Federal Court  Cour fédérale

Date: 20130918

Docket: IMM-12757-12

Citation: 2013 FC 962

Montréal, Quebec, September 18, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARIA LUISA RUEDA Y SOTOMAYOR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant seeks a judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] of a decision of an Immigration Officer refusing the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds pursuant to section 25(1) of the *IRPA*.

II. Background

[2] The Applicant, Mrs. Maria Luisa Rueda Y Sotomayor, is a Mexican citizen. She is the mother of four children, two of whom are permanent residents in Canada (Irma Carmona Rueda and Montserrat Carmona Rueda), and two of whom live in Mexico. The Applicant also has four sisters and three brothers who live in Mexico. Prior to her arrival in Canada, the Applicant lived with her husband in Mexico. Her husband passed away in October 2011, while the Applicant was residing with her daughter in Canada.

[3] The Applicant's eldest daughter residing in Canada, Irma, was granted permanent residence status in June 2005, after being recognized as a protected person. The Applicant's other daughter, Montserrat, arrived in Canada in July 2004, as a refugee claimant; however, she was denied refugee status in Canada.

[4] The Applicant first arrived in Canada on January 20, 2006, shortly after her daughter, Montserrat, suffered a cerebral haemorrhage, which left her with spastic hemiparesis on the left side of her body, impairing her control of movement. She was originally told that she would be in a vegetative state. The Applicant was given a temporary resident visa until December 20, 2006 to take care of her daughter. (Application Record [AR] at pp 31-32 and Affidavit at para 6, AR at p 15).

[5] On September 2, 2006, however, the Applicant and her daughter, Montserrat, voluntarily left Canada and returned to Mexico to be with their family. Although Montserrat remained in Mexico for nearly two years (AR at p 10), the specialized care and medical treatment which

Montserrat had received in Canada was the only treatment she had received. She had neither medical care or treatment in Mexico.

[6] On January 24, 2008, the Applicant and Montserrat returned to Canada and were re-admitted as temporary residents. The Applicant clearly stated that this return to Canada was specifically for follow-up treatments for her daughter (AR at p 10).

[7] In June 2008, the Applicant's daughter, Montserrat, filed an application for permanent residence status in the Spouse or Common-Law Partner in Canada Class, following her marriage to her former roommate, Miriam Castillo de Pedro, in February 2008. She was granted permanent residence status on January 26, 2009.

[8] According to the AR, Mrs. Castillo de Pedro and Montserrat, although married, she and her spouse never did reside together after their marriage. From the time of their return to Canada in January 2008 to November 2009, the Applicant and her daughter, Montserrat, resided with Irma, the Applicant's other daughter from whom, according to uncontradicted testimony and evidence, she is now estranged. Since November 2009, the Applicant has resided alone with her daughter, Montserrat. The marriage between Mrs. Castillo de Pedro and Montserrat ended sometime in 2010 (AR at p 11).

[9] In April 2010, the Applicant submitted her application for permanent residence status on H&C grounds. In her application, the Applicant explained that she could not leave Canada as her

daughter, Montserrat, depends most heavily on her to perform her essential daily needs, from dressing to household chores and necessities for personal welfare, due to her limited mobility.

[10] In November 2012, subsequent to his consideration of the case, the Officer refused the Applicant's H&C application.

III. Decision under Review

[11] The Officer's decision was in the form of a letter, dated November 22, 2012 and the Officer's "Reasons for Decision" was dated on the same day. In his decision, the Officer found that the Applicant had provided insufficient evidence to support the conclusion that a return to Mexico would amount to an unusual and undeserved or disproportionate hardship.

[12] Subsequent to the Officer's assessment, the Officer determined that the Applicant had made little effort to establish herself in Canada. At the time of his decision, the Applicant did not express herself in either official language, although she could make herself understood as explained in the evidence. Although she had not been employed, she had volunteered; the Applicant supported herself entirely by sharing with her daughter, her daughter's social assistance income with assistance from a food bank.

[13] Furthermore, the Officer found that the Applicant's allegations regarding the best interests of her "child", her 40 year-old daughter, Montserrat, could not be accepted as a child from the perspective of the legislation, given her advanced age. (Rightly so, although every child is a dependent but not every dependent is a child.) The Officer conducted an examination of the

documentary evidence and interview notes to determine the impact the Applicant's departure from Canada would have on her daughter, Montserrat. (The multiple detailed point-specific specialist medical and hospital reports clearly explaining the medical situation and care needs of Montserrat in content and context are not addressed by the Officer.)

[14] The Officer concluded that there was insufficient evidence to support the Applicant's allegation that alternative care would not be available for her daughter in her absence. The Officer noted that Montserrat had a sister, Irma, who resided in a nearby town (Drummondville, QC), as well as a spouse, Miriam Castillo de Pedro. Without viewing the entirety of the evidence, the Officer inferred that both would likely have some level of involvement in her mother's absence, although it is clearly demonstrated that financial care and sponsorship of the mother was withdrawn by her other daughter who had estranged herself and was no longer on speaking terms and that the spouse of the daughter was separated from her with no evidence to the contrary.

[15] The Officer came to the conclusion that the Applicant did not present any evidence regarding a lack of available community services for individuals who have mobility issues. (The Applicant did provide evidence regarding the lack of evidence of existing services for individuals with lack of autonomy and, also, demonstrated a lack of other alternatives in her situation due to her physical, mental and emotional state (which would lead but to institutionalization if the mother were to leave – per p 106 of the Certified Tribunal Record [CTR]) Exhibits 1 and 2 at pp 53-60 and 62-67 of the AR respectively.)

[16] Finally, in regard to the Applicant's reintegration into Mexico, the Officer held that the Applicant had two daughters and seven siblings who still reside in Mexico. According to the Officer, this would provide a strong support network to ease her transition in Mexico. (Although the testimony demonstrates otherwise, the a preference to remain with family in Mexico was not considered a feasible option due to a lack of transportation, medical care, therapy and employment integration in Mexico – Exhibit 1 at pp 32-35.)

[17] The Officer did not satisfy himself that the hardship the family would experience would be unusual and undeserved or disproportionate. Consequently, he found that the Applicant's circumstances did not justify an exemption from the requirement to file an application for permanent residence from outside the country.

IV. Issue

[18] Did the Immigration Officer fail to consider the evidence and render a reasonable decision?

V. Relevant Legislative Provisions

[19] The following legislative provision of the *IRPA* is relevant:

Humanitarian and compassionate considerations — request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, examine the circumstances	25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet

concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VI. Analysis

[20] In *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the Supreme Court of Canada held that "considerable deference should be accorded to immigration officers exercising the powers conferred by the legislation, given the fact-specific nature of the inquiry, its role within the statutory scheme as an exception, the fact that the decision-maker is the Minister, and the considerable discretion evidenced by the statutory language" (at para 62).

[21] In the case of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, the Supreme Court of Canada held that, when reviewing a decision on the standard of reasonableness, the Court must concern itself with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[22] In her submissions, the Applicant argues that the Officer ignored the letters she provided from various health care professionals regarding her daughter's medical condition. The Applicant alleges that this evidence demonstrates a lack of existing services for individuals in Mexico who

struggle with mobility issues and highlights the importance of her presence in Canada for the physical and mental well-being of her daughter.

[23] The Applicant relies upon *Jamrich v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804 and *Kim v Canada (Minister of Citizenship and Immigration)*, 2006 FC 244, to support her conclusion that the Officer's decision does not stand up to a "somewhat probing examination"; and, she does refer to the multiple specialist medical and hospital reports to be consulted as to how the Respondent failed to meet this standard. She refers and shows the evidence for what it is, in and of itself, rather than commenting or editorializing on it in detail. The meticulous specialist medical and hospital evidence speaks of grave consequences for the daughter should her mother leave Canada.

