Federal Court Cour fédérale

Date: 20090604

Docket: IMM-3407-08

Citation: 2009 FC 585

Ottawa, Ontario, June 4, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

MAUREEN ELAINE COBHAM

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of an immigration officer's decision dated July 16, 2008, rejecting the applicant's request to be exempted on humanitarian and compassionate

(H&C) grounds from the normal requirement to apply for permanent residence from outside of Canada.

[2] The applicant requests that the decision be set aside and the matter referred to a different visa officer for redetermination. The applicant also seeks the costs of these proceedings.

Background

[3] Maureen Elaine Cobham (the applicant) is a widow and citizen of Barbados who has lived continuously in Canada since her arrival in 1992 on a visitor's visa. Since then, she has worked almost continuously as a live-in caregiver or cleaner for different families with whom she claims to have established very close relationships. In 1991, her then-employer submitted an application under the Foreign Domestic Worker Program, but the application was refused.

[4] The applicant's mother and half-brother live in Barbados, as do four grown children she continues to support through regular remittances of money and goods.

[5] In June 2004, the applicant applied to the Minister under subsection 25(1) of the Act to be exempted from the normal process of applying for permanent residence from outside of Canada, on the basis of H&C factors. According to the applicant, she qualifies as a *de facto* family member of her son, grandchildren, brother, and cousin living in Canada, as well as of the families for whom she has worked over the years. Her son, Fabien Cobham, a permanent resident, has made an

undertaking to support his mother, but it is largely symbolic as he is ineligible to sponsor her given his annual income of $11,000.

[6] In a letter dated July 16, 2008, the applicant was informed that her application had been denied.

Officer's Decision

[7] In her reasons dated July 14, 2008, the officer first considered whether the applicant constituted a *de facto* family member of her son and his daughters, as well as her cousin and her employer. Noting that the record included letters of support from the applicant's son and granddaughters, the officer acknowledged that there was an "emotional bond between the son and mother and the grandchildren and grandmother". Nevertheless, she found that there was insufficient evidence to establish that they were so "financially or emotionally dependent on each other to the extent that it would cause unusual and undeserved or disproportionate hardship if she had to leave Canada and apply for permanent residence in the normal way".

[8] Second, the officer examined the applicant's establishment in Canada. She observed that the applicant had been here 16 years and that she has been continuously employed for that period, as indicated by the letters in the record provided by her employers, with only a brief period of unemployment from December 2006 until April 2007. The officer acknowledged that the applicant had taken steps to upgrade her skills, earning a high school diploma from the International

Correspondence Schools in August 1996 and a diploma as a Natural Health Consultant in November 2003, and completing a course at the Klara Johnson School of Cake Decorating. In addition, the officer found that she had never been on social assistance, and had regularly sent money and goods to Barbados to assist her family. Nonetheless, she concluded at page six of the decision:

> I have considered the length of time the applicant has been in Canada and during this time it is expected that a certain level of establishment has occurred, however this in and of itself does not amount to the applicant facing unusual and undeserved or disproportionate hardship if she were required to apply from outside Canada.

[9] Next, the officer considered the potential hardship facing the applicant were she to return to Barbados to apply for permanent residence. The officer rejected the applicant's claim that she would suffer hardship because her relatives in Barbados were unable to support her, finding that she has not provided any evidence to substantiate this claim. Moreover, the officer observed that the applicant, who has been working for the past 16 years in Canada and has proven she is industrious, resourceful and motivated, had not shown that she could not use her skills to support herself in Barbados.

[10] Finally, the officer dismissed as mere speculation the applicant's claim that her return to Barbados meant, in effect, that she was unlikely to ever return to Canada either as a visitor or as a permanent resident, given her particular circumstances. The officer also found that such a question was beyond the scope of her assessment.

Issues

[11] The applicant raises the following issues:

1. What is the appropriate standard of review?

2. Did the officer fetter her discretion in the assessment of hardship by failing to take into account the fact that the applicant's H&C application is her only viable option for immigration to and remaining in Canada?

3. Did the officer err in law by failing to provide sufficient reasons for the conclusions she has drawn in the process of assessing the applicant's permanent residence application?

Applicant's Submissions

[12] At paragraph 12 of her memorandum, the applicant sets out what appears to be one of the branches of her argument:

> [I]f forced to return to Barbados, there would be no realistic way of the Applicant being ever reunited with her family members in Canada, since, as already explained, the Applicant's son could not sponsor her and she could not apply for a visa on her own, as she does not meet the selection criteria for Skilled Workers.

[13] This situation, it is argued, presents a form of hardship that the officer was bound to consider in her analysis. The applicant puts it this way:

> [I]f the Officer is considering what hardship results from having to apply outside of Canada, isn't it a rather obvious relevant factor whether the person can apply outside Canada to begin with?

[14] According to the applicant, given her advanced age and low educational achievement, she would not meet the minimum criteria for permanent residence as a skilled worker. And given the requirement in sections 179 and 183 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) that it be established that a prospective visa holder will leave Canada by the end of the period authorized for their stay, it is also very unlikely that she would ever be granted a visitor's visa, having overstayed her previous visa by over a decade. The applicant argues:

> In short, the Officer failed to consider and comprehend the simple fact that this was the Applicant's only route of becoming a Permanent Resident of Canada and remaining here with her extensive family.

