Federal Court  Cour fédérale

Date: 20190320

Docket: IMM-749-18

Citation: 2019 FC 339

Ottawa, Ontario, March 20, 2019

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

LEDA VIRGINIA GUTIERREZ ORTIZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Leda Virginia Gutierrez Ortiz, is a 69-year-old citizen of Costa Rica who arrived in Canada as a visitor in February 2003. She says she left Costa Rica because she was a victim of severe family violence at the hands of her ex-partner. The Refugee Protection Division [RPD] of the Immigration and Refugee Board denied her claim for refugee protection in June 2004. Her application for a pre-removal risk assessment [PRRA] was rejected in February 2005.

The Applicant then remained in Canada without status for the next 12 and a half years until she was removed in September 2017.

[2] Prior to her removal, the Applicant applied for a permanent resident visa from within Canada on humanitarian and compassionate [H&C] grounds. However, in a decision dated January 30, 2018, a Senior Immigration Officer refused her H&C application. 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 return the matter for redetermination by a different immigration officer.

I. Background

[3] Although the Applicant filed a claim for refugee protection in February 2003, she did not appear for her hearing before the RPD on two separate occasions. The RPD therefore deemed her claim to be abandoned in June 2004. The Applicant then applied for a PRRA in December 2004, but this application was rejected in February 2005.

[4] Following the rejection of her PRRA, the Canada Border Services Agency [CBSA] ordered the Applicant to attend a removal interview in March 2005. After she failed to attend the interview, CBSA issued a warrant for her arrest on March 16, 2005. CBSA executed this warrant and arrested the Applicant nearly 12 years later, when she voluntarily presented herself to CBSA on February 24, 2017. She was released shortly thereafter on a bond.

[5] The day before the Applicant presented herself to CBSA, she applied for a permanent resident visa from within Canada on H&C grounds. The Officer refused this application in a decision dated January 30, 2018.

[6] Although the Applicant has four siblings residing in Costa Rica, she says they are unable to provide her with any material support due to their age and lack of employment. Her three older siblings are retired and the younger one does not work.

[7] The Applicant worked as a housekeeper for a large hotel chain from February 2004 until the time of removal in September 2017.

[8] The Applicant resided with her son, who is a permanent resident of Canada, from 2003 to 2013, and then again from December 2015 to September 2016 to assist her daughter-in-law with a difficult pregnancy. In May 2016 the Applicant's daughter-in-law gave birth to a girl, and the Applicant provided care and assistance for her granddaughter while living with the family. In September 2016, after her then 16-year-old grandson arrived in Canada from Costa Rica, the Applicant left her son's residence to live on her own. She says she helped orient her grandson to life in Canada by taking him to school and preparing his meals.

[9] If allowed to remain in Canada, the Applicant claims she would provide childcare to her granddaughter, allowing her daughter-in-law to return to work, and also would provide monetary support for rent and groceries to her son's family.

II. The Officer's Decision

[10] The Applicant based her H&C application on her establishment in Canada, on the best interests of her two grandchildren, and on hardships she would experience in Costa Rica.

[11] The Officer noted that the Applicant had not attempted to regularise her immigration status in Canada for more than 12 years after her refugee claim was abandoned and had been employed during this time without authorisation. Her lack of regularizing her status, and working in Canada without authorization were, in the Officer's view, factors significantly not in her favour.

[12] The Officer assigned minimal positive weight to the fact that the Applicant speaks English, and that she had volunteered at a hospital, was a member of a church, and had friends in Canada.

[13] The Officer considered the Applicant's submission that she had helped orient her grandson to life in Canada, but found the support she provided, such as preparing meals and taking him to school, was lessened because not only was he almost an adult and able to make his own meals and travel to school by himself, but he also had the support of his father and step-mother.

[14] The Officer also considered that the Applicant had provided support to her granddaughter and resided with her from birth until September 2016 when she moved from her son's home. The

Officer was not persuaded that the Applicant's granddaughter had any memories of her. The Officer noted that the Applicant's granddaughter resided with her parents, and the Officer was not persuaded that her parents had not appropriately cared for her or not concerned themselves with her best interests.

[15] The Officer accepted that grandparents play an important role in the lives of grandchildren and that it was in the grandchildren's best interests to allow the Applicant's exemption request. The Officer assigned this factor significant positive weight.

[16] In response to the Applicant's submission that she would not be able to support herself in Costa Rica and that her four siblings residing there were not in a position to provide housing or material support, the Officer was not persuaded her siblings would not be in a position, or not be willing, to provide her with emotional support to help her re-establish herself in Costa Rica.

[17] Although the Applicant had been employed for many years in Canada, the Officer was not persuaded she did not have savings or that she could not utilise her savings to support herself in Costa Rica. The Officer further noted that the Applicant's son is a unionized construction worker, and the Officer was not persuaded he would not be in a position to provide the Applicant with some financial support.

[18] The Officer considered the Applicant's approximately 13 years of hotel cleaning experience and that she speaks English. The Officer was not persuaded though, that she could

not utilise these skills in order to acquire work in Costa Rica if she was required to apply for permanent residence from outside of Canada.

[19] The Officer observed that the Applicant had been returned to Costa Rica, and there was no evidence that she had not acquired housing, that she was not supporting herself in Costa Rica, or that she was suffering hardship. The Officer found the Applicant had not provided any objective evidence to support her contention that she left Costa Rica in 2003 as a result of violence at the hands of her ex-partner; nor had the Applicant provided any objective evidence to show that her ex-partner had any interest in her during her time in Canada or in the months in which she recently resided in Costa Rica.

[20] After noting that the general country conditions in Costa Rica were not perfect, the Officer was not persuaded the Applicant would face more than minimal hardship based on her particular circumstances and assigned this factor minimal positive weight in favour of her exemption request.

[21] The Officer concluded by stating:

> In summary, I find that the applicant's decision to remain in Canada without legal status for over 12 years is a significant negative factor. I find that her decision to work in Canada without authorisation for approximately 12 years is a factor that I assign significant negative weight. I find that the applicant's establishment, the best interests of her two grandchildren in Canada, and any hardship that she will encounter in having to apply for permanent residence in the regular manner, does not overcome the significant negative weight assigned to her decision to remain in Canada without legal status and her decision to work without legal authorisation.

III. Analysis

A. *Standard of Review*

[22] An immigration officer's decision to deny relief under subsection 25(1) of the *IRPA* involves the exercise of discretion and is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44, [2015] 3 SCR 909). 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).

[23] 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).

B. *Was the Officer's decision reasonable?*

[24] The Applicant says the Officer failed to engage with the importance of grandparents to grandchildren in view of the documentary evidence in this regard submitted with her H&C application.

[25] This submission lacks merit. The Officer noted the support the Applicant had provided as a grandmother and the potential impact on the grandchildren if she was not granted an exemption under subsection 25(1) of the *IRPA*. The Officer gave this factor significant positive weight even though the Applicant was not the primary caregiver for the affected children, that the eldest grandchild was able to provide care for himself in the form that she had provided to him, and that the youngest grandchild would not recognize a loss due to her age. In my view, the Officer reasonably concluded that the children's best interests would not be jeopardized if an exemption was not granted.

[26] This is not a case where the best interests of the children were minimized as was the case in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 65, 243 NR 22; nor were they insufficiently considered since the Officer assigned this factor significant positive weight. As the Federal Court of Appeal determined in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras 12 and 13, [2002] 4 FC 358, the requirement to consider the best interests of a child does not require a specific result in any given case. Rather, it is one factor an officer has to consider when exercising his or her discretion. If

the officer is sensitive to the impact of the decision on the children, then the decision will be sustainable and reasonable even if the result is averse to an H&C applicant.

[27] The Applicant relies upon the decision in *Benyk v Canada (Citizenship and Immigration)*, 2009 FC 950, [2009] FCJ No 1164 [*Benyk*], arguing that this decision involved facts very similar to the present case and noting that the judicial review application was granted.

[28] This reliance is misplaced. Although there are similarities, in that both concern H&C applications by a grandmother desiring to remain in Canada with her grandchildren for whom she was a caregiver, the Applicant here is not the primary caregiver for the grandchildren. In *Benyk*, the applicant grandmother was "one of two primary caregivers" for the grandchildren given the nature of their mother's work (at para 6), and the officer unreasonably implied that the grandchildren's mother could get a different job to allow her to care for her children if the grandmother returned to her country of origin (paras 12 and 13).

[29] Before concluding, a final point warrants note. The Officer speculated as to the degree to which the Applicant's siblings in Costa Rica would provide emotional support, the Applicant's savings, and whether her son was in a position to provide her with some financial support to help re-establish herself in Costa Rica. These musings by the Officer were unjustified in view of the evidence before the Officer. They were not, however, central to the Officer's decision, nor were they such that they rendered the entire decision unreasonable when the decision is reviewed as an "organic whole" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54, [2013] 2 SCR 458).

IV. Conclusion

[30] The Officer in this case did not minimize the best interests of the Applicant's grandchildren. On the contrary, the Officer assigned this factor significant positive weight. The Officer reasonably considered the other factors raised by the Applicant's H&C application and, after weighing the other positive and negative factors, arrived at a reasonable decision. As the Court in *De Melo Silva v Canada (Citizenship & Immigration)*, 2013 FC 941 at para 8, 234 ACWS (3d) 1020, noted: "The number of years spent in Canada, in and of themselves, under illegal circumstances, in respect of the immigration law is not a reason to reward such behaviour."

[31] 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.

[32] 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-749-18

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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APPEARANCES:

Ronald Shacter	FOR THE APPLICANT
Asha Gafar	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Silcoff Shacter Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT