Federal Court  Cour fédérale

Date: 20200318

Docket: IMM-1522-19

Citation: 2020 FC 389

Ottawa, Ontario, March 18, 2020

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

GLENDA SERNICULA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This case concerns the decision of an immigration officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC") to refuse the Applicant's application for permanent residence under the Live-in Caregiver Program ("LCP"). The Applicant's spouse was found medically inadmissible under section 38(1)(c) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"), and thus the Applicant was found inadmissible pursuant to section 42 of the *IRPA*.

[2] The Applicant is a citizen of the Philippines, who came to Canada in February 2012 under the LCP. The Applicant's two children and spouse live in the Philippines. In November 2014, after completing her work requirements under the LCP, the Applicant applied for permanent residence. However, after completing the immigration medical examinations, the Applicant's spouse was diagnosed with Chronic Kidney Disease.

[3] In July 2018, the Applicant received a letter from IRCC stating that her spouse's medical condition was likely to cause an excessive demand on Canadian health services. The Applicant, with the assistance of counsel, provided an individualized care plan to demonstrate that her spouse would not cause an excessive demand on Canadian health services. In the alternative, the Applicant requested that her family be exempted from medical inadmissibility on humanitarian and compassionate ("H&C") grounds.

[4] On or around February 28, 2019, the Applicant received a letter from IRCC stating that her application for permanent residence was refused on the basis of medical inadmissibility.

[5] The Applicant submits that the Officer failed to conduct an individualized assessment of the care plan for the Applicant's spouse. The Applicant also submits that the Officer erred in unreasonably exercising discretion in the assessment of the H&C factors. In particular, the Applicant submits that the Officer erred in the assessment of the best interests of the children ("BIOC") by failing to consider relevant contradictory evidence and basing the decision on speculation.

[6] For the reasons below, I find that the Officer's decision is unreasonable. This application for judicial review is granted.

II. **Facts**

A. *The Applicant*

[7] Ms. Glenda Sernicula (the "Applicant") is a 41-year-old citizen of the Philippines. The Applicant's two children, Riza Mae (aged 16) and Russ Gerald (aged 14), and the Applicant's spouse, Mr. Russell Pedrosa reside in the Philippines. Prior to coming to Canada, the Applicant worked as an elected official on the Barangay Council in her village in the Philippines, earning approximately $73 CAD per month. The Applicant's spouse, Mr. Pedrosa, worked as a tricycle driver, making deliveries in the village.

[8] On February 6, 2012, the Applicant came to Canada under the Live-in Caregiver Program ("LCP"), in order to provide education for her children. The Applicant sent remittances of approximately $675 CAD per month to the Philippines to support her children's living expenses and tuition.

[9] After completing her work requirements, the Applicant applied for permanent residence under the Live-in Caregiver Class in November 2014, and included her spouse and two children as accompanying dependants in her application. However, after a medical examination with the IRCC panel physician, Mr. Pedrosa was diagnosed with Chronic Kidney Disease.

[10] On July 18, 2018, the Applicant received a letter from IRCC stating that Mr. Pedrosa was determined to be an individual whose "health condition might reasonably be expected to cause excessive demand on health services in Canada," pursuant to section 38(1)(c) of the *IRPA*.

[11] In response to this letter, on or around December 18, 2018, the Applicant provided submissions and evidence outlining an individualized care plan for Mr. Pedrosa, demonstrating

that he would not cause an excessive demand on Canadian health services. The care plan explained that Mr. Pedrosa would remain in the Philippines where he receives medical treatment, is surrounded by family members, and can look after his mother. In the alternative, the Applicant requested for an exemption from inadmissibility on H&C grounds. The H&C grounds focused on the Applicant's establishment in Canada, financial hardship, and the best interests of her children. The submissions noted that educational costs for the Applicant's children amounted to approximately $942 CAD each year, which the Applicant is currently able to afford from her income in Canada, but could not if she had to return to the Philippines.

B. *The Underlying Decision*

[12] On or around February 28, 2019, the Applicant's application for permanent residence was refused on the basis of Mr. Pedrosa's medical inadmissibility pursuant to sections 38(1)(c) and 42 of the *IRPA*.

[13] In the decision, the Officer acknowledged the Applicant's request to change Mr. Pedrosa's status in the application to "non-accompanying" dependant. However, after noting that "removing someone from an application for permanent residence should only be done in exceptional circumstances and should not be done to overcome a known or suspected inadmissibility," the Officer refused the request to remove Mr. Pedrosa from the Applicant's application.

[14] The Officer noted the IRCC Medical Officer's opinion that Mr. Pedrosa's condition would require medical treatment amounting to approximately $92,000 per year and a possible kidney transplant costing $100,000. The Officer concluded that there was no reason to dispute the Medical Officer's statements, and as a result, found that Mr. Pedrosa was inadmissible under

section 38(1)(c) of the *IRPA*. Pursuant to section 42(1)(a) of the *IRPA*, the Officer found that the Applicant was also inadmissible and refused her application for permanent residence.

[15] With regard to H&C considerations, the Officer noted that Mr. Pedrosa is required to pay approximately $1,497 CAD each year for his medical treatments in the Philippines, and that he is expected to incur costs of $1,565 CAD for his medication. While the Officer acknowledged the Applicant's contribution to Mr. Pedrosa's medical costs and treatment in the Philippines, the Officer found that Mr. Pedrosa's medical care was not contingent upon the Applicant's residence and employment in Canada. The Officer referenced Mr. Pedrosa's health care coverage from the Philippine Health Insurance Corporation, and the fact that Mr. Pedrosa had applied for funding from Persons with Disabilities and the Philippines Charity Sweepstakes to assist with the cost of medication and treatment. The Officer also found that the documentary evidence did not support the Applicant's claim that she would be unable to secure employment or financially support medical costs if she returned to the Philippines.

[16] Moreover, the Officer found that the Applicant's children would "continue to receive the love, care and support of their parents and other family members in the Philippines and Canada, and also have access to healthcare and an education" should the Applicant return to the Philippines. The Officer found that the Applicant's submission that she would be unable to pay for her children's school tuition if she returned to the Philippines was "speculative". The Officer noted that there was no objective documentary evidence to show that the Applicant would be unable to secure employment in the Philippines. As a result, the Officer concluded that the Applicant's children would not be negatively affected by the Applicant's return to the Philippines.

[17] The Officer noted that the Applicant's work in Canada "affords her more buying power with the Canadian dollar" and the ability to secure work in the Philippines "may be unexpected", but ultimately found that it is not the intent of section 25 of the *IRPA* to "make up for the difference in the standard of living between Canada and other countries".

III. **Issues and Standard of Review**

[18] The issues arising on this application for judicial review are as follows:

1. Did the Officer err by failing to properly consider and by ignoring evidence on the best interests of the children?

2. Did the Officer err in the assessment of the individualized care plan for the Applicant's spouse?

[19] Prior to the Supreme Court's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) [*Vavilov*], the reasonableness standard applied to the review of an immigration officer's decision on H&C applications under section 25 of the *IRPA*: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 (CanLII) at para 44 [*Kanthasamy*]; *Douti v Canada (Citizenship and Immigration)*, 2018 FC 1042 (CanLII) at para 4; *Chen v Canada (Citizenship and Immigration)*, 2019 FC 988 (CanLII) at para 24. There is no need to depart from the standard of review followed in previous jurisprudence, as the application of the *Vavilov* framework results in the same standard of review: reasonableness.

[20] As noted by the majority in *Vavilov*, "a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker," (*Vavilov* at para 85). Furthermore, "the reviewing court

must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency," (*Vavilov* at para 100).

IV. **Relevant Provisions**

[21] Section 38(1) of the *IRPA* reads as follows:

Health grounds	**Motifs sanitaires**
38 (1) A foreign national is inadmissible on health grounds if their health condition	**38 (1)** Emporte, sauf pour le résident permanent, interdiction de territoire pour motifs sanitaires l'état de santé de l'étranger constituant vraisemblablement un danger pour la santé ou la sécurité publiques ou risquant d'entraîner un fardeau excessif pour les services sociaux ou de santé.
(a) is likely to be a danger to public health;	
(b) is likely to be a danger to public safety; or	
(c) might reasonably be expected to cause excessive demand on health or social services.	

[22] Sections 42(1)(a) of the *IRPA* reads as follows:

Inadmissible family member	**Inadmissibilité familiale**
42 (1) A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if	**42 (1)** Emportent, sauf pour le résident permanent ou une personne protégée, interdiction de territoire pour inadmissibilité familiale les faits suivants :
(a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; or	**a)** l'interdiction de territoire frappant tout membre de sa famille qui l'accompagne ou qui, dans les cas réglementaires, ne l'accompagne pas;
(b) they are an accompanying	

family member of an inadmissible person.	**b)** accompagner, pour un membre de sa famille, un interdit de territoire.

[23] Under section 25(1) of the *IRPA*, the Minister may exempt a foreign national who is applying for permanent residence and is inadmissible pursuant to section 42 of the *IRPA*, if the Minister is of the opinion that the circumstances are justified under H&C considerations, including BIOC:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25 (1)** Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

V. **Analysis**

A. *Consideration of the Best Interests of the Children*

[24] The Applicant submits that the Officer erred in assessing the BIOC by ignoring relevant and contradictory evidence, and by basing the findings on speculation unsupported by the evidence before them. As noted above, section 25(1) of the *IRPA* legislates that the BIOC affected by an application for permanent residence must be considered when a request to overcome inadmissibility is made on H&C grounds. The Applicant notes the Supreme Court's emphasis on the importance of the BIOC analysis in H&C applications in *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817. The Applicant refers to the Ministerial Guidelines on assessing the BIOC titled "Humanitarian and compassionate assessment: best interests of a child," which state that decision-makers must be "alert, alive and sensitive" to the BIOC in assessing H&C submissions, and that decision-makers must consider all evidence submitted by an applicant in relation to the H&C request.

[25] The Applicant submits that the Officer failed to properly consider the evidence that the Applicant could not secure employment in her field (Bachelor of Science in Hotel and Restaurant Management) when she previously lived in the Philippines. The Applicant had previously noted that she came to Canada under the LCP because her income, combined with Mr. Pedrosa's income, was insufficient to support their children's education. The Applicant argues that the Officer failed to consider the costs associated with her children's education and the Applicant's inability to meet such needs should she return to the Philippines.

[26] The Applicant submits that the Officer erred in failing to provide reasons why contradictory evidence was not considered to be relevant or trustworthy: *Simpson v Canada*

(Minister of Citizenship and Immigration), 2006 FC 970 (CanLII) at para 44; *Lugo Garcia v Canada (Citizenship and Immigration)*, 2009 FC 1241 (CanLII) at para 2; *Terigho v Canada (Minister of Citizenship and Immigration)*, 2006 FC 835 (CanLII) at para 9. The Applicant argues that the Officer also failed to consider the evidence regarding systemic age discrimination in employment that the Applicant would face in the Philippines. Moreover, the Applicant submits that the Officer's assumption that the Applicant would be able to afford her children's education costs in the Philippines is purely speculative. The Applicant relies on several case law to support this proposition: *Begum v Canada (Citizenship and Immigration)*, 2013 FC 824 (CanLII) at para 62 [*Begum*]; *Shchegolevich v Canada (Citizenship and Immigration)*, 2008 FC 527 (CanLII) at para 11 [*Shchegolevich*].

[27] The Respondent submits that the Officer properly assessed the BIOC. The Respondent submits that the H&C decision is reasonable because the Officer appropriately appreciated the children's circumstances as a whole and gave significant weight to the BIOC. The Respondent cites *Brambilla v Canada (Citizenship and Immigration)*, 2018 FC 1137 (CanLII) and *Hawthorne v Canada (Minister of Citizenship and Immigration*), 2002 FCA 475 (CanLII) at paras 4 to 7 for the proposition that while BIOC must be taken into account, it is not necessarily a determinative factor. The Respondent notes that the Officer considered that the Applicant's children would continue to receive the "love, care and support of their parents" and "have access to healthcare and an education".

[28] Moreover, the Respondent submits that the Officer reasonably found the Applicant's submission—that she would not be able to afford her children's tuition—to be speculative. The Officer noted that there was no objective documentary evidence to suggest that the Applicant would not be able to secure employment in the Philippines. The Respondent submits that the

Officer reasonably assessed the evidence as a whole and correctly applied the test set out in *Kanthasamy*.

[29] In my view, the Officer erred in failing to properly consider the evidence regarding BIOC. With regard to the Applicant's submission that she would be unable to afford her children's tuition if she returned to the Philippines, the Officer unreasonably found this to be "speculative". The Applicant had clearly indicated that she was making $73 CAD per month when she worked in the Philippines, and even with her spouse's income at the time as a tricycle driver, the income was not enough to support her children's education costs. I note that currently, the Applicant's spouse is unable to work due to his Chronic Kidney Disease, and the Applicant is now the sole source of income for the entire family of four. Even if the Applicant was fortunate to obtain a similar position upon her return as an elected official of the village making $73 CAD a month, she simply could not afford to pay $78.58 CAD per month ($943 CAD per year) on the children's tuition. The family would be left destitute with a negative balance each month and without any money to pay for Mr. Pedrosa's medical costs and the family's day-to-day living expenses.

[30] On the facts of the case, the numbers paint a clear picture of financial inability—however, the Officer failed to consider the evidence and unreasonably concluded that the Applicant's submissions were "speculative". I find that it was the Officer who employed speculative reasoning by basing the decision on assumptions unsupported by the facts (See *Begum* and *Shchegolevich* above). Based on this irrational reasoning, by concluding that the children would continue to "have access to healthcare and an education," the Officer erred in the BIOC analysis.

[31] Moreover, the Applicant had provided documentary evidence pointing to a systematic age discrimination in employment in the Philippines. The Applicant, as a woman in her forties, would face discrimination especially in hiring practices. It is well established that it is unreasonable for an Officer to fail to provide reasons why contradictory evidence was not considered to be relevant or trustworthy (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC)). By concluding that "there was no objective documentary evidence to show that the Applicant would be unable to secure employment in the Philippines," the Officer failed to properly consider the evidence and failed to provide reasons why the evidence was not relevant.

[32] For the reasons above, the Officer's decision is unreasonable.

B. *Mr. Pedrosa's Individualized Care Plan*

[33] As the Officer's decision is unreasonable, I do not find it necessary to consider the second issue.

VI. **Certified Question**

[34] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

VII. **Conclusion**

[35] The Officer failed to properly consider the evidence and erred by basing the decision on speculation unsupported by the facts. The Officer also failed to provide reasons why contradictory evidence was not considered relevant or trustworthy. Overall, the Officer erred in

the assessment of the best interests of the Applicant's children, especially with regard to the children's ability to continue their education.

[36] I find that the Officer's decision is unreasonable. This application for judicial review is granted.

JUDGMENT in IMM-1522-19

THIS COURT'S JUDGMENT is that:

1. The decision is set aside and the matter referred back for redetermination by a different decision-maker.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1522-19
STYLE OF CAUSE:	GLENDA SERNICULA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 19, 2019
JUDGMENT AND REASONS:	AHMED J.
DATED:	MARCH 18, 2020

APPEARANCES:

Natalie Drolet	FOR THE APPLICANT
Banafsheh Sokhansanj	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Migrant Workers Centre Barristers and Solicitors Vancouver, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT