Federal Court  Cour fédérale

Date: 20190911

Docket: IMM-5202-18

Citation: 2019 FC 1158

Ottawa, Ontario, September 11, 2019

PRESENT: Mr. Justice McHaffie

BETWEEN:

MARIA ALEJANDRO LUCIO DAMIAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] A child who is brought to Canada by a parent cannot be faulted for remaining in Canada without legal status as a child. If that child, grown to adulthood, applies for permanent residence, it is unreasonable for an immigration officer to hold it against them that the time they spent in Canada during their childhood resulted from a disregard of immigration law.

[2] The immigration officer reviewing Maria Damian's application for permanent residence on humanitarian and compassionate [H&C] grounds did just that. While recognizing Ms. Damian's establishment in Canada, the officer noted that her establishment was "based on a wilful disregard of Canadian immigration law" and that she assumed those establishment efforts being "fully cognizant that her immigration status was uncertain." In reaching this conclusion, the officer did not take into account that Ms. Damian was a minor for seven and a half of the almost ten years she was in Canada.

[3] I conclude that the officer's refusal of Ms. Damian's application was unreasonable on this basis. The refusal was also unreasonable as it discounted Ms. Damian's concerns regarding the dangers of returning to Colombia because her exposure to violence would be "no greater than others in Colombia." This Court has been clear that the H&C analysis does not require an applicant to demonstrate a greater risk than the general population. The decision is therefore quashed and Ms. Damian's application is returned for redetermination by another officer.

II. Ms. Damian's Application for Permanent Residence on H&C Grounds

[4] Ms. Damian was born in Colombia. She spent three years in the United States with her mother as a young child, and returned to Colombia at the age of eight. Her mother then began a relationship with a Canadian citizen living in Colombia, who treated Ms. Damian as a daughter. The family planned to move to Canada and have the stepfather submit a family sponsorship application covering Ms. Damian and her mother. In anticipation of this, Ms. Damian's mother brought her to Canada at the age of ten, in June of 2007.

[5] Unfortunately, Ms. Damian's stepfather fell ill and died in Colombia before the sponsorship application could be filed. Since that time, Ms. Damian has lived with her mother in Canada, although neither of them has had legal status since at least June 2009 when their last visitor record expired. During this period, Ms. Damian attended school, graduated from high school in 2014, and subsequently worked as a babysitter and cleaner.

[6] On May 1, 2017, at the age of 20, Ms. Damian sought to regularize her status and applied for permanent residence on H&C grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Her application highlighted, among other grounds: her establishment in Canada, including her ties to her community of Jehovah's Witnesses and her stable employment; her hopes to study and work in early childhood education; her difficulties with Polycystic Ovarian Syndrome; and her concerns about returning to Colombia, including both corruption, violence and poverty in Colombia and difficulties she would face in light of her Canadian accent and flawed Spanish, her medical condition and her faith.

[7] Ms. Damian's application included letters of support from members of her community and her romantic partner, confirmation of her schooling, general information about Polycystic Ovarian Syndrome, and information regarding conditions in Colombia. However, it did not include documents confirming her employment history, earnings or financial status. Nor did it contain medical evidence regarding her condition.

III. Refusal of Ms. Damian's Application

[8] The officer reviewed the grounds put forward by Ms. Damian, correctly noting that she bore the onus of satisfying the decision-maker that permanent resident status or an exemption from the requirements of the *IRPA* was justified by H&C considerations.

[9] In reviewing the evidence of Ms. Damian's establishment in Canada, the officer noted both her declared employment and the absence of supporting documentation regarding her employment earnings and financial standing. Given the absence of documentation, the officer was not satisfied on the record that "adequate arrangements for the care and support of the applicant have been made." This language comes from section 39 of the *IRPA* as part of the test for financial inadmissibility. However, as the officer was not assessing financial inadmissibility, I read the officer's conclusion as simply being that the absence of evidence meant that financial establishment was not a positive factor in Ms. Damian's application.

[10] The officer noted Ms. Damian's graduation from high school, her involvement in the Jehovah's Witness community, and the letters of support filed with the application. The officer then gave the following analysis on the issue of establishment:

> It is noted that undertaking studies, finding employment, forming social networks and participating in religious observance are not uncharacteristic activities undertaken by newcomers to a country. Rather, the applicant has demonstrated a typical level of establishment for a person in similar circumstances.
>
> I commend the applicant's work ethic and her communal involvement. That said, the applicant's assertions of establishment and integration into Canadian society are based on a wilful disregard of Canadian immigration law. Namely, by remaining continuously and working in Canada without authorization.

> The applicant has continued to accumulate time in Canada by her own volition without having the legal right to do so. She has been living in Canada without legal status for over 9 years and assumed her establishment efforts being fully cognizant that her immigration status was uncertain and that removal from Canada could become an eventuality. [Emphasis added.]

[11] The officer then considered the factors in Ms. Damian's country of origin, Colombia. The officer did not accept the contention that Ms. Damian's Canadian accent would hinder her integration into Colombian society. With respect to Ms. Damian's submissions regarding her medical condition and the health care system in Colombia, the officer noted that there was no medical evidence of a diagnosis of Polycystic Ovarian Syndrome, and no evidence that treatment would be unavailable in Colombia. With respect to concerns regarding political violence and corruption, the officer concluded the following:

> Counsel submits that requiring the applicant to leave Canada for Colombia will expose her to political violence and corruption. To act in support, counsel has presented articles and reports from various sources that provide insight into country conditions in Colombia. The documentary evidence filed by counsel describes human rights abuses in the country involving civilians due to long-standing internal armed conflict between the government and guerilla groups. While unfortunate, it is reasonable to infer that the likelihood of exposure for the applicant to this type of indiscriminate violence is no greater than others in Colombia. [Emphasis added.]

[12] In the result, the officer refused Ms. Damian's application, providing the following conclusion:

> I have examined all the factors the applicant has put forth within this application. I have given little weight to the applicant's establishment in Canada and the factors in her country of origin. Considered cumulatively, I am not of the opinion that granting the requested exemption under subsection 25(1) of the *Act* is warranted. [Emphasis added.]

IV. Analysis

A. *Humanitarian and Compassionate Relief under Subsection 25(1) of the IRPA*

[13] The nature and purpose of subsection 25(1) of the *IRPA* has been the subject of extensive discussion in the Federal Courts and in the Supreme Court of Canada, including notably in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*].

[14] Justice Abella for the majority in *Kanthasamy* adopted the approach to H&C determinations described by the first chair of the Immigration Appeal Board, Janet Scott, both in her reasons in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, [1970] IABD No 1 (QL/Lexis) [*Chirwa*], and in subsequent evidence before a Joint Committee of the Senate and House of Commons. Under this approach, subsection 25(1) provides a discretion "to mitigate the rigidity of the law in the appropriate case", which will be exercised where the established facts, viewed globally, would excite in a reasonable person in a civilized community "a desire to relieve the misfortunes of another", provided those misfortunes justify the granting of relief from the effect of the provisions of the *IRPA*: *Kanthasamy* at paras 12-21, 28-33; *Chirwa* at para 27.

[15] I note that in the summarized formulation above, I have replaced the words "warrant the granting of special relief", which appeared in the predecessor to subsection 25(1) and thus in *Chirwa*, with the words "justify the granting of relief" to reflect the current language of the provision. This does not affect the substance of the analysis, as the majority in *Kanthasamy* found that the *Chirwa* approach applies to the current subsection 25(1).

[16] Referring to passages in the dissent in *Kanthasamy*, and to this Court's decision in *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 [*Semana*], the respondent Minister submitted that relief under section 25 is intended to be "exceptional and extraordinary", and that it therefore requires that "exceptional or extraordinary circumstances" be demonstrated. Ms. Damian took issue with the Minister's description of H&C relief as "exceptional and extraordinary", suggesting that while such language was commonly used prior to *Kanthasamy*, it is inconsistent with the approach described by the majority in *Kanthasamy*.

