Federal Court  Cour fédérale

Date: 20190307

Docket: IMM-2919-18

Citation: 2019 FC 280

Ottawa, Ontario, March 7, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

ERICA JANE GUNA MALONZO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review by Erica Jane Guna Malonzo [the "Applicant"] in respect of a May 14, 2018 decision [the "Decision"] of an immigration officer in the Philippines [the "Officer"] refusing the application for a permanent residency visa. In the Decision, the Officer held that there were insufficient humanitarian and compassionate ["H&C"] grounds to warrant relief.

II. Background

[2] The Applicant is a 29 year old single woman who is a Filipino citizen. She resides in the Philippines.

[3] The Applicant has a nine year old child, Prince Gabriel Valisno Navarro ["Gabriel"], who lives in Canada with his legal guardian. Gabriel's legal guardian is the Applicant's mother, Marilou Cortiguerra ["Marilou"]. Marilou is supported as Gabriel's caretaker by the Applicant's stepfather, Federico Robles Cortiguerra ["Federico Sr."]. Marilou, Gabriel, and Federico Sr. currently all reside together in Calgary, Alberta.

[4] In 2011, the Applicant, her child, Marilou, and Federico Sr. were sponsored by Federico Sr.'s son, Federico Robles Cortiguerra Jr. ["Federico Jr."] through a family class sponsorship. The Applicant and Gabriel were included in the sponsorship application as the Applicant at the time seemed to meet the legal definition of being an accompanying dependent.

[5] In 2013, Citizenship and Immigration Canada (as it was at the time) accepted the family sponsorship and issued Confirmations of Permanent Residencies ["CoPRs"] for all four family members. The Applicant said that in this time period, there was a family dispute between Federico Jr. and her. Apparently, the Applicant was disrespectful to Federico Sr. As a result, Federico Jr. wanted to punish her by not allowing her to come to Canada.

[6] Since then, the Applicant's evidence is that she has apologized for her actions and "totally proved to the family th(at) she deserves a second chance".

[7] The Applicant indicated that because she was "forbidden" by her family from travelling to Canada at the time of the dispute, and without legal advice, she did not request an extension of time to confirm her permanent resident status. Eventually, her CoPR expired.

[8] But in contrast the evidence shows that from 2011 to 2014, the Applicant was in a common-law relationship with a man in the Philippines named Marc Saavedra ["Marc"]. Marc was the Applicant's first partner since Gabriel's biological father Noeni Navarra. The Applicant did not disclose this common-law relationship in the original sponsorship application. Had she done so, she would not have met the definition of being a dependent during the initial sponsorship as per section 117(1)(h) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ["Regulations"].

[9] When the Applicant began her relationship with Marc in 2011, she left Gabriel to be cared for by Marilou and Federico Sr. The Applicant provided consent for Gabriel to travel with Marilou and Federico Sr. when they moved to Canada on February 28, 2014 under the sponsorship agreement.

[10] The Applicant chose to stay behind with her boyfriend Marc. The Applicant stated that she was so attached to her boyfriend that she could not imagine being separated from him even for "one day". The notes from the interview by the Officer indicate that she was content with not

coming to Canada at the time, as she had been living as a common-law partner with Marc. She said she did not want to leave Marc when Marilou and Federico Sr. said that Marc could not come with them to Canada.

[11] In December 2015, Marilou and Federico Jr. submitted a sponsorship application, for the Applicant to come to Canada, pursuant to H&C considerations.

[12] The Applicant attended an interview at the Canadian embassy in Manilla on April 18, 2018. The Officer took extensive notes during the interview.

[13] In her interview, the Applicant said that she became involved in drugs and alcohol due to the bad influence of Marc. The Applicant further indicated that her parents told her that she could not come to Canada when she was with Marc. She claims that she had no issue with this decision at the time, given that she thought she would be able to be sponsored within a 6-12 month period after she broke up with her common-law partner.

[14] The Applicant in the interview admitted to not working or attending school in the interim.

[15] She confirmed in the interview that her mother Marilou is the legal guardian of Gabriel, and together with Federico Sr., they are the sole caregivers and financial providers for Gabriel.

[16] On May 14, 2018, the Applicant received confirmation that her application had been rejected and that she would not be granted an exemption based on H&C factors under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ["IRPA"].

III. Style of Cause

[17] The Style of Cause will be amended to show the Respondent as "The Minister of Citizenship and Immigration".

IV. Issues

A. Was the Officer's Decision reasonable?

V. Standard of Review

[18] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, the Supreme Court of Canada held that a visa officer's assessment for H&C relief under section 25(1) of the IRPA is subject to a reasonableness standard, given the exceptional and discretionary relief sought.

VI. Analysis

A. *The Law*

[19] The relevant provisions of the Act reads as follows:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**

25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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.

25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, 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.

