Federal Court  Cour fédérale

Date: 20181204

Docket: IMM-271-18

Citation: 2018 FC 1218

Toronto, Ontario, December 4, 2018

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

ANGELICA HENSON

APPLICANT

And

THE MINISTER OF IMMIGRATION, REFUGEES, AND CITIZENSHIP CANADA

RESPONDENT

JUDGMENT AND REASONS

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] to review a decision made by a Senior Immigration Officer [Officer] dated January 11, 2018 [Decision] wherein the Officer denied the Applicant's application for permanent residence on humanitarian and compassionate [H&C] grounds. I find that the Applicant has demonstrated to the Court why the Decision is unreasonable, as explained below.

I. BACKGROUND

[2] The Applicant, Angelica Henson, is a citizen of the Philippines. She arrived in Canada in 2004 and received a work permit as a live-in caregiver. Her work permit was renewed in 2005 and extended until 2007. The Applicant returned to the Philippines twice: to get married in 2005 and for a vacation in 2007. Several months after returning to Canada, she gave birth to her daughter, a Canadian citizen who will soon be turning 11.

[3] Since the expiration of her work permit in 2007, the Applicant has unsuccessfully sought both permanent and temporary residence through a number of avenues. The Applicant's applications for permanent residence through the live-in caregiver program in 2008 and 2010 were rejected due to her failure to meet the program's eligibility requirements. Subsequently, the Applicant applied for a temporary resident permit and work permit, both of which were denied.

[4] In 2012, she applied for, and was denied, permanent residence on H&C grounds. While leave for judicial review of the refusal was granted, the judicial review was ultimately dismissed.

[5] A section 44 report was written in 2014 which deemed her inadmissible under subsection 41(a) of IRPA, and a removal order was issued. The Applicant's pre-removal risk assessment was denied.

[6] In 2016, the Applicant submitted a second application for permanent residence on H&C grounds, which was also refused. The Applicant was granted leave for judicial review of that

refusal through a consent order in 2017, pursuant to which her application was sent to a different officer for redetermination.

[7] The second officer also refused the application. Again, the Applicant was granted leave for judicial review of that second refusal by way of a consent judgment. Pursuant to that second consent order, the application was sent to a third officer for redetermination. It is this Decision which forms the basis for this application for judicial review.

[8] As this is the third time this H&C application is before the Court, after having gone back and been refused by an officer for a third time, what follows is a detailed summary of the Decision, to be clear about why the matter is being returned to a fourth officer.

II. DECISION UNDER REVIEW

[9] The Officer considered the Applicant's movement between the Philippines and Canada and determined that the Applicant has resided in Canada for approximately 13 years. The Officer considered the Applicant's employment history in Canada and noted that she has been unemployed for an extended period of time (since 2008).

[10] The Officer assessed the Applicant's living situation and determined that she lives rent-free at a friend's residence. Additionally, the Officer found that the same friend provides the Applicant with regular financial payments for subsistence and enjoyment. The Officer also

determined that the Applicant has friends who occasionally provide her with clothing, food, and money.

[11] Based on the finding that the Applicant relies on her friends for support, the Officer determined that the Applicant is not self-reliant: her consistently low bank account balances and dependence on friends led the Officer to conclude that the Applicant had not demonstrated sound financial management. This conclusion weighed negatively against a finding that the Applicant had become established in Canada.

[12] Consideration of letters of support as well as the Applicant's involvement in her community weighed in favour of the Applicant's establishment in Canada. The Officer, however, noted that this level of establishment was to be expected of an individual who had lived in Canada for 13 years.

[13] The Officer went on to consider the best interests of the Applicant's daughter. The Officer noted the Applicant's concern that the child's father who lives in the Philippines will take her daughter away, but concluded this concern was speculative and that parental custody of the daughter is a matter to be determined in family court.

[14] The Officer noted the Applicant's worry that her daughter's inability to speak Tagalog will pose a challenge to her. While acknowledging that this could complicate her integration and re-establishment abroad, the Officer noted that English is an official language in the Philippines.

Furthermore, the Officer found that the daughter could communicate with some family members in the Philippines in English.

[15] The Officer considered the state of the education system in the Philippines. Specifically, the Officer assessed the Applicant's contentions that Filipino schools are expensive and of a poor quality. The Officer noted the lack of evidence indicating that the Applicant would be unable to send her daughter to a public school. Despite the poor quality of the education system in the Philippines, the Officer found that the daughter could return to Canada to study due to her Canadian citizenship.

[16] The Officer went on to consider the Applicant's prospects for re-establishment in the Philippines. The Officer noted the Applicant's argument that there is a lack of economic opportunities in the Philippines and that she would be adversely impacted by age discrimination, given that age discrimination in hiring practices is widespread in the Philippines. However, the Officer found mitigating factors to include the Applicant's upbringing, education, and employment history in the Philippines, as well as her ability to communicate in Tagalog and English. The Officer concluded that re-establishment may be difficult, but would be facilitated by the Applicant's resilience and adaptability.

[17] Finally, the Officer determined that the Applicant did not have valid immigration status for the majority of the time that she was in Canada, a negative factor in the assessment. Similarly, the Officer found that the Applicant originally worked in Canada with knowledge that she was unauthorized to do so, and found that this was a negative factor which carried significant

weight. She did not leave Canada when required, despite being advised to on multiple occasions, and the Officer held that this was a serious negative factor which carried significant weight.

[18] The Officer concluded that the positive factors in the application did not outweigh the negative factors, and refused the application.

III. ISSUE AND ANALYSIS

[19] This application for judicial review raises only one issue – whether the decision was reasonable, which is the relevant standard of review in this matter (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 44). The Applicant contends that the Decision is unreasonable due to three of the central reasons cited by the Officer, namely (i) age discrimination, (ii) establishment, and (iii) inadmissibility. I agree that there are flaws in the Officer's analysis of all three points that, given their centrality to the refusal, render the Decision unreasonable.

A. *Hardship*

[20] The Applicant argues that the Officer unreasonably determined that she would be able to re-establish herself in the Philippines, given the evidence that was provided regarding the Applicant's profile and discrimination she would face due to her age. The Applicant provided significant objective evidence on the point, including hiring practices in the Philippines, in asserting that she would face hardship in applying from abroad, and the resulting hardship on her daughter. The Applicant also explained that she had no connections to the Philippines given the

13 years she spent in Canada, and her previous employment. The Applicant also provided evidence from her family members in the Philippines stating they would be unable to support her.

[21] The Officer nonetheless found that her brothers are employed and that there is no evidence of poverty. And, despite acknowledging age discrimination and high unemployment in the Philippines, the Officer found the Applicant's family ties, previous employment, and background there would mitigate that hardship.

[22] I am persuaded by the Applicant for the following reasons.

[23] First, the Officer's reasoning is illogical: the fact that the Applicant states that she will be unable to find work to support her daughter, and the evidence this argument is based on, are not examined. Rather the Officer engages in a *non-sequitur*, using the fact that her brothers are working, for the proposition that the Applicant will have support in the country, in spite of clear evidence from her family members to the contrary.

[24] Second, the fact that the Applicant speaks Tagalog does not address the problem identified by the Officer regarding the combined challenges of age discrimination and unemployment. Having identified those dual challenges, the Officer failed to explain how language proficiency might have overcome the hardship created by those societal realities, given the Applicant's profile as a job seeker over forty, who has been away from the labour market for over 13 years. The fact that she speaks Tagalog neither addresses the evidence that she

submitted, nor responds to her claim of hardship in applying from abroad. Furthermore, the fact that she and her daughter may get emotional support from family members in the Philippines, which the Officer notes, does not address her underlying concern about employment and providing for her nearly 11-year-old daughter, who will need specialized education to integrate into a foreign culture and language. The 11-year-old Canadian child has never visited the country, nor speaks Tagalog.

[25] Finally, the Officer points to the Applicant's brothers as having found work. Yet, they have entirely different profiles from her, having worked for many years in the Philippines. They are not trying to re-enter the labour market after over 13 years abroad, and are not single parents with a Canadian daughter. The fact that they may not be living in poverty (and the evidence is far from conclusive on this point) has little to do with the Applicant's particular hardship profile presented to the Officer.

[26] The Officer ultimately had a duty to assess the hardship based on her unique profile. *Kanthasamy* instructs that an officer must look at the Applicant's individual circumstances in light of general country conditions. There, Justice Abella held for the majority that the officer's approach "failed to account for the fact that discrimination can be inferred where an applicant shows that he or she is a member of a group that is discriminated against" (at para 53). Here, similarly, the Officer failed to properly undertake this assessment.

[27] I note that this is not the first time that an officer has failed to look at country condition evidence in relation to the Applicant's pursuit of H&C relief. The most recent letter setting out

the agreement for the consent judgment states that the second H&C decision contained errors in "the country condition analysis with respect to age discrimination". The Officer has made a similar error in this latest Decision under review.

B. *Establishment*

[28] Next, the Officer found that the Applicant had not met an exceptional level of establishment, and concluded:

> Based on the information and evidence before me, I find the applicant has demonstrated an expected level of establishment in Canada for an individual who has resided in Canada for over a decade. I do not find the level of establishment exhibited by the applicant to be exceptional.

[29] Here, the Officer clearly indicates that the Applicant's establishment fell below what would be considered exceptional, but did not state what would be considered exceptional. A similar analysis was found to be deficient in *Chandidas v Canada (Citizenship and Immigration)*, 2013 FC 258, where Justice Kane held that the officer did not sufficiently explain the conclusion on the issue of establishment:

> [80] [T]he officer reviewed the family's degree of establishment in detail, and referred to their work, income, family ties, courses taken, schools attended, and community involvement in various passages of the decision. The officer does not indicate what he would consider to be extraordinary or exceptional establishment; he simply states that this is what he would expect.

[30] Similarly, here the Officer did not provide any indication of what would be "exceptional".

[31] The Applicant presented significant evidence to the Officer of her establishment in Canada over 13 years, including letters of support, details about her prior work (when she did have a work permit), community involvement including with the Church, and general integration into her community through her involvement with her daughter.

[32] While I recognize that the case law acknowledges that degree of establishment alone is insufficient to justify an exemption under subsection 25(1) of IRPA (*D'Souza v Canada (Citizenship and Immigration)*, 2017 FC 264 at para 13), given that there were other positive factors cited by the Officer, such as the best interests of the Applicant's child, the Officer might have arrived at a different outcome on H&C relief after a proper establishment analysis.

C. *Inadmissibility*

[33] Finally, I find that the Officer erred in focusing on the Applicant's inadmissibility, including her financial struggles. The Officer alluded to the concept of financial inadmissibility in the following portion of the Decision:

> I further find the applicant failed to demonstrate a pattern sound financial management in Canada [*sic*]. I note it is expected of foreign nationals in Canada to be financially independent otherwise they may be inadmissible to Canada for financial reasons.
>
> [Emphasis added]

[34] There are two basic problems with this finding. First, it is a given that many individuals applying for H&C relief may be inadmissible: if this were not the case, the section 25 exemption would be illusory. On the issue of financial affairs, the Officer noted:

> … that there is little information or evidence the applicant sought or received welfare in Canada. However, since the applicant is financially supporting herself and her daughter through the generosity of her friends, I find that she is not self-reliant in Canada. As a result, given her lack of self-sufficiency and based on the information on her bank statements, I find the applicant failed to demonstrate she has a pattern of sound financial management in Canada. Therefore, I find this is a negative consideration of her establishment in Canada.
>
> [Emphasis added]

[35] However, the Applicant has been unauthorized to work in Canada since 2008 when her work permit expired. Thereafter, she attempted to resolve her status on several occasions, which would have restored her ability to work. As a result of her loss of work authorization, she submitted that reliance on supportive friends was the only way to survive financially. Her other choices would have been to apply for social assistance, or engage in unauthorized work, and she submits that either of these two options would have been held against her in subsequent proceedings, including this H&C application.

[36] I agree that it was thus unreasonable for the Officer to fault the Applicant's lack of self-reliance and financial mismanagement, given the alternatives. The Applicant previously applied for work authorization in the hopes of working legally, but was refused. Thus, the Applicant was caught in a catch-22 situation.

[37] The purpose of an H&C adjudication is to decide whether someone should be permitted to overcome the usual requirements of the legislation, which can include inadmissibility. Here, being fixated on potential financial inadmissibility (which was not actually found) hampered the Officer's ability to impartially undertake that exercise, and to genuinely assess the case.

[38] In the instant case, similar to what Justice de Montigny found in *Sultana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 533 at paragraph 30, the positive factors ended up being filtered out through the prism of earlier conduct that required recourse to the H&C application in the first place. In other words, had the Applicant been authorized to work – as she had been when she first came to Canada under the live-in caregiver program – then she would not have financially mismanaged her affairs. As a result of viewing the application through this lens, the H&C remedy, one which is available in the immigration forest, was lost amongst the trees.

IV. CONCLUSION

[39] For the reasons enumerated above, the Decision is flawed in three fundamental respects, namely with respect to the assessment of (i) hardship, (ii) establishment, and (iii) inadmissibility. These flaws collectively render the Decision unreasonable. This is now the third time the application is being returned for redetermination.

JUDGMENT in IMM-271-18

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed.

2. The matter shall be remitted to a different officer for redetermination.

3. No costs or certified questions shall issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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