Federal Court  Cour fédérale

Date: 20220613

Docket: IMM-8362-21

Citation: 2022 FC 878

Ottawa, Ontario, June 13, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ROSALIE DAMASCO PASCUAL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of a Senior Immigration Officer of Immigration, Refugees, and Citizenship Canada (the "Officer"), dated October 19, 2021. The Officer refused the Applicant's application for permanent residence from within Canada on humanitarian and compassionate (H&C) grounds (the "Decision") pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*Act*").

II. Background

[2] The Applicant, Rosalie Damasco Pascual, is a 41-year-old female citizen of the Philippines. The Applicant arrived in Canada on December 21, 2008 on a multiple-entry visa and with a work permit. The Applicant was issued several subsequent work permits with the most recent expiring on March 21, 2013. Accordingly, the Applicant has been without status in Canada since March 2013.

[3] While in Canada, the Applicant has worked as a live-in caregiver or nanny. In March 2013, upon the completion of the required 24 months of full-time work as a live-in caregiver, the Applicant applied for permanent residence and a work permit extension. The application was refused due to an administrative error with the application fee payment, which the Applicant was unable to correct within the requisite 90 days. Since the expiration of her work permit, the Applicant has worked part-time or been unemployed.

[4] The Applicant has an 11-year-old daughter (a Canadian citizen), for whom she is the primary caregiver. Since 2011 (and the child was approximately one year old), the father has been paying child support, as well as financing the child's extracurricular activities, school tuition and supplies, clothing, food, and other necessities. The father spends some time with his child when he is not travelling for work – on an approximately weekly basis.

[5] In January 2018, the Applicant's daughter was diagnosed with dyslexia and attention-deficit/ hyperactivity disorder (ADHD) for which she has an individual education plan in place at her private school.

[6] The Applicant and her daughter have been living at the YMCA Munroe House, which provides free, fully-furnished accommodation, including hydro and cable, as well as access to donations of clothing and household items, food, gift cards, and transit card. The Applicant does not receive social assistance.

[7] On December 31, 2020, the Applicant filed an H&C application seeking an exemption from the requirements of the *Act* to facilitate the processing of her application for permanent residence from within Canada. The Applicant sought H&C relief on the following grounds:

(1) Her establishment in Canada;

(2) The best interests of her daughter; and

(3) The adverse country conditions in the Philippines.

[8] The Officer refused the Applicant's H&C application in the Decision dated October 19, 2021, communicated to the Applicant on November 1, 2021. The Applicant seeks an order quashing the Officer's Decision and remitting the matter to a different officer for redetermination.

III. Decision Under Review

[9] After considering all of the circumstances and the documentation that was submitted by the Applicant, the Officer was not satisfied that the H&C considerations before them justified an exemption under subsection 25(1) of the *Act* and refused the Applicant's H&C application.

A. *Establishment in Canada*

[10] In regard to the Applicant's establishment in Canada, the Officer found the following:

(1) The Applicant was employed as a live-in caregiver for approximately 25 months between February 2010 and March 2013. While it was indicated by the Applicant that she worked part-time prior to and after this period, corroborating evidence was not submitted;

(2) The Applicant submitted income documentation for the years 2010 to 2012, but there is no documentation for the other years;

(3) The Applicant does not receive governmental social assistance; however, she does rely on assistance from the YMCA. The Officer acknowledged that the Applicant's lack of status would have limited her ability to earn an income, but that no evidence indicating the Applicant's financial management while her work permits were valid was submitted;

(4) The Applicant has resided at five different addresses since her work permit expiry in March 2013;

(5) No evidence was submitted to corroborate the Applicant's statements that she will be able to obtain employment with a valid work permit or permanent residence and no letters of reference were submitted from her current employers;

(6) No evidence was submitted to support the Applicant's assertion that she has been participating or contributing to her local community; and

(7) Though the Applicant has resided in Canada for over twelve years, she was without status for eight and a half of those years. The Officer found that this time without status cannot be a basis for the Applicant to remain in Canada: *Gonzalez v. Canada (Citizenship and Immigration)*, 2009 FC 81.

[11] Based on the foregoing, the Officer determined that the Applicant's establishment does not merit exceptional discretion.

B. *Best Interests of the Children (BIOC)*

[12] In regard to the best interests of the Applicant's daughter, the Officer noted that:

(1) The Applicant's daughter is a dual citizen of Canada and the Philippines and thus can stay or return to Canada at the discretion of her parents;

(2) The child's father is co-parenting with the Applicant in Canada, though not in a relationship with the Applicant;

(3) There was no evidence submitted that the child's father would be unwilling or unable to continue to financially support the child should she return to the Philippines with the Applicant;

(4) While the Applicant submitted that her daughter only speaks English, the application submissions noted that the Applicant prefers Tagalog and only speaks conversational English. Therefore, while the child may not be fluent in Tagalog, there is no evidence that she has not been exposed to it.

Furthermore, the Officer's independent research found that English is one of the official languages of the Philippines and the child will have access to both English and Filipino language education;

(5) The Officer acknowledged the child's dyslexia and ADHD diagnoses (and special education assistance at school) but found that there was no evidence submitted indicating that similar support would be unavailable or inaccessible in the Philippines; and

(6) The Officer acknowledged that, at the time of the application, the child would not have been eligible for a COVID-19 vaccine. However, no evidence was submitted to support that the child would be unable to safely travel to the Philippines, that the child was at an increased risk, or that adequate healthcare was not available in the Philippines.

[13] Based on the foregoing, the Officer found that, while there would be a period of transition for the child to adapt to a life in the Philippines should she accompany the Applicant,

no evidence was adduced to demonstrate that a relocation would result in the child's best interests being negatively affected.

[14] In addition, the Officer noted that the evidence demonstrated that the child has a good relationship with her father and access to remote learning should it be decided that she should stay in Canada. Furthermore, no evidence was provided that the child would be unable to communicate with her mother or visit the Philippines.

[15] The Officer acknowledged that there are benefits to the child being in contact with both parents; however, based on the evidence the Officer was not satisfied that a close and supportive relationship with either parent could not be continued from a distance.

[16] The Officer concluded that, though of substantial weight, this BIOC factor did not warrant an exemption for the Applicant.

C. *Return to the Philippines & Adverse Country Conditions*

[17] In regard to any hardship the Applicant may face if she returns to the Philippines, the Officer found that:

(1) The Applicant completed her education, including a bachelor's degree, in the Philippines in 2003;

(2) There was no evidence that the Applicant was reliant on financial support or not self-supporting during her time in the Philippines;

(3) The Applicant provided no evidence to support that it is unsafe returning to the Philippines as a result of the COVID-19 pandemic. The Officer conducted their own research and found that total COVID-19 deaths per capita in the Philippines have been consistently less than half of those in Canada in 2021. Furthermore, British Columbia has offered vaccines for free regardless of immigration status and there is no evidence that the Applicant is not fully vaccinated;

(4) The Applicant has lived the majority of her life in the Philippines and is thus familiar with the culture, language, customs, and traditions; and

(5) All of the Applicant's family, other than her daughter, reside in the Philippines. There is no evidence that her family would be not be willing or able to assist the Applicant if she were to return to the Philippines.

[18] The Officer determined that the above factors support that the Applicant's return to the Philippines is feasible and that she would not face hardship that would warrant an exemption.

D. *Other*

[19] In addition to the H&C factors described above, the Officer reviewed the Applicant's submissions regarding the administrative error with the fee payment associated with her permanent residence and work permit applications in March 2013. The Officer found that no evidence was provided from the bank explaining the alleged misdirection of funds from the Immigration, Refugees, and Citizenship Canada (IRCC) to a British Columbia medical plan, nor any resolution to reverse the mistake and direct the funds to the IRCC as intended.

[20] Furthermore, no evidence was provided that the Applicant made reasonable efforts to restore her status until seven years later with this H&C application. At the time of the application, the Applicant was not subject to a removal order and was in a position to mitigate conditions that may negatively affect her ability to return to Canada. The Applicant had submitted applications for a temporary resident permit and work permit in February 2021 – approximately one month after submitting this H&C application.

[21] The Officer found the Applicant's assertion that had her permanent residence and work permit extension applications submitted in March 2013 been accompanied by the requisite funds they would have been approved was speculative. Indeed, the Applicant's work permit extension application was not received until July 10, 2013 – approximately four months after the permit had expired.

IV. Issues

[22] The issues to be decided on this judicial review are:

(1) Was the Decision reasonable?

(2) Was the Decision procedurally fair?

V. Standard of Review

[23] Where a Court reviews the merits of an administrative decision the standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paragraph 23).

[24] Issues that relate to a breach of procedural fairness are reviewed on the standard of correctness or a standard with the same import (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraphs 34-35 and 54-55, citing *Mission Institution v. Khela*, 2014 SCC 24 at paragraph 79).

VI. Analysis

A. *Preliminary Issue – Admissibility of the Applicant's Affidavit*

[25] The evidentiary record on a judicial review is usually limited to what was before the administrative decision-maker (*Rosianu v. Western Logistics Inc.*, 2019 FC 1022, citing *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*AUCC*] at paragraph 19, aff'd in *Rosianu v. Western Logistics Inc.*, 2021 FCA 241 [*Rosianu*]).

[26] There are three exceptions to this rule and affidavits may be received by the Court i) to provide background information that may assist in the understanding of the relevant issues, ii) to provide material information necessary to determine whether there has been a breach of

procedural fairness, and/or iii) to highlight the lack of evidence before the decision-maker when it made its decision (*AUCC* at paragraph 20).

[27] The Respondent argues that paragraphs 4 and 51 to 53 (including Exhibit A) contain extrinsic evidence not before the Officer and thus should not be considered by the Court.

[28] I find that paragraphs 4 and 51 to 53 (including Exhibit A) are admissible. While not before the Officer, the evidence contained in these paragraphs and exhibit provide background information that may assist the Court in the understanding of the relevant issues of the best interests of the child and any hardship the Applicant may face if she were to return to the Philippines.

B. *Was the Decision reasonable?*

[29] Subsection 11(1) of the *Act* requires foreign nationals to apply for a visa before entering Canada. Subsection 25(1) of the *Act* provides the Minister of Immigration, Refugees, and Citizenship (the "Minister") the discretionary authority to exempt foreign nationals from the requirement under subsection 11(1) if it is justified on the basis of H&C considerations.

[30] The Applicant bears the onus of establishing that H&C relief is warranted and that their personal circumstances are such that having to go outside of Canada to apply for a visa would cause a degree of hardship that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy v. Canada (Citizenship and*

Immigration), 2015 SCC 61[*Kanthasamy*] at paragraph 21). The presence of *some* degree of hardship does not necessarily mean that an H&C application will be successful.

[31] The application of the "unusual and undeserved or disproportionate hardship" standard (as set out in the Minister's Guidelines) is supported by a non-exhaustive list of factors, such as establishment in Canada, ties to Canada, the best interests of any children affected by their application, factors in their country of origin, health considerations, consequences of the separation of relatives, and any other relevant factors. Relevant considerations are to be weighed cumulatively, as part of the determination of whether relief is justified in the circumstances and should not fetter the immigration officer's discretion to consider all relevant factors.

[32] In addition, a decision under subsection 25(1) will be found unreasonable if the interests of children affected by the decision are not sufficiently considered. A decision-maker must do more than simply state that the interests of a child have been taken into account; those interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence (*Kanthasamay* at paragraph 39). An officer is required to be alert, alive, and sensitive to the best interests of the child.

[33] An officer's task is to consider the submitted evidence and to balance the impact on the best interests of the child with the other factors relevant to an H&C application to determine whether an H&C exemption is warranted in the circumstances.

[34] Although an officer may be guided by a liberal and compassionate approach, subsection 25(1) was not intended to be an alternative to the immigration scheme (*Kanthasamy* at paragraph 23).

[35] Absent H&C relief, the Applicant would be required to apply for permanent residence in Canada from the Philippines.

[36] The Applicant argues two key issues in challenging the reasonableness of the Officer's Decision:

A. The Officer failed to conduct a meaningful analysis of the best interests of the child, disregarding the age of the child, the length of the child's establishment in Canada, and the importance of being supported by both parents; and

B. The Officer ignored relevant evidence of the Applicant's establishment in Canada.

[37] I find that throughout the Decision, the Officer outlined and demonstrated a clear and accurate understanding of the legal principles applied in an H&C application, including those that guide a BIOC analysis.

[38] The Applicant failed to adduce objective evidence for many of her claims and the Officer reached a reasonable conclusion based on the limited evidentiary record.

[39] The Officer reasonably considered the child's circumstances as a whole in light of the evidence that the Applicant submitted, and weighed the BIOC factor accordingly along with the

other relevant H&C factors. The Applicant's position on judicial review amounts to a disagreement with the Officer's weighing of the evidence. The paucity of the evidence on the negative impact on the child returning to the Philippines with respect to her medical conditions or schooling also weighs against the Applicant's position.

[40] The premise that a child's best interest will be favoured by the non-removal of a parent or by remaining in Canada with their parent is presumed and need not be stated in the reasons (*Hawthorne v. Canada (MCI)*, 2002 FCA 475 at paragraph 5). The Officer reasonably examined both scenarios of having the child remain in Canada with her father or travel to the Philippines with her mother based on the evidence before them. It was not required for the Officer to state the obvious: having both parents in Canada would be a best-case scenario for the child. Overall, the Officer reasonably concluded the Applicant had not established that an H&C exemption was required in whether the child were to accompany the Applicant to the Philippines or were to stay in Canada with her father.

[41] The additional evidence submitted in the Applicant's affidavit at paragraphs 51 to 53 (including Exhibit A) provides further background information on the details of the child's relationship with her father. This additional information does not appear to substantially add to what was already considered by the Officer.

[42] The Officer reasonably balanced the BIOC factor in the totality of the available evidence, noting correctly that the BIOC must be given substantial weight, but reasonably found that this

factor was not sufficient to lead to a positive H&C determination. It is not the role of the Court to re-weigh that evidence.

[43] The Officer's decision with respect to the Applicant's establishment in Canada was also reasonable based on the limited evidence submitted, including the Applicant's years of lacking legal status in Canada and her failure to establish that she had a reasonable expectation she would be allowed to remain in Canada following the expiry of her legal status. Living in Canada without status since 2013 is not a factor favouring the Applicant concerning establishment.

[44] The additional evidence submitted in the Applicant's affidavit at paragraph 4 provides further background information on the details of the Applicant's family's living conditions in the Philippines. This additional information does not alter the information already before the Officer. The Officer had noted that there was no evidence that the Applicant's family was unwilling or unable to provide support, even if this was limited to emotional support; the Officer made no presumption that the Applicant would be living with her family when she relocated.

[45] The Officer weighed the establishment factor in a reasonable and justifiable manner and was reasonable.

[46] The decision was reasonable.

C. *Was the Decision procedurally fair?*

[47] The Applicant argues that the Officer breached procedural fairness by failing to give the Applicant an opportunity to respond to the evidentiary deficiencies that the Officer identified in the H&C application.

[48] As stated above, the onus of establishing that an H&C exemption is warranted lies with an applicant; an officer is not required to highlight weaknesses in an application and request further submissions. An officer is under no obligation to provide an opportunity to fill in gaps in the evidence (*Bagatnan v. Canada (Citizenship and Immigration)*, 2021 FC 1188 at paragraphs 10 to 19).

[49] The Decision was procedurally fair. The Officer did not base their Decision on concerns about the credibility, accuracy, or genuineness of the documents that the Applicant submitted in support of her H&C application. Rather, the Officer assessed the evidence that was submitted and concluded that the Applicant had failed to demonstrate that H&C considerations warrant an exemption from the requirements of the *Act*. In the circumstances, the Officer was under no obligation to give the Applicant an opportunity to address concerns before rendering a decision.

JUDGMENT in IMM-8362-21

THIS COURT'S JUDGMENT is that

1. The Application is dismissed.

2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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