Federal Court  Cour fédérale

Date: 20140113

Docket: IMM-8734-12

Citation: 2014 FC 35

Ottawa, Ontario, January 13, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROSALBA MOJICA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of a Senior Immigration Officer [Officer] dated 10 August 2012. That decision refused the Applicant's request to reconsider and reverse the Officer's decision of 27 June 2012, which refused the Applicant's application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds, under subsection 25(1) of the Act.

BACKGROUND

[2] The Applicant was born in 1956 and is a citizen of Mexico. Her husband passed away in 1987. She has two adult children who live in Canada and are Canadian citizens.

[3] The Applicant lived alone in the town of Cuernavaca, a 45 minute drive from Mexico City. She entered Canada in July 2008 as a visitor and made an application for permanent residence on H&C grounds on 27 October 2008.

[4] The Applicant based her H&C application on the grounds of risk to her day-to-day being if she returned to Mexico, as well as on family ties. With regard to risk, she submitted that as a single woman living alone in Mexico with children living in Canada, she would be perceived as rich and an easy target for criminals. Country documentation was submitted describing the wave of crime and lawlessness plaguing the country, particularly in Mexico City. On the issue of family ties, the Applicant submitted that she is extremely close to her two adult children, who both live in Canada. Allowing her to stay would enable her children to continue to support her financially and emotionally.

[5] The Application was refused on 27 June 2012.

[6] On 18 July 2012, having received notice of the negative decision, the Applicant submitted a Request for Reconsideration wherein she made additional submissions and disclosed the contents of her children's refugee claims, which had not been before the Officer. The evidence revealed that her daughter had been raped by the son of a notorious drug trafficker, and subsequently pursued by him.

Once her daughter left for Canada, the Applicant's son was threatened and attacked by men seeking his sister's whereabouts. Both children filed refugee claims in Canada and are now Canadian citizens.

[7] By way of letter dated 10 August 2012, the Officer informed the Applicant that the initial decision to refuse her H&C application remained unchanged.

DECISION UNDER REVIEW

[8] The Decision in this case consists of the letter to the Applicant dated 27 June 2012 [Refusal Letter], the Officer's reasons for decision [Reasons] and the second refusal letter [Second Refusal Letter] dated 10 August 2012.

[9] The Officer began by stating the test to be met by the Applicant: "the Applicant bears the onus of satisfying me, the decision maker, that her personal circumstances, including the best interests of any child affected by my decision, are such that the hardship of having to obtain a permanent resident visa from outside Canada as required by the Immigration and Refugee Protection Act (IRPA) would be: (i) unusual and undeserved, or (ii) disproportionate."

[10] The Officer noted the Applicant's concerns regarding the high levels of crime in Mexico, as well as her circumstances as a lone, middle-aged woman with children living in Canada, but determined that there was insufficient evidence to corroborate the allegation that the Applicant "was perceived to be rich and an easy target for criminals." The Officer then proceeded to examine the country conditions in Mexico and noted that while violence against women remains a serious

issue, the Mexican government is making serious efforts to address it. On this point, the Officer concluded that, while the general situation for women in Mexico may cause the Applicant some hardship, it did not amount to unusual and undeserved or disproportionate hardship.

[11] Regarding the ongoing violence and crime discussed in the documentary evidence on Mexico, the Officer found that the conditions described were faced by the general population, and the Applicant had not provided any specific occurrences or sufficient evidence to establish that she faces a possible risk of being a victim of crime. Therefore, the Officer concluded that the evidence did not show that the hardships relating to conditions in the country of origin would result in an unusual and undeserved or disproportionate hardship for the Applicant if she were to return to Mexico.

[12] The Officer then examined the issue of the Applicant's family ties, noting her submissions that the she would be "alone, lonely and isolated in Mexico" and that she is extremely close to her children, relying on them for both emotional and financial support. However, the Officer found that there was insufficient evidence to assess the interdependency between the Applicant and her children or to assess the extent to which the Applicant would be impacted by a possible separation. The Officer also found that there was insufficient evidence that the Applicant could not maintain relationships with her family in Canada from abroad through other means. Therefore, the Officer was not satisfied that leaving Canada would have a significant negative impact on the Applicant that would constitute an unusual and undeserved or disproportionate hardship. Finally, the Officer noted the existence of the new Parent and Grandparent Super Visa, stating that the Applicant would likely be able to apply for it with the help of her children.