[20] The relevant provisions of the Regulations reads as follows:

Member

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is

(a) the sponsor's spouse, common-law partner or conjugal partner;

(b) a dependent child of the sponsor;

(…)

(h) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father

Regroupement familial

117 (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :

a) son époux, conjoint de fait ou partenaire conjugal;

b) ses enfants à charge;

(…)

h) tout autre membre de sa parenté, sans égard à son âge, à défaut d'époux, de conjoint de fait, de partenaire conjugal, d'enfant, de parents, de membre de sa famille qui est l'enfant de l'un ou l'autre de ses parents, de membre de sa famille qui est l'enfant d'un enfant de l'un ou l'autre de ses parents, de parents de l'un ou l'autre de ses

of that mother or father (i) who is a Canadian citizen, Indian or permanent resident, or (ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.	parents ou de membre de sa famille qui est l'enfant de l'un ou l'autre des parents de l'un ou l'autre de ses parents, qui est : (i) soit un citoyen canadien, un Indien ou un résident permanent, (ii) soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

B. *Fettering Discretion*

[21] The Applicant submits that the Officer fettered his or her discretion, thus rendering the Decision unreasonable. According to the Applicant, the Officer focused too heavily on the fact that the Applicant did not properly provide information that she had a common-law partner, which would have disqualified her under section 117(1)(h) of the Regulations in the original sponsorship application.

[22] The Applicant further argued that the Officer fettered his or her discretion by focusing on the negative factors as to why she was not eligible, and looking through a prism of misbehaviour, instead of focusing on H&C factors. The Applicant submits that the Officer erred by saying she chose not to go to Canada, when in fact she just accepted her family's decision. This is a distinction that the Applicant argues makes the Decision unreasonable.

[23] Another error advanced by the Applicant is that the Officer stated that she made a strategic decision to send her son with her parents, which she claims is not true. The Applicant said that she accepted the situation only because she understood she would be reunited with

Gabriel in 6 months or so. The Applicant's position is that the Officer's conclusion that the Applicant caused the situation she finds herself in is inaccurate, and consequently constitutes a significant error.

[24] The fact that the Officer considered the evidence provided by the Applicant during the interview regarding her choices cannot be read as fettering the Officer's discretion. I find that the Officer, rather than vindictively focusing on past misrepresentation, actively assessed whether the particular circumstances were so compelling as to merit the extraordinary remedy afforded by section 25(1) relief.

[25] While the Officer was entitled to note the past misrepresentation, I do not find that there was an undue focus on this issue of past misrepresentation. In reading the Decision, I find instead that the Officer took into account the best interests of the child ["BIOC"] as well as other factors, which is not indicative of the decision maker fettering his or her discretion.

C. *Unreasonable Assessment Factors*

(1) BIOC Assessment

[26] The Applicant submitted that the Officer was unreasonable in his or her determination of the BIOC, and that the analysis related to the BIOC was almost non-existent. Further, the Applicant argued that the Officer only focused on whether it was in the best interests of Gabriel to remain in Canada, as opposed to assessing whether it was in his best interest to be reunited with his mother by allowing her to come to Canada based on H&C factors.

[27] The Applicant's position is that there is no mention of the fact that Marilou and Federico Sr. are ageing, making it difficult for them to continue to work and look after the child. The Applicant argued that the Officer ignored the evidence presented by the Applicant in the form of two letters and that the Officer did not evaluate these letters that relate to the question of the BIOC.

[28] Another argument advanced by the Applicant is that there is no mention of the Applicant's hardship that she was in a relationship with a man who influenced her to drink and do drugs. In argument the Applicant said that she became involved in this relationship after being in a vulnerable position after having a child at the age of 19. The Applicant argued that the Officer gave no consideration of that issue.

[29] The Applicant further takes issue with the assessment that her mother and step-father are the ideal guardians. The Applicant argues that the Officer does not consider the hardship of the separation on Gabriel and the Applicant, and further does not consider that Marilou and Federico Sr. are ageing.

[30] The letters referred to by the Applicant are somewhat dated. One is an email dated September 20, 2015, called a "letter of compassion" and the other is from her brother-in-law. As noted above, there is no evidence provided by a school or other independent assessor.

[31] The September 20, 2015 email by the Applicant, which expresses her love for her child, is touching. She decided that her child would have a better life in Canada with his grandparents.

[32] The Officer noted that they had considered all the information and documents and I have no reasons not to believe this letter was not considered. The Officer in their deliberation show that they considered not only the love expressed in the letter but also the other circumstances and evidence. The interview notes show that when she left in 2011 to live with her boyfriend (2011 to 2014), and left her son, she visited him about once a month. She stated, "…I did not feel that I was capable of raising him". It cannot be said the Officer ignored any evidence or any other evidence presented by the Applicant.

[33] Further, there was no evidence put forward that the child was not being well cared for by Marilou and Federico Sr., as the Applicant led evidence that the child was always being supervised, and that the grandparents had been the child's caretakers since infancy. Also part of the consideration was that Gabriel's grandparents are the legal guardians per the relevant guardianship order issued by the Calgary Provincial Court. As well, the Officer considered the fact that together, Marilou and Federico Sr. have essentially acted in the capacity of parents since Gabriel's birth.

[34] The facts of this case are very sympathetic but it must be remembered that the onus is on the Applicant to provide the evidence for the decision maker to make the BIOC analysis on. The evidence that was filed was considered by the Officer, but the Applicant provided very little evidence of this nature. It is not the role of the officer to obtain information as the onus is on the applicant. For example there is no evidence provided by a school or any other independent assessor concerning the effects on the child of the separation or of the guardian's ability to manage the childcare responsibilities.

[35] It is also important to note that H&C is an extraordinary remedy, and for the H&C application to be granted, the relevant evidence must reflect that high standard.

[36] While it is possible to come to a different conclusion on the BIOC analysis – considering the fact that Marilou and Federico Sr. are getting older, who themselves state that they are finding it more difficult to take care of Gabriel alone - it is not my role to make that decision. Given that the Officer had conducted an in-person interview, and has the expertise gained from being an in-country officer, a high degree of discretion must be afforded to this assessment on the reasonableness standard.

[37] The BIOC analysis is reasonable and grounded in the evidence including independent country condition documentation

(2) Negative Factor Regarding Motivation

[38] The Applicant argues that the Officer unfairly criticized her inability to obtain gainful employment in the Philippines, as this ignores the country condition information regarding how single mothers face difficulty in trying to become employed. The Applicant argued that the focus on her “motivation” is unjustified and in error.

[39] The argument was advanced by submitting that the Officer “suggested that because Erica apparently lacked motivation and willingness to improve her situation in the Philippines, she would also exemplify those same qualities in Canada, ergo, where she resides is of no bearing to the assessment since the end result will be the same”.

[40] The Officer found that:

- The Applicant has taken no steps to change her life, including not returning to pursue education, or to seeking employment opportunities, demonstrating a "lack of motivation". The Applicant remains financially dependent on her mother, who is currently employed as a janitor;
- The Applicant appears to show little motivation to be a parental caretaker by seeking employment, further education, or anything that would demonstrate a new attitude;
- Rather, she is currently volunteering at the Jesus Miracle Crusade "Pastoral" church for a rather superficial reason: to avoid falling into "temptation" (like falling in love again).

[41] The Officer did not err in looking at motivation as one of many factors in assessing the H&C factors that were to be considered in this application for a permanent residency visa. The motivation factor was discussed in answer to the Applicant advancing that she, "…fears she may find difficulties in finding employment in the Phils resulting in financial problems…" The Officer further found that "While I recognize that Cda offers better employment opportunities as compared to the Phils, it is not the lack of opportunities that caused PA's current situation… I do not see how this lack of motivation will change if PA goes to Cda". The Officer's examination of her motivation is appropriate and is part of the Officer's role to assess the "hardship" component important in the H&C determination of a permanent residency visa application.

[42] The cases relied on by the Applicant, *Lauture v Canada (Minister of Citizenship and Immigration)*, 2015 FC 336; *Marshall v Canada (Minister of Citizenship and Immigration)*, 2017 FC 72, concern errors made in H&C applications when motivation was used to assess an

applicant's establishment in Canada. These two decisions are in contrast to these facts, where motivation was used in making a determination on a permanent residency application and whether H&C factors could warrant relief. The factual differences make those cases inapplicable in this situation.

[43] I find that the Officer's assessment that the Applicant has not made an appropriate effort to become self-sufficient is reasonable and supported by the record.

D. *Wrong Section*

[44] In the written material, the Applicant presented an argument related to the Officer citing the wrong section of the Regulations. I informed him that this argument was unlikely to succeed as it was a matter of substance over form and that the correct test had been used. The Applicant did not dispute this assessment.

[45] It is important to note that the above cannot be read as a kind of *carte blanche* for an officer to be careless in their citation of a section, as clearly the section of the act being relied on is important. On these facts, however, it was clear that the test used and the section relied on were the correct one, and that the misstatement of the section was a typographical type of error. For that reason, I do not find there to be a procedural fairness error that makes this decision reviewable.

E. *Conclusion*

[46] Reasonableness requires that the decision must exhibit justification, transparency and intelligibility within the decision-making process. The decision must be within the range of possible, acceptable outcomes, defensible in fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12). In conclusion, the Decision meets the test as set out above for being reasonable.

JUDGMENT in IMM-2919-18

THIS COURT'S JUDGMENT is that:

1. The Style of Cause will be amended for the Respondent to be "The Minister of Citizenship and Immigration";
2. The application is dismissed; and
3. There is no certified question.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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