Date: 20081117

Docket: IMM-5342-07

Citation: 2008 FC 1283

Ottawa, Ontario, November 17, 2008

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

NARCISA ANCHETA SIMAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of immigration officer Thierry A. N'kombe (the officer), dated December 8, 2007, in which the officer refused the Applicant's request for an exemption from the permanent resident visa on humanitarian and compassionate (H&C) grounds and an application for a temporary resident permit (TRP).

I. Issues

[2] The Applicant raises the following issues in this application:

a. Did the immigration officer err in ignoring evidence?

b. Did the immigration officer err in finding that the Applicant's application was one of convenience rather than hardship when refusing the Applicant's H&C and TRP applications?

c. Did the immigration officer fail to provide adequate reasons?

II. Factual Background

[3] Ms. Narcisa Ancheta Siman is a citizen of the Philippines who came to Canada on March 23, 2004, under the Live-in Caregiver Program (LCP). The LCP is a prescribed class where participants in the program must complete two years of full-time employment to qualify for permanent residence. However, the total duration of all work permits (added together) should not exceed three years. The three-year period gives the participants in the program flexibility to compensate for periods of unemployment, illness, vacation or maternity leave. There is also a bridge extension that is an interim work permit given to those who are between jobs and have not yet found a new employer.

[4] The Applicant's first employer was Melodie Stania. Due to her employer's marital problems, the Applicant was laid off in December 2004. Since Ms. Stania provided the Applicant with advance notice of her impending termination, the Applicant was able to secure new employment through an employment agency with an alternative employer, Denise Schaffer, a laser plastic surgeon. It appears that there were no gaps in her employment.

[5] Due to a miscommunication regarding whether the employment agency or Ms. Schaffer was responsible for filing the Applicant's further application for a Labour Market Opinion with Human Resources Canada (LMO), the Applicant's work permit was not renewed prior to its expiration. This came to the attention of the Applicant in March 2005. Her application was sent in April 2005. At that time, the Applicant's work permit had already expired. The Applicant was therefore not able to maintain her compliance with the LCP.

[6] Around May 2005, the Applicant filed an application to restore her work permit and advised Citizenship and Immigration Canada (CIC) that her LMO was to follow shortly. She received her LMO from Service Canada three days after sending her application for the restoration of her work permit.

[7] On July 15, 2005, the Applicant's application for restoration of her work permit was refused because it was not supported by a LMO. Due to this refusal, the Applicant's employment was terminated by Schaffer due to her lack of status.

[8] The Applicant has been living in Canada without status since July 2005 and has been working without authorization. According to the Applicant's affidavit, she has been working for the family of Judy and Paul Magrath since September 2005, but they are hesitant to confirm the Applicant's employment with them because of her lack of status in Canada.

[9] The Applicant retained an immigration consultant, Alfonso Bontoc, to assist her in securing a work permit but the consultant did not submit anything. This came to her attention about eight months later.

[10] On February 28, 2007, she made an application for permanent residence in Canada based on H&C grounds. She also requested, in the alternative, the issuance of a TRP. This request was made due to her potential inadmissibility to Canada because she is working without a valid authorization.

III. Decision Under Review

[11] On December 8, 2007, the officer decided that an exemption would not be granted and the application for permanent residence from within Canada on H&C grounds was rejected.

[12] The officer relied on three bases in refusing the Applicant's H&C and TRP applications: the possible hardship in applying overseas for the LCP program; her degree of establishment in Canada and the economic situation in the Philippines.

[13] The officer recognized that the Applicant is not a burden to society. She belongs to a congregation and several letters of support from friends were provided, but her degree of establishment is nothing beyond the normal establishment that one would expect the Applicant to have accomplished in the circumstances, since she has been in Canada since 2004.

[14] The Applicant did not demonstrate that severing her community and employment ties to Canada would have a significant negative impact that justifies an exemption under H&C considerations.

[15] As well, the officer recognized that social and economic conditions in the Philippines may not be favourable, but they are a common factor that affects the general population as a whole. The officer finally noted that this application is one of convenience rather than hardship.

[16] As for the request for a TRP, the Applicant has no ties to Canada; her parents and seven brothers and sisters do not reside here. The Applicant was refused an employment authorization on July 15, 2005 and she made a conscious decision to remain in Canada and engage in employment without authorization. The Applicant is a qualified Live-in Caregiver who is eligible to apply again and return to Canada in the normal manner. The officer did not find any compelling reasons to issue a TRP.

IV. Analysis

A. *Standard of Review*

[17] The Applicant submits that the appropriate standard of review applicable to judicial reviews of H&C decisions is reasonableness *simpliciter* (*Ojinma v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 922, 116 A.C.W.S. (3d) 571).

[18] The Respondent adds that the single reasonableness standard elaborated by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, does not entail a more intrusive review by the courts. Where the question is one of fact, discretion or policy, deference will usually apply automatically. The appropriate standard of review in the case at bar is the newly articulated standard of reasonableness.

1. Did the immigration officer err in ignoring evidence, thus rendering an unreasonable decision?

[19] The Applicant alleges that the hardship of having to apply for a permanent resident visa from outside Canada would be unusual, undeserved or disproportionate due to her degree of establishment in Canada, the economic situation in the Philippines and the loss of income she would incur during the application process. The Applicant states that it will be extremely difficult for her to start the LCP program again, as wait times in Manila currently exceed two years.

[20] The Respondent notes that sections 6.5 and 6.6 of the Operational Manual IP-5 (IP-5) explain the exceptional nature of the H&C considerations, which are limited to cases where an Applicant would face an unusual and undeserved or disproportionate hardship not anticipated by the legislation if they were required to apply for a permanent resident visa from outside of Canada. Section 6.7 specifies that the unusual and undeserved hardship must be the result of circumstances beyond the person's control, whereas section 6.8 explains that the hardship must have a disproportionate impact on the Applicant due to their personal circumstances.

[21] The Applicant submits that the officer erred by ignoring certain elements of evidence pertinent in the case at bar. The Applicant states that it is an error in law for the officer to make a decision without having regard to the totality of the evidence before it (*Owusu-Ansah v. Canada (Minister of Employment and Immigration)*, 98 N.R. 312, 15 A.C.W.S. (3d) 344 (F.C.A.); *Carlos Enrique Sangueneti Toro v. Minister of Employment and Immigration*, [1981] 1 F.C. 652, [1980] F.C.J. No. 192 (C.A.) (QL); *Ana Vilma Irarrazabal-Olmedo v. Minister of Employment and Immigration*, [1982] 1 F.C. 125 (C.A.).

[22] In *Jamrich v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 804, 124 A.C.W.S. (3d) 773 at paragraph 22, the Court reproduced the indicia set out by IP-5 to determine the degree to which an Applicant is established in Canada. The Applicant believes that, in reference to these indicia of establishment and considering the fact that she arrived here approximately four years ago, she is very well established.

[23] The officer failed to consider the personal circumstances of the Applicant regarding the economic hardship she would experience if she were required to return to the Philippines and re-apply for the LCP. The officer misconstrued the evidence when he found that the social and economic conditions in the Philippines are not favourable, but they are a common factor that affects the general population as a whole.

[24] The Applicant also contends that the officer failed to consider the totality of the evidence when he ignored the financial support that the Applicant provides to her family in her country. It is

not merely a situation of economic hardship but rather an issue that affected her ability to support her parents in the Philippines.

[25] Finally, the Applicant argues that the officer failed to consider the evidence before him when he simply stated that the Applicant had failed to maintain compliance with the LCP program. The officer did not consider the mitigating circumstances which explain that the Applicant's work permit applications were not filed in time because there was miscommunication between the agency and her employer concerning who had carriage of her LMO application. The Applicant had paid an immigration consultant to file her work permit but the consultant did nothing. This evidence was ignored by the immigration officer.

[26] The Respondent notes that the officer considered the grounds basing the Applicant's request, such as her degree of establishment in Canada and the economic hardship of having to apply for a visa from outside Canada and found that they do not amount to unusual and undeserved or disproportionate hardship to the Applicant. The officer did not ignore any evidence in rendering his decision. According to the Respondent, the Applicant's arguments constitute an attempt to have the Court substitute the officer's assessment for an alternative assessment of the evidence which is favourable to the Applicant, which is not a ground for judicial review.

[27] The Respondent cites *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635 at paragraph 12, and argues that it is not the function of the Court in judicial review proceedings to substitute its view of the merits of an H&C application for that of the

statutory decision-maker, even though, on the record, the in-country claim to be granted permanent resident status on H&C grounds might have merit. According to the Respondent, the Court's intervention is not warranted.

[28] There is a presumption that the officer has considered all the evidence before him. While the officer is not obliged to recite every evidentiary fact before him in his decision, it is expected that the significant facts will be described and that there will be some discussion and consideration of these facts. A “blanket statement” to the effect that the officer has considered all the evidence is insufficient (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 (F.C.T.D.); *Bains v. Canada (Minister of Employment and Immigration)*, 63 F.T.R. 312, 40 A.C.W.S. (3d) 657) (F.C.T.D.).

[29] The Court is of the opinion that the officer considered and addressed the evidence before him and based his decision on the Applicant’s possible hardship in applying overseas for the LCP program, her degree of establishment in Canada and the general economic situation in the Philippines. The officer also analysed the grounds forwarded by the Applicant and did not make a sweeping statement which disregarded or misconstrued certain elements of evidence as alleged.

2. Did the immigration officer err in law in finding that the Applicant’s application was one of convenience rather than hardship when refusing the Applicant’s H&C and TRP applications?

[30] The Applicant argues that the LCP must be administered openly but the officer applied the Operational Manuals in a rigid and inflexible manner (*Karim v. Canada (Minister of Employment and Immigration)*, 21 F.T.R. 237, 11 A.C.W.S. (3d) 271 (F.C.T.D.); *Bernardez v. Canada (Minister*

of Citizenship and Immigration), 49 A.C.W.S. (3d) 369, 27 Imm. L.R. (2d) 149 (F.C.T.D.); *Lim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 657, 272 F.T.R. 293. In addition, in *Lim*, above, the Court recognized that re-applying for the LCP constitutes a form of hardship, given the backlog in the Philippines at the time.

[31] The Applicant specifies that the IP-5 should not be applied in a rigid and inflexible manner in the context of an H&C application for permanent residency (*Yhap v. Canada (Minister of Employment and Immigration)*, [1990] 1 F.C. 722, (T.D.); *Vidal v. Canada (Minister of Employment and Immigration)*, 41 F.T.R. 118, 25 A.C.W.S. (3d) 709 (F.C.T.D.)). The Applicant explains that she worked as a Live-in Caregiver for Canadian families for over 24 months in the three years immediately following her arrival to Canada. If her application for a work permit and restoration of her temporary resident status had not been refused in July 2005, the Applicant would now have been eligible for permanent residence as a member of the Live-in Caregiver Class. In refusing the application, the officer fettered his discretion.

[32] Moreover, according to the Applicant, the officer erred in law by failing to consider the potential inadmissibility the Applicant could face if she were to apply overseas for the LCP because of her non-compliance with the Act since she is presently in Canada without status. Accordingly, her applications for H&C considerations and a TRP are not merely a matter of convenience as found by the immigration officer but rather one of disproportionate harm and/or undue hardship.

[33] Likewise, the officer erred in refusing the Applicant's TRP based on the finding that she made a conscious decision to remain in Canada and engage in employment without employment authorization. From a plain reading of section 24 of the Act, it is clear that the issuance of TRPs is intended for Applicants who may be inadmissible to Canada.

[34] The Respondent states that the case at bar is not an application for leave and for judicial review of the Respondent's July 2005 refusal to issue the Applicant a work permit and restore her temporary resident status. Therefore, the case law the Applicant refers to relating to the LCP is not applicable to this H&C decision.

[35] The Respondent also notes that the officer considered the Applicant's circumstances and found insufficient reasons to justify granting the Applicant's request for a TRP. In particular, the officer considered that the Applicant has no family ties to Canada as her parents and seven brothers and sisters do not live here, that she made a conscious choice to remain in Canada and work here without legalizing her status in 2005 and that she is a qualified Live-in Caregiver who is eligible to re-apply in the normal manner.

[36] Contrary to the Applicant's assertions, the Respondent submits that the officer clearly did not refuse the Applicant's request for a TRP merely because she may be determined to be inadmissible. The Respondent notes that the Operational Manual IP-1 states that TRPs should not be used to restore the temporary resident status of a visitor, student or worker when their status has expired.

[37] Unfortunately, the miscommunication between the employment agency and the Applicant's employer in 2005 regarding who was responsible for the renewal of her work permit cannot be used to justify the Applicant's current H&C or TRP requests. As noted by the officer, the Applicant chose to remain in Canada and to engage in employment without authorization. The Applicant has not satisfied the officer or this Court that there would be undue hardship if she returned to the Philippines and re-applied for the LCP in the normal manner.

[38] Furthermore, the fact that the Applicant has some degree of establishment in Canada is not sufficient to justify her H&C request (*Ruiz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 465, 147 A.C.W.S. (3d) 1050; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 413, 138 A.C.W.S. (3d) 350).

3. Did the immigration officer fail to provide adequate reasons?

[39] The Applicant alleges that the immigration officer failed to explain why submitting a new LCP application in light of her potential inadmissibility in the Philippines would not constitute undue hardship, which is the appropriate test for an H&C application.

[40] The Applicant argues that the officer's reasons are inadequate because he did not explain why the Applicant would not suffer hardship in light of her establishment in Canada, nor did he consider the explanations she provided regarding her failure to file an application for a work permit

extension in the prescribed time. The officer also failed to consider the stream of financial support that the Applicant provides to her parents in the Philippines.

[41] The Applicant quotes *Future Inns Canada Inc. v. Nova Scotia (Labour Relations Board)*, 160 N.S.R. (2d) 241, 69 A.C.W.S. (3d) 1073, where the Nova Scotia Court of Appeal stated, at paragraph 52, that "courts can and should require written reasons from a Tribunal wherever there are substantial issues to be resolved." In the recent decision *Canada (Minister of Citizenship and Immigration) v. Mann*, 2004 FC 1338, 258 F.T.R. 139, the Court overturned the decision of the Immigration Appeal Board on the grounds that its reasons were inadequate. The Federal Court has also overturned a decision on an H&C application on the basis of inadequate reasons because the reasons offered no explanation that could be considered by the Court on review (*Adu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 565, 139 A.C.W.S. (3d) 164).

[42] The Applicant contends that the officer has made a similar error in this case. In rendering his reasons, he has simply recited the evidence and blamed the Applicant for having established herself while in tenuous circumstances and not maintaining compliance with the LCP program. There is no meaningful consideration of the mitigating circumstances in which the Applicant found herself.

[43] The Respondent submits that the officer's reasons meet the test for adequacy as they inform the Applicant of the reasons for which her application was denied and they do not prejudice her ability to seek judicial review.

[44] The Respondent notes that it is well-established that reasons serve two main purposes: letting the parties know that the issues have been considered and to allow the parties to file an appeal or an application for judicial review (*Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.); *Townsend v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 371, 231 F.T.R. 116; *Fabian v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1527, 244 F.T.R. 223). In *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, the Supreme Court of Canada held that the inadequacy of reasons is not a free-standing right of appeal, in that it does not automatically constitutes a reviewable error. A party seeking to overturn a decision on the basis of the inadequacy of reasons must show that the deficiency in reasons has occasioned prejudice to the exercise of a legal right to appeal (see also *R. v. Kendall*, 75 O.R. (3d) 565 at paragraph 44 (Ont. C.A.).

[45] According to the Respondent, the officer clearly stated that the Applicant's degree of establishment in Canada was not beyond the norm of what would reasonably be anticipated of an individual living in Canada for less than four years and the normal hardship of having to sever community and employment ties to apply in the manner contemplated by the legislation does not amount to unusual and undeserved or disproportionate hardship. The officer also noted that the alleged economic difficulties of having to apply for a permanent resident visa from the Philippines do not extend beyond the usual hardship anticipated by the legislation. The officer's reasons are therefore sufficient to address the Applicant's alleged grounds of unusual and undeserved or disproportionate hardship and to allow her to exercise her right to file an application for leave and for judicial review.

[46] The Court finds that the officer has provided cogent and sufficient reasons to justify his refusal to grant an H&C to the Applicant. She has not demonstrated that the officer erred.

[47] No question for certification was proposed and none arises.

JUDGMENT

THIS COURT ORDERS that the application be dismissed. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5342-07
STYLE OF CAUSE:	**NARCISA ANCHETA SIMAN and THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 23, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	Beaudry J.
DATED:	November 17, 2008

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