Date: 20080205

Docket: IMM-1076-07

Citation: 2008 FC 139

Ottawa, Ontario, February 5, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LILIA BISTAYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] The Immigration Appeal Division (IAD) found that the Applicant's son could not be considered in the family class by application of paragraph 117(3)(*d*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 *(*Regulations) and that it could not consider the humanitarian and compassionate considerations pursuant to section 65 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] The Applicant explains that she filed her application as a humanitarian and compassionate application (H&C), and not a sponsorship; however, there is no class such as a family class H&C mentioned by her.

[3] Indeed, an application for H&C consideration cannot be made alone, and has to be accompanied by an application for permanent residency as required by section 66 of the Regulations.

JUDICIAL PROCEDURE

[4] This is an application pursuant to paragraph 72(1) of the IRPA, for judicial review of a decision of the (IAD) of the Immigration and Refugee Board, rendered on February 20, 2007, dismissing the Applicant's appeal because it did not have the jurisdiction to entertain it.

FACTS

[5] The Applicant, Ms. Lilia Bistayan, is a Canadian citizen.

[6] Ms. Bistayan had a son with her common-law partner on November 18, 1987.

[7] Ms. Bistayan left the Philippines three years later and her son's grandmother continuously cared for him since that time.

[8] Ms. Bistayan came to work in Canada in 1994.

[9] Ms. Bistayan admits that she did not mention her son on her application for landing in Canada and on her application for citizenship.

DECISION UNDER REVIEW

[10] Ms. Bistayan, a Canadian citizen, wanted to sponsor her son who lived in the Philippines. Her application was dismissed because she did not mention she had a son on her application for landing in Canada. The IAD dismissed her appeal because it did not have the jurisdiction to entertain it. Ms. Bistayan is seeking judicial review of that decision.

ISSUE

[11] Did the IAD fail to exercise its jurisdiction?

ANALYSIS

[12] The IAD found that Ms. Bistayan's son could not be considered in the family class by application of paragraph 117(3)(*d*) of the Regulations and that it could not consider the humanitarian and compassionate considerations pursuant to section 65 of the IRPA.

[13] Ms. Bistayan explains that she filed her application as an H&C, and not a sponsorship; however, there is no class such as a family class H&C mentioned by her.

[14] Indeed, an application for H&C consideration cannot be made alone, and has to be accompanied by an application for permanent residency as required by section 66 of the Regulations:

66. A request made by a foreign national under subsection 25(1) of the Act must be made as an application in writing accompanied by an application to remain in Canada as a permanent resident or, in the case of a foreign national outside Canada, an application for a permanent resident visa.	**66.** La demande faite par un étranger en vertu du paragraphe 25(1) de la Loi doit être faite par écrit et accompagnée d'une demande de séjour à titre de résident permanent ou, dans le cas de l'étranger qui se trouve hors du Canada, d'une demande de visa de résident permanent.

[15] OP4 – Processing of applications under section 25 of the IRPA reiterates how to make an H&C application :

3.1. Forms required To make their initial submission, applicants must use existing departmental forms for the three classes of immigration applications (family, economic, or refugee). To receive H&C consideration, they must apply in one of these three classes. They can also provide additional written information in support of their request for consideration under section A25(1), should they so choose, or should an officer request it.	**3.1. Formulaires requis** Pour présenter leur première demande, les demandeurs doivent utiliser les formulaires de demande du Ministère pour l'une des trois catégories d'immigration (regroupement familial, immigration économique ou réfugiés). Ils doivent présenter une demande dans l'une de ces trois catégories pour que les motifs d'ordre humanitaire soient pris en considération. Ils peuvent aussi, s'ils le veulent ou si un agent le leur demande, fournir par écrit des renseignements supplémentaires pour appuyer leur demande de considération en vertu du paragraphe 25(1).

…	[...]
5.3. Consideration on humanitarian and compassionate grounds	**5.3. Motifs d’ordre humanitaire**
A request for consideration on humanitarian and compassionate grounds must be made in writing and must accompany an application for permanent residence made under one of the existing three classes. A determination must first be made that the applicant does not comply with one of these three classes before such a request is reviewed or considered.	Une demande présentée pour des motifs d’ordre humanitaire doit être faite par écrit et doit accompagner une demande de résidence permanente présentée dans l’une des trois catégories d’immigration. Il faut tout d’abord que l’on ait déterminé que le demandeur ne fait partie d’aucune des trois catégories d’immigration avant qu’une demande pour motifs d’ordre humanitaire soit examinée ou prise en considération.

[16] The IAD found that Ms. Bistayan’s son was not a member of the family class.

[17] That finding is not contested by Ms. Bistayan.

[18] The IAD also found that it did not have jurisdiction to consider H&C considerations in Ms. Bistayan’s case.

[19] The IAD’s conclusion is well-founded.

[20] Ms. Bistayan’s right of appeal before the IAD was governed by subsection 63(1) of the IRPA, which provides:

63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.	**63.** (1) Quiconque a déposé, conformément au règlement, une demande de parrainage au titre du regroupement familial peut interjeter appel du refus de délivrer le visa de résident permanent.

[21] The scope of the appeal is limited by section 65 of the IRPA, which states that the IAD can only consider H&C considerations if it has decided that the foreign national is a member of the family class :

65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.	**65.** Dans le cas de l'appel visé aux paragraphes 63(1) ou (2) d'une décision portant sur une demande au titre du regroupement familial, les motifs d'ordre humanitaire ne peuvent être pris en considération que s'il a été statué que l'étranger fait bien partie de cette catégorie et que le répondant a bien la qualité réglementaire.

[22] Section 117 of the Regulations stipulates on who is a member of the family class and who is not. In the present case, the relevant provision is paragraph 117(9)(*d*) of the Regulations, which states:

117. (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if	**117.** (9) Ne sont pas considérées comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes :

…	[…]
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.	*d*) sous réserve du paragraphe (10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

[23] As Ms. Bistayan's son fits the description of subsection 117(9)(*d*) of the Regulations, the IAD found that he was not a member of the family class.

[24] It is trite law that in such a case, the IAD had no jurisdiction to hear Ms. Bistayan's appeal:

> [6] …In *Phan v. Canada* (*Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 239, 2005 FC 184, it was made clear that an undeclared person, such as Victor, is not eligible to be considered a member of the family class. Madam Justice Mactavish in *Phan* agreed that the Immigration Appeal Division may not consider H&C considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations as set out in section 65 of the Act…
>
> **[7]** Section 65 of the Act clearly provides that the IAD "may not consider" H&C considerations unless the foreign national is a member of the family class - of which Victor is not a member…
>
> …
>
> [9] As with the first issue, the IAD does not have jurisdiction to consider H&C matters on an appeal under s. 63(1) and s. 65(1). See *Huang v. Canada* (*Minister of Citizenship and Immigration*), [2005] F.C.J. No. 1580, 2005 FC 1302.

(*Tse v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 393, [2007] F.C.J. No. 537 (QL); Reference is also made to *Yen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1307, [2005] F.C.J. No. 1583 (QL); *Xu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1575, [2005] F.C.J. No. 1938 (QL); *Akhter v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 481, [2006] F.C.J. No. 606 (QL); *Flores v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 854, [2005] F.C.J. No. 1073 (QL); *Li v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1109, [2006] F.C.J. No. 1409 (QL).)

[25] Ms. Bistayan complains that the IAD ruled on her H&C while it did not have the jurisdiction to do so; however, the IAD did not rule on the H&C application.

[26] Indeed, the IAD had to assess if Ms. Bistayan was a person described in paragraph 117(9)(*d*) of the Regulations before deciding if it had jurisdiction or not.

[27] As a matter of fact, the IAD determined first if paragraph 117(9)(*d*) applied to Ms. Bistayan's son to conclude that it did not have the jurisdiction to consider H&C considerations.

[28] In so doing, the IAD clearly stated the issue before it.

[29] Ms. Bistayan states she had a right to a hearing; however, this Court has already dismissed this argument in *Flores*, above:

> [48] The applicant submitted that the IAD's decision denied her right to present her case and be heard, which is a breach of the principles of fundamental justice. I

> do not agree. The applicant was provided with an opportunity to make submission prior to the IAD making a decision. The applicant did so through counsel by letter dated June 30, 2004. There was therefore no breach of the principles of fundamental justice in regards to the applicant's argument that she was denied the right to present her case.

[30] Ms. Bistayan states that she should have been advised that the IAD would dismiss her appeal because she had no right of appeal, and that the IAD should have considered her ground of appeal under paragraph 67(1)(*b*), i.e. the visa officer did not consider the H&C grounds.

[31] The IAD did not dismiss Ms. Bistayan's appeal for lack of jurisdiction.

[32] As a matter of fact, nowhere in its decision did the IAD conclude that it lacked jurisdiction to hear Ms. Bistayan's appeal.

[33] On the contrary, the IAD considered the appeal, found that Ms. Bistayan's son was a person described in paragraph 117(9)(*d*), and that it did not have jurisdiction to consider H&C grounds, pursuant to section 65 of the IRPA.

[34] The IAD also considered Ms. Bistayan's ground of appeal – the visa officer failed to consider the H&C grounds:

> [37] Before closing, the tribunal finds that CAIPS notes indisputably establish that the visa officer considered the humanitarian and compassionate considerations of this case.

(IAD's reasons, p. 6, para. 37.)

CONCLUSION

[35] The IAD considered Ms. Bistayan’s argument.

[36] There is no violation of natural justice by the IAD.

[37] For all of the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

Obiter

The case can be examined in a different manner, under a differently termed request, but not in the manner currently presented, to be able to ensure that the delicate fragility of the human condition, nevertheless, be addressed under legislative provisions that would, at least, allow for the consideration of a different response from the Canadian authorities.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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