Federal Court Cour fédérale

Date: 20180719

Docket: IMM-4859-17

Citation: 2018 FC 762

Ottawa, Ontario, July 19, 2018

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MARGILITA COPADA APURA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns an application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds. Margilita Copada Apura (the "Applicant") is a citizen of the Philippines and came to Canada as part of the Government of Canada's Live-in Caregiver Program (LCP) in February 2015. She left behind her husband and three daughters so that she could support them with her earnings, as they live in rural poverty in the Philippines.

Shortly after coming to Canada, she gave birth to her youngest child, Anastacia, who is two years old and a citizen of Canada. The Applicant's employment as a live-in caregiver was terminated shortly after she gave birth to Anastacia.

[2] The Applicant applied for permanent residence on H&C grounds in September 2016. In support of her application, she submitted that she had established herself in Canada, that she faces adverse country conditions should she return to the Philippines, and that the best interests of her child will not be served by returning to the Philippines. The application was rejected by a Senior Immigration Officer (the "Officer") by way of a decision (the "Decision") dated October 30, 2017. The Officer conducted a "global assessment" of these three factors and remained unconvinced that the Applicant's situation qualified for a positive H&C determination.

[3] The Applicant comes before this Court seeking judicial review of the Decision, claiming that the Officer applied the incorrect legal standard, improperly analyzed the evidence, erred in the consideration of the best interest of the child, and misapprehended the evidence.

II. Facts

A. *The Applicant*

[4] The Applicant is a 42 year old citizen of the Philippines. She is married to Marlon Apura Colima (Mr. Colima) and they have four daughters: Mae (20 years old), Jashenna (17 years old), Marneth (15 years old) and Anastacia (2 years old). Mr. Colima and the three eldest daughters live on a farm in Maydolong East Samar, a rural part of the Philippines that was devastated by

Typhoon Haiyan in 2013. The eldest daughter attends college, while the other two daughters are in high school. Mr. Colima started a business by building a warehouse to process copra (copra is the flesh inside a coconut, which is used to make palm oil), but it was destroyed in the typhoon. He now farms and fishes for subsistence and some income.

[5] The Applicant grew up in a poor and abusive home; her father struggled with alcoholism and physically abusive, going so far as to threaten the Applicant's life on one occasion. The Applicant and her siblings experienced hunger and were sometimes pulled out of school to assist with farming. The Applicant nevertheless had the support of her sister, Florita, with whom she shared a close bond. They are close in age and, as adolescents, they moved together to the city of Manila to do domestic work for a wealthy family. The Applicant saved her money and eventually attended Eastern Samar State University, but could not complete her studies after giving birth to her second daughter because she could no longer afford it. Instead, she stayed at home to raise her daughters, and helped her husband on the farm.

[6] In 2001, Florita applied to work as a nanny in Hong Kong and, with her help, the Applicant eventually did the same. The Applicant travelled there in November 2003 and worked long days to finance the family's copra business and to pay off the loans she took to finance her travel. She continued working there until November 2007, after which she returned to the Philippines.

[7] The Applicant returned to school and obtained a bachelor's degree in early childhood education, graduating in March 2009. She twice wrote the standardized exams that are required

to enter her profession, but she did not pass them. Without the resources to try again, she returned to caring for her children at home, farming, and helping with the copra business.

[8] In 2013, Florita contacted the Applicant and encouraged her to take a course in caregiving so that she could travel to Canada and work for her employer. The following year, the Applicant applied to the LCP. She was accepted and entered Canada in February 2015. Shortly before leaving the Philippines, she found out that she was pregnant, so she notified her sister and prospective employer. Her sister offered to adopt the baby and allow it to remain in the Applicant's life, and the employer still wanted the Applicant to come to Canada to work for her.

[9] The Applicant signed a three-year contract and moved into her employer's home. She was paid $574.81 biweekly, after deductions were made for taxes, room, boarding and meals. She gave birth to Anastacia in August 2015, and requested maternity leave for 26 weeks due to serious complications associated with the delivery. The employer subsequently terminated the Applicant's employment, providing two weeks' wages, and offering an additional weeks' wages should the Applicant sign a "full and final release" from future lawsuits. By way of explanation, the employer said that she no longer had a need for the Applicant's services. This justification was offered in spite of the fact that the Applicant's employment contract stipulates that termination shall be "for just cause" (Certified Tribunal Record, p. 268).

[10] Out of a job and without a home, the Applicant moved in with Florita and her husband, but she did not stay there for long. The Applicant grew uncomfortable about having Florita adopt Anastacia, and told her sister and brother-in-law that she would no longer agree to the

arrangement. They had an argument during which the Applicant felt physically threatened, and she was kicked out of her sister's home. The Applicant called a friend, who called the police. Having no home, the Applicant moved into a shelter. She acted as a live-in caregiver to an elderly person for a few months, but this work arrangement did not last and the Applicant eventually moved back into the shelter.

B. *Conditions in the Philippines*

[11] The Applicant's husband and three daughters live in rural poverty in the Philippines. They have electricity on their farm, but do not have running water. They grow bananas and sweet potato, and Mr. Colima catches some fish. They sell what they do not eat, and can only occasionally afford rice and meat.

[12] Typhoon Haiyan devastated the Applicant's region of Maydolong East Samar. The warehouse that the Applicant's family had built for the copra business was destroyed, as were the crops that they were growing, such that the family had to rely on donations from humanitarian agencies. The family's home was not destroyed, but the kitchen was wrecked and needed repair.

[13] Diseases are present in the Applicant's region. The Applicant's husband has recently been hospitalized for dengue and typhoid, as has one of her daughters (Marneth). In the wake of the typhoon, flooding also caused the spread of cholera, typhoid and dengue.

C. *Decision Under Review*

[14] The analysis in the Decision begins by stating that “a positive H&C decision is an exceptional response to a particular set of circumstances or factors” and notes that the Applicant has put forward three H&C factors in her application, notably: establishment, adverse country conditions and the best interest of the child (Decision, p. 3).

[15] With respect to establishment, the Officer notes the length of time that the Applicant has been in Canada (two years) and that she was employed in the LCP but is no longer working. The Officer further notes that there was no evidence of fiscal management, but that the Applicant is self-sufficient. The Officer also notes the letters of support written by friends and acquaintances, and gives some positive consideration to them. The Officer concludes that the Applicant’s “efforts over a short duration do not merit exceptional discretion” and therefore accords this factor minimal weight (Decision, p. 4). The Officer then moves on to consider a psychiatrist report which diagnosed the Applicant with Post-Traumatic Stress Disorder (PTSD). The Officer notes that there is no evidence that the Applicant is receiving treatment for her PTSD, and accords the report “some weight” (Decision, p. 5).

[16] With respect to adverse country conditions, the Officer acknowledges that the economic climate of the Philippines is poor relative to Canada, and that some hardship may be associated with reintegrating in such conditions. However, the Officer finds that those difficulties “arise from the normal and foreseeable working of the law” (Decision, p. 5). The Officer determines that the Applicant is educated, acquired transferrable skills and experience in Canada and Hong

Kong that will assist her with her transition, and she will have the support of her family upon return. The Officer notes that the Applicant did not submit any proof of the remittances she claims to send to her family in the Philippines, and further takes issue with the fact that Mr. Colima's letter did not indicate how much in remittances he receives, and Mae's letter does not indicate that the Applicant paid her school fees. Accordingly, the Officer affords adverse country conditions "minimal weight."

[17] With regards to the best interest of the child, the Officer notes the following concerns with respect to Anastacia: return to the Philippines may expose her to tropical illnesses, she would not have adequate medical care if she falls ill, the quality of her education would be much poorer, and there are physical safety concerns due to high crime rates and terrorism. The Officer assumes that Anastacia will be returning to the Philippines with her mother, and determines that she will thus benefit from her mother's care and guidance through the transition to life in the Philippines. The Officer further notes that "the child's father, as well as three sisters and aunts and uncles all reside in the Philippines and insufficient objective evidence has been presented to indicate that they will be unable or unwilling to support the child with integration into Philippines society (*sic*)" (Decision, p. 7). The Officer acknowledges that Canada could be considered a more desirable place for Anastacia, and recognizes that she may enjoy better future opportunities in Canada as opposed to the Philippines; nevertheless, the Officer ultimately finds that the socio-economic advantage of remaining in Canada is not determinative of the outcome. The Officer further finds that the Applicant's fear of her daughter catching a tropical disease is speculative, and finds no evidence that any of the Applicant's children or family has caught one of those diseases and was not able to obtain medical care. The Officer concludes by stating that

he or she is “not satisfied that a negative decision in this matter, while difficult is contrary to [Anastacia’s] best interests” (Decision, p. 9).

III. Issues

[18] The Applicant identified the following issues for consideration on judicial review:

- The Officer erred by relying on the incorrect legal test
- The Officer’s analysis of the Applicant’s mental health was unreasonable
- The Officer’s analysis of the best interest of the child was unreasonable
- The Officer misapprehended the evidence

IV. Analysis

A. *The Officer erred by relying on the incorrect legal test*

[19] The Applicant argues that the Officer relied on an incorrect legal test by applying a standard of “exceptional” circumstances in order for an H&C exemption to be granted. The Applicant notes that this word is used twice in the Decision, where the Officer is describing the nature of the H&C analysis and where the Officer characterizes the discretion which he or she will exercise. The Applicant argues that, following the Supreme Court of Canada’s decision in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], an Officer deciding an H&C application must consider hardship in addition to any other relevant factor that might justify an exemption. The Applicant then cites a line of jurisprudence to illustrate that the Federal Court has consistently required that decision-makers apply the expanded approach outlined in *Kanthasamy* when considering an H&C application.

[20] The Respondent argues that the Supreme Court of Canada's decision in *Kanthasamy* did not alter the jurisprudence that a positive H&C decision is an "exceptional" remedy. In support of the argument, the Respondent cites this Court's decisions in: *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 [*Serda*]; *Douglas v Canada (Citizenship and Immigration)*, 2017 FC 703 at para. 29 [*Douglas*]; *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para. 27 [*Zlotosz*]; *Dubovtsev v Canada (Citizenship and Immigration*), 2008 FC 1368 at para. 12 [*Dubovtsev*]. The Respondent urges that *Kanthasamy* merely clarified that the former "unusual and undeserved or disproportionate hardship" threshold should not be used as a strict test.

[21] The parties do not agree upon the law, specifically the interpretation of *Kanthasamy*. Recalling that the standard of review in this case is correctness, no deference is owed to the decision-maker. In other words, if the Court is of the view that the Officer stated or applied an incorrect legal test, the Decision must be quashed.

[22] Contrary to the position of the Respondent, there is no doubt that the law has changed since *Kanthasamy*. The paragraph that the Respondent refers to in *Douglas* was a summary of one of the litigant's positions, not this Court's analysis of the test. *Serda* and *Dubovtsev* predate *Kanthasamy* and are thus of no value to the Respondent's position. As such, we are left with *Zlotosz*. In that case, Justice Diner relied upon the finding of Justice Brown in *Ngyuen v Canada (Citizenship and Immigration)*, 2017 FC 27 [*Nguyen*] at para. 29, which I shall reproduce in its entirety:

> The Applicant asked me to find that *Kanthasamy* has brought an end to the principle that H&C relief is extraordinary, as was held in

> *Khosa v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 24 (CanLII) at para 6, citing *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII), [2002] 1 SCR 84 [*Chieu*]. With respect, there is no such injunction in *Kanthasamy*. While raised in the dissent, the majority is silent on this point. It is difficult to construe the Supreme Court of Canada's silence as effecting a change in the law, given the Court had the opportunity to do so explicitly had that been its intent. Since section 25 of IRPA is not a parallel or "alternative immigration scheme", it seems to me that H&C considerations are still properly considered to be extraordinary and, as *Chirwa* put it, a form of "special relief".

In any event, my own review of the jurisprudence suggest that there are, in fact, other cases (aside from *Zlotosz* and *Ngyuen*) where this Court has accepted that H&C is an "exceptional" or "extraordinary" form of relief: *Lovo v Canada (Citizenship and Immigration)*, 2018 FC 329 at para. 17; and *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 at paras. 54-55.

[23] I accept my colleagues' views, subject to one important caveat which I do not think to be contradictory. When a decision-maker's H&C analysis suggests that absence of "exceptional" or "extraordinary" circumstance forms the basis of the decision to deny relief, it is to impose the incorrect legal standard. It is to commit an error akin to that which was committed in *Kanthasamy*, where H&C decision-makers were incorrect to impose the "unusual and undeserved or disproportionate hardship" threshold. Moreover still, it is to apply a standard that does not find expression in the text of s. 25 of the *Immigration and Refugee Protection Act* ("*IRPA*"*)*.

[24] Having discussed the test and with the *Chirwa* factors in mind, I now turn to examine what was done in the case before me. The Decision reveals neither a correct appreciation of the

legal test, nor an appropriate application of the test as stipulated in *Kanthasamy*. Humanitarian and compassionate factors ought to direct the decision-maker's attention to the fact that the Applicant has been trying to support her family to the best of her ability, but has faced many setbacks in doing so, most of which are beyond her control. The family's experience with a devastating typhoon is one factor, and her termination six months into a three year contract of employment (quite possibly on the basis of her pregnancy) is another. The Officer applied the incorrect legal test by failing to have sufficient regard for the equitable relief purpose behind s. 25 of the *IRPA*. The following passages are illustrative of this problem:

> A positive H&C decision is an exceptional response to a particular set of circumstances or factors related to the applicant.
>
> [Decision, p. 3]
>
> […]
>
> I find her efforts over a short duration do not merit exceptional discretion.
>
> [Decision, p. 4]
>
> […]
>
> I have taken into account the applicant's situation and the hardships she identified in terms of returning to the Philippines.
>
> [Decision, p. 5]
>
> […]
>
> There will inevitably be some hardship associated with being required to leave Canada.
>
> [Decision, p. 5]
>
> […]
>
> Should the applicant's children in the Philippines experience any hardships.
>
> [Decision, p. 9]

[…]

> [T]he H&C process is not designed to eliminate all hardships.
>
> [Decision, p. 9]

[25] By contrast, the only appropriate appreciation for the correct test appears once in the Decision, where it is stated that the Applicant bears the onus "of satisfying the decision-maker that the granting of permanent resident status or an exemption from any applicable criteria or obligations of the IRPA is justified by humanitarian and compassionate considerations [emphasis added]" (Decision, p. 2). Although there are no "magic words" to illustrate when the appropriate legal test under s. 25 has been properly applied, the above passages suggest to me that the Officer did not have due regard to the principles enunciated in *Kanthasamy*, and instead applied a test that focuses on hardship to the exclusion of the *Chirwa* humanitarian and compassionate considerations. This error must be corrected upon redetermination.

B. *The Officer's analysis of the Applicant's mental health was unreasonable*

[26] The Applicant argues that the Officer's evaluation of Dr. Parul Agarwal's report was unreasonable. The Applicant submits that the Officer's consideration of this evidence was brief and perfunctory, and that the Officer gave the report "some" weight exclusively on the grounds that the Applicant is not receiving treatment for her PTSD in Canada. The Applicant again points to *Kanthasamy* for the proposition that Officers cannot reduce the weight afforded to mental health evidence on the basis of a failure to access treatment. The Applicant then cites *Kanthasamy*, *Davis v Canada (Citizenship and Immigration)*, 2011 FC 97 [*Davis*] and *Lara Martinez v Canada (Citizenship and Immigration)*, 2012 FC 1295 [*Martinez*]. The Applicant

further contends that the Officer erred by failing to turn his or her mind to the impact that removal would have upon the Applicant's mental health.

[27] The Respondent contends that the Officer's assessment of the psychiatrist report (erroneously referring to it as a psychologist report) is reasonable. The Respondent suggests that that the Officer simply observed that the Applicant is not receiving treatment for PTSD in order to clarify that there would be no interruption to treatment if she leaves Canada. The Respondent further contends that there is no obligation on the Officer to explicitly consider the impact that removal would have on the Applicant's mental health, because the psychiatrist's report in this case does not raise this issue. The Respondent distinguishes *Kanthasamy*, *Davis* and *Martinez* by noting that, in each of those cases, the medical reports specifically raised the issue of the applicants' mental health upon return to the country of origin.

[28] In my view, *Kanthasamy* stands for the proposition that, having accepted a mental health diagnosis, there is no need to adduce additional evidence about treatment; in the words of Justice Abella, to do so would give rise to the "problematic effect of making [a mental health diagnosis] a conditional rather than a <u>significant</u> factor [emphasis added]": *Kanthasamy* at para. 47. In the case at bar, the Officer provides no explanation as to why the psychiatrist report is afforded "little weight." Both parties have speculated about the Officer's observation that the Applicant is not receiving treatment in Canada: the Respondent suggests that this simply constitutes recognition that there would be no interruption to treatment, where the Applicant contends that weight was reduced solely because she was not seeking treatment. In my view, such speculation is not needed to resolve the issue; the Officer simply has not discharged the burden of explaining

how he or she arrived at the conclusion to afford little weight to the report, rendering that conclusion unreasonable.

[29] In any event, the Officer should have considered the impact of return upon the Applicant's mental health. In my view, it is not unreasonable to expect that decision-makers draw reasoned inferences from a report that signals mental health issues. If the impact upon return is not specifically analyzed, an officer may draw his or her own reasonable conclusions based on the totality of the evidence. That is the approach that is taken with other medical issues: *Mings-Edwards v Canada (Citizenship and Immigration)*, 2011 FC 90 at para. 12, and there is no principled basis upon which to distinguish mental health conditions from other medical conditions. In the case at bar, the Officer did not need the doctor to contemplate the impact of return to make the Applicant's PTSD a live issue. The report provides a clear diagnosis of the condition, its stressors and symptoms, and thus it was incumbent upon the Officer to consider the impact that removal would have in light of that evidence. His or her failure to do so was unreasonable.

V. Conclusion

[30] For the foregoing reasons, judicial review is granted. The Officer's H&C analysis lacks appreciation for the "humanitarian and compassionate" considerations that are mandated by s. 25 of *IRPA*, and instead appears to be overly preoccupied with hardship and determining whether this Applicant's circumstances merit "exceptional" relief. On this basis alone, the Decision cannot stand. However, the Officer further erred with respect to his or her consideration of the Applicant's mental health evidence.

[31] Finding, as I have, the Officer understood and applied the incorrect legal test and unreasonably assessed the Applicant's mental health evidence, it is unnecessary to address the other issues put forward on this application for judicial review.

VI. Certification

[32] Counsel for both parties was asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

JUDGMENT in IMM-4859-17

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter referred back for redetermination by a differently officer in accordance with these reasons.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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