Federal Court Cour fédérale

Date: 20180413

Docket: IMM-3819-17

Citation: 2018 FC 404

Halifax, Nova Scotia, April 13, 2018

PRESENT: The Honourable Mr. Justice Bell

Docket: IMM-3819-17

BETWEEN:

MARILYN MENDOZA ALCANTRA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of the August 24, 2017 decision of an Immigration Officer [Officer] of Immigration, Refugees and Citizenship Canada [IRCC] wherein the Officer refused the Applicant's application for permanent residence under the spouse or common-law in Canada class. Although the Applicant is the spouse of her sponsor in Canada,

the Officer concluded she is inadmissible on grounds of serious criminality and criminality, as contemplated by paragraphs 36(1)(a) and 36(2)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA]. The Officer refused the application on grounds of criminality after deciding that humanitarian and compassionate [H&C] considerations did not outweigh the Applicant's reasons for inadmissibility to Canada.

[2] Brief reasons for granting the application for judicial review and remitting the matter for re-determination by a different Immigration Officer were made orally at the conclusion of the hearing. These reasons, although brief, explain the basis of my conclusion in this sad, confusing, and lengthy saga. I say sad and confusing, because errors made by the British Columbia Provincial Court system have been adopted by the Royal Canadian Mounted Police criminal records system and the Parole Board of Canada, resulting in significant harm to the Applicant.

II. Relevant Facts

[3] The Applicant is a 39-year-old citizen of the Philippines who entered Canada on November 30, 2003, under the live-in caregiver class. She holds a Bachelor of Science in Nursing degree from the Philippines and is currently employed as a dietary aid at the Point Grey Private Hospital in Vancouver, British Columbia. She lives in Vancouver with her husband and 9-year-old daughter. Both her husband and daughter are Canadian citizens.

[4] In 2007, the Applicant was working as a live-in caregiver for Ms. Annetta Marchese, who was 93 at the time. On April 9, 2007, the Applicant took two cheques out of Ms. Marchese's chequebook and made them payable to herself. The cheques totalled $3,000.00, $1,500.00 of

which was sent to the Applicant's sick mother in Singapore via money order, and $1,500.00 of which remained in the Applicant's bank account.

[5] On April 27, 2007, Ms. Marchese's daughter confronted the Applicant about the cheques. The Applicant confessed and apologized immediately. The Applicant was eventually arrested and charged with four criminal offences even though Ms. Marchese did not wish to see her charged. Ms. Marchese pleaded for leniency for the Applicant in her victim impact statement.

[6] On August 20, 2007, the Applicant pled guilty to count 1 (theft contrary to section 334 of the *Criminal Code*, R.S.C., 1985, c. C-46 [*Criminal Code*]) and count 4 (use of a forged document, contrary to subsection 368(1) of the *Criminal Code*) of a four-count Information. She did not plead guilty to counts 2 and 3, nor was there a trial at which she was found guilty of those two counts. The court eventually suspended the passing of sentence, issued a probation order and ordered the Applicant pay the sum of $3,000.00 to the Royal Bank of Canada via the Court Clerk.

III. Analysis

A. *Standard of Review*

[7] Where previous jurisprudence has determined the standard of review applicable to an issue before the court, it is unnecessary to engage in a full standard of review analysis (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras 57, 62 [*Dunsmuir*]). In the present application, the parties agree reasonableness is the appropriate standard of review. Indeed, it is well-settled that an Immigration Officer's findings on the sufficiency of H&C considerations is

subject to a reasonableness standard (*Kisana v. Canada (Citizenship and Immigration)*, 2009 FCA 189, [2010] 1 F.C.R. 360 at para. 18 [*Kisana*]; *Rai v. Canada (Citizenship and Immigration)*, 2008 FC 1338, [2008] F.C.J. No 1674 at paras 17-18; *Herrera v. Canada (Citizenship and Immigration)*, 2015 FC 261, [2015] F.C.J. No 891 at para. 6 [*Herrera*]; *Semana v. Canada (Citizenship and Immigration)*, 2016 FC 1082, [2016] F.C.J. No 1058 at para. 18 [*Semana*]).

B. *Conviction error*

[8] At page 124 of the Certified Tribunal Record [CTR], one reads the notation from either the clerk or the court reporter that on August 20, 2007, the Applicant pled guilty to counts "1 **&** 4" [emphasis added]. However, under the title SENTENCE on the same form, dated October 23, 2007, one reads the notation that the Applicant was sentenced on counts "1 – 4". The absence of the ampersand is critical to what next transpired. The Probation Order recorded that the Applicant was convicted of four offences. This led the Royal Canadian Mounted Police to record in its indices that the Applicant committed four offences. The same error would later be communicated to the Parole Board of Canada at the time the Applicant sought a suppression of her criminal record. This erroneous information was eventually communicated to the Officer who relied upon it, in part, to reject the Applicant's request for permanent residency.

[9] The Officer could have become aware of the error. Indeed, although she states that she read the court proceedings, which are part of the CTR, she appears to have overlooked the following:

1. The notation that on August 20, 2007, the Applicant pled guilty to two counts, not four (page 124 of the CTR);

2. Statements by counsel and the Court Clerk that the judge was called upon to sentence on “Counts 1 and 4” (lines 40 – 45 at page 177 of the CTR);
3. The judge’s comments before passing sentence that the Applicant “pled guilty to two counts on the information that is before me” (line 1, page 184 of the CTR).

[10] In the two-page refusal letter sent to the Applicant by the Officer on August 24, 2017, the Officer erroneously advised the Applicant that she had been convicted of four crimes. These erroneous observations were included in the Officer’s reasons and in the GCMS notes (page 450 of the CTR). I consider those conclusions unreasonable in the circumstances. They are based on errors that were identifiable based on the evidence before the Officer.

C. *Error relating to restitution payment*

[11] In 2015, the Applicant applied for a record suspension. The Parole Board of Canada refused the application, stating it was not satisfied the Applicant had completed her sentence given that court documents showed the $3,000.00 of restitution had not been paid. By operation of s. 36(3)(b) of the IRPA, this became a fateful finding against the Applicant. Had she received her record suspension, she would not have been inadmissible to remain in Canada.

[12] The Applicant disagreed strongly with the Parole Board’s assertion that she had not made the restitution payment. She claimed the money had been garnished from a bank account held by her and her husband. The Applicant, her husband, and her mother-in-law all signed statutory declarations stating as much. The Applicant also contacted the Royal Bank of Canada to confirm the payment, but was advised the bank only kept records for seven years. Importantly, there is no

evidence from the Royal Bank of Canada that the money was not paid. The Applicant eventually relented and paid the money, according to her, a second time. On this issue of whether restitution was paid, I also consider it relevant that the Applicant applied for suppression of her criminal record knowing full well that she was required to have completed all aspects of her sentencing, including the payment of any restitution order. The form clearly states what is required in that regard.

[13] Given the absence of a statement from the Royal Bank of Canada that the money remained outstanding, the unopposed statutory declarations maintaining that restitution had been paid, the errors already evident from the British Columbia Provincial Court, and the fact the Applicant applied for suppression of her criminal record, stating in the application that restitution had been paid, I consider the conclusion that the Applicant failed to pay the restitution in the first instance to be unreasonable.

D. *Errors in the H&C assessment*

[14] I turn briefly to the H&C considerations. I note the Applicant was convicted over 10 years ago of two offences, both of which were prosecuted by summary procedure. The fact the charges proceeded summarily should have, in my view, mitigated in favour of the Applicant. She has now been in Canada approximately 15 years, is well respected and well-regarded by her co-workers, employer and associates. She has a Canadian husband and a Canadian child in Canada. The Applicant was remorseful, admitted her crime, and pled guilty at the first opportunity. The victim pleaded for leniency.

[15] At page 9 of the CTR, the Officer concludes “I am not satisfied that she does not pose a danger to public safety”. That conclusion must be contrasted with the letter from Didier Jallabert dated April 24, 2014, which states, among other things, that the Applicant is “very honest”. The Officer’s conclusion must also be contrasted with the statement by Rachel Felwa that the Applicant is, among other things, “reliable”. Also, compare the Officer’s conclusion that the Applicant poses a danger to public safety to the opinion of the Administrator at the Hospital where she works, who describes her as possessing an “outstanding” work ethic and being a “respected and valued member of our team”. None of these letters found their way into the Officer’s analysis, wherein the Officer concludes the Applicant poses a danger to public safety.

IV. Conclusion

[16] In my view, two of the pillars that weighed heavily against the Applicant constituted her alleged four convictions and her alleged failure to pay restitution in the first instance. One of those pillars is clearly false. That falsity was evident to anyone who took the time to read the file. The second pillar regarding the failure to pay restitution is on a very shaky foundation given the unopposed statutory declarations, the absence of a statement from the Royal Bank of Canada that the money remained outstanding, the errors already evident from the British Columbia Provincial Court and the Applicant’s declaration to the Parole Board of Canada in her application for suppression of her criminal record that the $3000.00 had been paid. Having said all of the above, it is admittedly unclear whether the garnishment was made through the clerk’s office or directly by the Bank.

[17] Given the clearly erroneous conclusion that the Applicant was convicted of four offences rather than two, the evidence that she made the restitution payment, and the Officer's failure to explain why the Applicant poses a risk to public safety, despite substantial conflicting evidence, I find the Officer's decision does not meet the test of justification, transparency and intelligibility, and does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, as contemplated by the reasonableness standard set out in *Dunsmuir*.

[18] For these reasons, I consider it appropriate to grant the application for judicial review and refer the matter back for re-determination by another Immigration Officer, with directions, pursuant to paragraph 18.1(3)(b) of the *Federal Courts Act*, R.S.C., 1985, c. F-7. Those directions will be that the Immigration Officer re-determining the matter must accept that the Applicant was found guilty of two offences (summary theft and summary use of a forged document), not four offences; and that the Applicant paid restitution to the Royal Bank of Canada by way of garnishment directly from her bank account, and, as events have unfolded, she has paid twice.

JUDGMENT in IMM-3819-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed without costs;
2. The matter is re-mitted to another Immigration Officer for re-determination with directions that: (a) the Applicant was found guilty of two offences in 2007 (summary theft and summary uttering of a forged document) and not four offences; and, (b) the Applicant paid restitution to the Royal Bank of Canada by way of garnishment directly from her bank account, and, as events have unfolded, she has paid twice.
3. There is no question for certification.

"B. Richard Bell"

Judge

<u>FEDERAL COURT</u>

<u>SOLICITORS OF RECORD</u>

DOCKET:	IMM-3819-17
STYLE OF CAUSE:	MARILYN MENDOZA ALCANTRA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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