Date: 20071102

Docket: IMM-5438-06

Citation: 2007 FC 1124

BETWEEN:

MUOI VAN VU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

GIBSON J.

INTRODUCTION

[1] These reasons follow the hearing on the 23rd of October, 2007, at Toronto, of an application for judicial review of a decision of an Immigration Officer refusing the Applicant's application for landing from within Canada on humanitarian and compassionate grounds, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*[1]. The decision is dated the 29th of August, 2006 and was received by the Applicant on the 8th of September, 2006.

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[1] S.C. 2001, c. 27.

[2] The Applicant's application for leave and for judicial review of the decision was only filed on the 6th of October, 2006. The Applicant requested an extension of time to file. At the hearing, counsel for the Applicant addressed the issue of an extension of time to file. Counsel for the Respondent took no position on the request. An extension of time to file was granted orally and will be reflected in the Court's Order herein.

BACKGROUND

[3] The Applicant is a forty-eight year old male born in Quang Ninh, Vietnam. He entered Canada on the 22nd of June, 1992 as a permanent resident, together with this wife and daughter. The Applicant and his family members were selected abroad out of a refugee camp in Hong Kong, under the Designated Class, DC1. The Applicant's daughter was born on the 25th of September, 1989 in Hong Kong in the refugee camp. Both the Applicant's wife and his daughter are now Canadian citizens.

[4] Since arriving in Canada, the Applicant and his wife have parented two additional children, both born in Canada and therefore Canadian citizens, the elder born on the 15th of September, 1997 and the younger born on the 27th of March, 2004.

[5] Further, since arriving in Canada, the Applicant and his wife have struggled to adapt and to maintain their family unit. The Applicant has only a grade 10 education from Vietnam and speaks very little English or French. The Applicant has worked at various jobs, primarily in restaurants but also as a cleaner, a mechanic apprentice and a farm hand.

[6] The Applicant has acquired a significant criminal record in Canada. In 1993, he was convicted of assault and was fined $250.00. More significantly, in 1994, he was convicted in British Columbia of trafficking in a narcotic (heroin) and received a sentence of nine (9) months imprisonment. Also more significantly, and certainly most recently, the Applicant was convicted of four (4) offences on the 10th of June, 2002, the offences being: operating a grow-op for which he received a fifteen (15) month sentence; possession for the purpose of trafficking for which he received a twelve (12) month concurrent sentence; illegal use of electricity or gas, presumably in conjunction with the grow-op, for which he received a three (3) month concurrent sentence; and, although this conviction is disputed by the Applicant, driving with more than 80 mgs. of alcohol in his blood for which he received a fine and a one (1) year driving prohibition. Nothing will turn on whether the "driving impaired" conviction was actually registered against the Applicant.

[7] In the result, a Removal Order issued against the Applicant and his removal was scheduled. The Applicant applied for deferral of his removal and that application was denied. Based on this application, a stay of the Applicant's removal was granted.

THE DECISION UNDER REVIEW

[8] The decision letter of the Immigration Officer is *pro forma*. That being said, it is supported by three (3) pages of the Officer's notes to file. Following a one paragraph introduction that parallels paragraph 3 of these reasons, the Immigration Officer turns in her notes to file to the Applicant's criminal history. She concludes this portion of her notes as follows:

> …Given his [the Applicant's] extensive criminal history, the seriousness of the convictions and the short period of time that has elapsed since he was last released from prison in April 2003, I am not satisfied that client will not be tempted and succumb to the easy financial rewards criminal activities have provided in the past.

[9] The Immigration Officer then goes on to briefly consider the Applicant's employment record, she concludes:

> Giving [sic] that he has been changing employer regularly, client did not satisfy me he could hold steady employment.

[10] The Immigration Officer then, even more briefly, discusses the amount of time since arriving in Canada that the Applicant has spent incarcerated, a total elapsed time of less than that identified by the Officer, and the reliance of the Applicant and his family, from time to time, on public assistance. On this latter point, she concludes that she was not satisfied that this would be "…a temporary situation".

