Federal Court  Cour fédérale

Date: 20110415

Docket: IMM-3081-10

Citation: 2011 FC 469

Ottawa, Ontario, April 15, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROSALINE KARGBO,
ABDUL KARGBO
and
ALIMATU KARGBO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for an order directing the Respondent to find that the Applicants have established humanitarian and compassionate (H&C) grounds for the granting of their permanent residence applications, to make a final determination on these applications within a set time, and for special costs.

BACKGROUND

[2] The Principal Applicant and her two children, the Applicant Daughter and the Applicant Son, are citizens of Sierra Leone. In 2000, the Principal Applicant left her children and husband at home and travelled to Freetown to visit her sister. While there, she was kidnapped, brought to a village and forced by rebels to live as a captive "wife." She escaped a year later and, in time, made her way to Canada. She was accepted as a Convention refugee and became a permanent resident of this country on 2 February 2006.

[3] Her husband was killed during the civil war. She has not seen her children since she was captured in 2000, and she was unable to locate them during the civil war and its aftermath. She discovered their whereabouts after she was granted permanent resident status, at which time she submitted a sponsorship application and permanent residence applications to bring them to Canada. She ultimately requested that the applications be considered based on H&C grounds.

[4] The application was twice refused in error. The first refusal was issued on 3 June 2009, following a misunderstanding by a visa officer that both the Applicant Daughter and Son had failed to respond to official "Fairness Letters" and that neither met the definition of a dependant. These errors having been discovered, the file was reopened in July 2009, only to be refused a second time on 1 March 2010. The second refusal was based on a misapprehension of the facts and the application of the wrong test in determining whether the Principal Applicant, as a sponsor, should

be exempt from the regulatory requirement of not being in receipt of social assistance for a reason other than disability.

[5] In light of these errors, in September 2010 the Respondent consented to a re-determination of the H&C application by a different officer. The re-determination has yet to be conducted because the parties cannot agree on the issues of costs, the time limit within which the Respondent must complete the re-determination, and directed verdict.

ISSUES

[6] The parties raise the following issues:

i. Whether special reasons exist to warrant an award of costs and, if so, the amount of those costs;

ii. When the Respondent must complete the re-determination; and

iii. Whether a directed verdict is appropriate in these circumstances.

STATUTORY PROVISIONS

[7] The following provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), are applicable in these proceedings:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme

requirements of this Act, and may, 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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.

pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

Payment of fees

(1.1) The Minister is seized of a request referred to in subsection (1) only if the applicable fees in respect of that request have been paid.

Paiement des frais

(1.1) Le ministre n'est saisi de la demande que si les frais afférents ont été payés au préalable.

Exceptions

(1.2) The Minister may not examine the request if the foreign national has already made such a request and the request is pending.

Exceptions

(1.2) Le ministre ne peut étudier la demande de l'étranger si celui-ci a déjà présenté une telle demande et celle-ci est toujours pendante.

Non-application of certain factors

(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

Non-application de certains facteurs

(1.3) Le ministre, dans l'étude de la demande d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles

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.	l'étranger fait face. Critères provinciaux (2) Le statut de résident permanent 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.

[8] The following provisions of the *Federal Courts Act*, R.S.C. 1985, c. F-7, are applicable in these proceedings:

Application for judicial review **18.1** (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought. […] **Powers of Federal Court** (3) On an application for judicial review, the Federal Court may (*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or (*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.	**Demande de contrôle judiciaire** **18.1** (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande. […] **Pouvoirs de la Cour fédérale** (3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut : *a*) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable; *b*) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

ARGUMENTS

The Applicants

The Directed Verdict

[9] The Applicants ask the Court to direct the Respondent, first, to find that they have sufficient H&C grounds with respect to their permanent residence applications and, second, to make a final determination on these applications within a set time of the Court's order. In seeking a directed verdict, they are not asking this Court to approve their permanent residence applications; the visa office will still be able to request that the Applicants undergo medical examinations and police background checks before permanent residence status is granted.

[10] The Applicants submit that the undisputed evidence of their forcible separation and brutal treatment demonstrates conclusively that an H&C exemption, pursuant to section 25 of the Act, is warranted with respect to their permanent residence applications. See *Tran v Canada (Minister of Citizenship and Immigration)*, 2007 FC 806 at paragraphs 17-18.

[11] Operational Guidelines IP5 state that the assessment of hardship is one way in which a visa officer can determine whether there are sufficient H&C grounds to justify granting the exemption requested by the applicant. Assuming that the exemption were not granted, the officer must inquire whether the applicant would suffer unusual and undeserved hardship, i.e., hardship not anticipated by the Act or Regulations or hardship resulting from circumstances beyond the applicant's control,

or disproportionate hardship, i.e., hardship that would have an unreasonable impact on the applicant due to his or her personal circumstances.

