Federal Court  Cour fédérale

Date: 20180517

Docket: IMM-4041-17

Citation: 2018 FC 523

Ottawa, Ontario, May 17, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

ANNE PIERRE PAUL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision dated August 31, 2017 by an officer [Officer] rejecting an application to re-open his negative decision of the Applicant's application

for permanent residence on humanitarian and compassionate [H&C] grounds on the December 22, 2016.

[2] For the reasons that follow, the application is dismissed.

II. Background

[3] The Applicant is a 75 year-old citizen of Haiti, with only four years of education. She has been residing in Canada since October 2008. She is a widow, and has no children residing in Haiti.

[4] The Applicant resides in Montreal with one of her grand-daughters and a great-grand-daughter. She suffers from a number of medical conditions including Type 2 diabetes, arterial hypertension, atherosclerotic heart disease and chronic low back pain. The Applicant's grand-daughter assists her with taking her numerous medications.

[5] In 2008, the Applicant arrived in Canada on a visitor visa. She subsequently claimed asylum and her application for refugee protection was denied in 2011.

[6] On November 29, 2013, the Applicant's first H&C application was denied.

[7] On June 30, 2016, the Applicant's second H&C application was denied.

[8] On July 27, 2016, the Applicant signed her third H&C Application. Detailed submissions were filed in support of this Application.

[9] This third H&C application was submitted under the "Special Measures for Nationals from Haiti and Zimbabwe affected by the lifting of the Temporary Suspension of Removals" [the Special Measures]. Under these Special Measures, eligible applicants benefit from a suspension of removal proceedings until a final decision is made on the H&C application.

[10] On October 20, 2016, the province of Quebec refused to deliver a Quebec Selection Certificate to the Applicant.

[11] The Applicant's H&C application was rejected by the Officer by reasons dated December 22, 2016.

[12] On December 28, 2016, the Applicant's then immigration consultant, Mr. François Jean Denis, sent a letter to Immigration, Refugees and Citizenship Canada [IRCC] seeking a copy of the reasons for the H&C refusal. On the same day, IRCC sent a copy of the reasons to the Applicant's immigration consultant.

[13] On July 10, 2017, the new legal representative Me Geneviève Binette, from the Committee to Aid Refugees, faxed a request to IRCC to obtain a copy of the reasons of the H&C refusal. On July 12, 2017, IRCC sent a copy of the reasons by fax to Me Geneviève Binette.

[14] In July 2017, the Applicant filed a pre-removal risk assessment application [PRRA]. She is currently under a legislative stay of removal by the filing of her PRRA application.

[15] On August 31, 2017, eight (8) months after the third H&C refusal, the Applicant filed a reopening request to have the said H&C refusal reconsidered. Detailed submissions were filed in support of the application.

[16] This re-opening request provided letters from two doctors regarding the Applicant's medical conditions, evidence of the medications she is taking, evidence on the lack of availability of medical care and medications for the Applicant in Haiti, evidence of her strong links to Canada, evidence regarding the best interests of her great-granddaughter and evidence of country conditions in Haiti, including the risk of gender-based persecution. The re-opening request also contained new facts, which had not been before the Officer in the initial H&C, namely that she no longer had any children residing in Haiti, and was no longer in receipt of social assistance, which was due to her opening a child care business.

III. Impugned Decision

[17] The Officer noted that there was no evidence of issues of past procedural unfairness in the prior H&C refusal.

[18] His determination was that there were no new facts or evidence presented which would warrant a reconsideration of the H&C refusal decision.

[19] The Officer also considered the Applicant's age but also noted that she had support from her family members, children and grand-children, and had legal representation.

[20] The Officer considered the timing of her reopening request. He noted that the Applicant had waited more than half a year after the third H&C refusal to request a reopening.

[21] The Officer looked at the two prior and recent H&C refusals (June 2016 and December 2016) in the immigration case history of the Applicant. He noted that the same medical allegations had been raised in those two prior H&C, and found that the evidence related to the Applicant's health and medical needs could have been easily provided at the time she filed her third H&C application. The Officer noted that the question of the insufficiency of the evidence had already been mentioned back in the second H&C refusal.

[22] The Officer was of the opinion that the new submissions and new evidence, namely not having any more family members in Haiti, should be analyzed in the course of another H&C application.

[23] He also noted the fact that, since the Applicant has a PRRA application already filed, her new H&C application would be assessed together.

[24] The Officer concluded that there was insufficient reasons to reopen the case and refused the Applicant's request to reopen the H&C refusal.

IV. Issues

[25] The issue is whether the refusal to reconsider the application was unreasonable because of alleged errors in the Officer's reasons:

1. Failure to properly assess the prejudice to the Applicant in terms of the risk of removal during the processing of a new H&C by loss of protections afforded by the Special Measures applying if the H&C is reconsidered;

2. The Officer unreasonably failed to consider that the lack of success in underlying H&C application and procedural deficiencies on her part were due to the incompetence of her lawyer;

3. Failure to recognize that the Applicant would face a real risk if removed and that her personal security would be endangered, even in the short-term, due to her multiple medical problems and the lack of adequate medical care in Haiti.

V. Standard of Review

[26] A decision of a reviewing officer refusing to reopen an H&C refusal to have it reconsidered is subject to the reasonableness standard of review: *Xu v Canada (Citizenship and Immigration)*, 2018 FC 9 at para 13; *Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44 at para 32. An initial H&C refusal should not to be reviewed by this Court on judicial review when assessing the reasonableness of a decision of an officer denying a reopening request. The

Court should only limit itself to determining whether the refusal of an officer is reasonable or not, as seen in *Medina v Canada (Minister of Citizenship and Immigration)*, 2010 FC 504 at para 32:

> [32] I agree with the Minister that a decision refusing to reopen an H&C application is a distinct decision from the actual decision on the H&C application decision, and may thus be challenged as a distinct decision in a judicial review proceeding.

[27] The Federal Court has consistently held that the onus is on the applicants to show to reviewing officers that circumstances warrant the exercise of their discretion to reopen a previous application that was previously refused in "the interest of justice" and "in unusual circumstances": *Malik v Canada (Minister of Citizenship and Immigration)*, [2009] FC 1283 at paras 40−46; *Ali v Canada (Citizenship and Immigration)*, 2012 FC 710 at para 31; *Ghaddar v Canada (Citizenship and Immigration)*, 2014 FC 727 [*Ghaddar*] at para 19.

[28] The Court of Appeal in *Canada (Citizneship and Immigration) v Kurukkal*, 2010 FCA 230, stated that this type of decision is essentially a "screening exercise" to determine whether or not to exercise the discretion to reconsider. The Court specifically rejected the argument that an officer dealing with a reopening request had to conduct a full review and weighing of the evidence.

[29] The Federal Court has reiterated that the process involves two steps, the first being whether to proceed with reconsidering the previous decision. As long as the reviewing officer does in fact make a discretionary decision on whether to reopen the case or not, she/he has no

obligation to consider new evidence, except in circumstances of bad faith: *Hussein v Canada (Citizenship and Immigration)*, 2018 FC 44 at paras 55, 57.

> [55] The Minister's Delegate's decision reflects the governing jurisprudence. The first step in the two step approach is for the Minister's Delegate to determine whether to proceed to reconsider the previous decision. The second step – an actual reconsideration of the earlier decision – would not proceed unless the Minister's Delegate decides to exercise his or her discretion to reconsider the earlier decision. The decision in this case, which did not proceed past the first step, reveals that the Minister's Delegate was very aware of the circumstances, and that she exercised her discretion appropriately.
>
> […]
>
> [57] There is no general obligation to grant the reconsideration request where "new" evidence is submitted. An applicant must show that this is warranted in the interests of justice, or given the unusual circumstances (*Ghaddar* at para 19). The Minister's Delegate did not err by failing to analyze the three birth certificates. The consideration of such evidence would arise at the second step −i.e., the actual reconsideration, if the Minister's Delegate had exercised her discretion to reconsider.

VI. Analysis

[30] Having been unsuccessful on three H&C applications, and thereafter delaying some eight (8) months, the Applicant seeks reconsideration for the purpose of filing an entirely different application intended to respond to the inadequacies identified by the Officer in the first application.

[31] The Applicant argues that no reasons are provided as to why an "essentially new H&C" should more appropriately be examined in a new H&C application, when it is obvious that a

reconsideration is not intended for the purpose of re-arguing a case on new facts most of which could have been presented at the H&C hearing.

[32] The Applicant did not meet any of the factors normally supportive of a decision to reconsider an H&C application when the case is one of an essentially a new application. Those cited in the Guidelines governing reconsiderations include: procedural unfairness, concerns of fraud or misrepresentation, corrections of clerical or other errors, new evidence based on new facts that arose after the original decision not reasonably available and that is material and reliable, and whether the evidence would be more properly considered in the context of a new application.

[33] The principal submission advanced by the Applicant for the reconsideration is to ensure that the Applicant cannot be removed under the Special Measures until a final decision is rendered on her H&C application. It is acknowledged that a reopening of the H&C application, if provided, would extend the protection against her removal under the Special Measures, which otherwise have since expired.

