Federal Court Cour fédérale

Date: 20171109

Docket: IMM-227-17

Citation: 2017 FC 1027

Ottawa, Ontario, November 9, 2017

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

MICHELLE ANN WILLIAMS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Michelle Ann Williams, is a 51-year-old citizen of Trinidad and Tobago. She moved to the United States in 1985 and lived there for the next 15 years. Following a criminal conviction in the State of Nevada, she moved to Canada in 2000 and has lived here since then. In an application dated August 27, 2015, she applied for permanent residence under the spouse or common-law partner in Canada class and on humanitarian and compassionate grounds as she was aware her criminal conviction and failure to comply with her sentence could

render her inadmissible to Canada. In a letter dated January 9, 2017, an Officer at Immigration, Refugees and Citizenship Canada refused the Applicant's application for permanent residence on the ground that she was inadmissible for serious criminality. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision.

I. Background

[2] On October 19, 1998, the Applicant entered a guilty plea to a charge of possession of a credit card without the cardholder's consent. The Applicant maintains that she had been given the stolen credit card by a third party and had intended to use it to commit fraud by obtaining a cash advance, but she became afraid at the last minute and did not obtain the advance. She received a suspended sentence of between twelve and thirty-two months and was ordered to pay restitution of $46,403 USD within the first four and a half years of probation. The Applicant did not pay the restitution and, shortly after the conviction, she was willingly deported from the United States.

[3] The Applicant arrived in Canada in 2000 on a visitor visa valid for six months and settled in Toronto. Her relationship with her husband, Brett Fowler, began in 2006 and they were married in 2009. The Applicant has two adult children and a grandson who live in New York City. In 2011, Mr. Fowler was diagnosed with clogged arteries and an aortic aneurysm; his medical condition requires regular treatments and assistance from the Applicant.

[4] In 2010, the Applicant applied for permanent residence under the spouse and common-law partner in Canada class. In a letter dated June 27, 2013, Citizenship and Immigration Canada [CIC] requested a number of documents relating to the Applicant's criminal conviction. She provided a police record but did not include all of the requested documents, apparently due to inadvertence. CIC sent a second letter dated January 8, 2014, but this letter was apparently not received by the Applicant or her counsel at the time. Consequently, the Applicant's first application for permanent residence was refused in a letter dated June 26, 2014. Counsel for the Applicant submitted the requested documents on October 24, 2014, and requested that CIC reconsider the decision but this request was refused in a letter dated December 22, 2014. This refusal letter informed the Applicant that she could submit a new application for permanent residence, and she did so in an application received by CIC on September 3, 2015.

[5] The Applicant's second application for permanent residence was made under the spouse or common-law partner in Canada class and also on humanitarian and compassionate [H&C] grounds as she was aware her criminal conviction and failure to comply with her sentence could render her inadmissible to Canada. In a letter dated May 16, 2016 [the Stage 1 letter], Immigration, Refugees and Citizenship Canada [IRCC] informed the Applicant that she met the eligibility requirements to apply for permanent residence as a member of the spouse or common-law partner in Canada class, and that a final decision would not be made until all remaining requirements had been met, including medical, security, and background checks for the Applicant. The Stage 1 letter also requested that the Applicant provide a criminal record check as well as a police certificate from each place where she resided for six months or more since the

age of 18. In a further letter from IRCC dated September 22, 2016, the Applicant was requested to provide certified court documents relating to her criminal conviction in Nevada.

II. The Officer's Decision

[6] In a letter dated January 9, 2017, the Officer refused the Applicant's second application for permanent residence on the ground that she was inadmissible for serious criminality under paragraph 36(1) (b) of the *IRPA*. The Officer determined that the offence she had been convicted of in Nevada, if committed in Canada, would equate to an offence contrary to section 342 of the *Criminal Code*, RSC 1985, c C-46. The Officer's letter noted that the Applicant had requested to be exempted from the criminal inadmissibility on H&C grounds under section 25 of the *IRPA*, "but it was determined that insufficient H/C grounds were identified to justify the exemption request." The Officer's letter also informed the Applicant that she was required to leave Canada within sixty days.