[12] The Applicants submit that they would suffer both unusual and undeserved hardship and disproportionate hardship if the permanent residence applications are not granted on H&C grounds. First, they would be separated indefinitely because the Principal Applicant cannot sponsor the Applicant Daughter and Son—they are now too old, and the Principal Applicant receives social assistance because she can no longer work. Second, the Act does not anticipate the separation of a mother from her children due to civil war and through no fault of their own. Third, the hardship would have a disproportionate effect on the Principal Applicant, who suffers from anxiety, depression and Post Traumatic Stress Disorder.

[13] The Applicants ask the Court to find that they have established H&C grounds and that their permanent residence visa be issued within a set time-frame.

There Are "Special Reasons" Justifying an Award of Costs

[14] The Applicants rely on *Manivannan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1392 at paragraphs 59-60, wherein I observed:

> I do not see evidence of bad faith in this case, but there has been unreasonable delay at the visa post in Colombo. The file has been allowed to drag on for reasons that have not been adequately explained and it has required litigation before the visa post has finally provided the husband's visa….
>
> As Justice Harrington pointed out in *Singh* [*v Canada (Minister of Citizenship and Immigration*), 2005 FC 544] (paragraph 24) this "Court has considered undue delay in processing a claim to be a special reason which would justify costs." In the present case I

> believe the record shows that there has been undue and unreasonable delay on the part of the visa post in Colombo in a situation that gave rise to significant humanitarian considerations and which has thwarted the family reunification principles that are an essential part of our immigration legislation.

[15] The Applicants submit that, as in *Manivannan*, the delay in their case has been unreasonable and has thwarted the family reunification objectives of the Act. Two years of this delay are due in large part to a concern, raised at the visa post in February 2008, that the Applicant Daughter and Son were not as young as they claimed to be. This remained an issue until January 2010 when, after repeatedly asking them for additional documents proving their age, the visa post resolved its concerns based on a document that was in its possession from the first day it began processing the applications for permanent residence. The Applicants contend that the Respondent's processing of the applications has been marked by intransigence and careless disregard, and that this constitutes special reasons for an award of costs.

The Respondent

Directed Verdict Is Not Appropriate

[16] The Respondent acknowledges that, pursuant to paragraph 18.1(3)(*b*) of the *Federal Courts Act*, the Court may refer a matter back for re-determination with such directions as it considers appropriate. However, the jurisprudence is clear that a directed verdict "is an exceptional power that should be exercised only in the clearest of circumstances." See *Canada (Minister of Human Resources Development) v Rafuse*, 2002 FCA 31 at paragraph 14. The Respondent relies on my decision in *Malicia v Canada (Minister of Citizenship and Immigration)*, 2006 FC 755 at paragraph 20, where I said:

> It is the Court's view that, when the matter is returned for reconsideration, the Officer responsible is required to re-examine all aspects of the Decision, and the Court should not interfere with this process by isolating one aspect and placing it outside the scope of reconsideration. The Court should not issue a direction that has the effect of making a decision that is for the decision-maker to make and, while the Court may guide the decision-making process, it cannot make the actual decision.

[17] The Respondent also notes that the Federal Court of Appeal also has stated that it is not appropriate for the Court to go through the file and determine that all the requirements for landing have been met. See *Dass v Canada (Minister of Citizenship and Immigration)* (1996), [1996] 2 FC 410, [1996] FCJ No 194 (QL) (FCA) at paragraph 23. The Supreme Court of Canada also has observed that, in H&C matters, "[i]t is the Minister who [i]s obliged to give proper weight to the relevant factors and none other." See *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraph 37. Moreover, even if the Applicant establishes H&C grounds, the "Minister may allow the exception, but he may choose not to allow it … when he is of the view that public interest reasons supersede humanitarian and compassionate ones." See *Legault v Canada (Minister of Citizenship and Immigration*), 2002 FCA 125 at paragraph 17. The Respondent submits that, given the discretionary nature of H&C applications and the exceptional nature of the Court's power to issue a directed verdict, the Court should allow the Respondent to reconsider the applications, which it has agreed to do within seven days of the Court's order granting the application for judicial review.

There Are No "Special Reasons" to Warrant an Award of Costs

[18] The Applicants seek costs in the amount of $8000. The Respondent relies on Rule 22 of the *Federal Court Immigration and Refugee Protection Rules* in submitting that there are no "special reasons" to warrant an award of costs. The policy behind the "no costs" rule is to ensure that costs are not a deterrent factor for those engaged in immigration litigation. The fact that an immigration officer may have been wrong is not enough to overturn the "no costs" regime. See *Iftikhar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 49 at paragraphs 13 and 17.

[19] Special reasons may exist if one party has engaged in conduct which is unfair, oppressive, improper or marked by bad faith or has unnecessarily or unreasonably prolonged proceedings. See *Johnson v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1262 at paragraphs 26-27. However, the Respondent has not engaged in such conduct. On the contrary, it did not oppose leave and, by letter dated 28 September 2010, it offered to consent to the Applicants' application for leave; and it agreed to have the matter re-determined by a different officer.

[20] The Applicants have already been awarded costs in the amount of $2000 for having to respond to the Respondent's unsuccessful motion for an extension of time. Consequently, it is respectfully submitted that there are no special reasons in this case to justify an award of costs.

[21] In the event that the Court does find special reasons to issue an award of costs, the Respondent submits that the amount should be assessed in accordance with Column III of Tariff B

of the *Federal Courts Rules*. The Applicants are seeking $8000 in costs, which approximate costs on a solicitor and client basis. Such costs are unwarranted in this matter as there is clearly no evidence of "reprehensible, scandalous or outrageous conduct" on the part of the Respondent. See *Canada (Minister of Citizenship and Immigration) v Harkat*, 2008 FCA 179 at paragraph 13.

ANALYSIS

[22] Both sides agreed that the Decision should be sent back for re-determination by a different officer. This leaves the Court to deal with the outstanding issues of directed verdict, time-limits for completion of the re-determination and finalization of the permanent residence application, and costs.

Directed Verdict

[23] The situation of the Applicants invites great sympathy. Through no fault of their own, they have undergone years of trauma that has been exacerbated by mistakes by the Respondent that have delayed a decision that could finally allow them to be re-united.

[24] While it agrees that everything must be done to ensure that a decision is made soon, the Court must also be mindful of jurisprudence on directed verdicts. As the Respondent points out, the case law is replete with warnings that the Court cannot intervene and exercise a discretion that Parliament has said must remain with the Minister, except in truly exceptional circumstances.

[25] In the present case, the Applicants are not asking the Court to isolate any particular factor. The Applicants simply want the Court to direct that they have established humanitarian and compassionate grounds in their application for permanent residence. Section 18.1(3)(*b*) of the *Federal Courts Act* authorizes the Court to refer a decision back for reconsideration "with such directions as it considers to be appropriate."

[26] While the Court is aware that it should not usurp the Minister's discretion, my reading of this file, together with submissions from counsel, leads me to the following conclusions:

a. The facts of this case present an extremely compelling case of unusual, undeserved and disproportionate hardship;

b. I can find nothing in the file that should prevent a positive decision for the Applicants on H&C grounds;

c. When questioned in open Court whether there were any particular factors that might be weighed against a positive decision, the Minister conceded that it had put no such factors forward and could not see anything that would prevent a positive decision.

[27] In my view, and without usurping the Minister's discretion, I think that this decision should be returned for re-consideration with the direction that the officer re-considering the matter will take into account the Court's view of the merits of the Applicants H&C grounds as well as the Respondent's concession that there would appear to be nothing on the file to weigh against a positive H&C decision.

Costs-Special Reasons

[28] The Applicants seek costs in the amount of $8000. The Applicants do not have the funds to finance this litigation and their counsel is acting on a *pro bono* basis. Once again, the situation commands great sympathy. After all, the escalation in costs has been caused to a considerable extent by mistakes made by the Respondent.

Rule 22 of the Federal Courts Immigration and Protection Rules

[29] The rule in immigration matters, however, is that costs should not be awarded unless the Court finds "special reasons."

[30] While it is true that these proceedings (and I include here the earlier decisions and the attempts to rectify careless mistakes) have been prolonged by mistakes made by the decision-makers, this does not in itself amount to special reasons.

[31] The jurisprudence of this Court clearly establishes that being wrong is not enough to warrant costs.

[32] This Court has consistently held that "special reasons" may exist if one party has engaged in conduct which is unfair, oppressive, improper or actuated by bad faith or has unnecessarily or unreasonably prolonged proceedings. As Justice Dawson made clear in *Johnson v Canada (Minister of Citizenship and Immigration)* 2005 FC 1262 at paragraphs 26 and 27:

> **26** Both parties acknowledge that pursuant to Rule 22 of the Federal Court Immigration and Refugee Protection Rules, SOR/2002-232, special reasons must exist for the Court to award costs on application for judicial review. Special reasons may be found if one party has unnecessarily or unreasonably prolonged proceedings, or where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith.
>
> **27** The fact that a tribunal has made a mistake does not by itself constitute a special reason for costs. While I find the decision of the RPD to have been perverse, that fact is insufficient to warrant granting costs to Mr. Johnson. In the present case, the Minister did not oppose the application for leave, consented to an extension of time Mr. Johnson required, and offered to consent to the decision being set aside on a timely basis after the tribunal record was delivered. In these circumstances, I find that Mr. Johnson has failed to establish the existence of special reasons that would justify an award of costs.

[33] Looking at these factors, although it might be argued that the Respondent has unnecessarily or unreasonably prolonged recent proceedings to some extent, I think the Applicants have already been granted a costs award that covers that aspect of the problem. But the alternative ground – "where one party has acted in a manner that may be characterized as unfair, oppressive, improper or actuated by bad faith" – also needs to be considered.

[34] Mistakes have been made in two decisions that, in my view, were perverse but, as Justice Dawson points out, this is not sufficient. This is a case that, from the beginning, cried out for compassion and prompt action. The Applicants have faced trauma that simply cannot be comprehended by most people. In this context I do believe that, given their backgrounds and vulnerabilities, the Applicants have been treated in a way that has been insensitive, and they have been subjected to needless delays at the visa post in the processing of their applications and needless resistance from the Minister in rectifying obvious mistakes and bringing this matter to a point where

a final decision can be made. The processing of their application has taken twice as long as could have been expected, and through no fault of the Applicants. Their application has been refused twice because of careless mistakes and notwithstanding considerable efforts by Applicants' counsel to expedite the process. All of this has cost the Applicants time and money in a context where time is of the essence because of the fragile state of Ms. Rosaline Kargbo and where funds are not available to finance a drawn-out process and careless mistakes.

[35] Notwithstanding obvious careless mistakes at the visa post, the Minister has continued to resist until, apparently, the arrival of Mr. Hicks as counsel for the Minister and a change of attitude in the face of the compelling H&C factors and an acknowledgment of past mistakes. At the very least, I think I would have to describe the Minister's approach to this matter until the more recent change of attitude as careless, unfair and oppressive, particularly when the situation of the Applicants cried out for a prompt resolution. On the other side, since the Minister has finally taken stock of the situation and acknowledged past mistakes and injustices and there has been some cooperation. Leave was not opposed and the Minister has made suggestions for the timely resolution of the problems. Consequently, I feel that some recognition of past unfairness and oppression is required in the way of costs but that the full amount claimed is too much. I think an appropriate figure would be $4000.

Time-Lines

[36] At the hearing of this matter in Toronto, counsel were able to agree on an approach to setting time limits.

[37] There was already agreement that the re-consideration decision would be completed within seven days of the date of the Court's judgment in this review application. All that was needed was a time-limit for the finalization of the permanent residence application.

[38] The Minister has indicated that finalization of the permanent residence application can occur within 30 days of receipt by the Minister of a copy of form IMM-1017 which, apparently, will be available when the children have completed their medical examinations with the local Designated Medical Practitioner (DMP). Applicants counsel has agreed to this approach.

Certification

[39] Both parties agree there is no question for certification and the court concurrence.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The decision is quashed and the matter will be returned for re-determination by a different officer taking into account the following:
    a. The re-determination will be made and the Applicants will be notified of the results within seven days of the date of this judgment;
    b. In making the re-determination, the Officer will bear in mind that the decision is the Minister's to make but that, after reviewing the file and hearing counsel at the review hearing, it is the view of this Court that, as the file now stands:
        i. The facts present an extremely compelling case of unusual, undeserved and disproportionate hardship;
        ii. The Court can see nothing on the file that should prevent a positive decision for the Applicants on H&C grounds; and
        iii. When questioned in open Court as to whether there were any known factors that might prevent a positive decision for the Applicants, the Minister conceded in a forthright way that there were no factors before the Court that might prevent a positive decision and that, as

matters stood, the Minister could not see anything that would stand in the wake of a positive decision.

2. If the re-determination is positive, the Minister will priorize the application for permanent residence on an urgent basis and will employ best efforts to finalize the application as soon as possible and, in any event, will render a final decision and notify the Applicants within 30 days of receipt by the Minister of a copy of Form IMM-1017 from the Applicants.

3. The Minister will pay the Applicants special costs in the amount of $4000.

4. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3081-10
STYLE OF CAUSE:	**ROSALINE KARGBO, ABDUL KARGBO and ALIMATU KARGBO** **and** **THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	April 14, 2011
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DATED:	April 15, 2011

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