

Federal Court



Cour fédérale

Date: 20091130

Docket: IMM-2932-09

Citation: 2009 FC 1223

Toronto, Ontario, November 30, 2009

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

PETRA MARIA DAVIS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of an Immigration officer dated April 29, 2009, refusing the Applicant's application for permanent residence based on humanitarian and compassionate grounds under subsection 25(1) of the Act.

Factual Background

[2] The Applicant is a citizen of St. Vincent and the Grenadines (St. Vincent) born on April 21, 1971 who claims she has been the victim of physical abuse, sexual abuse, homelessness, domestic

abuse and poverty while in St. Vincent. The Applicant claims her mother and step-father were the perpetrators of this abuse when she was a minor, but that she recently experienced ill treatment at the hands of her former common-law spouse, John Knight.

[3] The Applicant began living with Mr. Knight in 1987 and she claims she suffered domestic abuse from the beginning of the relationship until she left St. Vincent to come to Canada in March 1995.

[4] The Applicant submitted her refugee claim on January 15, 2003 and her claim was based on her being a victim of domestic violence in St. Vincent. The Applicant's refugee claim was rejected by the Refugee Protection Division of the Immigration and Refugee Board (RPD) on February 3, 2004, on the basis of a lack of credibility in her story and on the fact that there was adequate state protection available. The Applicant challenged that decision at the Federal Court, but the application for leave was denied in June 2004.

[5] Subsequently, the Applicant submitted an application under humanitarian and compassionate grounds (H&C) pursuant to subsection 25(1) of the Act and she was asked to provide updated submissions in September 2008. The H&C application was denied on April 29, 2009. The negative H&C determination forms the basis of this application for leave and judicial review.

[6] The Applicant brought motions for stays of the removal orders concerning both her H&C application and the negative PRRA determination dated April 23, 2009. On June 15, 2009, this Court granted both stay motions.

Impugned Decision

[7] The officer rejected the Applicant's H&C claim based on the finding that she did not provide sufficient evidence to demonstrate that her personal circumstances were such that having to apply for a permanent resident visa from outside of Canada would create unusual, undeserved or disproportionate hardship for her.

[8] The Applicant has been in Canada for fourteen (14) years. During this time, a certain level of establishment is expected to have occurred, but the officer notes that this alone may not amount to the Applicant facing disproportionate or unusual and undeserved hardship. The factors considered by the officer in the Applicant's H&C application include hardship or sanctions upon return to St. Vincent; spousal, family or personal relationships that would create hardship if severed; her degree of establishment in Canada; her ties or residency in any other country and her return to her country of nationality.

[9] The officer based his decision on different factors, including the following: In September 2008, Dr. J. Pilowsky conducted a psychological assessment of the Applicant and concluded that the Applicant is suffering from chronic symptoms of post-traumatic stress disorder (PTSD) and chronic major depressive episode, moderate severity. The officer found that although it was

concluded that the Applicant suffers from chronic major depressive episode and experiences symptoms of PTSD, the assessment did not show future recommended treatment procedures. Also, updated submissions regarding the Applicant's therapy, which show that the Applicant has continued the counselling as recommended, were not provided. The Applicant did not give details relating to the medical care she may be presently receiving in Canada.

[10] The Applicant also did not provide sufficient documentation indicating that health care services would not be adequately provided for her in St. Vincent. According to the World Health Organization (WHO), St. Vincent has had a mental health policy since in 1998 and district medical officers are trained to handle mental health issues and are experienced in administering psychotropic medication. The documentary evidence shows there are medical, psychological, social and legal services and treatment centres in St. Vincent and the evidence does not support that the Applicant would be unable to obtain services in St. Vincent if she so chose.

[11] It is alleged that the Applicant has been traumatized by the abuse of her former common-law spouse and that she fears he will seek her out should she return to St. Vincent. The Applicant states that her behaviour and personality have been seriously affected by the abuse and she asserts that she will suffer hardships in St. Vincent because the prevailing attitude towards women who have been abused has not fundamentally changed since she departed in 1995. The Applicant submits that domestic abuse is common in St. Vincent and state protection is inadequate. She further states there is no reasonable internal flight alternative (IFA) available because St. Vincent is a small island with a population of 118,000.

[12] The police officers in St. Vincent investigate all complaints from citizens about assault or other abuse and submit their findings to the police commissioner. The officer recognized the 2008 Country Reports acknowledge that violence against women remains a serious problem in St. Vincent. The law does not criminalize domestic violence, but rather, provides protection for victims. The cases involving domestic violence are usually charged under assault, battery or other similar offences. The St. Vincent and the Grenadines Human Rights Association reports that domestic violence often remains unpunished because victims choose not to seek assistance from the police for the prosecution of offenders. Furthermore, many victims decide not to press charges once domestic tensions cool down. The police are therefore reluctant to follow up on domestic violence cases in St. Vincent.

[13] However, the officer found the Applicant did not show her personal circumstances would amount to hardship and there is no evidence of her required medical treatment, nor that her former spouse would seek her in St. Vincent and that state protection is not available to her in St. Vincent.

Issues

[14] As per the hearing, there is only one issue for the Court to decide:

1. Did the officer err in relying on extrinsic evidence?

Applicant's Arguments

[15] The Applicant submits the officer breached fairness and denied the Applicant a meaningful opportunity to participate in the decision making process by using the World Health Organization Mental Health Atlas published in 2005 (the WHO document) as the basis for a sweeping finding that mental health issues are taken care of in St. Vincent. However, the WHO document weighed very heavily on the final determination of the H&C application, which was refused. The Applicant submits the officer breached fairness and caused prejudice to the Applicant by denying her a meaningful opportunity to make submissions regarding this document (*Mark v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 364, [2009] F.C.J. No. 451 (QL) at par. 15-18).

