Federal Court  Cour fédérale

Date: 20171122

Docket: IMM-1043-17

Citation: 2017 FC 1060

Ottawa, Ontario, November 22, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

LUCRECIA GARCIA BALAREZO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Lucrecia Garcia Balarezo, is a 60 year old citizen of Peru who arrived in Canada in 2009 as an international student to take English courses so that she could acquire the language level required to apply for a work permit under the Live-In Caregiver Program [LCP]. Since her arrival, she has been issued a series of study and work permits, the last of which permitted her to work as a caregiver until May 5, 2016. The Applicant's first application for a permanent resident visa as a member of the live-in caregiver class was refused in a letter from

Immigration, Refugees, and Citizenship Canada [IRCC] dated July 7, 2016. After this refusal, the Applicant again applied for a permanent resident visa under the same class but an Immigration Officer refused this second application in a letter dated February 21, 2017, on the basis that she had not, contrary to paragraph 112(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, as amended [*IRPR*], applied for a work permit as a live-in caregiver before entering Canada, and was not a member of the live-in caregiver class under paragraph 113(1)(d) of the *IRPR* since she had not entered Canada as a live-in caregiver. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of the Officer's decision.

I. Background

[2] While the Applicant was studying, her personal and educational expenses as well as her room and board were provided by Jose Alberto Castillo Balarezo and Rita Roxana Villanueva Meza, a married couple with two young children. Upon completion of the Applicant's studies, Mr. Castillo obtained a positive labour market opinion [LMO] dated March 26, 2012, to employ the Applicant as a live-in caregiver under NOC code and title "6474 - Live-in caregiver." Consequently, the Applicant applied for a work permit online from within Canada on April 22, 2012, stating in her application that she intended to work as a live-in caregiver. This first work permit was issued on May 4, 2012, and extended for a period of three years until May 4, 2015, by the issuance of another work permit on October 22, 2012. These permits were issued for the NOC code 6474-000 occupation of babysitters, nannies, and parent's helpers, although this code did not appear on the work permits. Each of these permits referenced the LMO by its number.

[3] The Applicant's first work permit was mailed to her address in Toronto, despite her expectation that she would be required to leave Canada to be examined for admissibility under the LCP. The first work permit issued on May 4, 2012, stated that the Applicant had to undergo an immigration medical examination within 90 days and that the medical forms had been sent separately. The Applicant subsequently received instructions from IRCC to attend an authorized physician in Toronto for a medical examination and she complied with these instructions. According to the Applicant, she specifically inquired about exiting Canada for examination as a live-in caregiver and had obtained an American visa in order to do so.

[4] In April 2015, the Applicant made another online application for a work permit. A third work permit was issued on June 22, 2015. This third work permit was valid until May 5, 2016, and stated the Applicant's occupation as being that of "caregiver" under Case Type 57. The Remarks section of the permit noted "LCP, same employer" and "LMO #7870215" and "eligible to apply for permanent residence after completing employment requirements."

[5] The Respondent has filed an affidavit of the immigration officer, Wendy Cannan, who refused the Applicant's first application for a permanent resident visa. According to Ms. Cannan, the officer who issued the third work permit on June 22, 2015, ought not to have issued it. Ms. Cannan says in her Affidavit that the Applicant "was not eligible for a work permit under the LCP because she did not apply for an LCP work permit before entering Canada in accordance with subsection 112(a) of the *IRPR*." Ms. Cannan also states that the LCP was terminated in November 2014 and the live-in caregiver classification, NOC code 6474-200, discontinued. Ms. Cannan further states that the Case Type 57 refers to a work permit issued under the LCP.

[6] The Applicant first applied for permanent residence as a member of the live-in caregiver class in April 2016. That application was refused in July 2016 on the grounds that the Applicant's initial work permit had not been issued under the LCP and the Applicant was never assessed under the LCP criteria. Although the Applicant requested reconsideration of the refusal of her first application for permanent residence, a second officer maintained the refusal. Accordingly, the Applicant made a second application for a permanent residence visa under the live-in caregiver class. IRCC received this second application on August 18, 2016.

II. Decision

[7] In a letter dated October 11, 2016, IRCC informed the Applicant that there was no indication that she had been examined prior to entering Canada for the LCP or that she had entered Canada as a live-in caregiver. This letter stated that if the Applicant wished to make submissions on the matter, she had 60 days to do so. The Applicant's counsel provided submissions in a letter dated December 7, 2016. These submissions summarized why it was reasonable for the Applicant to expect that, after she completed her employment requirement, she would be eligible to apply in Canada for permanent residency under the LCP, and also stated it would be against her legitimate expectations and procedural fairness to reject the application. The Applicant's counsel submitted that, among other things:

> …a final decision rejecting this Application will have a drastic effect on Lucrecia's expectations and quality of life. She would have to immediately return to Peru without a job and attempt to reapply for permanent residency under another program with different requirements from the LCP. Applying to the permanent residency under the new Caregiver Program will cause significant hardship to Lucrecia considering her level of English, age and level of education. …

> Additionally, Lucrecia has become an integral and valuable part of her employers' family, to which she is attached as her own…

[8] Included in the Applicant's submissions was a letter signed by Mr. Castillo and Ms. Villanueva, stating that the Applicant:

> …has helped us look after our two daughters, Camila and Micaela, with love and kindness.
>
> …she takes cares [*sic*] of our daughters while we are at work with love, kindness, patience, and good ethics. We see our children happy and secure when they spend time with her.
>
> …our daughters see Lucrecia as a member of our nuclear family. Not having her with us would certainly and seriously affect our daughters' emotional well-being. She has a warm and very close relationship with our children; seeing her departing from their nuclear environment would be an extremely sad and a stressful experience.

[9] Also included in the submissions of December 7, 2016, were several court decisions, notably this Court's decision in *Jacob v Canada (Citizenship and Immigration)*, 2012 FC 1382, 423 FTR 1 [*Jacob*], a case where the applicant sought an exemption on humanitarian and compassionate grounds from the requirement that he had to have entered Canada as a live-in caregiver.

[10] The Applicant's counsel provided additional submissions in a letter dated January 25, 2017, including documents to evidence that the Applicant underwent medical examinations in Canada as instructed by IRCC. These submissions included a copy of the Applicant's letter submitted with her application to extend her work permit in April 2015, in which she asked for

confirmation whether she was required to undergo medical examinations again in order to extend her work permit.

[11] In a letter dated February 8, 2017, an immigration officer refused the Applicant's second application for permanent residence as a member of the live-in caregiver class on the grounds she had not applied for a work permit as a live-in caregiver before entering Canada, and that she was not a member of the live-in caregiver class since she had not entered Canada as a live-in caregiver. Although this refusal was reconsidered by another officer following IRCC's receipt of the Applicant's January 25 submissions, the refusal was maintained in a further letter to the Applicant dated February 21, 2017.

[12] In the Global Case Management System [GCMS] notes, the officer who issued the letter of February 8, 2017, noted that the Applicant had undergone a medical examination and had provided a labour market opinion. This officer also acknowledged in the GCMS notes a letter from Mr. Castillo and Ms. Villanueva dated September 3, 2009, which the Applicant had presented when she first entered Canada on her study permit; the officer noted this letter states that "the sole purpose of Lucrecia's trip is to study English full time so that she may pass the necessary test to apply for a caregiver job with us in the future" and that they "also understand that before the expiration of her study visa, Lucrecia must leave Canada."

[13] The Officer who reconsidered the refusal stated in the letter dated February 21, 2017, that the Applicant's application had been "considered on its substantive merits." In the GCMS notes, the Officer noted the Applicant's submission that: "Applying to the permanent residency under

the new Caregiver Program will cause significant hardship to Lucrecia considering her level of English, age and level of education." The Officer then stated in the GCMS notes: "The other submissions cite court cases with h&c but they do not appear to be asking for h&c consideration. As no new evidence provided that client was examined under the live-in caregiver program prior to entering Canada, refusal decision upheld."

III. Issues

[14] Although the Applicant's submissions raise several issues, the one issue which is dispositive of this application for judicial review is whether it was reasonable for the Officer not to consider the humanitarian and compassionate [H&C] factors raised by the Applicant's second application for permanent residence as a member of the live-in caregiver class.

IV. Analysis

A. *Standard of Review*

[15] A visa officer's decision as to whether to grant permanent residence through the LCP is a question of mixed fact and law reviewable on the standard of reasonableness (*Jacob* at para 30; also see *Palogan v Canada (Citizenship and Immigration)*, 2013 FC 889 at para 9, 232 ACWS (3d) 1057).

[16] Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable

outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.

B. *Was it reasonable for the Officer not to consider the H&C factors raised by the Applicant's second application for permanent residence as a member of the live-in caregiver class?*

[17] The Applicant maintains that the Officer failed to consider H&C factors in view of the unusual, undeserved or disproportionate hardship which would be caused to the Applicant if forced to return to Peru to re-apply for permanent residency under the new caregiver program. According to the Applicant, a return to Peru at age 60 after having been out of the country since 2009 and without any work prospects would have a drastic impact on her quality of life. Moreover, the Applicant says her removal from Canada would have a significant impact on the Castillo-Villanueva family because the family has come to rely on her to care for the children. The Applicant notes that Mr. Castillo, Ms. Villanueva, and their two daughters consider her as a part of the family and an "aunt" to the children, and that she has also been involved in volunteer activities through her church and has contributed to the Canadian economy through Canada Pension Plan deductions from her salary. In the Applicant's view, she would not likely qualify under the new caregiver program or the express entry program as a skilled worker given her age, language skills, and educational background.

[18] The Applicant points to section 5.27 of the Inland Processing Manual, IP 5, *Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds*, which provides that an officer "may use discretion to consider, on their own initiative, whether an exemption on H&C grounds would be appropriate." According to the Applicant, this Court, in cases such as *Brar v Canada (Citizenship and Immigration)*, 2011 FC 691 at para 58, 391 FTR 192; *Canada (Citizenship and Immigration) v Mora*, 2013 FC 332 at paras 36-37, 430 FTR 90 [*Mora*]; *Nascimento et el v Canada (Citizenship and Immigration)*, 2012 FC 1424 at paras 17-20, 422 FTR 147, has interpreted section 5.27 as giving rise to a duty to consider H&C factors when the facts or submissions imply a request to consider such factors.

[19] The Respondent says the Applicant's reliance on *Jacob* is misplaced. Although the applicant in *Jacob* did not qualify for permanent residency under the LCP since he had not entered Canada as a live-in caregiver, Mr. Jacob, unlike the Applicant in this case, had made an explicit request for an exemption from the statutory requirements on H&C grounds. According to the Respondent, in the absence of an explicit request under subsection 25(1) of the *IRPA* for an exemption from the statutory requirements on H&C grounds, there is no obligation for an officer to consider such grounds. Moreover, the Respondent says, in view of *Kumari v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1424 at para 9, 127 ACWS (3d) 748, an implicit request for H&C consideration does not need to be considered.

[20] It is true that the Applicant did not explicitly request consideration of her application for permanent residence under subsection 25(1) of the *IRPA*. It is also true, as the Respondent points out, that, in the absence of an explicit or implicit request under subsection 25(1) of the *IRPA* for

an exemption from the statutory requirements on H&C grounds, there is no obligation for an officer to consider such grounds. There is, however, an exception in this regard. As the Court stated in *Mora*:

> [36] In *Kumari v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1424 at para 9, Justice O'Reilly explained the issue as follows:
>
> > 9 Finally, the applicants submit that the officer should have considered humanitarian and compassionate factors in their favour. However, in the absence of an explicit request, the officer was under no obligation to consider the applicants' case on humanitarian and compassionate grounds: *Chen v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 871 (QL) (T.D.); *Chen v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 275 (QL) (T.D.). In his interview with the visa officer, Mr. Chand described circumstances that could have formed the basis of humanitarian and compassionate consideration. The applicants suggest that this amounted to an implicit request to which the officer was bound to respond. In my view, the officer was not obliged to respond to an implicit request.
>
> [37] There is an exception to this rule, however. Section 5.27 of the Inland Processing Manual 5 [IP 5] states that an officer:
>
> > " […] may use discretion to consider, on their own initiative, whether an exemption on H&C grounds would be appropriate.
> >
> > When the applicant does not directly request an exemption, but facts in the application suggest that they are requesting an exemption for the inadmissibility, **officers should treat the application as if the exemption has been requested**." [Emphasis added in the original]
>
> [38] At paragraph 58 of *Brar v Canada (Minister of Citizenship and Immigration)* 2011 FC 691, Justice Russell interpreted section 5.27 to mean that there is a duty to consider H&C factors when the facts or submissions imply that they are being asked to be considered.

[21] In this case, the Officer stated in the GCMS notes, after referencing the Applicant's submission that applying for permanent residence under the new caregiver program would cause her significant hardship, that the "other submissions cite court cases with h&c but they do not appear to be asking for h&c consideration." In my view, in the circumstances of this case the Officer should have considered the H&C factors because the facts and the Applicant's submissions in response to the procedural fairness letter raised such factors. In her counsel's submissions dated December 7, 2016, the Applicant requested that IRCC consider her "specific circumstances" and the letter from Mr. Castillo and Ms. Villanueva raised concerns about their daughters' "emotional well-being" if the Applicant was compelled to leave the family. The Applicant's submissions were such that they prompted the Officer to query in the GCMS notes whether the Applicant was requesting H&C consideration in view of her circumstances, and with this in mind it was not reasonable for the Officer then not to consider the H&C factors raised by the Applicant's second application for permanent residence.

[22] Moreover, it appears the Officer either misapprehended or may not have fully considered the court decisions submitted by the Applicant, notably the decision in *Jacob*, a case which was factually similar to the Applicant's circumstances. Although the applicant in *Jacob* had made an explicit request for an exemption from the requirement that he had to have entered Canada as a live-in-caregiver, the Officer here appears to have overlooked or disregarded Justice Lemieux's comments:

> [33] …What the applicant was seeking was an exemption from the requirement he had to have entered Canada as a live-in-caregiver. He entered Canada legally under a student visa but owing to circumstances beyond his control the institution which he attended closed its doors. He then applied for authorization as a live-in-caregiver and was so authorized. He fulfilled his

> obligations under the *IRPR* and was advised he met the requirements for permanent residence. In short, the Officer erred in processing Mr. Jacob's application as if it was a simple exemption request from having to apply for permanent residency to Canada from abroad. He was applying for permanent residency in Canada because that is what he was entitled to as a live-in-caregiver which he was but for having entered in Canada legally but as a student. [Emphasis in original]

[23] In short, in the circumstances of this case, it was not reasonable for the Officer to conclude that the Applicant was not requesting an H&C exemption and, consequently, not consider or address the H&C factors raised by the Applicant's second application for permanent residence as a member of the live-in caregiver class. The Applicant's second application should have been assessed on the basis of the H&C factors it presented and not merely considered "on its substantive merits."

V. Conclusion

[24] The Applicant's application for judicial review is, therefore, allowed. The Officer's decision is not reasonable and, consequently, it is set aside. The matter is returned for reconsideration by a different immigration officer in accordance with these reasons for judgment. No question of general importance is certified.

JUDGMENT in IMM-1043-17

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the decision by the immigration officer dated February 21, 2017, is quashed and set aside, and the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1043-17
STYLE OF CAUSE:	LUCRECIA GARCIA BALAREZO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 10, 2017
JUDGMENT AND REASONS:	BOSWELL J.
DATED:	NOVEMBER 22, 2017

APPEARANCES:

Alexander Munera Susana Mijares Pena	FOR THE APPLICANT
Kareena Wilding	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Munera Professional Corporation Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT