Federal Court  Cour fédérale

Date: 20180307

Docket: IMM-3048-17

Citation: 2018 FC 260

Ottawa, Ontario, March 7, 2018

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

FATIME NASSAR NASSAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] On June 22, 2017, Ms. Fatime Nassar Nassar's application for humanitarian and compassionate (H&C) consideration under section 25(1) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA] was refused by a Senior Immigration Officer with Citizenship and Immigration Canada (the Officer). The Applicant applied for judicial review of

that decision saying it failed to adequately address the best interests of the children (BIOC), among other factors.

[2] I am dismissing this judicial review for the reasons that follow.

II. Background

[3] The 55 year old Applicant, Fatime Nassar Nassar, has lived in Canada for the past 18 years. Originally from Lebanon, she arrived in Canada on September 21, 2000, on visitor status, and made a refugee claim which was later denied.

[4] During her first seven years in Canada, the Applicant lived with her brother and his family, helping to raise his children. On June 9, 2007, the Applicant married her husband, Mahmoud Mansour. She moved in with him and his children, who were 16 and 24 years old at the time. Since then she has helped raise her step-grandchildren and they have a strong family bond. The Applicant's husband, now 66 years old, submitted that he relies on her for help including shopping, cooking, cleaning and bathing as he suffers from back pain.

[5] The Applicant's husband is a Canadian Citizen, and he tried to sponsor her previously. On May 13, 2008, that sponsorship application was refused. The Applicant then made two applications for permanent residence (on September 21, 2010 and May 24, 2012) but these were also denied. The husband's submissions as recited in the decision indicate that they have attempted to settle her immigration status since they were married "... counsel was seemingly unable to suitably handle her case".

[6] On September 9, 2016, the Applicant submitted an H&C application. The reviewing Officer found that many aspects of the application had insufficient evidence. For instance, the Officer found there was insufficient evidence that her family in Lebanon would be unable to accommodate her or that her husband would "currently be ineligible to sponsor her from abroad." After considering the other factors, such as the BIOC, the Officer found insufficient factors to warrant approving the application.

[7] In a letter dated June 22, 2017, the Applicant's H&C request was refused. The letter also stated that she was without a valid visitor status, so she must leave Canada by August 22, 2017.

A. *Preliminary*

(1) New Evidence

[8] To support her judicial review, the Applicant filed new material that was not before the Officer. The Applicant says this new evidence falls within the exception to the general rule prohibiting new evidence as it is submitted to support a procedural fairness argument (*Ochapowace Indian Band v Canada (Attorney General)*, 2007 FC 920 at para 9; *Nchelem v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1162 at para 13).

[9] I ruled at the hearing that I would not allow the new evidence. The material was in the Applicant's possession prior to the H&C application, and I find that the material is related to the Applicant's argument of whether the decision was reasonable and not to procedural fairness issues.

[10] The Applicant argued the Court should consider the evidence because the Officer was obliged to consider all material produced from Citizenship and Immigration Canada (CIC), even material from another department. This argument fails because the onus is on the Applicant to put her best foot forward and provide sufficient (and in this case the salient) information in an H&C application (*Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38; *Joseph v Canada (Minister of Citizenship and Immigration)*, 2015 FC 661).

[11] CIC has many departments, material, and information from a variety of applications. There is no obligation on an H&C officer to go through all of the Applicant's and her sponsor's previous applications as well as review all the information stored on all the different CIC systems. In fact, sometimes files are destroyed and not even available.

[12] Nor can an applicant omit pertinent evidence and then use it as argument that the decision maker erred. For example, information about whether a person is as the H&C officer stated "would currently be ineligible to sponsor her from abroad" is wholly within the control of the Applicant. The onus is on the H&C applicant to provide the information that tells the whole story to the H&C officer. In the present case, considering that the material relates directly to the sponsorship and was in the Applicant's and her husband's possession prior to applying for H&C relief, she cannot now supplement their position that the Officer erred by not considering this evidence.

(2) What was before the decision maker?

[13] The Applicant's written submissions allege the Officer ignored a number of affidavits. During the Applicant's oral argument, the Court asked counsel to direct it to the evidence in the record that the decision maker allegedly ignored. This uncovered the fact that a number of affidavits were not in the Certified Tribunal Record (CTR), although they were filed in the Application Record (AR) that was before the leave judge.

[14] In both the CTR and the AR, the H&C application contains an index provided by the Applicant's previous lawyer listing the affidavits purportedly submitted (CTR page 73; AR page 47). The index shows that affidavits that were to be included in the application were for Mahmoud Mansour, Hassan Mansour, Fatime Mansour, Zeinab Rahal, Mohamed Nassar, and Celine Nassar. As well, the index shows that a family tree, several letters, and photos were filed.

[15] Cross referencing the index revealed that affidavits of Zeinab Rahal (step-granddaughter), Mohamed Nassar (brother), and Celine Nassar (niece) are not found in the CTR. The three affidavits are included within the AR, however, the affidavit of Zeinab Rahal and the affidavit of Celine Nassar do not have the last page with a jurat, so they are not sworn or signed (AR pages 78-79 and 83-84 respectively). While the affidavit of Mohamed Nassar does contain the jurat, it is not sworn or signed (AR pages 80-82).

[16] In contrast, the affidavits of Mahmoud Mustapha Mansour (CTR page 83; AR page 56), Hassan Mahmoud Mansour (CTR pages 92 & 112 duplicate; AR page 65), and Fatime

Mahmoud Mansour (CTR pages 99 & 119 duplicate; AR page 72), are all sworn and found in both the CTR and in the AR.

[17] Letters from Leila Mansour (CTR page 126), Ali Reda (CTR page 128), Majida Hamieh (CTR page 131), Zahia Nassar (CTR page 132), Gabriel Mansour (CTR page 133), and Ramzi Mansour (CTR page 135) are all found in the CTR.

[18] This was not brought to the attention of the Court or the Respondent and only was brought to light when the Court questioned the Applicant's counsel as to where the evidence was he referred to. The Applicant's arguments regarding BIOC all relate to the H&C Officer erring by not considering the evidence contained in the affidavits. But these affidavits were not included in the CTR and though they are included in the AR they are unsworn and unsigned.

[19] The Applicant's counsel and his assistant had no explanation as to why the CTR did not contain the affidavits. Counsel said he was unaware of the issue and was sure it was all before the decision maker. Prior to the hearing there had been no correspondence or motions regarding the CTR possibly missing documents.

[20] In making my determination, I have considered that:

- The Officer did not reference any of the evidence contained in the affidavits absent from the CTR, but does reference the facts and argument contained in the submissions and evidence in the affidavits found in the CTR. This is consistent with what would occur if the affidavits were not before the decision maker.
- The affidavits included in the AR but absent from the CTR are not sworn or signed.
- The H&C application contained in the CTR has duplicates of two of the affidavits and it is possible that counsel sent duplicates of affidavits instead of the other unsworn and unsigned affidavits when submitting the application.

- The letters that are said to be included in the application and are in the CTR are mentioned by the Officer in the decision. In contrast the affidavits not contained in the CTR are not mentioned in the decision. The conclusion being that the Officer considered whatever was actually contained in the H&C application.
- Even if the reason they were not provided is due to clerical error, it was not brought to the attention of the Officer so was not evidence that was before them.

[21] For the considerations above, I have concluded that unfortunately (if it was a clerical error), that the affidavits listed above in paragraph 15 were not included in the H&C application. Therefore, based on the evidence before me, I will only consider the sworn affidavits in the CTR and will not consider the unsworn and unsigned affidavits in the AR as evidence that was before the decision maker.

III. Issues

[22] Was the decision reasonable?

IV. Standard of Review

[23] The standard of review of H&C decisions is reasonableness (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817), and the standard of review of procedural fairness issues is correctness (*Canada (Attorney General) v Fetherston*, 2005 FCA 111).

V. Analysis

A. *BIOC*

[24] What is not at issue is the fact that, from all accounts, the Applicant is a loved and valued member of her husband's family.

[25] The Applicant says that *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] has told us that the decision maker must be alert, alive, and sensitive to the BIOC. Though counsel agreed with the Court that the BIOC is one factor to be weighed among others, he argued that the Officer did not address the evidence in the detail that is required. For instance, the Applicant says the Officer failed to consider the distress Celine Nassar (niece) and Zeinab Rahal (step-granddaughter) will feel if the Applicant must leave Canada, evidence of which is apparent in their affidavits.

[26] Given that I have found that the unsworn affidavits of Celine Nassar and Zeinab Rahal were not before the Officer, I cannot find that the Officer failed in the BIOC assessment based on the evidence in the affidavits that were properly before the decision maker.

[27] The Officer did find that the BIOC considerations and the Applicant's family was an important factor, but it does not trump all other factors. As it is not the role of this Court to reweigh the evidence, I cannot find the officer erred in the BIOC assessment.

B. *Establishment*

[28] The Applicant submits that the Officer seemed to ignore evidence of her establishment and focused instead on the possibility of a sponsorship application by her husband.

[29] The reasons state the Officer was sympathetic to the Applicant's family role in Canada, and recognized she has lived in Canada for 17 years with her numerous stepchildren and step-grandchildren. Establishment was a positive factor in the H&C determination.

[30] This positive factor was used in the balancing process, but there are many factors that must be analysed and weighed. The Officer did not ignore the establishment factors, and deference must be given to the weight the Officer determined this factor should carry. For that reason I do not find the officer ignored evidence the officer just weighed the factor differently that the Applicant wished.

C. *Wrong test concerning personalized discrimination*

[31] The Applicant submits the Officer used an incorrect test, one that required she submit evidence of previous discrimination. The Applicant submits the correct test is whether the country conditions would constitute unusual, undeserved, or disproportionate hardship as described in *Monemi v Canada (Solicitor General),* 2004 FC 1648 at paragraph 39 [*Monemi*]. The Applicant also argued the decision is unreasonable for failing to discuss hardship or disproportionate hardship as described in *Dandachi v Canada (Minister of Citizenship and Immigration),* 2016 FC 952.

[32] It is helpful here to review the Supreme Court of Canada's decision *Kanthasamy*, where an officer found there was a lack of evidence that Mr. Kanthasamy would be personally discriminated against. The Supreme Court of Canada accordingly held that officer erred for failing to consider the discrimination that could be inferred due to Mr. Kanthasamy's membership in a group that is discriminated against. I note that *Kanthasamy* has since broadened the test described in *Monemi*.

[33] In the present case, the Officer said there was insufficient evidence that the Applicant was previously discriminated against. However, as the Applicant's counsel agreed at the hearing, this Officer did consider the violence and discrimination against women in Lebanon. This decision is therefore distinguishable from the situation in *Kanthasamy*, as the Officer considered these as hardships the Applicant may face if she returns to Lebanon. As with BIOC and establishment, however, discrimination is but one factor an officer will weigh and balance in making an H&C determination.

D. *Speculation*

[34] The Applicant submits the Officer had no evidence to support statements that she could adapt to Lebanon after 17 years away, and no evidence that she would receive support from relatives who live there.

[35] This argument tries to reverse the onus on the Applicant to support her submissions with

evidence. The material filed by the Applicant is silent save for the following submission in the H&C application found at CTR page 76; AR page 49:

> The applicant has siblings in Canada- see the affidavit of Mohamed Nassar, tab 7 and estranged siblings in Lebanon. The applicant's siblings in Lebanon are mostly married, living their own lives with no concern for the applicant. Fatime has not heard from them since she first came to Canada in September 2000. There is no contact between them, which means that they will be unable to accommodate for her if she were to go to Lebanon and therefore she will have no place to stay.

[36] The Applicant did not file an affidavit in her H&C application that the Officer could consider in support of this remark in the submissions. She did file an affidavit for this judicial review, but that evidence was not before the decision maker. The evidence before the Officer was that she lived in Lebanon for 37 years and immediate family members still live there. In the H& C decision five (5) sisters are listed with four (4) living in Lebanon and one in France as well as three (3) brothers with one living in Lebanon and two (2) in Canada. Without further evidence filed regarding her family still in Lebanon, the Applicant cannot now say the Officer speculated that her family would be unwilling to help her. It is not the role of the Officer to seek out information about the Applicant's family; the role of the Officer is to determine the weight and credibility of the evidence. The Officer made the determination on the limited material before him and found that there was insufficient evidence that her family in Lebanon would be unable to accommodate her.

[37] The application is dismissed.

[38] No question was presented for certification.

JUDGMENT in IMM-3048-17

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3048-17
STYLE OF CAUSE:	FATIME NASSAR NASSAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 22, 2018
JUDGMENT AND REASONS:	MCVEIGH J.
DATED:	MARCH 7, 2018

APPEARANCES:

Mr. Raj Napal	FOR THE APPLICANT
Ms. Alison Engel Yan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

NLC Lawyers Brampton, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT