Federal Court  Cour fédérale

Date: 20180322

Docket: IMM-2337-17

Citation: 2018 FC 329

Ottawa, Ontario, March 22, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

YESENIA MARGARITA LOVO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Lovo seeks review of the decision denying her request for humanitarian and compassionate [H&C] relief under s.25 of the *Immigration and Refugee Protection Act* [IRPA] and for a temporary resident permit [TRP]. In the May 18, 2017 decision the Senior Immigration Officer [the Officer] found that the circumstances did not justify granting this relief to Ms. Lovo. In the absence of any identified errors by the Officer, this judicial review is dismissed.

I. Background

[2] Ms. Lovo is a citizen of the United States [US] who came to Canada as an infant and became a permanent resident in 1991. Sadly she had a difficult childhood and was physically and sexually abused. As an adult she became addicted to drugs, had abusive relationships and got into trouble with the law.

[3] In 2010, she was reported for serious criminality under s.44 of the IRPA which resulted in a deportation order being issued against her. In 2011, the Immigration Appeal Division [IAD] agreed to stay the deportation order for three years. In February 2015 the IAD cancelled the stay of removal. In August 2015, she was again reported under s.44 of the IRPA for criminal convictions.

[4] In January 2016 her pre-removal risk assessment application was unsuccessful.

II. Decision Under Review

[5] The decision under review is the H&C decision.

[6] The Officer considered Ms. Lovo's establishment in Canada including her employment history. The Officer noted that while Ms. Lovo had periods of employment, she was unemployed for the ten (10) years preceding her application. There was also no information on file regarding her assets in Canada, friends, or community ties.

[7] With respect to family, the Officer noted that Ms. Lovo was making efforts to reconcile with her mother. No details were provided by Ms. Lovo regarding her brothers and a sister. Ms. Lovo's common law relationship with PK was marked by drug use and physical altercations, which resulted in a no contact order issued against Ms. Lovo.

[8] The Officer noted that Ms. Lovo is the mother of four children and that she lost custody of her three older children. Her youngest child, Fiona, who she had with PK, is in the custody of PK.

[9] On the best interests of the children [BIOC] considerations, the Officer noted the evidence of Dr. Agarwal and accepted that separation of Fiona from her mother did not favour her well-being, but concluded that Fiona's well-being had already been jeopardized by exposing her to an environment of criminality. The Officer cited the IAD decision which found that the BIOC did not outweigh the seriousness of Ms. Lovo's offences. The Officer concluded that PK would be able to raise Fiona and would facilitate access with Ms. Lovo upon her removal to the US.

[10] The Officer considered Ms. Lovo's mental health and referenced the report of Dr. Thirlwell who diagnosed her with severe post-traumatic stress disorder [PTSD] and major depressive disorder. Dr. Thirlwell states that if Ms. Lovo is removed to the US, her condition would deteriorate, and she would be at a serious risk of suicide. The Officer noted, however, that despite treatment, Ms. Lovo relapsed and has a pattern of criminal and drug behaviour. The Officer noted that she has been on daily methadone treatment since 2012.

[11] In terms of rehabilitation, the Officer noted that Ms. Lovo had some success with a drug rehabilitation program, but that she was removed from the program when she was found with alcohol. The Officer noted that the IAD stayed Ms. Lovo's removal from Canada on the basis of her rehabilitation, however the stay was lifted because she had been charged and convicted with other criminal offences. In his report, Dr. Agarwal spoke to Ms. Lovo's prospects for treatment and rehabilitation.

[12] Finally, the Officer addressed country conditions in the US. Ms. Lovo argued that there would be hardship if she was removed to the US because she would not have access to methadone in a timely manner. Specifically, Dr. Agarwal states that Ms. Lovo would be at risk of relapse while she waited for methadone in the US. Ms. Lovo put various articles into evidence on the psychological effect of addiction on suicide. However, the Officer concluded that this evidence did not demonstrate that Ms. Lovo would not be able to access treatment in the US. Further the Officer noted that it was "speculative" that a waiting period would cause Ms. Lovo to commit suicide. While the Officer found that relocation would present challenges, and that access to a methadone treatment clinic at the earliest opportunity is required, the Officer noted that there are a number of treatment clinics in the US.

[13] Overall, while Ms. Lovo had a number of positive factors in favour of her H&C application, including her intention to make positive changes in her life and her daughter Fiona, however the Officer noted that she had more than 20 criminal convictions on record. The Officer was not satisfied that conditions in the US were such that they amounted to hardship. The Officer

also concluded that Ms. Lovo's absence from Canada would not be detrimental to the overall well-being of Fiona.

[14] The Officer refused the H&C relief and denied Ms. Lovo a TRP.

III. Issues

[15] Ms. Lovo raises the following issues with respect to the reasonableness of the H&C decision:

A. Did the Officer reasonably consider rehabilitation efforts?

B. Is the BIOC analysis reasonable?

C. Did the Officer properly consider hardship?

IV. Standard of Review

[16] The parties agree that the standard of review is reasonableness, but disagree about what reasonableness requires in the context of this case. Relying on *Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 [*Vavilov*] and *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], Ms. Lovo argues that the margin of deference is limited, owing to the importance of the matter to Ms. Lovo and the requirement that H&C applications be analyzed closely.

[17] However, in *Kanthasamy*, the Supreme Court stated that H&C relief is not meant to be an alternative immigration scheme (*Kanthasamy*, at para 23). Accordingly, the Federal Court has

held that H&C relief is exceptional precisely because it is not meant to be an alternate immigration scheme (*Edo-Osagie v Canada (Citizenship and Immigration)*, 2017 FC 1084 at para 31; *Kaur v Canada (Citizenship and Immigration)*, 2017 FC 757 at para 52).

[18] Accordingly, the reasonableness standard of review is applied deferentially in light of the wide discretion exercised by H&C officers. This standard of review is mandated by the Supreme Court's comments in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 62 [*Baker*], which holds that "considerable deference" is owed to H&C officers.

[19] While Ms. Lovo relies on *Vavilov*, that case involved a different legal context: the interpretation of a home statute by a decision-maker (*Vavilov*, at para 36). While *Vavilov* does say that the reasonableness standard can be applied deferentially where the interests are high, these comments do not overturn *Baker* in the specific context of H&C relief.

[20] Accordingly, the standard of review for H&C decisions has been adequately settled by precedent according to *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 57, and a deferential form of the reasonableness standard has long applied to the exercise of H&C relief: *Ahmad v Canada (Citizenship and Immigration)*, 2017 FC 923 at para 18; *Lobjanidze v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1098 at para 8; *Ogunyinka v Canada (Citizenship and Immigration)*, 2015 FC 595 at para 19).

V. Analysis

A. *Did the Officer reasonably consider rehabilitation efforts?*

[21] Ms. Lovo argues that the Officer failed to consider the evidence of her current rehabilitation efforts. She argues that the Officer unduly focused on her past failures. She also argues that the Officer failed to address the addiction evidence before him which demonstrates that addiction is a disease. Finally, she argues that the Officer failed to consider the medical evidence of Dr. Agarwal.

[22] However, this argument is fundamentally an attack on the adequacy of reasons, which is not a standalone basis for review (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14). The Officer concluded that Ms. Lovo's rehabilitative record did not demonstrate a commitment to sobriety. This conclusion came from the Officer's assessment of Ms. Lovo's entire history, including her frequent relapses, and not just her recent period of sobriety.

[23] The Officer evidently put weight on this history, and was entitled to do so. Ms. Lovo erroneously seeks to reweigh this evidence on judicial review (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 61). Based on the deference owed to the Officer, his decision is reasonable.

B. *Is the BIOC analysis reasonable?*

[24] Ms. Lovo argues that the Officer did not consider the evidence of Dr. Agarwal regarding the degree of attachment between her and her daughter. She argues that the Officer ignored the evidence of the child's father, PK, attesting to the importance of Ms. Lovo in their daughter's life.

[25] An H&C decision will be found to be unreasonable if the interests of children affected by the decision are not sufficiently considered (*Kanthasamy*, at para 39). The BIOC must be "well identified and defined" and examined "with a great deal of attention" (*Kanthasamy*, at para 39; *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at paras 12 and 31 [*Legault*]) and decision-makers must be "alert, alive, and sensitive" to the BIOC (*Baker*, at para 75). The BIOC do not mandate a certain result (*Legault*, at para 12) because, generally, the BIOC will favour non-removal (*Zlotosz v Canada (Immigration, Refugees and Citizenship*), 2017 FC 724 at para 22).

[26] In this case, the decision shows that the Officer considered all the evidence, specifically the evidence of Dr. Agarwal which stated that the child would be adversely impacted by her mother's removal. This factor was given positive consideration in Ms. Lovo's application, even concluding that separation from Ms. Lovo did not favour Fiona's well-being. However, the Officer also details why this factor was not determinative in light of the negative elements of Ms. Lovo's application. In the Officer's view Dr. Agarwal's evidence was "speculative" and PK could facilitate access of Fiona to Ms. Lovo.

[27] These findings are reasonable in light of the record. While Ms. Lovo argues that the Officer was wrong to call Dr. Agarwal's evidence "speculative" it is well-established that expert reports are not dispositive, especially where they are obtained for the purpose of litigation (*Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at para 31; *Czesak v Canada (Citizenship and Immigration)*, 2013 FC 1149 at paras 37-40). Although medical diagnoses should not be discounted on the basis of speculation, the Officer here explained why he was discounting this evidence (*Gramaglia v Canada (Attorney General)*, 1998 CanLII 8387 (FC)). He noted that Fiona's well-being had already been jeopardized by Ms. Lovo's criminal activities. He conducted a holistic assessment of Ms. Lovo's criminality, her relationship with Fiona and the role of Fiona's father in her life.

[28] Since a BIOC analysis does not favour a particular result, the Officer was entitled to find that Ms. Lovo's criminality outweighed the BIOC considerations.

C. *Did the Officer properly consider hardship?*

[29] Ms. Lovo argues that the Officer discounted her addiction illness and risk of suicide on the basis that treatment would be available in the US, contrary to *Kanthasamy.* She argues that she is at real and immediate risk of suicide if she is removed to the US as stated in the report of Dr. Agarwal. She argues that the Officer erred by concluding that her risk of suicide is "speculative" given the evidence on the record. She submits that she will be unable to access methadone treatment in the US.

[30] *Kanthasamy*, at paras 46-47 provides that where an officer accepts a medical diagnosis, the officer cannot expect an applicant to adduce further evidence about the availability of treatment in another country. However, here the Officer did not wholly accept the particular diagnosis that removal would cause suicide. As such, the comments from *Kanthasamy* do not apply.

[31] More importantly, the Officer concluded that any risk of hardship on removal was outweighed by Ms. Lovo's criminality. The Officer considered the evidence which indicated that there might be impediments to Ms. Lovo receiving methadone treatment in the US. However the Officer notes that "…alternate treatment locations may have to be sought" by Ms. Lovo. The Officer concluded that while Ms. Lovo's "intention to curb her substance-abuse" was a compelling factor, it did not overcome the negative factors in her case.

[32] The Officer is entitled to deference in this conclusion. The onus is on Ms. Lovo to establish the facts and evidence to trigger the exercise of the s.25 discretion (*Owusu v Canada (Minister of Citizenship and Immigration),* 2004 FCA 38 at para 5). Here, she had the onus to show that methadone treatment would not be available in the US. Here the Officer was not satisfied that she met the evidentiary onus on her to show that the consequences of her removal might outweigh the negative factors.

[33] A similar argument was made in *Fatt Kok v Canada (Citizenship and Immigration),* 2011 FC 741[*Fatt Kok*] where the applicant argued that the H&C officer failed to consider the

evidence of the limited availability of methadone in Malaysia. The Court in *Fatt Kok* concluded that this was essentially a request that the Court to reweigh the evidence.

[34] Overall, the Officer concluded that Ms. Lovo's criminal convictions weighed heavier in the balance (*Lupsa v Canada (Citizenship and Immigration)*, 2009 FC 1054 at paras 51-52) than the medical evidence. On the evidence this is a reasonable conclusion for the Officer to make and there is no basis for this court to intervene.

VI. Conclusion

[35] As harsh as this result may seem, Ms. Lovo has not identified an error on the part of the Officer which merits this Court's intervention. The Officer considered all of the evidence and weighed all of the factors, positive and negative. However, the positive factors were insufficient to tip the balance in Ms. Lovo's favour. In the absence of a reviewable error, this judicial review is dismissed.

JUDGMENT in IMM-2337-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No serious question of general importance is certified.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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