Federal Court Cour fédérale

Date: 20191204

Docket: IMM-542-19

Citation: 2019 FC 1557

Ottawa, Ontario, December 4, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ANA JOSEFA VILLAMAN LUCIANO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On August 3, 2017, Ms. Ana Josefa Villaman Luciano (the "Applicant"), applied for permanent residence from within Canada based on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27

("*IRPA*"). She is now seeking judicial review of the decision of the Senior Immigration Officer (the "Officer") to refuse her H&C application on January 2, 2019.

[2] For the reasons that follow, this application for judicial review is allowed.

II. **Facts**

A. *The Applicant*

[3] The Applicant is a 60-year-old woman who is a citizen of the Dominican Republic. She was a lawyer in the Dominican Republic and left her job to support her daughter and granddaughter in Canada.

[4] The Applicant has a 27-year-old daughter, Christine Villaman ("Christine"), and a four-year-old granddaughter, Zurie Senior ("Zurie"). Christine and Zurie are both Canadian citizens.

[5] The Applicant last entered Canada on a visitor visa in February 2016 to help support her daughter and granddaughter. The Applicant has stayed in Canada until now through extensions of her visitor visa. However, her latest visitor extension application was refused after the denial of her H&C application.

[6] The Applicant first entered Canada in 1990 and gave birth to Christine in Canada in 1991. She states that her pregnancy was the result of a sexual assault. The Applicant engaged in

unauthorized employment while in Canada around this time. The Applicant and her daughter returned to the Dominican Republic in 1993.

[7] Christine returned to Canada in 2006 when she was about 15 years old and finished high school in Canada. The Applicant visited her when she graduated from high school in 2011.

[8] Around 2014, Christine became pregnant. She had married a man named Camillio Senior ("Camillio") in 2013. By 2014, Camillio and Christine were not getting along. The Applicant came to Canada to help Christine through the pregnancy, as Camillio was not around. The Applicant's granddaughter, Zurie, was born on November 26, 2014. The Applicant stayed in Canada from November 2014 to September 2015.

[9] After Zurie was born, Christine and Camillio became further estranged. At one point, Camillio accused Christine of sexual and physical abuse. Christine was held in jail for four days and Camillio took Zurie for four months.

[10] Christine and Camillio are in the midst of a custody dispute over Zurie. A report of the Children's Lawyer filed with the H&C application speaks to the "terrible" situation between Christine and Camillio.

[11] Christine suffers from depressive disorder and post-traumatic stress disorder ("PTSD"). Letters from Christine's treating psychiatrist, Dr. Jennifer Hirsch at Mount Sinai Hospital, from 2014 and 2016, and from the Hope 24/7 domestic violence clinic therapist in 2017 confirm that

Christine has a history of depression and suicidal ideation. Christine states that she was physically, verbally, and psychologically abused by her ex-husband, which worsened her mental health. The Children's Lawyer found that her domestic violence allegations were plausible and well-supported by evidence from collateral sources. Several of the documents in the Certified Tribunal Record refer to the ex-husband continuing to harass Christine through text messages.

[12] The Applicant has been the main moral support for her daughter and granddaughter since her return to Canada in February 2016. The letters from Christine's psychiatrist and therapist affirm that having her mother in the country would help her manage her depression, create a stable life for Zurie, and obtain a fair custody arrangement. The Children's Lawyer report confirms that the Applicant has been a significant support for Christine, which has contributed to her functioning well. The Children's Lawyer emphasized the importance of Christine ensuring that her mental health remains stable through the determination of custody.

[13] Christine received sole temporary custody of Zurie in 2017 with her ex-husband having access rights. The Applicant participates in the visitation exchanges as a third party.

[14] The Applicant takes care of Zurie when Christine is at work and when Christine has depressive episodes. The Applicant lives with and is financially supported by Christine, although the family is also financially supported by their local Brampton denomination of the Church of Jesus Christ of Latter-Day Saints. The Applicant attached Christine's pay stubs and employment letter from 2016 for her work as a cleaner and labourer. Christine's total earnings from September to December 2015 were approximately $669.50 and from January to October

2016 appear to be approximately $2,900. Between March and April 2017, Christine appears to have made about $1,600 as a temporary labourer.

