Federal Court  Cour fédérale

Date: 20190509

Docket: IMM-3246-18

Citation: 2019 FC 628

Ottawa, Ontario, May 9, 2019

PRESENT: Mr. Justice Favel

BETWEEN:

CLAUDIA LIZBETH PEREZ FERNANDEZ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of the decision of a senior immigration officer [Officer] from the Backlog Reduction Office in Toronto, Ontario, dated June 27, 2018, refusing the Applicant's application for permanent residence from within Canada on Humanitarian and

Compassionate [H&C] grounds. For the reasons that follow, the application for judicial review is dismissed.

II. Background

[2] The Applicant, aged 32, is a citizen of Mexico. She is a single mother and has an 8-year-old daughter who was born in Canada. The Applicant's parents and sister reside in Mexico. On May 6, 2008, the Applicant came to Canada as a visitor and was authorized to remain in the country until November 5, 2008. In 2017, the Niagara Falls Enforcement Agency discovered that the Applicant had been residing in Canada illegally and that her visitor status had expired in 2008. The Applicant failed to apply for an extension of her visitor status and no attempts were made to restore it. Subsequently, an exclusion order was issued against the Applicant on April 12, 2017. The Applicant submitted an application for permanent residence from within Canada on H&C grounds to Citizenship and Immigration Canada on April 10, 2017.

[3] The Applicant claims that she entered Canada in 2008, following a traumatizing and violent incident aboard a city bus in Mexico. During her stay in Canada, the Applicant met an older man with whom she later became pregnant. The Applicant's partner at that time was not ready to have a child and wanted the Applicant to have an abortion, but the Applicant opposed and her Canadian daughter was born in July 2010. After being absent for almost two years, the Applicant's partner reconsidered and chose to become a part of his daughter's life. Until today, the Applicant's partner maintains a relationship with his Canadian daughter and the Applicant claims that he supports her financially with monthly payments of $500.00.

[4] Being a single, unwed mother, the Applicant submits that she fears her return to Mexico. She stated that her family in Mexico would not support her due to her pregnancy. The Applicant also claims that seeking housing and employment in Mexico would be a burden on her and her daughter.

III. Impugned Decision

[5] By letter dated June 27, 2018, the Officer informed the Applicant that her application for permanent residence from within Canada on H&C grounds was refused and that the Applicant did not qualify for an exemption. The Applicant presented submissions with respect to: her establishment in Canada, the best interests of her child, and adverse country conditions in Mexico.

A. *Establishment in Canada*

[6] The Officer considered the evidence before him and noted that the Applicant had been living in Canada since May 2008. The Officer acknowledged that the Applicant had taken many courses in the aesthetic field to become an esthetician in Canada. It was also noted that the Applicant purchased several products and some equipment, spending over $20,000, for her business Dolly Lashes. The Applicant offers esthetic services from a studio in her home and claims to earn approximately $50,000 per year. Many of the Applicant's clients provided letters of support and expressed their satisfaction with her esthetic services. The Officer considered those letters of reference filed by the Applicant. However, the Officer stated that there was no evidence that the Applicant's business had been registered. "[E]ven though the applicant has

stated that she earns approximately $50, 000 per year, I have not been provided with any corroborating evidence regarding her actual income since her arrival in May 2008, nor that she has paid any taxes on this income."

[7] The Officer also noted that the Applicant had formed relationships with several friends in Canada. The Officer recognized that the Applicant had been in Canada since 2008 and had been involved in volunteer work. The Officer found that the Applicant had "acquired some establishment through her work experience and social connections"; however, the Officer was not satisfied that the Applicant would be granted an exemption from the IRPA and its regulations, in view of the fact that she would not be facing any hardship if she were to apply for permanent residence from outside Canada. The Officer further made the following finding:

> [T]he applicant never attempted to regularize her status in Canada since her visitor status expired in November 2008, therefore I find that the applicant's lack of regard for the immigration laws of Canada do not weigh in her favour.