[7] In addition to the Officer's letter, the Officer's notes form part of the reasons for the decision to refuse the Applicant's application for permanent residence. It is well established that a visa decision letter may not contain all of the reasons for a decision (see: *Ziaei v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1169 at para 21, 161 ACWS (3d) 788; also see *Muthui v Canada (Citizenship and Immigration)*, 2014 FC 105 at para 3, 237 ACWS (3d) 741).

[8] The Officer's notes show that Mr. Fowler's medical condition was considered. The Officer referenced a letter from Mr. Fowler's cardiologist which stated that the Applicant

“played a positive influence” in her husband’s medical management and that “her absence would negatively impact his health.” The Officer stated that the Applicant and her husband “have been in a relationship for a relatively long period of time” and her dedication to her husband’s medical condition “is truly commendable; significant weight was assigned to both elements.” The Officer continued by stating:

> Notwithstanding the above, I am however not of the opinion that - in itself - this constitute [*sic*] sufficient grounds to exempt the applicant from her inadmissibility to Canada for serious criminality pursuant [to] A36 (1)(b) of IRPA. I noted the seriousness of the offence committed and the significant restitution that was imposed by the Court in this case - amounting to over USD $46,000. I also noted that the client has also failed to make any repayment toward the restitution as per the information provided.

[9] The Officer also considered the Applicant’s two adult children and grandson who live in New York City. The Officer found that “limited evidence” was provided to demonstrate that the Applicant could not maintain regular contact with her family members in spite of higher travel costs and distance between New York City and Trinidad and Tobago. The Officer then reviewed reference letters from various individuals including friends and clients of the Applicant. The Officer found that it was evident the Applicant had formed various relationships since arriving in Canada. The Officer noted that, while some weight was assigned to this factor, “developing personal relationships is normally expected after an extended stay in one place.” The Officer further noted that the Applicant has relatives in Trinidad and Tobago and it could reasonably be assumed that she would have some social network there if she was to return to Trinidad and Tobago. The Officer also noted that, while the Applicant had worked as a house cleaner in Toronto and had worked in factories in the past, “limited evidence” was submitted to demonstrate that the Applicant had developed strong financial and professional ties to Canada or

that she could not be "rightfully employed and financially self-supporting" in Trinidad and Tobago should she be required to return there.

[10] The Officer considered general country condition reports for Trinidad and Tobago indicating violence and discrimination towards women, natural disasters, and criminality including crimes of a sexual nature. The Officer remarked that the country conditions described in the Applicant's submissions were "of a general nature only" and "limited evidence" was provided to show that the Applicant would be "personally and directly affected by these conditions" should she return to Trinidad and Tobago. The Officer noted that the Applicant had no criminal convictions in Canada and stated that, while this was commendable, this is "normally expected from all residents of Canada."

III. Issues

[11] This application for judicial review raises the following issues:

1. Was the Applicant denied procedural fairness by the Officer rendering a negative H&C decision after she had been found to be eligible at Stage 1?
2. Was it reasonable for the Officer to find that there were insufficient H&C grounds to permit an exemption to the Applicant's criminal inadmissibility?

IV. Analysis

A. *Standard of Review*

[12] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909). An officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FC 358).

[13] Under the reasonableness standard, the Court is tasked with reviewing a decision for "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]. Those criteria are met if "the reasons 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": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Newfoundland Nurses*]. Additionally, "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome"; and it is also

not “the function of the reviewing court to reweigh the evidence”: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339 [*Khosa*].

