Date: 20061005

Docket: IMM-6945-05

Citation: 2006 FC 1190

[ENGLISH TRANSLATION]

Fredericton, New Brunswick, October 5, 2006

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

SIOBHAN DUPLESSIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER AND ORDER

[1] The applicant is challenging the legality of a decision by an immigration officer on November 2, 2005 refusing her application for an exemption from a permanent resident visa based on humanitarian and compassionate considerations.

[2] The applicant is originally from Saint Lucia. She arrived in Canada in 1995 at 20 years old. She is now 31 years old. Since 1995, she has been working as a nanny, caring for two children who are now 13 and 14 years old. She is working without a work permit. On May 28, 2013, the applicant filed an application for an exemption from the obligation to obtain a permanent resident visa from outside Canada based on humanitarian and compassionate considerations. On November 2, 2005, the immigration officer issued a negative decision.

[3] In her decision, the immigration officer noted that the applicant was able to develop meaningful ties to Canadian society. The applicant has also always worked, had volunteered with several organizations, had made many friends, and had no criminal record. The officer noted, however, that the applicant's establishment in Canada was the result of a personal choice, not circumstances beyond her control. Indeed, the applicant can still return to her country of origin as she did in 1996 and file her residency application there.

[4] The officer also noted that the applicant has developed significant attachment to the family who employs her and with her three-year-old god-daughter. However, the applicant could remain in contact with them, particularly through letters, telephone conversations, the Internet and visits. In that regard, the applicant did not submit any information to suggest to the officer that her departure

would have any negative impact on the development of her employer's two children or her god-daughter.

[5] The applicant also mentioned that two members of her family are Canadian citizens: her sister and a cousin. However, the officer noted that the applicant did not provide any information on the possible difficulties that would result from a separation from those two individuals. As well, the applicant's mother and father still live in Saint Lucia.

[6] The officer also noted that the applicant does not seem to have taken any steps to resolve her situation prior to 1999, when she met with an immigration advisor to begin steps in that regard. That advisor allegedly told her that he had sent a residency application to immigration authorities, when that was not the case. The applicant filed a complaint against the immigration advisor with the police in 2004. The officer mentioned that the applicant did not explain how those events could impact her ability to file a residency application from abroad. The officer also noted that she had no indication that the applicant needed to be in Canada for any proceedings following the complaint she filed.

[7] In conclusion, after considering all the elements submitted to her, the officer was not satisfied that the difficulties she would face in filing her application for permanent residence from outside Canada are "disproportionate, unusual or undeserved". She therefore refused the application for exemption based on humanitarian and compassionate considerations, leading to this application for judicial review.

[8] The parties agree that the standard of review in such a case is reasonableness ***simpliciter*** ***(Baker v. Canada (Minister of Citizenship and Immigration),*** [1999] 2 S.C.R. 817, at paras 57 to 62;

Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, at para. 56). Clearly, if there is a breach of a principle of natural justice or procedural fairness, that is enough to set aside the decision and refer the matter to another decision-maker.

[9] Although the following arguments were not necessarily presented in this order by counsel for the applicant, it is submitted that: first, the officer failed to exercise her jurisdiction by basing her refusal on the criteria set out in chapter IP-5 of the guidelines (which refer to "disproportionate, unusual or undeserved difficulties if the application were filed from outside Canada"); second, the officer drew conclusions that were unreasonable or were not based on the evidence; and, third, the duty to act fairly was such that the officer should have interviewed the applicant.

[10] First, before examining the three grounds cited above, the affidavit from the applicant's employer must be dismissed, as an application for judicial review does not usually accept new evidence.

1. Did the immigration officer fail to exercise her jurisdiction by basing her refusal on the criteria mentioned in the Directives?

[11] One of the cornerstones of the Act is that, before arriving in Canada, individuals who wish to live here permanently must file an application from outside Canada and be

Immigration and Refugee Protection Act, S.C. 2001, c. 27, allows the Minister to process and approve permanent residency applications filed from inside Canada in the following cases:

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 a la présente loi, et peut, de sa propre initiative, étudier le cas de cet &ranger 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 a l'étranger — compte tenu de Pinter& supérieur de l'enfant directement touche — ou Pinter& public le justifient.

[12] The applicant submits that decisions by immigration officers under subsection 25(1) of the Act are currently "governed" by issued guidelines IP-05, but that the Minister can modify from time to time as he sees fit, as they are not contained in a regulatory text.

