

Date: 20071217

Docket: IMM-4902-06

Citation: 2007 FC 1326

Ottawa, Ontario, December 17, 2007

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

XIAO PING HOU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Hou is a Pakistani citizen of Chinese ethnicity. Her parents and siblings have all immigrated to Canada, with her siblings becoming Canadian citizens, and she has no family remaining in Pakistan. Ms. Hou runs a financially successful hair salon in her home, but claims that life is otherwise very difficult as a non-Muslim woman living alone in Pakistan.

[2] A first application for permanent residence with the sponsorship of her family, in late 2004, was refused as she did not meet the requirements of the family class. Ms. Hou had also requested

consideration for an exemption from the visa requirements under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) on humanitarian and compassionate (H&C) grounds but that had been overlooked. An application for judicial review of the first refusal was settled on the understanding that she could submit a fresh H&C application. This judicial review proceeding stems from the refusal of the second application. At the close of the hearing, I advised counsel that I would allow the application and provided brief oral reasons which I will now provide in writing with citations.

ISSUE:

[3] The only significant issue on this application was whether the Officer erred in failing to consider appropriate factors on an application for an exemption on humanitarian and compassionate grounds brought from outside Canada.

ANALYSIS:

[4] The standard of review of H&C decisions is well established as reasonableness *simpliciter*: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39 (QL), at paragraphs 57-62, *Yu v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 956, [2006] F.C.J. No. 1217, *Dang v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 290, [2007] F.C.J. No. 363.

[5] Humanitarian and compassionate grounds are considered pursuant to section 25 of IRPA,

which reads as follows:

<p>25. (1) The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.</p>	<p>25. (1) Le ministre doit, sur demande d'un étranger interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.</p>
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[6] In considering applications under section 25, immigration officers have guidelines provided in the form of Manuals by Citizenship and Immigration Canada. The Manual relevant to Ms. Hou's application is *Overseas Processing Policy Manual OP4 - Processing of Applications under Section 25 of the IRPA*. Section 8.3 of Manual OP4, dealing with H&C considerations for family class applicants "describe[s] some situations where positive consideration might be warranted." It notes, however, that officers "cannot be restricted by guidelines; they are obliged to consider all the information they have."

[7] One of the categories laid out in section 8.3 is *de facto* family members; those who do not meet the eligibility requirement for the family class as such, but are in a sufficient state of

dependence as to render them *de facto* members of a nuclear family in Canada. Specifically listed in the examples of those who might be *de facto* family members is a brother or sister left alone in the country of origin without family of their own.

[8] Ms. Hou's situation fits the description laid out in section 8.3 of Manual OP4, and her case should have been considered under those guidelines. Factors listed for consideration in the Manual are:

- 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.
(emphasis added)

[9] There is no indication in the computerized ("CAIPS") notes, which serve as the reasons for decision in this case, that the Officer considered Ms. Hou's evidence in the context of these factors. The Officer referred in his decision to the reasonableness of Ms Hou's fears, his assessment of whether she suffers persecution, the possibility of her moving to another location within Pakistan and whether there were sufficient reasons to overcome her lack of points. While these may have been relevant to a refugee determination or application for a visa as a skilled worker, they were not material to the H&C application before the officer. He did not address any of the factors which had been advanced as favouring her application.

[10] The Minister is not bound by policy directives, as noted by Justice Michel M.J. Shore in *Yu*, above. However, it is generally accepted that discretion should be exercised within the context of the stated purpose of the statutory instrument and the Ministerial guidelines: *Baker*, above, at paragraph 67.

[11] One of the objectives of IRPA, as set out in section 3.(1)(d), is “to see that families are reunited in Canada”. The level of family dependency and personal isolation is one of the factors which should be considered, although it is not a determinative factor: *Samaroo v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 292, [2007] F.C.J. No. 376. It, and the other factors as set out in the Manual and the objectives of IRPA, should collectively be considered by an immigration officer in a case like this. It does not appear that the Officer in the instant case took the appropriate factors into account when coming to his decision.

[12] Accordingly, this application for judicial review is allowed. Ms. Hou’s sponsored application for permanent residency in the family class category on H&C grounds will be reconsidered by a different Immigration Officer. No questions were proposed for certification.

JUDGMENT

IT IS THE JUDGMENT OF THIS COURT that the application is allowed and the matter remitted for reconsideration by another officer in accordance with these reasons. No questions are certified.

“Richard G. Mosley”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4902-06

STYLE OF CAUSE: XIAO PING HOU

AND

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: December 12, 2007

REASONS FOR JUDGMENT: MOSLEY J.

DATED: December 17, 2007

APPEARANCES:

Wennie Lee FOR THE APPLICANT

Asha Gafar FOR THE RESPONDENT

SOLICITORS OF RECORD:

WENNIE LEE FOR THE APPLICANT
Lee & Company / Barristers
Toronto, Ontario

JOHN H. SIMS, Q.C. FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario