Federal Court  Cour fédérale

Date: 20090611

Docket: IMM-5197-08

Citation: 2009 FC 615

Ottawa, Ontario, June 11, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

CHERYL-ANN ARLETTE LYNCH
a/k/a ARLETTE LYNCH

Applicant

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Immigration Officer considered the Applicant's allegation that the refusal of her work permit application was unfair in that she was misled by the fact that the Quebec authorities had different criteria than those set out in s. 112 of the *Immigration and Refugee Protection Regulations*, SOR/2002/227 (Regulations) with respect to live-in caregivers.

[2] The Immigration Officer noted that it is clearly stated on the "certificate d'acceptation du Québec à titre de travailleur temporaire" (CAQ) that "*Le présent certificat n'est pas un document*

d'admission et ne saurait en aucun cas dispenser son titulaire des autorisations requises par le Gouvernement du Canada".

II. Judicial Procedure

[3] This is an application for judicial review of a decision of an Immigration Officer, dated November 4, 2008, denying the Applicant's application to file an Application for Permanent Residence from within Canada on humanitarian and compassionate grounds.

III. Facts

[4] The Applicant, Ms. Cheryl-Ann Arlette Lynch (a.k.a. Arlette Lynch), is a citizen of St-Vincent and the Grenadines. She came to Canada, as a visitor, on April 15, 2003. She was entitled to stay in Canada until October 14, 2003.

[5] Ms. Lynch was allowed to extend her visitor status a few times, up until December 31, 2006. Every time her visitor status was extended, Ms. Lynch was reminded that she was prohibited from engaging in employment in Canada.

[6] Ms. Lynch was issued a CAQ, in April 2004, March 2005 and February 2006. The letter sent to Ms. Lynch along with the certificates stated: "Nous vous signalons que notre Certificat d'acception du Québec (CAQ) ne vous autorise pas à travailler tant que vous n'aurez pas obtenu un permis de travail de Citoyenneté et Immigration Canada".

[7] On July 9, 2004, Ms. Lynch's application for a work permit filed from within Canada was refused in Vegreville because she was ineligible.

[8] On June 5, 2006, Ms. Lynch's application for a work permit as a live-in-caregiver was refused at the visa office of Port of Spain in Trinidad and Tobago as she did not meet the requirements of section 112 of the Regulations. More specifically, the designated immigration officer concluded that Ms. Lynch had not successfully completed a course of study equivalent to secondary schooling in Canada and that she did not have one year of full-time work experience within the three years prior to the day she submitted her application for a work permit.

[9] Ms. Lynch did not file an Application for Leave and for Judicial Review of the decision refusing her work permit. Instead, she continued to work illegally.

[10] On January 31, 2007, Ms. Lynch's Application for an extension of her visitor record was refused.

[11] On March 27, 2007, Ms. Lynch's Application for a temporary resident permit and a work permit was refused.

[12] On November 13, 2007, Ms. Lynch submitted her Application for Permanent Residence from within Canada based on H&C considerations.

IV. Analysis

[13] Ms. Lynch filed as Exhibit "B" of her affidavit "A copy of relevant portions of the M.I.C.C. website and its *Guide des procédures d'immigration* regarding the requirements of the live-in caregiver program.

[14] These documents should not be considered as they were not submitted to the Immigration Officer who rendered the decision which is under review (*Asafov v. Canada (Minister of Employment and Immigration)* (1994), 48 A.C.W.S. (3d) 623, [1994] F.C.J. No. 713 (QL); *Wazid v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1415, 153 A.C.W.S. (3d) 687; *Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 260, 324 F.T.R. 83).

[15] While the policies of Citizenship and Immigration Canada (CIC) can obviously be relied upon in a judicial review of an immigration officer's decision, the same cannot be said with the policies and the other materials published by a province on their website unless they have been submitted to the decision-maker.

Standard of Review

[16] Contrary to what is argued by Ms. Lynch, at paragraphs 19 to 21 of her factum, the applicable standard of review in the present case is that of reasonableness. Indeed, Ms. Lynch's arguments do not raise an error of law but are rather an attempt to show that the Immigration Officer did not properly excise her discretion under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[17] As a result, this Court will only intervene to set aside the Immigration Officer's decision if it is demonstrated that it was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.R. 190; *Doroshenko v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1139, [2008] F.C.J. No. 1422 (QL)).

General Principles

[18] It is a fundamental principle of the IRPA that those who want to become permanent resident of Canada must apply for permanent residence from outside Canada (IRPA at s. 11; Regulations at s. 6; *Espino v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 74, 308 F.T.R. 92; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, [2009] F.C.J. No. 4 (QL)).

[19] Section 25 of the IRPA gives the Minister the power to allow individuals to file their application for permanent residence from within Canada. This is an exceptional and discretionary measure (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 (C.A.) at paras. 15-16).

[20] The test to be applied by an immigration officer when reaching a decision under section 25 of the IRPA is to determine whether the person who requests an exception would suffer unusual, undeserved or disproportionate hardship if he were to follow the normal requirements of the Act. In *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206, [2000] F.C.J. No. 1906 (QL), it is stated:

> [26] I return to my observation that the evidence suggests that the applicants would be a welcome addition to the Canadian community. Unfortunately, that is not the test. To make it the test is to make the H & C process an ex post facto screening device which supplants the screening process contained in the Immigration Act and Regulations. This would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay. The H & C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship. There is no doubt that the refusal of the applicants' H & C application will cause hardship but, given the circumstances of the applicants' presence in Canada and the state of the record, it is not unusual, undeserved or disproportionate hardship…

[21] The Immigration Officer applied the right test and her assessment of the evidence was reasonable.

The Immigration Officer's decision was reasonable

[22] The Immigration Officer's decision was reasonable. She dealt with all the grounds raised by Ms. Lynch in support of her H&C request. The fact that she did not arrive at the conclusion that Ms. Lynch wanted does not mean that she did not consider her allegations.

The "misleading" information

[23] The Immigration Officer considered Ms. Lynch's allegation that the refusal of her work permit application was unfair in that she was misled by the fact that the Quebec authorities had different criteria than those set out in s. 112 of the Regulations with respect to live-in caregivers.

[24] The Immigration Officer noted that it is clearly stated on the CAQ that "*Le présent certificat n'est pas un document d'admission et ne saurait en aucun cas dispenser son titulaire des autorisations requises par le Gouvernement du Canada*".

[25] The Immigration Officer concluded that Ms. Lynch failed to explain why it would be unusual, undeserved or disproportionate to file an application for permanent residence from Outside Canada.

[26] Ms. Lynch shows her disagreement with the decision rendered by the Immigration Officer. She reiterates that the information provided by the Quebec authorities was misleading, that she and her employer reasonably followed the instructions they received for three years, that being misinformed by a competent government agency is an unusual and undeserved hardship when that conduct causes a person to invest years of their life and their funds in pursuing a course of action that is doomed to failure.

[27] Note of Ms. Lynch's arguments show that the Immigration Officer committed an error which would warrant this Court's intervention.

[28] Ms. Lynch's arguments divert the Court from the real issue that the Immigration Officer had to look at.

[29] The issue was not whether being misinformed by the Quebec authorities constituted unusual and undeserved hardship. Rather, the issue was whether the requirement to apply for permanent residence from outside Canada would cause Ms. Lynch unusual, undeserved or disproportionate hardship.

[30] In any event, assuming that Ms. Lynch and her employer were misled by the Quebec authorities, and were not simply willfully blind, this is a matter between them and the province and does not confer Ms. Lynch the right to have her Application for Permanent Residence processed from within Canada.

[31] Ms. Lynch and her employer might possibly have legal recourses against the province for their losses; however, the Quebec authorities warned Ms. Lynch and her employer that a work permit had to be obtained from CIC. This should have incited them to look at the federal requirements.

[32] Had Ms. Lynch and her employer been more interested in the federal requirements, they would have easily found the requirements of s. 112 of the Regulations. They would also have found that the operation manuals located on CIC's website have two chapters on live-in caregivers

(Chapter OP 14 deals with the processing of the initial application for a work permit in the live-in caregiver category and Chapter IP 4 describes the processing of the subsequent renewal and issuance of new work permits and the application for permanent residence in Canada following the completion of two years of employment as a live-in caregiver). Chapter OP 14 clearly states:

8.6 Quebec-bound applicants	**8.6 Requérants qui entendent se rendre au Québec**
Under the *Canada-Quebec Accord*, Quebec's consent is required in order to admit live-in caregivers as temporary workers. Therefore a Certificat d'acceptation du Québec (CAQ) is required before issuing a work permit. The Ministère des Relations avec les citoyens et de l'Immigration (MRCI) issues a CAQ only after both the employer and employee have signed the live-in caregiver work contract.	Aux termes de l'*Accord Canada-Québec*, le Québec doit donner son consentement en vue de l'admission d'aides familiaux résidants en qualité de travailleurs temporaires. Il faut donc obtenir un *Certificat d'acceptation du Québec (CAQ)* avant de délivrer un permis de travail. Le Ministère des Relations avec les citoyens et de l'Immigration (MRCI) exige, avant de délivrer un tel certificat, que l'employeur et l'employé signent un contrat de travail d'aide familial résidant.
When an applicant has obtained a CAQ but does not meet federal requirements, the federal Regulations take precedence. These applicants should be refused. Issuance of a CAQ under the federal Live-in Caregiver Program does not automatically guarantee a work permit. (Emphasis added).	Si un requérant obtient un CAQ, mais ne satisfait pas aux exigences du gouvernement fédéral, ce sont les dispositions réglementaires fédérales qui priment. Il faut refuser les demandes de ces requérants. La délivrance d'un CAQ aux termes du Programme des aides familiaux résidants du gouvernement fédéral ne garantit pas automatiquement la délivrance d'un permis de travail.

[33] Ms. Lynch was never misled by the Canadian authorities, but even if it were the case, it would not give her the right to have her Application for Permanent Residence processed from within Canada.

[34] With respect to Ms. Lynch's allegation that she and her employer reasonably followed the instructions they received for three years is inaccurate. Both Ms. Lynch and her employer were informed that a work permit was required and they disregarded this requirement.

The allegation of domestic violence

[35] The Immigration Officer also considered Ms. Lynch's allegation that she had been abused in the past by her former boyfriend. In two paragraphs of her submissions in support of her Application for Permanent Residence from within Canada, Ms. Lynch stated that she had a relationship with a man who was violent. She wrote that this relationship came to an end in 2002.

[36] The Immigration Officer found that Ms. Lynch did not explain how this situation would prevent her from filing her Application for Permanent Residence from outside Canada.

[37] In light of Ms. Lynch's own admission that she had left her violent boyfriend in 2002 and in the absence of any allegation that she would still be at risk, the Immigration Officer's decision was reasonable.

[38] The same can be said with respect to Ms. Lynch's allegations that her baby died the day after she gave birth. Moreover, as was noted by the Immigration Officer, Ms. Lynch did not provide any document to prove her allegations.

[39] It is clear from the jurisprudence that Ms. Lynch had the onus of establishing the facts on which her request for an exemption was based (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635 at para. 8; *Williams v. Canada (Minister of*

Citizenship and Immigration), 2006 FC 1474, 154 A.C.W.S. (3d) 689; *Doroshenko*, above; *Samaroo v. Canada*, 2007 FC 292, 156 A.C.W.S. (3d) 440; *Li v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292, 152 A.C.W.S. (3d) 699; *Wazid*, above).

> The impact of the Applicant's departure on her employer and her employer's children, the Applicant's attachment with her relatives in Canada, the impact of the Applicant's departure on her family members in St-Vincent and the Applicant's social and economic establishment in Canada

[40] At paragraph 27 of her memorandum, Ms. Lynch argues that the Immigration Officer minimized the hardships that she would encounter if she had to apply outside of Canada.

[41] Ms. Lynch invites the Court to substitute its own assessment of the evidence to that of the Immigration Officer and come to a different conclusion. That is not the role of the Court on judicial review (*Li v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1292, 152 A.C.W.S. (3d) 699 at para. 25; *Choudhary v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 412, 166 A.C.W.S. (3d) 1124 at para. 23; *Samaroo*, above at para. 17; *Williams*, above at para. 12).