[13] Based on all of the information submitted up to that point, the Officer was not satisfied that the Applicant had presented sufficient H&C grounds to justify the requested exemption, and refused the Application on 27 June 2012.

[14] Following the Request for Reconsideration submitted by the Applicant, the Officer issued a second refusal letter dated 10 August 2012. The letter did not contain separate reasons, but stated that "[a]fter considering the additional submissions, the initial decision to refuse your H&C application remains unchanged."

ISSUES

[15] The Applicant raised the following issues in written submissions:

a. Did the Respondent err in applying the wrong test to the assessment?

b. Did the Respondent err in failing to consider the submission dated 18 July 2012?

However, at the oral hearing of this application the Applicant withdrew issue (a).

STANDARD OF REVIEW

[16] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake

a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36.

[17] Since the Applicant withdrew her argument based on issue (a), it is unnecessary to consider the standard of review that applies to that issue.

[18] Issue (b) involves determining whether the Officer erred in failing to consider the submissions in the Applicant's Request for Reconsideration. Responding to a request for reconsideration of an application for permanent residence involves an exercise of discretion that is reviewable on a standard of reasonableness: *Trivedi v Canada (Minister of Citizenship & Immigration)*, 2010 FC 422 at para 17; *Rashed v Canada (Minister of Citizenship and Immigration)*, 2013 FC 175 at para 44 [*Rashed*].

[19] In her arguments, the Applicant also takes issue with the adequacy of the reasons provided in the Second Refusal Letter. In *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*], the Supreme Court of Canada held at para 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." Thus, any issue that may arise as to the adequacy of reasons will be considered in the context of the reasonableness of the Officer's decision.

[20] When reviewing a decision on the standard of reasonableness, the analysis will be concerned 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." See *Dunsmuir*, above, at para 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision 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."

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable in these proceedings:

Application before entering Canada	**Visa et documents**
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	11. (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
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	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

may, on request of a foreign national outside Canada, examine the circumstances 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.	loi, et peut, sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet 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.

ARGUMENT

Applicant

[22] The Applicant submits that the Officer erred by failing to consider the submissions dated July 18, 2012. Relying on the Federal Court's decision in *Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2009 FC 695 (reversed on other grounds, 2010 FCA 230), the Applicant says that it is desirable to adopt a flexible approach to reconsidering cases in appropriate circumstances, including where there is new information in the context of an H&C assessment. The Applicant submits that this is a case where it would be reasonable and equitable for the decision-maker to reconsider. The Applicant also relies on *Marr v Canada (Minister Citizenship and Immigration)*, 2011 FC 367, where Justice Zinn stated at para 57:

> … Basic fairness and common sense suggest that if a visa officer, within days of rendering a negative decision on an application that has been outstanding for many years, receives a document confirming information already before the officer that materially affects the result of the application, then he or she should exercise his or her discretion to reconsider the decision. Nothing is served by requiring an applicant to start the process over and again wait years

> for a result when the application and the evidence is fresh in the officer's mind and where the applicant is not attempting to adduce new facts that had not been previously disclosed.

[23] Although the Second Refusal Letter states that the Applicant's additional submissions were considered, no reasons were provided. The Applicant submits that this constitutes an error in law, as per *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. The Applicant further argues that a boilerplate remark that additional submissions were considered cannot stand, relying on *Bhuiyan v Canada (Minister of Citizenship and Immigration)*, 2012 FC 117 [*Bhuiyan*] at para 15:

> [15] Even if the boilerplate remark that the additional material had been considered had been inserted in the refusal letter, it would not necessarily follow that reconsideration actually took place. As stated in Court of Appeal in *Attaran*, above, at paragraph 36:
>
> > Conversely, just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative. To find such a statement to be conclusive of the inquiry would be to elevate form over substance, and encourage the recital of boilerplate statements in the record of the decision-maker. […]

[24] While the Applicant acknowledges that the "adequacy" of reasons is no longer a stand-alone basis for quashing a decision, as stated by the Supreme Court of Canada in *Newfoundland Nurses*, above at para 14, the same decision states that reasons must allow the reviewing court to understand why the tribunal made its decision, and permit it to determine whether the conclusion is within the range of acceptable outcomes (at para 16). The Applicant relies on the reasoning of Justice Rennie in *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at paras 9-11:

> [9] The decision provides no insight into the agent's reasoning process. The agent merely stated her conclusion, without explanation. It is entirely unclear why the decision was reached.

> [10] *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 does not save the decision. Newfoundland Nurses ensures that the focus of judicial review remains on the outcome or decision itself, and not the process by which that outcome was reached. Where readily apparent, evidentiary lacunae may be filled in when supported by the evidence, and logical inferences, implicit to the result but not expressly drawn. A reviewing court looks to the record with a view to upholding the decision.
>
> [11] *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

Respondent

[25] The Respondent submits that the Applicant has made bald statements that amount to a disagreement with the way the Officer assessed the evidence. It is not the role of the Court to reweigh the evidence.

[26] On the issue of the Applicant's Request for Reconsideration, the Respondent submits that the Officer considered the further submissions and was not obliged to do more than to state that "[a]fter considering the additional submissions, the initial decision to refuse your H&C application remains unchanged." The Respondent argues that the Applicant has not shown any rationale for requiring two sets of reasons to be rendered for one application.

[27] Accordingly, the Respondent requests that the application for judicial review be dismissed.

ANALYSIS

[28] At the oral hearing of this application on 30 October 2013 the Applicant withdrew her "wrong test" ground of review and concentrated upon the reconsideration aspects of the Decision as contained in the Officer's letter of 10 August 2012.

[29] As the Applicant points out, this is a form refusal letter, but that in itself does not constitute a reviewable error.

[30] The Applicant suggests that the Officer may not even have considered her reconsideration submissions and evidence, but I do not think there is any convincing reason to doubt the Officer's express words that these submissions were considered. That being the case, the issue before me is whether the reconsideration Decision contained in the 10 August 2012 letter which refers to the original refusal of 27 June 2012 is unreasonable.

[31] The Applicant suggests I should apply a correctness standard in this context, but it is my view that the Applicant is asking the Court to consider matters of justification, transparency and intelligibility that fall within para 47 of *Dunsmuir*, so that we are really concerned with whether the reconsideration Decision was reasonable or not. The Applicant does not attack the original decision in her arguments, so I must assume she accepts it and that it contains no reviewable error.

[32] It is clear to me that the Officer exercised his or her discretion to reconsider, but declined to change the original refusal. The reasons are brief: "After considering the additional submissions, the initial decision to refuse your H&C application remains unchanged." The original decision to refuse contains the original reasons for refusal, so I think we have to accept that the original reasons are also intended to be applicable to the new submissions, for reconsideration.

[33] In *Bhuiyan*, above, Justice Harrington provides the following guidance:

> [15] Even if the boilerplate remark that the additional material had been considered had been inserted in the refusal letter, it would not necessarily follow that reconsideration actually took place. As stated in Court of Appeal in *Attaran*, above, at paragraph 36:
>
> > Conversely, just as the absence of express evidence about the exercise of discretion is not determinative, the existence of a statement in a record that a discretion was exercised will not necessarily be determinative. To find such a statement to be conclusive of the inquiry would be to elevate form over substance, and encourage the recital of boilerplate statements in the record of the decision-maker. […]

[34] In the present case, the boilerplate remark is contained in the Decision. It does not necessarily follow that reconsideration took place, but the text of the letter provides no evidence that it did not. The whole context requires examination.

[35] The Request for Reconsideration refers to the Applicant's daughter's past traumatic experiences and the reason they were not revealed, but it says very little about the Applicant that could be relevant to assessing unusual and undeserved or disproportionate hardship if the Applicant leaves her children and returns to Mexico. The essence of the submission is contained in counsel's words:

> While we recognize that we wish this information had been disclosed to you earlier for your reconsideration, however, we do ask that you please consider the Daughter's reluctance to re-visit her past given how difficult it must be for a rape victim to re-tell their ordeals, we therefore ask that you please exercise your discretion to reconsider your decision, in light of the circumstances at bar.

[36] While it is entirely understandable that the Applicant and her daughter might be reluctant to re-visit the daughter's past experience in Mexico, the Request for Reconsideration does not explain how this bears upon the Officer's assessment of the hardship that the Applicant herself faces. When I put this matter to counsel at the hearing of this application, she said that the submissions and evidence revealed the Applicant to be "more vulnerable" than she had revealed in her original submissions and that the Applicant herself might face harassment from drug traffickers if she goes back. Reasonably speaking, I do not see how the Officer would be able to pick this up from the submissions. The Applicant's own fears in the past were not that she had been threatened; she feared for her children who are now safe in Canada. It may be that her daughter, because of her own past experience, requires the presence of her mother, but if this is the case, she does not mention it in her hand-written letter to the Officer in which she says that:

> Since we got accepted as permanent residents and then making our dream come true by becoming Canadian Citizens, all my brothers and I have been doing is improving our lives and look at the bright side of life

[37] Both the Applicant's daughter and her son have been through college and now have successful jobs.

[38] In my view, I see nothing in the Request for Reconsideration and the enclosed materials that is of relevance to the Officer's obligation to assess unusual and underserved or disproportionate

hardship that the Applicant might face, or that would alert the Officer to issues of increased vulnerability or harassment concerns. The submissions are about the past experiences of the Applicant's children. They do not refer to present dangers or hardship. Even if, for instance, the Applicant fears that upon return to Mexico she will be harassed to reveal the whereabouts of her children, the reluctance to discuss her daughter's rape would not have prevented her from revealing this in the original submissions.

[39] In H&C applications, the onus is on the applicant to establish unusual and undeserved or disproportionate hardship. The Applicant in this case, assisted by her children, was given every opportunity to make her case and to place all relevant evidence before the Officer, including the considerations referred to in the reconsideration request. The Applicant and her children chose not to include certain information with the original application.

[40] There is, in any event, nothing in the new submissions to support a reconsideration. The information is a submission by counsel and a hand-written letter from the Applicant's daughter about her own experiences in Mexico. There is no explanation as to why this should cause the Officer to reconsider the Decision that had already been made. The Applicant simply enclosed a copy of the refugee claims that her children had filed, which include more information about general violence in Mexico. None of this information shows the Applicant to be in any danger or subject to unusual and undeserved or disproportionate hardship. It is obvious why the Officer decided that the initial Decision to refuse the H&C application should remain unchanged. There was nothing in the further submissions that added to the possible hardship faced by the Applicant or

her children if she returned to Mexico. The reasons given in the initial Decision did not need to be changed.

[41] In *Rashed*, above, Justice Shore provided the following guidance on the discretion to reconsider at para 49:

> In *Trivedi*, above, Justice Crampton held that "[t]here is no general duty to reconsider an application for permanent residence upon the receipt of new information and there is no general duty to provide detailed reasons for deciding not to do so" (at para 30). Nevertheless, the Federal Court of Appeal in *Kurukkal v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 230 (CanLII), 2010 FCA 230, has held that "the principle of functus officio does not strictly apply in non-adjudicative administrative proceedings and that, in appropriate circumstances, discretion does exist to enable an administrative decision-maker to reconsider his or her decision" (at para 3). According to *Kurukkal*, a decision-maker's "obligation, at [the request for reconsideration] stage, is to consider, taking into account all relevant circumstances, whether to exercise the discretion to reconsider" (at para 5).

[42] It seems to me that the Officer in the present case, after "considering the additional submissions," exercised his or her discretion to leave the initial Decision unchanged.

[43] It is also my view that the record permits the Court to understand why the Officer made this decision, and whether the conclusion is within the range of acceptable outcomes.

[44] The Applicant also leaves entirely unchallenged the Officer's conclusion that the Applicant will be able to obtain the new Parent and Grandparent Super Visa which would render her able to remain in Canada for a two-year period. If this is available to her, it is difficult to see how the

Applicant would have to face unusual and undeserved or disproportionate hardship, or why the past experiences of her children have any bearing in the matter at hand.

[45] All in all, it seems to me that the original reasons adequately cover the additional submissions. There is no reason to think they were not considered. The Decision, overall, is intelligible and transparent and falls within the *Dunsmuir* range.

[46] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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