Federal Court  Cour fédérale

Date: 20190625

Docket: IMM-1783-18

Citation: 2019 FC 857

Ottawa, Ontario, June 25, 2019

PRESENT: Mr. Justice Brown

BETWEEN:

JANETH LOPEZ GALLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review by the Applicant, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a rejected application for permanent residence on humanitarian and compassionate grounds [H&C] made by a senior immigration officer [Officer], dated March 28, 2018 [Decision].

II. Facts

[2] The Applicant is a Mexican citizen, born in 1992. She came to Canada with her mother in 2008 at the age of 16. They filed a claim for refugee protection in Canada in September, 2008, based on physical and sexual abuse of the Applicant by her brother in Mexico, who is now deceased, and her father. The Refugee Protection Division [RPD] rejected the claim in 2011, finding an internal flight alternative [IFA] in Guadalajara, Mexico. The Applicant's mother was removed from Canada. The Applicant went into hiding and was not removed. The Applicant then initiated a pre-removal risk assessment which was refused in 2012. She filed her H&C application in December, 2016.

[3] The Applicant was scheduled for removal in July, 2017. She submitted a deferral request and filed an application for leave and judicial review of a deemed refusal to defer removal. The deferral request was denied, but Justice Manson stayed the removal order.

[4] The Officer rejected the Applicant's H&C on March 28, 2018. The Applicant filed an application for leave and for judicial review on April 18, 2018. On December 20, 2018, CBSA informed the Applicant she was scheduled for removal to Mexico City. Counsel for the Applicant submitted a deferral request. Justice Boswell granted a stay of removal in January, 2019, pending disposition of the current application for judicial review.

[5] At the time of the Decision, the Applicant was 25 years old with a Canadian-born four-year-old daughter. She is now 26 and her daughter is now 5. Her H&C is based on her

establishment in Canada, the best interest of her daughter, lack of support services in Mexico, and stigma of unwed mothers in Mexico. The Applicant claims she suffered from psychological and sexual abuse by her father and brother in Mexico. A psychiatrist has diagnosed her with PTSD. Her brother was killed in Mexico and the people who killed him are no longer in prison.

III. Decision under review

[6] The Applicant's H&C application was refused. The Officer gave some weight to the Applicant's establishment and integration in Canada, but put greater weight on the likely success the Applicant would have returning to her native country. The Officer also gave significant weight to the RPD's findings regarding state protection in Mexico and the IFA in Guadalajara. The Officer found it would be in the best interest of the daughter to remain with her mother, especially since the father was allegedly deported from Canada to Trinidad in April 2014. The Officer further decided the Applicant provided insufficient evidence to establish instability to access medical care and mental health services in Mexico for herself or her daughter, should the need arise.

[7] The Officer also concluded, somewhat counterintuitively, that there was insufficient evidence to demonstrate that the best interest of the daughter - a Canadian citizen born in Toronto - would be compromised should she relocate to Mexico with her mother. This finding was discussed at the hearing, and I am not persuaded it comports with the realities of this case.

IV. Issues

[8] The Applicant raised a number of issues, however I need only deal with two:

A. The Officer failed to consider the current medical evidence of mental health; and

B. The Officer misapplied the establishment test.

V. Standard of review

[9] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57, 62 [*Dunsmuir*], the Supreme Court of Canada holds that a standard of review analysis is unnecessary where "the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." A review of an officer's H&C decision is conducted on the reasonableness standard: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44. The decision of whether to grant or deny an exception for H&C reasons is "exceptional and highly discretionary; thus deserving of considerable deference by the Court": *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335, per Zinn J at para 30.

[10] In *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55, the Supreme Court of Canada explains what is required of a court reviewing on the reasonableness standard of review:

> [55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts

> and law" (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14). When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

[11] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

VI. Analysis

A. *The Officer failed to consider the current medical evidence of mental health*

[12] The Applicant submits the Officer failed to consider the psychological impact on removal in terms of both the Applicant and the daughter. Three reports regarding the Applicant's mental health were before the Officer: (1) a registered psychotherapist's report dated October 5, 2016, stating the Applicant exhibits symptoms consistent with PTSD, "general anxiety disorder, and major depressive disorder due to the extensive sexual abuse, rape, and threats she endured in

Mexico ..."; (2) a psychiatric report of a psychiatrist, a specially trained medical doctor, dated June 28, 2017, confirming the Applicant's PTSD diagnosis; and (3) a letter from the Applicant's primary care physician - also a medical doctor - dated July 10, 2017, which indicated that the Applicant has symptoms of PTSD. The physician also expressed the "opinion that returning to Mexico will cause harm for both [the Applicant and her daughter] with regards to mental health and personal safety."

[13] The Applicant submits the Officer failed to address the 2017 documents; see Decision at page 5: "I have also considered that the this [*sic*] assessment was completed in October 2016 and since that time insufficient objective evidence has been provided regarding the applicants [*sic*] current mental health as well as any treatment she has had."

[14] Despite very able efforts by counsel for the Minister, the failure of the Officer to deal with either of the two medical opinions provided by the doctors concerned leaves me unpersuaded they were properly or adequately considered. I appreciate officers need not deal with all the evidence, and I am aware of the presumption that they have read the entire file. But given the fact the opinions from the doctors were considerably more current that those of the psychotherapist, and also came from considerably more qualified professionals in the field, particularly from the psychiatrist, the Applicant must succeed on this point.

B. *The Officer misapplied the establishment test*

[15] I am also of the view that the Officer in effect and unreasonably flipped the Applicant's success in making a life for herself and her daughter in Canada, into a negative by using it to

find, in effect, the Applicant and her Canadian daughter will easily integrate into the Mexican society she left 10 years ago at the age of 16, and with which she has had no discernible contact since.

[16] The Applicant takes issue with these excerpts of the Decision at pages 6, 7:

> In addition, the applicant presents herself as [*sic*] adaptable and resourceful individual. I note she left Mexico with her mother in 2008 and travelled to Canada. After her mother was removed from Canada she remained in Canada with limited ties to Canada, she has overcome many adversities and demonstrated an ability to adapt to new locales, differing cultures, different languages, life changes, including associated life situations, i.e. securing employment, integrating, having a child, etc... I accept that returning to her native Mexico will not be without its difficulties and that there will be a period of adjustment. However, the applicant would not be returning to an unfamiliar place, language or culture.
>
> ...
>
> It is important to note that the applicant had the wherewithal to move to Canada, secure a residence after her mother left Canada, seek employment, forge friendships and raise her daughter on her own. I am satisfied that the applicant can do the same upon return to Mexico**.**

[17] The Applicant submits the Officer misapplied the 'evidence of establishment' test because the Officer used the Applicant's establishment in Canada against her: see *Lauture v Canada (Minister of Citizenship and Immigration)*, 2015 FC 336, per Rennie J, as he then was [*Lauture*]:

> [21] In the present case, the Officer concluded that the applicants' "engagement in society is remarkable" and that the relations they had formed with their community were significant. However, despite this conclusion the Officer did not weigh the establishment factor in the applicants' favour, and instead dismissed the factor on the basis that community involvement also

> may occur in Haiti. This is not a proper application of the establishment factor.
>
> …
>
> [23] Instead of assessing whether the applicants would be able to volunteer and attend church in Haiti, the Officer should have assessed the applicants' evidence of employment, volunteer work, and integration in their community *in Canada*. The Officer then should have considered whether this factor favours the application, is neutral, or weighs against the application.

[18] I appreciate the applicants in *Lauture* provided considerably more evidence of establishment than the Applicant did in the case at bar, but nonetheless, the Officer in my view unreasonably transformed that evidence into negative findings in both cases. Doing so creates an internal conflict in the Officer's reasons; on the one hand the Applicant's establishment is elevated to justify a finding of ease of return, but on the other hand, it is diminished so as to weaken her establishment. As Justice Rennie found: "Instead of assessing whether the applicants would be able to volunteer and attend church in Haiti, the Officer should have assessed the applicants' evidence of employment, volunteer work, and integration in their community *in Canada*. [Emphasis in original.]" In my view, this was not done but should have been in this case as well.

[19] The principle set out in *Lauture* was confirmed recently in *Aguirre Renteria v Canada (Minister of Citizenship and Immigration)*, 2019 FC 134, per Barnes J at para 8:

> [8] I also question the Officer's treatment of Mr. Aguirre's Canadian establishment as effectively a reason to send him back to Colombia. This is the type of Catch-22 thinking that was of concern to Justice Donald Rennie in *Lauture v Canada*, 2015 FC 336 at para 26, [2015] FCJ No 296. Credit for Canadian establishment should be given and not used as an excuse to deny

relief: see *Sebbe v Canada*, 2012 FC 813 at para 21, [2012] FCJ No 842.

[20] These matters taken individually or cumulatively are determinative and give rise to judicial review being granted. Given this conclusion I need not consider the other points raised.

VII. Conclusion

[21] Stepping back and looking at the Decision as an organic whole, I am of the view it is unreasonable. Keeping in mind that judicial review is not a line-by-line treasure hunt for errors, I am of the view that the Decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, pursuant to *Dunsmuir* at para 47.

VIII. Certified question

[22] Neither party submitted a question of general importance to certify, and none arises.

JUDGMENT in IMM-1783-18

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for redetermination by a different decision-maker, no question is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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