[42] A reading of the Immigration Officer's notes shows that she considered all the grounds submitted by Ms. Lynch in support of her Application for Permanent Residence from within Canada. She did not ignore the impact that a departure from Canada would have on the Ms. Lynch and on other people; however, she found that this did not constitute unusual, undeserved or disproportionate hardship.

[43] According to the jurisprudence, the degree of establishment in Canada is not decisive on an application based on H&C considerations. Similarly, the hardship inherent in being required to leave after having spent several years in Canada is normally not sufficient to warrant an exception. Again, s. 25 of the IRPA is intended to provide an exceptional relief for unusual, undeserved and

disproportionate hardship (*Singh*, above at paras. 51-52; *Wazid*, above at paras. 14-16; *Monteiro v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1322, 166 A.C.W.S. (3d) 556 at paras. 18-20; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 368, 167 A.C.W.S. (3d) 161 at para. 2; *Souici v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 66, 308 F.T.R. 111 at paras. 9-10 and 36-40).

[44] As was stated by Justice James Russell, in *Pashulya v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1275, 275 F.T.R. 143:

> [43] An applicant has a high threshold to meet when requesting an exemption from the application of s. 11(1) of *IRPA*. This Court has repeatedly held that the H & C process is designed not to eliminate the hardship inherent in being asked to leave after one has been in place for a period of time, but to provide relief from "unusual, undeserved and disproportionate hardship" caused if an applicant is required to leave Canada and apply from abroad in the normal fashion. That the Applicant must sell a house or car or leave a job or family is not necessarily undue or disproportionate hardship; rather it is a consequence of the risk the Applicant took by staying in Canada without landing (*Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. LR. (3d) 206 at paras. 12, 17, 26 (F.C.T.D.); *Mayburov v. Canada (Minister of Citizenship and Immigration)* (2000), 183 F.T.R. 280 at para. 7; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 7 at para. 14).

[45] Ms. Lynch chose to work illegally in Canada. Accordingly, the Immigration Officer was entitled to conclude that her employment and the attachment with her employer's children were not independent from her control. As was stated by Justice Marc Nadon, in *Tartchinska v. Canada (Minister of Citizenship and Immigration)* (2000), 185 F.T.R. 161, 96 A.C.W.S. (3d) 112:

> [21] More importantly, the Guidelines certainly do not suggest that an applicant must pursue self-sufficiency at all cost and without regard to the means. I therefore disagree with the Applicants" argument that "[i]t is irrelevant whether self-sufficiency is pursued with or without a work permit." In my opinion, the source of one"s self-sufficiency is very relevant; otherwise, anyone could claim an exemption on the basis of self-sufficiency even if that self-sufficiency derived from illegal activities. I appreciate that in this case the Applicants worked honestly, albeit illegally. Nonetheless, the Applicants knowingly attempted to circumvent the system when they chose to continue working without authorization. Indeed, despite being told during their first interview that they were not authorized to work and that they should cease, there was no indication that the

> Applicants had given up their employment at the time of the second interview. Moreover, their lawyer had cautioned them about the risks of working without a work permit as well as on the ostensible benefit of showing self-sufficiency (regardless of its source), and they chose to remain in Canada and work illegally.
>
> [22] I understand that the Applicants hoped that accumulating time in Canada despite a departure order against them might be looked on favourably insofar as they could demonstrate that they have adapted well to this country. In my view, however, applicants cannot and should not be "rewarded" for accumulating time in Canada, when in fact, they have no legal right to do so. In a similar vein, self-sufficiency should be pursued legally, and an applicant should not be able to invoke his or her illegal actions to subsequently claim a benefit such as a Ministerial exemption. Finally, I take note of the obvious: the purpose of the exemption, in this case, was to exempt the Applicants from the requirement of applying for status from abroad, not to exempt them from other statutory provisions such as the requirement of a valid work permit. (Emphasis added).

(Also, *Rai v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1338, [2998] F.C.J. No. 1674 (QL)).

[46] Ms. Lynch has failed to demonstrate that the Immigration Officer ignored the evidence or that its factual assessment was unreasonable.

V. Conclusion

[47] For all of the above reasons, the Application for Judicial Review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;

2. No serious question of general importance be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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