Federal Court  Cour fédérale

Date: 20140501

Docket: IMM-5337-13

Citation: 2014 FC 405

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, May 1, 2014

PRESENT: The Honourable Mr. Justice Montigny

BETWEEN:

SHIRLEY ADELINE AGATHA JARVIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision rendered on July 29, 2013, by Immigration Officer M.C. Bennett (officer), in which he rejected the application for permanent residence on humanitarian and compassionate grounds (H&C application) of Shirley Adeline Agatha Jarvis (applicant).

[2] For the reasons below, I am of the view that the applicant's application for judicial review should be allowed.

The facts

[3] The applicant is a citizen of St. Vincent and the Grenadines, born on June 15, 1945. In 1971, she married James Jarvis, with whom she had three children: Karen, born in 1961, Cleopatra, born in 1967, and Junior, born in 1972. A few years later, the applicant's husband was arrested for a serious offence and was eventually executed.

[4] The applicant then began dating Lawrence Pierre (Mr. Pierre). Although the relationship started off well, Mr. Pierre allegedly later began abusing the applicant verbally, financially and psychologically. The applicant's daughter Cleopatra even alleges that she and her sister were sexually abused by Mr. Pierre.

[5] In 1989, Cleopatra came to Canada and married. She has since acquired Canadian citizenship. In 1998, the applicant's son also came to Canada to study. He returned to St. Vincent and the Grenadines in 2006.

[6] The applicant allegedly left Mr. Pierre in 1991 but moved back in with him in 1993. In 1999, the applicant suffered from health problems and was forced to retire early. She came to Canada with a visitor's visa in 2004 to undergo certain surgical procedures. In 2005, she applied for an extension of her visa, but it was refused. Because she feared returning to St. Vincent because of her former partner, she decided to stay in Canada without status. She did not file a claim for refugee protection until January 28, 2011, and this was rejected by the Refugee Protection Division on

November 20, 2012. On May 14, 2013, her application for leave and for judicial review was rejected by this Court.

[7] During all those years, the applicant lived with her son, until he left Canada, at which point she moved in with her daughter.

[8] On June 22, 2012, the applicant filed the H&C application on which these proceedings are based. Her application was based on (1) her establishment and integration (family ties) in Canada; (2) the best interests of her granddaughter; (3) the adverse conditions in St. Vincent and the Grenadines; and (4) the challenges facing a woman of her age and in her medical condition in moving back to a country where she would have nobody to take care of her. This application was rejected on July 29, 2013, and this application for judicial review was filed on the following August 13.

The impugned decision

[9] The officer began by noting that part of the H&C application was based on the risks that the applicant would face if she were to return to St. Vincent. However, the evidence submitted in support of these risks was the same as that filed in support of her claim for refugee protection. According to subsection 25(1.3) of the IRPA, the factors taken into consideration in the analysis of a claim for refugee protection under sections 96 and 97 may not be considered in examining an H&C application. Because this evidence refers to a risk of persecution or threats, it is beyond the scope of what may be considered in an H&C application and was therefore disregarded by the officer.

[10] However, the officer continued his analysis by asking himself whether the situation in St. Vincent demonstrated that the applicant would suffer undeserved or disproportionate hardship. He concluded that the applicant had not discharged her burden of proof to this effect because she had failed to demonstrate that Mr. Pierre continued to constitute a risk to her. The officer also noted, citing the United States Department of State Country Report (US DOS Report), that violence against women is a problem in St. Vincent, but that the authorities have taken measures to help victims, and that the applicant had not shown that she had availed herself of this support. Therefore, the officer was not persuaded that returning to St. Vincent would cause the applicant to suffer disproportionate or undeserved hardship.

[11] The officer also indicated that he was sensitive to the state of the applicant's health. However, she did not prove that health care would not be available to her. The officer also noted that the applicant's son is currently living in St. Vincent and that he could offer a degree of support.

[12] The officer noted that the applicant lived in Canada with her daughter and granddaughter, adding that separation is a natural consequence of immigration. He emphasized that they would be able to remain in contact through other means. He recognized that the applicant had a special relationship with her granddaughter and that the girl would be affected by her grandmother's departure, but he expressed the view that the granddaughter was not dependent on the applicant to such an extent that the latter's departure would constitute undeserved or disproportionate hardship for the child.

[13] Finally, the officer noted that the applicant had arrived in Canada with a temporary status and that she had remained with no legitimate expectation that she would be given the right to remain

permanently. Furthermore, there is no evidence indicating that she remained in Canada for reasons beyond her control.

