Date: 20090211

Docket: IMM-1647-08

Citation: 2009 FC 155

Montréal, Quebec, February 11, 2009

PRESENT: The Honourable Maurice E. Lagacé

BETWEEN:

MERELLA PAULA MARTE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (*IRPA*), of an immigration officer's decision, dated March 13, 2008, wherein the officer found that the applicant would not suffer "unusual or undeserved" or "disproportionate" hardship if she applied for permanent residence from outside Canada and therefore denied her application for permanent residence from within Canada on humanitarian and compassionate grounds (H & C).

II. The Facts

[2] A citizen of Philippines, the applicant arrived in Canada on July 3, 2005, as a member of the live-in caregiver category, under the Live-in Caregiver Program (LCP). Her one-year permit to work in that capacity expired on July 2, 2006.

[3] After working for her first employer for close to eight months, the applicant allegedly was forced to leave her employment because she had been sexually abused by her employer against whom she filed a complaint with the *Commission des normes du travail*, as well as with the Montréal Police.

[4] Subsequently, the applicant found another employment with the Cloutier family who hired her in May 2006, to care for their newly born son. The applicant applied in July 2006 for a "certificat d'acceptation du Québec" (CAQ) for the approval of her new job, which she received in December 2006.

[5] The applicant received a letter from Service Canada and the *Ministère de l'Immigration et des Communautés culturelles du Québec* (MICCQ) dated December 16, 2006, confirming the approval of her job offer by the MICCQ and requesting that the applicant obtain a work permit from Canadian immigration authorities by her new employer.

[6] The Cloutier family, as the new employer, then applied to renew the applicant's work permit and their application was denied on February 22, 2007. Between March 2007 and November 2007, the applicant made several applications for employment authorization, all of which were refused.

[7] The applicant also made an application for a temporary resident permit. On June 7, 2007, the Cloutier family, as the new employer, was advised that the application for a temporary resident permit under the LCP had been received and would be treated taking into account the high volume of applications waiting processing. The new employer was then informed that the processing period could take 12 to 18 months from June 7, 2007.

[8] In February 2008, the applicant was informed by the Case Processing Centre in Vergeville that her application for a temporary resident permit had been transferred to the Canadian Immigration Centre in Montréal for processing.

[9] On February 12, 2008, the applicant was advised by the Case Processing Centre in Vergeville that her application for permanent resident from within Canada on H & C grounds had been transferred to the Canadian Immigration Centre in Vancouver for processing.

[10] Finally, on March 13, 2008**,** a negative decision was rendered regarding the application for permanent residence on H & C grounds.

III. Issues

i. Did the immigration officer commit a breach of procedural fairness in ignoring material facts?

ii. Did the immigration officer render an unreasonable decision?

IV. Analysis

Standard of Review

[11] The appropriate standard of review of a decision on an H & C application is reasonableness with respect to matters of fact or mixed fact and law. Consequently, the decision must be justifiable, transparent and intelligible within the decision-making process (*Dunsmuir v. New Brunswick*, 2008 SCC 9). It should be vacated only if it is perverse, capricious, not based on the evidence or based on an important mischaracterization of material facts. But, on the other hand, a breach of procedural fairness is cause to set the resultant decision aside, unless there is no possible way that another outcome could have been reached.

[12] Given the discretionary nature of H & C decisions, considerable deference must be accorded to such decisions. Intervention is therefore only warranted if the decision cannot withstand a somewhat probing examination (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817).

Ignoring Material Facts

[13] The applicant contends that the officer erred in stating that the Cloutier family did not obtain Human Resources and Skill Development Canada's (HRSDC) approval when she started working for the Cloutier family.

[14] Moreover, she argues that the officer acted without regard for the evidence and violated the principles of natural justice in stating the applicant never provided the police report she had promised to file in support of her contention that she left her first employer because of an abusive behavior situation.

HRSDC Approval of a New Employer

[15] The officer stated in the decision that there was no evidence provided on file or no record in the Foss system that the applicant had applied for HRSDC approval of a new employer.

[16] The officer, however, then goes on to explain that the applicant found new employment in May 2006 with the Cloutier family and yet did not sign for a "certificat d'acceptation du Québec" until July 2006.

[17] The evidence of the certificate is not enclosed in the certified record despite having a copy of same in the applicant's record. The Court recognizes that it is the applicant's responsibility to provide all materials that pertain to their file and that failure to do so must not be brought against the decision maker. But still the question remains open to determine if the officer had any indication on

file that the HRSDC had given its approval although the certificate had not been produced by the applicant.

[18] The officer acknowledges in the written reasons, that the applicant was accepted by Quebec Immigration, and had the skills that may qualify her for the caregiver program; however, in the reasons for refusing the application, the officer notes that there is no indication in the Foss system that the applicant had applied for HRSDC approval of a new employer when she started working for the Cloutier family.

[19] Citizenship and Immigration Canada's manual *Processing Live-in Caregivers in Canada* states at paragraph 5.3 that live-in caregivers "may change employers but must apply for a new work permit, with a validated job offer and a new employment contract."

[20] The officer notes also that in February 2007, the applicant "applied for an extension of her employment authorization" and that "this application was refused". The officer considers that the applicant reapplied in March 2007, in August and November 2007. Knowing that the applicant had requested extensions of her new employment authorization, the officer should have been aware thereon that the application for extension of an employment authorization implied that the applicant had previously obtained the HRSDC approval of her new employer. Otherwise, why apply for an extension of an employment authorization if the HRSDC approval did not exist?

