Date: 20090409

Docket: IMM-3991-08

Citation: 2009 FC 360

Ottawa, Ontario, April 9, 2009

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

CHRISTINA SANTOS

Applicant

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision dated August 22, 2008, refusing the applicant Christina Santos' application for permanent residence on the grounds that she did not meet the admissibility requirements of section 72(1)(e)(i) of the *Immigration and Refugee Protection Regulations*, SOR 2002-227 (the Regulations).

BACKGROUND

[2] Ms. Santos is a citizen of the Philippines. She applied for permanent residence status under the IRPA Live-in Caregiver Class program (LCP). Ms. Santos completed the LCP in July 2004. She then applied for and was approved in principle for permanent residence in January 2005.

[3] In 2005, Ms. Santos learned that her husband was living with another woman and had a child with her. She returned to the Philippines in 2006 to visit her children. She begged her husband to come back but he refused.

[4] In 2007, Citizenship and Immigration Canada requested information regarding the current status of her relationship with her husband. Ms. Santos wrote a letter stating that she and her husband were still married. In 2008, she learned that Mr. Santos had another child with his new partner.

[5] On June 24, 2008, Citizenship and Immigration Canada sent Ms. Santos a “fairness letter” advising her that Mr. Santos had committed a criminal act, and was therefore inadmissible to Canada, which by default made Ms. Santos inadmissible. The letter invited her to respond. She contacted Mr. Santos and agreed to terminate their relationship. He sent her his court records, and an affidavit giving her custody and guardianship of their children.

[6] Ms. Santos understood the June 24, 2008 letter to be requiring her to submit a new application for permanent residence, and therefore filed a new application. Her second application

included her three children as applicants, but excluded her spouse. She included a cover letter dated July 7, 2008 explaining the relationship breakdown and the affidavit from her spouse giving up legal custody and guardianship of their children. She also submitted her spouse's court records, which indicated that he did not have a criminal record. Her application for permanent residence was refused on August 22, 2008. Ms. Santos applied for reconsideration of that application on August 27, 2008.

[7] Ms. Santos filed for divorce in Ontario on September 3, 2008.

DECISION UNDER REVIEW

[8] The Immigration Officer found that Ms. Santos did not meet the requirements of the Live-in Caregiver Program class for permanent residence because her husband was found to be inadmissible under s.36(1)(c) of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (IRPA).

[9] The Immigration Officer noted that Ms. Santos was approved in principle on January 26, 2005 for permanent residence, along with her three children and husband who lived in the Philippines.

[10] The Immigration Officer noted in the decision that Ms. Santos has submitted a new application which listed her three children as accompanying and her husband as non-accompanying. However, the Immigration Officer refused the new application because the "information contradicts statements previously made by the applicant".

[11] The Immigration Officer summarized the history of the application with regard to Ms. Santos' husband. The Immigration Officer noted that when interviewed by the Manila office, the husband had stated that his wife no longer supported him and that he was no longer the legal guardian of the children he had with Ms. Santos. The Officer does not appear to have given any weight to the fact that this evidence coincides with evidence given by Ms. Santos on the new application. The Officer engaged in a selective analysis of the evidence, highlighting previous evidence contradicting Ms. Santos' evidence of the marriage breakdown, while failing to consider evidence corroborating her July 7, 2008 statements explaining the marriage breakdown.

[12] The decision refuses Ms. Santos' application based on the inadmissibility of her estranged husband.

LAW

[13] Section 42(a) of Act states:

Inadmissible family member **42.** A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if (*a*) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or	Inadmissibilité familiale **42.** Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants : *a*) l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;

[14] Section 36(1)(c) of Act states:

Serious criminality **36.** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for … (*c*) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	Grande criminalité **36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants : … *c*) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

[15] Section 72(1)(e)(i) of the Regulations states:

Obtaining status **72.** (1) A foreign national in Canada becomes a permanent resident if, following an examination, it is established that (*e*) except in the case of a foreign national who has submitted a document accepted under subsection 178(2) or of a member of the protected temporary residents class, (i) they and their family members, whether accompanying or not, are not	Obtention du statut **72.** (1) L'étranger au Canada devient résident permanent si, à l'issue d'un contrôle, les éléments suivants sont établis : *e*) sauf dans le cas de l'étranger ayant fourni un document qui a été accepté aux termes du paragraphe 178(2) ou de l'étranger qui fait partie de la catégorie des résidents temporaires protégés : (i) ni lui ni les membres de sa famille — qu'ils l'accompagnent ou non — ne

inadmissible,	sont interdits de territoire,

[16] Section 23 of the Regulations states:

Prescribed circumstances — family members	Cas réglementaires : membres de la famille
23. For the purposes of paragraph 42(*a*) of the Act, the prescribed circumstances in which the foreign national is inadmissible on grounds of an inadmissible non-accompanying family member are that	**23.** Pour l'application de l'alinéa 42*a*) de la Loi, l'interdiction de territoire frappant le membre de la famille de l'étranger qui ne l'accompagne pas emporte interdiction de territoire de l'étranger pour inadmissibilité familiale si :
(*b*) the non-accompanying family member is	*b*) le membre de la famille en cause est, selon le cas :
(i) the spouse of the foreign national, except where the relationship between the spouse and foreign national has broken down in law or in fact, (underlining added)	(i) l'époux de l'étranger, sauf si la relation entre celui-ci et l'étranger est terminée, en droit ou en fait,

ISSUES

[17] The issues in this application are as follows:

a. Was the decision of the Immigration Officer unreasonable with regard to the applicant's relationship with Mr. Santos?

b. Were the applicant's procedural fairness rights breached?

c. Did the Officer fetter his discretion by not considering humanitarian and compassionate considerations?

d. Was the decision of the Immigration Officer unreasonable with regard to Mr. Santos' criminal inadmissibility?

STANDARD OF REVIEW

[18] The standard of review for decisions of visa officers is reasonableness *simpliciter*: see *Ram v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 671.

ANALYSIS

Issue No. 1: Was the decision of the Immigration Officer unreasonable with regard to the Applicant's relationship with Mr. Santos?

[19] The applicant submits that the Immigration Officer erred in finding that Ms. Santos was inadmissible because of the inadmissibility of her spouse, because their marriage had broken down in fact at the time of the determination.

[20] The applicant submits that the Immigration Officer's conclusion that the relationship with her husband was ongoing was unreasonable. The Officer relied exclusively on Ms. Santos' letter from December 2007 which affirmed that the relationship was ongoing. However, the Officer did not properly consider the new evidence or her letter dated July 7, 2008, and therefore the decision was unreasonable.

[21] The evidence before the Officer regarding the marriage breakdown is as follows:

a. Mr. Santos' evidence given at the interview in Manila that Ms. Santos "had ceased to support him and that he was not their children's legal guardian";

b. In July 2008, Ms. Santos submitted a new application for permanent residence "to cancel the sponsorship for her husband",
c. The explanation of Ms. Santos that "I (had) applied for my husband to join me here in Canada for the sake of my 3 children. But actually he has committed adultery and I just found out he already have 2 children";
d. The affidavit of Mr. Santos that he gave "permission for his wife … to have full time and permanent custody or guardianship" of their children; and
e. The July 7, 2008 letter which stated, *inter alia*,: "…I want him out of my life, and I do not want him to join me here in Canada."

[22] It was unreasonable for the Officer to conclude that the relationship between the applicant and Mr. Santos was ongoing, when in fact it had broken down.

[23] The respondent does not address the fact that the Officer did not address the contradicting evidence regarding Mr. Santos' statement at the interview in Manila that Ms. Santos had ceased to provide support for him, and that he no longer had custody or guardianship of their children.

[24] The Court finds that the Officer's conclusion is unreasonable based on the evidence. The Officer relied on some evidence and disregarded other evidence with no explanation. Mr. Santos clearly stated in his interview in Manila that he and Ms. Santos were no longer a couple. Furthermore, Ms. Santos had submitted a new application which stated that she was married, which

she was, but that her husband was committing adultery, had two children with another woman, was completely estranged from the applicant, and the applicant wanted him "out of my life".

Issue No. 2: Were the Applicant's procedural fairness rights breached?

[25] The applicant submits that the interests at stake in this application are significant and thus must be accorded the highest degree of natural justice. The applicant submits that Citizenship and Immigration should adopt a flexible and constructive approach in determining an application for permanent residence for a member of the LCP.

[26] In *Turingan v. Canada (M.E.I.)*, [1993] F.C.J. No. 1234, at para. 8, Justice Jerome stated:

> After a thorough analysis of the Foreign Domestic Program, the learned Justice reached the following conclusions:
>
> > ... (ii) the F.D.M. [Foreign Domestic Movement Program] was created in response to the recognition that domestic workers were performing a valuable service, often forming significant ties in this country but were generally less likely to achieve permanent residence status than other immigrants;
> >
> > (iii) the purpose of the Programme is hence to facilitate the attainment of permanent residence status for foreign domestic workers subject to certain terms and conditions;
> >
> > (iv) the Programme is to be administered in a flexible manner with the emphasis on extended advice and counselling services available in order that applicants may upgrade their skills, where necessary, to qualify for the Programme...
>
> It is clear from this passage that the purpose of the Program is to facilitate the attainment of permanent residence status. It is therefore

> incumbent on the Department to adopt a flexible and constructive approach in its dealings with the Program's participants. The Department's role is not to deny permanent residence status on merely technical grounds, but rather to work with, and assist the participants in reaching their goal of permanent residence status.

[27] The applicant submits that the rigid approach taken by the Immigration Officer was inappropriate and unreasonable. Given that there was a question of credibility, noted by the Officer, the Court finds that an interview should have been conducted. Ms. Santos would have been able to clarify at that juncture that the relationship was in fact over at that point.

[28] Ms. Santos successfully completed the LCP. She fulfilled her requirements to apply for permanent residence, and thus, the Immigration Officer should have given her the opportunity to explain what was found in the decision to be “contradictory evidence”.

[29] In view of the Court’s findings, the Court does not need to consider the remaining issues.

[30] There is no question proposed by the parties or the Court for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application is allowed, the decision of the Immigration Officer dated August 22, 2008 is set aside and the matter is referred to another immigration officer for redetermination with a direction from the Court that the evidence establishes that the applicant's marriage has in fact broken down.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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