[13] Paragraphs 5.1, 6.7 and 6.8 read as follows:

> Applicants bear the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside of Canada would be
>
> (i) unusual and undeserved or
> (ii) disproportionate.
>
> Applicants may present whatever facts they believe are relevant.
>
> Unusual and undeserved hardship is:
>
> > the hardship (of having to apply for a permanent resident visa from outside of Canada) that the applicant would face should be, in most cases, unusual, in other words, a hardship not anticipated by the Act or
> > Regulations; and
> >
> > the hardship (of having to apply for a permanent resident visa from outside Canada) that the applicant would face should be, in most cases, the result of circumstances beyond the person's control.

> Humanitarian and compassionate grounds may exist in cases that would not meet the "unusual and undeserved" criteria but where the hardship (of having to apply for a permanent resident visa from outside of Canada) would have a disproportionate impact on the applicant due to their personal circumstances.

[14] In this regard, the applicant submits that, although the guides and directives are valid and useful, they must not limit the discretion of the decision-maker. Neither the former subsection 114(2) of the *Immigration Act*, R.S.C. 1985, c. 1-2, nor the new subsection 25(1) of the Act refer to disproportionate, unusual or undeserved difficulties". In this case, the applicant submits that the immigration officer only examined the issue of whether she should grant or refuse an exemption for humanitarian and compassionate considerations based on the criteria set out above. It is thus clear that she abandoned her discretion under section 25 of the Act (see ***Thamotharem v. Canada (Minister of Citizenship and immigration),*** [2006] 3 F.C.R. 168 (F.C.), 2006 FC 16, at paras. 106-116).

[15] That ground for review must be dismissed for the following reasons.

[16] First, I note that the applicant does not question the validity of the guidelines adopted by the Minister. In ***Baker v. Canada (Minister of Citizenship and Immigration),*** [1999] 2 R.S.C. 817, L'Heureux-Dube J. commented as follows on the guidelines, at para 72:

> As described above, immigration officers are expected to make the decision that a reasonable person would make, with special consideration of humanitarian values such as keeping connections between family members and avoiding hardship by sending people to places where they no longer have connections. The guidelines show what the Minister considers a humanitarian and compassionate decision, and they are of great assistance to the Court in determining whether the

> reasons of Officer Lorenz are supportable. They emphasize that the decision-maker should be alert to possible humanitarian grounds, should consider the hardship that a negative decision would impose upon the claimant or close family members, and should consider as an important factor the connections between family members. The guidelines are a useful indicator of what constitutes a reasonable interpretation of the power conferred by the section, and the fact that this decision was contrary to their directives is of great help in assessing whether the decision was an unreasonable exercise of the H & C power.

[17] In *Dhillon v. Canada (Minister of citizenship and Immigration),* 2005 FC 1067, the Court examined the decisions by the immigration officers under subsection 25(1) in light of the guidelines. The Court recognized that they gave immigration officers a lot of flexibility in assessing evidence regarding the expressions used in them. Gibson J. noted the following at para 22:

> Counsel for the Applicant urged that the officer, on cross-examination on her affidavit, failed to provide effective responses to questions regarding the interpretation of "unusual hardship", "undeserved hardship" and "disproportionate hardship" as used in the Ministerial guidelines. Counsel herself acknowledged at question 24 in the transcript of examination of the officer that she knew "... the terms are not really very well defined." Indeed, they are not "well defined". I am satisfied that the Officer was consistently correct in emphasizing that the terms are not absolute, that the relative weight to be given to the evidence bearing on the various terms is at the discretion of the officer applying them to the facts of a given application, and that it is the officer himself or herself who is left with the responsibility of determining their application, once again on the facts of each individual application, and the relative weight to be given to them. I have great sympathy for the position taken by the officer under cross-examination and find that she made no reviewable error by failing to understand the guidelines and applying them on the facts of this application.

[18] In my view, the immigration officer did not commit a reviewable error in relying on the

Minister's guidelines. They are a useful guide in exercising the ministerial discretion that is delegated in this case to the immigration officer *(Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206; *Pashulya v. Canada (Minister of Citizenship and Immigration)* (2004), 257 F.T.R. 143, 2004 FC 1275).

[19] In this case, the applicant is unable to indicate what other criteria, if any, the immigration officer should have considered in addition to or in the place of the criteria found in the guidelines. The applicant has not satisfied me here that it was unreasonable for the immigration officer to examine whether the difficulties are unusual, disproportionate or undeserved >> as part of an application for a visa exemption based on humanitarian and compassionate considerations. Consequently, the allegation made here by the applicant thus seems to me to be more theoretical than practical, as the true issue in this case is to determine whether the decision in question is reasonable under the circumstances, which leads me to examine the applicant's second argument.

2. **Did the immigration officer reach draw conclusions that were unreasonable or not based on the evidence?**

[20] The applicant submits that, given the lack of communication with her, the immigration officer drew gratuitous and unreasonable conclusions that were not based on the information before her, which constitutes a reviewable error *(Ramprashad-Joseph v. Canada (Minister of Citizenship and immigration),* 2004 FC 1715).

[21] In that regard, the applicant submitted that the conclusion that there were no disproportionate difficulties for a person who has lived in Canada for more than 10 years and no longer has any ties to her country of origin, drawn without truly communicating with the applicant, is arbitrary and constitutes an overriding error. She also submits that she could not help her mother and brother if she returns to Saint Lucia. As well, contrary to what the immigration officer wrote in her reasons, it would be almost impossible for the applicant to remain in contact with her employer's family due to delays in mail delivery and the high costs associated with telephone and Internet costs. She also submits that the immigration officer incorrectly concluded that she did not need to be in Canada for any proceedings following the complaint filed against the immigration advisor.

[22] Despite all the sympathy that this Court may have for the applicant, who may be placed in a difficult situation if a removal order is carried out, this Court cannot substitute its judgment for that of the decision-maker. The decision to grant a visa exemption is a discretionary decision and the immigration officer considered all relevant factors, including the issue of the best interest of any child affected by the decision. In my view, the evidence and the reasons provided by the immigration officer reasonably support her conclusion. The immigration officer's decision is essentially factual. After reviewing the record, the conclusions in this case are not arbitrary or capricious. The officer's reasons for decision show that she considered all the evidence.

[23] It is true that the applicant submitted two letters from her employer that mention that the family considered her to be a member of their family, but her employer did not elaborate on the

effect that the applicant's departure would have on their two children. In the letter she wrote in support of her application for a visa exemption, the applicant did not emphasize the best interests of her employer's children and did not submit many details in that regard.

[24] The applicant also did not indicate that she was providing for the financial needs of her family in Saint Lucia. The only thing she mentioned in this regard was as follows: "In august [sic] 1996,1 returned to canada [sic]. Lucky for me, I had not been replaced [sic] job wise. The kids were delighted. I worked and was no longer stressed. I was even able to send money every now and then back to my mother in St-Lucia to help her and my little brother out" (Certified Tribunal Record, at p. 37). The applicant did not mention that she continues to send money or that she is currently financially supporting her family.

[25] Finally, although submitted as evidence the event report from the Montréal Police, dated May 19, 2004, she did not submit evidence that she needs to be in Canada for proceedings related to that complaint.

[26] Essentially, the applicant submits that the conclusion that there are no disproportionate difficulties for a person who has lived in Canada for more than 10 years and who no longer has any ties to her country of origin, drawn without really communicating with the applicant, is arbitrary and constitutes an overriding error. Although the applicant will face difficulties, they are not deemed to be "disproportionate and unusual or undeserved". The officer's assessment of the difficulties is

consistent with the usual criteria, seems reasonable in the circumstances, and stands up to a careful review by the Court (see *Kawtharani v. Canada (Minister of Citizenship and Immigration),* 2006 FC 162, at para. 34). That leaves an examination of the applicant's final argument, regarding the fact that she was not called to an interview prior to the refusal decision.

3. Did the duty to act fairly mean that the officer should have interviewed the applicant?

[27] According to the affidavit signed on December 19, 2005, by Diane Belanger, the former counsel charged with filing the applicant's application for permanent residency, the authorized representatives of the Department of Immigration made certain statements at a meeting in November 1995 that created a legitimate expectation of being called to an interview in cases similar to that of the applicant.

[28] Thus, according to the minutes of the meeting in question, as part of an application for permanent residency filed in Canada based on humanitarian and compassionate considerations, an interview would not necessarily be granted in cases where there is no benefit in holding an interview, including cases of technical refusals or in the event of inadmissibility on the grounds of criminality. On the other hand, the immigration officer could invite the client in situations [translation] "in which judgment must be used (Minutes: CIC-NGO Working Group on Service Quality, November 29, 1995, document submitted as Exhibit DB-1).

