Federal Court  Cour fédérale

Date: 20100127

Docket: IMM-1926-09

Citation: 2010 FC 88

Ottawa, Ontario, January 27, 2010

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

NELLY CONCEPCIO BELANDO DELISA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision (the Decision) made by Immigration Officer (the Officer) Christine Blackburn, dated April 1, 2009, wherein the Officer refused the Applicant's application for permanent resident status under the spouse or common-law partner in Canada based on the applicant's receipt of Income Support from the Ontario Disability Support Program (ODSP).

I. Background

[2] The Applicant is a sixty-four (64) year old citizen of Uruguay. She has a twenty-one (21) year old son, who is not a party to this Application, with her common-law spouse. The Applicant is the common-law spouse of fifty-six (56) year old Mr. Mario Washington Villano Gimenez. Mr. Gimenez is a citizen of Canada.

[3] Mr. Gimenez has been receiving ODSP payments since 2004. On January 12, 2006, the Ontario Social Benefits Tribunal determined that Mr. Gimenez was a person with a disability that is unlikely to improve.

[4] In August 2004, Mr. Gimenez applied to sponsor the Applicant and their son for permanent residence under the Spouse or Common-Law partner in Canada class (Spousal Class). The application was initially refused on August 4, 2005, on the basis of Mr. Gimenez's ineligibility to sponsor pursuant to subsection 133(1)(k) of the *Immigration and Refugee Protection Regulations* (*IRPR*), S.O.R./2002-227, which barred persons who were receiving social assistance for a reason other then disability from sponsoring a foreign person. The Applicant brought a judicial review application which was allowed by Justice Roger Hughes on consent. The application was rejected for the same reason upon re-determination by Officer Blackburn on March 10, 2006. The Applicant brought another judicial review application which was discontinued after the Respondent consented to remit the matter for re-determination.

[5] On April 18, 2006, Officer Blackburn confirmed that Mr. Gimenez met the requirements for eligibility as a sponsor.

[6] On February 6, 2007, the Applicant was sent a letter form Citizenship and Immigration Canada (CIC) to advise her that the application for permanent residence may have to be refused. Immigration Officer A. Ngoga informed the Applicant as follows:

> Information suggests that your application to remain in Canada as a permanent resident may have to be refused as it appears you are a person described in section 39 of the *Immigration and Refugee Protection Act*. Persons described in this section are inadmissible to Canada. Specifically, you[r] spouse and sponsor Mario Washington Villano Gimenez is in receipt of Ontario Disability Support Program (ODSP). The foregoing is cause case for refusal of your application for permanent residence.

[7] The Applicant received an identical letter on October 24, 2007. On November 26, 2007, the Applicant responded through counsel as follows:

> It must be emphasized that section 39 of the Immigration and Refugee Protection Act is not applicable to warrant the refusal of my Clients' application. Mr. Gimenez is in receipt of disability benefits not of choice but because of medical problems. His spouse and/or dependents should be barred from joining him in Canada just because he is unable to work by reasons of ill-health. There is no evidence to show that Ms. Delisa [and] her son are unable and/or unwilling to support themselves financially. Indeed, they are ready, willing and able to work to support themselves in Canada.

[8] The Applicant received another letter from a different Immigration Officer, Ms. Chantal Pillon, on January 21, 2008, identical in content to the previous two, except for the correction of a

typo. The Applicant responded on January 24, 2008, by reference to the earlier letter of response dated November 26, 2007.

[9] On April 1, 2009, Officer Blackburn denied the application for permanent residence on the basis of the Applicant's inadmissibility for financial reasons pursuant to section 39 of the *Immigration and Refugee Protection Act* (*IRPA*), S.C. 2001, c. 27. Officer Blackburn noted that this decision was not made on the basis of the sponsor's eligibility; rather it was an assessment of the Applicant's admissibility.

