Federal Court  Cour fédérale

Date: 20100126

Docket: IMM-1718-09

Citation: 2010 FC 85

Ottawa, Ontario, January 26, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

GLENIS THERESA JOHN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Glenis Theresa John was 18 years old when she came to Canada from Grenada in 1990 in order to care for her ailing mother. She has never left, notwithstanding that her visitor's visa expired in 1991, and notwithstanding that her mother died in 1994. She has remained with her uncle's family, which includes her grandmother, of whom she takes care.

[2] In 2008, she applied for permanent resident status from within Canada on humanitarian and compassionate grounds. This is an exception to the normal procedure which requires an applicant to apply from outside Canada. The Minister, however, may waive requirements of the *Immigration and Refugee Protection Act* on compassionate and humanitarian grounds, as contemplated by section 25 thereof.

[3] The Immigrant Officer refused her application. This is a judicial review of that decision.

THE FACTS

[4] In her application, Ms. John, who has now lived more than half her life in Canada, set out various factors, and attached seven letters of recommendation. In her Notes to File dated 23 March 2009, the Immigration Officer aptly summarized these factors as follows:

- Has been in Montreal for almost eighteen years;
- Came to Canada to take care of her mother in July 1990. Mother had Breast Cancer. Mother died on 11 September 1994;
- After the death of her mother, stayed in Montreal where she could have emotional support of close family members;
- Has been separated of her siblings;
- Aunts, uncles and Granny became her support network. Felt more connected to her family members in Montreal than the siblings she left in Grenada;
- Stayed in Montreal to look after her Granny; to repay the generosity of her family in Montréal who had continued to care for her Granny; would be terrible to her Granny to lose her caregiver;
- Financially independent;
- Involved with church activities and community events but did not formally joined any church or organization not to draw attention to herself;
- Could not go back to her father because he was never part of her life;

- No longer has a Grenadian accent;
- Would be a stranger in a strange land if she went back to Grenada

[5] In her analysis, the Immigration Officer came to the conclusion that Ms. John was not actually financially independent. She noted that she lived with her uncle and that she earned pin money by gardening, babysitting, and hairdressing. Perhaps Ms. John considers herself financially independent in that she has made no claim against the State, but the Immigration Officer's conclusion is eminently reasonable. She stated that she could not give significant favourable weight to this aspect of the application. As shall be discussed, the finding that she was not financially independent is a double edged sword. The only inference to draw is that she is dependent on her uncle.

[6] She went on to hold that Ms. John is single, without children, without brothers or sisters in Canada, but with three brothers and two sisters in Grenada. She was of the view that this fact counterbalanced her ties to Canada. She concluded that Ms. John would not be subjected to unusual, unjustified or disproportionate hardship were she to apply for permanent residence from outside Canada.

[7] In her application for judicial review, Ms. John relied strongly on Citizenship and Immigration Canada's guidelines *IP-5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*. These Guidelines are not law, and are not binding on Immigration Officers. Yet in nearly all cases they serve as a valuable checklist as to matters which ought to be taken into consideration.

[8] The two factors emphasized by Ms. John in this judicial review are that her prolonged stay in Canada has led to establishment, and that the Immigration Officer failed to properly take into account her family relationships here.

[9] The Minister's position, somewhat in the alternative, is that the Officer was not required to consider *de facto* family relationships because she was not asked to. However, in any event, she did take all relevant factors into account, and her decision should not be set aside because it is reasonable (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190).

DISCUSSION

[10] During the hearing I rejected out of hand as a distinct stand-alone issue the prolonged stay in Canada submissions. Ms. John is here because she chooses to be here. There were no circumstances beyond her control which required her to stay here.

[11] As to her family relationships in Canada, she has lived with her grandmother, her uncle and his family for many years. I take it that her grandmother is a family class member, and that her uncle would be a *de facto* family member. Her grandmother is in a direct ascending line while her uncle is in the collateral line (see the *Civil Code of Quebec*, S.Q. 1991, c. 64, articles 655-659).

[12] In speaking of *de facto* family members, paragraph 13.8 of the Guidelines suggests that an important consideration is to what extent the applicant would have difficulty meeting financial or

emotional needs without the support and assistance of the family unit in Canada. “Separation of persons in such a genuine dependent relationship may be grounds for a positive decision.”

[13] The Guideline goes on to list a number of factors the Officer should consider which include whether the dependency is *bona fide*, the level thereof, the stability and length of the relationship, the ability and willingness of the family in Canada to provide support, other alternatives such as siblings outside Canada “able and willing to provide support” and whether there has been a significant degree of establishment in Canada.

[14] I cannot accept the Minister’s submission that the Officer need not have considered *de facto* family relationships because section 13.8 of the Guidelines was not specifically brought to her attention. The facts were clearly set out in the application, and not only were staring her in the face, but indeed were noted by her. In my view, the relevant factors were adequately brought to her attention.

[15] Having found that Ms. John was not financially independent, and not doubting her emotional needs within the family unit in Canada, the Immigration Officer should have considered the ability and willingness of the family in Canada to provide support (which she, by necessary implication, decided they were) against the possibility of her siblings in Grenada being willing and able to provide support. No analysis was done in that direction.

[16] Consequently, in the circumstances of this case, I find the decision to be unreasonable.

[17] Although the decision was a discretionary one and must be exercised in good faith, which it clearly was, following *Dunsmuir*, above, it must also be reasonable. The cases cited by the Minister were not, in my opinion, on point. *Sandhu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1032, is distinguishable because the *de facto* family membership issue was not raised before the Immigration Officer. I have found that in this case it was. In *Leung v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 200, Madam Justice Snider rightly pointed out that there is no obligation to address the shortcomings of an application. In this case I have found that there were no shortcomings. Furthermore, in that case there was evidence that the applicant would be able to support himself if returned to Hong Kong. No analysis of that nature was done in this case.

[18] The decision of Mr. Justice Zinn in *Pascual v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 993, dealt with another issue entirely, e.g., a failure to declare a family member pursuant to section 117(9) d) of the *Immigration Regulations*. Thus the issue was not whether the non-accompanying spouse was or was not a *de facto* family member, the issue was that, as a matter of law, the non-accompanying, non-declared, spouse could not be considered as a member of the family class. If a member of the family class, but as a matter of law unable to be considered as such, it follows that such a person could not be considered as a *de facto* family member.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is granted.

2. The decision of the Immigration Officer is quashed.

3. The matter is remitted to a different Immigration Officer for reconsideration in light of these reasons.

4. There is no serious question of general importance for certification.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	Glenis Theresa John v. MCI
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APPEARANCES:

Mark J. Gruszczynski	FOR THE APPLICANT
Mireille-Anne Rainville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GRUSZCZYNSKI, ROMOFF Barristers & Solicitors Westmount, Quebec	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT