Date: 20080916

Docket: IMM-560-08

Citation: 2008 FC 1039

Vancouver, British Columbia, September 16, 2008

PRESENT: The Honourable Madam Justice Heneghan

BETWEEN:

SUHAILA ODICHO
DANIEL SAMANO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mrs. Suhaila Odicho, wife and Mr. Daniel Samano, husband (collectively "the Applicants") seek judicial review of a decision of a Visa Officer (the "Visa Officer") of the Embassy of Canada in Damascus, Syria, who refused to issue a permanent resident visa to the wife. The decision was made on May 3, 2007.

[2] The Applicants were married in Syria on September 16, 2004. In September 2004, the husband was informed by his brother that a sponsorship application on his behalf had been approved. The husband was landed in Canada on January 26, 2005, and first submitted an application to sponsor his wife in May 2005.

[3] The application was refused and a new application was submitted in November 2006.

[4] The application was initially refused in a decision made on February 6, 2007. The wife's application was rejected on the grounds that the husband had failed to disclose his marriage when he landed as a permanent resident in Canada on January 26, 2005. The application on behalf of the dependent child was refused for the same reason.

[5] Upon reconsideration of the February 6, 2007 decision, the refusal of the application relative to the dependent child was reversed. However, the Visa Officer maintained the rejection of the application on behalf of the wife on the basis of paragraph 117(9)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the "Regulations"). The reconsideration decision was made on May 3, 2007.

[6] The Applicants argue that the Visa Officer erred by failing to consider humanitarian and compassionate ("H & C") grounds, pursuant to subsection 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c-27 (the "Act"). They submit that they specifically requested that the

wife's application for permanent residence in Canada be considered on the basis of section 25 of the Act.

[7] The Minister of Citizenship and Immigration (the "Respondent") says that the husband made a misrepresentation about his marital status, and the Applicants are now trying to avoid the consequences of this misrepresentation by asking for the exercise of discretion pursuant to section 25 of the Act. The Respondent submits that the evidence submitted by the Applicants with respect to the factors to be considered under section 25(1), including the best interests of the dependent infant child, is deficient.

[8] Since the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Court is required to review the decision of statutory decision-makers upon either the standard of correctness or that of reasonableness. The decision here in issue required the Visa Officer to assess the evidence that was presented and, in my opinion, the appropriate standard of review is reasonableness.

[9] In my opinion, the decision here fails to meet the standard of reasonableness. The refusal letter of May 3, 2007, contains the following reason for the rejection of the Applicants' application on H & C grounds:

> I have completed the assessment of your request for humanitarian and compassionate consideration pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*. I am of the opinion that humanitarian and compassionate considerations do not justify granting you permanent residence or an exemption from any applicable criteria or obligation of the Act. You have not provided

> sufficient evidence of any such considerations in your application for permanent residence in the Family Class category. This decision applies only to you, Suhaila Odicho. If you wish to go ahead with processing for a permanent resident visa for Odicho Samano, please notify this office within 45 days of receipt of this letter.
>
> As a result, you do not meet the definition of a member of the family class.
>
> Subsection 11(1) of the Act provides that a foreign national must, before entering Canada, apply to an officer for a visa or any other document required by the regulations. The visa or document shall be issued, if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act. For the reasons set out above, I am not satisfied that you are not inadmissible and that you meet the requirements of the Act. I am therefore refusing your application.

[10] In reading this conclusion, the Visa Officer apparently ignored the submissions that were made in support of the H & C application, as set out in the letter dated December 12, 2006, written by counsel for the Applicants:

> …
> When the sponsor returned home he began preparing to depart for Canada. He did not think to advise Immigration Canada about his new marriage as he believed that immigration would then take back the visa and refuse the application. He did not understand the implication for the future sponsorship of his wife with respect to his decision.
>
> The sponsor therefore travelled to Canada and arrived January 26, 2005. When he arrived at the airport, he followed all the other passengers to customs. The sponsor advises that customs officials took his photographs and then brought him to the airport exit where he met his relatives who had come to pick him up. Customs officials did not ask him any questions as he did not speak or understand English. The sponsor advises that there were not [sic] interpreters at the airport and that he was simply allowed to enter Canada. The sponsor further advises that his relatives were not asked to help translate and that there were no authorities that wanted to speak with him.

> …
>
> It is submitted that the circumstances are unusual and clearly explained. There was no bad faith on the part of the sponsor. His decision not to include his wife in the original application was misguided and unnecessary as had he included her there is no reason she would have been refused. The sponsor has been a successful immigrant. It is further submitted that his omissions were in fact not material as his spouse and for that matter his dependent child are not medically or criminally inadmissible.
> …

[11] There is no dispute that the husband failed to declare his wife as a non-accompanying dependent when he landed in Canada in January 2005. There is no evidence to challenge the *bona fide* of the marriage of the Applicants. There is no evidence to challenge the status of the infant as their child. Indeed, the Respondent did not file an affidavit from the Visa Officer.

[12] There is one critical fact and that is the husband's failure to declare the change in his marital status when he landed in Canada. This failure gave rise to the exclusion of his wife pursuant to the terms of paragraph 117(9)(d) of the Regulations which provides as follows:

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-	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

accompanying family member of the sponsor and was not examined.	membre de la famille du répondant n’accompagnant pas ce dernier et n’a pas fait l’objet d’un contrôle.

[13] Subsection 25(1) of the Act provides a means for persons to overcome the consequences of non-compliance with the requirements of the Act and the Regulations. Subsection 25(1) provides as follows:

Humanitarian and compassionate considerations	**Séjour pour motif d’ordre humanitaire**
25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister’s own initiative or on request of a foreign national outside Canada, 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 se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d’un étranger se trouvant hors du Canada, 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.

[14] This provision of the Act addresses the examination of the “circumstances” of a foreign national who is inadmissible or who does not meet the statutory requirements, including the requirements of the Regulations. It is an ameliorative provision.

[15] In the present case, the Visa Officer apparently ignored the material that was submitted concerning the “circumstances” of the husband’s failure to declare the change in his marital status at the time he landed in Canada. In my view, the Applicants tendered the essential evidence, which is the existence of a marriage, of a family and of a desire to be together. The husband provided an explanation for his initial failure to disclose the change in his marital status and, in my view, there is nothing more to be said. The Applicants have submitted the necessary facts. They carry the burden of establishing the evidence to justify an exercise of discretion, but in my opinion the discharge of this burden does not require superfluity.

[16] The Visa Officer’s decision does not demonstrate an understanding of the purpose of subsection 25(1), which is to overcome the consequences of being in breach of the statutory requirements. The initial decision of February 6, 2007, which excluded the child, as well as the wife, illustrates an excess of zeal on the part of the original decision-maker, if not a misunderstanding of section 117 of the Regulations.

[17] As a result, the application for judicial review is allowed. The decision of May 3, 2007, is quashed and the matter is remitted for reconsideration by a different member of the Canadian Embassy in Syria.

[18] There is no question for certification arising.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. The decision of May 3, 2007, is quashed and the matter is remitted for reconsideration by a different member of the Canadian Embassy in Syria. No question is certified.

"E. Heneghan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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