Federal Court  Cour fédérale

Date: 20210909

Docket: IMM-7290-19

Citation: 2021 FC 930

Ottawa, Ontario, September 9, 2021

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

CARMEN LEVITTA SMALL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review by the Applicant, Carmen Levitta Small, seeking to challenge the decision [the Decision] dated November 18, 2019, by a senior immigration officer [the Officer] with Immigration, Refugee and Citizenship Canada [IRCC], made pursuant to section 25 (1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27

[IRPA], refusing to grant the Applicant's application for permanent residence based on humanitarian and compassionate grounds [H&C application].

[2] For the reasons that follow, I conclude that the application should be granted.

II. Background Facts

[3] The pertinent facts are briefly set out as follows.

[4] The Applicant was born in 1971 in St. Vincent, and remains a citizen of that country. At age 8, she left St. Vincent and went to Barbados to join her mother who had fled two years earlier to escape an abusive relationship.

[5] During her time in Barbados, the Applicant resided with her mother and stepfather. When the Applicant was 11 years old, her stepfather began to sexually abuse her. The abuse continued until the Applicant was 18 years old. Throughout this period, the Applicant became pregnant, underwent an abortion, had several miscarriages, and attempted suicide.

[6] In 1997, the Applicant's mother left Barbados and came to Canada.

[7] The Applicant arrived in Canada on April 16, 1998, and received temporary resident status as a visitor for a period of six (6) months. Upon the expiry of her temporary visa status, the Applicant remained in Canada without legal status. Her mother passed away on August 13, 1999.

[8] In 2004, the Applicant met her now ex-husband and married him in 2007. Her spouse had a child from a previous relationship named Sasha. Since Sasha did not grow up with her biological mother, the Applicant became her mother figure and the two formed a close bond.

[9] Although the relationship with her spouse ended in 2010, the Applicant remained close to her stepdaughter. Sasha became a single mother of three children, whom the Applicant considers her grandchildren. Throughout the years, Sasha relied on the Applicant for help, including moral and financial support.

[10] In 2014, the Applicant made her first application for permanent residence on H&C grounds with the help of an immigration consultant. The application was denied in 2015. The Applicant did not seek judicial review of that decision.

[11] In September 2017, the Applicant applied a second time for permanent residence based on H&C grounds.

[12] On August 21, 2018, a report was issued against the Applicant for her overstay in Canada pursuant to section 44 of the IRPA.

III. The Officer's Decision

[13] The Officer refused the Applicant's second H&C application for permanent residence in a written decision dated November 18, 2019.

[14] The Officer evaluated the factors identified by the Applicant in support of her H&C application, including her degree of establishment in Canada. Based on an assessment of all the factors, the Officer concluded that the Applicant's requested exemption was not justified on humanitarian and compassionate considerations.

[15] In terms of establishment, the Officer comments that the Applicant "has a degree of establishment in Canada" and indicates that "some weight" has been assigned to this factor.

[16] The Officer notes that the Applicant had resided in Canada for over twenty-one (21) years, was enrolled in a high school program at the Stratford Institute in 2014, worked as a babysitter between May 1998 and June 2007, and has been a self-employed janitor as of 2007. The Officer also notes that the Applicant is the sole proprietor of Small-C Janitorial Service, became a member of the West Toronto Church of God in May 1998, and volunteered at St. Clair West Services for Senior as of 2014.

[17] The Officer also notes the friendships and relationships she has formed in Canada, including the close relationship between the Applicant and her stepdaughter Sasha, and her role as a support system to Sasha, a single mother, and her children. The Officer reproduces certain extracts from the Applicant's application in the Decision, including the following paragraph:

> Sasha's life became stable with me in her life. The marriage however ended in 2010, Sasha became devastated I had to leave. She remained close to me today, we still have a very strong mother and daughter relationship and I am in her life daily she is struggling with her own children as a single parent, however, I am helping her a lot financially and with child care and I am her children's grandmother. We are very close and I bring stability and a better quality of life and improved welfare in the children's life.

> Without my support, assistance and continued involvement in my grandchildren and Sasha's life, the best interest of these children will not be served. There will be severe hardships to them and to me, emotionally, financially and psychologically. I am there (*sic*) Nana and it would devastate them and me. They are my only family and only reason I have to live for, after all that I have suffered in my life.

[18] The Officer states that they are alert and sensitive to the fact that the Applicant has been a support system for Sasha and her children. The Officer also acknowledges that being a single parent may be challenging for Sasha. The Officer states that this is not a unique situation and that safety nets would be available to Sasha should she require them upon the Applicant's departure from Canada.

[19] The Officer concludes that while they haven given "positive consideration" to the Applicant's establishment in Canada, she continued to stay in Canada beyond the expiry of her temporary resident status and worked without authorization for an extended period of time. The Officer notes that the Applicant did not attempt to legalize her status until 2014 and remained in Canada despite the fact that her H&C application was refused in 2015. Given the Applicant's disregard for Canadian regulations, the Officer states that "some weight" has been assigned to this negative factor.

[20] The Officer goes on to assess the risks and adverse country conditions that the Applicant would face if she returned to St. Vincent. The Officer notes that the Applicant left St. Vincent at a young age and joined her mother in Barbados after she escaped a domestic abuse situation. They acknowledge that the Applicant was a victim of sexual assault at the hands of her stepfather

and that she had multiple miscarriages. Moreover, they recognize that the Applicant's mother left Barbados for Canada in 1997 and that the Applicant followed her and arrived in Canada in 1998.

[21] The Officer concludes that there is little information to indicate that the Applicant would face harm at the hands of her mother's ex-partner in St. Vincent, because it has been close to forty (40) years since she has set foot in St. Vincent. Further, there is insufficient evidence that her mother's ex-partner has threatened or harassed her, or showed interest in locating or harming her, recently. Moreover, there was no evidence that the Caribbean environment would have a negative impact on the Applicant's psychological health due to the abuse she suffered when she was there.

