Date: 20090630

Docket: IMM-4908-08

Citation: 2009 FC 689

Ottawa, Ontario, June 30, 2009

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

FAYE RUDDER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction and Background

[1] In this judicial review application, Faye Rudder (the Applicant), a citizen of Guyana and 53 years of age, challenges the September 19, 2008 decision made by a Visa Officer (the Officer) at the Canadian Embassy located in Port of Spain, Trinidad and Tobago, refusing her application for a temporary residence visa in the visitor category (TRV) to enable her to come to Canada to visit her relatives and to view the gravesites of her mother and her sister who have passed away in 2003 and 2004.

[2] This is the Applicant's second try at obtaining a TRV. Her first attempt failed when her application was refused on May 15, 2008. The record shows, rather than challenging the first decision, the Applicant whose visit was sponsored in particular by her brother, Stan Shepherd, a new application would be filed which would answer some of the concerns giving rise to the first refusal.

[3] The reasons for refusal of the two TRVs were as follows and are taken from the Certified Tribunal Record (CTR). They are in the form of CAIPS notes.

[4] The basis of the May 15, 2008 refusal was as follows:

> No travel.
> To visit sisters, Wendy Rudder in Toronto and Bernadette Klass in Mississauga.
> Subject has five siblings – all residing in Canada.
> Marital status not listed. Five children in Guyana.
> Letter from brother stated that siblings in Canada support subject.
> Subject not employed.
> No funds of her own.
> Refused – not a bf visitor. No Travel history, not employed, no funds of her own.
> Children are all adults. Not convinced subject is sufficiently established at this time.
> No compelling ties to return.

[5] The reasons for refusing the visa on her second application were:

> Family status:
> - Common-Law
> - 5 children
> - All live in Guyana
> - Family non-accompanying
> - 4 of 5 siblings in Canada, parents deceased
>
> Travel history:
> - Old-style passports – Guyana government says they are only valid until 31-12-2009

- Previous TRV refusal
- No previous travel

Funds & Employment:
- Housewife – no income
- Siblings in Canada paying all expenses and letter states they support her

Reasons for travelling to Canada:
- To visit siblings and mother's grave site

No compelling reason to travel, and even less to return
Source of funds is questionable

No credible proof of employment income
No travel history
I am not satisfied that this Applicant is well enough established to ensure her return.
Application refused.

The Legislative and Regulatory Scheme

[6] The *Immigration and Refugee Protection Act* (*IRPA*) and the *Immigration and Refugee Protection Regulations* (*IRPR*) govern the status and obligations of temporary residents who seek to enter into Canada for a temporary purpose.

[7] In terms of *IRPA*, the following provisions apply to temporary residents:

- Subsection 22.(1) provides: "A foreign national becomes a temporary resident if an officer is satisfied that the foreign national has applied for that status, has met the obligations set out in paragraph 20(1)(b) and is not inadmissible".

- Paragraph 20(1)(b) stipulates every foreign national who seek to enter and remain in Canada must establish to become a temporary resident that they hold "the visa or other document

required under the regulations and will leave Canada by the end of the period authorized for their stay".

[8] In terms of *IRPR*, section 179 provides for the issuance of a TRV as follows:

179. An officer shall issue a temporary resident visa to a foreign national if, following an examination, it is established that the foreign national	179. L'agent délivre un visa de résident temporaire à l'étranger si, à l'issue d'un contrôle, les éléments suivants sont établis :
(a) has applied in accordance with these Regulations for a temporary resident visa as a member of the visitor, worker or student class;	a) l'étranger en a fait, conformément au présent règlement, la demande au titre de la catégorie des visiteurs, des travailleurs ou des étudiants;
(b) will leave Canada by the end of the period authorized for their stay under Division 2;	b) il quittera le Canada à la fin de la période de séjour autorisée qui lui est applicable au titre de la section 2;
(c) holds a passport or other document that they may use to enter the country that issued it or another country;	c) il est titulaire d'un passeport ou autre document qui lui permet d'entrer dans le pays qui l'a délivré ou dans un autre pays;
(d) meets the requirements applicable to that class;	d) il se conforme aux exigences applicables à cette catégorie;
(e) is not inadmissible; and	e) il n'est pas interdit de territoire;
(f) meets the requirements of section 30.	f) il satisfait aux exigences prévues à l'article 30.

[9] Reference must also be had to OP-11 dealing with Temporary Residents issued by Citizenship and Immigration Canada. It explains how an Officer should assess applications for TRVs made by prospective visitors, workers and students and outlines the criteria which prospective temporary residents must meet.