[11] The Officer's assessment of the Applicant's family situation and the best interests of his children is contained in a single paragraph of her notes to file. That paragraph reads:

> During the interview on 26 April 2006, the bonafides of the relationship between Mr. Vu and his spouse were assessed. Although they have been separated from each other for lengthy periods of time, specifically when Mr. Vu was incarcerated, I am satisfied their relationship is real and ongoing. I also believe that they live with their children as a family. I am however questioning the impact of the father's influence on his children. As per above, Mr. Vu has been convicted for numerous offences, some of them considered serious offences. Client stated that his emotional and financial support was needed for his daughter to successfully complete her secondary education and get accepted at the university level. I am not denying that Mr. Vu is providing emotional support to his children; however, after reviewing all the information on file, I am not satisfied that allowing him to remain in Canada on a permanent basis would be in their best interest. Client has lived in Canada since June 1992, thus 14 years. Although this considerable period of time is a factor in his favour, I am not satisfied that he has successfully established himself to Canadian society. Client did not significantly upgrade his skills while in Canada. His integration to the community through involvement in community organizations or volunteer work is insufficient as he only stated he sometimes helped out at church.

[12] The Officer then concludes with the following paragraph:

> I am satisfied that the seriousness of his [the Applicant's] criminal activities in Canada outweighs the humanitarian and compassionate grounds presented in his application, along with those of his spouse and children. Although one of the *Immigration and Refugee Protection Act* objectives is to see that families are reunited in Canada, it is also my duty as an immigration officer to protect the health and safety of Canadians and to maintain the security of Canadian society. After carefully reviewing all the information on file, Mr. Muoi Van Vu's application for permanent residence is refused.

THE ISSUES

[13] Apart from the issue of an extension of time to file this application for judicial review, which I briefly dealt with earlier in these reasons, counsel for the Applicant raised five (5) issues which I will summarize as follows:

- first, whether the Immigration Officer erred in citing a conviction of the Applicant for driving with more than 80 mgs of alcohol in his blood when there was little, if any, evidence before her to support such a conviction;
- secondly, whether the Respondent erred in assessing the Applicant's application against the criteria for humanitarian and compassionate grounds applications rather then as a spousal sponsored inland application after a spousal sponsorship had in fact been filed;
- thirdly, whether the analysis of the Immigration Officer with respect to the best interests of the Applicant's children was so flawed and cursory that it resulted in reviewable error;
- fourthly, whether the Immigration Officer focused to an inappropriate degree on the Applicant's criminal record to the exclusion of other factors; and

- finally, whether materials on the Tribunal Record are sufficient to give rise to a reasonable apprehension of bias on the part of the Immigration Officer.

ANALYSIS

[14] I am satisfied that the central substantive issue on this application revolves around the Immigration Officer's treatment of the best interests of the Applicant's children. The reference to a criminal conviction giving rise to a fine and a driving suspension which is not clearly substantiated is, I am satisfied, not central to the decision. While the treatment of the Applicant's application as a humanitarian and compassionate grounds application unsupported by his spouse's sponsorship is a significant issue, I will not dwell on it. The Immigration Officer's allegedly undue focussing on the Applicant's criminal record will be briefly touched on in the discussion of the best interests of the Applicant's three (3) children. Finally, evidence in the Tribunal Record of what might conceivably be regarded as influence being brought to bear on the Immigration Officer is most likely "litigation privileged" material that should not have appeared on the Tribunal Record and undoubtedly only appeared there because the Tribunal Record was prepared very late and in the result was undoubtedly not thoroughly reviewed before it was provided to the Court and to Applicant's counsel.

[15] I turn then to the issue regarding the best interests of the Applicant's children. The standard of review on that issue is, of course, reasonableness *simpliciter*[2].

[16] In *Soto v. Canada (Minister of Citizenship and Immigration)*[3], my colleague Justice Dawson provided a very helpful review of "some settled principles of law that govern humanitarian and compassionate applications where the interests of children are raised". She wrote:

> …
> - The officer's decision is to be reviewed on the standard of reasonableness.
> - "For the exercise of the officer's discretion to fall within the standard of reasonableness, the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying [a humanitarian and compassionate] claim even when the children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Ministers guidelines, the decision will be unreasonable". See: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paragraph 75.
> - The presence of children does not call for a certain decision. It is up to the officer to determine the appropriate weight to be accorded to this factor, in all of the circumstances of the case. It is not the role of the reviewing court to re-weigh the evidence before the officer.
> - The Ministerial guidelines, now found in Chapter 5 of the Inland Processing Manual (IP 5) are of assistance in determining whether an officer's decision is reasonable. This is because the guidelines "are a useful indicator of what constitutes a reasonable interpretation of the power" conferred by what is now subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). See: *Baker,* at paragraph 72.
> - Directions contained in IP 5 relevant to the present case include:
>
> 5.19 Best interests of the child
>
> […]
>
> Generally, factors relating to a child's emotional, social, cultural and physical welfare should be taken into account, when raised. Some examples of factors that applicants may raise include:

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[2] *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.
[3] [2006] F.C.J. No. 1912; 2006 FC 1524, December 20, 2006.

- the age of the child;
- the level of dependency between the child and the H&C applicant;
- the degree of the child's establishment in Canada;
- the child's links to the country in relation to which the H&C decision is being considered;
- medical issues or special needs the child may have;
- the impacts to the child's education;
- matters related to the child's gender.

[…]

12.10 Separation of parents and children

The removal of an individual without status from Canada may have an impact on family members who do have the legal right to remain (i.e., permanent residents or Canadian citizens). Other than a spouse or partner, family members with legal status may include children, parents and siblings, among others. The lengthy separation of family members could create a hardship that may warrant a positive [humanitarian and compassionate] decision.

In evaluating such cases, officers should balance the different and important interests at stake:

- Canada's interest (in light of the legislative objective to maintain and protect the health, safety and good order of Canadian society);
- family interests (in light of the legislative objective to facilitate family reunification);
- the circumstances of all the family members, <u>with particular attention given to the interests and situation of dependent children related to the individual without status</u>;
- particular circumstances of the applicant's child (age, needs, health, emotional development);
- financial dependence involved in the family ties; and
- the degree of hardship in relation to the applicant's personal circumstances (see Definitions, Section 6.6, Humanitarian or compassionate grounds).

[emphasis added]

[17] I have earlier quoted in these reasons, the brief paragraph from the Immigration Officer's reasons that even more briefly focuses on the children's interests. For ease of reference, I quote again from that paragraph:

> …I am satisfied that their [the Applicant and his spouse's] relationship is real and ongoing. I also believe that they live with their children as a family. I am however questioning the impact of the father's influence on his children. …Client stated that his emotional and financial support was needed for his daughter to successfully complete her secondary education and get accepted at the university level. I am not

> denying that Mr. Vu is providing emotional support to his children; however, after reviewing all the information on file, I am not satisfied that allowing him to remain in Canada on a permanent basis would be in their best interest.

One can extrapolate from the context in which the foregoing appears that the Immigration Officer's concern about the Applicant is with his criminal record and the significant absences from the family home that resulted from his incarceration. However, the Immigration Officer acknowledges the Applicant's emotional support to his children, she fails to mention his extensive efforts to provide, through legitimate efforts, economic support to his children and to his spouse and appears to completely overlook the Applicant's role, other than through emotional support, in relation to his two young sons born in Canada.

[18] The Immigration Officer was not obliged to render a positive decision. That being said, she was, however, obliged by subsection 25(1) of the *Immigration and Refugee Protection Act* to consider the children's interests. I am satisfied by reference to the Immigration Officer's notes to file and by reference to Chapter 5 of the Inland Processing Manual, in part quoted above, that the Immigration Officer failed to consider the children's interests, as required by subsection 25(1) of the *Act*, and as an important factor in the manner directed by the Respondent in Chapter 5 of the Inland Processing Manual.

[19] In the result, against a standard of review of reasonableness *simpliciter*, the decision under review must be set aside.

CONCLUSION

[20] This application for judicial review will be allowed. The decision under review will be set aside and the Applicant's application for landing from within Canada will be referred back to the Respondent for redetermination by a different officer.

CERTIFICATION OF A QUESTION

[21] Counsel will have fourteen (14) days from the date these reasons are issued to make submissions on certification of a question. Thereafter, an Order will issue.

"Frederick E. Gibson"
JUDGE

Ottawa, Ontario.
November 2, 2007

FEDERAL COURT

SOLICITORS OF RECORD

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