[10] Officer Blackburn noted that the Applicant was not disabled but nevertheless collected ODSP benefits as a spouse of an ODSP-entitled person. Officer Blackburn determined that the Applicant is unable to support herself because of her failure to remove herself from her spouse's ODSP benefits, notwithstanding her possession of a valid work permit. Officer Blackburn determined that the Applicant was provided with several opportunities to discontinue receipt of ODSP benefits since February 6, 2007, so that she may comply with section 39 of *IRPA*. The application for permanent residence was therefore denied.

II. Standard of Review

[11] The standard of review for questions of law is correctness while other issues are reviewable on a reasonableness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; and *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339,

per Justice Binnie at paragraph 59). At paragraph 59 of *Khosa*, above, reasonableness has been articulated as follows:

> Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47). There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. The standard of review in this matter is reasonableness for the questions of fact or mixed fact and law and correctness for questions of law.

[12] The standard of review in this case is reasonableness for questions of fact and mixed law and fact. However, questions of procedural fairness are reviewable under a standard of correctness: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 243 N.R. 22.

III. Legislation

[13] Section 11 of the *IRPA* requires a foreign national to satisfy an Immigration Officer that he or she is not inadmissible and for the foreign national's sponsor to satisfy the Immigration Officer that he or she complies with the sponsorship requirements of the Act:

Application before entering Canada	Visa et documents
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis

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.	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.
If sponsor does not meet requirements	Cas de la demande parrainée
(2) The officer may not issue a visa or other document to a foreign national whose sponsor does not meet the sponsorship requirements of this Act.	(2) Ils ne peuvent être délivrés à l'étranger dont le répondant ne se conforme pas aux exigences applicables au parrainage.

[14] Subsection 63(1) of the *IRPA* grants the sponsor a right of appeal to the Immigration Appeal Division from an Immigration Officer's denial of a permanent resident visa under the Family Class:

Right to appeal — visa refusal of family class	Droit d'appel : visa
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.

[15] Section 39 of the *IRPA* renders foreign nationals who are unable to support themselves in Canada inadmissible for financial reasons:

Financial reasons	Motifs financiers
39. A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themself or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.	39. Emporte interdiction de territoire pour motifs financiers l'incapacité de l'étranger ou son absence de volonté de subvenir, tant actuellement que pour l'avenir, à ses propres besoins et à ceux des personnes à sa charge, ainsi que son défaut de convaincre l'agent que les dispositions nécessaires — autres que le recours à l'aide sociale — ont été prises pour couvrir leurs besoins et les siens.

[16] Subsection 133(1)(k) of the *IRPR* renders ineligible a sponsor who receives social assistance for a reason other then disability:

Requirements for sponsor	Exigences : répondant
133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	133. (1) L'agent n'accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu'à celle de la décision, le répondant, à la fois :
[…]	[…]

(k) is not in receipt of social assistance for a reason other than disability.	k) n’a pas été bénéficiaire d’assistance sociale, sauf pour cause d’invalidité.

IV. Issues

[17] The Applicant raises the following issues:

(a) Did Officer Blackburn err in law in determining that the Applicant is a person described in section 39 of *IRPA* as she was in receipt of social assistance?

(b) Was Officer Blackburn’s determination that the Applicant was in receipt of social assistance an erroneous finding of fact made in a perverse or capricious manner or without regard to the material before him?

(c) Does benefit under the ODSP constitute social assistance to warrant a refusal of a permanent residence application pursuant to section 39 of *IRPA*?

[18] The Applicant raises another issue in her reply, which I formulate as follows:

(d) Did Officer Blackburn breach the duty of procedural fairness?

[19] In my view, the following preliminary issue arises in these proceedings:

(e) What weight if any should be given to newly filed evidence?

V. Analysis of Preliminary Issue

E. *What Weight if Any Should Be Given to Newly Filed Evidence?*

[20] The Respondent objects to certain parts of the sponsor's (Mr. Gimenez) affidavit that contain *ex post facto* information. Specifically, the Respondent submits that exhibits "K", "L", "M", and "N", referred to at paragraphs 16-19 of Mr. Gimenez's affidavit were not forwarded along with the Application for permanent residence. The Respondent further objects to paragraphs 17, 19 and 20 of the Applicant's affidavit because they provide evidence that was not submitted to the Immigration Officer. Similarly, paragraphs 18-20 of the Applicant's affidavit refer to events that post-date the Officer's decision.

[21] It is trite law that judicial review of a decision of a federal board, commission or other tribunal must proceed using the evidence which was before the decision-maker: *Charlery (Designated Representative) v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 993, 108 A.C.W.S. (3d) 354, per Justice Francis Muldoon at paragraph 16.

[22] I have reviewed paragraphs 16-19 of Mr. Gimenez's affidavit and the aforesaid exhibits and I find that they should be given no weight in these proceedings because they were not before the Immigration Officer. Paragraphs 17, 19 and 20 of the Applicant's affidavit should be given no weight for same reason. Paragraphs 18-20 should be given no weight because they describe events that post-date the decision under review.

A. *Did Officer Blackburn Err in Law in Determining That the Applicant is a Person Described in Section 39 of IRPA As She Was in Receipt of Social Assistance?*

[23] The Applicant submits that the disability exception found in subsection 113(1)(k) of the *IRPR* operates to exempt from the definition of "social assistance" any benefits payable under the ODSP for the reason that the recipient suffers a disability.

[24] The Applicant submits that she and the sponsor are both exempted from subsection 133(1)(k) because of the sponsor's dependency upon the applicant for his personal care. By extension, section 39 of *IRPA* is not applicable to the Applicant because but for her primary care-giving responsibility for her spouse, she would have been able and available for gainful employment to support herself and her dependant son.

[25] There is no basis in law for this submission. The Applicant misapprehends the interrelationship between the section 39 of the *IRPA* and subsection 133(1)(k) of the *IRPR*.

[26] Subsection 133(1)(k) of the *IRPR* is part of the requirements for the sponsor. None of the provisions in this section, including subsection 133(1)(k), bear upon the foreign national. The disability exemption in subsection 133(1)(k) allows persons who rely on social assistance by reasons of their disability to be approved as sponsors. However, the fact that the sponsor who is thus exempted is allowed to rely on social assistance does not mean that the Applicant, a foreign national, can similarly rely on the same social assistance.

[27] The Applicant is mistaken when she submits that the ODSP benefits upon which the sponsor relies cannot be considered social assistance. A benefit that would have been described as social assistance in the absence of a disability is not transformed into a benefit that is not social assistance by reason of an underlying disability.

[28] The phrase “social assistance” is undefined in the legislation or regulations, but the Federal Court of Appeal held that it connotes “welfare”: *Thangarajan v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 167, 242 N.R.183 (Fed. C.A.), per Justice Rothstein (then of the Federal Court of Appeal) at paragraph 13. It is evident that social assistance is a flexible term that can include among other things “public assistance, in the form of government subsidized housing”: *Kaisersingh v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 F.C. 20, 89 F.T.R. 276 (F.C.T.D.), per Justice Barbara Reed at paragraph 17. In my view, there can be no doubt that benefits under the ODSP are a form of social assistance, notwithstanding the fact that the Applicant is in receipt of those benefits by virtue of being a dependant of the sponsor who receives those benefits by reason of disability.

[29] While the sponsor may be approved as a sponsor despite relying on social assistance by reason of a disability, the Applicant must nevertheless satisfy the Immigration Officer that she is not inadmissible for any of the myriad grounds of inadmissibility pursuant to section 11 of the *IRPA*. One of those grounds of inadmissibility is found at section 39 of the *IRPA*, which bars the Applicant for financial reasons.

[30] Pursuant to section 39 of the *IRPA*, if applicants cannot show that they are willing and able to support themselves, they must show that adequate arrangements for their care and support have been made, others then those that involve social assistance. I can identify no error in law in the manner in which Officer Blackburn applied the financial inadmissibility criterion to the Applicant.

B. *Was Officer Blackburn's Determination That the Applicant Was in Receipt of Social Assistance an Erroneous Finding of Fact Made in a Perverse or Capricious Manner or Without Regard To the Material Before Him?*

[31] The Applicant submits that Officer Blackburn made a perverse finding of fact when she failed to realize that the Applicant was unable to earn employment income by reason of the around-the-clock care she was providing to her sponsor spouse. The Applicant submits that the new information at exhibits K, L, M, and N of the sponsor's affidavit verifies the sponsor's medical conditions which were fully described in the Ontario Social Benefits Tribunal decision.

