

Federal Court



Cour fédérale

Date: 20120320

Docket: IMM-5151-11

Citation: 2012 FC 337

Ottawa, Ontario, March 20, 2012

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

LESLIE ANNETTE HOLDER

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Leslie Annette Holder, seeks judicial review of a decision of an Immigration Officer (Officer), dated July 6, 2011. The Officer denied her application for permanent residence on humanitarian and compassionate (H&C) grounds under section 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

I. Background

[2] The Applicant is a 48 year old citizen of St. Vincent and the Grenadines (St. Vincent). She initially came to Canada as a visitor in 2004 and worked as a caregiver in Montreal.

[3] She suffers from type I diabetes with complicating factors including nerve damage and loss of eyesight. She also sustained an injury to her leg as a result of mistreatment by her employer in Montreal. Exacerbated by her underlying condition, this injury has led to mobility restrictions.

[4] The Applicant brought a refugee claim based on sexual abuse and rape by her father's cousin since the age of 10 as well as threats and violence from her brother. She also referred to her sexual orientation as a lesbian. The Refugee Protection Division of the Immigration and Refugee Board found that she was not a Convention refugee or person in need of protection as there was adequate state protection in St. Vincent.

[5] In June 2010, the Applicant filed applications on H&C grounds and for a Pre-Removal Risk Assessment (PRRA).

[6] In February 2011, she requested that her PRRA decision either not be released until the H&C was determined or that the same Officer decide both applications.

[7] The same Officer declined the Applicant's PRRA and H&C applications in July 2011. Leave for judicial review sought concurrently for the PRRA decision was denied on

November 1, 2011 (IMM-5153-11). In the present application, this Court is tasked solely with considering the Officer's determination on H&C grounds.

II. H&C Decision

[8] At the outset, the Board noted that the Applicant had not submitted evidence to support the conclusion that state protection was not available to her in St. Vincent. She had also failed to provide documentary evidence to demonstrate that treatment would not be available for her medical issue, or that it would be a hardship to access such treatment.

[9] Regarding evidence submitted that the Applicant would face discrimination as a homosexual; the Board found that although homophobia is still widespread in St. Vincent, the general public does not appear to be aggressive towards homosexuals.

[10] The Board noted that the Applicant's partner had not provided information enumerating the hardships she would incur if her relationship with the Applicant was severed. Similarly, there was no evidence from the Applicant's daughter that she would not be willing or able to assist the Applicant, if only emotionally, should she be returned to St. Vincent. The Applicant's reliance on friends and community members for errands and doctor's appointments as well as her involvement in church-related tasks was acknowledged by the Board. While it was reasonable to expect that the Applicant maintained meaningful personal ties while in Canada, she had not established that severing these ties would have a significant negative impact on her that would constitute an unusual and undeserved or disproportionate hardship.

[11] The Board also concluded that while leaving Canada after more than six years would be difficult, the Applicant had not become established in Canada to the extent that severing ties amounted to an unusual and undeserved or disproportionate hardship. She was initially employed as a caregiver but is now unemployed and in receipt of Ontario Disability Support Program (ODSP) benefits. She had not received recommended treatment for her condition of a major depressive episode and chronic posttraumatic stress disorder since her assessment three years earlier.

[12] As far as her ties to St. Vincent were concerned, the Board noted she had immediate family members who continue to reside in the country and there was no evidence that they would be unable and unwilling to assist her. She also had ten years of work experience as a cosmetics and crafts vendor.

[13] Although she suffered from diabetes, she had not let the condition deter her from being active in her community and it was reasonable to believe that she could be as active in St. Vincent. Should her condition deteriorate and she was unable to work, the country's currently amended social insurance law provides for assistance, including disability pensions.

[14] The Board concluded based on the evidence before it that the Applicant had not demonstrated her personal circumstances were such that the hardship of not being granted the requested exemption would be unusual and undeserved or disproportionate.

III. Issues

[15] This application raises the following issues:

- (a) Did the Officer ignore material evidence?
- (b) Did the Officer make unreasonable findings in light of the evidence?
- (c) Did the Officer apply the wrong test in assessing H&C grounds?

IV. Standard of Review

[16] Assessments on an H&C application are reviewed on a standard of reasonableness (see *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646, [2008] FCJ no 814 at para 11).

[17] In applying the reasonableness standard, the Court must consider “the existence of justification, transparency and intelligibility” as well as “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[18] Also notable is previous recognition by this Court that H&C assessments are highly discretionary and therefore there is a wider scope of possible reasonable outcomes (see *Inneh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 108, [2009] FCJ no 111 at para 13).

[19] By contrast, the application of a legal test and questions of procedural fairness demand the correctness standard (see *Dunsmuir*, above at para 50; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paras 43-44).

V. Analysis

A. *Ignoring Material Evidence*

[20] The Applicant disputes the Officer's finding that she was not severely restricted in her daily activities as being made without regard for the evidence.

[21] According to the Applicant, the Officer ignored evidence that she is unable to meet daily needs without the assistance of friends and community members. However, I am not convinced that the Officer failed to address this particular aspect of the application. The Officer expressly refers to this evidence in a section entitled "Personal ties that would create hardship if severed." It comments on the details of a letter from the Applicant's pastor describing the degree of her involvement in church activities. While she asserted that assistance from friends and community members was required to perform daily activities, the Officer found this evidence did not specifically support her

claim. Based on what was before the Officer, weighing the evidence of friends and community support in this manner was reasonable.

