Federal Court  Cour fédérale

Date: 20180130

Docket: IMM-2019-17

Citation: 2018 FC 92

Ottawa, Ontario, January 30, 2018

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MYRLA CATINDIG

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA], of a decision of a senior immigration officer [Officer] from Citizenship and Immigration Canada dated April 25, 2017, by which an application for permanent residency from within Canada based on humanitarian and compassionate grounds [H&C], filed under subsection 25(1) of the IRPA, was refused.

II. Facts

[2] The Applicant, aged 45, is a citizen of the Philippines.

[3] The Applicant is married and has four children residing in the Philippines.

[4] The Applicant has always been the financial provider of her family and has provided for a sister who suffers from physical disability since high school.

[5] The Applicant has a degree in secondary education and is registered as a professional teacher in the Philippines for a period of 14 years.

[6] As the family expanded, the Applicant and her husband decided to work overseas to support their children financially and pay for their education.

[7] Prior to coming to Canada, the couple worked abroad in Hong Kong in 2009. The Applicant's contract was one by which she was to work as a live-in domestic for two years, but she applied to come to Canada in January 2010 to work as a live-in caregiver before the termination of her contract. After working for two years as a live-in caregiver, the Applicant intended to apply for permanent residence in Canada.

[8] The Applicant worked for her first employer for three months, after leaving her employment due to verbal abuse by her employer. Through a Canadian placement agency, the

Applicant was then able to secure employment from a second employer and obtain a work permit, valid from January 27, 2011 to June 10, 2013. The Applicant worked for her employer for six months prior to the approval of her work permit. Once again, the Applicant left her employment due to excessive demands to assist the employer brother-in-law's household. The Applicant claims to have worked for her employer for well over two years; however, given the particular circumstances, the employer refused to declare the months the Applicant worked for her prior to the issuance of the work permit.

[9] On December 29, 2012, after working, yet, for another family for about four months, the Applicant had to find a new employer because her previous employer underwent a divorce. The Applicant was then obliged to find another employer in June 2013. She claims to have worked for her employer while the Labour Market Opinion [LMO] application was in process. The employer applied twice for an LMO, but each time the application was refused. The employer failed to inform the Applicant of these refusals. Unfortunately for the Applicant, she had already been working for six months for her employer.

[10] Given the relationships that she had had with her employers, the Applicant was not enabled to obtain evidence of employment establishing that she has in fact worked for two years as a live-in caregiver.

[11] The Applicant currently has no status in Canada and continues to work for families as a house cleaner.

[12] On June 29, 2016, the Applicant submitted an application for permanent residence under the Live-In Caregiver Program from within Canada on H&C grounds.

III. Decision

[13] On April 25, 2017, the Officer refused the Applicant's application for permanent residence under H&C grounds.

[14] The Officer began his analysis by mentioning that the Applicant bears the onus of demonstrating that the hardship of having to obtain a permanent resident visa from outside Canada would be unusual or disproportionate.

[15] The Officer identified the Applicant's H&C grounds as being based on her establishment in Canada, as well as for the best interests of her children and her risk of return to the Philippines, in regard to her situation.

A. *Establishment in Canada*

[16] The Officer was satisfied that the Applicant resided in Canada for more than seven years since her arrival to Canada in 2010. He noted that the Applicant was integrated into the community. She has developed friendships; however, none demonstrated close interdependent relationships that would suffer hardship if separated. The Officer had insufficient objective evidence establishing that the Applicant has received treatment for these psychological and emotional hardships if she had to leave her friends. The Applicant is also the financial provider

of her family in the Philippines. She supports the needs of her children and her younger sister who suffers from a severe degenerative disease which has rendered her sister bedridden. The Officer concluded that the degree of establishment of the Applicant is of a level that was naturally expected of her, bearing in mind her seven year period in Canada. The Officer was not satisfied that the Applicant could not return to the Philippines and still maintain her relationships with her friends in Canada.

[17] The Officer was not convinced that the Applicant would not be able to find employment in the Philippines and use her employment skills and knowledge obtained in Canada to obtain employment. The simple fact that the Applicant was employed in Canada is not sufficient to demonstrate integration in Canadian society to warrant granting an exemption under subsection 25(1) of the IRPA.

B. *Risk of returning to the Philippines*

[18] After reviewing country condition evidence in the Philippines, the Officer found that there is a functioning police force and judicial system committed to protecting its citizens from criminal violence. The Officer had insufficient evidence before him to establish that the Applicant's or any of her family's homes were destroyed by a natural disaster and are currently inhabitable. Regarding the Applicant's statement that there is inadequate health care and a troubled economy in the Philippines, the Officer indicated in his reasons that many countries are not as fortunate to have the same social, including financial and medical support as found in Canada; however, it is not the purpose of section 25 of the IRPA to equate the standard of living

between Canada and other countries in situations that do not demonstrate undue hardship as per the relevant jurisprudence thereon.

C. *Best interests of the children*

[19] The Officer was not convinced that the Applicant would be unable to provide financial support for her children in a similar manner if she is returned to the Philippines. The Officer noted that the Applicant has spent the majority of her life in the Philippines and he was satisfied that the best interests of the children would be met if the Applicant returned to the Philippines to provide care and support for them there.

D. *Conclusion*

[20] The Officer did consider all the information and evidence regarding the H&C application in its entirety. He considered the personal circumstances of the Applicant including her establishment in Canada, the best interests of the children and her risk of return to the Philippines. After reviewing the factors and evidence presented herein, the Officer was not satisfied that the Applicant has established that a positive exemption is warranted on H&C grounds.

IV. Issues

[21] This matter raises the following issues:

1. Did the Officer err in failing to consider the Applicant's request for a temporary resident permit [TRP]?

2. Did the Officer make an unreasonable H&C decision given the evidence?

[22] The Court finds that the applicable standard of review regarding decisions in which an officer has failed to consider an applicant's request for a TRP is that of correctness (*Abdeli v Canada (Citizenship and Immigration)*, 2015 FC 146 at para 30 [*Abdeli*]; *Shah v Canada (Citizenship and Immigration)*, 2011 FC 1269 at para 36 [*Shah*]).

[23] As for the second issue, the parties agree that the standard of review to be applied to an H&C decision is reasonableness (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44; *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18). Consequently, the Court must not interfere with an H&C officer's findings of fact or discretionary decisions as long as they are intelligible, transparent, justifiable, and fall within the range of possible, acceptable outcomes that are defensible in respect of the facts and the law (*Abdeli*, above, at para 29; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

V. Relevant Provisions

[24] Subsection 25(1) of the IRPA states:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37	**25** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf

— or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VI. Submissions of the Parties

A. *Submissions of the Applicant*

[25] Regarding the first issue, the Applicant argues that the Officer erred by failing to consider the Applicant's request for a TRP. In fact, the Applicant requested consideration of a TRP within her H&C application, if the Officer found that there were insufficient grounds to grant the Applicant her application for permanent residence. The Applicant provided written submissions specifically for a TRP assessment to be made by the Officer which had not been addressed.

[26] In her written submissions, the Applicant argued that her continued presence in Canada is necessary to support her children abroad. Moreover, the basis of the Applicant's inadmissibility

is due to remaining beyond authorization and working without status. Therefore, allowing the Applicant to obtain a TRP that is valid for at least six months, counsel argues that the Applicant could subsequently apply for a work permit as well, allowing her to work with authorization.

[27] The Applicant submits that where an applicant makes a TRP request in the context of a permanent resident application, it must be considered and failure to do so constitutes a reviewable error (*Japson v Canada (Minister of Citizenship and Immigration)*, 2004 FC 520 at paras 23-25 [*Japson*]). The Applicant also submits that in *Shah*, a TRP was requested within the context of an H&C application and the officer failed to consider the applicant's request. The application for judicial review was consequently granted (*Shah*, above, at para 77).

[28] The Applicant submits that even in instances where an H&C application is refused, a TRP may be appropriate if an officer feels the applicant should be allowed to remain in Canada temporarily. If the Officer is of the view that a TRP should not be considered, it still needs to provide reasons for refusing such a request. The very fact that the Applicant's TRP request was not considered by the Officer demonstrated a general lack of attention by the Officer in considering the evidence as a whole. Consequently, the application (as a whole) should be returned to be considered anew by a different officer.

[29] Finally, as for the second issue, the Applicant submits that the Officer did not render a reasonable decision.

B. *Submissions of the Respondent*

[30] With regard to the first issue, the Respondent acknowledges that no decision was made on the TRP request by the Officer. It is therefore the Respondent's position that the matter of the TRP be returned and that a decision be rendered according to the law.

[31] The Respondent opposes the Applicant's challenge to the refusal of her H&C application.

[32] It is therefore submitted that the application for judicial review regarding the H&C refusal ought to be dismissed and that this application for judicial review be granted solely to permit consideration of the Applicant's TRP application.

VII. Analysis

[33] For the following reasons, the application for judicial review is granted.

[34] The Court finds that the Officer erred by failing to consider the Applicant's TRP request.

[35] The Applicant made a TRP request in her H&C application if her application on H&C grounds were to be refused. The application had written submissions specifically for a TRP assessment, given the fact that the Applicant is in Canada without a work permit.

> Alternatively, if it is found that there are insufficient grounds to grant her permanent residence, it is requested that a Temporary Resident Permit ("TRP") be issued to Ms. Catindig instead. If a TRP is issued for more than six months, an open work permit is

> also requested, for which the relevant fees and forms are available upon request.
>
> […]
>
> Together, these numerous factors form a strong and compelling basis to issue Ms. Catindig a Temporary Resident Permit, if the H&C application is to be refused. With a TRP that is valid for at least six months, Ms. Catindig could subsequently apply for a work permit as well, allowing her to work with authorization.
>
> (Certified Tribunal Record [CTR], Application for permanent residence –LCP program with request for exemptions under humanitarian and compassionate grounds or temporary resident permit, in the alternative, pp 39 and 65.)

[36] Even if brief, the Court concludes that the Officer should have addressed and assessed the Applicant's TRP request in his reasons. "Even if there is no basis for the issuance of a TRP, the officer should indicate the request was given consideration" (*Shah*, above, at para 77; *Japson*, above, at para 25; *Lee v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1461 at para 16; *Dhandal v Canada (Citizenship and Immigration)*, 2009 FC 865 at paras 11-17).

[37] Finally, if the Applicant had not made such a request to consider the possibility of issuing her a TRP, the Officer would not be obliged to address, nor even to consider the request; however, that is not the case at bar.

> There is no indication in the applicant's materials that he ever made a request for such a permit, and there was consequently no obligation on the immigration officer to consider issuing that kind of permit to the applicant. The Bulletin admittedly contemplates situations in which an immigration officer may consider granting a Temporary Resident Permit in the absence of a request from an applicant, but it cannot mandate the immigration officer to do so. The mere fact that he did not exercise his discretion to grant the permit to the applicant, without more, cannot constitute a reviewable error.

(*Rogers v Canada (Citizenship and Immigration)*, 2009 FC 26 at para 39.)

[38] The Applicant made a TRP request that needed to be assessed by the Officer. Whether the Officer did in fact assess the request or not is unclear. Even if brief, the Officer, at the very least, had to indicate in his reasons if the TRP request was assessed and if a TRP was to be issued or not, given the Applicant's particular circumstances. The decision as a whole needs to be rendered anew by a different officer in order to ensure that a complete assessment is given to the Applicant's application.

[39] As for the second issue, it is unnecessary to address the H&C at this time since the TRP is to be considered prior to any conclusive consideration of the H&C. The H&C would have to have been considered by this Court if the first issue of the decision would have been reasonable. That, however, is not the case at bar. After consideration of the submissions on H&C by both respective counsel, it is specified that the H&C decision of the Officer was reasonable as per the legislation and supported by the jurisprudence (*Lopez Segura v Canada (Citizenship and Immigration)*, 2009 FC 894; *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at para 60).

VIII. Conclusion

[40] The application for judicial review is granted.

JUDGMENT in IMM-2019-17

THIS COURT'S JUDGMENT is that the application for judicial review be granted on the basis that the TRP request must be considered as it had not been considered previously, although the H&C had been duly considered. Therefore, the matter is returned to a different decision maker to consider the TRP anew based on the evidence on file as per the legislation and jurisprudence. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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