[15] The Applicant also has a job offer as a nanny from someone who goes to her church if the Applicant is able to obtain permanent residency.

[16] The Applicant has involved herself in the local church through volunteering and participating in conversational English classes. The Applicant has attached four letters from neighbours and friends in Canada who attest to her integrity and honour.

[17] The Applicant's employer in the Dominican Republic ended her contract as a supervisor of a legal department in January 2017 because of her length of stay in Canada. The Applicant had previously been able to return to this position in the Dominican Republic when she returned from her visits to Canada in 2011 and 2015.

[18] The Applicant also submitted two news articles that spoke to conditions in the Dominican Republic, as well as the "Dominican Republic 2016 Human Rights Report" from the US Department of State. One article was from an online news network "News Americas Now" referring to Dominican Republic having a higher unemployment rate for women than for men. The second article was a New York Times article about the Zika virus in the Dominican Republic. The human rights report referred to violence against women as a pervasive problem, although the government was taking steps to increase protection and prosecution with limited

resources. The report also refers to discrimination against women in the workplace, as shown by their low representation in leadership positions, lower pay, and higher rate of unemployment.

[19] In July 2018, the Applicant was notified that her H&C application had been withdrawn and her file had been destroyed after IRCC received a withdrawal request from the Applicant. The Applicant wrote to IRCC explaining that she had not withdrawn her application and that it had likely been a forged document submitted by Christine's estranged husband, Camillio. The Applicant submitted a letter from Christine's family lawyer dated August 13, 2018 to support her request to re-open her file. The lawyer affirmed the vital role that the Applicant plays in the life of her granddaughter, especially given the bitter custody dispute between Christine and Camillio. The family lawyer attested to the importance of the Applicant's role in allowing Christine to receive sole temporary custody of Zurie. After this explanation, the Applicant was able to re-apply and keep her original application date.

[20] The Applicant submitted some additional documents when she re-filed her application including an updated letter of employment for Christine showing that Christine was employed full-time at a warehouse earning an annual salary of $30,680 as of June 4, 2018.

B. *H&C Decision*

[21] The Officer found that although the best interests of Zurie and the Applicant's family ties in Canada weighed in favour of the application, the Applicant had other alternative immigration streams available to her through sponsorship under the family class. Therefore, an exemption under subsection 25(1) of the *IRPA* was not justified.

[22] The Officer reviewed the Applicant's immigration history, including the history of the withdrawal and re-opening of the Applicant's file.

[23] The Officer then reviewed the Applicant's establishment in Canada, family ties and best interests of the child ("BIOC"), available alternative immigration streams, and hardship if the Applicant returned to the Dominican Republic.

(1) Establishment

[24] The Officer acknowledged the Applicant's volunteer work, involvement in her church, and the friendships she had formed in Canada. However, the Officer found that the Applicant had an "expected level of establishment" for someone who had lived in Canada for two years. The Officer noted that some hardship would be caused by being physically separated from friends in Canada, but that she would still be able to maintain contact with her friends through other means.

[25] The Officer also weighed the financial situation of the Applicant and her daughter as a negative factor against the Applicant's establishment in Canada because the Applicant had not shown that the Applicant and Christine had a pattern of sound fiscal management. The Officer found they had not submitted enough evidence through bank statements or other documents to show that Christine would be able to continue to support the Applicant. In addition, the Officer was concerned that the Applicant was receiving some financial support from her church.

[26] The Officer also put little weight on the Applicant's job offer. The Officer found that the Applicant's job offer did not provide any information regarding whether her potential employer had applied for a Labour Market Impact Assessment to determine whether they could hire someone who was not a permanent resident or citizen. In addition, the Officer noted that the Officer's role was not to assess an Applicant's potential for establishment, but only the establishment that had already occurred.

(2) Family Ties and Best Interests of the Child

[27] The Officer stated that they gave "considerable weight" to Zurie's best interests and the Applicant's family ties. However, the Officer did not accept that the Applicant was Zurie's principal caregiver, as it was Christine who was awarded temporary custody. The Officer speculated that the court would not have granted temporary custody to Christine if she had been unable to act as Zurie's primary caregiver.