B. *Best interests of the child [BIOC]*

[8] Next, the Officer considered the Applicant's Canadian daughter born on July 28, 2010. In her submissions, the Applicant stated that a return to Mexico would be extremely difficult for her daughter because she does not speak Spanish, only English. The Officer reviewed the evidence on file and noted that the Applicant only started taking English courses in 2012, therefore, it was reasonable to believe that the Applicant's daughter would have "some knowledge" of the Spanish language, as it was the only language the Applicant knew at the time. The Officer considered the child's performance in school, namely that she is a "good student", "works well independently" and has a "strong connection with her best friend". The Applicant also submitted

that her daughter attended summer camp and dance recitals. After reviewing the entire evidence submitted by the Applicant, the Officer was not convinced that the child would not be able to pursue her education and participate in extracurricular activities in Mexico.

[9] The Officer also considered the father's presence in the child's life. It is submitted that the child spends time with her father, however, due to his medical condition and possible inadmissibility to Canada due to criminality, the child's father is unable to be the sole provider of his daughter. The Applicant mentioned that the father makes payments of $500 per month for the child's needs. According to the Officer, "the applicant has not provided sufficient objective evidence to corroborate the role that [the father] plays in [the child's] life. The applicant has not provided any objective financial evidence or custody/access documents." For these reasons, as well as the father's potential deportation from Canada, the Officer found that the father's presence in the child's life is "minimal".

[10] The Officer noted the child's medical condition (bronchitis). The Applicant stated that Mexico would not be a safe country for her daughter because of its high level of pollution. The Applicant was unable to obtain her daughter's medical file from her doctor. Based on the evidence before him, the Officer found that there was insufficient objective evidence to prove the child's medical condition. The Officer also found that the Applicant failed to indicate how her daughter would be deprived from receiving the appropriate medical care in Mexico. The Officer acknowledged that "[the child's] best interests are to remain with her primary caregiver who is her mother and that her interests are better served in Canada." However, the Officer noted that the Applicant's extended family live in Mexico. If returned to Mexico, the Canadian child would

able to bond with her extended family, with her mother by her side. While the Officer recognized that the child would experience disruption in Mexico, he stated that "different standard of living exist between countries and many countries are not as fortunate to have the same social, financial and medical supports as those found in Canada". After carefully reviewing the evidence on file, the Officer was of the view that the BIOC factor was not, in and of itself, sufficient to justify the granting of an exemption under s 25(1) of the IRPA.

C. *Adverse country conditions*

[11] The Applicant fears her return to Mexico after the violent incident she experienced on the bus. After reviewing the Applicant's evidence on country conditions, the Officer was not satisfied that it would be difficult for the Applicant and her daughter to return to Mexico and to apply for permanent residence from outside Canada. According to the Officer, "Mexico is a democratic state that possesses the necessary political structures, judicial institutions and security apparatus to perform the requisite functions to protect its citizens."

[12] The Applicant submitted that she no longer speaks to her family members in Mexico after they found out about her pregnancy and her relationship with an older man. As a single, unwed mother in Mexico, the Applicant stated that she would experience problems finding housing and employment. The Officer, however, noted that it is not the first time that the Applicant has moved to a different country and started anew. The Officer found that the Applicant possesses the "skills" and "drive" to re-establish herself in Mexico. The Officer also noted that the Applicant has lived in Mexico for the majority of her life and has a degree in Business Administration from Mexico. Although the Applicant submits that she would not have any

support from either her family or her friends in Mexico, there is insufficient evidence before the Officer to convince him that the Applicant's family would have no interest in supporting her and her daughter if they were to return to Mexico. The Officer also noted that the Applicant would not be re-establishing in "an unfamiliar place" because of her understanding of the country's language and culture.

> Considering all the evidence before me and having provided it with due weight, I acknowledge that while there will inevitably be some hardship with being required to leave Canada, it is my finding that the applicant has not established that the hardships associated with general country conditions in Mexico, would warrant a positive exemption under humanitarian and compassionate considerations.

IV. Issues

[13] The Applicant raised the following issues in her written submissions, as slightly reformulated below by the Court:

1. Did the Officer err in considering the Applicant's establishment in Canada, as well as other H&C considerations, through a narrow lens of hardships?
2. Did the Officer make an unreasonable finding in the BIOC assessment?
3. Did the Officer fetter his discretion in relying on factors not indicated in s25 of the IRPA?

V. Standard of Review

[14] After carefully reviewing both parties' submissions, the Court finds that the Officer's findings in the assessment and weighing of the H&C factors, as well as the "fettering of discretion", raise questions of mixed fact and law and are reviewable under the standard of

reasonableness (*Stemijon Investments Ltd. v Canada (Attorney General)*, 2011 FCA 299 at para 24; *Uwase v Canada (Citizenship and Immigration)*, 2018 FC 515 at para 24). Therefore, the Court will intervene only if the decision 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 at para 47).