[22] I do, however, share the concerns raised by the Applicant regarding the Officer's treatment of relevant medical evidence.

[23] The Officer seemingly ignored letters from two doctors and a nurse practitioner making reference to her difficulties walking and use of assistive devices. Aside from general references to the Applicant having a disability, there is no substantial consideration of the nature of her mobility restrictions, which would appear central to the overall application. The Respondent has argued that the letters would not contradict the Officer's finding that there was no independent evidence the Applicant requires and receives help for her daily activities. Given the importance of the medical evidence to making this determination, however, the Officer would be expected to explicitly mention and consider the nature of it (see for example *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ no 1425 at paras 27-28).

[24] In addition, this is problematic where there is some debate as to whether her disability and receipt of ODSP relates merely to restrictions on her ability to work or daily activities in general. Before making this distinction, the Officer would have to provide a more fulsome analysis of the evidence as to the restrictions she faced, even if that evidence was somewhat limited.

[25] As a consequence, I recognize that the Officer erred in failing to specifically address important medical evidence.

B. *Unreasonable Findings*

[26] The Applicant further contests the reasonableness of the Officer's finding that there was family support available to the Applicant in St. Vincent and she could access government assistance.

[27] In respect of the argument that family support would not be forthcoming from a violent brother and family members who opposed her sexual orientation, the Applicant has not demonstrated a clear error. The Officer merely made reference to her mother and brother who continue to reside in St. Vincent. There was also no evidence found to corroborate that her family would be unwilling or unable to assist her. This was a reasonable conclusion since the Applicant had not pointed to evidence beyond the submissions of counsel in this regard and she retains the onus of establishing undue hardship (see for example *Amponsah v Canada (Minister of Citizenship and Immigration)*, 2010 FC 974. [2010] FCJ no 1218 at para 33).

[28] Similarly, the Applicant's suggestion that a breach of procedural fairness resulted from failing to give her an opportunity to respond to documentary evidence regarding government assistance available in St. Vincent is not convincing. An officer may rely on publicly available documents so long as they are not novel and do not relate to changes in general country conditions (see *Mancia v Canada (Minister of Citizenship and Immigration)*, [1998] 3 FC 461, [1998] FCJ no 565 at paras 26-27; *Stephenson v Canada (Minister of Citizenship and Immigration)*, 2011 FC

932, [2011] FCJ no 1156 at paras 33-39; *Xie v Canada (Minister of Citizenship and Immigration)*, 2010 FC 580, [2010] FCJ no 686 at para 29)

[29] While not a clear breach of procedural fairness, however, I do have concerns regarding the Officer's approach to assessing the evidence related to government assistance. Initially the Officer focused on the ability of the Applicant to find work as a former cosmetics and crafts vendor in St. Vincent and proceeded to suggest that if her condition deteriorated government assistance would be available to her. Based on the evidence, it is clear that the Applicant's condition has already deteriorated while here in Canada to the point where she is unable to work and relies on disability benefits. Any reference to her ability to work in St. Vincent is at odds with the preponderance of evidence before the Officer.

[30] The material issue is therefore the prospects of the Applicant for receiving similar assistance in St. Vincent. Since this was a significant factor in the overall determination, it is unreasonable for the Officer to have erroneously focused on the Applicant's ability to work and then fail to conduct a thorough analysis of the nature and extent of benefits available to her. The Officer has not provided sufficient justification for its definitive conclusion that the Applicant "will have access to government assistance" should she be returned to St. Vincent and unable to work. This particular finding was not reasonable.

C. *Correct Legal Test*

[31] Irrespective of my conclusions as to the assessment of evidence above, I do not accept the Applicant's submissions that the Board also applied the incorrect legal test in the assessment of her H&C application. The cases relied on to suggest that the Board confused the assessment of risk and state protection as in a PRRA prove to be of limited relevance in this instance.

[32] While I acknowledge the Board's initial reference to state protection, it is clear from the remainder of the decision that the focus was on an assessment of whether the Applicant would face undue hardship – the determinative issue in H&C applications.

[33] More specifically, the Board considered whether medical treatment would be available in St. Vincent or she would incur hardship in accessing that treatment. It also addressed the hardship that would result from severing personal ties to Canada. The Board summarized its assessment by stating:

Having read and considered the information presented by the applicant and her counsel as well as publicly available documentation, I find that the evidence before me does not support the applicant's assertion that the hardships associated with returning to St. Vincent are unusual and undeserved or disproportionate.

[34] Since the Board directed its attention to the degree of hardship associated with the Applicant's return to St. Vincent, it cannot be said to have erred in applying the appropriate test for H&C grounds. To the extent I have already found the Board to have erred, this was in relation to the treatment of important evidence in making the assessment rather than any incorrect statement of the test itself.

VI. Conclusion

[35] Since the Board was unreasonable in its consideration of critical aspects of the evidence submitted for the H&C determination, this application for judicial review is allowed. The matter is referred back to a different Officer for re-consideration.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed. The matter is referred back to a different Officer for re-consideration.

“ D. G. Near ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: LESLIE ANNETTE HOLDER v MCI

PLACE OF HEARING: TORONTO

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** NEAR J.

DATED: MARCH 20, 2012

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