[28] The Officer noted that the Applicant provides a "crucial source" of support and plays a "vital role" in the lives of Christine and Zurie by helping Christine, the Applicant's only child, to recover from depression and PTSD. Without the Applicant, Christine would have to pay for daycare or may be unable to work full-time. The Officer accepted that Christine has no other family in Canada other than the Applicant and that Christine's mental health might deteriorate if the Applicant had to leave Canada. The Officer found that this could affect the level of care Zurie receives.

(3) Alternative Immigration Streams

[29] The Officer found that there was little evidence to show why the Applicant could not be sponsored by Christine under the family class category, especially since Christine had previously sponsored her estranged husband through the family class. Given that H&C applications are meant to be for extraordinary situations, they should not be granted where there is an alternative available immigration stream.

[30] Although the Officer noted that Christine might not meet the minimum income requirement to sponsor the Applicant, the Officer found that the Applicant had not provided enough documentary evidence to show Christine's financial situation and demonstrate how Christine was attempting to resolve her potential ineligibility as a sponsor. The Officer compared this expectation on Christine to show she was attempting to increase her income to the requirement on someone with past criminality to show that they have taken steps to rectify past behaviour and prevent future criminality.

[31] The Officer also suggested that Christine could apply for a Super Visa for the Applicant. Alternatively, the Applicant could apply for a temporary resident visa and/or continue to extend her stay under her current visa.

(4) Hardship to Return

[32] The Officer found that the Applicant would likely be able to re-establish herself in the Dominican Republic. The Applicant is highly educated with significant work experience in the Dominican Republic. She has siblings residing in the Dominican Republic and there is little evidence that they would not be able to support her. She could get a job in the Dominican Republic and financially assist her daughter in Canada. She would be able to join a local church and maintain similar spiritual, emotional, and community support for herself. There was nothing preventing the Applicant from attempting to return to Canada to visit her daughter and granddaughter in the future.

III. **Issue and Standard of Review**

[33] The issue is whether the Officer's assessment of H&C factors raised in the Applicant's application is reasonable.

[34] The standard of review for an H&C decision is reasonableness given the fact-driven and discretionary nature of the decision (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*]); *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62 [*Baker*]). Reasonableness review is concerned with the existence of justification, transparency and intelligibility within the decision-making process, as well as whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir v New Brunswick,* 2008 SCC 9 at para 47). The

question is whether any deficiencies of the Officer's decisions are sufficient to render the whole decision unreasonable (*El Thaher v Canada (Citizenship and Immigration),* 2012 FC 1439 at para 49 [*El Thaher*]).

IV. **Analysis**

[35] The purpose of H&C considerations in immigration legislation, such as in subsection 25(1) of the *IRPA*, is to "offer equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another'" (*Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338. Although the decision to grant relief will be discretionary and highly contextual, officers must substantively consider and weigh all relevant facts and factors in making humanitarian and compassionate determinations (*Kanthasamy* at para 25). Therefore, a reasonable H&C analysis cannot be confined to a checklist (*Salde v Canada (Citizenship and Immigration),* 2019 FC 386 at para 22).

[36] While H&C relief is not intended to provide an alternative immigration scheme, officers' reasons must reflect the tradition underlying H&C factors—the idea of introducing flexibility to the law to allow for sympathy and compassion towards others' misfortunes (*Kanthasamy* at paras 13, 21-24).

A. Proposed Alternative Immigration Streams

[37] The Applicant argues that the Officer erred in speculating that alternative immigration streams were available to the Applicant through parental sponsorship. Unlike spousal sponsorship, which Christine had previously done for her ex-husband, parental sponsorship requires a minimum necessary income. The Applicant provided documentation showing Christine's income from 2015 to 2018. In 2018, Christine had been able to obtain a better paying full-time position, but her salary still would not be enough to sponsor the Applicant.

[38] The minimum income requirement for parental sponsorship is the low-income cut-off amount plus 30% for the past three taxation years. For Christine to have been able to sponsor the Applicant, she would need to have made $47,476 in 2015, $48,404 in 2016, and $48,945 in 2017 according to *Guide 5772 – Application to Sponsor Parents and Grandparents*. The Applicant also argues that the parental sponsorship program is a lottery to enter, so there is a possibility that the Applicant would not even be selected.

