Date: 20071221

Docket: IMM-5922-06

Citation: 2007 FC 1340

Ottawa, Ontario, December 21, 2007

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

THI TUOI DO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of an Immigration Program Manager (the IPM), dated October 2, 2006, in which the applicant's humanitarian and compassionate (H&C) exemption request was denied.

BACKGROUND

[2] The applicant, a citizen of Vietnam, applied to immigrate to Canada under the skilled worker class with her two dependent sons. She additionally requested that if she was rejected under the selection criteria that she be considered for an H&C exemption from the statutory criteria set out in the Act and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations") on the basis that she was the last remaining family member in Vietnam. The applicant's parents and 11 siblings reside in Canada. The applicant was originally not included on her brother's application for permanent residence along with her other family members because she was married at the time, and thus was not considered a dependent.

[3] In a decision dated October 2, 2006, the IPM denied the applicant's request for an H&C exemption to the statutory requirements of the Act and Regulations because she was of the view that the applicant had not made out a case that she would suffer undue hardship by remaining in Vietnam.

[4] The IPM indicated that the applicant was employed, had housing, and was able to travel freely around Vietnam as a trader. Furthermore, the IPM highlighted the fact that the applicant had not submitted any corroborating evidence that she will face special hardship as a divorced woman. The IPM was of the view that divorce was becoming more and more commonplace in Vietnam.

[5] Further, the IPM asserted the applicant's best interest as a child to be reunited with her parents and siblings in Canada was mitigated by the fact that she was a mature woman with a family of her own.

ANALYSIS

[6] It is well established that exemptions for H&C reasons are reviewable on the standard of reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (QL), at para. 62; *Yu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 956, [2006] F.C.J. No. 1217 (QL), at para. 20; *Nalbandian v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1128, [2006] F.C.J. No. 1416 (QL), at para. 12; *Liang v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 967, [2006] F.C.J. No. 1222 (QL), at para. 7; *Dang v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 290, [2007] F.C.J. No. 363 (QL), at para. 26).

[7] Thus, the IPM's decision will be reasonable "if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 55).

[8] The burden is on the applicant to present evidence necessary to support his or her application (*Leung v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 200, [2007] F.C.J. No. 264 (QL), at para. 7; *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] F.C.J. No. 158 (QL), at para. 5).

[9] The evaluation of this evidence takes place within the limits of the discretionary power conferred upon the Minister, and by extension the Minister's delegate by s.25(1) of the Act. The

scope of the discretionary power is indicated by the legislative context, including the objectives of the Act, and the ministerial guidelines (*Baker*, *supra*, at para. 67).

[10] In the present legislative context, the objectives of the Act and associated guidelines suggest that family reunification is an important consideration. Particularly, section 3(1)(d) stipulates that one of the objectives of the Act is "to see that families are reunited in Canada". Further, s. 8.3 of the Overseas Processing Manual Chapter 4 (OP4) sets out "situations where positive consideration might be warranted" but indicates that the list is non-exhaustive. It goes on to state that "these guidelines are to assist officers in assessing H&C situations [but that officers] cannot be restricted by guidelines; they are obliged to consider all the information they have."

[11] Of relevance to the present case, one of the examples given in the guidelines is that of the "*de facto* family member" defined as "persons who do not meet the definition of a family class member" but who are in situations of dependence which makes them a *de facto* member of a nuclear family that is either in Canada or that is applying to immigrate.

[12] With respect to the determination of *de facto* family members, the guideline indicates that the following elements may be taken into consideration:

- whether dependency is bona fide and not created for immigration purposes;
- the level of dependency;
- the stability of the relationship;
- the length of the relationship;
- the impact of a separation;
- the financial and emotional needs of the applicant in relation to the family unit;
- ability and willingness of the family in Canada to provide support;

> • applicant's other alternatives, such as family (spouse, children, parents, siblings, etc.) outside Canada able and willing to provide support;
> • documentary evidence about the relationship (e.g., joint bank accounts or real estate holdings, other joint property ownership, wills, insurance policies, letters from friends and family);
> • any other factors that are believed to be relevant to the H&C decision.

Thus, administrative officers, such as the IPM, are to evaluate indicia of dependence in determining whether an H&C exemption is meritorious.

[13] The applicant submits that subsumed within the present "*de facto* family" policy is a previous policy entitled "The Last Remaining Family Member" (LRFM). LRFM was a procedure whereby individuals who did not satisfy the strict definition of family member set out in the Family Class Regulations could benefit from the treatment accorded accompanying family members. In this policy the "primary consideration [was] that the Immigrant has considerable difficulty meeting his/her financial or emotional needs without the support and assistance of the family unit who is migrating to, or is already in, Canada." (see *Sitarul v. Canada (Minister of Citizenship and Immigration*, [1995] F.C.J. 1067 (QL), at para.. 17, citing Policy IS 1.17).

[14] With respect to the applicability of the LRFM policy, in *Yu*, *supra*, at para. 29, Shore J. indicated that "The Immigration Policy IS 1.17 [The Last Remaining Family Member Policy] is similar to the "*De Facto* Family Member" policy set out in OP4." However, in *Liang*, *supra*, at paras. 16-17, Dawson J., asserted that to argue that the current policy must be read as incorporating the previous policy does "violence to Parliament's intent."

[15] While I recognize that similarities do exist between the present and former policy insofar as there is a concern for dependent, *de facto* family members, it does not dictate that all last remaining family members must therefore be exempted from the requirements of the Act and Regulations. Under the present policy, as under the former, the level of dependency remains a primary consideration.

[16] Further, the level of family isolation and dependency is but one of many factors that the decision-maker is advised to consider in making H&C determinations (*Samaroo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 292, [2007] F.C.J. No. 376 (QL), at para. 15; *Sandhu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1032, [2006] F.C.J. No. 1298 (QL), at para. 20).

[17] In evaluating the IPM's decision, it is not for this Court to re-weigh the relevant factors, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, [2002] S.C.J. No. 3 (QL), at para. 34).

[18] Furthermore, administrative officers are not required to supply "as detailed reasons for their decisions as may be expected of an administrative tribunal that renders its decisions after an adjudicative hearing." (*Ozdemir v. Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331, [2001] F.C.J. No. 1646 (QL), at para.11).

[19] In addition, administrative officers are not required to expressly identify each and every consideration of the legislative framework (*Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2002] F.C.J. No. 1687 (QL), at para. 3; *Samaroo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 292, [2007] F.C.J. No. 376 (QL), at para. 15). Imposing this kind of requirement, would, in affect, elevate form over substance and allow decision-makers to evade their obligation to examine relevant factors by simply making mention of them (*Hawthorne*, *supra*, at para. 3); as aptly indicated by Décary J.A. in *Legault*, *supra*, at para. 13, "to mention is not to examine and weigh."

[20] Thus, of primary importance is that the decision-maker "dealt with the evidence before him and exercised his discretion in a non-arbitrary manner." (*Leung*, *supra*, at para. 15). As stated by Gibson J. in *Nalbandian*, *supra*, at paragraph 15, the analysis must reveal that the decision-maker was "cognisant" of the principle in s. 3(1)(d) of the Act, and the considerations set out in OP4 regarding *de facto* family members.

[21] Turning to the IPM's decision and specifically the CAIPs notes, the applicant submits that it is the duty of the IPM to come to her own conclusion and not to buttress her opinion on the basis of another officer. However, the CAIPs notes, which were prepared by an immigration counsellor, indicate that they were for the IPM's assessment and thus not meant to replace her own final decision.

[22] Further, while the IPM must conduct her own analysis and not rely on that of the immigration counsellor, there is nothing precluding the IPM from taking these CAIPs notes into consideration in the overall analysis of the case. While the CAIPs notes were not prepared by the IPM and thus do not form part of the final decision and reasons, the IPM's refusal letter was sufficiently comprehensive and stands on its own without the need of other sources to support the determination.

[23] The applicant also submits that the IPM should have been aware that her daughter, who the IPM indicated she would be leaving behind, had submitted her own application to the same visa office and thus would not have remained in the country. However, I have nothing before me to support the contention that the IPM should have been aware of this circumstance.

[24] In the present case, I am satisfied that the IPM took into account the relevant factors in the application. The IPM's decision reveals that she took into account the fact that the applicant's siblings and parents live in Canada, but concluded as she is a mature woman with a family of her own that this factor was mitigated. She also took into consideration the fact that the applicant had a job, housing, and that her children were being educated. The IPM also noted that the applicant did not submit any evidence of hardship faced due to her current divorce.

[25] I conclude that, while I may not agree with the outcome, the IPM's decision to deny the applicant's H&C exemption request was reasonable.

[26] For these reasons, the application for judicial review of the Immigration Appeal Division decision is dismissed.

[27] Counsel for the applicant has asked that the following questions be certified:

1. Does section 3(1)(d) compel the discretion exercisable by a visa officer under section 25(1) of the IRPA require that discretion to demonstrate a cognizance of the duty of family reunification?

2. While the discretion exercisable under section 25(1) is based upon the policy, (policy not being the law), does the adoption of the hardship part of the overseas policy require consideration of the *de facto* part of the policy, one being dependent on the other. In other words, can the officer accept one part of the policy while rejecting the other part of the policy?

[28] Pursuant to s.74(d) of the Act, an appeal to the Federal Court of Appeal may be made only if a serious question of general importance is certified. To be certified, the question must be one which transcends the interests of the immediate parties to the litigation, contemplates issues of broad significance or general application, and be one that is determinative of the appeal (*Canada (Minister of Citizenship and Immigration) v. Liyanagamage (F.C.A.)*, [1994] F.C.J. No. 1637, at para. 4).

[29] While the questions presently raised by the applicants may be of a serious nature and of general importance, they are not determinative of the appeal. Given the above analysis, I am of the view that the IPM was cognizant of the objectives of family reunification provided for by s.3(1)(d) of the Act, and did in fact consider the *de facto* family member policy as well as the hardship policy. Accordingly, the questions as posed by the applicant do not merit certification.

JUDGMENT

THIS COURT ORDERS that the application for judicial review of the Immigration Appeal Division is dismissed.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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