Federal Court Cour fédérale

Date: 20211202

Docket: IMM-6266-19

Citation: 2021 FC 1339

Ottawa, Ontario, December 2, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ICILDA MORGAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>JUDGMENT AND REASONS</u>

[1] Icilida Morgan asks the Court to set aside the September 30, 2019 decision of an immigration officer denying her application for permanent residence from within Canada on humanitarian and compassionate grounds. For the reasons that follow, her application will be dismissed.

[2] Ms. Morgan, is an 81 year old citizen of Jamaica. She entered Canada on June 1, 1991, and never left. She has been living and working in Canada without authorization ever since.

[3] In April 1998, she married William Palmer, a Canadian citizen. Mr. Palmer intended to sponsor her for permanent residency, but he passed away in June 1998 before he was able to do so. Ms. Morgan continues to receive his modest pension.

[4] The submissions regarding the decision were restricted to three issues:

1. Whether the Officer's consideration of establishment in Canada was unreasonable;
2. Whether the Officer failed to apply the proper legal test; and
3. Whether the Officer failed to consider the hardship that would be faced if Ms. Morgan were required to return to Jamaica.

Establishment in Canada

[5] Ms. Morgan submits it was unreasonable for the Officer to acknowledge her adaptability, resilience, and self-sufficiency, yet reject her application as a result of a lack of status or authorization. She says that the Officer undermined all of her accomplishments because of her failure to comply with immigration laws and because her work history in Canada was done without authorization.

[6] She submits that the Officer ought to have considered the relevance and severity of her non-compliance and says that it is illogical to dismiss nearly 30 years of work that evidences her self-sufficiency. She relies on this Court's judgment in *Mitchell v Canada (Minister of*

Citizenship and Immigration), 2019 FC 190 for this point. It is submitted that in summarily dismissing her work history, the Officer fettered his discretion. Moreover, it is said that there is a reasonable apprehension of bias in this case, as the Officer appears to be under the mistaken belief that granting humanitarian and compassionate relief would encourage others living without status to ignore the law.

[7] She submits that the facts of this case are exactly those that would, per the test set out in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 (IAB) [*Chirwa*], cause a reasonable person in a civilized society to desire that she be relieved of her misfortune.

[8] I agree that an officer cannot summarily dismiss an unauthorized work history without considering the circumstances of that lack of authorization. However, in this case the Officer did consider Ms. Morgan's circumstances. The Officer considered Ms. Morgan's stated reason for failing to leave Canada, her failure to seek consular assistance upon losing her passport (twice), and her failure to obtain status in Canada for nearly 30 years. The Officer concluded that she had failed to establish that she was unable to leave Canada. All of this was done to assess the circumstances of the non-compliance.

[9] The submissions regarding bias do not have any merit. There is nothing in the reasons that suggests that the Officer was biased towards one outcome or another.

[10] The submissions regarding the application of the standard in *Chirwa* is similarly without merit. Humanitarian and compassionate decisions are discretionary: see *Nguyen v Canada*

(Minister of Citizenship and Immigration), 2017 FC 27 at para 3. As such, they are entitled to considerable deference. The role of this Court on a judicial review is not to reweigh and reassess the evidence: see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55. The submissions made here as to whether the facts and circumstances of Ms. Morgan would excite one to wish to relieve her of them are a request to reassess and reweigh the evidence.

[11] I further find that the Officer did not "undermine" Ms. Morgan's accomplishments and establishment because of a lack of authorization; rather, he weighed her establishment in her favour while weighing her non-compliance against her. There is no contradiction in doing so. This is exactly the task the Officer was expected to do: weigh the various factors for and against the application.

[12] I find that the Officer's decision with respect to Ms. Morgan's work history and establishment was reasonable.

The Application of the Proper Legal Test

[13] It is submitted that the Officer applied the wrong legal test for humanitarian and compassionate exemptions. Ms. Morgan submits that the proper test is to determine whether the circumstances "would excite a reasonable [person] in a civilized community a desire to relieve the misfortune of another": see *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 21; *Chirwa*, above at 350. It is not, she says, as set out by

the Officer, “whether the granting of permanent resident status or an exemption, is justified, by humanitarian and compassionate considerations.” She submits that the “test” set out by the Officer is a statement of what is being asserted by her and is not a legal test; a legal test is a statement of the standard that must be met.

[14] She also says that the Officer’s use of the terms “extraordinary” and “exceptional” indicates that the wrong test was applied and shows that the Officer was using a more stringent legal standard than that established in the jurisprudence.

[15] I do not accept the submission that the Officer applied a more stringent test than set out in the jurisprudence.

[16] The Officer’s task on a humanitarian and compassionate application is to determine whether the circumstances justify relief. To do so, the Officer must make a discretionary and subjective determination of whether relief is warranted. This is what the Officer did. Throughout the decision, the Officer considered whether humanitarian and compassionate relief was justified. The Officer weighed the evidence of the circumstances of Ms. Morgan and came to a conclusion on whether relief was warranted.

[17] It is submitted that the Officer’s use of “extraordinary” and “exceptional” indicate that a higher standard was applied than was appropriate in the circumstances. I do not agree.

[18] In *Damian v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1158 at para 21, Justice McHaffie said the following about these words:

> [T]o the extent that words such as “exceptional” or “extraordinary” are used simply descriptively, their use appears to be in keeping with the majority in *Kanthasamy*, although such use may not add much to the analysis. However, to the extent that they are intended to import a legal standard into the H&C analysis that is different than the *Chirwa/Kanthasamy* standard of “exciting in a reasonable person in a civilized community a desire to relieve the misfortunes of another, provided those misfortunes justify the granting of relief,” this would appear to be contrary to the reasons of the majority. Given the potential for words such as “exceptional” and “extraordinary” to be taken beyond the merely descriptive to invoke a more stringent legal standard, it may be more helpful to simply focus on the *Kanthasamy* approach, rather than adding further descriptors.

[19] While the use of these words by an officer may not be ideal, the words “exceptional” and “extraordinary” are not forbidden. There is no error where an officer uses these terms in their descriptive sense and not as a legal standard. Both this Court and the Federal Court of Appeal have also described subsection 25(1) as “exceptional”: see e.g. *Shackleford v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1313, at para 16; *Legault v Canada (Citizenship and Immigration)*, 2002 FCA 125, at para 15.

[20] The word “exceptional” is used twice in the decision under review. The word “extraordinary” appears once. In all three instances, it is clear that the Officer is using these terms descriptively and not as a legal test. The Officer describes relief under subsection 25(1) as an “exceptional” measure in the sense that it is not an alternative immigration scheme; it is an exception to the general rule. “Extraordinary” is used to describe situations which are unforeseen by the Act. These situations are “extraordinary” in the sense that they are beyond the

usual cases that would have been accounted for. There is no indication that the Officer expected the case to rise to a particular threshold of "exceptional" or "extraordinary" in order for relief to be granted.

Hardship if Returned to Jamaica

[21] It is submitted that the decision does not properly grapple with the multifaceted nature of the hardship that Ms. Morgan would face given her age, gender, martial status, and economic status. She says that rather than considering the country conditions in the context of her circumstances, the Officer instead engaged in a generalized review of country conditions more appropriate in the context of a risk assessment.

[22] She points to several alleged shortcomings in the decision, including the Officer's suggestion of remedies that are, in her view, irrelevant, such as her ability to seek assistance from a women's shelter and a discussion of supports for victims of domestic violence. She also flags as irrelevant the discussion of supports for women returning to Jamaica as a result of failed refugee claims. She also points to the extensive discussion of crime in Jamaica, despite minimal submissions on this point by Ms. Morgan, as further evidence that the Officer did not properly consider the her personal circumstances.

[23] I agree with the Respondent that the Officer was entitled to take into account the Applicant's ability to re-establish herself Jamaica: see *Zhou v Canada (Minister of Citizenship and Immigration)*, 2019 FC 163. It was appropriate to consider the fact that Ms. Morgan would continue to receive pension payments, and had the possibility of receiving financial assistance

and possibly immigration sponsorship from her children in the United States. It was also appropriate for the Officer to consider her transferrable skills, language ability, and previous life experience in Jamaica. There was nothing inappropriate in the Officer discussing assistance to women returning to Jamaica due to failed refugee claims. This is relevant, as it demonstrates that services are available to women in similar circumstances to those of Ms. Morgan. In short, I do not accept that the Officer ignored Ms. Morgan's age, gender, and personal circumstances.

Conclusion

[24] For these reasons, the application must be dismissed. Neither party proposed a question to be certified.

<u>JUDGMENT IN IMM-6266-19</u>

THIS COURT'S JUDGMENT is that the application is dismissed, and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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