[39] The Applicant submits that this case is similar to *Torres v Canada (Immigration and Citizenship)*, 2017 FC 715 at para 9 [*Torres*] where the Court found it was unreasonable for an officer to propose an alternative stream to apply for permanent residency when it was clear from the evidence that it was not a viable alternative.

[40] The Applicant also states that the Officer erred in proposing that temporary statuses such as Super Visas, temporary resident visas, or temporary resident visa extensions could be

equivalent to permanent resident status. When the Court in *Kanthasamy* stated that H&C applications should not be an alternative immigration route, they were referring only to other ways of receiving permanent resident status, not temporary statuses. In addition, Super Visa applications also have minimum necessary income requirements, which could not be met by Christine.

[41] The Respondent argues that the onus is on the Applicant to provide sufficient evidence showing why Christine would be unable to sponsor her permanent resident application under the parental sponsorship category, as in *Goraya v Canada (Citizenship and Immigration)*, 2018 FC 341 at para 16 [*Goraya*]. Since the Applicant did not explain in her submissions to the Officer why these alternative immigration streams were not available to her, the Court should not consider the Applicant's arguments regarding the unavailability of these alternatives now. In addition, the Officer noted that Christine might not meet the minimum income requirements, but found that the Applicant has not shown how Christine is attempting to resolve her ineligibility as a sponsor. As H&C applications are not meant to be an alternative immigration route, the fact that the Applicant might not be guaranteed permanent resident status through parental sponsorship or a temporary status does not mean that the Applicant should receive permanent residency under an H&C application.

[42] The Respondent suggests that the Applicant can still apply for permanent residency from outside Canada while continuing to have extended visits under a temporary status. For example, she could apply for permanent residency using her possible job offer. The fact that the Applicant

did not receive an extension to her visitor status was not in front of the Officer and therefore should not be considered by the Court now.

[43] I take the Respondent's view that H&C applications are not meant to provide a parallel immigration system, instead they are about providing a "safety valve" in exceptional circumstances (*Semana v Canada (Citizenship and Immigration),* 2016 FC 1082 at para 15). Therefore, the onus is on the Applicant to establish the grounds for exceptional relief.

[44] On the other hand, the Officer's suggestion of alternative immigration streams is unreasonable, especially since the Officer appeared to use these alternatives as the primary factor to outweigh the "considerable weight" given to the Applicant's family ties and the best interests of her granddaughter.

[45] In this case, unlike in *Goraya,* the Applicant did provide evidence of her daughter's income between 2015 and 2018. Although the Applicant did not specifically state in her initial application that the alternative immigration streams proposed by Officer were not available to her, the evidence provided to the Officer indicated that streams reliant on a minimum necessary income of a sponsor would be unavailable. The Officer was aware that Christine had recently obtained full-time employment and at least somewhat acknowledged, "[I]t may be possible the applicant's daughter does not meet the minimum income requirement to sponsor the applicant." Therefore, the Officer did not merely make a finding regarding the insufficiency of evidence in front of him, but suggested an immigration alternative that was evidently contrary to the evidence before them.

[46] As in *Torres* at paragraph 9, in the case at bar, it is unreasonable for the Officer to advance that the Applicant could qualify for parental sponsorship. The evidence before the Officer plainly indicated that the Applicant's daughter had struggled to obtain full-time employment and had only secured a full-time position in 2018, which paid well below the income needed to sponsor a parent for permanent residency or a Super Visa.

[47] The Officer then took the liberty to add another requirement that the Applicant not only show alternative immigration streams were not available to her, but that Christine was working hard to resolve her ineligibility as a sponsor. Furthermore, the Officer improperly compared this situation to the expectation that an individual with criminality demonstrate their rehabilitation when applying for an H&C exemption.

[48] The comparison between Christine—as someone with a low income who is dealing with mental illness, fighting for the custody of her child, and working full-time—with an individual who is criminally inadmissible to Canada not only borders on a repugnant and entirely inappropriate comparison between poverty and criminality, but it also exposes the Officer's utter lack of understanding of a humanitarian and compassionate approach. Alleviation from poverty or low income is an entirely different matter than the rehabilitation efforts of someone with criminality—officers should exercise careful attention to the parallels drawn in their analysis.