[29] The applicant also submits that the policy cited above was followed in Montréal and that it

was not officially changed. Ms. Belanger also mentioned that, over the course of her career, in about a hundred similar cases in which she was counsel, there were only two negative decisions that were not preceded by an in-person interview. That therefore creates a legitimate expectation of having an interview, within the meaning of ***Baker,*** above, at para 26 and ***Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village),*** [2004] 2 S.C.R. 650, 2004 SCC 48, at para. 10.

[30] Moreover, in her affidavit dated April 18, 2006, Ms. Belanger states that a telephone conversation with the Director at CIC in Montréal in March 2006 confirmed her suspicions that the elimination of interviews at CIC in Montréal is dictated by contingencies related to administrative convenience, and that it is the backlog of cases, rather than considerations related to a reassessment of the case, that now determine whether an interview is held.

[31] The applicant also submits that, when an officer is prepared to draw unfavourable conclusions despite the documentary evidence, even when the interest of children is raised, there should be communication with the applicant. In this case, the immigration officer only spoke with the applicant for five minutes by telephone and the questions that she asked were not related to the essential elements of the applicant's case.

[32] In my view, there was no breach of the rules of procedural fairness.

[33] I agree with the respondent, who submits that the applicant is attempting to shift the burden of proof in arguing that the officer should have contacted the applicant to ensure that she had nothing to add.

[34] Moreover, according to jurisprudence, the applicant does not have an absolute right to an interview and is also required to provide the decision-maker with all facts relevant to her application. In *Owusu v. Canada (Minister of Citizenship and Immigration) (F.C.A.),* [2004] 2 F.C.R. 635, 2004 FCA 38, at para 8, Evans J. stated:

> H & C applicants have no right or legitimate expectation that they will be interviewed. 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.

[35] It is true that the decision in *Owusu* was rendered under the former *Immigration Act*, R.S.C. 1985, c 1-2, which is now repealed. However, I also note that the Court has referred to that decision in interpreting section 25 (see *Hussain v. Canada (Minister of Citizenship and Immigration,* 2006 FC 719, at paras. 10-11).

[36] Regarding the past practice of granting interviews, that aspect was addressed by this Court in *Etienne v. Canada (Minister of Citizenship and Immigration),* 2003 FC 1314. Pinard J. wrote the following at para 9:

> There is nothing in the record that suggests that the officer had affirmed, implicitly or explicitly, that the applicants would have an

> interview. Nothing in the evidence establishes the existence of a systematic practice of granting an interview. It is perhaps true that, in the past, an interview had always been granted to the applicants' former counsel in other cases. However, this does not establish a "legitimate expectation" of an interview. The caselaw of this Court is consistent that an interview is not required to ensure procedural fairness in processing applications for visa exemptions for humanitarian considerations (see, for example *Cheema (Litigation Guardian) v. Canada (Minister of Citizenship and Immigration)*, (June 4, 2002), IMM-2187-01, 2002 FCT 638 (CanLII), *Ming v. Minister of Citizenship and Immigration* (November 15, 2001), IMM-5953-00, 2001 FCT 1253 (CanLII), and *Sellakkandu v. Minister of Employment and Immigration* (October 13, 1993), 92-T-2029).

[37] Based on the evidence on record, I am satisfied that the applicant had a reasonable opportunity to present her case. I therefore conclude that the immigration officer had no duty to grant the applicant an interview.

[38] For all these reasons, the application for judicial review must be dismissed.

[39] The applicant submitted the following two questions for certification:

1. Can an immigration officer validly refuse an application for permanent residency based on humanitarian and compassionate considerations, filed in Canada under section 25 of the ***Immigration and Refugee Protection Act***, solely because the applicant's departure would not cause disproportionate, unusual or undeserved difficulties, as required by chapter IP-5 of the guidelines from the Minister of Immigration?

2. Can circumstances related to administrative contingencies, such as backlogs in the processing of cases — which also vary from one CIC office to another — justify the decision or practice of offering or not offering an interview to review an application for permanent residency based on humanitarian and compassionate considerations, filed in Canada under section 25 of the *Immigration and Refugee Protection Act?*

[40] The first question is purely theoretical and is not a determining factor given my conclusion that, following a very careful review of the reasons given by the immigration officer, the decision to grant a visa exemption for humanitarian and compassionate considerations seems reasonable under the circumstances. The second question is clearly factual and raises no questions of general importance.

ORDER

THE COURT ORDERS that

1. The application for judicial review is dismissed;

No questions are certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6945-05
STYLE OF CAUSE:	SIOBHAN DUPLESSIS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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