VI. Relevant Provision

[15] Subsection 25(1) of the IRPA is relevant in this proceeding:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, 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	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, 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

considerations relating to the foreign national, taking into account the best interests of a child directly affected.	tenu de l'intérêt supérieur de l'enfant directement touché.

VII. Analysis

[16] For the following reasons, the application for judicial review is dismissed.

A. *Did the Officer err in considering the Applicant's establishment in Canada, as well as other H&C considerations, through a narrow lens of hardships?*

[17] According to the Applicant, the Officer erred in applying the wrong legal test when assessing her H&C application. The Applicant argued that the Officer considered her application through the lens of hardship rather than H&C factors. Counsel for the Applicant pointed to the passages of the H&C decision that utilized the word "hardship". The Court disagrees with the Applicant's submissions regarding certain evidence that was not accorded sufficient weight by the Officer. The Court reminds that it is not the role of a reviewing court to reweigh the evidence (*Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 at para 58).

[18] The Officer made an appropriate assessment of the H&C application. He considered the entire evidence on file and nothing in the record contradicts his findings. The Officer neither erred in taking the Applicant's degree of establishment in Canada into account nor did he err in weighing this factor with the other H&C factors in the Applicant's file (*Lupsa v Canada (Citizenship and Immigration)*, 2009 FC 1054 at para 74 [*Lupsa*]). "[I]t is well established in the case law that the degree of establishment is an important, but not determinative, factor in an H&C application" (*Lupsa* at para 73) [Emphasis added by the Court].

[19] The onus was on the Applicant to present relevant evidence which would permit the Officer to exercise his discretion by determining whether it was justified to grant the Applicant an H&C exemption under these circumstances (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5). The granting of an H&C exemption is an exceptional and discretionary finding. It was reasonable for the Officer to conclude that the Applicant's degree of establishment in Canada did not warrant a special exemption under the legislative requirements (*Mikhno v Canada (Citizenship and Immigration)*, 2010 FC 386 at para 39).

[20] As submitted by the Respondent, the Officer noted in his reasons that the Applicant remained illegally in Canada after no longer having a valid visitor status. The Officer also noted that the Applicant did not make any efforts to regularize her status in Canada. It was therefore reasonable for the Officer to find that "the applicant's length of time in Canada is of her own making and not as the result of circumstances beyond her control." (Certified Tribunal Record [CTR], H&C Reasons and Decision, p 7). The Applicant disagreed and argued that the issue in this case is the Applicant's stability and her ability to take care of her family. The Court is persuaded by the argument of the Respondent.

[21] The Respondent also argued that the word "hardship" was used in a descriptive manner and not as part of the legal test. Support for this argument is found in *Boukhanfra v Canada (Minister of Citizenship and Immigration)*, 2019 FC 4, [2019] FCJ No 6 [*Boukhanfra*]. The Court is persuaded by the Respondent's argument and agrees with Justice Grammond that "what is significant is not the use of specific words, but the fact that the reasons provide a justification that accords with the directions given by the Supreme Court in *Kanthasamy*." (*Boukhanfra* at

para 15). The Court finds, similarly, that in this case, the reasons provide justification that accord with the *Kanthasamy* directions.

B. *Did the Officer make an unreasonable finding in the BIOC assessment?*

[22] The Applicant argued that the Officer erred in his BIOC analysis. According to the Applicant, the Officer made a contradictory finding that the child's "best interests are to remain with her primary caregiver who is her mother and that her interests are better served in Canada" (CTR, H&C Reasons and Decision, p 7), yet he found that the Applicant would not suffer hardship if returned to Mexico. The Applicant argued that the Officer's decision lacked sensitivity towards the child (*Cerezo v Canada (Citizenship and Immigration)*, 2016 FC 1224 at para 6 [*Cerezo*]). The Applicant also argued that the Officer wrongly determined that the child would be able to attend school and receive education in Mexico because it was submitted by the Applicant that her daughter did not speak Spanish and the Applicant's extended family would not want to support her or her child.

[23] The Court is not persuaded by the Applicant's submissions. H&C applications are very fact specific. In *Cerezo*, the Court found that the officer erred in finding that it was in the best interest of the applicant's children to remain with both parents and that their interests would be better served in Canada. The officer's reasons also indicated that it was up to the parents to decide where their children would reside. In the case at bar, the Officer acknowledged that it was in the child's best interests to remain with her primary caregiver, her mother, and that the child's interests were better served here in Canada. The Officer then weighed all of the relevant factors surrounding the child's circumstances and noted that, if returned to Mexico, the child would

remain with her mother. As submitted by the Respondent, the Applicant disagrees with how the Officer considered the H&C factors and evidence.

[24] The Officer did not err in finding that, in light of all the evidence, "it [was] reasonable to believe that the applicant's daughter would have some knowledge of the Spanish language" (CTR, H&C Reasons and Decision, p 6). There was insufficient evidence before the Officer to convince him that the child would not be able to attend school and receive education in Spanish if returned to Mexico. After reviewing the entire record, the Court notes that there is evidence, from an "early communication assessment report", submitted by the Applicant, confirming the Officer's finding. On August 9, 2012, the Applicant's daughter underwent an evaluation in communication with the Yorktown Child and Family Centre, in Toronto, Ontario. The report indicates that the languages spoken in the child's home are Spanish and English. The report also includes a box for additional comments which reads:

> [The child] is exposed to Spanish at home. According to parent report, she understands Spanish and English equally well. [The child]'s mother did not report any concerns regarding comprehension skills at the time of assessment. This area will be monitored during intervention. Further assessment is warranted.
>
> [Emphasis added.].
>
> (CTR, Early Communication Assessment Report dated August 9, 2012, pp 109-110)

[25] The onus was on the Applicant to provide the Officer with sufficient evidence to support her BIOC arguments in her H&C application. The Officer reasonably concluded that there was insufficient evidence before him to indicate that the child would be unable to attend school in

Mexico. The Officer also found that there was insufficient evidence to corroborate the child's medical condition.

[26] The assessment of a child's best interests is highly contextual and decision-makers must be sensitive when considering a particular case (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 at para 35). In this case, the Officer did not simply identify the specific circumstances of the child. The Officer properly assessed the child's age, language, her relationship with her father, her education, her extracurricular activities, as well as her medical needs both in Canada and in Mexico. The Officer gave a clear and detailed analysis of the BIOC factor and his findings do not contradict the evidence that was before him. After considering the BIOC factor, the Officer recognized that while the BIOC factor is an important one, it is not determinative and did not warrant in itself an exemption. The Court finds that the Officer was alert, alive and sensitive to the child's best interests. Therefore, it cannot be found that the decision is unreasonable (*Canada (Minister of Citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at para 31).

C. *Did the Officer fetter his discretion in relying on factors not indicated in s25 of the IRPA?*

[27] The Applicant argued that the Officer fettered his discretion by requiring that the degree of establishment in Canada be exceptional. The Respondent, on the other hand, argued that the use of the word "exceptional" by the Officer was not an error. It was simply misconstrued by the Applicant. The Court agrees with the Respondent. The Officer provided the following reasons in his decision:

> While the applicant has acquired some establishment through her work experience and social connections, and would like to enjoy the quality of life she has in Canada, I do not find that this is an exceptional situation unanticipated by our immigration laws.
>
> [Emphasis added.]
>
> (CTR, H&C Reasons and Decision, p 6)

[28] The decision, read as a whole, provides clear and adequate reasons of the Officer's assessment of the Applicant's degree of establishment in Canada, and of the other H&C factors.

> […] The Officer did not adopt an exceptional level of establishment as a legal threshold required to be met for the application to succeed and therefore reject the application on that basis. Nor did the Officer discount the Applicant's degree of establishment because it did not rise to an exceptional level.
>
> (*Thiyagarasa v Canada (Citizenship and Immigration)*, 2019 FC 111 at para 31)

VIII. Conclusion

[29] The Court finds that the Officer's decision does not warrant this Court's intervention. The decision is reasonable and the application for judicial review is dismissed. No question of general importance will be certified.

JUDGMENT in IMM-3246-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question of general importance is certified and none arises. There is no order as to costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3246-18
STYLE OF CAUSE:	CLAUDIA LIZBETH PEREZ FERNANDEZ v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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