Date: 20080220

Docket: IMM-1538-07

Citation: 2008 FC 219

Ottawa, Ontario, February 20, 2008

PRESENT: The Honourable Orville Frenette

BETWEEN:

JEANIE LYNN LAO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated February 1, 2007, rendered by Mr. Harold Wulf, the Second Secretary at the Canadian Embassy in Manila, Philippines (the Second Secretary), wherein he denied the applicant's application for permanent residence under section 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) with respect to her application under subsection 117(9) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

I. Background

[2] Ms. Jeanie Lynn Lao (the applicant) was born May 22, 1983 in the Philippines. Her birth certificate indicates Jimmy Lao as her father and Evelyn Yuquimpo as her mother.

[3] Jimmy Lao (the sponsor) arrived in Canada and became a permanent resident on July 6, 1996. He declared three dependants and a spouse at the time, but did not include the applicant. He became a Canadian citizen December 29, 2001.

[4] On September 27, 2005, the applicant filed an application for permanent residence in Canada under the family class which was refused on March 30, 2006 on the basis that she did not meet the requirements for immigration to Canada due to her sponsor's failure to declare her when he became a permanent resident. No appeal of that decision was brought.

[5] On August 6, 2006, the applicant made a new application for permanent residence in Canada as a member of the family class with exemption from the requirement that she be under the age of twenty-two. In addition, the applicant's representative asked for a direct consideration under subsection 25(1) of the Act on the basis that there are sufficient compassionate and humanitarian grounds to grant permanent residence to the applicant. On February 1, 2007, the Second Secretary decided that the applicant was not a member of the family class with respect to her sponsor. He also concluded that after reviewing her case on humanitarian and compassionate (H&C) considerations, it was not justified by H&C considerations to grant her permanent residence status or to exempt her from any applicable criteria or obligation of the Act.

[6] The application for H&C is mainly based on the following explanation. Ms Evelyn Yuquimpo (step mother) is not the birth mother of the applicant. Her real mother was the concubine of the sponsor before he was married to the step mother. The step mother was told of the existence of the child only one week before the wedding. Due to family and general social pressure in the Philippines, the applicant was raised by her grand-parents. The sponsor did not declare her because the step mother did not want her family to know about the applicant. The applicant, the sponsor and the three other children born to the sponsor and the step mother now want to be reunited in Canada. The grand-mother who took care of the applicant has passed away and the grand-father has left for the United States. There is no close family left in the Philippines. The applicant is educated and has the ability to become economically established.

II. Decision under review

[7] The Second Secretary wrote the following in the Computer Assisted Immigration Processing System (CAIPS) notes:

> IN CONSIDERATION OF H&C IN THIS CASE, I DO NOT FIND COMPELLING REASONS TO RECOMMEND A25 IN THIS CASE.
>
> ACCORDING TO SPONSOR, FAILURE TO INCLUDE SUBJ IN HIS WIFE'S APPLICATION WAS UPON HERSELF. AFTER IMMIGRATION OF SPR RELATIONSHIP BECAME BETTER. IT IS NOT CLEAR WHY THERE HAS BEEN NO EFFORT TO SPONSOR SUBJECT PREVIOUSLY IF SPONSOR AND HIS FAMILY HAVE SUCH STRONG FEELINGS FOR HER IN THE PAST. SUBJECT HAS PURSUED HER EDUCATION HERE IN THE PHILIPPINES, GRADUATED FROM A WELL-KNOWN PRIVATE UNIVERSITY AND IS NOW GAINFULLY EMPLOYED WITH IBM.

> PREVIOUS APPLICATION WAS FILED WHILE SUBJECT WAS COMPLETING UNIVERSITY STUDIES. WITH SUBJECT NOW 23 YEARS OLD AND APPARENTLY WORKING AND LIVING INDEPENDENTLY. I AM NOT SATISFIED THAT ANY OF THE CONSIDERATIONS PRESENTED BY THE REPRESENTATIVE ARE SUFFICIENT TO OVERCOME THE EXCLUSION OF R117(9)(d). I AM NOT SATISFIED THAT NON-DECLARATION WAS NOT DUE TO AN ACT OF OMISSION BUT RATHER A DELIBERATE CHOICE OF SPONSOR AND HIS WIFE DUE TO CONSCERNS ABOUT FAMILY IMAGE.

III. Legislation

[8] The relevant legislation is contained in Annex A.

IV. Issue

A) Did the Second Secretary err in his assessment of the evidence or fail to provide adequate reasons?

V. Applicable standard of review

The Supreme Court of Canada, in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 62, determined that the applicable standard of review of a decision based on H&C grounds made from within Canada should be reasonableness *simpliciter*. Recently, this Court has applied the same standard of review for H&C applications made from outside of Canada (*David v. Canada (Citizenship and Immigration)*, 2007 FC 546 at paragraph 14 [*David*]; *Nalbandian v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1128, at

paragraph 12). However, on a question of procedural fairness, the applicable standard of review is correctness (*Canada (Attorney General) v. Sketchley*, 2005 FCA 404).

VI. Applicant's submissions

[9] The applicant argues that the Second Secretary erred in considering the circumstances of the applicant in relation to subsection 25(1) of the Act and paragraph 117(9)(*d*) of the Regulations and did not give adequate reasons to support his decision.

VII. Respondent's submissions

[10] The respondent alleges that the Second Secretary's reasons demonstrate that he considered all the relevant factors in his assessment of the application and that there is no basis for the Court's intervention.

VIII. Analysis

A) Did the Second Secretary err in his assessment of the evidence or fail to provide adequate reasons?

[11] The applicant believes that the Second Secretary did not consider all the relevant factors or engage in a meaningful analysis of those factors. The applicant believes that he should have considered: the legislative scheme and Parliament's intention; the intention of the applicant's father at the time of his application for permanent residence, as he had nothing to gain by omitting his daughter; the relationship between the applicant and her family; as well as the change in circumstances after the sponsor left the home country.

[12] The Second Secretary summarized the grounds given for H&C in the CAIPS notes as follows:

> - WISH TO BE REUNITED WITH FATHER.
> - WISH BY SPR AND HIS WIFE TO RECTIFY MISTAKE OF LEAVING HER BEHIND.
> - GRANDMOTHER PASSED AWAY AND GRANDFATHER HAS GONE TO U.S..
> - SUBJ HAS SKILLS AND ABILITY TO BECOME ECONOMICALLY ESTABLISHED.
> - SUBJ HAS RELATIONSHIP WITH HALF-SIBLINGS IN CANADA.

[13] The respondent argues that it appears from the CAIPS notes that the Second Secretary did consider the factors alleged by the applicant but found that balancing these with the unfavourable factor that although the sponsor had been granted permanent residence status in Canada since July 1996, no attempts to sponsor the Applicant were made until 2005.

[14] Moreover, the respondent notes that the applicant did not demonstrate that she was a "dependent child" pursuant to section 2 of the Regulations, which specifies that the child has to be less than 22 years old. On this particular question, I would note that the applicant's representative requested, in the letter dated August 6, 2006 an exemption of the requirement to be twenty-two years old on H&C grounds. The Second Secretary did not really address this concern so I believe it was not a turning point in his decision.

[15] Justice Michel Shore, in *Li v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1109, examined the reasons of a visa officer who had determined not to grant permanent residence

on H&C grounds after having found that the applicant was excluded from the family class and wrote the following at paragraphs 27 and 28 :

> The reasons provided by the Visa Officer through the CAIPS notes are not sufficient because they do not make findings of fact with respect to the evidence submitted by Mr. Li. Indeed, the CAIPS notes do not refer to the relationship between Mr. Li and his father, Mr. Li's need and reasons for wanting to be with his father, the life Mr. Li could expect in Canada, the relationship with his sister (who is now in Canada), and the fact that his father has been supporting Mr. Li financially.
>
> The Visa Officer's decision does not begin to approach the complexity of the interplay between paragraph 117(9)(*d*) of the Regulations and subsection 25(1) of IRPA. It does not disclose any analysis of the factors for and against allowing an exemption from paragraph 117(9)(*d*) of the Regulations, and therefore, does not show that any balancing was done to determine whether, in the particular circumstances of Mr. Li, H & C factors existed to overcome paragraph 117(9)(*d*).

[16] In the case at bar, I believe it is important to cite here, once more, a crucial part of the CAIPS notes:

> IT IS NOT CLEAR WHY THERE HAS BEEN NO EFFORT TO SPONSOR SUBJECT PREVIOUSLY IF SPONSOR AND HIS FAMILY HAVE SUCH STRONG FEELINGS FOR HER IN THE PAST. SUBJECT HAS PURSUED HER EDUCATION HERE IN THE PHILIPPINES, GRADUATED FROM A WELL-KNOWN PRIVATE UNIVERSITY AND IS NOW GAINFULLY EMPLOYED WITH IBM.
>
> […]
>
> I AM NOT SATISFIED THAT NON-DECLARATION WAS NOT DUE TO AN ACT OF OMISSION BUT RATHER A DELIBERATE CHOICE OF SPONSOR AND HIS WIFE DUE TO CONCERNS ABOUT FAMILY IMAGE.

[17] I am of the opinion that if the Second Secretary thought it was “not clear” as to why the applicant applied in September 2005 for the first time, it can only mean that he did not consider or that he erred in his assessment of the evidence that was before him. The grandmother of the applicant, who raised her, passed away in July 2005, less than 2 months before the applicant applied for the first time to come to Canada. As her infirm grandfather had moved to the United States, it is understandable that the applicant wanted, at that point, to join what was left of her close family. The sponsor also gave a detailed explanation concerning his spouse’s feeling towards the applicant which changed only over the years. Although the half-siblings presented letters to demonstrate their affection toward the applicant, it has been alleged that the spouse had had strong feelings against sponsoring the applicant, but no longer objects.

[18] In addition, it is clear from the evidence submitted in support of the application that no “omission” is alleged for the non-declaration of the applicant. Although this choice was deliberate and related to family image, the Second Secretary nonetheless had to analyse the H&C factors to see if, in the circumstances, an exemption from paragraph 117(9)(*d*) of the Regulations should be granted. The applicant provided an extensive explanation as to why, when he came to Canada, he did not mention the applicant.

[19] Although directives (Manual I.P. 2) for processing applications under Section 25 of the IRPA are not law, they indicate the factors to be considered in deciding such application.

[20] Finally, the evidence reveals that the applicant had been unemployed since February 2006, her last employer being IBM. This is a disturbing fact because the Second Secretary wrote in the CAIPS notes dated January 29, 2007, that the applicant "IS NOW GAINFULLY EMPLOYED WITH IBM". This is a factual error.

[21] While it is within the Second Secretary's discretion to balance the different factors, he has the obligation to consider them and on this, I will cite Justice Luc J. Martineau in the decision *David*, above, in which he wrote the following at paragraph 24:

> [24] While it is not the role of the Court to re-weigh the evidence, it must be satisfied that the totality of the evidence has been thoroughly reviewed by the decision-maker. This appears not to be the case and the few indications mentioned in the CAIPS notes do not provide a clear rationale of why any of the public policy considerations mentioned by the First Secretary (such as the past misrepresentations) should prevail here over the objective mentioned at paragraph 3(1)(*d*) of the Act "to see that families are reunited in Canada". Nor do they reveal whether the First Secretary considered that *de facto* family members excluded from the family class because of the operation of paragraph 117(9)(*d*) of the Regulations may suffer hardship indefinitely.

[22] Justice Frank Iacobucci gave the following explanation of the reasonableness standard in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paragraph 56:

> …An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in evidence, or that was contrary to the

> overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference. [Emphasis added]

[23] In the present case, I believe that the decision should be set aside because the reasons given by the Second Secretary are, on one hand, not drawn from the evidence submitted are speculative and, on the other hand, not complete enough to understand the rationale of why the H&C considerations presented were not sufficient to overcome the exclusion of paragraph 117(9)(*d*) of the Regulations.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application for judicial review is allowed.
2. The decision made on February 1, 2007 is set aside and the matter is sent back for re-determination by a different decision maker.

"Orville Frenette"
Deputy Judge

ANNEX A

The discretionary power of the Minister to grant an exemption is found at subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 and reads as follows:

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.	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.

The following extracts of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 are relevant in the instant judicial review:

2. The definitions in this section apply in these Regulations.	2. Les définitions qui suivent s'appliquent au présent règlement.
[…]	[…]
"dependent child" , in respect of a parent, means a child who	«enfant à charge» L'enfant qui :
(a) has one of the following relationships with the parent, namely,	a) d'une part, par rapport à l'un ou l'autre de ses parents :
(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or	(i) soit en est l'enfant biologique et n'a pas été adopté par une personne autre que son époux ou conjoint de fait,
(ii) is the adopted child of the parent; and	(ii) soit en est l'enfant adoptif;
(b) is in one of the following situations of dependency, namely,	b) d'autre part, remplit l'une des conditions suivantes :

(i) is less than 22 years of age and not a spouse or common-law partner,

(ii) has depended substantially on the financial support of the parent since before the age of 22 — or if the child became a spouse or common-law partner before the age of 22, since becoming a spouse or common-law partner — and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, has been a student

(A) continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and

(B) actively pursuing a course of academic, professional or vocational training on a full-time basis, or

(iii) is 22 years of age or older and has depended substantially on the financial support of the parent since before the age of 22 and is unable to be financially self-supporting due to a physical or mental condition. (enfant à charge)

117. [...]

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

[…]

(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.

(i) il est âgé de moins de vingt-deux ans et n’est pas un époux ou conjoint de fait,

(ii) il est un étudiant âgé qui n’a pas cessé de dépendre, pour l’essentiel, du soutien financier de l’un ou l’autre de ses parents à compter du moment où il a atteint l’âge de vingt-deux ans ou est devenu, avant cet âge, un époux ou conjoint de fait et qui, à la fois :

(A) n’a pas cessé d’être inscrit à un établissement d’enseignement postsecondaire accrédité par les autorités gouvernementales compétentes et de fréquenter celui-ci,

(B) y suit activement à temps plein des cours de formation générale, théorique ou professionnelle,

(iii) il est âgé de vingt-deux ans ou plus, n’a pas cessé de dépendre, pour l’essentiel, du soutien financier de l’un ou l’autre de ses parents à compter du moment où il a atteint l’âge de vingt-deux ans et ne peut subvenir à ses besoins du fait de son état physique ou mental. (dependent child)

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) 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.

FEDERAL COURT

SOLICITORS OF RECORD

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