Federal Court  Cour fédérale

Date: 20190917

Docket: IMM-6468-18

Citation: 2019 FC 1179

Toronto, Ontario, September 17, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

MARIA THERESA ESLABRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Maria Theresa Eslabra asks the Court to set aside the decision denying her application for permanent residence from within Canada on humanitarian and compassionate grounds [the H&C application]. The officer found that her establishment in Canada was normal for a newcomer to Canada and that returning to the Philippines would not sever the family ties she had in North America. Ms. Eslabra contends that the officer misapplied the test in *Kanthasamy v Canada*

(Minister of Citizenship and Immigration), 2015 SCC 61 [*Kanthasamy*], ignored evidence, and failed to adequately explain the findings made.

[2] Ms. Eslabra advanced numerous submissions directed to the unreasonableness of the decision; however, the heart of the matter is whether the officer considered all the relevant evidence and the entirety of Ms. Eslabra's circumstances. For the following reasons, I find that the officer did not. Therefore, the decision is unreasonable and must be set aside.

[3] Ms. Eslabra arrived in Canada in March 2009 when she came to visit her sister, Vilma. Soon after, Vilma developed stomach cancer. Ms. Eslabra obtained a temporary resident permit to stay Canada and care for Vilma, who died in 2012.

[4] In 2012, Ms. Eslabra received a work permit and soon found a job. In early 2013, she sought to extend her work permit. Vision Critical, her employer at the time, offered her a job and had received a positive Labour Market Opinion [LMO] from Service Canada. Despite the positive labour opinion, Citizenship and Immigration Canada [CIC] denied the application for a work permit extension.

[5] Ms. Eslabra sought judicial review of CIC's refusal of her work permit extension. The Department of Justice offered to settle the application, with the promise that a different officer would redetermine her application. While waiting for the redetermination, Vision Critical withdrew its job offer as Ms. Eslabra no longer had a work permit. Without a job offer, CIC rejected Ms. Eslabra's work permit application on the redetermination. Ms. Eslabra states that

had the CIC accepted the work permit on the first application, as it should have, she would have been eligible to apply for permanent residence from within Canada under the Canadian Experience Class stream.

[6] Given that she was not eligible for permanent residence on any other ground, Ms. Eslabra was forced to apply for permanent residence on humanitarian and compassionate grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[7] The decision under review focuses on Ms. Eslabra's establishment in Canada. Indeed, on the first page of the decision, under the heading directing the officer to "briefly outline the factors expressed by the applicant" the officer writes only "establishment in Canada." While that is one of the factors Ms. Eslabra relied on, it is not the sole factor she advanced. One important factor she advanced was CIC's earlier erroneous decision and its consequences.

[8] In reference to the earlier erroneous decision, Ms. Eslabra's counsel made the following submission in the H&C application:

> We submit that Ms. Eslabra has suffered hardship due to this unacceptable error. Please keep in mind that if the work permit extension was issued (which it should have) it would have permitted Ms. Eslabra to work under NOC#2172 for one year which would have made her eligible to apply for permanent residence from within Canada under the CEC class. It is trite to say that the officer's error sparked a chain [of] events that are numerous and irreparable to fix other than the application herein.

[9] The Minister observes that the officer referenced the earlier decision when writing in the H&C decision:

> It is noted that in order for the applicant to extend her work permit, the applicant received a job offer from Vision Critical in April 2013 which received a positive Labour Market Opinion (LMO) in June 2013. On 22 August 2013, she was advised by IRCC that she was ineligible to obtain a work permit allowing her to continue her employment with the company. On 4 September 2013, believing that an error was made in law in reaching this decision, the applicant filed for litigation of the matter in Federal Court. On 4 November 2013, she withdrew her litigation in favour of having IRCC re-determine the matter. On 2 December 2013, IRCC re-determined the matter and advised the applicant that despite having a valid LMO, she no longer had a job offer and therefore was ineligible for a work permit. No further action was sought by the applicant on the matter. [emphasis added]

[10] Counsel for the Minister submitted that the final sentence above indicates that the officer considered the circumstances arising from CIC's (now IRCC) mistake. I am not persuaded, notwithstanding this creative reading, that the officer considered the CIC decision and its consequences. He or she never provided any analysis of the relevance of CIC's mistake to the applicant's situation and whether this raised a deserving humanitarian and compassionate consideration.

[11] As was noted by Justice Ahmed in *Salde v Canada (Minister of Citizenship and Immigration)*, 2019 FC 386, at para 22:

> When officers are entrusted with the responsibility of analysing H&C applications, they must determine if the application would "excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338 (Imm App Bd) at 350). Indeed, the SCC has directed that an H&C analysis must consider all relevant factors (*Kanthasamy* at para 25).

[12] In facts similar to those before the court, in *Mursalim v Canada (Minister of Citizenship and Immigration)*, 2018 FC 596, Justice Norris found that the lost opportunity to become a permanent resident because of the Respondent's previous error was an important aspect of the H&C application that the officer was required to assess and weigh. I agree. CIC's error and the significant consequences to Ms. Eslabra is a relevant factor put before the officer and had to be properly considered.

[13] Having failed to address the earlier error by CIC and the consequences of that error to this applicant, the decision under review cannot be said to be reasonable as it fails to consider a very important factor.

JUDGMENT IN IMM-6468-18

THIS COURT'S JUDGMENT is that this application is allowed, the decision under review is set aside and the application is to be considered by a different officer, in keeping with these Reasons.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Preevandra K. Sapru	FOR THE APPLICANT
Melissa Mathieu	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Preevandra K. Sapru Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Department of Justice Toronto, Ontario	FOR THE RESPONDENT