[15] The second branch of the applicant's argument is her claim that the officer's reasons are not adequate because they fail to explain why the applicant did not meet the definition of a *de facto* family member, and why her degree of establishment would not place her in a situation of unusual, undeserved or disproportionate hardship. The applicant argues that the officer failed to comply with section 9.3 of the Minister's guidelines for in-land processing of permanent residence applications (IP-5), which directs officers in recording their reasons to, "Explain the thought process behind the decision. Make no assumptions; fill in the gap between the facts listed and the decision". At paragraph 26 of her submissions, the applicant writes:

> The reasons merely consist of a review of the relevant facts of this case and the ultimate conclusion that given these circumstances, an exemption is not warranted. No inherent line of reasoning is to be found anywhere in this "decision".

In other words:

> … The Officer's decision, in short, amounts to a mere restatement of the relevant facts of this case and her ultimate conclusion, without any line of reasoning at all demonstrating **how** the Officer arrived at such conclusion.
>
> [Emphasis in original]

[16] As a result, the applicant argues, it is impossible to decipher why the officer concluded as she did on important elements of the claim.

Respondent's Submissions

[17] The respondent emphasizes, in written submissions, that the exemption available under subsection 25(1) of the Act is both exceptional and discretionary. The respondent reminds the Court that the onus is on the applicant to bring forth all the necessary evidence to make her case and argues that this is a case where she simply failed to so.

[18] The respondent notes that hardship must consist of more than the mere inconvenience or predictable costs associate with leaving Canada:

> That an applicant must sell a house or car or leave a job or family is not necessarily undue hardship; rather it is a consequence of the risk that the applicant took by staying in Canada without landing.

[19] According to the respondent, the applicant has not demonstrated that the officer made a material error in relation to any of the findings; she merely disagrees with the assessment.

[20] With respect to the argument that an exercise of discretion under section 25 of the Act provides the only means by which the applicant could remain in Canada, the Minister responds at paragraph 28 of the submissions:

> The Applicant argues that the Officer fettered her discretion in failing to take into account the H & C application was her only option for immigrating or remaining in Canada. The Respondent categorically rejects this argument as unfounded and without regard [to] the decision of the officer. In essence what the Applicant argues is that she should benefit from her long time illegal status in Canada and that this somehow entitled her to remain as a result. This cannot be the case. The Applicant has been fully aware that she has been living and working illegally in Canada since her arrival. She has, it would seem, been underground hiding from immigration authorities but now wants to benefit from her actions. This is inconsistent with the objectives of IRPA. Moreover, it is submitted that the Officer was clearly aware of the argument advanced by the Applicant in relation to her speculation in relation to consideration under another section of the Act….

[21] The respondent also disagrees that the officer's reasons are inadequate. Instead of merely listing factors and stating a conclusion as alleged by the applicant, the officer addressed the grounds and made reasonable findings with respect to each as to why they were not compelling enough to justify an exemption on H&C grounds.

<u>Applicant's Reply</u>

[22] The applicant, in her reply, reiterates that the officer's conclusions on key points are unreasonable, and fall short of being justified, transparent and intelligible, as required by *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, at paragraph 47.

<u>Analysis and Decision</u>

[23] **<u>Issue 1</u>**

<u>What is the appropriate standard of review?</u>

Generally speaking, decisions of immigration officers are reviewed on a standard of reasonableness. However, where the issue is the sufficiency of the reasons, the standard is correctness.

[24] I wish now to deal with Issue 3.

[25] **<u>Issue 3</u>**

<u>Did the officer err in law by failing to provide sufficient reasons for the conclusions she has drawn in the process of assessing the applicant's permanent residence application?</u>

The officer' analysis with respect to the applicant's establishment does not seem to contain any explanation for the conclusion she reached. After summarizing the evidence, the officer ended the first paragraph on page 6 of her reasons with the following statement:

> I have considered the length of time the applicant has been in Canada and during this time it is expected that a certain level of establishment has occurred, however this in and of itself does not amount to the applicant facing unusual and undeserved or disproportionate hardship if she were required to apply from outside Canada.

[26] The respondent argues that the officer was entitled to come to this conclusion because the fact that "an Applicant must sell a house or car or leave a job or family is not necessarily undue

hardship; rather it is a consequence of the risk that the Applicant took by staying in Canada without landing". What is at issue here, however, is not the correctness of the conclusion, but the adequacy of its justification. I agree with the applicant that it is impossible to decipher on what basis the officer concluded as she did, in view of the evidence. Madam Justice Mactavish's statement at paragraph 14 of *Adu v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 693, 2005 FC 565 applies equally here:

> In my view, these 'reasons' are not really reasons at all, essentially consisting of a review of the facts and the statement of a conclusion, without any analysis to back it up. That is, the officer simply reviewed the positive factors militating in favour of granting the application, concluding that, in her view, these factors were not sufficient to justify the granting of an exemption, without any explanation as to why that is. This is not sufficient, as it leaves the applicants in the unenviable position of not knowing why their application was rejected.

(See also *Kim v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1399, at paragraph 24; *Aleman v. Canada (Minister of Citizenship and Immigration.)*, [2004] F.C.J. No. 293, at paragraphs 38 to 41; *Jasim v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1290; *Via Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25 (C.A.), at paragraphs 21 and 22.)

[27] I am of the view that the applicant's degree of establishment is an important factor in this case and therefore, the inadequacy of the reasons on this point bear on the fairness of the overall decision.

[28] The application for judicial review must be allowed and the matter referred to a different officer for redetermination.

[29] Because of my finding on this point, I will not deal with the other matters in issue.

[30] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

[31] Section 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, governs cost awards in immigration matters:

> 22. No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders.

There are no special reasons to order costs in this matter.

JUDGMENT

[32] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different officer for redetermination and there shall be no order for costs.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

The following provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c.

27 are pertinent:

11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

[…]

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.

11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.

[…]

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.

FEDERAL COURT

SOLICITORS OF RECORD

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