Federal Court  Cour fédérale

Date: 20161005

Docket: IMM-311-16

Citation: 2016 FC 1114

Toronto, Ontario, October 5, 2016

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

CAROL MONICA ARELLANO CRUZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] The applicant, Carol Monica Arellano Cruz, is a citizen of the Philippines. She came to Canada in September 2008 as a member of the Live-In Caregiver Class, leaving a young son at home with her mother. Her husband was working in Hong Kong. In November 2011, Ms. Cruz submitted an application for permanent residence which included her husband and son. Her

application was “locked-in” on November 25, 2011. On March 1, 2012 an electronic file regarding the application was created in the Global Case Management System (GCMS).

[2] Between March 2012 and September 2014, Ms. Cruz received several requests from Citizenship and Immigration Canada (CIC) requesting clarification and further information with respect to her application. Acting on her own behalf, Ms. Cruz sent correspondence to CIC providing the requested information.

[3] On June 20, 2015 CIC sent a letter to the applicant by email requesting four specific documents: (1) Form IMM5669; (2) Form IMM5406; (3) an original Philippines Police Certificate for her son, Monard Allen Cruz; and, (4) a NSO CENOMAR or certificate from the Philippines National Statistics Office indicating that there was no record of marriage of the son. The CIC letter indicated that these documents had to be produced within 90 days of the date of the letter. Ms. Cruz did not provide the documents within that time-frame because, she says, she did not receive the letter.

[4] On October 22, 2015 Ms. Cruz made further inquiries regarding her application with the assistance of a lawyer at the Flemingdon Community Legal Services. Prior to this, she was not represented by counsel.

[5] On November 13, 2015 CIC Officer Loren Eleniak sent a refusal letter to the applicant which indicated that she had not met the requirements under subsection 16(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“IRPA”). Therefore, the Officer denied her

application for permanent residence as a member of the Live-in Caregiver Class under subsection 72(1) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 ("IRPR").

[6] On December 7, 2015 Officer Eleniak sent a further letter directly addressing the applicant's submissions of October 22, 2015 and noting that the initial decision to refuse her application remained unchanged.

[7] On December 8, 2015 the applicant's counsel made further submissions to CIC requesting it to reconsider the decision to refuse the application for permanent residency. Officer Eleniak responded to counsel's letter of December 8, 2015 on January 8, 2016 indicating that after considering the additional submissions, the initial decision to refuse the application would stand. The applicant then brought this application for judicial review of the January 8, 2016 refusal to reconsider the decision under subsection 72(1) of the IRPA.

[8] In her affidavit submitted by the respondent, Officer Eleniak notes that on May 29, 2015 the Case Processing Centre in Vegreville, Alberta implemented new procedures for dealing with emails that have bounced back or returned to the sender as undeliverable. These included steps to ensure that any attachments to the email, such as the letter of June 20, 2015, would be printed and mailed by ordinary post mail to the current address for the applicant on their system. Further, the email address would be "expired" or treated as inactive on the GCMS system. There was no indication in their system that the June 20, 2015 email bounced back as undeliverable. Nor was there an indication that subsequent messages sent to the applicant's email address bounced back.

[9] Attached to the applicant's affidavit filed in support of this application is a print out of a search of her Yahoo email account in-box on March 16, 2016 for the search terms "citizenship and immigrati" [sic]. The search turned up 10 messages between CIC and the applicant from October 2012 to December 2015 but there is no indication of the June 20, 2015 message. The print-out also indicates, however, that there were 187 messages in the account spam folder on that date and there is no indication of a search of that folder.

II. ISSUES

[10] The issues argued by the parties are as follows:

A. Did the Officer breach procedural fairness in processing the applicant's permanent residency application?

B. Was the Officer required to consider the best interests of the child?

III. ANALYSIS

[11] There is no dispute between the parties that the standard of review for violations of procedural fairness in permanent resident applications is correctness: *Khan v Canada (Minister of Citizenship and Immigration)*, 2015 FC 503 at para 12; *Mission Institution v Khela*, 2014 SCC 24 at para 79.

[12] The applicant's argument with respect to the first issue essentially amounts to a plea that the Immigration Officer should have taken further steps to alert her of any missing documentation and give her an opportunity to respond. At the time that the request for further documentation was sent she was unrepresented. She argues that the Officer processed her

application in a rigid manner, relied on a “minimum of communication” and failed to provide opportunities for mistakes by the applicant, if there were any, to be corrected. The applicant also contends that had she received the letter it would have been impossible for her to provide the requested documents within the time-frame specified. In particular, she argues, she could not have received a police certificate or NSO CENOMAR for her son as he was under the age of 18 years at that time.

[13] Ms. Cruz relies on the decision of Associate Chief Justice Jerome in *Turingan v Canada (MCI)*, [1993] FCJ No 1234 at paras 6-8. *Turingan* involved an application to overturn a refusal to grant an application for permanent residence to a live-in care giver. At the hearing the respondent agreed that the decision should be set aside and returned for a redetermination because of a mistake in the calculation of the amount of time the applicant had worked. Associate Chief Justice Jerome took advantage of the occasion to comment on the nature of the Live-in Care-giver Program and how immigration officers should exercise their discretion. Citing principles expressed by Rouleau J. in *Karim v Canada (MEI)* (1988) [1989] 21 F.T.R. 237 at 238, Associate Chief Justice Jerome concluded as follows:

> It is clear from this passage that the purpose of the Program is to facilitate the attainment of permanent residence status. It is therefore incumbent on the Department to adopt a flexible and constructive approach in its dealings with the Program’s participants. The Department’s role is not to deny permanent residence status on merely technical grounds, but rather to work with, and assist the participants in reaching their goal of permanent residence status.

[14] The respondent relies on several decisions of this Court to the effect that once evidence is provided that a communication was sent to an applicant and the Department has no indication

that the communication failed, the risk of non-delivery rests with the applicant: *Alavi v Canada (MCI)*, 2010 FC 969 at para 5; see also, *Kaur v Canada (MCI)*, 2009 FC 935 at para 12; *Zare v Canada (MCI)*, 2010 FC 1024 at para 36; *Patel v Canada (MCI)*, 2014 FC 856 at paras 16-21; *Wijayansinghe v Canada (MCI)*, 2015 FC 811 at paras 40-41. The respondent argues that she must simply demonstrate that the correspondence "went on its way" to the applicant: *Ilahi v Canada (MCI)*, 2006 1399 at para 7. Moreover, the respondent submits, the applicant failed to submit the requested documents as part of her request for reconsideration.

[15] Justice Peter Annis recently reviewed the jurisprudence surrounding issues of email miscommunication in *Kennedy v Canada (Minister of Citizenship and Immigration)*, 2015 FC 628 at para 15. He concluded that it has developed into two lines of cases. The first holds that the respondent Minister needs to prove two things: (1) that the communication was sent to an e-mail address supplied by the applicant; and (2) that there has been no indication that the communication may have failed or bounced-back. If both conditions are proven, then it does not matter if the communication was received by the applicant or not because the respondent would have satisfied the duty of fairness. The second line of cases turns on the finding of fault by one of the parties. Specifically, where the visa officer proves, on a balance of probabilities, that a document is sent, a rebuttable presumption arises that the applicant received it, and the applicant bears the risk for the missed communication: see also *Patel v Canada (Minister of Citizenship and Immigration)*, 2015 FC 900 at para 36.

[16] On the record before me, I must conclude that the duty of procedural fairness was satisfied in this case. Applying the first line of cases identified by Justice Annis it does not matter

that the applicant did or did not receive the June 2015 letter. If I were to apply the fault based approach, I would have to conclude that the Eleniak affidavit proves that the email with the attachment was sent. The evidence provided by the applicant is insufficient to establish that she did not receive the email and unfortunately, in the circumstances, she bears the risk of miscommunication.

[17] With respect to the second issue the applicant submits that the best interests of her son, Monrad Cruz, should have been taken into consideration by the Officer in reaching his or her conclusion. Monrad was under 18 years old when the application was submitted but reached that milestone in October 2015. The applicant argues that humanitarian and compassionate factors, specifically an analysis of the best interests of the child, are applicable to Live-in Caregiver applications and that a specific request for such an analysis is not necessary: *Monje v Canada (Citizenship and Immigration)*, 2013 FC 116; *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533.

[18] No request to take humanitarian and compassionate considerations into account was submitted by the applicant. The Officer did not have a duty to advise the applicant to seek an exemption under section 25 of the IRPA: *Araujo v Canada (Minister of Citizenship and Immigration)*, 2009 FC 515 at para 14; *Mustafa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1092 at paras 10 and 14. I note that in both of the cases relied upon by the applicant, *Monje* and *Sultana*, a specific request was made to consider humanitarian and compassionate factors to overcome inadmissibility. Absent such a request, I am not persuaded

that the Officer was required to take the best interests of the applicant's son into consideration in reaching a decision.

[19] Accordingly, I must dismiss the application for judicial review. No questions of general importance were submitted by the parties and none will be certified.

[20] Before concluding, I think it appropriate to observe that there is little indication in the record of the application of the principles expressed by Justice Rouleau in *Karim* and by Associate Chief Justice Jerome in *Turingam*, cited above. CIC does not appear to have adopted a "flexible and constructive approach" in dealing with the applicant or considered that its role was to help her achieve her goal of permanent residence. Rather it appears to have pursued a strict interpretation of the program requirements. Jerome ACJ questioned the merits of such a "harsh stance" in *Turingam*. The result here will have profound consequences for the applicant and her family.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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