Federal Court Cour fédérale

Date: 20191025

Docket: IMM-4603-18

Citation: 2019 FC 1332

Ottawa, Ontario, October 25, 2019

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

GLORIA SANTOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Gloria Santos seeks judicial review of the refusal by an immigration officer [Officer] to grant her request to apply for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] I am satisfied that the Officer's decision was reasonable and procedurally fair. The application for judicial review is therefore dismissed.

II. Background

[3] Ms. Santos is a citizen of the Philippines. She is 42 years old.

[4] Ms. Santos married her former husband in the Philippines in 2000. Their son was born two years later. Ms. Santos says her former husband did not contribute to the family's expenses, and they eventually divorced in 2015.

[5] Ms. Santos and her older brother have helped support their mother in the Philippines since they were teenagers. Ms. Santos held numerous jobs in the Philippines until 2005, when she moved to Taiwan in search of new opportunities. Her family, including her son, remained in the Philippines.

[6] Ms. Santos found life in Taiwan difficult, and in 2011 she paid an agency all her savings to help her relocate to Canada. She has resided in Canada ever since. She worked legally until December 2014 in a variety of positions under several work permits. She sent most of her earnings home to her mother to pay her expenses and those of her son.

[7] In December 2014, Ms. Santos' employer refused to provide her with a copy of her application for a labour market opinion, even though she had paid him $1,000 to help her obtain a work permit. She quit her job and did not work from January until March 2015.

[8] In March 2015, Ms. Santos was hired as a live-in caregiver by an immigration lawyer, who promised to help her obtain a work permit. However, Ms. Santos' application was refused in January 2016 under rule 200(3)(g) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227. Rule 200(3)(g), which is no longer in effect, prohibited the issuance of a work permit to a temporary foreign worker who had worked in Canada for a cumulative period of four years.

[9] Ms. Santos again quit her job and remained unemployed until May 2016, when she moved to Hamilton to live with her common-law partner. She earned money from odd jobs until August 2016, when she moved to Toronto to live with her partner's sister.

[10] Ms. Santos found work in Toronto as a mushroom farmer. She was paid very little. Her employer said he would obtain a work permit for her but never fulfilled this promise. Ms. Santos returned to a previous job in packaging.

[11] Ms. Santos submitted her H&C application on November 13, 2017. It was refused on July 13, 2018.

III. Decision under Review

[12] The Officer gave some positive weight to Ms. Santos' establishment in Canada, noting that that she had found employment, made friends, paid taxes, and participated in community activities. However, the Officer did not find her degree of establishment to be exceptional, observing that it was no more than one would expect of individuals living in Canada for that length of time.

[13] The Officer found there was insufficient evidence of Ms. Santos forming any significant relationships, including with her common-law partner. Nor was there a sufficient basis to conclude that these relationships would be severed if she returned to the Philippines.

[14] The Officer was not persuaded that Ms. Santos would be reduced to poverty if she returned to the Philippines. The Officer found that, despite her age, the employment skills Ms. Santos had acquired in Canada, Taiwan, and the Philippines were transferable. The Officer held that Ms. Santos' level of education and work experience would enable her to continue supporting her family in the Philippines. The Officer was unconvinced that age discrimination would hamper Ms. Santos' attempts to find employment there.

[15] The Officer acknowledged Ms. Santos' strong ties to her mother and teenage son, and concluded that her son's best interests would be served by reunification with his mother in the Philippines.

IV. Issues

[16] This application for judicial review raises the following issues:

A. Was the Officer’s decision reasonable?

B. Was the Officer’s decision procedurally fair?

V. Analysis

[17] A decision of an immigration officer to grant or refuse a request to apply for permanent residence from within Canada on H&C grounds is subject to review by this Court against the standard of reasonableness (*Kanthasamy v Canada (Citizenship and Immigration),* 2015 SCC 61 at para 44 [*Kanthasamy*]). The Court will intervene only if the decision falls outside the range of possible, acceptable outcomes that are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[18] Whether an immigration officer applied the correct legal test in assessing an H&C application is reviewable against the standard of correctness (*Guxholli v Canada (Citizenship and Immigration)*, 2013 FC 1267 at para 17). Questions of procedural fairness are similarly reviewable by this Court against the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43).

[19] It is well established that an immigration officer's exercise of discretion under ss 25(1) and 25.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, is exceptional (*Kanthasamy* at para 19). It is not intended to serve as an alternative path to immigration, and should be applied sparingly (*Kanthasamy* at paras 14, 23).

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

[20] Ms. Santos says the Officer ignored relevant evidence and did not follow the Immigration, Refugees and Citizenship Canada guideline titled "IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds".

[21] IP 5 has been replaced by a series of "Operational instructions and guidelines" [Guidelines]. The guideline titled "Humanitarian and compassionate consideration" requires immigration officers to conduct a global assessment of H&C factors.