[14] In short, the officer recognized that leaving Canada would result in a certain degree of hardship for the applicant, but he was not convinced, based on the evidence before him, that it would be unusual, undeserved or disproportionate hardship.

Issue

[15] The sole issue in this application for judicial review is whether the officer's decision is reasonable.

Standard of review

[16] The standard of review applicable to H&C decisions has been consistently held to be reasonableness. These applications require the exercise of a broad discretion granted to the Minister and involve questions of mixed fact and law: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18; *Piard v Canada (Minister of Citizenship and Immigration)*, 2013 FC 170 at para 11.

[17] This Court must therefore exercise deference and great restraint in determining whether the findings are justified, transparent and intelligible, and whether they fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.

Analysis

[18] The applicant submits that the decision is unreasonable mainly on the ground that the officer failed to take into account all of the evidence in the record. In her written submissions to the officer, counsel for the applicant had argued that the applicant's son did not have a very good relationship with his mother and that, regardless, he lacked the means to help her financially. In support of this statement, she referred to a letter from the son filed as Exhibit A-7, and she also referred to this exhibit in the list of exhibits accompanying her submissions. However, this letter is inexplicably absent from the Certified Tribunal Record, which indicates that the officer assigned to the H&C application never saw it.

[19] During the hearing, counsel for the respondent admitted that the officer should have asked about this exhibit expressly mentioned by counsel for the applicant, but he submitted that this letter could not have had a determinative effect given the officer's other findings. However, this is not at all clear.

[20] There is no doubt that the decision about whether or not to grant permanent residence on humanitarian and compassionate grounds is discretionary and involves a multitude of factors. In this case, the officer found that the applicant would not be at risk if she were to return to St. Vincent, that there was no evidence to the effect that she would be unable to access the health care she needed, and that separation from her daughter and granddaughter was a natural consequence of her removal.

[21] That said, the officer also took into account the fact that "the applicant has a son living in St. Vincent and there is no evidence before me that he would not be able to provide assistance and

support to her if she returns to St. Vincent and the Grenadines". However, the son's letter filed as Exhibit A-7 directly contradicts this statement. Not only does it confirm the abusive nature of his stepfather, but it also mentions that he is a single father, that he works sporadically as a journalist, that he must often travel for work and that he is incapable of taking care of his mother because "I am struggling to make ends meet as it is a present time".

[22] It is true that this letter is neither dated nor sworn. However, it is consistent with the version presented by his sister Cleopatra, who wrote the following in a letter dated April 8, 2013, filed as Exhibit A-9 in support of her mother's application:

> My brother resides in St-Vincent but I know he is unable and also unwilling to look after my mother. My mother and brother have a strained relationship ever since their living together in Toronto, as my mom found it difficult to understand his lifestyle and did not agree with the way he took care of his son. My brother continues to struggle with the daily care of his son as a single parent and maintaining his job which does not pay him enough to even afford to rent a house of his own.
> (Tribunal Record, p 81)

[23] It is indeed possible that the son's letter, had it been considered by the officer, would not have affected his decision. However, I cannot be certain of this. After all, this is not a case in which the officer simply failed to consider a piece of evidence; on the contrary, the officer made a finding that contradicted the evidence submitted. There may be good reason to ascribe little weight to this letter, but it is not this Court's role to speculate on how it might be assessed. What is certain, however, is that the allegations of the applicant's son in his letter, which were corroborated by the statements of his sister, are central to the applicant's arguments and relevant to the analysis of an element expressly addressed by the officer in his reasons. I therefore adopt the reasoning of

Justice Gauthier in *Machalikashvili v Canada (Minister of Citizenship and Immigration)*, 2006 FC 622, in which she wrote the following (at para 9):

> As mentioned in several earlier decisions of the Court (*Kong v. Canada (M.C.I.)*, [1994] F.C.J. No. 101; *Gill v. Canada (M.C.I.)*, [2003] F.C.J. No. 1270; *Ahmed v. Canada (M.C.I.)*, [2003] F.C.J. No. 254; *Li v. Canada (M.C.I.,)* [2006] F.C.J. No. 634), a breach of Rule 17(b) will justify setting the decision aside when the evidence missing from the certified record was particularly material to the finding under review. There is no doubt that this is the case here.

[24] For these reasons, I find that the application for judicial review must be allowed, and the application for permanent residence on humanitarian and compassionate grounds must be remitted to a different officer for redetermination. The parties did not submit a question for certification, and none will be certified.

ORDER

THIS COURT ORDERS that the application for judicial review be allowed. No question is certified.

"Yves de Montigny"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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