[10] OP-11 makes it clear that an Officer “must not issue a TRV to a foreign national unless satisfied the Applicant will leave Canada at the end of the period authorized for their stay”. The Officer must be satisfied an Applicant has the ability and willingness to leave Canada at the end of the temporary period authorized.

[11] Paragraph 9 of OP-11 is entitled “Procedure: Assessing the application”. It identifies the areas officers should explore with Applicants for the purpose of determining whether: (1) an Applicant intends to remain in Canada illegally, to claim refugee status or otherwise seek to remain in Canada at the end of the period authorized for their temporary stay; and, (2) the ties to their home country are sufficiently strong to ensure that they are motivated to return home after their visit to Canada.

[12] Amongst the areas to be explored are:

- The trip’s purpose: What will the Applicant be doing in Canada? What are the Applicant’s plans for visiting Canada? Are those plans well thought out?

- The trip’s duration: how long? Is the time definite? Is the time reasonable?

- Who invited the person to Canada? Is there proof of an invitation? What family does the person have in Canada? What is their immigration status?

- What ties does the Applicant have in his/her country of residence? Is the person employed? What family does the person have there and where was the family at the time of the application? What financial obligations is the person leaving behind? Does the Applicant have property there? If so, what is its value? What other responsibilities or obligations is the person leaving behind? How will they be discharged?

- How will the person support herself or himself in Canada? Is the person staying in hotels or with relatives?

- Will the Applicant be able to leave Canada? Does the person have the financial ability to return to his/her country of residence such as an airplane ticket?

- Is there an impediment to entering Canada such as a criminal record or a serious medical condition?

- Has the person ever been refused a TRV to travel to Canada?

Facts

[13] In her second application for a TRV, dated September 3, 2008, the Applicant provided the following information:

1) She is the common law spouse of Philip Douglas and this for the last 30 years.
2) She has four daughters and one son, three of whom are living at home.

3) She has three sisters and two brothers residing in the Toronto area.
4) She is seeking a one month visa to come to Canada for a vacation and to visit the grave sites of her mother and sister.
5) She had received a negative decision in May 2008 to her request for a TRV due to her failure to satisfy the requirements of Regulation 179.
6) She has no employment history but stated she was a "homemaker, childcare provider taking care of my grandchildren".

[14] Her TRV application is supported by the following documents:

1) A letter dated July 14, 2008, from her brother Stan Shepherd and attached documents in support of his sister's TRV application. He indicates he and his sisters in Toronto invited Faye Rudder to come to visit them to allow her to know her nieces and nephews and other relatives and to visit the gravesites of her mother and sister who passed away in 2003 and 2004. He says his sister Faye would stay at his home which he owns and that "I will be fully responsible for her well being. I will also secure health insurance for her". He is a Canadian citizen working as a Registry Officer with the Courts Administration Services. He undertook "to ensure that Faye lives up to her obligations to leave Canada upon the expiry of her TRV" and that he is willing to sign a bond on her behalf.

2) He provided proof of employment and salary.

3) A letter from her common law spouse who confirms he is the spouse of Faye Rudder and they have been together for the past 30 years; that he supports her application for a visitor's visa and is of the opinion a trip to Canada "will help bring closure following the passing of her mother and sister and would enable her to see family members she hasn't seen in many years". [My emphasis.]

4) Proof of the death of the Applicant's sister.

[15] In a further affidavit sworn on March 30, 2009, after he had received a copy of the CTR, Stan Shepherd deposes he noticed the CTR has missing documents which has been provided to the Canadian High Commission in Guyana, namely:

1) His affidavit sworn August 1, 2008 in support of the application;
2) A letter dated September 4, 2008 with attached financial documents faxed to the Canadian High Commission in Guyana which he confirms was received there; and,
3) When his sister Faye filed her TRV application with the Canadian High Commission in Guyana, she included his August 1, 2008 affidavit.

[16] In his August 1, 2008 affidavit, Mr. Shepherd explains why his sister Faye was submitting a new TRV application after being refused one a short time before. He indicates she would travel on a two way return ticket; she had strong family ties in Guyana: her five children reside there, her common law spouse of 30 years is also there, she owns her home, she is a homemaker, provides child care for her grandchildren and raises rare livestock. She also receives a monthly support from

her siblings in Canada. She has never been convicted of a criminal offence and is in good health. Mr. Shepherd repeats he will be responsible for her and he guarantees by his personal assurance his sister Faye will leave Canada at the end of her authorized stay.

[17] The September 4, 2008 letter addressed to the Canadian High Commission in Georgetown, Guyana provides: (1) a mortgage statement showing the substantial equity balance in his home; (2) the amount available on his line of credit at BMO; (3) his tax return; (4) a letter of support from his sister Wendy and her RBC bank statement; and, (5) his weekly pay stub.

Analysis

(a) The Standard of review

[18] The Supreme Court of Canada, in *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), reformed the standard of review analysis by merging the patent unreasonableness standard into the standard of reasonableness. As the Federal Court of Appeal's judgment, in *Boni v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 68, shows, depending on the circumstances of a particular case and specifically, the nature of the question at issue, the standard of review of a decision of a Visa Officer refusing a TRV is patent unreasonableness, if the refusal was based on a question of fact – a review of the evidence and when other questions are at issue, the standard of reasonableness governs.

[19] The decision of a Officer dealing with a TRV application is a discretionary decision, which *Dunsmuir* recognizes at paragraph 51, "questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from factual issues generally attract a standard of

reasonableness while many legal issues attract the standard of correctness recognizing, however, some legal issues attract the more deferential standard of reasonableness".

[20] More recently, the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (*Khosa*), considered whether the provisions of paragraph 18.1(4)(d) of the *Federal Courts Act*, governing judicial review of a federal tribunal, had an impact on the standard of review analysis. This paragraph of the *Federal Courts Act* provides the Federal Court may grant relief if a federal tribunal "based its decision or order on an erroneous finding of fact that is made in a perverse or capricious manner or without regard for the material before it." [My emphasis.]

[21] In *Khosa*, Justice Binnie, for the majority, made these points on the standard of review:

1) Paragraph 18.1(4)(d) of the *Federal Courts Act* does not legislate a standard of review but only sets out grounds for relief.

2) Having said this, he wrote at paragraph 3 of his reasons paragraph 18.1(4)(d): "does provide legislative guidance as to "the degree of deference" owed to the Immigration Appeal Division". At paragraph 46, he explained: "More generally, it is clear from s. 18.1(4)(*d*) that Parliament intended administrative fact finding to command a high degree of deference."; adding: "This is quite consistent with *Dunsmuir*. It provides legislative precision to the reasonableness standard of review of factual issues in cases falling under the *Federal Courts Act*." [My emphasis.]

[22] With *Khosa*, we have the benefit of the Supreme Court of Canada's application to a federal tribunal of *Dunsmuir* which concerned judicial review of a decision of an adjudicator appointed under provincial law.

[23] I take from *Khosa*, the following teachings:

1) At paragraph 59, Justice Binnie wrote:

> **59** Reasonableness is a single standard that takes its colour from the context. One of the objectives of Dunsmuir was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome.

2) At paragraph 62, he added:

> **62** It is apparent that Fish J. takes a different view than I do of the range of outcomes reasonably open to the IAD in the circumstances of this case. My view is predicated on what I have already said about the role and function of the IAD as well as the fact that Khosa does not contest the validity of the removal order made against him. He seeks exceptional and discretionary relief that is available only if the IAD itself is satisfied that "sufficient humanitarian and compassionate considerations warrant special relief". The IAD majority was not so satisfied. Whether we agree with a particular IAD decision or not is beside the point. The decision was entrusted by Parliament to the IAD, not to the judges. [My emphasis.]

3) At paragraph 63, he stresses the importance *Dunsmuir* places on providing reasons "which constitute the primary form of accountability of the decision maker to the Applicant, to the

> public and to a reviewing court". He cites with approval that Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, a case where an Immigration Officer refused an application for permanent residence on humanitarian and compassionate grounds.

[24] I also have in mind what Justice Décary said in *Aguebor v. (Canada) Minister of Employment and Immigration*, [1993] F.C.J. No. 732, at paragraph 4:

> **4** There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden.

Application to this case

[25] In *Khosa*, the Supreme Court of Canada emphasized the reasonableness standard required deference and stressed that reviewing courts "cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law"." In the context of judicial review of administrative action, it is clear that "the law" includes the general principles of "administrative law" (*Khosa*, a paragraph 4).

[26] There is no question an application by a foreign national for a TRV triggers a discretionary decision by an Officer. Administrative law has settled the principles upon which discretionary decisions of Officers dealing with TRV decisions must be reviewed.

[27] The case law in this area is to the effect the principles established by the Supreme Court of Canada in *Maple Lodge Farms Ltd. v. Government of Canada et al*, [1982] 2 S.C.R. 2 (*Maple Lodge Farms)* generally apply. (See the Federal Court of Appeal's decision in *Jang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 312; *Salman v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 877; *Liu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 751; and, *Guo v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1353.)

[28] In *Maple Lodge Farms*, Justice McIntyre wrote:

> In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

[29] In this case, I am disturbed by two circumstances.