[49] The Officer recognized the value of the Applicant's support to Christine in allowing her to stabilize her mental health and obtain full-time employment, but then justified cutting off this support by effectively concluding that Christine had not worked hard enough to warrant keeping

her support system. This type of reasoning is circular and uses Christine's mental health struggles against her, especially where the evidence did show that Christine had been steadily improving her employment prospects between 2015 and 2018 with the support of her mother. This reasoning certainly fails to reflect the "attitude of a person sensitive and responsive to the misfortunes of others or animated by a desire to relieve them" (*Nagamany v Canada (Citizenship and Immigration)*, 2019 FC 187 at para 32).

[50] Lastly, the Officer proposed that the Applicant could continue to extend her temporary resident visa. I agree with the Respondent that the Court cannot consider the new evidence that the Applicant was not granted her temporary resident visa extension following the H&C decision as it was not in evidence before the Officer. Therefore, it was reasonable for the Officer to indicate that the Applicant could extend her temporary resident visa. However, the Officer had to consider the effect of the Applicant's continued temporary resident status on the other H&C factors put forward, such as the best interests of the Applicant's granddaughter, which the Officer did not do.

B. BIOC

[51] The Applicant argues that the Officer's analysis of the best interests of Zurie was insufficient because the Officer did not engage in balancing the BIOC against other factors. Although the Officer gave "considerable weight" to the fact that granting the Applicant's H&C application was in Zurie's best interests, the Officer did not explain how these factors were balanced against other factors in the decision. Being "alert, alive and sensitive" to the BIOC requires more than simply saying weight has been given to their interests, but reasons to show

that the Officer considered the effects of a negative decision on the child and weighed it against countervailing factors (*Cardona v Canada (Citizenship and Immigration),* 2016 FC 1345 at paras 31, 36).

[52] The Respondent argues the Officer did balance the best interests of Zurie against the lack of evidence regarding why Christine cannot sponsor the Applicant or how Christine is attempting to overcome the minimum necessary income requirement, if it is a barrier.

[53] In addition, the Respondent argues there is no evidence to show that the Applicant's presence is essential for her daughter to maintain custody of her granddaughter. The Applicant has speculated on never being able to return to visit her granddaughter and daughter given that she has been allowed to return for extended stays previously.

[54] In my view, the Officer has failed to explain in an intelligible manner how they balanced the "considerable weight" put on Zurie's best interests and the Applicant's family ties with the countervailing factors. The primary countervailing factor appears to be the Officer's finding that Christine could sponsor the Applicant through the parental sponsorship program. As I have found above, this was not an available suggestion based on the record before the Officer. With regard to the possibility that the Applicant may be able to visit Zurie and Christine on a temporary status, the Officer did not address how this temporary status would impact family ties and Zurie's best interests. Furthermore, given the ongoing custody dispute and delicate situation, even temporary absences of the Applicant may have lasting impacts on Christine and Zurie.

[55] It appears the Officer attempted to balance the considerable positive factors, especially the best interests of Zurie, against the possibility of alternative immigration streams to the Applicant, which were unavailable to the Applicant at the time. However, the Officer's reasons do not provide an intelligible basis for explaining how the best interests of a child could be outweighed by alternative immigration streams when the two long-term options are not currently available to the Applicant. The Officer was not "alert, alive and sensitive" to the full consequences of the decision on the best interests of the child—the Officer unreasonably concluded that Christine's "insufficient efforts" to increase her income above the necessary minimum to sponsor the Applicant justified the interests of a four-year-old child from receiving stability and support from the Applicant.

[56] The Officer's conclusion regarding the alternative immigration streams renders the Officer's decision unreasonable. The Officer unreasonably determined that the alternative immigration streams outweighed the "considerable weight" supposedly given to the BIOC, a consideration required under subsection 25(1) of the *IRPA.*

V. **Certified Questions**

[57] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VI. **Conclusion**

[58] For the reasons above, this application for judicial review is granted. The Officer unreasonably proposed alternative immigration streams for permanent residency that were not available to the Applicant and used the existence of the proposed alternative immigration streams to outweigh the considerable weight placed on family ties and the best interests of the Applicant's granddaughter, Zurie.

JUDGMENT IN IMM-542-19

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter referred back for redetermination by a different H&C officer.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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