Federal Court  Cour fédérale

Date: 20151023

Docket: IMM-168-15

Citation: 2015 FC 1201

Ottawa, Ontario, October 23, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ARIELA EPSTEIN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of an Immigration Officer (Officer), dated December 17, 2014, rejecting the Applicant's in-land permanent residence application on humanitarian and compassionate (H&C) grounds made pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[2] For the reasons that follow, the application is allowed.

II. Background

[3] The Applicant is an 82 year-old citizen of Israel. In July 2010, the Applicant's two daughters and their respective families immigrated to Canada. The Applicant came to Canada on July 7, 2010 and has remained in Canada on a temporary visa. The Applicant applied for permanent residence under the parent and grandparent sponsorship program on January 3, 2014, two days after the temporary suspension was lifted on the program. Her application has since been accepted for processing. On May 14, 2014, the Applicant applied for an exemption from the in-Canada eligibility criteria, asking Citizenship and Immigration Canada (CIC) to allow her to remain in Canada while the sponsorship application is processed.

[4] The Applicant's application for exemption based on H&C grounds was rejected on December 17, 2014. The Officer accepted that the Applicant lives with one of her daughters in Canada, that she shares a close bond with all her family members in Canada, and that she is financially supported by her daughters and sons-in-law. The Officer also noted the Applicant's anxiety and depression over the prospect of being separated from her family members in Canada as she is currently taking anti-anxiety medication. In concluding that the difficulties related to family dependency were insufficient to justify an exemption on H&C grounds, the Officer found that while it would be difficult for the Applicant to leave Canada, the Applicant's physical separation from her daughters was to be expected since the daughters decided to immigrate to Canada. The officer also found that the Applicant would be able to endure the separation as she was separated from her children in the past, that the separation would not be permanent, and that

the Applicant would be able to continue her close relationship with her daughters and grandchildren through correspondence. Moreover, the Officer found that her family would continue to support her financially if she were to return to Israel.

[5] The Applicant alleges that the Officer did not consider the disproportionate hardship aspect of the test as set out in the CIC Operational Manual, IP 5 – *Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds* (IP 5 Guidelines) since the evidence submitted before the Officer clearly demonstrates that the Applicant would suffer a disproportionate hardship if she were to return to Israel. The Applicant also relies on *Kaur v Canada (Citizenship and Immigration),* 2010 FC 805 [*Kaur*] to argue that the Officer failed to address the Applicant's personal circumstances.

[6] The Applicant submits that the Officer erred in the assessment of physical separation as hardship since the Applicant's age, high degree of dependency on her family, and difficult life were not properly considered. The Applicant states that she was forced to live in an orphanage for 12 years when her father abandoned her and attempted to cut the Applicant's ties with her mother. The Applicant only reunited with her mother at the age of 16 after her mother remarried. At the young age of 19, the Applicant married a man 30 years her senior who was emotionally and physically abusive towards her, yet she remained in the marriage to care for her children. Throughout her life, the Applicant says that she lived solely for her children's well-being. While the Officer found that the Applicant was able to keep close contact with her daughters over 25 years ago while they were studying abroad, the Officer's reliance on this point to justify that the Applicant would not suffer an undue, undeserved, and disproportionate hardship if she were to

be physically separated from her family now at the age of 82 is unreasonable. The Applicant relies on *Nicayenzi v Canada (Citizenship and Immigration)*, 2014 FC 595, 457 FTR 65 [*Nicayenzi*] to argue that the Officer made findings of fact based on mere speculation in this regard since the evidence submitted demonstrates that the Applicant has no living relatives in Israel and significantly depends on her family in Canada to support and care for her socially, financially, and psychologically, on a daily basis.

[7] The Applicant also challenges the Officer's finding that the assessment prepared by her psychiatrist, Dr. Brotman, was prepared as an advocate for the Applicant.

III. Issues and Standard of Review

[8] The issue raised by this judicial review application is whether the Officer, in concluding as he did, committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7, in failing to consider whether requiring the Applicant to return to Israel would have a disproportionate impact due to her personal circumstances.

[9] The appropriate standard of review is reasonableness since the matter is related to the Officer's assessment of mix questions of fact and law (*New Brunswick (Board of Management) v Dunsmuir*, 2008 SCC 9, [2008] 1 SCR 190, at para 47 [*Dunsmuir*]; *Nicayenzi*, above at para 10, *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, [1999] SCJ No 39; *Walker v Canada (Citizenship and Immigration)*, 2012 FC 447 at para 31, [2012] FCJ No 479 (QL); *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at para 18, [2009] FCJ No 713).

IV. Analysis

[10] Generally, a foreign national must apply for a permanent resident visa from outside Canada. In order to be exempt from this requirement, the foreign national must demonstrate that the exemption is justified by H&C considerations relating to him or her pursuant to section 25 of the Act. In this respect, the IP 5 Guidelines provide that H&C grounds may exist where the hardship of having to apply from outside Canada "would have an unreasonable impact on the applicant due to their personal circumstances."

[11] Upon review of the Officer's decision and the evidence before him, I am of the view that the Officer failed to properly address the Applicant's personal circumstances, particularly, the Applicant's age and dependency on her family in Canada.

[12] While the Officer mentions in the summary section of his analysis that the family provides the Applicant with emotional support, he does not conduct a thorough analysis of this factor. In my view, and for the reasons that follow, this is a reviewable error.

[13] This Court has held that while immigration officers have discretion as to the weight assigned to an applicant's personal circumstances in H&C applications, officers cannot have any disregard for them. (*Kaur*, above at paras 18-19; *Koromila v Canada (Citizenship and Immigrations)*, 2009 FC 393, at para 68 [*Koromila*]). This Court has also held that an immigration officer cannot ignore "significant evidence of an applicant's emotional and human dependency on her family in Canada" (*Koromila*, above at para 68). This is especially true

where a fundamental change has occurred in an applicant's personal situation *(Le Blanc v Canada (Minister of Citizenship and Immigration),* 2012 FC 1292, at para 31[*Le Blanc*]).

[14] In my view, the focus of the Applicant's H&C application relates to her desire to remain in Canada surrounded by her entire family as she reaches the final stages of her life. In response to the Applicant's pleas, the Officer found that:

> […] when Ms. Epstein's daughters applied to immigrate to Canada with their families, a separation would have been expected by them. In making the choice to leave Israel to live permanently in Canada, I find that Ms. Epstein's daughters would have reasonably anticipated the difficulties that their mother would face living in Israel on her own with no family or friends.

[15] In my view, the Officer's finding demonstrates that he failed to grasp the essential point of the application. The H&C application is the plea of an elderly woman to remain with her family in Canada as she waits for her permanent residency application to be processed. She has always been surrounded by her family. Indeed, her daughters postponed their immigration to Canada for several years to be with the Applicant in Israel in order to keep the family together. The evidence is clear that the Applicant is dependent on her family in Canada to provide her with shelter, food, and emotional and financial support. In sum, the Applicant is entirely reliant on her family for her daily needs. In omitting to consider the Applicant's emotional and physical dependency on her family, the Officer disregarded personal circumstances of the Applicant that were fundamental to her claim. The Officer's failure to properly assess the evidence and failure to have regard to relevant personal circumstances of the Applicant constitute reviewable errors (*Aguirre v Canada (Citizenship and Immigration),* 2014 FC 274, 450 FTR 301, at para 9; *Kaur*, above at para 18).

[16] Moreover, in concluding that the Applicant's difficulties relating to family dependency were insufficient to justify an exemption under H&C grounds, the Officer also found that the Applicant would be able to "maintain her close relationship with her daughters' families through correspondence, telephone calls and visits when she returns to Israel." In my view, by characterizing the facts in this manner, the Officer ignored the Applicant's change in circumstances, namely, that she would be significantly isolated if she were to return to Israel. As Justice Shore stated in *Yu v Canada (Minister of Citizenship & Immigration)*, 2006 FC 956, at paragraph 30, "*[t]here is a significant factual difference between living together and sharing day-to-day life and an occasional visit*." In this case, the Officer failed to grasp this difference when analyzing the personal circumstances of the Applicant. The family's move to Canada is a significant change in the Applicant's personal circumstances with respect to her emotional and personal support network as the evidence is clear that the Applicant's close relationship with her family encompasses so much more than just occasional conversations over the phone or the occasional visit. This significant change, coupled with the advanced age of the Applicant, and evidence of significant isolation if she were to return to Israel, placed a duty on the Officer to carry out a more substantial analysis of the Applicant's significant change in personal circumstances (*Le Blanc v Canada (Citizenship and Immigration)*, 2012 FC 1292, at para 31).

[17] In my opinion, the Officer's decision does not fall within a range of possible, acceptable outcomes, defensible in fact and in law. Given this finding, there is no need to determine whether the Officer unreasonably gave no weight to the assessment prepared by the Applicant's psychiatrist.

[18] No question of general importance has been proposed by the parties. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The matter is referred back to Citizenship and Immigration Canada to be redetermined by a different immigration officer; and

3. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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