Federal Court Cour fédérale

**Date: 20180302**

**Docket: IMM-3071-17**

**Citation: 2018 FC 241**

**Ottawa, Ontario, March 02, 2018**

**PRESENT: The Honourable Madam Justice McDonald**

**BETWEEN:**

**LUCITA ARMISTAN WILLIAMS**

**Applicant**

**and**

**THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP**

**Respondent**

## JUDGMENT AND REASONS

[1] Ms. Williams seeks review of the June 20, 2017 decision of the Senior Immigration Officer [the Officer] who refused her application for permanent resident status on humanitarian and compassionate [H&C] grounds under s.25 of the *Immigration and Refugee Protection Act* [IRPA].

[2] For the reasons that follow, this judicial review is allowed.

## I. Background

[3] In 2006, Ms. Williams came to Canada as a visitor from St. Vincent and the Grenadines [SVG].

[4] In 2007, she started working in Canada. In 2014, she started working as a caregiver. However, Ms. Williams only obtained authorization to work in Canada in 2015. Since 2017, she has continued to work fulltime.

[5] In 2010, Ms. Williams claimed refugee status in Canada on the basis of the domestic violence she suffered in SVG. Her refugee claim was denied by the Refugee Protection Division in December 2011.

[6] In February 2016 Ms. Williams received a negative pre-removal risk assessment and she was scheduled for removal on September 9, 2016. When she did not attend for removal, she was detained and later released on terms and conditions.

[7] In April 2016, the Applicant filed for an application for permanent residence status on H&C grounds.

## II. H&C Decision

[8] On June 20, 2017 Ms. Williams' H&C application was denied.

[9] The Officer considered the adverse country conditions in SVG in light of Ms. Williams' history of being a victim of domestic violence at the hands of her father and common law partner. The Officer noted that SVG is a democratic country with a functioning judiciary and a police force which is effective at responding to complaints. The Officer concluded that domestic violence victims have access to victim services, even though the law of SVG does not criminalize domestic violence. This risk to Ms. Williams was a factor weighed by the Officer in relation to the rest of the application.

[10] On establishment, the Officer noted Ms. Williams' work experience, but noted that this positive factor was negatively impacted by the fact that she did not have authorization to work in Canada until September 2015. The Officer noted that she attended night school, but commented that no additional information was provided on her education endeavours.

[11] The Officer considered the evidence respecting Ms. Williams' son [CW] including psychiatric assessments, medical reports, and support letters. The evidence indicated that CW suffers from depression, anxiety, and has gender dysphoria. The Officer considered Ms. Williams' role and her claim that her support has been instrumental in CW's transition from female to male. The Officer concluded Ms. Williams could continue to support her son from SVG and the Officer was satisfied that CW had a support system in Canada.

[12] The best interests of the child [BIOC] considerations related to Ms. Williams' grandson and her claim that she spends significant time with him. The Officer gave "favourable

consideration" to this, but found that given Ms. Williams works full-time, it was questionable how much involvement she had in his daily activities.

[13] Finally the Officer considered Ms. Williams' medical evidence, in particular two reports from Dr. Pilowsky from 2011 and from 2015. In the 2011 report, Dr. Pilowsky concluded that Ms. Williams suffers from PTSD and recommended counselling. The Officer noted that "Dr. Pilowsky does not identify specific psychological or diagnostic tests that were performed during her initial consultation and interview of the applicant."

[14] In the 2015 report, Dr. Pilowsky stated "I am of the professional opinion that this woman's current diagnosis is as follows: Chronic Post-Traumatic Stress Disorder (309.81), as well as Major Depressive Disorder, Severe (296.23)." The Officer noted that Dr. Pilowsky's letter outlined that the Applicant completed two psychological tests.

[15] The Officer noted that it was unclear whether Ms. Williams sought counselling. Accordingly the Officer concluded that the evidence did not support an ongoing counselling relationship. The Officer found that Ms. Williams' subsequent behaviour was not indicative of one who is ill and in need of treatment.

[16] The Officer concluded by noting that significant weight was given to the fact that s.25 of the IRPA is an exceptional measure and denied the H&C application.

## III. Standard of Review

[17] The standard of review on the Officer's decision not to grant relief on H&C grounds is reasonableness (*X.Y. v Canada (Citizenship and Immigration)*, 2018 FC 213 at para 8).

## IV. Issue

[18] Ms. Williams raises a number of issues relating to the reasonableness of the Officer's decision. However the Officer's treatment of the medical evidence is dispositive of this application.

## V. Analysis

### A. *Medical Evidence*

[19] Ms. Williams argues that the Officer erred by concluding "…I find that the applicant's subsequent behaviour is not indicative of one who is ill and in need of treatment." Specifically, Ms. Williams notes that *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 6 at paras 46-47 [*Kanthasamy*] prohibits the Officer from requiring her to adduce additional evidence of whether treatment was sought, if the diagnosis of the physician is accepted.

[20] The Respondent on the other hand argues that the Officer did not expressly accept the diagnosis, and if he did, this was a factor weighed in relation to the rest of the application. Furthermore, the Respondent argues that *Kanthasamy* cannot be interpreted to support a

situation, like here, where an applicant fails to follow the recommended treatment but can nonetheless rely upon a medical diagnosis.

[21] With respect to the 2011 report the Officer concluded that Dr. Pilowsky "did not identify specific psychological or diagnostic tests that were performed during her initial consultation and interview of the applicant."

[22] With respect to the 2015 report where Dr. Pilowsky diagnoses Ms. Williams with post-traumatic stress disorder and Major Depressive Disorder, the Officer concludes:

> The evidence before me does not support that there exists an on-going counselling relationship between the applicant and Dr. Pilowsky, or that she had more than these two assessment visits; accordingly I find that the applicant's behaviour is not indicative of one who is ill and in need of treatment.

[23] Notably, the Officer does not expressly disagree or reject the medical diagnosis in the 2011 report or in the 2015 report. Rather, the Officer impugns the diagnoses, specifically the 2015 diagnosis, by relying on the inference that a diagnosis is not to be believed if Ms. Williams did not seek follow-up treatment. The Officer provides no explanation or justification for this conclusion. By approaching the medical report in this manner the Officer erred as this is prohibited by *Kanthasamy.*

[24] This case is similar to *Sitnikova v Canada (Citizenship and Immigration),* 2017 FC 1081 at para 26 [*Sitnikova*]. There, the Court noted that the Officer "did not question the validity of the psychiatrist's diagnosis" but then "discounted the probative value of the psychiatric evidence because [the applicant] had failed to seek follow-up treatment for the mental health concerns that

had been identified by her psychiatrist." In that case, as here, the Officer did not expressly reject the medical opinion (*Sitnikova*, at para 28).

[25] Here the Officer did not explain why the medical evidence should not be believed. Rather the Officer relied simply on whether or not the Applicant sought medical treatment. In absence of any analysis of the diagnosis, the Officer's decision cannot be justified in the sense described in *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

[26] While not every error committed by an administrative decision-maker constitutes a reviewable error (*Zhu v Canada (Citizenship and Immigration)*, 2017 FC 615 at para 23), here the error goes to the "heart of the decision" (*Castillo Mendoza v Canada (Citizenship and Immigration)*, 2010 FC 648 at para 24). The assessment of the Applicant's medical evidence clearly affected the overall balance of the decision.

[27] The judicial review is therefore granted.

## VI. Certified Question

[28] The Respondent posed the following question for certification:

> In an H&C application, is it an error for an Officer not to positively weigh the fact that an applicant has been diagnosed with a mental illness that will likely deteriorate if they return to their country of origin if the applicant has taken no steps to receive treatment for that illness that is readily available to them in Canada?

[29] Legal counsel for the Applicant disagrees that this is an appropriate question for certification and argues that *Kanthasamy* is a full answer to the proposed question.

[30] In the circumstances I agree that this is not an appropriate question for certification. The question posed is largely theoretical and in any event is answered by *Kanthasamy* and *Sitnikova*.

[31] I decline to certify the question posed by the Respondent.

**JUDGMENT in IMM-3071-17**

**THIS COURT'S JUDGMENT is that**:

1. The judicial review is granted and the matter is remitted for redetermination; and

2. No question is certified.

"Ann Marie McDonald"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3071-17 |
| **STYLE OF CAUSE:** | LUCITA ARMISTAN WILLIAMS v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | JANUARY 24, 2018 |
| **JUDGMENT AND REASONS:** | MCDONALD J. |
| **DATED:** | MARCH 02, 2018 |

**APPEARANCES:**

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| Michael Butterfield | FOR THE RESPONDENT |

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