Federal Court  Cour fédérale

Date: 20190711

Docket: IMM-5780-18

Citation: 2019 FC 925

Vancouver, British Columbia, July 11, 2019

PRESENT: Madam Justice Strickland

BETWEEN:

FEBRILLET LORENZO
FRANCIS CAROLINA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of a Senior Immigration Officer [Officer] refusing the Applicant's application, made pursuant to s 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

Background

[2] The Applicant, Francis Carolina Febrillet Lorenzo, is a citizen of the Dominican Republic. She initially came to Canada on a visa in April 2012. On December 27, 2015, she married Juan Castillo Sanchez, who subsequently sponsored her application to become a permanent resident of Canada. They divorced on January 25, 2017 and on that same day he withdrew his spousal sponsorship. On May 30, 2017, the Applicant made an application for permanent residence on H&C grounds. In a decision dated November 21, 2018, her application was refused. That decision is the subject of this application for judicial review.

Decision Under Review

[3] The Officer stated that he or she had considered the evidence the Applicant had advanced for consideration with respect to her establishment in Canada. The Officer noted that the Applicant has resided in Canada for approximately 6 years, she is self-employed as a cleaner, she is involved with her church, and has volunteered in the community. The Officer found her efforts to be commendable and gave her establishment some weight.

[4] The Officer noted that the Applicant wanted to remain in Canada because she had no home, a lack of family support, and a lack of medication in the Dominican Republic. She also feared poverty, drugs, unemployment, corruption and crime. However, the Applicant had provided insufficient evidence to satisfy the Officer that she could not reasonably seek or obtain employment in the Dominican Republic given her education, skills, and work experience acquired there and in Canada.

[5] The Officer acknowledged that the Applicant has family and friends in Canada. The Officer stated that he or she did not discount the ties that had developed between the Applicant and her family and friends here. However, the Officer was not satisfied that the Applicant could not return to the Dominican Republic and still maintains her relationships with them. Further, there was insufficient evidence to establish that these relationships were characterized by a degree of interdependency and reliance such that separation would justify the granting of an H&C exemption on that basis.

[6] While acknowledging that different standards of living exist between countries, the Officer stated that Parliament did not intend the purpose of s 25 of the IRPA to be to make up for the difference in standard of living between Canada and other countries. Rather, its purpose is to give the Minister the flexibility to deal with situations which were unforeseen by the IRPA where H&C grounds compel the Minister to act.

[7] The Officer also acknowledged that the Applicant suffered physical, sexual and psychological abuse at the hands of her Canadian permanent-resident husband while she lived in Canada. While sympathetic to her circumstances, the Officer concluded that he had insufficient objective evidence before him that she would face harm at her former husband’s hands if she were to return to the Dominican Republic. Nevertheless, the Officer had reviewed country conditions in the Dominican Republic, but found that if the Applicant felt threatened or encountered difficulties in her country, she could seek assistance of the police or the judicial system.

[8] The Officer also noted that the Applicant had spent the majority of her life in the Dominican Republic. While the Officer accepted that she may face some difficulties in readjusting to life there, she had not persuaded the Officer that it would justify granting an exemption under H&C considerations. Further, she would be returning to existing friends, social networks and a familial network.

[9] The Officer stated that he or she had considered all information and evidence regarding the application in its entirety. After reviewing the factors and evidence presented, the Officer was not satisfied that the Applicant had established that a positive exemption was warranted on H&C grounds.

Issues and Standard of Review

[10] The Applicant is self-represented in this judicial review as she was in making her H&C application. In her written submissions in support of this application, she lists many alleged errors made by the Officer such as following an irregular process; fettering of discretion; breaching unspecified *Charter* rights and unspecified provisions of the IRPA and regulations; and reliance on extrinsic evidence. However, these allegations of error are not otherwise addressed in her submissions and, upon review of those submissions, it is apparent that the main thrust of the application is the Applicant's allegation that the Officer erred in his or her treatment of the evidence and made erroneous findings of fact.

[11] Accordingly, I am satisfied that the sole issue arising is whether the Officer's decision was reasonable. An officer's assessment and weighing of the H&C factors raises questions of mixed fact and law that are reviewable on a reasonableness standard (*Kanthasamy v Canada*

(Citizenship and Immigration), 2015 SCC 61 at para 1, 44 [*Kanthasamy*]; *Baker v Canada (Citizenship and Immigration)*, [1999] 2 SCR 817 at para 63; *Perez Fernandez v Canada (Citizenship and Immigration)*, 2019 FC 628 at para 14).

Positions of the Parties

[12] In essence, the Applicant submits that the Officer ignored evidence, gave insufficient weight to her evidence, erroneously concluded that she still has family in the Dominican Republic, and failed to take into account all relevant factors and the Immigration, Refugees and Citizenship Canada guideline entitled "Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds", or IP-5, section 12.7 of which deals with family violence [IP-5 Guideline]. When she appeared before me, it became clear that the Applicant felt that the Officer had not viewed her claim thorough the lens of the abuse that she has suffered and how this has and would impact her if she is removed to the Dominican Republic. In other words, the Officer failed to view her circumstance as a victim of domestic violence with compassion. I note that while in her written submissions the Applicant also alleges a breach of procedural fairness, her submissions do not actually identify such a breach.

[13] The Respondent submits that in reading the Officer's reasons as whole, it is clear that the Officer understood the Applicant's situation but found insufficient evidence to justify a positive exemption from the normal requirement to apply from outside Canada for permanent resident status. Further, all information presented by the Applicant was considered and disagreement with the weight assigned to the evidence does not, without more, warrant judicial intervention. The Respondent submits that the conclusion reached by the Officer was based on the evidence presented, was not unreasonable and that the Applicant has not shown an error in analysis, in

ignoring or misconstruing the evidence, or in considering the H&C application globally and in accordance with the jurisprudence. Although other information might have been available to support the Applicant's claim, none was put before the Officer. The Applicant simply failed to meet her onus to provide sufficient H&C factors to justify an exemption.

Analysis

[14] Section 25(1) of the IRPA gives the Minister discretion to exempt foreign nationals from the ordinary requirements of the Act if the Minister is of the opinion that such relief is justified by H&C considerations relating to the foreign national, taking into account the best interest of a child directly affected. An H&C exemption is an exceptional and discretionary remedy, which discretion the Supreme Court of Canada has described as intended to provide a flexible and responsive exception to the ordinary operation of the IRPA, or, a discretion to mitigate the rigidity of the law in an appropriate case (*Kanthasamy* at para 19).

[15] The onus of establishing that an H&C exemption is warranted lies with the applicant (*Kisana v Canada (Minister of Citizenship and Immigration*), 2009 FCA 189 at para 45). This means that the applicant must provide sufficient evidence to convince the officer to grant this exceptional remedy. What warrants relief will vary depending on the facts and context of each case, but officers making H&C determinations must substantively consider and weigh all relevant facts and factors before them (*Kanthasamy* at paras 24–25). In this case, having reviewed the record and the Officer's decision, I have concluded that the Officer failed to consider the serious spousal abuse that the Applicant suffered at the hands of her former spouse as a compassionate factor to be weighed as a part of the Officer's H&C analysis.

[16] I reach this conclusion because, in her H&C application, the Applicant placed great emphasis on her allegation that her former husband was physically, sexually and psychologically abusive. She described this abuse in detail. It involved beatings – one of which caused her to have a miscarriage – intimidation, degradation, threats, financial and other control, sexual abuse, and efforts to force the Applicant into prostitution to provide her spouse with money for drugs and alcohol. All of this under the overarching threat of withdrawing his spousal application for permanent residence.

[17] The Officer did not question the Applicant's credibility and acknowledged that, while in Canada, the Applicant suffered physical, sexual and psychological abuse at the hands of her former husband. The Officer stated that he or she was sympathetic to the Applicant's circumstances but that there was insufficient objective evidence to establish that the Applicant would face harm at her former husband's hands if she were to return to the Dominican Republic. It is true that in her H&C application the Applicant did not provide evidence to support that her husband would or had the capacity to harm her if she were to return to the Dominican Republic or to support her claim, made in her application for judicial review, that her former husband has ties to the Dominican Republic and that she will be persecuted there by his family, who are members of gangs and of the police.

[18] However, the Officer appears to have failed to recognize that the domestic abuse the Applicant has suffered is, in and of itself, a compassionate factor to be weighed in the Officer's analysis, not just that if she is removed from Canada she will not face that risk in the Dominican Republic. Further, the support provided to the Applicant by her friends and family in Canada should also have been considered in light of her circumstance as a victim of domestic abuse. In

that regard, the Applicant refers to the IP-5 Guideline which lists family violence as one of the factors that should be considered when processing H&C applications.

[19] I note that the IP-5 Guideline appears to have been replaced with a section in a Program Delivery Manual, entitled "Family Violence", which closely resembles what was s 12.7 of the IP-5 Guideline. The Family Violence section acknowledges that spouses who are in abusive relationships and are not permanent residents or Canadian citizens may feel compelled to stay in the relationship or abusive situation so they may remain in Canada. It indicates that officers should be sensitive to situations in which the spouse of a Canadian citizen or permanent resident leaves an abusive situation and, as a result, does not have an approved family class sponsorship and lists factors to be considered in that context. The Program Delivery Manual, as a guideline, is not binding (*Kanthasamy* at para 32). Nor does a reviewable error necessarily arise solely from a failure of the Officer to explicitly mention such a guideline (see for example *Tovar v Canada (Citizenship and Immigration)*, 2016 FC 598 at paras 30, 33–34; *Sargsyan v Canada (Citizenship and Immigration)*, 2015 FC 333 at para 15; *Herman v Canada (Citizenship and Immigration)*, 2010 FC 629 at para 29). However, in my view, an error arises in this matter from the Officer's failure to recognize and consider the domestic abuse the Applicant suffered as a compassionate factor to be considered in the context of her request to stay in Canada.

[20] In this regard, it is significant to note that in the H&C decision, under factors for consideration, the Officer identified establishment in Canada, risk and adverse country conditions. However, under the section entitled "Other factors for consideration: (e.g. health considerations present, domestic violence in Canada, etc)" the Officer wrote in "Not applicable".

[21] The Applicant points out that the Officer did not refer to a March 21, 2017 letter from a nurse at the Black Creek Community Health Centre. This states that she had been seeing the Applicant since September 2016 and that the Applicant suffers from generalized anxiety disorder. However, officers are not required to refer to each piece of evidence in their reasons. They are presumed to have considered all of the evidence before them unless important contradictory evidence has not been addressed (*Canada (Citizenship and Immigration) v Alharbi*, 2019 FC 395 at para 14; *Thiyagarasa v Canada (Citizenship and Immigration)*, 2019 FC 111 at para 48 [*Thiyagarasa*]; *Cepeda-Gutierrez v Canada (Citizenship and Immigration)* (1998), 157 FTR 35 at paras 16–17).

[22] And, although this Court has previously held that when psychological reports are available indicating that the mental health of applicants would worsen if they were to be removed from Canada, an officer must analyze the hardship that applicants would face if they were to return to their country of origin and officer cannot limit the analysis to a determination of whether mental health care is available in the country of removal (*Sutherland v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1212 at paras 15–16 [*Sutherland*]; also see *Kanthasamy* at para 48; *Ashraf v Canada (Citizenship and Immigration)*, 2013 FC 1160 at para 5; *Davis v Canada (Citizenship and Immigration)*, 2011 FC 97 at para 19 [*Davis*]), here the letter is not a psychological report. It is a letter from a nurse. The letter does not explain how a diagnosis of generalized anxiety disorder was reached nor is any detail of the symptoms the Applicant suffers provided. Given this, the Officer was not required to treat the letter as if it were a report from a psychiatrist, a qualified psychologist or even the Applicant's own physician, or to afford it any weight as such. However, in my view, as the Officer accepted that the Applicant is a

victim of domestic violence, the Officer should have at least referred to the nurse's letter and considered it in that context when assessing the her H&C application.

[23] The Officer also found that the Applicant would be not be returning to an unfamiliar place, language, culture or a place devoid of a familial network that would render her re-integration unfeasible. The Applicant submits that the Officer wrongly stated that all of her family lives in Dominican Republic and that, in fact, her immediate family has moved to Spain. It is correct that the Applicant's H&C application reflects that her mother (with whom she resided before coming to Canada), half-brothers and a half-sister, now live in Spain and that her father is deceased. She also stated in her H&C submissions that she has many family members in Canada including aunts, uncles and cousins who will provide her with any support that she needs, and that she does not have similar support in the Dominican Republic. While I do not agree with her submission that the Officer found that all of her family still live in the Dominican Republic, given her circumstances, the Officer should have considered that her immediate family will not be there to provide emotional support should she return. Similarly, the letter from Reverend Vaso Rajak dated May 9, 2017 should have been considered. This letter addresses the domestic abuse suffered by the Applicant, her involvement with the church, the church's willingness to support the Applicant, and states that if her H&C application is refused that she is, in effect, being punished for leaving an abusive relationship.

[24] While it is not the role of court to reweigh the evidence (*Ramesh v Canada (Citizenship and Immigration)*, 2019 FC 778 at para 16), in my view, this is a circumstance similar to *Swartz v Canada (Minister or Citizenship and Immigration)*, 2002 FCT 268 [*Swartz*]. There the Court concluded that, despite generally accepting that the applicant had a history of an abusive

relationship and particularly the physical and emotional abuse by her husband, the reasons showed no direct reference to the sympathetic consideration of the applicant's circumstances as a result of her leaving an abusive relationship and thus foregoing any prospect of an approved sponsorship by her husband. The Court concluded that, in that way, the reasons of the immigration officer did not consider the circumstances in accordance with the guidelines concerning family violence.

[25] I acknowledge that the Applicant could have submitted stronger evidence in support of her claim overall. However, I am satisfied that, similar to *Swartz*, the Officer in this matter erred in failing to consider, sensitively or otherwise, the domestic abuse that the Applicant suffered as a compassionate factor in the decision-making process, rendering the decision unreasonable.

JUDGMENT in IMM-5780-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the decision under review is set aside and the matter is referred back for reconsideration by a different immigration officer.
2. No question of general importance for certification was proposed or arises.
3. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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