Federal Court  Cour fédérale

Date: 20190329

Dockets: IMM-3202-18
IMM-3203-18

Citation: 2019 FC 386

Ottawa, Ontario, March 29, 2019

PRESENT: The Honourable Mr. Justice Ahmed

Docket: IMM-3202-18

BETWEEN:

JASON REY SALDE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-3203-18

BETWEEN:

CHRISTINE RENITH SALDE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are siblings, a sister and her minor brother, and citizens of the Philippines. When their mother, a participant of Canada's Live-in Caregiver Program, was diagnosed with cancer, they obtained temporary resident visas ("TRVs") and travelled to Canada to be with her. She died less than two weeks later.

[2] Prior to her death, the Applicants' mother applied for permanent residency. Immigration, Refugees and Citizenship Canada ("IRCC") received this application one day after she died. As a result of her death, the application was withdrawn.

[3] The Applicants, whose mother's dying wish was for them to have a better life in Canada, applied for humanitarian and compassionate ("H&C") consideration under section 25(1) of the *Immigration and Refugee Protection Act*, SC, 2001, c 27 ("IRPA"). In a letter dated June 21, 2018, an officer with IRCC (the "Officer") rejected their application. On July 10, 2018 the Applicants sought judicial review of this decision at the Federal Court. I am setting this decision aside for the following reasons.

II. Background

[4] The Applicants, 17 year old Jason Rey Salde ("Jason") and his 23 year old sister Christine Renith Salde ("Christine") are both citizens of the Philippines. Their mother came to Canada as a participant of the Live-In Caregiver Program, an undoubtedly difficult decision that

involved leaving her family behind. In 2011, wanting a better life for her family, their mother applied for permanent residency. The application listed her two children as overseas dependents. This application was refused, re-determined, and then refused again in 2015, so she applied again. Tragically, she was also diagnosed with terminal breast cancer.

[5] TRVs were granted to the Applicants so they could be with their mother during her terminal illness. They arrived in Canada on November 25, 2016. She passed away less than two weeks after their arrival, on December 7, 2016. Even at that difficult time, their mother's dying wish was for her children to live in Canada:

> Her last words on her last breath: "My two lovely children…I need you to stay and continue my journey and want you [to have] a better life in Canada. Don't give up this journey."

[6] The day after her passing, IRCC received the mother's second application for permanent residency. As a result of her death, her application was withdrawn and the application fee was refunded.

[7] The Applicants, wanting to fulfill their mother's dying wish and have a better life in Canada, submitted H&C applications on April 27, 2018. They did not have much money and were surviving on help from friends and family in Canada. Christine also requested a work permit so she could support herself and her minor brother. In the application, the Applicants also stated that they only have each other as their father abandoned them for another family.

[8] Although the Applicants wanted to extend their visitor visa, there was no money to do so. Instead, they later wrote a letter supporting their H&C application. The letter explains their difficulty recovering from their mother's death, and their hope against hope that their application

will be considered. Again they asked for a temporary permit so they could support themselves through work and study.

A. *The H&C Decision*

[9] On June 21, 2018, the Officer wrote letters to each of the Applicants, explaining that their H&C request was denied. The Officer arrived at this conclusion after considering the following factors: establishment, family reunification, hardship, and best interests of the children ("BIOC").

[10] In regards to establishment, the Officer notes that the Applicants say they have none. Despite this, the Officer determined that the fact the Applicants have family and friends in Canada does indicate some ties to Canada. As a result, the Officer gave the Applicants' establishment in Canada a little weight.

[11] In regards to family reunification, the Officer reviewed the Applicants' submission that a man in Canada, Guillermo Panganban, is their uncle. But referring to their TRV application that indicates his support was only temporary, the Officer determined that there was no evidence that their uncle will continue to support them. And as the Applicants did not submit documents to establish that Mr. Panganban is their uncle, the Officer was unsatisfied that he is either a person with whom the Applicants have a level of dependence or their biological relative.

[12] Similarly, the Officer found a lack of evidence supporting the Applicants' assertions about their father leaving them. The Officer determined the only evidence was that Christine resided with her father in the Philippines and Jason resided with his aunt while he went to school. The Officer found no evidence that this support would not continue upon their return to the

Philippines. Because the Officer found that this evidence was contrary to the Applicants' submission that they do not have family in the Philippines, the Officer afforded that statement little weight. The Officer further determined that there was a lack of family or people willing to continue to support the Applicants if they stayed in Canada. Overall, the Officer determined that keeping the family together should garner significant weight, and whether Christine and Jason live in Canada or the Philippines they may remain together.

[13] In the Applicants' H&C application, the field labeled "If applicable, considering the best interest of the child, provide information on any child affected by this decision" is blank. Although it was blank, the Officer recognized that Jason was 15 at the time of their application, and therefore his BIOC should be considered. The Officer's analysis considered the evidence that Jason has family in the Philippines, including an aunt he resided with since 2014 when he began attending secondary school. The Officer also determined there was no evidence of family in Canada, other than the alleged uncle. And because Jason had only been in Canada for 1.5 years, the Officer found that he would still be familiar with the language and customs in the Philippines.

[14] The Officer also determined that Christine and Jason would face minimal hardship if they return to the Philippines. The Officer noted that Christine could complete the culinary arts program that she was enrolled in prior to her mother's death. In addition, the Officer determined that any hardship of leaving friends behind in Canada would be mitigated by the presence of family, friends, neighbours and community members in the Philippines.

[15] Because the Applicants each received separate decision letters, they separately filed for judicial review of this decision in Federal Court. On December 13, 2018, this Court ordered that their files, IMM-3202-18 and IMM-3203-18, were to be heard together.

III. **Issue and Standard of Review**

[16] The sole issue before me is whether the Officer's assessment of H&C factors is reasonable (*Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, at para 8 [*Kanthasamy*]).

IV. **Analysis**

[17] The Applicants submit that the decision is unreasonable because it is focused on what is perceived as minimal establishment and hardship. Therefore, the Applicants argue that the Officer committed a reviewable error by failing to consider the factors with a compassionate lens (*Kanthasamy*; *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762; *Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596; *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72). The Applicants submit the facts of this case cannot be assessed robotically, but fit in the new expanded paradigm required by the Supreme Court of Canada ("SCC") in *Kanthasamy.*

[18] The Applicants also submit that the decision is unreasonable because the Officer failed to be alert, alive, and sensitive to the best interests of Jason (*Kanthasamy* at paras 35-41; *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 SCC 699 at para 75). For example, the Applicants submit the Officer fails to consider their mother's attempts at obtaining permanent residency for her family in Canada. The Applicants also argue that the Officer fails to actually

come to a determination about Jason's BIOC, and ignored his mother's dying wish which indicates her conviction that his best interests are to live in Canada.

[19] The Respondent argues that the Applicants simply disagree with the outcome of the decision. According to the Respondent, the analysis indicates that their mother's dying wish was duly considered because the Officer notes the Applicants' wish to continue their mother's journey, and notes three times that their mother is deceased. The Respondent further argues that the Officer's analysis of establishment and hardship is proper, and that the onus was on the Applicants to submit any supporting evidence (*Owusu v Canada (Citizenship and Immigration)*, 2004 FCA 38). The Respondent submits that there was no error in the Officer's assessment which considered "establishment, family ties and hardship in Philippines".

[20] The Respondent also submits that the BIOC was limited because the Applicants, who have the burden of proof, did not request any BIOC assessment in their application (Owusu at para 5; *Anaschenko v Canada (Citizenship and Immigration)*, 2004 FC 1328 at para 8). Therefore, the Respondent argues that the Officer thoroughly analyzed all the relevant circumstances.

[21] An H&C application made under section 25(1) of the IRPA is no ordinary application. This provision ensures that the Minister has the flexibility necessary to mitigate against rigid laws. The words of the Honourable Justice Abella of the SCC in *Kanthasamy* are words that cannot be easily forgotten:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as

> discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
>
> [Emphasis in original.]

[22] When officers are entrusted with the responsibility of analysing H&C applications, they must determine if the application would "excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Manpower & Immigration)* (1970), 4 IAC 338 (Imm App Bd) at 350). Indeed, the SCC has directed that an H&C analysis must consider all relevant factors (*Kanthasamy* at para 25). In other words, a reasonable H&C analysis is not confined to a checklist.

[23] Yet this Officer's analysis does nothing more than robotically assess a checklist of factors. Consequently, the analysis is confined in scope to categorical elements and a selective review of the evidence. Indeed, wherever the evidence contained compassionate factors, those factors do not appear in the reasons. It is as if the Officer, going through a checklist of establishment, hardship, family reunification, and some BIOC, could not fit in the compassionate factors and so they were disregarded. But *compassionate* factors do not always fit neatly in a checklist or template. And the flexibility provided by this provision was never intended to do so.

[24] This selective review of the evidence led to a lack of alertness, aliveness, and sensitivity to Jason's best interests. A textbook example is the treatment of a letter written by him and his sister. In this letter, the Applicants wrote that they are experiencing difficulty recovering from

the loss of their mother. Christine and Jason write that their *hope against hope* is to live in Canada:

> We decided to write this letter hoping to fight for hope against hope, hoping that your good office will consider our appeal. Spending another buck for our extension is a huge one for us. Especially in our situation that the payment we are spending in the application was made through the donations from many friends who are very supportive for this cause.

[25] But the decision does not delve into the compassionate factors in this letter or elsewhere in the record. For instance, it ignores the evidence that Jason's mother left him behind in the Philippines so she could take part in Canada's Live-in Caregiver Program for the opportunity to give him and his sister a better life. For many years she provided care for this other family in Canada, and through the program she applied for permanent residency. When that first application was rejected she did not give up, but filed another application, again listing her two children as dependents. In this case, being alert, alive, and sensitive to Jason's circumstances includes paying attention to his mother's sacrifice for her family.

[26] Also in the record before the Officer are Jason's mother's last words and dying wish for her children to live in Canada so they can have better lives—a dying wish that the Applicants describe as their hope against hope. The facts are also these: their mother died one day too soon for IRCC to process her application within which the Applicants were listed as overseas dependents. I cannot find that the Officer was alert, alive, and sensitive to the BIOC when the decision merely notes three times that the Applicants' mother died. Without more that analysis is not enough to satisfy the reasonableness requirement.

[27] These young Applicants, who came to Canada to care for their dying mother, could not demonstrate factors such as volunteering in the community or employment. But H&C relief is

not restricted to applicants who have lived in Canada for more than 1.5 years, who have gone to school in Canada, who volunteered, or who have met any other checklist of factors. Rather, a reasonable H&C analysis is responsive to the facts of each case. In Justice Abella's words, "[w]hat *does* warrant relief will clearly vary depending on the facts and context of the case, but officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them: *Baker*, at paras. 74-75" (*Kanthasamy* at para 25) (emphasis in original). As not all the relevant facts and factors were considered in this case, the decision is unreasonable and I am setting it aside.

V. **Certified Question**

[28] Counsel for both parties was asked if there were questions requiring certification, they each stated that there were no questions arising for certification and I concur.

VI. **Conclusion**

[29] This application for judicial review is allowed.

JUDGMENT in IMM-3202-18 and IMM-3203-18

THIS COURT'S JUDGMENT is that:

1. The decision under review is set aside and the matter referred back for redetermination by a differently constituted panel.
2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3202-18
STYLE OF CAUSE:	JASON REY SALDE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
DOCKET:	IMM-3203-18
STYLE OF CAUSE:	CHRISTINE RENITH SALDE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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