Date: 20090904

Docket: IMM-2926-08

Citation: 2009 FC 874

Ottawa, Ontario, September 4, 2009

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

CHANTAL BAVUNU KRENA,
KETSIA KRENA and
JODICK MOUDIANDAMBU

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

and

LOW INCOME FAMILIES TOGETHER
and CHARTER COMMITTEE ON
POVERTY ISSUES

Interveners

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant, Ms. Chantal Krena, is a woman from the Democratic Republic of Congo (DRC). She is a single mother of two children, ages 11 and 5, and does not receive any financial support from the father of either child. Ms. Krena came to Canada in November 1997 and made a

refugee claim at that time. The claim was later deemed abandoned when she travelled to the United States for a number of years. In 2005, Ms. Krena moved back to Canada and took up residence in Ontario. Ms. Krena wishes to remain in Canada rather than returning to the DRC from where she could apply for permanent residence in accordance with the provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*).

[2] In December 2005, Ms. Krena, for herself and her two children, submitted an application, pursuant to s. 25 of the *IRPA*, for exemption from certain requirements of *IRPA* on the basis of humanitarian and compassionate (H&C) considerations. In particular, Ms. Krena asked the Minister of Citizenship and Immigration (the Minister) to exempt her from the requirement in s. 11 of *IRPA* that she apply for permanent residence status before entering Canada. In addition, she asked that her application be processed without payment of the applicable fees, which would be $850. She submitted that the fee regulation was inoperative under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (*Charter*) without a waiver or exemption provision. Ms. Krena further requested that her application be processed regardless of the non-payment of the fees due to her financial circumstances. The application was returned un-processed in March 2006.

[3] In this application for judicial review, the Applicants do not challenge a decision or order made by the Minister. Rather, they challenge the validity of the fees required for the Minister to process her application under s. 25 of *IRPA*, which fees are established by s. 89 of *IRPA* and s. 307 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (*IRP Regulations* or the *Regulations*).

[4] The Applicants seeks a number of remedies. The key remedies sought by the Applicants can be stated as follows:

- An order quashing the Minister's decision to charge the Applicant a fee to access the H&C procedure under s.25(1) of *IRPA*;

- An order compelling the Governor General in Council (GIC) to make a regulation providing for the exempting of indigents who are unable to pay a fee to access the procedure under s.25(1) of *IRPA*;

- A declaration that ss. 307, 10(1)(d) and 66 of the *IRP Regulations*, which requires the payment of a fee as a condition of accessing the procedure under s.25(1) of *IRPA* is *ultra vires* in that it fetters the Minister's discretion under s. 25(1) of *IRPA*;

- A declaration that ss. 307, 10(1)(d) and 66 are inoperative as being contrary to s. 15(1) and s. 7 of the *Charter*;

- A declaration that ss. 307, 10(1)(d) and 66 are in breach of the "foundational constitutional principles of constitutional principles of the Rule of Law"; and

- An order directing the Minister to refund the fees paid by the Applicants.

[5] By Order of Prothonotary Aalto, the Charter Committee on Poverty Issues (CCPI) and Low Income Families Together (LIFT) were granted intervener status in this application for judicial review.

II. History of this Application for Judicial Review

[6] In May 2006, the Applicants and the Gunther family (see Court File No. IMM-3045-08) commenced separate actions in the Ontario Superior Court of Justice (OSCJ) challenging the H&C application fees on substantially the same grounds as alleged in this judicial review application. On February 27, 2007, Justice Himel of the OSCJ granted a motion to stay the Krena and Gunther actions on the basis that the Federal Court was the appropriate forum to pursue these matters. Since the parties had already taken steps in the OSCJ actions, Justice Himel ordered that the pleadings, examinations, expert reports and other documentary discovery exchanged in those actions could be relied upon in any Federal Court proceedings.

[7] On May 4, 2007, the Krena family and the Gunther family filed a joint statement of claim (Court File No. T-749-07). The defendant in the Federal Court action brought a motion to direct the plaintiffs to proceed by way of judicial review. The motion was adjourned pending the outcome of the Federal Court of Appeal in *Hinton v. Canada (Minister of Citizenship and Immigration),* 2008 FC 7, rev'd 2008 FCA 215, [2009] 1 F.C.R. 476, in which a number of questions were certified relating to the appropriate procedure steps for constitutional challenges to fee regulations of the *IRPA*. The Federal Court of Appeal's decision in *Hinton* upheld the procedure of challenging the fee

regulations by way of an application for leave and judicial review, and then having the application converted to an action and certified as a class action once leave was granted.

[8] The Applicants, therefore, commenced the present application for leave and judicial review following the Court of Appeal's decision in *Hinton.*

III. Payment of Fees

[9] On May 11, 2007, the Applicants paid the $850 fee required for the processing of their H&C application. Although, in the affidavit filed in this judicial review, Ms. Krena states that she paid this fee "sous protestation", there is no evidence in the record that any such protest was made at the time that the fees were paid. What appears to be a further application was subsequently submitted on March 10, 2008 by the Applicants' then-counsel. Included in the submissions was the following statement with respect to the payment of fees:

> Please note that the fee of $850 has been paid to the government under protest and under compulsion. This statement is made being to protect Ms. Krena's ability to recover any funds that might be forthcoming from the on-going litigation or other litigation. . . .

IV. Legislative Framework

[10] Immigration law requires that all applications for permanent residence in Canada be made from outside Canada (*IRPA*, s. 11(1)). However, s. 25 of *IRPA* gives the Minister of Citizenship and Immigration (the Minister) the discretion to exempt persons from that requirement on the basis of H&C considerations. Applicants who seek permanent residence on this basis are required to pay a

processing fee. Section 89 of the *IRPA* allows the Minister to prescribe fees for the services provided in the administration of *IRPA* and s. 307 of the *IRP Regulations* specifically sets out a fee for an in-Canada H&C application under s. 25 of *IRPA*. Section 10(1)(d) of the *IRP Regulations* states that an application may not be processed unless the applicable processing fee is paid. The full text of these relevant provisions is set out in Appendix A to these reasons.

V. Do the Applicants have standing?

[11] The threshold question to be addressed is whether the Applicants have standing to bring this application for judicial review.

[12] The Applicants must demonstrate that they are "directly affected by the matter in respect of which relief is sought", as required by s. 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The undisputed fact is that, on May 11, 2007, Ms. Krena paid the required fee. Evidence that this payment was made is contained in the application record. Thus, any refusal of the Minister to process the in-Canada application without the payment of the fees is no longer relevant. The Minister is currently, I assume, processing the H&C application.

[13] The Applicants argue that they preserved their rights by borrowing the money and making the payment only under protest. The record does not support this contention except on an after-the-fact basis. Ms. Krena made the payment on May 11, 2007 without any indication that it was being made under protest. The only statement of protest was made almost one year later – on March 10, 2008 – when another counsel submitted another in-Canada application and made comprehensive

submissions on the merits of the application. At that time, the Applicants' then-counsel asserted that the payment was made under protest. This reasoning is simply not sufficient. Had the Applicants intended to preserve their rights, they ought to have included that direction with the payment. In its absence, I conclude that there was an intention to pay the required fees in the normal course, in spite of the outstanding action.

[14] However, even if there had been a payment "under protest", I fail to see how this judicial review meets the requirements of s. 18.1(1). This is because, the Applicants are no longer "directly affected by the matter in respect of which relief is sought", as required by s. 18.1(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Stated differently, the Applicants are no longer entitled to a remedy of requiring the Minister to consider waiving the H&C application fee.