[17] The question of whether terms such as "exceptional" and "extraordinary" continue to apply to subsection 25(1) in the wake of *Kanthasamy*, and the extent to which they form part of the legal test under that section, have been the subject of some discussion in recent decisions of this Court: see, e.g., *Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 at paras 13-15; *Apura v Canada (Citizenship and Immigration)*, 2018 FC 762 at paras 22-23; *Ngyuen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 29; see also *Santiago v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 91 at para 27, referring to the H&C mechanism in para 67(1)(*c*) of the *IRPA*.

[18] The applicability of "exceptional and extraordinary" language, and whether an applicant under subsection 25(1) must show "exceptional or extraordinary circumstances", does not determine this matter. The officer did not use or rely on those terms; rather, the Minister introduced them in defending the officer's decision before this Court. I therefore do not need to determine this question. However, given the focus placed on this issue by the parties, I provide the following brief observations.

[19] First, relief under subsection 25(1) can be described semantically as "exceptional", in that it provides an exception to the requirements of the *IRPA*, and as "extraordinary", in that granting such relief is not in the ordinary course. Indeed, counsel for the applicant conceded as much. To this extent, the use of "exceptional" can simply indicate that, to use the language of Justice Moldaver in dissent in *Kanthasamy*, section 25(1) "was meant to operate as an exception, not the rule": *Kanthasamy* at para 94. The majority in *Kanthasamy* agreed that this was the case, adopting language from *Chirwa* that confirms that the section is not "to be applied so widely as to destroy the essentially exclusionary nature" of the *IRPA*: *Kanthasamy* at para 14.

[20] The question is therefore whether the use of "exceptional and extraordinary" language goes beyond being merely descriptive to create a heightened standard or test for assessing an H&C application. On this issue, the dissent in *Kanthasamy* argued that the "exceptional" nature of the relief justified a more stringent standard: "As the Minister is empowered to grant an exceptional remedy, the test should also convey the level of intensity that those factors must reach — that is, the stringent threshold for relief." [Emphasis added]: *Kanthasamy* at para 100. This stringent threshold took the form of the "simply unacceptable" standard proposed by the dissent: *Kanthasamy* at paras 63, 101-104. The majority did not adopt this approach, as the dissent recognized: *Kanthasamy* at paras 106-107.

[21] Thus, to the extent that words such as "exceptional" or "extraordinary" are used simply descriptively, their use appears to be in keeping with the majority in *Kanthasamy*, although such use may not add much to the analysis. However, to the extent that they are intended to import a legal standard into the H&C analysis that is different than the *Chirwa*/*Kanthasamy* standard of

"exciting in a reasonable person in a civilized community a desire to relieve the misfortunes of another, provided those misfortunes justify the granting of relief," this would appear to be contrary to the reasons of the majority. Given the potential for words such as "exceptional" and "extraordinary" to be taken beyond the merely descriptive to invoke a more stringent legal standard, it may be more helpful to simply focus on the *Kanthasamy* approach, rather than adding further descriptors.

[22] Leaving this issue aside, and regardless of the language that may be used to describe H&C relief, decisions under subsection 25(1) of necessity involve an exercise of discretion by the Minister's delegate. Exercising this discretion is at the heart of the H&C analysis, and Parliament has conferred that discretion on the Minister and their delegates. This Court reviews the substantive exercise of that discretion on a standard of reasonableness: *Kanthasamy* at para 44. The Court is not to substitute its discretion for that of the officer, but to determine whether the officer's decision is reasonable, *i.e.*, whether it provides justification, transparency and intelligibility, and 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.

[23] For the reasons set out below, I conclude that the officer's exercise of the discretion granted under subsection 25(1) was unreasonable in this case.

B. *The Officer's Treatment of the Applicant's Establishment*

[24] As noted above, the officer commended Ms. Damian for her work ethic and communal involvement. However, these establishment factors were then entirely discounted, or at least

given “little weight”, on the basis that Ms. Damian’s establishment was based on a “wilful disregard” of Canadian immigration law, since she remained and worked in Canada without authorization. In reaching this conclusion, the officer clearly discounted Ms. Damian’s establishment during the entirety of her time in Canada, as the officer referred to her being “without legal status for over 9 years”, a time frame that coincides with the entire length of Ms. Damian’s stay in Canada since the age of ten.

[25] There is no reasonable basis to conclude that a child who was brought to Canada by her mother acted in “wilful disregard of Canadian immigration law”, did so “by her own volition”, or was “fully cognizant that her immigration status was uncertain.” To hold the conduct of a parent against their child in such a manner is contrary to the notion of a “humanitarian and compassionate” approach to the assessment and is unreasonable.

[26] This Court has recognized that evidence of establishment in Canada may be considered in light of the circumstances that gave rise to it, including whether time in Canada arose from illegality or disregard of immigration laws. In *Semana*, for example, the applicant had remained in Canada “through repeated lies and fraud,” and Justice Gascon found that it was not unreasonable for the Immigration Appeal Division to have concluded that “establishment under illegal circumstances should not be rewarded”: *Semana* at paras 48-51.

[27] At the same time, as Justice Walker noted recently in *Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23, subsection 25(1) presupposes that an applicant has failed to comply with one or more of the provisions of the *IRPA*. It is thus appropriate that the decision-

maker "assess the nature of the non-compliance and its relevance and weight against the applicant's H&C factors in each case." Here, the officer failed to assess or address the circumstances leading to the applicant's non-compliance, her age during the majority of the period of non-compliance, the fact that almost half of her life had been spent in Canada, or the timing of her application to regularize her status after reaching the age of majority. Given the importance of these circumstances to the matter being considered by the officer, failure to consider them renders the decision unreasonable and does not reflect the application of the approach to H&C applications prescribed by *Kanthasamy*.

C. *The Officer's Treatment of Country Condition Evidence*

[28] The officer also gave little weight to the various factors raised by Ms. Damian pertaining to conditions in Colombia. Some of these factors, such as the potential impact of Ms. Damian's medical condition, were discounted owing to a lack of evidence, a conclusion reasonably open to the officer in the circumstances.

[29] However, in assessing the potential for exposure to political violence and corruption in Colombia, the officer discounted this factor on the basis that Ms. Damian would not be subject to such concerns to any greater degree than the general public: "While unfortunate, it is reasonable to infer that the likelihood of exposure for the applicant to this type of indiscriminate violence is no greater than others in Colombia."

[30] As Justice Gleason, then of this Court, noted in *Diabate v Canada (Citizenship and Immigration)*, 2013 FC 129 at para 36 [*Diabate*], "[i]t is both incorrect and unreasonable to

require, as part of [the H&C] analysis, that an applicant establish that the circumstances he or she will face are not generally faced by others in their country of origin." While Justice Gleason was addressing a pre-*Kanthasamy* formulation of the H&C analysis, this Court has applied the same principle post-*Kanthasamy*: see *Martinez v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 69 at para 12; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at para 21.

[31] As the Minister correctly points out, *Kanthasamy* requires that an applicant show that they would be personally affected by adverse country conditions: *Kanthasamy* at paras 55-56. However, I cannot agree with the Minister's submission that the officer in this case was simply concluding that there was no demonstrated direct negative impact of the country conditions on Ms. Damian. To the contrary, the officer expressly discounted the concerns of violence in Colombia not because it was not shown that it would impact Ms. Damian, but because that impact would be the same as that felt by others in Colombia. This is the reasoning and approach to adverse country conditions that was held to be unreasonable in *Diabate* and it is equally unreasonable here.

[32] The Court is conscious that the officer's decision should be approached as an "organic whole," and that judicial review should not be a "line-by-line treasure hunt for errors", as the Supreme Court of Canada cautioned in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at para 54. However, the errors made by the officer in discounting the establishment evidence based on Ms. Damian's legal status and discounting the evidence of conditions in Colombia on the basis of its applicability to all Colombians were central to the officer's ultimate conclusion on the H&C application. Each

affected the officer's overall weighing of factors and exercise of discretion, and these errors are sufficient to render the decision as a whole unreasonable.

[33] The application for judicial review is allowed. Neither party proposed that a question be certified, and none is certified.

JUDGMENT IN IMM-5202-18

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed and the applicant's application pursuant to section 25 of the *Immigration and Refugee Protection Act* is sent back for redetermination by a different officer.

"Nicholas McHaffie"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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