[22] Ms. Santos argues that the Officer ignored much of her involvement in the religious and Filipino communities, as well as her relationship with her common-law partner. She also says that the Officer considered the relevant factors in isolation, rather than collectively (citing *Kanthasamy* at para 28).

[23] The Officer's decision states: "I have considered all information and evidence regarding this application in its entirety". The Officer's determination that an H&C exemption was unwarranted was made "[a]fter reviewing the factors and evidence presented herein". There is

nothing in the Officer's decision to suggest the factors were improperly considered in isolation. Nor has Ms. Santos demonstrated how a more "global" assessment would have changed the outcome.

[24] Ms. Santos argues that the Officer misapplied the legal test for determining an H&C application by requiring her to demonstrate that her establishment was "exceptional". The same argument was made before Justice Yvan Roy in *De Sousa v Canada (Citizenship and Immigration)*, 2019 FC 818 [*De Sousa*], and was rejected for the following reasons (at para 27):

> The applicants submit that the decision maker set a high bar for his consideration of the establishment by requiring that it be "exceptional" (Memorandum of fact and law, para 31). I do not believe that this parsing of the words is a reflection of what was actually found by the decision maker. He did not set a threshold at the level of exceptional. The decision merely assessed the establishment as being unexceptional. As a matter of fact, when the sentence is read in its entirety, it becomes clear that the decision maker was simply saying that "it is not uncommon for individuals who reside in Canada to be employed, to become integrated into their community, form friendships, pay their taxes, volunteer their time, and maintain good civil record". That is certainly true. Indeed, the decision maker gave some favorable weight to the establishment in Canada. There is no doubt that these applicants are making a contribution to their community and they have not been a drain on resources. But the point is that such establishment is not so out of the ordinary that it would carry very significant weight.

[25] Similar considerations apply here. As in *De Sousa*, the Officer in this case ascribed positive weight to Ms. Santos' degree of establishment in Canada.

[26] Ms. Santos takes issue with the Officer's finding that her family could help her resettle and re-establish herself in the Philippines. She notes that her elderly mother suffers from diabetes

and her teenage son is still in school. Both rely on Ms. Santos for financial assistance. However, the Officer's comments about Ms. Santos' resettlement and re-establishment were not made in relation to financial assistance, but to support in general. In addition, Ms. Santos has two brothers in the Philippines. Ms. Santos' counsel initially sought to adduce evidence before this Court regarding the brothers' circumstances, but conceded that this was not before the Officer and could not be relied upon in this application for judicial review.

[27] Ms. Santos says the Officer was not "alert, alive and sensitive" to the best interests of her son (citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 and *Kanthasamy* at para 39). However, the Officer considered the son's circumstances and noted that Ms. Santos had not demonstrated she would be unable to find work in the Philippines given her education and experience. The Officer then concluded that the son's best interests would be served by reuniting with his mother in the Philippines. This conclusion falls within the range of possible, acceptable outcomes.

[28] Finally, Ms. Santos says the Officer fettered his discretion by finding that Ms. Santos should be denied H&C relief because she failed to comply with Canadian immigration law by remaining in Canada and working without authorization. However, the Guidelines permit an immigration officer to consider whether an applicant's stay in Canada was beyond his or her control. The guideline "Humanitarian and compassionate assessment: Establishment in Canada" specifies that circumstances that are not beyond an applicant's control include: "Applicant goes 'underground' and remains in Canada illegally." According to this guideline: "In such cases,

inability to leave Canada is not considered beyond the control of the applicant and could reasonably be viewed as a strong negative factor”.

B. *Was the Officer’s decision procedurally fair?*

[29] Ms. Santos argues that the Officer breached her right to procedural fairness by denying her application on the basis of extrinsic evidence, namely publicly-available information regarding age discrimination legislation in the Philippines. She says she should have been given notice of the Officer’s intention to rely on this information and an opportunity to respond.

[30] As Justice Yves de Montigny explained in *De Vazquez v Canada (Citizenship and Immigration)*, 2014 FC 530 at paragraph 28, it is not the document itself which dictates whether it is “extrinsic” evidence that must be disclosed to an applicant in advance, but whether the information contained in the document would have been known by an applicant, in light of the submissions made. The information relied upon by the Officer regarding age discrimination in the Philippines was general in nature and was reasonably available to Ms. Santos. The issue of age discrimination was squarely raised in her submissions.

VI. <u>Conclusion</u>

[31] The application for judicial review is dismissed. Neither party proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4603-18
STYLE OF CAUSE:	GLORIA SANTOS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 10, 2019
JUDGMENT AND REASONS:	FOTHERGILL J.
DATED:	OCTOBER 25, 2019

APPEARANCES:

Roger Rowe	FOR THE APPLICANT
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Law Offices of Roger Rowe Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT