C grounds is a two-step process. First, H&C grounds are considered in order to determine whether the applicant may apply for permanent residence from within Canada. As noted in the officer's decision, the applicant provided sufficient evidence to fulfill this step. Secondly, the applicant must satisfy all other legislative requirements under IRPA. The officer determined that the applicant did not fulfill this step as he was found to be criminally inadmissible under paragraph 36(1)(a) of IRPA.

[11] At the hearing of the application for judicial review, the applicant argued that the officer failed to consider whether the H&C factors in his case warranted granting him an exemption pursuant to subsection 25(1) of IRPA, thereby overcoming his criminal inadmissibility.

[12] The respondent submitted that pursuant to section 25 of IRPA, the Minister could, of his own initiative, have made an exemption with respect to the applicant's criminal inadmissibility, but did not. In addition, the respondent submitted that the applicant could have requested an exemption with respect to his criminal inadmissibility, but no such request was made.

[13] There was no dispute at the hearing that the H&C process involved two steps. The first step consists of the officer determining whether or not the applicant can apply for permanent residence status from within Canada. The officer determined that the applicant could apply from within Canada. The second step requires the officer to determine whether the applicant meets the requirements of IRPA and is not inadmissible. In this case, the officer found that the applicant was criminally inadmissible under paragraph 36(1)(a) of IRPA.

[14] In order for the applicant to succeed on this application, he must show that he requested an exemption with respect to his criminal inadmissibility. The record discloses the following requests by the applicant:

We request that you process Mr. Kassim's application for landing on humanitarian and compassionate grounds as per the provisions of s. 25(1) of the *Immigration and Refugee Protection Act (IRPA)* and in accordance with immigration policy as stated in the Inland Processing Manual Chapter 5 (IP-5). Mr. Kassim's application is based on the following three grounds:

1. Personalized Risk (IP-5 13.1)
2. Establishment in Canada (IP-5 11.2)
3. Other Cases (IP-5 13.12)

...

Conclusion

In coming to a decision, we implore you to please address your mind to the fact that Mr. Kassim is a young educated man with a bright future ahead of him. In his young age, he has been subjected to persecution. Although he has minor brush with the law (resulting for instance, in a one year probation in 2001), he generally has a good civil record in Canada and Nigeria.

(Tribunal record page 152)

I would also note that the applicant's criminal lawyer advised the officer of the applicant's criminal conviction.

[15] Although the applicant's request could have been more explicit, I am of the view that the above facts taken together are sufficient to constitute a request by the applicant to exempt him from the effects of his criminal inadmissibility.

[16] The officer's refusal letter makes the following reference to the applicant's criminal inadmissibility:

First, humanitarian and compassionate factors are assessed to decide whether to grant an exemption from certain legislative requirements to allow processing of your application for permanent residence from within Canada. On 13-May-2005 a representative of the Minister of Citizenship and Immigration approved your request for an exemption from these requirements for the purpose of processing this application. **This decision, however, does not exempt you from the**

second step of the process, that is, meeting all other statutory requirements of the Immigration and Refugee Protection Act, such as, medical, security and passport considerations and arrangements for your care and support.

A separate decision has been made regarding your ability to meet other statutory requirements and it appears that you are inadmissible to Canada. Specifically you are inadmissible for criminality under section 36(1)(a) of The Immigration and Refugee Protection. As a result, your application for permanent residence is refused and the exemption previously granted has no further effect.

[17] The officer's notes read in part as follows:

MR. KASSIM'S APPLICATION FOR PERMANENT
RESIDENCE WAS REFUSED TODAY AS HE IS CRIMINALLY
INADMISSIBLE UNDER SECTION 36(1)(A) OF THE
IMMIGRATION AND REFUGEE PROTECTION ACT. . . .

[18] I cannot determine from the above whether the officer considered the request for an exemption with respect to the applicant's criminal inadmissibility. If the request was considered, I cannot determine what factors were taken into account by the officer. Consequently, I find the decision to be unreasonable and it must be set aside.

[19] The application for judicial review is therefore allowed and the matter is referred to another officer for redetermination.

[20] The parties shall have one week from the date of this decision to submit any proposed serious question of general importance for my consideration for certification and a further five days for any reply.

“John A. O’Keefe”

Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

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

11.(1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document shall be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

24.(1) A foreign national who, in the opinion of an officer, is inadmissible or does not meet the requirements of this Act becomes a temporary resident if an officer is of the opinion that it is justified in the circumstances and issues a temporary resident permit, which may be cancelled at any time.

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

11.(1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement, lesquels sont délivrés sur preuve, à la suite d'un contrôle, qu'il n'est pas interdit de territoire et se conforme à la présente loi.

24.(1) Devient résident temporaire l'étranger, dont l'agent estime qu'il est interdit de territoire ou ne se conforme pas à la présente loi, à qui il délivre, s'il estime que les circonstances le justifient, un permis de séjour temporaire — titre révocable en tout temps.

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

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.

36.(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

36.(1) Emportent interdiction de territoire pour grande criminalité les faits suivants:

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-324-06

STYLE OF CAUSE: KAYODE ZAHEED KASSIM
- and -
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 16, 2007

REASONS FOR JUDGMENT OF: O'KEEFE J.

DATED: July 6, 2007

APPEARANCES:

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