[15] The question of standing in an application for judicial review was recently considered in the case of *League for Human Rights of B'Nai Brith Canada v. Canada*, 2008 FC 732, 334 F.T.R. 63. In that decision, Justice Dawson reviewed the concept of "directly affected" as the terminology was used in s.18.1 of the *Federal Courts Act*. At paragraphs 24-25, she wrote:

> The jurisprudence establishes that, for a party to be considered to be "directly affected," the decision at issue must be one which directly affects the party's rights, imposes legal obligations on it, or prejudicially affects it directly. See: *Rothmans of Pall Mall Canada Ltd. v. Canada (Minister of National Revenue)*, [1976] 2 F.C. 500 (C.A.).
>
> In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, an appeal from the Federal Court of Appeal, the Supreme Court of Canada quoted with approval at page 623 the following passage from *Australian Conservation Foundation Inc. v. Commonwealth of*

> *Australia* (1980), 28 A.L.R. 257, when considering the existence of direct standing:
>
> > A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.
> >
> > [Emphasis added]

As a result of having paid the fee – whether or not it was made under protest – the subject matter underlying the Applicants' judicial review application has disappeared. The Applicants could not gain any benefit or advantage from this judicial review, beyond the "satisfaction of righting a wrong, upholding a principle or winning a contest".

[16] In the alternative, the Applicants' judicial review application would fail for reasons of mootness. As the parties have not raised this issue, I will deal with it briefly. The Supreme Court of Canada in *Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342, [1989] S.C.J. No. 14 set out the principles for mootness: "The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case" (at para.15). Thus, "a case is moot if it fails to meet the 'live controversy' test" (at para.16).

[17] *Borowski* set out a two-step analysis for mootness. First, the question is whether a tangible and concrete dispute has become academic. Second, if the answer to the first part is affirmative, one asks whether the court should nonetheless exercise its discretion to hear the case based on several

factors: (a) an adversarial relationship between the parties still exists; (b) the expenditure of limited court resources is justified; and (c) in exercising its jurisdiction, the court stays within its adjudicative role rather than intruding into the role of the legislature.

[18] Applying this to the case at bar, the Applicants' judicial review of the Minister's decision to enforce the requisite fee for the H&C application is moot. As already mentioned, the Applicant has paid the fee, and the H&C application has been submitted. A decision by this Court would have no practical effect on the rights of the Applicants. In other words, there is no "live controversy" that remains. This is exemplified in paragraph 23 of *Borowski*: "the inapplicability of a statute to the party challenging the legislation renders a dispute moot".

[19] Second, even if an adversarial relationship still exists between the parties, and the expenditure of limited court resources is justified, a decision by this Court on the payment or not of fees would overstep our adjudicative function and reach into the realm of political decision-making. The blurring of roles is particularly evident from the remedy sought by the applicant: an order compelling the GIC to make a regulation about H&C fees under s. 25(1) of *IRPA*. Furthermore, under s. 89 of *IRPA*, the government has exclusive powers to establish or waive fees by regulation. Thus, it is clear that Parliament's intention is to waive fees by legislative decisions or regulations – not by judicial pronouncements under s. 25(1) of *IRPA*.

[20] Finally, I decline to exercise my discretion to consider the now-hypothetical questions posed by the Applicants.

VI. Conclusion

[21] I conclude that the application will be dismissed either on the basis that the Applicants have no standing to bring this application or on the grounds that the matter is now moot.

[22] The Applicants ask that I certify the following question:

> Where the Minister has represented that he has neither the obligation nor discretion to waive the humanitarian and compassionate applications fee, do indigent persons who pay the fee under protest lose standing to challenge the propriety of the fee for persons in their circumstances?

[23] In my view, this question is not appropriate for certification. The underlying assumption of the proposed question is that the Applicants paid the fee under protest. As I stated above, the fact is that the "under protest" claim was only made one year after the payment of the fee. Further, even if I accept that the fee was paid under protest, I cannot conclude that this is a question of general importance; I have no evidence as to how many others (if any) are in a similar situation of having paid a fee under protest.

[24] Having determined that no question will be certified, however, I observe that many of the issues raised by the Applicants in their submissions have been considered in the companion file of *Toussaint v. Canada (Minister of Citizenship and Immigration)*, Court File No. IMM-326-09 and that questions have been certified in that judgment.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"
Judge

Immigration and Refugee Protection Act, S.C. 2001, c, 27

Application before entering Canada

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.

Humanitarian and compassionate considerations

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.

Provincial criteria

(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.

Loi sur l'immigration et la protection des réfugiés, L.C. 2001, c. 27

Visa et documents

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.

Séjour pour motif d'ordre humanitaire

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.

Critères provinciaux

(2) Le statut ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

Fees

Regulations

89. The regulations may govern fees for services provided in the administration of this Act, and cases in which fees may be waived by the Minister or otherwise, individually or by class.

Immigration and Refugee Protection Regulations, SOR/2002-227

Form and content of application

10. (1) Subject to paragraphs 28(*b*) to (*d*), an application under these Regulations shall

. . .

(*d*) be accompanied by evidence of payment of the applicable fee, if any, set out in these Regulations;

Application under Section 25 of the Act

Fees

307. The following fees are payable for processing an application made in accordance with section 66 if no fees are payable in respect of the same applicant for processing an application to remain in Canada as a permanent resident or an application for a permanent resident visa:

(*a*) in the case of a principal applicant, $550;

(*b*) in the case of a family member of the principal applicant who is 22 years of age or older or is less than 22 years of age and is a spouse or common-law partner, $550; and

(*c*) in the case of a family member of the principal applicant who is less than 22 years of age and is not a spouse or common-law partner, $150.

Frais

Règlement

89. Les règlements peuvent prévoir les frais pour les services offerts dans la mise en oeuvre de la présente loi, ainsi que les cas de dispense, individuellement ou par catégorie, de paiement de ces frais.

Règlement sur l'immigration et la protection des réfugiés, DORS/2002-227

Forme et contenu de la demande

10. (1) Sous réserve des alinéas 28*b*) à *d*), toute demande au titre du présent règlement :

. . .

d) est accompagnée d'un récépissé de paiement des droits applicables prévus par le présent règlement;

Demande en vertu de l'article 25 de la Loi

Frais

307. Les frais ci-après sont à payer pour l'examen de la demande faite aux termes de l'article 66 si aucuns frais ne sont par ailleurs à payer à l'égard du même demandeur pour l'examen d'une demande de séjour au Canada à titre de résident permanent ou d'une demande de visa de résident permanent :

a) dans le cas du demandeur principal, 550 $;

b) dans le cas d'un membre de la famille du demandeur principal qui est âgé de vingt-deux ans ou plus ou qui, s'il est âgé de moins de vingt-deux ans, est un époux ou conjoint de fait, 550 $;

c) dans le cas d'un membre de la famille du demandeur principal qui est âgé de moins de vingt-deux ans et n'est pas un époux ou conjoint de fait, 150 $.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET:	IMM-2926-08
STYLE OF CAUSE:	KRENA et al v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	June 23, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Snider J.
DATED:	September 4**,** 2009

APPEARANCES:

Mr. Andrew C. Dekany Mr. Angus Grant	FOR THE APPLICANTS
Mr. Martin Anderson Ms. Kristina Dragaitis Mr. Ned Djordevic	FOR THE RESPONDENT
Ms. Amina Sherazee Mr. Rocco Galati	FOR THE INTERVENER LIFT
Mr. Raj Anand	FOR THE INTERVENER CCPI

SOLICITORS OF RECORD:

Andrew C. Dekany Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT
Amina Sherazee Barrister and Solicitor	FOR THE INTERVENER LIFT
Weir Foulds LLP Barristers and Solicitors Toronto, Ontario	FOR THE INTERVENER CCPI