[14] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43). Whether an administrative decision was fair is generally reviewable by a court. However, the analytical framework is not so much one of correctness or reasonableness but, instead, one of fairness. As noted by Jones & deVillars, *Principles of Administrative Law*, 6th ed. (Toronto: Carswell, 2014) at 266):

> The fairness of a proceeding is not measured by the standards of “correctness” or “reasonableness”. It is measured by whether the proceedings have met the level of fairness required by law. Confusion has arisen because when the court considers whether a proceeding has been procedurally fair, the court…decides whether the proceedings were correctly held. There is no deference to the tribunal’s way of proceeding. It was either fair or not.

[15] Under the correctness standard of review, the reviewing court shows no deference to the decision-maker’s reasoning process and the court will substitute its own view and provide the correct answer if it disagrees with the decision-maker’s determination (see: *Dunsmuir* at para 50). Moreover, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (see: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). When applying a correctness standard of review, it is not only a question of whether the decision under review is correct, but also a question of whether the process followed in making the decision was fair (see: *Makoundi v Canada (Attorney General)*, 2014 FC 1177 at para 35, 471 FTR 71).

B. *Was the Applicant denied procedural fairness by the Officer rendering a negative H&C decision after she had been found to be eligible at Stage 1?*

[16] The Applicant argues that the Officer made a procedural error by making a negative H&C determination after a previous decision-maker had made a positive decision on the basis of the same evidence, including evidence of the Applicant's criminal history. According to the Applicant, H&C factors are normally considered at Stage 1, and Stage 2 normally involves routine medical and criminal background checks and not reconsideration of evidence and H&C factors. In the Applicant's view, because the Stage 1 decision-maker considered all of the evidence, including evidence of criminality, the Stage 1 decision was in effect an approval of the Applicant's permanent residence application pending routine medical and criminal checks. The Applicant says that since she was not informed that her criminal inadmissibility had not yet been considered, it was reasonable for her to conclude that she had been approved on the basis of the Stage 1 letter.

[17] The Respondent says the Applicant mischaracterizes the Stage 1 letter which stated only that the Applicant had met the eligibility requirements under the spouse or common-law partner in Canada class, and that a final decision would not be made until additional information was submitted. The Respondent points to the fact that the Applicant received a letter, some four months after the Stage 1 letter, requesting court documents pertaining to her criminal conviction, and another letter dated December 8, 2016, informing her that her application had been transferred to the Etobicoke office of IRCC for further assessment. In the Respondent's view, it is clear from the Stage 1 letter and the request for additional documents that there was no assessment of H&C factors at Stage 1. According to the Respondent, the only matter which had

been considered was whether she had met the eligibility requirements of the spouse or common-law partner in Canada class. The Respondent says this procedure is entirely in keeping with sections 5.31-5.36 of the *Spouse or Common-Law Partner in Canada Class Manual*, which also specifies that in cases of serious criminality the application will be referred to an inland IRCC office as was done in this case.

[18] The Applicant's argument that the Officer made a procedural error by making a negative H&C determination after a previous decision-maker had made a positive decision in the Stage 1 letter is without merit. The Stage 1 letter in this case did not state that the Applicant's criminal history would not be considered at Stage 2. In fact, the Stage 1 letter states only that the Applicant met the eligibility requirements to apply for permanent residence as a member of the spouse or common-law partner in Canada class, and that a final decision would not be made until all remaining requirements for becoming a permanent resident had been met, including security, medical, and background checks for the Applicant. The request for documentation subsequent to the Stage 1 letter undermines the Applicant's position that the Stage 1 decision-maker considered all of the evidence, including evidence of criminality, and the H&C considerations.

C. *Was it reasonable for the Officer to find that there were insufficient H&C grounds to permit an exemption to the Applicant's criminal inadmissibility?*

[19] The Applicant cites section 5.25 of the IP 5 *Immigration Applications in Canada made on Humanitarian or Compassionate Grounds* [H&C Guidelines], arguing that the criminal inadmissibility provisions are designed to prioritize security and that the Officer should have considered that the Applicant had no criminal record in Canada and posed no threat to national

security. The Officer's failure to do so is a reviewable error, the Applicant says, in view of *Figueroa v Canada (Citizenship and Immigration)*, 2014 FC 673, [2014] FCJ No 702 [*Figueroa*]. According to the Applicant, the Officer applied the wrong test by failing to engage in an analysis of why the seriousness of her crime and the level of threat to national security outweighed the H&C factors.

[20] The Applicant relies upon *Melendez v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1363, 275 ACWS (3d) 835, for the proposition that it is insufficient to simply state that the seriousness of the offence committed outweighed the H&C factors, without explaining why, and that such a bare assertion without further reasons renders a decision unintelligible. In the Applicant's view, the Officer failed to consider: why a two-decade-old conviction for a stolen credit card outweighs the hardship faced by the Applicant's husband, for whom she is the primary caregiver; the best interests of her grandchild; the hardship to the Applicant's children and those individuals for whom she is a caretaker through her work; and the hardship to the Applicant due to adverse economic conditions and high levels of criminality, including violence towards women, in Trinidad and Tobago.

[21] The Respondent contends that the Applicant is asking the Court to reweigh the evidence, something which is not a basis for judicial review. The Respondent notes that the Officer explained the reasons for finding inadmissibility for serious criminality, which included not only the seriousness of the offence but also the Applicant's failure to comply with the significant restitution order. In the Respondent's view, the Officer considered the H&C factors, but found that they were insufficient to outweigh the inadmissibility, and this finding was open to the

Officer. The Respondent distinguishes *Figueroa* on the basis that it involved a consideration of section 34 of the *IRPA* (inadmissibility based on national security) rather than paragraph 36(1)(b) (inadmissibility for serious criminality) which is the case here.

[22] According to the Respondent, the Applicant's evidence was insufficient to show the nature of the negative impact on the Applicant should she be forced to return to Trinidad and Tobago. In the Respondent's view, there was insufficient evidence to show: that her family could not visit her in Trinidad and Tobago; that she would be unable to find employment there; and what type of negative impact her husband would face should she be removed other than a bare assertion that he would be negatively impacted. The Respondent defends the Officer's determination that the documentary evidence on country conditions was general in nature and did not show that the Applicant would face the alleged hardships in Trinidad and Tobago.

[23] *Newfoundland Nurses* dictates that the Officer's reasons must be sufficiently clear to allow the Court to understand why the Officer reached the decision he or she did. It is troublesome that the Officer in this case appears to have reached the conclusion that the Applicant's level of criminality was so serious as to outweigh all of the H&C considerations. The Officer denied the Applicant's H&C request without considering the substance of the offence or how it interacts with the objective of prioritizing security as stated in paragraph 3(1) (h) of the *IRPA*. It appears that the Officer may not have been mindful of section 5.25 of the H&C Guidelines. This section contemplates that in some cases the H&C factors can outweigh or offset a "relatively minor and single incident of criminality."

[24] In my view, the Officer's decision does not sufficiently explain why the conviction for possession of a stolen credit card outside of Canada nearly twenty years ago outweighs the H&C factors. It was not reasonable for the Officer simply to label the offence as being "serious" without assessing the circumstances and substance of the offence against the H&C considerations. The Officer failed to explain why the seriousness of the offence committed and the unpaid restitution outweighed the H&C factors. The decision is unintelligible in the absence of any reason or reasons why this was so. The decision must be set aside and the matter returned to a different officer for redetermination.

V. Conclusion

[25] The Applicant's application for judicial review is allowed.

[26] Neither party raised a serious question of general importance; so, no such question is certified.

JUDGMENT in IMM-227-17

THIS COURT'S JUDGMENT is that: the application for judicial review is granted; the decision of the Immigration Officer dated January 9, 2017, is set aside; the matter is returned for redetermination by a different immigration officer in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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