Federal Court Cour fédérale

Date: 20200430

Docket: IMM-4428-19

Citation: 2020 FC 572

Ottawa, Ontario, April 30, 2020

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SHANIA CRISTOBAL

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This judicial review was heard by videoconference with all parties appearing by video.

[2] This is a judicial review of a May 28, 2019 decision by a visa officer ["the Officer"] at the High Commission of Canada in Manila, Philippines. The Officer did not find Shania Cristobal ["the Applicant"] to be a *de facto* child of her aunt Analynn Hernando ["the aunt"] and therefore

the Officer did not have sufficient humanitarian and compassionate [H&C] grounds to overcome section 2 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*].

[3] I believe this decision was unreasonable and the application should be sent back for redetermination.

II. Background

[4] The Applicant was born in the Philippines on January 1, 2000. The Applicant has been living with her aunt Analynn Hernando, who is her father Elmer's sister, since she was 6 months old. At this point the Applicant says it has been 18.5 years that she has been with her aunt who has been her *de facto* mother.

[5] In September 2015, the aunt applied for permanent residence in Canada. The aunt's application was sponsored by the aunt's 60-year-old mother (the Applicant's grandmother) who is a naturalized Canadian citizen. The aunt's mother immigrated to Canada with her husband but the husband passed away, so the aunt's mother is now living alone in Innisfail, Alberta.

[6] On the permanent residence application, the Applicant Shania Cristobal is listed as a dependent child along with the aunt's two biological children Kimnyl and Chanyl.The application indicated the Applicant has been under her aunt's care since she was 6 months old even though she was not formally adopted.

[7] In the 2015 application, the aunt's representative indicated the aunt and the Applicant "have a very stable mother-daughter relationship with a high degree of dependency." The Applicant's parents (not together for a significant length of time) by affidavit confirmed that they had transferred her care to her aunt since she was a baby and each provided their consent for the Applicant to be included in the aunt's application.

[8] On April 23, 2019, a procedural fairness letter was sent to the aunt asking for "all available documents to demonstrate the mother/child relationship between you and Shania since she was 6 months old up to present" as well as regarding the dependency of the aunt's child Kimnyl.

[9] The aunt was interviewed the following month on May 22, 2019. However, the Applicant was never asked to be interviewed. At the interview, the Officer raised their concerns about the Applicant not meeting the "dependent child" definition in the *Regulations*. The questions asked of the Applicant and answers are captured in the GMCS notes. The documents submitted to the Officer included: a letter from the Applicant's doctor, affidavits from the biological parents, school ID cards, tuition cheques, submissions from counsel, and affidavits from neighbours and the aunt.

[10] At the interview, when asked about the Applicant's contact with the biological family, the aunt indicated it had been monthly for family celebrations she had seen her biological father who she calls Tito. But then the aunt indicated Tito has had three strokes and is barely communicable so he recently moved in with them.

[11] The aunt further acknowledged that she lived in Dubai from 2004 until 2010 or 2011. During this time the Applicant as well as the two biological children lived with the aunt's grandmother (the Applicant's great-grandmother) and the aunt's ex-husband.

[12] The aunt said she had paid for the legal paperwork to adopt the Applicant. Her husband who "eventually left" did not want to sign the documents so the adoption was never processed. When asked for the documentation she said she no longer has the documents. She referred to herself as "the only mother Shania has ever known" and maintained that she is the *de facto* mother.

[13] The interview started at 10:10 and though it appears brief, the GMCS notes do not indicate how long it was.

[14] The interviewing officer's notes express that the aunt "has submitted limited evidence to demonstrate the level of dependency, the stability of the relationship especially considering that PA was gone for 6 to 7 years of Shania's childhood." The notes indicate "there has been no submissions showing the relationship between PA and Shania such as photos, chats, communications etc." The interviewing officer concluded the Applicant is now 19 years old and seems to be caring for herself and would be "fine" if separated from her aunt.

III. Decision

[15] By letter dated May 28, 2019, the Officer concluded that the Applicant was not a dependent child. The Officer cited section 2 of the *Regulation*] which defines "dependent child" as a child who:

> (a) has one of the following relationships with the parent, namely,
>
> > (i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or
> >
> > (ii) is the adopted child of the parent; and
>
> (b) is in one of the following situations of dependency, namely,
>
> > (i) is less than 22 years of age and is not a spouse or common-law partner, or
> >
> > (ii) is 22 years of age or older and has depended substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be financially self-supporting due to a physical or mental condition. (enfant à charge)

[16] The Officer further concluded there were insufficient H&C grounds to allow the Applicant to be treated as a dependent child to overcome section 2 of the *Regulations*. Accordingly, the Applicant was removed from the aunt's permanent residence application.

IV. Issue

[17] The issue is whether the Officer's refusal to grant H&C relief on the grounds that the Applicant was not a de facto child of the aunt reasonable.

V. Standard of Review

[18] In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, the Supreme Court of Canada indicated there is a presumption of a reasonableness review. This presumption can be rebutted (i) if the legislature prescribes a different standard of review or (ii) if the rule of law requires a standard of correctness be applied including for "constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies" (para 17). These exceptions do not apply here. I will review the decision using the standard of review of reasonableness.

VI. Analysis

A. *The Law*

[19] Even though the Applicant is not a biological or adopted child and therefore falls outside the definition of "dependent child" in section 2 of the *Regulations*, the Officer is to consider the instructions set out in the staff guidelines for Humanitarian and Compassionate Assessment: De facto family members ["the Guidelines"] concerning *de facto* family members.

[20] *De facto* family members are persons who do not meet the definition of a family class member. They are in a situation of dependence that makes them a *de facto* member of a nuclear family that is either in Canada or applying to immigrate. Some examples are a son or daughter (over age 19) or brother or sister left alone in the country of origin without family of their own;

or an elderly relative such as an aunt or uncle or an unrelated person who has resided with the family for a long time. Also included may be children in a guardianship relationship when adoption as described in subsection 3(2) of the *Regulations* is not possible. Separation of persons in such a genuine dependent relationship may be grounds for a positive assessment.

[21] The Guidelines list several H&C factors, including whether the relationship is *bona fide*; the level of dependency; the stability and duration of the relationship; the impact of separation; the Applicant's financial and emotional needs; the ability and willingness of the Applicant's family to provide support; and documentary evidence about the relationship. The onus is ultimately on applicant to show that an H&C exemption is warranted (*Zafra v Canada (Minister of Citizenship and Immigration)*, 2018 FC 420 at para 25).

[22] In a case cited by the Applicant, *Radix v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1253, Justice Campbell found when the Guidelines are invoked for a *de facto* parent-child relationship, the Court should consider if the Guidelines were reasonably applied. He noted *de facto* means "in fact, in reality, in actual existence, force, or possession, as a matter of fact" and it is the Officer's role to determine whether a child meets this definition (para 5).

B. *Applicant's argument*

[23] The Applicant's argument is that the Officer ignored evidence demonstrating the aunt was the *de facto* mother as she "was the only mother the applicant had ever known." The evidence the Applicant suggests was ignored included: affidavit evidence attesting to the parent-

child relationship between the aunt and the Applicant; a school report card from 2014 sent to the aunt; school ID cards from various years showing the aunt as the Applicant's emergency contact person; and evidence that the aunt paid for the Applicant's college tuition in 2017 and 2018. The Applicant further notes that when her aunt was in Dubai she left her with her grandmother, which was the same treatment received by the aunt's two biological children.

[24] In addition to overlooking this evidence, the Applicant argues the Officer did not apply the factors set out by the Guidelines for determining whether it is a *de facto* parent-child relationship. The Officer did not ask questions about the emotional bond and instead only asked 10 questions that did not address the *de facto* parent relationship. The Officer did not interview the Applicant and only interviewed her aunt. The Applicant felt the Officer should have at least asked one question about the mother-daughter bond if he then denied the application for that reason.

[25] The Applicant said that her lawyer was submitting the documentation so it was obvious that her aunt's interview was to be about the concerns from the procedural fairness letter and her lawyer's submissions about the documents and not the nature of the relationship. The Officer did not ask her anything specific about the relationship and then after the very brief interview the Officer then chose to disregard all the contradictory evidence showing a genuine relationship. The Applicant refers to the Officer's decision as an "impoverished assessment and myopic consideration" where evidence was ignored or mischaracterized.

[26] Also, the Applicant says the decision-maker concluding that the aunt had worked abroad for 6 to 7 years "…would lead one to determine that she would be fine if separated from PA as an adult" and can care for herself is nonsensical given the evidence before the officer.

[27] While the Applicant acknowledges that the submissions were not perfect and the aunt could have provided more evidence that this application should be granted because the decision-maker did not analyze what was filed. The Officer never found the sponsor or the documentary evidence not to be credible so it would be an error to then ignore the evidence and dismiss the claim.

[28] The Applicant concludes that the decision is not reasonable given she provided evidence from independent agencies over a long period of time of the *de facto* relationship and this was uncontradicted evidence.

C. *Respondent's argument*

[29] The Respondent's position is that the Applicant is asking the Court to re-weigh evidence and is doing a treasure hunt for errors which this Court has said is not its role on judicial review.

[30] The Respondent emphasizes the onus is on an Applicant on an H&C application. Here the Respondent says the Applicant did not bring sufficient evidence to show a genuine parent-child relationship. Though brevity in itself is not a negative the Respondent says that the affidavits filed do not elaborate on the relationship and are bare bones.

[31] The Respondent suggested that the Officer did not "ignore" contradictory evidence but instead found the evidence was insufficient because the Officer called it "limited evidence."

[32] The Respondent notes that the Applicant is not arguing a breach of procedural fairness in terms of questions asked at the interview, and the Applicant's arguments about the failure to ask questions about the emotional bond do not render the decision unreasonable. The Respondent pointed out that the aunt had the opportunity to tell the decision-maker at the interview about the bonds between her and the Applicant but did not do anything other than answer the questions put to her.

[33] It is not for the Respondent to have to search for the evidence as the onus is on the Applicant. The Respondent argued that if the Applicant fails to produce evidence then they do so at their own peril.

[34] Just because the Applicant now argues that the evidence was substantial does not make it so as the affidavits are very brief without any detail or particulars, just bare assertions. The Respondent says that the reasons are responsive to the limited evidence.

[35] Therefore, the Respondent asks that the application be dismissed.

VII. Analysis

[36] The Officer did not meaningfully engage with the evidence, concluding "[t]here has been no submissions showing the relationship between PA and Shania such as photos, chats,

communications etc." The Officer's view that there was "no submissions" is simply incorrect in light of the un-contradictedevidence canvassed above. The Officer's conclusion that there were "no submissions" is further undermined by the Officer's own reasons because the Officer goes on to assess the submissions showing a parent-child relationship in the following sentence.

[37] There is no requirement to provide photos, chats or communications. It is unclear that children living in *de facto* relationships with extended family members would even be able to prove their *de facto* parent-child relationship using photos, chats or communications. Instead, it is up to the Officer to weigh all the evidence presented.

[38] The Officer goes on to indicate "The submitted evidence to demonstrate the existence of mother/daughter relationship is limited to the signed affidavits of the biological parents, the family doctor confirming that PA has been acting as the guardian and some school records showing PA as guardian of Shania." Again, the Officer does not engage with this evidence or explain why the parental affidavits plus the doctor's notes plus the school records are insufficient or why these documents did not support a *de facto* relationship.There was also an affidavit filed by two friends of the aunt that the officer did not address.Perhaps the Officer did not believe the documents were sincere but that is not clear from the reasons.

[39] A review of the H&C factors set out in the Guidelines shows the Officer did not meaningfully engage with the documentation that supports the Applicant's H&C application:

a) *Bona fide relationship*: There was affidavit evidence from the aunt (the *de facto* mother) as well as the biological parents. The aunt said the Applicant has been "living with me

since her six (6) months old baby until present [sic]," The biological father's affidavit says Shania has "been under the care and custody of my sister…since she was still a baby." The biological mother's affidavit calls the aunt the Applicant's "known mother," A supporting affidavit from two family friends also confirmed the Applicant has been living with her aunt's family since she was less than a year old. There is also the doctor's note discussed below. The six people tell the same narrative and, importantly, the Officer did not suggest there were any issues or reasons to doubt the authenticity of their claims. Additionally, at page 7 of the decision when considering the H&C factors the Officer seems to accept the Applicant was living with the aunt since her infancy, and that the aunt left for Dubai for 6-7 years, then returned resumed living with the Applicant and her own children;

b) *Level of dependency & financial needs*: Even at the age of 19, the aunt continued to support the Applicant by paying her tuition as shown by cheques and receipts from 2017 and 2018. The aunt's affidavit confirms "I provide all the financial support she needs";