Respondent's Arguments

[16] In *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358, the Federal Court of Appeal considered *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, in the context of an H&C matter and held that the weighing of relevant factors is the responsibility of the Minister or his delegate and it is not the role of the courts to re-examine the weight given to the various factors by officers.

[17] According to the Respondent, the Applicant simply did not satisfy the officer that she would suffer unusual, undeserved or disproportionate hardship if she were to apply for permanent residence from outside of Canada (Operational Manual, IP-5 at sections 5.1, 6.7, and 6.8; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 413, 138 A.C.W.S. (3d) 350 at par. 11; *Uddin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 937, 116 A.C.W.S. (3d)

930; *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635).

[18] The Respondent submits that although the Applicant provided two psychologist's reports (dated December 2003 and September 2008 respectively) by Dr. Pilowsky concerning the status of her mental health, the officer noted that the Applicant did not set out what mental health treatment she had been provided, is being provided or what mental health treatments are suggested for the future. In other words, the Applicant did not establish that she is actually in need of mental health treatment and, even if she had established that she is in need of mental health treatment, she has not established that she could not receive adequate treatment in St. Vincent. Therefore, the officer's use of the WHO document to find that there is an adequate mental health infrastructure in St. Vincent did not prejudice the Applicant's interests.

Analysis

[19] This Court has previously held that the review of H&C decisions should be afforded considerable deference, and that the applicable standard was reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.)). Following the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 90, review of H&C decisions should continue to be subject to deference by the Court, and are reviewable on the newly articulated standard of reasonableness (*Dunsmuir* at par. 47, 55, 57, 62 and 64).

[20] For a decision to be reasonable, there must be justification, transparency and intelligibility within the decision making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir* at paragraph 47). In *Baker*, the Supreme Court ruled that the discretionary power granted to an immigration officer must be considered with a certain degree of deference (par. 51, 59, 62).

[21] An application under H&C grounds offers an individual special and additional consideration for an exemption from Canadian immigration laws, which are otherwise universally applied. The decision of an immigration official not to recommend an exemption takes no right away from an individual (*Vidal v. Canada (Minister of Employment and Immigration)*, (1999), 41 F.T.R. 118, 13 Imm. L.R. (2d) 123; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84; *Legault*).

[22] The purpose of H&C discretion is to allow flexibility to approve deserving cases not anticipated in the legislation, but it is not an alternative stream for immigration to Canada. A decision made on H&C grounds is an exceptional measure and, moreover, a discretionary one (*Irimie v. Canada (Minister of Citizenship and Immigration)*, (2000), 101, A.C.W.S. (3d) 995, 10 Imm. L.R. (3d) 206; *Legault* at par. 15).

[23] In the case at bar, the officer referred to the WHO document which is a document that shows the global resources dedicated to people suffering from mental and neurological disorders. In his decision, the Officer referred to the following passage of the WHO document:

The World Health Organization reveals that St. Vincent has a mental health policy which was initially formulated in 1998. The components of the policy are advocacy, prevention, treatment and rehabilitation. Further, a national mental health programme is present in the country. This programme was formulated in 2000 and reviewed and updated every year. The same document informs that there are budget allocations for mental health; the primary source of mental health financing is tax based. Accordingly, *the country has disability benefits for persons with mental disorders ... patients suffering from severe mental illnesses receive public disability benefits*”

In St. Vincent, district medical officers are trained to handle mental health issues and are experienced in administering psychotropic medication. In addition, regular training of primary care professionals is carried out in the field of mental health. In the last two years, about 25 personnel were provided training. It is noted that there are community care facilities for patients with mental disorders; community mental health services are available in all districts and psychiatric nurses are involved in these communities.

[24] The Court is of the view that the WHO document is a relevant document and it was relied upon by the officer to conclude that mental issues are taken care of in St. Vincent. However, the Applicant has argued that the WHO document was not part of the IRB National Documentation Package for St. Vincent dated March 18, 2009. This statement was not challenged. Although the Court agrees that the officer does not have to disclose all documentary evidence that post-dated the Applicant's submissions (*Kaybaki v. Canada (Solicitor General of Canada)*, 2004 FC 32, 128 A.C.W.S (3d) 784) the Court is of the opinion that, in the circumstances, the officer erred in not disclosing the WHO document in order to provide the Applicant with an opportunity to make submissions.

[25] The WHO document entitled “The World Health Organization Mental Health Atlas” shows global mental health resources remain inadequate. The document is a more technical than a Human Rights Report and is not commonly referred to. Moreover, the officer erred in finding that the WHO document seems to support the proposition that there is adequate level of mental health in St. Vincent. For instance, a survey in 192 countries shows a slight increase in the number of psychiatrists from 3.96 to 4.15 per 100,000 people worldwide. In comparison, the number of psychiatrists is 0.9 per 100,000 per population in St. Vincent. These data reveal that St. Vincent’s mental health resources available to citizen in St. Vincent can be below average. In the circumstances, the WHO document is a novel and a significant document and it was relied upon by the officer in his decision. Fairness dictates that the Applicant should have had the opportunity to make submissions with regard to the WHO document.

[26] Therefore, the officer erred in not disclosing to the Applicant the WHO document relied upon in making his decision. For these reasons, the application for judicial review is granted.

[27] The parties did not submit any questions for certification and none arise.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is granted. No question is certified.

"Richard Boivin"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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