[24] As pointed out by the Respondent, the Applicant's submissions regarding the applicable standard of review is incorrect; the standard of reasonableness does not require decisions to stand up to a "somewhat probing examination".

[25] The Respondent submits that the Court must rather determine in regard to reasonableness whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[26] In response to the Applicant's main allegation that the Officer failed to consider relevant evidence in his decision, the Respondent submits that the Officer did consider all evidence provided by the Applicant; however, none of the evidence appeared to assist the Officer in determining

whether the Applicant would face unusual, undeserved or disproportionate hardship if she was required to file her application for permanent residence from Mexico.

[27] In the present case, this Court finds that the Applicant did raise substantive arguments in her Applicant's Memorandum as to how she had met this threshold. The Applicant referred to detailed specialist medical and hospital reports specifying that her daughter would need institutionalization if the Applicant were to leave Canada (reference is made to p 106 of the CTR to a report from the Neurological Institute in Montreal attached to McGill University specifying consequences) as to why she disagreed with the weight assigned by the Officer to the evidence with respect to her daughter's medical condition.

[28] In a recent comment on this point, in *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65, [2012] 3 SCR 405, the Supreme Court of Canada emphasized that a reviewing court must consider a decision-maker's decision as a whole, in the context of the underlying record, to determine whether it was reasonable:

> [3] ... administrative tribunals do not have to consider and comment upon every issue raised by the parties in their reasons. For reviewing courts, the issue remains whether the decision, viewed as a whole in the context of the record, is reasonable (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R.). [Emphasis added.]

[29] In the present case, the Court has considered the basis upon which the Officer's decision was rendered to determine its lack of reasonableness on the basis of the entirety of the record; it contains documentation from specialist medical and hospital assessments of a detailed nature to the contrary of the reasoning and conclusion of the Officer.

[30] It is recognized by the Court that section 25(1) is an exceptional provision; one that allows an exemption only where an applicant can prove unusual, undeserved or disproportionate hardship if required to file an application for permanent residence from outside the country.

[31] Undeserved hardship is defined as hardship that is not anticipated by the *IRPA* or its regulations, and, in most cases, results from circumstances beyond the person's control. Disproportionate hardship is found in circumstances where an applicant applying for permanent residence from outside Canada would be confronted with a disproportionate impact based on circumstances of a personal nature (see *Immigration Manual*, IP 5 at pp 5.7, 5.8; *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, 340 FTR 29 at para 19).

[32] The exceptional nature of relief under section 25(1) is such that an applicant must meet a high threshold to be granted an exemption (*Irimie v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1906 (QL/Nexis) (FCTD) at para 12; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635).

[33] The Applicant's removal from Canada clearly appears to create a situation of severe consequences of a medical, physical, mental and emotional variety for reasons of a daily functioning necessity, in addition to that of family separation; it can be said to cause, in and of itself, unusual, undeserved or disproportionate hardship. Justice Denis Pelletier, then of the Federal Court, provides most useful guidance on this point in *Irimie*, above:

> [12] … It would seem to follow that the hardship which would trigger the exercise of discretion on humanitarian and compassionate grounds should be something other than that which is inherent in being asked to leave after one has been in place for a period of time. Thus, the fact that one would be leaving behind

> friends, perhaps family, employment or a residence would not necessarily be enough to justify the exercise of discretion. [Emphasis added.]

(Reference is also made to *Mayburov v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 953 (FCTD) (QL/Lexis).) The above decision of Justice Pelletier demonstrates that indeed much more would need to be in evidence in a H&C application which does appear to be the case herein in regard to the demonstrative evidence of unusual, undeserved or disproportionate hardship.

[34] The matter, as assessed by the Officer, was one where he concluded that the Applicant failed to demonstrate that she had met the threshold of unusual, undeserved or disproportionate hardship if separated from her daughter and returned to Mexico.

[35] The Officer, after his review of the Applicant's evidence in regard to the Applicant's establishment in Canada had determined that her degree of establishment did not reach the threshold to justify a statutory exemption.

[36] It the Court's view that this is a case unto itself (*cas d'espèce*) as it does appear that the Applicant had, in fact, provided sufficient clear evidence for her need to remain in Canada. As described above, at the time of the Officer's decision, the Applicant did not express herself in either official language (after nearly 5 years in Canada, although the evidence demonstrates she is able to make herself understood). As per the evidence, the Applicant had not been employed due to time constraints although she volunteered. She shared and subsisted entirely on her daughter's social assistance and a food bank to meet her needs. In addition, the Applicant did provide a number of support letters from family and friends which were noted in the decision; yet, the majority of the medical reports and letters demonstrate the Applicant's daughter's need for her mother to remain in

Canada and the Applicant's establishment, as linked to the care of her daughter, remain, for all intents and purposes, unaddressed. The mother is not requesting H&C for her own personal needs but to meet her daughter's daily needs which would not be met, except through institutionalization, according to the evidence, if she did not remain in Canada.

[37] The evidence itself, as witnessed upon her return to Mexico shortly after the onset of her daughter's illness, demonstrates that she did have a large supportive family in Mexico, which did help her reintegrate into the family framework upon her previous return, however, as was specified in the detailed evidence, no treatment or medical care was available for her daughter in the family's circumstances. In her H&C application, the Applicant specified that leaving her husband, (now deceased during her stay in Canada while attending to her daughter), her family, her job and her country to come to Canada was leaving a large part of her life behind (AR at pp 32 and 35) to ensure that her daughter would be taken care of as her daughter would not manage to do so otherwise without institutionalization as confirmed in multiple health professional reports and those living in the Applicant's and her daughter's midst.

[38] The evidence on file indicates that although Montserrat has both a sister and a spouse residing in Canada, neither can be considered as possible care givers to Montserrat in her mother's absence. All of the evidence from the medical establishment, and further to evidence from friends, also shows to be to the very contrary. In addition, health support services are demonstrated, as discussed in the evidence, as not being available in Mexico in the case of Montserrat, in her particular family circumstances.

[39] In her submissions, the Applicant makes reference to a letter included in the Applicant's Record at page 70, which alleges that Irma, Montserrat's sister, no longer speaks to Montserrat or the Applicant. This allegation was presented to explain that no alternative care was available for Montserrat in Canada. It would, thus, appear, if Irma, Montserrat's sister, does not speak to her, nor does she live with her, then Irma would not take care of her sister.

[40] Similarly, the Applicant specified in her interview with the Officer that her daughter was no longer in a relationship with her spouse; and, no evidence was shown to the contrary in regard to Montserrat's separation from her spouse.

[41] In light of the foregoing, the Court finds that the Officer did commit a reviewable error in the evaluation and weight given to the evidence; therefore, it is the Court's view that the Officer did not consider the evidence in its entirety. The Officer's decision falls outside of the range of acceptable outcomes and is not defensible in respect of the facts and law.

[42] This Court finds that the lack of addressing the challenges to the Applicant's return to Mexico in regard to the daughter's needs, as per extensive detailed objective evidence, itself, in respect of the lack of essential continued care for the Applicant's daughter, unless she is institutionalized in Canada, illustrates the consequences of omitting to address the specific key evidence on core issues at the very heart of the humanitarian and compassionate consideration without adequately even, if briefly, explaining or discussing such. According to clear unequivocal specialized evidence, if the mother (Applicant) is returned to Mexico, the only option for her

daughter, according to specialist medical reports in evidence, would be institutionalization in Canada (per previous reference to p 106 of the CTR).

VII. Conclusion

[43] Recognizing that this is a case unto itself (*cas d'espèce*) due to point-specific evidence, the Applicant's application for judicial review is granted.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be granted and the matter be returned for determination anew (*de novo*) before another Immigration Officer with no question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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