Federal Court  Cour fédérale

Date: 20090522

Docket: IMM-4512-08

Citation: 2009 FC 535

Ottawa, Ontario, May 22, 2009

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

KIRANJIT KAUR BASRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Kiranjit Kaur Basra seeks judicial review of the decision of a visa officer refusing her overseas application for permanent residence on humanitarian and compassionate grounds. For the reasons that follow, I am satisfied that several errors were made in the assessment of Ms. Basra's application, with the result that the decision under review is not reasonable. As a consequence, the application for judicial review will be allowed.

Background

[2] Ms. Basra is a citizen of India, and is the mother of a young son, Yudhvir. Ms. Basra's husband was killed in 2001. Her husband's parents and sister are Canadian citizens.

[3] Ms. Basra's late husband was his parents' only son, and Yudhvir is their only grandson. The Canadian family members claim to have a close relationship with their grandson, and regularly send money to assist Ms. Basra and Yudhvir in India. The evidence demonstrates that the family has provided the applicant with a total of 600,000.00 Rupees since 2002.

[4] Ms. Basra's in-laws want her to move to Canada with her child to be with them. To this end, Ms. Basra's sister-in-law and her husband signed sponsorship agreements and financial undertakings to support Ms. Basra's H&C application. Information regarding the couple's financial resources was also provided to the visa officer.

[5] In addition, evidence was submitted to demonstrate the closeness of the relationship between Ms. Basra and her son, and her husband's Canadian relatives. Medical information was also provided regarding the mental health of Ms. Basra's mother-in-law, and the importance to her well-being of having Yudhvir come to Canada to be with her.

[6] Ms. Basra's application was considered first as an application as a skilled worker, and the determination was made that she did not qualify as a member of this class. No issue is taken with respect to that determination.

[7] The officer then considered Ms. Basra's application for permanent residence on H&C grounds. After reviewing the evidence provided by Ms. Basra and her family members, the visa officer determined that there were insufficient H&C factors to overcome Ms. Basra's ineligibility as a skilled worker.

Analysis

[8] As will be explained below, there are three areas of concern with respect to the visa officer's decision, which lead to the conclusion that the decision was unreasonable.

The Visa Officer's Reference to the Wrong Guidelines

[9] Firstly, it appears from the CAIPS notes that the officer considered the application under section 6.14 of the *Overseas Selection and Processing of Convention Refugees Abroad Class and Members of the Humanitarian-Protected Persons Abroad Class* (OP5). In this regard, the officer noted that:

> Section 6.14 of OP5 states in part, 'De facto dependants must be the dependant of a principal applicant who has been determined to be a member of one of the three refugee classes. The de facto depend[a]nt must also meet the definition of refugee in their own right even when a dependency relationship is established.' Y[u]dhvir Singh does not meet the definition of De facto dependant.

[10] It is common ground that OP5 did not apply to this case, and that the application should have been considered under section 8.3 of the *Processing of Applications under Section 25 of the IRPA* guidelines (OP4).

[11] The visa officer has provided an affidavit explaining that the reference to the OP5 guidelines was an error, and that reference should have been made to the OP4 guidelines.

[12] I have previously commented on the practice of filing affidavits from visa officers explaining or elaborating on their reasons for their decisions, explaining why such affidavits should be given little weight: see, for example, *Fakharian v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 440, at para. 4; *Bin Abdullah v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1185, at paras. 12-15; *Alam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 182, at para.19. Other judges of this Court have expressed similar views: see *Hansra v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 230; *Sklyar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1226; *Santhirasekaram v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1188; *Jesuorobo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1092.

[13] Moreover, in this case, the officer's affidavit seems to suggest that the reference to the wrong guidelines was little more than a typographical error. However, it is evident from the CAIPS notes themselves that rather than having simply mistakenly referred to OP5 instead of OP4, the application was actually assessed under the wrong guidelines.

[14] While it is true that the visa officer did assess the various H&C factors in assessing the application under the OP5 guidelines, it is difficult to know how much weight was attributed to the

officer's finding that Yudhvir Singh did not meet the definition of de facto dependant because he did not meet the refugee definition.

The Visa Officer's Treatment of the Medical Report

[15] The second area of concern relates to the visa officer's treatment of the medical report with respect to Yudhvir's paternal grandmother. It appears from the CAIPS notes that the officer placed little weight on the medical report because "it appear[ed] to have been created for the purpose of this application".

[16] It is true that the amount of weight to be attributed to evidence is a matter within the discretion of the visa officer. However, the explanation provided by the officer for placing little weight on the medical report in this case is unreasonable.

[17] Individuals do not routinely obtain written reports from their physicians unless there is a reason for them to do so. A medical note may be required to explain an absence from work, because it is required for an insurance claim, or to support an immigration application. The fact that a medical report may have been obtained for a particular purpose does not, by itself, mean that it is unreliable or that little weight should be attributed to it.

[18] Moreover, the officer's reasoning would place applicants in an impossible situation. If no medical evidence is provided with respect to an individual's medical condition in immigration proceedings, the medical condition could be discounted on the basis that there was no medical

evidence to confirm that it existed. On the other hand, if medical evidence is obtained to support the application, the evidence could then be discounted for the reasons given by the officer in this case. This is not reasonable.

The Visa Officer's Finding with Respect to Ms. Basra's Ability to Support Herself

[19] The final difficulty with the officer's reasons relates to the finding that Ms. Basra was able to support herself and Yudhvir in India.

[20] The officer observes in the CAIPS notes that Ms. Basra's in-laws had been providing her with financial assistance, noting that in-laws would be expected to support their deceased son's widow and child in India. However, the officer then goes on to find that "Moreover, according to the information provided by the representative, the applicant is capable of financially supporting herself and her son".

[21] While it is true that the applicant had indicated in her application form that she was employed, there was simply no evidence before the officer to indicate that she was able to earn enough money to support herself and her son. Indeed, what evidence there was on that point was to the opposite effect.

[22] That is, the applicant had stated in her submissions that "As a widow in India with a young child, I do not have the ability to become self-sufficient".

[23] In the absence of any evidence to support the officer's finding of financial self-sufficiency on the part of the applicant, the finding is unreasonable.

Conclusion

[24] For these reasons, the decision does not fall within the range of possible acceptable outcomes that are defensible in light of the facts and the law: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 47. As a consequence, the application for judicial review is allowed.

Certification

[25] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, and the matter is remitted to a differently constituted panel for re-determination; and

2. No serious question of general importance is certified.

"Anne Mactavish"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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