[30] First, there was a dispute between the parties on the composition of the CTR which should have been settled in accordance with the provisions of sections 317 and 318 of the *Federal Courts*

Rules. The CTR was received after leave was granted and the issue fell to be settled by this Court of the hearing of the judicial review application. At the end of the day, this dispute has no impact upon my decision so I will say no more about it.

[31] Second, I note, in this case, there was no affidavit from the Officer explaining his/her decision or what material was in front of him/her when the decision was made. From the material before me, it appears all of the material was filed with the Canadian High Commission in Georgetown, Guyana while the decision itself was made by an Officer in Port of Spain, Trinidad and Tobago.

[32] In my view, this judicial review must be allowed for the following reasons:

1) The Officer has simply provided no adequate reasons for decision. The Officer does not respond to the new evidence which the applicant and her brother put before the decision-maker explaining why the second application is different than the first one which was refused but not appealed. This case is similar to the case which was before my colleague Justice O'Reilly in *Dhillon v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1446.

2) The Officer did not consider many of the factors spelled out in OP-11, the administrative guidelines. In *Baker*, Madam Justice L'Heureux-Dubé explained at paragraph 72, on behalf of her colleagues of the Supreme Court of Canada, the value of ministerial guidelines in assessing the reasonableness of a decision. In *Suresh v. Canada (Minister of Citizenship and*

> *Immigration)*, [2002] 1 S.C.R. 3, at paragraph 36, the Court explained the result in *Baker* was the Minister's delegate's failure to comply with self-imposed ministerial guidelines. A review of the factors spelled out in OP-11 for consideration with the ones referred by the Officer clearly show to a failure to consider many of the factors identified in the ministerial guideline to assess the central and only criteria spelled out in *IRPA* for the issuance of a TRV, namely, whether, on the evidence, the Officer should be satisfied an Applicant will return to his or her country of residence.

[33] Another way of putting it, the Officer's error is the failure to take into account relevant factors in the exercise of his/her discretion.

[34] Finally, I find the Officer's decision to be contrary to paragraph 18.1(4)(d) of the *Federal Courts Act*. The Officer's decision was reached either by ignoring the evidence before him or by drawing inferences from the evidence which are unreasonable in the perspective of the purposes and objectives for Canada granting entry to this country on a TRV in the category of a visitor.

[35] The evidence before the Officer included the Applicant's application for a TRV which stated the purpose of the visit, its duration, what compelled her return to Guyana – her children and grandchildren for whom she provides care as well as her 30 year relationship with her common law partner. The Officer also had the evidence of Mr. Shepherd by way of his letter of July 4, 2008, as well as Mr. Douglas' letter. Mr. Shepherd's letter attests to the living arrangements made for his sister and why it is important for her to visit. He guarantees her return and outlines his financial resources. Mr. Douglas confirms his 30 year relationship with Faye Rudder, points to the need to

bring closure on her mother and sister's deaths and the fact she had not seen the family for many years.

[36] The Officer found Faye Rudder had no compelling reasons to travel and even less reasons to return to Guyana because she was not sufficiently established there. The Officer questioned the source of funds available to Faye Rudder in Canada. In my view, the Officer could only have reached these conclusions by ignoring the evidence or by drawing inferences from the evidence which are unreasonable. In the circumstances, this Court's intervention is warranted. I cite Justice Lagacé's recent judgment in *Ogunfowora v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 471.

[37] I conclude by finding that this is an appropriate case for the issuance of a direction that a different visa officer issue to Faye Rudder forthwith a TRV for a period of one month when it is suitable for the Applicant to travel to Canada. I find that on the evidence in the record this is the only reasonable result a Visa Officer could reach on a re-consideration.

[38] In *Pacific Pants Company Inc. et al v. the Minister of Public Safety and Emergency Preparedness*, 2008 FC 1050, this Court at paragraphs 48 and 49 had an opportunity to discuss the scope of paragraph 18.1(3)(b) of the *Federal Courts Act* which authorizes the Court on setting aside a decision to do so "with such directions as it considers to be appropriate". I referred to the Federal Court of Appeal's decision in *Rafuse v. Canada (Pension Appeals Board)*, 2002 FCA 31, as authority that directions issued under paragraph 18.1(3)(b) may include directions in the nature of a directed verdict. In my view, a directed verdict is compelling on the facts of this case.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this judicial review application is allowed, the decision of the Officer refusing to issue a TRV to the Applicant is set aside and the matter is referred to a different Visa Officer with directions that a TRV for the period of one month be issued forthwith to the Applicant. No certified question was proposed.

"François Lemieux"

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Judge

FEDERAL COURT

SOLICITORS OF RECORD

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