[21] The officer is correct in stating in the decision that there was no evidence on first sight provided on file or no record in the Foss system that the applicant had applied for HRSDC approval of a new employer. However, the officer had on file sufficient information to be able to presume that the HRSDC approval of a new employer had been obtained. Also, if the written HRSDC approval was still required, it would have been fair and easy then for the officer to request the applicant to produce the authorization instead of stating in the reasons that there was "no evidence provided on file" or "no record in the Foss system that [the applicant had] applied for HRDC approval of a new employer".

[22] We now know that the applicant's new employer, the Cloutier family, received from Service Canada (formerly HRSDC) a letter dated December 16, 2006, wherein they noted that MICCQ and Service Canada had confirmed the applicant's employment offer from them.

The Police Report

[23] The officer notes in the reasons for the H & C refusal that the applicant stated having "left her first employer because of an abusive behaviour situation and that she had reported the situation to the police. She stated that a police report would follow. She has not provided the police report in the three months since the application was received".

[24] This quote from the reasons for the decision is inexact since the applicant transmitted the promised police report to the Canadian Immigration Centre in Vancouver on February 27, 2008,

and further the respondent admitted that this document was available and part of the record when the impugned decision was rendered.

[25] The officer clearly never took this report into account although it did corroborate the applicant's allegations of sexual harassment by her former employer and her needs to change jobs and why she was subsequently unable to fulfill the original conditions of the live-in caregiver class.

Living Arrangements

[26] The officer notes in the decision that the applicant was not living with the Cloutier family but with her aunt and cousin.

[27] The regulations clearly indicate that a live-in caregiver is "a person who resides in and provides child care, senior home support care or care of the disabled without supervision in the private household in Canada where the person being cared for resides." (*Immigration and Refugee Protection Regulations*, S.O.R./2002-227), r. 2).

[28] Temporary workers in Quebec, as is the case of the applicant in this file, must renew their authorizations to work and reside in Quebec if they wish to extend or renew their contract and/or if they have a new employer.

[29] Recognizing that the Citizenship and Immigration Canada's manual defines a live-in caregiver as a person who resides in and provides care in a private household in Canada in which

the person resides, and that the applicant was allegedly abused by her former employer, the Court finds that the officer did not properly exercise his discretion when he considered the applicant's request made under H & C grounds, and that he had to determine if the applicant complied with the terms and conditions of her original admissibility to Canada.

[30] The Court finds it more than natural that a young woman would seek to live with family members after having suffered a traumatic experience such as the one alleged. It was therefore inappropriate for the officer to fault the applicant for seeking a safe environment where she could lay her head at night. The Court does however recognize the statutory requirement to live with the employer and note that the applicant has not well explained the necessity for her to continue living with her aunt once hired by the Cloutier family.

Flexibility Required for Caregivers

[31] "The purpose of the Live-in-caregiver Program […] is to facilitate the attainment of permanent resident status for foreign domestic workers and therefore, it is incumbent on the Immigration Department to adopt a flexible and constructive approach in its dealings with the Program's participants. Failure to do so undermines the purpose of the Program" (*Peje v. Canada (Minister of Citizenship and Immigration),* [1997] F.C.J. No. 274 (T.D.) (QL), at para. 6); *Turingan v. Canada (Minister of Employment and Immigration)* (1993), 72 F.T.R. 316 (T.D.)).

[32] The officer here erred in fact in stating that the applicant did not obtain HRSDC approval. True the applicant did not produce in evidence the approval certificate, but the officer knew and

even noted that the applicant had applied for an extension of her new employment authorization. The officer should have taken notice or presumed then that the applicant had in fact obtained the necessary approval for her new employment since one cannot apply for an extension of an authorization that does not exists. Having knowledge of such presumed approval, the officer could have requested from the applicant to produce the certificate she had received instead of simply stating that there was “no record in the Foss system that she applied for HRDC approval of a new employer”. No certificate in record maybe, but the evidence adduced permitted the officer to presume that the HRSDC had given its approval.

[33] In addition, the officer failed to consider the police report produced as promised and requested. Had the officer examined the police report in record and seen that it corroborated the applicant’s allegations, he might have concluded differently, considering the flexibility required from an officer when dealing with requests of abused caregivers. Who knows also if the officer would not have concluded differently with regard to the applicant’s living arrangements as a caregiver?

[34] It is important to note that the officer never dismissed the probative value of the presumed HRSDC approval of a new employer that lied behind the applicant’s request for an extension of her new employment authorization. He never dismissed also the probative value of the police report produced in evidence. On the contrary, the officer compounded the error by insisting on the applicant’s failure to provide the police report and to produce the certificate of the HRSDC approval of her new employer.

[35] The applicant and her new employer, the Cloutier family, have shown great respect towards the law. The said family also showed compassion in assisting the applicant through these procedures and were present in Court when the present recourse was heard. They have tried unsuccessfully to obtain an extension of the applicant's employment authorization already obtained, and yet were unable to get the necessary permits. Finally, the applicant filed an application for permanent residence from within Canada on H & C grounds for which she was entitled to obtain at the very least a fair hearing.

V. Conclusion

[36] The Court recognizes that it must exercise great deference with regard to decision of this nature. But seeing the nature of the compounded factual errors made by the officer to conclude as he did, the Court does not see how an ordinary person such as the applicant could reasonably conclude that she obtained a fair hearing. Furthermore, considering the discretionary nature of H & C decisions, the Court is unable to conclude that without these errors there is no possible way that another outcome could not have been reached.

[37] As the above conclusions are sufficient to warrant the intervention of the Court, it will not be necessary to consider the other argument made by the applicant with respect to the child's best interests.

[38] The impugned decision is found for these reasons unreasonable with the consequence that the application will be allowed. The Court agrees with the parties that this affair raises no serious question of general importance to certify.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application is allowed, the decision dated March 13, 2008, is set aside, and the matter is referred to a different immigration officer for reconsideration.

"Maurice E. Lagacé"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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