Federal Court  Cour fédérale

**Date: 20180604**

**Docket: IMM-4811-17**

**Citation: 2018 FC 579**

**Ottawa, Ontario, June 4, 2018**

**PRESENT: The Honourable Mr. Justice Boswell**

**BETWEEN:**

**PATRYCJA CIESLAK**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The Applicant, Patrycja Cieslak, is a 29-year-old unmarried citizen of Poland who, on June 4, 2008, entered Canada with a six-month visitor's visa. Following expiration of her visitor status, she continued to reside in Canada and has remained here without status since then. Consequently, she applied for a permanent residence visa from within Canada on humanitarian and compassionate [H&C] grounds in November 2016. She based her H&C application on her establishment in Canada, the hardships she would face in Poland as a result of the verbal and

physical abuse she suffered at the hands of her father and having been sexually assaulted by an unidentified man when she was six years old, and as a result of general country conditions in Poland. In a decision dated October 19, 2017, a Senior Immigration Officer decided that an exemption from the legislative requirements to allow the Applicant's application for permanent residence to be processed from within Canada would not be granted. The Applicant has now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the Officer's decision. She asks the Court to set aside the Officer's decision and have her H&C application reconsidered by a different officer.

## I. The Officer's Decision

[2] The Officer refused the Applicant's application for an exemption from the regular permanent residence visa requirements on the basis that there were insufficient H&C factors to warrant such an exemption. After noting that the Applicant had entered Canada in June 2008 on a six-month visitor's visa and had immediately begun working without authorization, the Officer remarked that she made no attempt to regularize her immigration status in Canada until November 2016. The Officer considered the Applicant's explanation that she was young and unaware of immigration laws in Canada, but noted she was aware her visitor's visa expired in December 2008 and decided to remain in Canada anyway. The Officer determined that the Applicant had failed to provide a reasonable explanation for why she had remained in Canada for over eight years without attempting to legalize her immigration status, and found this to be a factor that was "significantly" not in her favour.

[3] The Officer then considered the Applicant's self-employment as a cleaner, an office worker, and as a flooring installer, finding on a balance of probabilities that she had undertaken unauthorized employment and that she had been paid in cash during her time in Canada. The Officer noted the absence of any income tax documentation, and considered the Applicant's explanation that she could not submit income tax because she did not have a social insurance number as a visitor to Canada. The Officer found the Applicant had not paid tax on her income during her unauthorized employment in Canada, stating that this factor was also "significantly" not in her favour.

[4] Although the Officer acknowledged that the Applicant had developed friendships in Canada and that her friends spoke highly of her, this was not unusual and the Officer was not persuaded that the Applicant could not maintain contact with her friends in Canada through letters, email, or through social or video media if she was required to leave Canada and apply for permanent residence in the regular manner. The Officer also considered that the Applicant had volunteered with the Guru Nanak Mission Centre and made charitable donations; that she had a driver's license, car insurance, and a furnished apartment; that she did not have a criminal record in Canada or in Poland and was able to communicate in English. The Officer assigned all of this evidence of establishment "minimal positive weight."

[5] The Officer also considered the Applicant's submission that she would suffer painful and traumatic memories if she was required to return to Poland and apply for permanent residence in the regular manner, noting that the Applicant, her four siblings, and her mother suffered regular verbal and physical abuse at the hands of her father, and that she was the victim of a sexual

assault at the age of six by a man who she never saw again. The Officer accepted that, while returning to her childhood home or seeing her father may bring back painful childhood memories, it was within the Applicant's power not to travel to her parents' home and not to engage in a relationship with her father. The Officer was not persuaded that these childhood experiences were related to Poland as a whole as opposed to a particular home and two particular individuals.

[6] The Officer next considered the Applicant's submission that she would be unable to find work in Poland and, consequently, would be forced to return to her parents' home. In this regard, the Officer noted the Applicant had completed a certificate in economics and administration in Poland, had significant work experience in Canada in the construction trade, and spoke Polish and English. While noting that the Applicant would need to apply herself to find work in Poland, the Officer was not persuaded she would not be able to use her skills and linguistic abilities to find work. The Officer further considered the fact that the Applicant had four siblings in Poland, three of whom were married and had their own homes, and was not persuaded she would not be able to live temporarily with one of her siblings or obtain assistance from them while re-establishing herself in Poland.

[7] In response to the Applicant's submission as to her fears about political changes in Poland, the Officer considered an article provided by the Applicant about a plan to step up the resistance movement against Poland's ultra-conservative government as well as the 2016 country report prepared by the US Department of State. The Officer determined that while conditions in Poland were not perfect, they were more than reasonable, and assigned this factor "no positive

weight." The Officer concluded the reasons for refusing the Applicant's H&C application by assigning no positive weight to the fact that the Applicant was born in Poland, resided there for the first 19 years of her life, was educated there, and spoke the language.

## II. Analysis

### A. *Standard of Review*

[8] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909 [*Kanthasamy*]). An officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FC 358).

[9] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls 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, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and*

*Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708 [*Newfoundland Nurses*]. Additionally, "it is not open to a reviewing court to substitute its own view of a preferable outcome"; nor is it "the function of the reviewing court to reweigh the evidence": *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339 [*Khosa*].

[10] The standard of review for an allegation of procedural unfairness is correctness (*Mission Institution v Khela*, 2014 SCC 24 at para 79, [2014] 1 SCR 502; *Khosa* at para 43). Under this standard, the Court must determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter (*Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 115, [2002] 1 SCR 3). The analytical framework is not so much one of correctness or reasonableness but, rather, one of fairness and fundamental justice. As the Federal Court of Appeal recently observed: "even though there is awkwardness in the use of the terminology, this reviewing exercise is 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied" (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, [2018] FCJ No 382). In other words, a procedure which is unfair will be neither reasonable nor correct, while a fair procedure will be both reasonable and correct. Furthermore, a reviewing court will pay respectful attention to the procedures followed by a decision-maker and will not intervene except where they fall outside the bounds of natural justice (*Bataa v Canada (Citizenship and Immigration)*, 2018 FC 401 at para 3, [2018] FCJ No 403).

B. *Did the Officer unreasonably assess the evidence?*

[11] The Applicant contends that the Officer failed to properly consider her level of establishment in Canada. In the Applicant's view, although she is more integrated into Canadian society than most newcomers, the Officer merely found that if one resides in Canada for close to nine years, one would have acquired such things as a driver's license, car insurance, and a furnished apartment. According to the Applicant, the Officer made unsupported assumptions about her ability to maintain contact with her friends should she be returned to Poland, noting that there is nothing in the evidence to suggest that her friends would have the means to visit her there. The Applicant argues that the Officer unreasonably weighed her consistent employment in Canada against her for the sole reason that she did not have proper authorization to work, and that the Officer mistakenly used criteria such as her level of education, work experience, and fluency in Polish and English against her when those factors ought to have supported her level of establishment in Canada.

[12] In the Respondent's view, the Applicant's arguments on the issue of establishment amount to a disagreement with the Officer's weighing of the evidence. According to the Respondent, this Court has repeatedly held that establishment alone is not sufficient to ground an H&C exemption, and that the normal consequences of removal do not constitute hardship. The Respondent notes it is not an error for an officer to consider the fact that establishment was obtained under circumstances within the Applicant's control. The Respondent characterizes the Applicant's submissions as amounting to an argument that, because of her long unauthorized stay in Canada, she has established herself such that H&C relief is warranted.

[13] On this issue, I agree with the Respondent. The Applicant's arguments concerning her level of establishment amount to a disagreement with the Officer's weighing of the evidence. Although the Officer did state that it was "understood that if one resides in Canada for close to nine years, one would have acquired such things" as a driver's licence, car insurance, and a furnished apartment, that statement is not akin to the "objectionable and troublesome" blanket statements about an applicant's level of establishment being no more than what would be expected which rendered the H&C officer's decision unreasonable in cases such as *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258 at para 80, [2014] 3 FCR 639; *Sebbe v Canada (Citizenship and Immigration)*, 2012 FC 813 at para 21, 414 FTR 268; and *Ndlovu v Canada (Citizenship and Immigration)*, 2017 FC 878 at paras 12 to 15, [2017] FCJ No 939 [*Ndlovu*].

[14] The Officer's comment about it being "understood" or expected that the Applicant would have acquired a driver's licence, car insurance, and a furnished apartment is only a small part of the Officer's reasoning on the level of her establishment. The Officer in this case reasonably assessed the Applicant's length of time or establishment in Canada and did not unduly focus on the "expected" or "understood" level of establishment. In any event, establishment is only one factor to be considered and is not determinative of an H&C application (*Ndlovu* at para 14; *Kanthasamy* at paras 40 and 98). The Officer assessed the evidence and reasonably found the Applicant had not met her burden of establishing that she would likely be affected by the country conditions in Poland.

C. *Did the Officer apply the wrong legal test for H&C consideration?*

[15] The Applicant maintains that the Officer applied the wrong test for H&C consideration by failing to assess the hardship she would face on return to Poland and failed to consider whether such hardship is unusual, undeserved, or disproportionate. In the Applicant's view, the Officer made a number of unreasonable findings with respect to the evidence of hardship, including making an unsupported assumption that the Applicant's siblings could support her despite evidence that she sends them financial support from Canada when possible, and a letter from her sister indicating she would have no choice but to live with her parents. According to the Applicant, the Officer's finding that she could live with her siblings is unsupported by the evidence, and the Officer's failure to allow her to respond to this assumption is a breach of procedural fairness. The Applicant contends that the Officer considered irrelevant details, including the extent of her charitable activities, without explaining why these details were relevant to the decision.

[16] The Respondent states that, following *Kanthasamy*, an officer must consider all relevant factors and that the "unusual and undeserved or disproportionate hardship" formulation is no longer the correct test for an H&C application. In the Respondent's view, it was not an error for the Officer to fail to apply this test, and the Officer's reasons include a summary and discussion of the Applicant's submissions regarding hardship in Poland. The Respondent contends that the Officer properly considered all of the Applicant's submissions, and based on the totality of the evidence, it was reasonable to conclude that returning to her abusive father was not the only option open to the Applicant and that assistance from her siblings was a possibility. According to

the Respondent, the Officer's comment about the Applicant's charitable activities was made in the context of assessing her level of establishment and is neither an irrelevant consideration nor determinative in any way of her application.

[17] The Applicant's reliance on outdated case law fails to acknowledge that the "unusual and undeserved or disproportionate hardship" formulation is now only one aspect of the test for H&C relief as articulated by *Kanthasamy*. H&C considerations are not limited to hardship, and hardship should not be treated as an independent test that an applicant must meet before obtaining H&C relief. Rather, H&C officers should consider and assess all relevant H&C factors, and focus on "the equitable underlying purpose of the humanitarian and compassionate relief application process" (*Kanthasamy* at para 31). *Kanthasamy* and subsequent H&C jurisprudence (such as *Zlotosz v Canada (Citizenship and Immigration)*, 2017 FC 724 at paras 17 to 20, 282 ACWS (3d) 594; *Abeleira v Canada (Citizenship and Immigration)*, 2017 FC 1008 at paras 33 to 34, 285 ACWS (3d) 613; and *Phillips v Canada (Citizenship and Immigration)*, 2018 FC 205 at paras 18 to 19, 289 ACWS (3d) 613) affirm that hardship is not the determinative or sole factor to be considered in an H&C analysis, and that "unusual and undeserved or disproportionate hardship" is to be regarded as instructive rather than determinative of an H&C application.

[18] In this case, the Officer explicitly considered the hardship potentially faced by the Applicant on return to Poland and balanced it against other relevant factors such as the nature of her establishment. The Officer did not, as the Applicant claims, make an unsupported assumption that she could live with her siblings on return to Poland. Rather, the Officer was not convinced based on the Applicant's evidence that she could not do so. In my view, this determination was a

reasonable weighing of the evidence. The Officer assessed the evidence and reasonably found the Applicant had not met her burden of establishing that she would likely be affected by the country conditions in Poland.

D. *Did the Officer breach procedural fairness by providing inadequate reasons?*

[19] The Applicant contends that the Officer did not provide reasons which could support a conclusion that there were insufficient H&C factors to grant an exemption. In the Applicant's view, the Officer concluded that her considerable level of establishment was not determinative of her H&C application, and turned the H&C considerations on their head by finding that the work and language skills she had developed in Canada would be beneficial to her in Poland. According to the Applicant, an officer's decision must include sufficient reasoning for an applicant to understand how a conclusion was reached. The Applicant notes the Officer's reasons make only a cursory mention of an article submitted by her and fail to explain why the conditions described in that article do not cause unusual and undeserved or disproportionate hardship for her. The Officer's statement that "general country conditions in Poland are not perfect; however they are more than reasonable" is inadequate, the Applicant says, to determine if the Officer considered whether a person in the Applicant's position as a female with no higher education would face hardship in Poland.

[20] In the Respondent's view, it is clear from the Officer's reasons that all relevant factors were carefully considered, and while immigration officers are not required to provide as detailed reasons for their conclusions as other decision-makers acting in a more adjudicative capacity, in this case the Officer's reasons are clear and cognizant of all relevant factors. According to the

Respondent, the Applicant's arguments amount to a disagreement with the Officer's weighing of the evidence. With respect to country condition evidence, the Respondent notes the onus was upon the Applicant to establish a link between her personal circumstances and country conditions, and that the articles submitted by the Applicant were so general it was reasonable for the Officer to assign the country conditions in Poland no positive weight.

[21] The Applicant's arguments on this issue are not persuasive. There was no breach of procedural fairness by the Officer in this case. It is abundantly clear from the reasons why the Officer rejected the Applicant's H&C application. The reasons are explicit that the Applicant's nearly nine-year stay in Canada is "significantly not in her favour" and the Officer refers numerous times throughout the reasons to the "unauthorized" nature of her time working in Canada. The Officer clearly stated why the various factors were weighed against the negative factor of her unauthorized stay and work in Canada. The Officer's reasons for the decision in this case are sufficiently intelligible and transparent to meet the threshold established by *Newfoundland Nurses* and, more recently, *Delta Air Lines Inc v Lukács*, 2018 SCC 2 at paras 22 to 25, 416 DLR ($4^{th}$) 579.

## III. Conclusion

[22] The Officer's reasons for refusing the Applicant's H&C application are intelligible, transparent, and justifiable, and the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The Applicant's application for judicial review is therefore dismissed.

[23] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

**JUDGMENT in IMM-4811-17**

**THIS COURT'S JUDGMENT is that:** the application for judicial review is dismissed, and no serious question of general importance is certified.

"Keith M. Boswell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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