[32] The Respondent submits that the Applicant failed to provide sufficient evidence to show that she was employed on a full time basis in providing care for her spouse. I agree.

[33] The Applicant has onus of establishing the facts on which her claim rests, and any omissions are at the Applicant's peril: *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C. 635, per Justice Evans at paragraph 8. The Applicant could have made submissions on the nature and extent of her work as a care provider for her spouse. Her failure to adduce sufficient evidence before the officer cannot justify the submission of that very evidence at the judicial review stage.

[34] Officer Blackburn was presented with limited evidence regarding the role of the Applicant with respect to her sponsor's medical conditions. To the extent that the Applicant submits that "adequate arrangements" have been made to support the Applicant pursuant to section 39 of *IRPA*, Officer Blackburn retains discretion to assess such arrangements and decide whether they render the Applicant admissible: *Purohit v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 620, 114 A.C.W.S. (3d) 732, per Justice Michael Kelen at paragraph 14. The decision reached by Officer Blackburn that the Applicant was expected to rely on social assistance, and thus inadmissible for financial reasons, was reasonably open to her on the record.

C. Does Benefit Under the ODSP Constitute Social Assistance To Warrant a Refusal of a Permanent Residence Application Pursuant To Section 39 of IRPA?

[35] My reasons under the heading for the first numbered reasons adequately address this aspect of the application.

D. *Did Officer Blackburn Breach the Duty of Procedural Fairness?*

[36] The Applicant submits that the officer breached the duty of procedural fairness by failing to alert her that her receipt of ODSP benefits could render her inadmissible to Canada pursuant to section 39 of the *IRPA* and to give her an opportunity to address those concerns. The Applicant submits that the fairness letters sent to the Applicant only referred to concerns regarding the sponsor's receipt of ODSP benefits.

[37] The relevant paragraph of the nearly identical fairness letters is reproduced below:

> Information suggests that you application to remain in Canada as a permanent resident may have to refused as it appears you are a person described in section 39 of the Immigration and Refugee Protection Act. Persons described in this section are inadmissible to Canada. Specifically, you[r] spouse and sponsor Mario Washington Villano Gimenez is in receipt of Ontario Disability Support Program (ODSP). The foregoing is cause case for refusal of your application for permanent residence. […]
>
> [Emphasis added]

[38] The Applicant draws the court's attention to the emphasized portion.

[39] The letters are confusing. In light of the contested history of this file, the insertion of the emphasized portion served to confuse the Applicant and distract her from the main inquiry into re-addressing the ability of Mr. Gimenez to sponsor the Applicant notwithstanding his receipt of ODSP benefits.

[40] In *Canada (Minister of Citizenship and Immigration) v. Abdul*, 2009 FC 967, [2009] F.C.J. No. 1178 (QL), Justice Kelen of this Court held at paragraph 26 that a fairness letter failed to make a clear inquiry to elicit adequate information for the purposes of conducting a personalized assessment of medical inadmissibility. The confusing portion of the fairness letter was reproduced at paragraph 4 of the decision:

> You may submit any information addressing the issue of excessive demand <u>if it applies to your case</u>. […]
>
> [Emphasis added]

[41] Clearly, the specific reference to the sponsor's ODSP benefits confused the Applicant and her counsel. Furthermore, CIC maintained the same wording of the fairness letters in the face of the Applicant's responses which ought to have revealed the depth of the confusion. I am of the view that the fairness letter failed to allow the Applicant an opportunity to provide the required information. This was a breach of the Immigration Officer's duty of procedural fairness.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. this application for judicial review is allowed; and

2. the matter will be referred back for a further re-determination.

" D. G. Near "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-1926-09**
STYLE OF CAUSE:	**DELISA v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**DECEMBER 1, 2009**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**JANUARY 27, 2010**

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