[34] The Applicant did not raise the application of the Special Measures in her request for reconsideration, although she argues that the Officer was aware of her status, as it was referred to in the materials filed. Instead, the Applicant submitted the situation was “urgent”, because if unsuccessful on her PRRA application, she could be removed. The Officer rejected the request on the ground that she delayed in bringing the reconsideration request until after being put on

removal notice and filing her PRRA application some eight (8) months after the H&C application.

[35] The Officer further suggested she would be protected by the legislative PRRA stay as it was only in "exceptional circumstances" that the PRRA and H&C applications would not be decided at the same time. He attributed this to reasons of administrative efficiency, and because the decision-maker would wish to have all information available in order to render the appropriate decision.

[36] The Applicant originally contended that the policy was that the two proceedings would not be heard together, but this would appear to be a misapprehension on her part. The present IRCC public website indicates that if an applicant submits both an H&C and a PRRA application, both assessments may be done concurrently. There is no evidence as to how this policy is applied, but even if overstated by the Officer, the fact remains that the Applicant's argument is speculative when the policy provides that jointly hearing the applications "may" occur. The Applicant is attempting to rely on a situation of speculation of being removed, when normally this is a reason to reject a request.

[37] It is also speculative that even if the PRRA was determined in advance of the H&C application, she would be removed before the new H&C was heard, in all the circumstances of this case. Similarly, the outcome of the new H&C application is not obvious, particularly when this is not an issue that the Officer examines in the first step of a reconsideration application. Nor is it a factor that is cited as a ground to reconsider a matter.

[38] In this vein, the Court is also of the view that extrinsic timing consequences, unrelated to any conduct of immigration authorities, such as the expiration of the Special Measures, pending PRRA and H&C bars, or other similar time related considerations that are not identified as factors to a decision, are not relevant to a reconsideration decision, any more than they would have been to the original H&C decision. These are not what could be described as exceptional circumstances in a reconsideration case.

[39] The only legitimate factor supporting a reconsideration of the matter argued by the Applicant was that of procedural unfairness due to the alleged incompetence of her consultant. This could have been a ground to set aside the H&C decision. However, setting aside a decision on the basis of counsel's incompetence occurs only in extraordinary circumstances. Allegations of incompetence also require notice to the impugned representative so as to provide an opportunity to respond, usually accompanied by a formal complaint to the oversight body, neither of which occurred here: *Ghaddar* at paras 22 −23; *Canada (Citizenship and Immigration) v Singh,* 2016 FCA 96 at paras 66−67.

[40] In the circumstances where the Applicant has failed on three H&C applications, the onus of shifting blame to the representative, in this case an immigration consultant as chosen by the Applicant, would appear even more difficult.

[41] There is also insufficient evidence to support a conclusion that the Applicant was vulnerable simply because of her age. None of the doctors providing evidence in support of her

case addressed this issue, nor was this contention supported by evidence from family members or the supporting letters of friends which describe an active and engaged person.

[42] The Applicant is also critical of the Officer for referring to the availability of medicines in Haiti said to be essential for her life. This is said to demonstrate a capricious disregard for the extensive evidence of risk if removed to Haiti even temporarily while awaiting the outcome of an H&C decision.

[43] It appears that the Officer was focused on what was the most serious short-term risk to the Applicant's health described in the submissions as the "unavailability of medicines essential to the life of Ms. Pierre Paul in Haiti" [TRANSLATION]. The Officer's comment was only to the effect that these medicines were acknowledged to be available in the private sector making it a question of affordability. It was noted that her family members had indicated they would provide her with financial support. In any event, the Court finds that this comment has no bearing on the decision not to reconsider the H&C application.

[44] In light of the foregoing, the Court finds that the Officer's decision is sufficiently justified and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

VII. Conclusion

[45] The application is dismissed. No question is certified for appeal.

JUDGMENT in IMM-4041-17

THIS COURT'S JUDGMENT is that the application is dismissed. No question is certified for appeal and the style of cause is amended to reflect the correct Respondent, the Minister of Citizenship and Immigration.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4041-17
STYLE OF CAUSE:	ANNA PIERRE PAUL V. MCI
PLACE OF HEARING:	MONTREAL, QUÉBEC
DATE OF HEARING:	APRIL 30, 2018
JUDGMENT AND REASONS:	ANNIS J.
DATED:	MAY 17, 2018

APPEARANCES:

Richard Goldman	FOR THE APPLICANT
Lynne Lazaroff	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mylène Barrière Clinique Juridique des solutions justes Mission communautaire de Montréal Montréal, Québec	FOR THE APPLICANT
Attorney General Of Canada Montréal, Québec	FOR THE RESPONDENT