[22] While the Officer sympathizes with the Applicant, they express confidence that the Applicant is resilient and has the ability to adapt in St. Vincent after a period of adjustment.

[23] In addition, the Officer is satisfied that the Applicant's ability to remain positive, despite her domestic abuse, would remain with her in St. Vincent. The Officer also believes that the Applicant would be able to use her financial savings as she re-establishes in St. Vincent and until she secures employment. The Officer expresses confidence that the Applicant would be able to find employment in St. Vincent because of her work experience, skills and training obtained in Canada, as well as her qualities as a reliable and hardworking individual.

[24] Given the foregoing, the Officer finds the financial hardship factor to be an insufficient ground to justify an H&C exemption.

[25] The Officer then takes into account the best interests of the child, more specifically the Applicant's close relationship to Sasha's children, and her role as a loving grandmother. The Officer states that they are satisfied that Sasha will continue to facilitate a meaningful relationship between the Applicant and her children through visits, telephone calls, online chats, or other means upon the Applicant's return to St. Vincent.

[26] The Officer states that in the circumstances, they are unable to conclude that the Applicant's departure would directly compromise the best interests of the children.

[27] Having assessed all of the factors and the circumstances in their entirety, the Officer is not satisfied that the H&C considerations raised by the Applicant justify an exemption under section 25 (1) of the IRPA.

IV. Issues

[28] The only issue to be determined is whether the Officer committed a reviewable error when they concluded that there were insufficient humanitarian and compassionate considerations to grant the Applicant's application for permanent residence.

V. Standard of Review

[29] The Supreme Court of Canada confirmed in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at paragraph 44, that the applicable standard when reviewing H&C decisions is reasonableness.

[30] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, in order to ensure that the decision as a whole is transparent, intelligible and justified: Canada (Minister of Citizenship and Immigration) v *Vavilov*, 2019 SCC 65, at para 15.

[31] Subsection 25(1) of the IRPA confers broad discretion on the Minister, and by implication on his delegate, the Officer, to determine H&C applications. The granting of an exemption for H&C reasons is deemed to be exceptional and highly discretionary and therefore "deserving of considerable deference by the Court": *Qureshi v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 335, (at para 30).

VI. Analysis

[32] The Respondent submits that the Decision is reasonable as the Officer did not err in their assessment of H&C factors, specifically the best interests of the child, the level of the Applicant's establishment in Canada and the hardships the Applicant would face upon return to St. Vincent. With respect, I disagree.

[33] Based on the formalistic nature of the Officer's reasons, I am unable to determine how their conclusion was reached. While the Decision may be transparent, it is neither intelligible, nor justified.

[34] Establishment in Canada is a relevant factor to consider when assessing an application on H&C grounds. It is settled law that an applicant's degree of establishment is not sufficient in

itself to justify exempting an applicant from the requirement to obtain an immigrant visa from outside Canada.

[35] In the present case, the Officer considered it appropriate to assign some weight to the length of time the Applicant spent in Canada despite the fact that she was without status and in violation of Canada's immigration laws. Notwithstanding, they failed to explain in any meaningful way why the Applicant's degree of establishment in Canada, which would appear to be substantial based on the record before me, was somehow trumped by her disregard of Canadian law, and ultimately proved insufficient to justify an H&C exemption, particularly in light of other relevant factors, such as the best interests of her grandchildren.

[36] In *Lada v. Canada (Citizenship and Immigration),* 2020 FC 270, the applicants sought judicial review of a decision of an officer who refused their request to apply for permanent residence from within Canada on H&C grounds. The applicants argued that the officer failed to provide a rationale for her repeated conclusions that none of the factors were supported by sufficient evidence. In dismissing the application for judicial review, Justice Simon Fothergill concluded that the officer's reasoning regarding the applicants' degree of establishment in Canada was transparent, intelligible and justified. He noted, however, that the officer's conclusions were always accompanied by explanations.

[37] Despite evidence that the Applicant has spent twenty-one (21) years in Canada, her history of stable employment, her financial independence, her close family ties to her Canadian family, her deep involvement in the community and her apparent good civil record in Canada,

the Officer could only muster a tepid finding that the Applicant has "a degree of establishment" and that "some weight" should be assigned to this factor.

[38] I note as well that the Officer glosses over the fact the Applicant left her country of birth as a child over forty (40) years earlier. There is also no analysis of the Applicant's previous H&C application and why it was denied.

[39] In *Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, Madam Justice Anne Mactavish, criticized decision making without any transparent reasoning in the following terms, at para 14:

> [14] In my view, these 'reasons' are not really reasons at all, essentially consisting of a review of the facts and the statement of a conclusion, without any analysis to back it up. That is, the officer simply reviewed the positive factors militating in favour of granting the application, concluding that, in her view, these factors were not sufficient to justify the granting of an exemption, without any explanation as to why that is. This is not sufficient, as it leaves the applicants in the unenviable position of not knowing why their application was rejected

[40] While immigration officers are not bound by any magic formula in the exercise of their discretion, given the relevance of the establishment factor in the present case, the Officer was required to explain how all of the positive and negative factors were balanced in assessing the Applicant's application. The Officer failed to do so.

VII. Conclusion

[41] For the reasons set out above, I am not satisfied that the Decision is reasonable. Consequently, the application for judicial review is allowed, and the matter must be returned to be considered by a different immigration officer.

[42] Neither party has submitted any questions of general importance for certification.

JUDGMENT IN IMM-7290-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated November 18, 2019, is set aside.
3. The matter is returned for redetermination by a different immigration officer.
4. No question of general importance is certified.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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