c) *Stability and duration of relationship*: The Applicant has been living with the aunt since she was an infant, although the aunt left to work in Dubai for between 6 and 7 years during the Applicant's youth. During that time the Applicant was a young child and moved in with the aunt's ex-husband and the aunt's grandmother along with the aunt's two biological children. The aunt treated the Applicant just as she treated her own two children during the Dubai work period. She came home from Dubai when her stepdad told her to come home and care for her children as the grandmother was sickly. At this time the children were 13 and 10 and the Applicant was 8;

d) *Applicant's other options*: The Applicant presented uncontradicted evidence that her aunt is supporting her andher biological parents do not support her;

e) *Documentary evidence about the relationship*: In addition to the affidavit evidence and the tuition cheques, there were at least three other pieces of documentation showing the aunt was the primary caregiver for the Applicant: (i) a letter from her physician; (ii) school report cards seemingly sent to the aunt; and (iii) school ID cards over the course of a number of years and a number of schools listing the aunt as "mother" in the emergency contact box.

[40] While courts can "connect the dots on the page where the lines, and the direction they are headed, may be readily drawn," courts should still pay "close attention… to a decision maker's written reasons and… they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made" (*Vavilov* at para 97). The reasons should "be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it" (*Vavilov* at para 95).

[41] A review of the reasons does not indicate to the Applicant why the Officer doubted the *bona fide* nature of the relationship or how the factors in the Guidelines above were weighed. The Officer says there was limited evidence about "the level of dependency" on the aunt *but* the Officer never questions the *bona fides* of the claimed relationship in the reasons or in the GMCS notes. The biological parents swore they gave up care and custody of the Applicant when she was an infant and this was backed by independent documentary evidence. The Officer did not grapple with this evidence.

[42] More specifically, there is no analysis of the letter from the Applicant's doctor who has cared for her since she was a 3-year-old. The letter states "Shania is under her personal care and Mrs. Hernando is responsible for her personal, educational and medical needs. Mrs. Hernando personally brings her to my clinic for medical consultations for any medical problems." Meanwhile, there were other indicators of a potential *de facto* relationship that the Officer entirely failed to address. These include :

- The aunt said the Applicant calls her father by his first name;
- The Applicant had minimal contact with her father other than at family gatherings until it seems the time of the interview. At that time the aunt said the father had suffered his third severe stroke and has severe medical complications which is the reason he recently moved in with his sister given his wife left him. The interview notes say that he can "can talk minimally";
- The aunt once tried to unsuccessfully adopt the Applicant but her ex-husband would not allow it; and
- The aunt has been the one paying her college tuition in Philippines.

[43] These four indicators – even if they would not necessarily have changed the outcome – are not mentioned in the reasons. This shows a lack of transparency on the Officer's part. Even though a standard of perfection cannot be expected when processing visas, an applicant can expect the Officer will consider the evidence they submit before concluding there were "no submissions."

[44] There were other factors listed in the Guidelines including alternative options for the child and the level of financial and emotional dependency that are not particularly clear looking at the Certified Record. While the onus is squarely on the Applicant, I accept that the Officer could have asked about emotional dependency or genuineness of the relationship if that was a particular concern. Instead the Officer asked a total of 10 questions and did not ask about emotional dependency and just concluded the child would be "fine" if her aunt left for Canada without her without any analysis.

[45] Whether a child is "fine" is not the test on an H&C application, as the test is whether there is sufficient H&C considerations to grant an application despite it not complying with the technical requirements. When the Applicant puts forward the affidavit evidence and documentation like the Applicant did in this case, a general conclusion that the child will be "fine" is not a justifiable and intelligible approach.

[46] The Officer's view of the effects of removal was that there was no evidence the Applicant could not support herself in the Philippines. This was not the case as the aunt indicates she provides financial support and pays the Applicant's tuition and provided documentary proof of it. This does not amount to "no evidence" and the Officer again did not meaningfully engage with the evidence.

[47] In light of the gaps in the reasoning and the pieces of evidence that were either entirely ignored or not meaningfully addressed, the Officer's reasoning was not transparent, justifiable, and intelligible and is therefore unreasonable (*Vavilov* at para 15).

VIII. Conclusion

[48] I will quash the decision and send it back to be re-determined by a different decision-maker. As this application started in 2015, the Applicant should be allowed to provide updated submissions.

[49] No questions were presented for certification and none arose from the submissions.

JUDGMENT IN IMM-4428-19

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The decision is quashed and sent back to a different decision-maker to be re-determined after allowing the Applicant to file updated submissions; and
3. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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