Federal Court Cour fédérale

Date: 20111213

Docket: IMM-306-11

Citation: 2011 FC 1413

Ottawa, Ontario, this 13th day of December 2011

Before: The Honourable Mr. Justice Pinard

BETWEEN:

VANESSA VALE PEREIRA

Applicant

and

MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of A. Bilich, Immigration Officer, Citizenship and Immigration Canada (the "officer"), pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, by Vanessa Vale Pereira (the "applicant"). In his decision, the officer rejected the applicant's application for permanent residence in Canada on the basis of humanitarian and compassionate relief.

[2] The applicant, a citizen of Brazil, arrived in Canada on December 31, 2002 as a student and a valid visitor until February 7, 2003. While she was still a student in Brazil, she decided to leave her country because of the abuse her and her sister had suffered. When she arrived in Canada, she resided with her sister and aunt, the latter not having legal status in Canada. The applicant filed an application for permanent residence on the basis of humanitarian and compassionate grounds. This application was converted to a spousal application in 2008 under section 124 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227, as amended S.C. 2002, c. 8, because the applicant had gotten married in 2007. Meanwhile, her sister was granted status in Canada on the basis of humanitarian and compassionate grounds.

[3] In 2010, due to the applicant's spouse's failure to attend her landing appointment in 2008 and the breakdown of her marriage in 2009, the applicant's application for permanent residence was considered on the basis of humanitarian and compassionate grounds rather than as an application under the spousal class.

[4] The applicant asserts that she came to Canada to escape from the "reign of guardianship" caused by her uncle's family, her parents and grandparents being deceased, no longer having any immediate family in Brazil. Consequently, she no longer has any ties to her country of origin.

[5] Furthermore, she is established in Canada, being a housecleaner and residing with her aunt. Although her aunt is not legally in Canada, she holds the family together in the applicant's opinion, instilling a sense of belonging, especially after the breakdown of her marriage and the feelings of abandonment this marital failure raised. This failure also led to her dependency on her sister and

aunt for emotional support, them being her only real family. Despite these factors, her application for permanent residence on the basis of humanitarian and compassionate relief was rejected by the officer.

[6] As a preliminary issue, the applicant submits that the record before the officer was incomplete, which shows a lack of care on the latter's part. However, counsel for the applicant admits that the significance of the alleged missing documents is purely speculative. Furthermore, there is absolutely no evidence of any prejudice to the applicant as a result of the alleged gaps in the tribunal record. Therefore, the applicant's preliminary argument is without merit.

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[7] The present application raises the following issues:

1. Did the officer err in his identification and application of the legal test for humanitarian and compassionate relief to the case at hand, notably, by failing to conduct a proper analysis of the applicant's personal circumstances?

2. Did the officer engage in speculation and make perverse findings of fact, thereby committing a reviewable error?

[8] It is agreed that the identification of the correct test in assessing humanitarian and compassionate grounds by an officer is a question of law and is to reviewed on a standard of correctness (*Ebonka v. Minister of Citizenship and Immigration*, 2009 FC 80 at para 16 [*Ebonka*]; *Premnauth v. Minister of Citizenship and Immigration*, 2009 FC 1125 at para 20 [*Premnauth*]). However, the officer's application of this test to the applicant's particular circumstances, and

ultimately, his decision to grant humanitarian relief are questions of mixed facts and law, to be reviewed on a standard of reasonableness (*Ebonka* at para 16; *Premnauth* at para 21; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; *Tartchinska v. Canada (Minister of Citizenship and Immigration)* (2000), 185 F.T.R. 161 at para 19 [*Tartchinska*]).

[9] This standard of reasonableness is explained by the broad discretion granted to officers evaluating exemptions based on humanitarian and compassionate grounds (*Tartchinska* at para 18). Thus, deference is owed to the officer's factual determinations and weighing of the evidence (*Dunsmuir v New Brunswick*, [2008] 1 S.C.R. 190 [*Dunsmuir*]).Weighing of the relevant humanitarian and compassionate grounds is not the function of this Court (*Suresh* at para 34) and an applicant is not entitled to a particular outcome (*Tartchinska* at para 18). Consequently, the officer's decision and findings must only be disturbed if his "reasoning process was flawed and the resulting decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir* at para 47). This Court must also intervene if the officer based his decision on erroneous findings of fact made in a perverse or capricious manner, or based on speculation.

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1. <u>Did the officer err in his identification and application of the legal test for humanitarian and compassionate relief to the case at hand, notably, by failing to conduct a proper analysis of the applicant's personal circumstances?</u>

[10] While the officer only mentioned "unusual" and "disproportionate" hardship at the end of his decision, he engaged in an analysis of the applicant's personal circumstances and did not

commit a reviewable error: the decision read as a whole evinces a reasonable application of the correct standard of undeserved, unusual or disproportionate hardship.

[11] The officer's decision constantly refers to the applicant's personal circumstances, specifically, her family ties, her establishment in Canada, the abuse she suffered and the breakdown of her martial relations, contrary to *Kaur v. Minister of Citizenship and Immigration*, 2010 FC 805. In *Kaur,* there was no mention whatsoever of the applicant's personal circumstances, so the applicant did not know why the officer did not accept her personal circumstances, nor why these factors were not given any weight (at para 23). Similarly, in *Adu v. Minister of Citizenship and Immigration*, 2005 FC 565, the officer had only mentioned the positive factors and dismissed the application for humanitarian and compassionate relief: the applicant did not know why his application was rejected (at para 14). However, the applicant here does understand what factors the officer considered and the weight they were given in coming to his conclusion: his reasons were adequate (*Kang v. Minister of Citizenship and Immigration,* 2011 FC 293 at para 27).

[12] As the respondent stated, substance trumps form: what matters is not the words used, but whether the officer undertook a proper analysis of humanitarian and compassionate grounds (*Pannu v. Minister of Citizenship and Immigration*, 2006 FC 1356 at paragraphs 37 and 41). The officer went through a discussion of each of the factors identified by the applicant before rejecting her claim. There is no doubt that her personal circumstances were considered: a proper analysis was undertaken. While this Court may not have necessarily come to the same conclusion, the officer's decision was reasonable, being defensible in facts and in law, falling within the range of possible, acceptable outcomes (*Dunsmuir* at para 47).

2. <u>Did the officer engage in speculation and make perverse findings of fact, thereby committing a reviewable error?</u>

[13] The applicant first argues that the officer erred in his consideration of the psychological report. I do not agree. The officer did not err in granting less weight to the psychological report, clearly explaining in his reasons his assessment of the report. The report was five years old at the time the officer rendered his decision and did not necessarily reflect the applicant's current mental state. It was also solely based on one subjective assessment, as explained by the respondent. Moreover, unlike in *Karimullah v. Minister of Citizenship and Immigration*, 2010 FC 824, relied on by the applicant, where there was not a single mention of the applicant's mental and emotional health, the officer does consider the applicant's emotional state in his assessment of the humanitarian and compassionate grounds.

[14] The officer did not go on to speculate that since this report was not convincing, the applicant was fully relieved of her mental anguish. Rather, the officer concluded that due to the applicant's age and that it had been eight years since she had first left Brazil, she would reasonably be able to cope with her personal circumstances: there is evidence supporting the officer's conclusion. The officer was not making a psychological determination, but making a factual determination based on his assessment of the evidence.

[15] Therefore, despite the conclusion in the psychological report that if the applicant was refused permission to stay in Canada, "her symptoms will intensify and her suffering will increase", it was reasonable for the officer to grant less weight to the report and make a different factual

determination for the above-mentioned reasons: his factual determinations are anchored in the evidence.

[16] The applicant further argues that the officer's finding that she had other family members who could provide support in Brazil is perverse. The applicant rightly asserts that the officer's finding that she has other family members she could rely on in Brazil, to compensate for the loss she will face, is perverse. The only family members she has left in Brazil are her abusers. While her uncle did not carry out the emotional and psychological abuse himself, it was under his roof, at the hands of his wife: it is ridiculous to assert that this man can provide the emotional support necessary without constantly remembering the abuse she suffered while under his care. The officer's finding as to the existence of other family members in Brazil is unintelligible and unjustified (*Dunsmuir*). However, this error alone, in the particular circumstances of the present case, is not determinative and does not warrant allowing the present application for judicial review.

[17] The applicant finally argues that the officer erred in his qualification of her family ties. In this regard, the respondent is right in asserting that weight cannot be given to the aunt's presence in Canada, since she is here illegally and her continued presence in the country is not guaranteed. Moreover, contrary to *Koromila v. Minister of Citizenship and Immigration*, 2009 FC 393 [*Koromila*] and *Yu v. Minister of Citizenship and Immigration,* 2006 FC 956 [*Yu*], the officer does not negate the applicant's emotional dependence on her sister and aunt: this humanitarian and compassionate factor is given weight, as mentioned in the officer's decision (see *Da Silva v. Minister of Citizenship and Immigration*, 2011 FC 347 at para 26 where consideration of an emotional bond by the officer is sufficient to distinguish the case from *Koromila).* While

undoubtedly, there is a difference between living together and sharing day-to-day life as opposed to occasional visits (*Yu* at para 30), the officer did not consider there to be sufficient evidence making the applicant's physical proximity necessary, considering she can live independently.

[18] It was also reasonable for the officer to conclude that there were reasonable lines of communication between Canada and Brazil. While the applicant's sister cannot necessarily return to Brazil, having sought permanent residence in Canada for humanitarian and compassionate grounds, there is no unreasonable obstacle preventing the applicant from visiting, nor any restriction as to oral communication. Hence, since physical proximity was not proven to be necessary, despite the applicant's acknowledged emotional dependence on her aunt and sister in Canada, it was reasonable for the officer to conclude that the family would nonetheless be able to stay in touch and maintain their bond once the applicant returned to Brazil.

[19] Therefore, overall, the officer's factual determinations were not perverse, but rather supported by his assessment of the evidence. Since his conclusions were anchored in the evidence, he did not engage in speculation (*Zhang v. Minister of Citizenship and Immigration*, 2008 FC 533 at paras 11-13). Hence, these conclusions were reasonable and deference is owed: this Court ought not intervene because the officer's determinations were well within the range of possible, acceptable outcomes defensible in facts and in law.

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[20] For the above-mentioned reasons, the application for judicial review is dismissed.

[21] I agree with counsel for the parties that this is not a matter for certification.

JUDGMENT

The application for judicial review is dismissed.

"Yvon Pinard"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-306-11
STYLE OF CAUSE:	VANESSA VALE PEREIRA v. MINISTER OF CITIZENSHIP & IMMIGRATION
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