Federal Court Cour fédérale

Date: 20181217

Docket: IMM-704-18

Citation: 2018 FC 1271

Ottawa, Ontario, December 17, 2018

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

CHERRYL RED

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Cherryl Red, seeks judicial review of the decision (Decision) of an immigration officer (Officer) denying her application for a permanent resident visa as a member of the Live-in Caregiver class. This application for judicial review is brought pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The Officer denied the Applicant's request for a permanent resident visa due to inadmissibility pursuant to paragraph 36(2)(c) of the IRPA on the basis that the Applicant admitted to having signed two cheques in January 2010 that were later dishonoured by the issuing bank. At the time, the Applicant lived in the Philippines. She contends that the Decision was unreasonable as the charge against her in the Philippines was discontinued and her actions do not constitute an offence under subsection 362(1) of the *Criminal Code*, RSC 1985, c C-46 (Criminal Code).

[3] For the reasons that follow, I find that the Decision was unreasonable. The application will be allowed.

I. Background

[4] The Applicant is a citizen of the Philippines. She came to Canada as a live-in caregiver in 2012 and applied for permanent residence on October 30, 2015 once she had completed three years of service.

[5] By way of letter dated September 28, 2017, the Applicant was notified by the Case Processing Centre (Vegreville) that she may be inadmissible pursuant to paragraph 36(2)(c) of the IRPA because she signed two cheques that were returned by the issuing bank in the Philippines: one due to insufficient funds and the second due to closure of the account. The letter stated that these actions amounted to an offence under subsection 362(1) of the Criminal Code. The Applicant was invited to make submissions to explain both the allegation and the fact that she had previously submitted a Philippine National Bureau of Investigation (NBI) certificate

stating “No Criminal Record” but, more recently, had submitted an NBI certificate that indicated “No Derogatory Record”.

[6] The Applicant responded to the letter on October 24, 2017. She provided an affidavit and court documents from the Philippines. The Applicant’s affidavit sets out the chain of events that led to the issuance of the cheques in question. In 2009, the Applicant’s ex-boyfriend, Arthur Agag, planned to work in Saudi Arabia to support their child. He applied for a loan from AsiaLink Finance Corporation (AsiaLink). The Applicant and Mr. Agag’s cousin signed as guarantors for the loan. AsiaLink opened a bank account at Tanay Rural Bank and required Mr. Agag and the Applicant to sign a series of blank cheques. There were no funds in the account at that time, a fact that was understood by all parties, including AsiaLink. If monthly payments were not made on time, AsiaLink would deposit a cheque for the amount owed.

[7] On January 19, 2010, AsiaLink loaned Mr. Agag 60,000 pesos. Mr. Agag did not travel to Saudi Arabia to work. He stayed in Manila and spent the money. The Applicant made the first payment of 8,250 pesos (approximately $210 Cdn.). Mr. Agag informed the Applicant that he would repay the remainder of the funds. The Applicant later learned that Mr. Agag did not make the payments. When AsiaLink attempted to cash the signed cheques, the cheques were dishonoured. The Applicant acknowledged receipt of a Notice of Dishonour from the bank on June 7, 2010 but has no recollection of receiving the Notice.

[8] The Applicant moved to Hong Kong to work as a domestic helper in August 2010. As part of her visa application, she submitted an NBI certificate dated March 24, 2010 that indicated

"No Derogatory Record". Also in 2010, the Applicant applied to the Canadian Live-in Caregiver Program and provided a copy of the March 2010 NBI certificate as part of her application.

[9] In April 2012, while in Hong Kong, the Applicant was contacted by Mr. Agag, who informed her that there was a court case pending against them for bouncing cheques. The Applicant states that it was at this point she realized the loan was not being paid. Mr. Agag asked her for money so that he could go to court and resolve the case. The Applicant gave him 3,000 pesos.

[10] During the same period, the Applicant's March 2010 NBI certificate expired and she applied for a new NBI certificate. The new NBI certificate, dated May 9, 2012, in slightly amended format and wording, indicated "No Record on File". The Applicant believed Mr. Agag had tricked her about the charges in order to have her send money.

[11] A charge was in fact brought against the Applicant in July 2010 in the Municipal Trial Court - Tanay, Rizal (Trial Court) for the violation of Batas Pambansa Bilang 22 (BPB 22) for having issued a cheque knowing she did not have sufficient funds to cover the amount of the cheque. However, the complainant, AsiaLink, filed an Affidavit of Desistance dated September 3, 2012, stating that its complaint against the Applicant was due to "MISACCOUNTING and MISAPPREHENSION OF FACTS" on its part. An Order was issued by the Trial Court withdrawing the charge on September 3, 2012.

[12] The Applicant obtained a further NBI certificate on May 27, 2015 which stated "No Criminal Record." On April 20, 2016, the Respondent requested a written explanation regarding the "No Criminal Record" comment on the NBI certificate and an explanation of the case against her. The Applicant provided the court records from the case in response.

[13] The Applicant received a final NBI certificate on February 3, 2017 indicating "No Derogatory Record".

II. Decision under Review

[14] The Decision is dated February 6, 2018 and consists of: (1) a letter setting out the Officer's conclusion that the Applicant was inadmissible pursuant to paragraph 36(2)(c) of the IRPA; and (2) the Officer's Global Case Management System (GCMS) notes, which form part of the Decision (*Pushparasa v Canada (Citizenship and Immigration)*, 2015 FC 828 at para 15).

[15] The Officer found that the Applicant committed an offence contrary to BPB 22 in signing the two cheques in the Philippines and that, if the Applicant had carried out the same acts in Canada, she would have committed an offence punishable pursuant to subsection 362(1) of the Criminal Code.

[16] The relevant portion of the GCMS notes reads as follows:

> The applicant's representative provides a cover letter in which he states that Ms. Red is not inadmissible because she was not convicted of an offence in the Philippines. While true, this does not affect her inadmissibility under A36(2)(c). I note that the procedural fairness letter of 28 September 2017 was clear and

> specific on this point. Ms. Red states in her own affidavit that the case against her was dismissed because the complainant filed an affidavit of desistence, stating that the case arose because of a misunderstanding. There is no explanation of what that misunderstanding may have been. Again, I note that this does not affect her inadmissibility under A36(2)(c). Ms. Red's affidavit states that she was one of two co-signers on a loan taken out by her boyfriend at the time, a man by the name of Arthur Agag. The cheques used for repayment of the loan were not honoured because there were no funds in the account. She states this was not her responsibility, as she did not take out the loan – Arthur Agag was responsible for providing the funds. However she has provided copies of the cheques which were dishonoured – both of them include her signature. She has provided a copy of a promissory note for repayment. This bears her name and signature as one of three people who were "jointly and severally" responsible for making payments. She has provided a copy of an NBI police certificate which expired 03 Feb 2018. This states "No Derogatory Record." She states that she does not know how this changed from a previous certificate, but speculates that it was a matter of NBI authorities catching up with court proceedings. She does not provide any basis for this speculation and I give it no weight. However it came about, this latest certificate does not mean she did not sign the cheques which were dishonoured. I am satisfied that Ms. Red is inadmissible, A36(2)(c). Documents presented show that two cheques which were dishonoured – one dated 23 March 2010 and one dated 23 April 2010. Deemed rehabilitation does not apply. Per R72(1)(e)(i), this application is refused.

III. Issues and Standard of Review

[17] The Applicant raises three issues for review in her written submissions. She argues that the Decision was unreasonable because the Officer failed to support the conclusions in the Decision letter with adequate reasons and because the Applicant's conduct did not disclose an offence under subsection 362(1) of the Criminal Code. The Applicant also argues that the Officer erred in law in failing to find that the Applicant's conduct was an offence under Philippine law. In my opinion, the Applicant's arguments all centre on the determinative issue of whether the Decision was reasonable.

[18] As a result, the standard of reasonableness applies to my review of the Decision (*Farenas v Canada (Citizenship and Immigration)*, 2011 FC 660 at para 21). Consequently, the Decision will only be set aside if it lacks justification, transparency, or intelligibility, and falls outside the range of possible, acceptable outcomes which are defensible on the particular facts of the Applicant's case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

IV. Legislative Background

[19] The relevant legislative provisions of the IRPA (section 33 and subsection 36(2)) and the Criminal Code (subsections 361(1) and 362(1)) are set out in Annex I to this judgment.

V. Analysis

Applicant's Submissions

[20] The Applicant's submissions centre on the inadequacy of the reasons provided by the Officer and are summarized in paragraph 9 of her Further Memorandum submitted to this Court:

> Apart from explaining that no conviction is required to sustain a s 36(2)(c) IRPA finding (which is correct), the Officer provides no reasons whatsoever in support of his conclusion that the Applicant's conduct (a) constituted an offence in the Philippines or that it (b) constitutes an offence in Canada. There is no assessment of the elements of either offence, no explanation of which facts were found to have satisfied those elements of the offences, and, indeed, no specification of which subsection of s 362(1) of the *Criminal Code* was relied on.

[21] The Applicant submits that paragraph 36(2)(c) of the IRPA requires an officer to find that: the act in question was committed; the act was an offence in the place in which it was

committed; and, if committed in Canada, the act would constitute an indictable offence under the Criminal Code. The Applicant argues that a reasonable decision would have laid out an analysis of the elements of the specific offences under Philippine and Canadian law and related those elements to the facts of the case. She submits that the Officer did not do so. Rather, the Officer appeared to be satisfied that the signing of two cheques later dishonoured was sufficient to found an offence in both countries. The Officer made no reference to the law or provisions pursuant to which he or she considered the acts in question an offence under Philippine law. The Officer made no findings as to any false pretense or intention on the part of the Applicant, an essential element of an offence in Canada under subsection 362(1). The Officer also ignored the fact that the charge against the Applicant in the Philippines was withdrawn by AsiaLink based on its misunderstanding of the facts. The Decision was, therefore, unintelligible and lacked justification.

Respondent's Submissions

[22] The Respondent submits that the Decision was reasonable. The Respondent argues that the Officer reviewed the Applicant's evidence and submissions in response to the procedural fairness letter of September 2017 but was not satisfied that the Applicant had provided a reasonable explanation for writing the dishonoured cheques. The Officer provided adequate reasons as the Decision letter was supplemented by the GCMS notes and was consistent with the evidence in the Certified Tribunal Record. The reasons explained why the Applicant's request was refused and did not prejudice her ability to seek judicial review. The Officer was not required to provide the in-depth reasoning required of an administrative tribunal (*Ozdemir v Canada (Citizenship and Immigration)*, 2001 FCA 331 (*Ozdemir*)). Finally, the Respondent

states that the Applicant's argument that there was no fraud because both parties were aware the account was without funds is disingenuous. It is precisely because the Applicant knew there were no funds in the account that her behaviour was fraudulent.

Analysis

[23] I find that the Decision was not reasonable. It provides little analysis of the facts and evidence before the Officer and the two facets or elements of paragraph 36(2)(c) of the IRPA.

[24] In the Decision letter, the Officer stated:

> You have not shown that you are able to comply with this requirement [para 36(2)(c) of the IRPA] because you have provided documents showing that you signed two cheques which were dishonoured by the bank. This is an offence contrary to the Philippines Batas Pambansa Bilang 22 (Bouncing Checks Law). If committed in Canada, these would be offences punishable under section 362(1) of the Criminal Code of Canada.

[25] I agree with the Respondent's argument that the Officer was not required to provide the same detailed reasons expected of a tribunal (*Ozdemir* at para 11). I also agree that it is well-established that the Officer's GCMS notes form part of the Decision. As a result, the Applicant's argument that the Officer provided no reasons whatsoever for the Decision is overstated. Nevertheless, the Officer was required to identify the critical reasoning that formed the basis of the findings and conclusions in the Decision. In other words, the Officer was required to address each element of paragraph 36(2)(c) of the IRPA and reasonably relate the facts and evidence provided by the Applicant to each such element. I find that the Officer did not do so.

[26] First, the Officer referred generally to BPB 22 as the basis for the conclusion that the Applicant's actions in signing the two cheques constituted an offence under Philippine law. The Officer did not identify a specific provision of the law and appears to rely solely on the fact of the initial charge against the Applicant. The Information laid against the Applicant in the Trial Court provides some indication of the basis of a charge pursuant to BPB 22, referring to the wilful and unlawful issuance of a cheque knowing there are insufficient funds to cover the amount of the cheque. Unfortunately, there is no analysis of these requirements in the Decision against the Affidavit of Desistance executed by AsiaLink and accepted by the Trial Court. The Affidavit states in part as follows:

> After careful deliberations and reflections on the part of the complainant and respondent, the latter found out that the institution of the instant complaint was due to MISACCOUNTING and MISAPPREHENSION OF FACTS on the part of the complainant and the respondent which fact was discovered after the case was filed for violation of B. P. 22;
>
> Because of the reason aforestated, the herein complainant could no longer continue the successful prosecution of the case and is now constrained to withdraw the complaint against the respondent with respect to the criminal charge of violation of B. P. 22 mentioned in the complaint.

[27] The charge was withdrawn by Order of the Trial Court in reliance on the Affidavit of Desistance.

[28] The Affidavit of Desistance and the Order of the Trial Court are unequivocal. The elements of an offence under BPB 22 could not be established on the basis of the Applicant's actions. The complainant, AsiaLink, swears in the Affidavit that its understanding of the facts was incorrect such that the prosecution of the case could not be successful. The Trial Court accepted the Affidavit of Desistance and withdrew the charge. I recognize that section 33 of the

IRPA requires only that an officer have reasonable grounds to believe that an offence was committed by the Applicant outside of Canada. However, in light of the evidence in the record to the contrary, the Officer was required to explain in some detail the conclusion that an offence was committed. The Officer's statement in the GCMS notes that the Applicant could not explain AsiaLink's misunderstanding is not a sufficient explanation.

[29] The Respondent relies on the case of *Magtibay v Canada (Citizenship and Immigration)*, 2005 FC 397 (*Magtibay*), in support of the argument that it was reasonably open to the Officer in this case to conclude that the Applicant committed an offence in the Philippines. In *Magtibay*, Justice Blais makes it clear that paragraph 36(2)(c) of the IRPA [then paragraph 36(1)(c)] does not require a conviction for the events in question, simply its commission. There is no dispute between the parties in this regard. In considering the case in the context of whether an offence has been committed, it is important to note that the factual basis of *Magtibay* differs substantively from that of the present case. In paragraph 5 of his decision, Justice Blais stated, "although the applicant's spouse was acquitted, the court found that the offence had in fact been committed, but since the victim had pardoned her aggressor, no conviction resulted" (emphasis added) (see also *Magtibay* at paras 12, 17 and 21). The issue in *Magtibay* centred on the role of the pardon. The underlying elements of the offence had been established by the prosecution. In the present case, the elements of an offence under BPB 22 were never assessed by the Trial Court.

[30] I turn now to the Officer's consideration of the second element of paragraph 36(2)(c) of the IRPA: whether the Applicant's actions, if committed in Canada, would constitute an

indictable offence under an Act of Parliament, namely subsection 362(1) of the Criminal Code. In the Decision letter, the Officer stated, “[i]f committed in Canada, these would be offences punishable under section 362(1) of the Criminal Code of Canada”. The GCMS notes contain no analysis of subsection 362(1), its constituent paragraphs or offences, or the actions of the Applicant against the requirements of the subsection. Most notably, as argued by the Applicant, the Officer provided no explanation for the apparent conclusion that the Applicant demonstrated the required fraudulent intent or intent to have another individual rely on a false statement.

[31] Subsection 361(1) of the Criminal Code defines a “false pretence” as a “representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.” The various subparagraphs of subsection 362(1) refer to obtaining credit by false pretence and to making a false statement in writing to obtain a loan. At the time she signed the cheques, the Applicant believed that her ex-boyfriend would make his loan repayments and that the cheques would not be cashed. Further, all of the parties to the transaction knew there were no funds in the account at the time the cheques were signed by the Applicant. This evidence is not contested by the Respondent. There was no act, representation or intention on the part of the Applicant to induce AsiaLink to rely on any false assertion or statement.

[32] The Officer failed to provide a substantive analysis in support of the conclusion that the Applicant’s actions, if committed in Canada, would have amounted to an offence under subsection 362(1). As a result, the Decision lacks transparency and intelligibility. Both the Applicant and this Court are left to speculate as to the Officer’s reasoning.

[33] A final note. The discussion by the Officer of the various NBI certificates obtained by the Applicant is not helpful to the Decision. The series of certificates reflect the progress of the charge against the Applicant in the Philippines. The final NBI certificate of February 2017 confirms the withdrawal of the charge (in its statement of "No Derogatory Record"), which is consistent with the evidence provided to the Officer.

VI. Conclusion

[34] The application is allowed.

[35] No question for certification was proposed by the parties and none arises in this case.

JUDGMENT in IMM-704-18

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The decision of the immigration officer is set aside and the matter is remitted for redetermination by a different officer

2. No question of general importance is certified.

"Elizabeth Walker"

Judge

ANNEX I

***Immigration and Refugee Protection Act*, SOR/93-47:**

Section 33	***Article 33***
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	33 Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.
[…]	[…]
Subsection 36(2)	***Paragraphe 36(2)***
36(2) A foreign national is inadmissible on grounds of criminality for	36(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :
(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;	a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;
(b) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence under an Act of Parliament; or

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

(d) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

***Criminal Code*, LRC 1985, c Ch-46 :**

Section 361

361(1) A false pretence is a representation of a matter of fact either present or past, made by words or otherwise, that is known by the person who makes it to be false and that is made with a fraudulent intent to induce the person to whom it is made to act on it.

[…]

Article 361

361(1) L'expression *faux semblant* ou *faux prétexte* désigne une représentation d'un fait présent ou passé, par des mots ou autrement, que celui qui la fait sait être fausse, et qui est faite avec l'intention frauduleuse d'induire la personne à qui on l'adresse à agir d'après cette représentation.

[…]

Section 362

362(1) Every one commits an offence who

(a) by a false pretence, whether directly or through the medium of a contract obtained by a false pretence, obtains anything in respect of which the offence of theft may be

Article 362

362(1) Commet une infraction quiconque, selon le cas :

a) par un faux semblant, soit directement, soit par l'intermédiaire d'un contrat obtenu par un faux semblant, obtient une chose à l'égard de laquelle l'infraction de vol peut

committed or causes it to be delivered to another person;	être commise ou la fait livrer à une autre personne;
(b) obtains credit by a false pretence or by fraud;	b) obtient du crédit par un faux semblant ou par fraude;
(c) knowingly makes or causes to be made, directly or indirectly, a false statement in writing with intent that it should be relied on, with respect to the financial condition or means or ability to pay of himself or herself or any person or organization that he or she is interested in or that he or she acts for, for the purpose of procuring, in any form whatever, whether for his or her benefit or the benefit of that person or organization,	c) sciemment fait ou fait faire, directement ou indirectement, une fausse déclaration par écrit avec l’intention qu’on y ajoute foi, en ce qui regarde sa situation financière ou ses moyens ou sa capacité de payer, ou la situation financière, les moyens ou la capacité de payer de toute personne ou organisation dans laquelle il est intéressé ou pour laquelle il agit, en vue d’obtenir, sous quelque forme que ce soit, à son avantage ou pour le bénéfice de cette personne ou organisation :
(i) the delivery of personal property,	(i) soit la livraison de biens meubles,
(ii) the payment of money,	(ii) soit le paiement d’une somme d’argent,
(iii) the making of a loan,	(iii) soit l’octroi d’un prêt,
(iv) the grant or extension of credit,	(iv) soit l’ouverture ou l’extension d’un crédit,
(v) the discount of an account receivable, or	(v) soit l’escompte d’une valeur à recevoir,
(vi) the making, accepting, discounting or endorsing of a bill of exchange, cheque, draft or promissory note; or	(vi) soit la création, l’acceptation, l’escompte ou l’endossement d’une lettre de change, d’un chèque, d’une traite ou d’un billet à ordre;
(d) knowing that a false statement in writing has been	d) sachant qu’une fausse déclaration par écrit a été faite

made with respect to the financial condition or means or ability to pay of himself or herself or another person or organization that he or she is interested in or that he or she acts for, procures on the faith of that statement, whether for his or her benefit or for the benefit of that person or organization, anything mentioned in subparagraphs (c)(i) to (vi).

concernant sa situation financière, ou ses moyens ou sa capacité de payer, ou la situation financière, les moyens ou la capacité de payer d’une autre personne ou organisation dans laquelle il est intéressé ou pour laquelle il agit, obtient sur la foi de cette déclaration, à son avantage ou pour le bénéfice de cette personne ou organisation, une chose mentionnée aux sous-alinéas c)(i) à (vi).

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-704-18
STYLE OF CAUSE:	CHERRYL RED v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 11, 2018
JUDGMENT AND REASONS:	WALKER J.
DATED:	DECEMBER 17, 2018

APPEARANCES:

Jared Will	FOR THE APPLICANT
Neeta Logsetty	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jared Will & Associates Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT