Federal Court  Cour fédérale

Date: 20110321

Docket: IMM-1908-10

Citation: 2011 FC 344

Ottawa, Ontario, March 21, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

DELISHA ABBOTT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of L. Miggiani, Immigration Officer, Citizenship and Immigration, dated March 16, 2010 and received by the Applicant on March 22, 2010. The letter advised the Applicant that she had been withdrawn from the principal applicant's application for permanent residence from within Canada on humanitarian and compassionate grounds, on which she had been listed as a dependent.

[2] The Applicant seeks an order setting aside the decision of the Immigration Officer and a declaration that she is approved in principle for landing within Canada on humanitarian and compassionate grounds.

[3] Based on the reasons that follow, this application is dismissed.

I. Background

A. *Factual Background*

[4] The Applicant, Delisha Abbott, is a citizen of St. Vincent. Her mother, Deann Abbott, the principal applicant (PA), submitted a Humanitarian and Compassionate (H&C) application in 2003. The Applicant, who was 15 years old at the time, was included as a dependent on that application. The application was based, in part, on the abusive behaviour displayed by the Applicant's step-father.

[5] In May 2005, Citizenship and Immigration Canada (CIC) received information that the Applicant had been charged with assault, assault with a weapon and robbery in May 2004. These charges were withdrawn in December 2004.

[6] By letter dated December 1, 2005, the PA and the Applicant were informed that on November 17, 2005 a representative of the Minister of Citizenship and Immigration had approved their request for an exemption pursuant to their H&C application.

[7] After receiving this positive "Stage 1" assessment, the H&C application passed to "Stage 2" and continued to be processed. "Stage 2" would determine whether the PA and her dependents were otherwise admissible and met all other requirements of the *Immigration and Refugee Protection Act*, RS 2001, c 27 [IRPA]. The PA and Applicant were required to complete new forms, provide other information and documents and pay a Right of Landing fee.

[8] In 2007, CIC learned that the Applicant had been charged with theft in August 2006, and with possession of a weapon in September 2006. Subsequent to a request for information sent to the PA in August 2007, CIC learned that the charges against the Applicant had been withdrawn in October 2006.

[9] By letter dated June 24, 2008 the PA's solicitor requested that the Applicant be "separated from Ms. Abbott's claim. Ms. Abbott is requesting this separation as she does not agree with the financial decisions that her daughter Delisha has made." CIC received information that the Applicant had been in receipt of provincial social assistance since April 16, 2008.

[10] In June 26, 2008 the Applicant's counsel advised the Etobicoke CIC office that the Applicant was no longer represented by the PA's counsel, and had her own counsel. In July of the same year, the Applicant's counsel provided the Etobicoke CIC with submissions and supporting documentation requesting that the Applicant be exempted from the applicable inadmissibility provisions of the IRPA. The Applicant has a Canadian-born daughter who has serious health issues.

The Applicant provided documents stating that the specialized care her daughter needs would not be available in St. Vincent.

[11] On November 9, 2008 the Applicant was charged with unlawful entry, threatening damage to property and mischief. These charges were withdrawn February 2, 2010.

[12] By letter dated April 6, 2009, the PA was directed to submit a statutory declaration regarding her June 24, 2008 request to remove the Applicant from her H&C application. The PA enclosed such a declaration in a letter dated September 28, 2009.

[13] The Applicant continued to move forward with her application. The Applicant's counsel twice requested an update on the status of the Applicant's file by way of letter May 14, 2009 and October 6, 2009. On October 8, 2009 an employee of the Etobicoke CIC spoke to the Applicant's counsel, informing her that the Applicant's medical was out of date and requesting an update on the status of any criminal charges laid against the Applicant. The Applicant's counsel was contacted again by the Etobicoke CIC by phone on November 19, 2009 seeking information concerning the disposition of the Applicant's criminal charges. A letter dated that same day was sent to the Applicant informing her that her medical results had expired.

[14] The PA's H&C application was assigned to Immigration Officer Laura Miggiani (the IO) on March 4, 2010. The IO noted the PA's affidavit declaring her wish to remove the Applicant from her application. On March 12, 2010 the IO made a note to file indicating that she had spoken with the PA's solicitor who confirmed that the PA still wished to removed the Applicant from her

H&C application and that the Applicant was aware that she was going to be removed and would have to file a separate application as she was no longer a dependent of the PA.

[15] On March 16, 2010 the IO sent the Applicant a letter informing her that she had been withdrawn from the PA's application and a letter to the PA informing her that her request to have the Applicant removed from her application had been carried out.

[16] On September 30, 2010, the Applicant was charged with two counts of uttering a forged document.

[17] On November 10, 2010 the PA was granted permanent residence status in Canada. The PA listed no accompanying family members, and answered that she had no dependents.

B. *Impugned Decision*

[18] The subject of this application for judicial review is the letter dated March 16, 2010 in which the IO advises the Applicant that she has been withdrawn from the PA's application for permanent residence from within Canada on H&C grounds on which she had been listed as a dependent.

[19] The letter goes on to inform the Applicant:

> You are presently within Canada without status and are required to leave Canada immediately. Failure to depart Canada may result in enforcement action being initiated against you. Enclosed please find a Voluntary Confirmation of Departure letter, which you are asked to present to Canadian immigration officials at your port of exit at least two hours prior to departure.
>
> [Emphasis in original]

II. Issues

[20] The Applicant raises the following issues:

(a) Whether the IO acted without jurisdiction in removing the Applicant from the H&C application on which she had been listed as a dependent, at the request of the PA of that application after "Stage 1" approval had been granted?

(b) In the alternative, if the IO did have the jurisdiction to remove the Applicant from her H&C application as she did, did she err by failing to properly reassess the "Stage 1" approval as set out in Inland Processing manual 5: "Immigrant Applications in Canada made in Humanitarian or Compassionate Grounds" (IP 5), requiring that the Applicant be provided with notice and an opportunity to respond?

(c) Whether the IO erred in law and breached principles of procedural fairness in relying on extrinsic evidence not provided to the Applicant prior to the decision?

(d) Whether the IO erred in law in concluding that the Applicant could, in March 2010, be withdrawn from the PA's H&C application because she was 22 and no longer financially dependent when the Applicant was a dependent at the time that the application was submitted in 2003 and granted "Stage 1" approval in 2005?

[21] The Respondent maintains that there is only one issue, the determination of which should, if this Court adopts the Respondent's position, conclude this matter:

(a) Whether the March 16, 2010 letter is a "decision" or determination reviewable under section 18.1 of the *Federal Courts Act* (RS, 1985, c F-7)?

[22] I will deal with this threshold issue first.

III. Standard of Review

[23] The errors alleged by the Applicant, are all errors of law. The standard of correctness will be applied.

IV. Argument and Analysis

A. *Is it a "Decision"?*

[24] The Respondent argues that the putative subject matter of this application does not concern the determination of a federal board, commission or other tribunal. Rather, the decision to remove

the Applicant from the PA's H&C application was the decision of the PA, and not of the Minister. It is the Respondent's position that the March 16, 2010 letter was a courtesy or informational letter and that jurisprudence from this Court holds that such letters are not decisions within the meaning of section 18.1 and therefore cannot be reviewed.

[25] While the Applicant does not dispute that the PA advised CIC that the Applicant's H&C application should be separated from her own, the Applicant argues that the IO made the decision that the Applicant's "Stage 1" approval should be revoked such that she is "in Canada without status and [is] required to leave Canada immediately." The Applicant bases this position on the fact that the letter informing the PA and the Applicant of the "Stage 1" approval was addressed to both the PA and the Applicant, and the fact that until the letter of March 16, 2010 every other communication with the Etobicoke CIC led the Applicant to believe that her claim was continuing to be processed.

(1) Was the Letter Informational in Nature?

[26] The Respondent relies on the Federal Court of Appeal decision in *Demirtas v Canada (Minister of Employment and Immigration)*, [1993] 1 FC 602 (CA), [1992] FCJ No 1126 (QL) which holds that informational letters are not decisions or orders contemplated as being reviewable by way of an application for judicial review within the meaning of subsection 18.1(2) of the *Federal Courts Act*.

[27] In *Dimirtas*, above, Justice Gilles Létourneau stated at para 8 (QL),

> The appellant contended that the Trial Judge erred in law by describing the letter of July 11, 1990, from the Director of the C.I.C. to counsel for the respondents as a "decision" reviewable by certiorari, and I believe that he is correct. Even if I were to take a very open-minded approach, I am unable to see how we could describe a mere informational letter from an administrative official in which, in reply to a request made to him, he draws his correspondent's attention to the existence of transitional legislative provisions and to the fact that a new quasi-judicial body was already seized of the cases which the correspondent wished to have transferred, as a "decision", and moreover a decision which granted or denied rights. In addition, in the days preceding the exchange of correspondence between the Director and counsel for the respondents, the new Immigration and Refugee Board had already informed the respondents that it was seized of their claims and that it was preparing to set a date for hearing. If counsel for the respondents intended to challenge the Board's jurisdiction over his clients' claims, he should have done so by making an objection before the Board and not by making a request to an official to transfer the files to another section.

[28] The Respondent considers the case of *Nkumbi v Canada (Minister of Citizenship and Immigration)* (1998), 160 FTR 194, 50 Imm LR (2d) 155 (TD) to be analogous to the present matter. In that case, Justice Pierre Blais relied on the decision in *Demirtas*, above, and Justice William McKeown's decision in *Carvajal v Canada (Minister of Citizenship and Immigration)* (1994), 82 FTR 241 (TD), 48 ACWS (3d) 787 to hold that a letter from an immigration counsellor explaining that the applicant could not make a new claim for refugee status because a departure order had been made against her but not executed was not a reviewable decision as the letter was informational only. The counsellor did not make the departure order, nor was she empowered to evaluate it or quash it.

[29] The Court cited secondary source material at para 39 of *Nkumbi*, above, to illustrate that the sending of a letter by an immigration officer is similar to the exercise of a limited power:

> The person having the limited power makes a decision as soon as the citizen meets the objective conditions set in the Act or Regulations. The former has no choice as to the substance of the decision to be made when the objective conditions set by the legislator are met. The application of these conditions does not pose problems of either assessment or interpretation. The decision requires (little or) no judgment on the part of the decision-maker. Her or she does not make a decision which requires choices to be made In this regard, there is no real decision-making authority.
>
> Licensing generally involves the exercise of a limited power. In the municipal context, for example, a renovation permit is issued as soon as the applicant meets the objective conditions set by the municipality. The agency seized of the application in such a situation has no freedom of choice in the decision to be made.

[30] The Court concluded that the decision which could have been challenged would have been the departure order itself.

[31] Similarly, in *Carvajal*, above, the immigration officer wrote to the applicants to remind them that they were ineligible for permanent residency status because of an earlier determination for which they had not sought judicial review. The application was dismissed, in part, based on the fact that the officer communicating the information was not empowered to make the decision that the applicants wished to challenge.

[32] The Respondent submits that as in *Nkumbi*, *Carvajal* and *Demirtas*, above, the IO's letter in the present case was an informational or courtesy letter informing the Applicant of the PA's decision. The IO was not exercising any discretion with respect to the matter and the letter is therefore not a "decision" that determined any substantive right.

[33] The Applicant cites the decision of Justice Russel Zinn in *Khadr v Canada*, 2010 FC 715, [2010] 4 FCR 36 for the proposition that statements that have a direct impact on the applicant constitute a decision that is subject to judicial review. Additionally, the Applicant cites *Markevich v Canada*, [1999] 3 FC 28, 163 FTR 209 (TD) (overturned on other grounds) in which Justice John Evans notes, at para 13, that in determining whether or not some form of administrative action is subject to judicial review it is important to ask if the action affects the rights or interests of individuals.

[34] The Applicant submits that the decision communicated to her in the letter of March 16, 2010 had a very serious impact on her rights and interests. The Applicant considers that, in essence, the IO decided to rescind the Applicant's "First Stage" approval, which resulted in the Applicant losing her status in Canada. The Applicant submits that the decision is final in nature.

[35] The Applicant distinguishes the present case from *Demirtas*, *Nkumbi* and *Carvajal*, above. In those cases the applicants sought judicial review of a letter from a person or body who was not authorized to make the decision requested of them, while in the present matter the decision was made by an Immigration Officer with delegated authority to determine H&C applications.

[36] In my view, the March 16, 2010 letter was informational in nature. The decision that the IO reported to the Applicant was unquestionably the decision of the PA. The fact that the Applicant lost her status in Canada as a result of the PA's decision is an unfortunate, but logical outcome.

[37] The Applicant's submission that the decision is final and affects her substantive rights and thus can be considered to be a decision for the purpose of an application for judicial review is illusory. It is clear that the Applicant can submit her own independent H&C application. There is nothing final in the nature of the letter such that it precludes the Applicant from continuing to pursue the same legal avenue of submitting an H&C application.

[38] Clearly, it would be unfair to require the PA to maintain the Applicant's legal status in Canada by allowing her to remain as a dependent on her application when the Applicant repeatedly behaved in ways that could have jeopardized, or at the least delayed, the processing of the PA's application. Had the Applicant been found to be inadmissible at Stage 2 of the process, the PA would have been inadmissible too and consequently, unable to obtain permanent resident status.

[39] On the other hand, given the lengthy processing times H&C applications entail, it seems unfair that the Applicant is being, firstly, denied the benefit, temporary as it is, of having a regularized status in Canada while awaiting a Stage 2 determination and secondly, of being deprived of the time, paperwork and effort the Applicant has already contributed to obtaining a positive Stage 2 decision. This must be especially bitter for the Applicant to bear because, as she points out, all communication she had with CIC up until the letter in question indicated that her application was being normally processed. I will add parenthetically, that while the Applicant claims in her written submissions to have been surprised by the affidavit of the PA effecting her removal from the application, the Field Operations Support System (FOSS) notes indicate that the Applicant was well-aware of the situation.

[40] The Applicant adds that in the present matter the Respondent can cite no legislative provision which would be violated by the continued processing of the Applicant's H&C application separately from that of the PA's. This might be true, but it is equally true that there is no policy or legislative provision that I can find that would allow CIC to essentially bifurcate the applications at this stage of the processing.

[41] The Applicant argues that the letter communicating the First Stage approval was addressed to the Applicant as well as to the PA. However, in *Gomes v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1217, 126 ACWS (3d) 486 Justice Danièle Tremblay-Lamer dealt with a case in which dependent children sought to be severed from the permanent residency application of their father. The dependents were full-time students at the time the application was made and were therefore considered as such throughout the process. However, once their father was found to be inadmissible due to medical issues, the dependents tried to argue that the fact that each family member received a separate acceptance letter was evidence that they had been treated separately. Justice Tremblay-Lamer disagreed. The dependents could have severed their application, but never requested to be treated separately from their father until he was found to be inadmissible. Moreover, it was clear that the positive H&C determination was based on the family's application as a unit.

[42] Similarly, in the present case, I do not consider the fact that the letter granting Stage 1 approval was addressed to both the PA and the Applicant to be persuasive evidence that the Applicant was granted Stage 1 approval which has since been unlawfully revoked. It is clear that the Applicant received Stage 1 approval as a dependent of the PA, based on a consideration of the

hardship that the PA would face in having to make an application from outside of the country. To separate the applications, but allow the Applicant to retain for herself the benefit of the consideration that was taken on the part of the PA would be specious.

[43] I reiterate, as Justice Tremblay-Lamer did in *Gomes*, above, that the Applicant remains free to make her own application at any time.

[44] The conclusion that the letter is informational only is sufficient to dispose of this application for judicial review. This conclusion also curtails the Applicant's other arguments. She fails to raise a reviewable error, but for completeness her submissions are examined below.

B. *Is There Any Other Reviewable Error?*

(1) Did the IO Act Outside of Her Jurisdiction?

[45] The Applicant argued that neither IRPA nor the *Immigration and Refugee Protection Regulations*, (SOR/2002-227) [IRPR] authorized the removal of the Applicant from the H&C application in the manner carried out by the IO. The Applicant submits that while not all positive "Stage 1" decisions will lead to permanent residency, the effect of the two stage process is to grant a conditional permanent residency at Stage 1, subject to the requirement that the applicant and any accompanying family members not be otherwise inadmissible. It is the position of the Applicant that the basis on which a refusal can properly be issued does not include the preference of a principle applicant as to the continued processing of a dependent.

[46] The Respondent reiterates in his submission that the Applicant was removed from the PA's application at the behest of the PA, not the IO, and that it was entirely within the discretion of the PA to make such a request. While all family members must be listed in the application and examined for admissibility, the decision to include a family member for concurrent processing as part of the PA's application is at the sole discretion of the PA. According to the Respondent, it is completely irrelevant that the PA was "approved-in-principle" – the PA is at liberty at any time during the processing able to request the withdrawal from her H&C application of a dependent family member for the purposes of concurrent processing.

(2) Did the IO Fail to Properly Reassess the Applicant's Stage 1 Approval?

[47] The Applicant submits that the IO erred by failing to properly reassess the "Stage 1" approval. The Applicant rests this argument on the guidelines in the IP 5 manual which provides that a Stage 1 approval can be revisited if significant factors come to light, such as the withdrawal of an undertaking. The Applicant submits that she does not fit in this category, as at all relevant times during her processing she was a child of the PA under 22 years of age. The Applicant further submits that where a Stage 1 decision is revisited or reopened, in cases of misrepresentation or fraud, the person must be given notice and an opportunity to respond to any allegations of misrepresentation. The IO never gave the Applicant any such notice, rather, any communication she had with CIC prior to the March 16, 2010 letter indicated that her application was undergoing a Stage 2 determination.

[48] In response, the Respondent maintains that the Applicant fails to appreciate that the decision to concurrently process her dependent application as an accompanying family member rested solely within the jurisdiction of the PA. Consequently, once the Applicant was dropped from the PA's application the IO had no corresponding duty to re-evaluate the Applicant's Stage 2 approval.

(3) Did the IO Breach the Applicant's Right to Procedural Fairness?

[49] The Applicant makes lengthy written submissions arguing that the IO erred in law and breached principles of procedural fairness in relying on extrinsic evidence not provided to the Applicant prior to the decision. The reasons obtained by the Applicant pursuant to Rule 9 of the *Federal Courts Rules*, (SOR/98-106) consisting of FOSS notes, make reference to the PA's affidavit requesting the Applicant's removal. The Applicant claims that she had no knowledge of the existence of the affidavit prior to receiving the reasons, and as such it is extrinsic evidence and a copy ought to have been provided to the Applicant for comment.

[50] Again, the Respondent submits that the Applicant misunderstands that the decision was taken by the PA, not the IO. The affidavit was merely a confirmation of the PA's wish to remove the Applicant from her H&C application.

[51] I must agree with the Respondent. It is hard to see what effect allowing the Applicant to comment on the affidavit prior to the issuance of the letter would have had. Unlike the case law cited by the Applicant, it is not clear that any comments made by the Applicant would have had any effect on the course of action taken by the IO. As the Respondent submits, in the present case there

was no determination made by the IO to which the rules of procedural fairness would even attach. There was no room in this decision-making process, which was undertaken solely by the PA, for the Applicant to participate in a meaningful way.

(4) Lock-in Date

[52] The FOSS notes provide as part of the reason for the March 16, 2010 letter that the Applicant is 22 years old and no longer a dependent. When the H&C application was initially submitted the Applicant was 15. Stage 1 approval was granted in 2005 when the Applicant was 17. The Applicant argues that the IO erred in concluding that the Applicant's age at the time the letter was prepared was a proper basis for concluding that the Applicant was no longer a dependent child. Age, for the purpose of assessing dependency in a sponsorship application, or even a Skilled Worker application, is locked in at the date of receipt of the application.

[53] The Respondent submits that this is a red-herring. The Respondent argues that the Applicant's application as a dependent family member was contingent on the PA's assent to processing – assent that could be withdrawn at any time. The IO simply noted that the Applicant, no longer a dependent, was now in a position to file her own independent H&C application.

[54] I accept the Respondent's submission on this point.

V. Conclusion

[55] In consideration of the above conclusions, this application for judicial review is dismissed.

[56] No question to be certified was proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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