Federal Court  Cour fédérale

**Date: 20190424**

**Docket: IMM-2901-18**

**Citation: 2019 FC 519**

**Toronto, Ontario, April 24, 2019**

**PRESENT: The Honourable Madam Justice Walker**

**BETWEEN:**

**ARIEL ESTRELLA GONZALES**

**Applicant**

**and**

**THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP**

**Defendant**

## JUDGMENT AND REASONS

[1] The Applicant, Mr. Ariel Estrella Gonzales, seeks judicial review of a decision (Decision) of a senior immigration officer (Officer) refusing his application for permanent residence from within Canada on humanitarian and compassionate grounds pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). The application for judicial review is brought pursuant to subsection 72(1) of the IRPA.

[2] For the reasons that follow, the application will be dismissed.

## I. Background

[3] The Applicant is a citizen of the Philippines. He arrived in Canada on January 19, 2002 as a visitor. His temporary resident visa expired on January 19, 2003. On March 14, 2003, the Applicant's request for an extension of his temporary resident status was denied by Citizenship and Immigration Canada (CIC) (now Immigration, Refugees and Citizenship Canada) and he was advised that he was required to leave Canada immediately.

[4] The Applicant's common-law partner, Sharon Rarama, is a Philippine citizen. She is also a permanent resident of Canada. Ms. Rarama came to Canada in 2005 to work as a caregiver. She initially applied for permanent residence in 2008 and was approved in principle on May 6, 2009.

[5] The Applicant and Ms. Rarama have been living together since 2009. They have two daughters, aged six and three-years old. Ms. Rarama includes the Applicant in her health benefits and insurance coverage. There is no issue as to the genuine nature of the relationship.

[6] On March 4, 2013, Ms. Rarama's application for permanent residence in Canada was refused. She applied for judicial review of the refusal and, in *Rarama v Canada (Citizenship and Immigration)*, 2014 FC 60, Justice Strickland allowed the application for judicial review and returned the matter for redetermination (2014 Rarama Decision).

[7] Ms. Rarama's permanent residence application was subsequently approved. In her application, Ms. Rarama did not name the Applicant as her common-law spouse. The Applicant submits that Justice Strickland's decision nevertheless acknowledged the couple's common-law relationship even though he was not identified by name.

[8] On May 17, 2016, the Applicant applied for permanent residence in Canada pursuant to the Spouse or Common-Law Partner in Canada Class.

[9] On March 8, 2018, the Applicant was informed that he did not meet the eligibility requirements of the class pursuant to subsection 124(c) and paragraph 125(1)(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRP Regulations). Ms. Rarama had not disclosed the Applicant as her common-law spouse in her own application for permanent residence. As a result, she was not eligible as a sponsor for the Applicant.

[10] In the same March 8, 2018 letter, the Applicant was informed that his file was being transferred to the CIC's Vancouver office to be considered on humanitarian and compassionate (H&C) grounds pursuant to subsection 25(1) of the IRPA. The denial of the Applicant's permanent residence application on H&C grounds is the Decision under review in this application.

## II. Decision under review

[11] The Decision is dated May 28, 2018. The Officer found that the factors cited by the Applicant in his H&C application were not sufficient to grant an exemption from the provisions of paragraph 125(1)(d) of the IRP Regulations.

[12] The Officer began the analysis section of the Decision by noting that the Applicant was not eligible to be sponsored by Ms. Rarama pursuant to a family class application as he was not declared as her spouse in her application for permanent residence. In a letter dated February 22, 2018, Ms. Rarama explained that the Applicant was undocumented and that his inclusion in her application would be problematic.

[13] The Officer then considered the Applicant's relationship with Ms. Rarama. The Officer referred to the fact that the couple had been living together since 2009 and that their friends' evidence was that they were in a loving and committed relationship. The Officer accepted the relationship as genuine.

[14] The Officer observed that the Applicant last entered Canada in 2002 and has remained in Canada without valid status for the past 16-years, during which period he allowed his Filipino passport to expire. The Applicant provided no explanation for why he had remained past the expiry of his temporary visa and the Officer found that the Applicant's continued presence in Canada without valid status was not beyond his control. The Officer also found that Ms. Rarama had knowingly misrepresented her relationship status with the Applicant for the purpose of

obtaining her own permanent resident status. The Officer gave little weight to her explanation for the misrepresentation.

[15] The Officer set out the Applicant's statements that he had never been involved in any criminal acts in Canada, had not been on social assistance and had worked part-time. The Officer noted that there was little evidence on file that the Applicant had applied for or obtained work permits authorizing him to work in Canada. This fact, coupled with the Applicant's extended presence in Canada without valid status, displayed a disregard for the provisions of the IRPA from which he now requested an exemption.

[16] The Officer addressed the best interests of the Applicant's two Canadian children, noting their ages, then six and two, stating:

> I accept that the Applicant has significant family ties in Canada. I find that, given Ayeizshia and Arieyanna's ages and dependency on their parents for care, support and love, the best interest of Ayeizshia and Arieyanna is to remain in the care of their parents, the Applicant and Sharon.

[17] The Officer recounted Ms. Rarama's evidence that she is dependent on the Applicant and that the family would be placed in a difficult situation and would be overwhelmingly sad if the Applicant's request for permanent residence were denied. She stated that the Applicant drops their older daughter off at school and takes care of the younger daughter while Ms. Rarama works. Ms. Rarama provided little explanation regarding the Applicant's contribution to the family's financial situation as he was not authorized to work in Canada.

[18] The Officer acknowledged the Applicant's hope that his daughters would not experience growing up without a father but also noted that he had previously left behind his eight-year old son in the Philippines. The Officer recognized that the two girls would miss him greatly but stated that the Applicant was not subject to a removal order or bar from returning to Canada. He would be able to apply for a work permit from abroad to be reunited with his family in Canada. In the alternative, the Officer stated that Ms. Rarama and the children could return to the Philippines with the Applicant. Both parents would be able to work in the Philippines. The Officer found that there was little indication that Ayeizshia and Arieyanna would be unable to access health care, education and basic necessities in the Philippines and concluded that the best interests of the children did not justify granting the Applicant an H&C exemption.

[19] Finally, the Officer referred to the cases cited by the Applicant regarding applicable H&C principles but stated that little explanation had been provided regarding the application of the jurisprudence to the Applicant's situation. Neither the Applicant nor his representative had explained the impact of the Applicant's departure on the best interests of his children or the disruption that would be caused to his establishment should he return to the Philippines. No psychological evidence or adverse country condition evidence was provided to the Officer.

[20] The Officer concluded that the H&C considerations cited in the Applicant's request for permanent residence did not justify an exemption from the requirements of the IRPA pursuant to subsection 25(1).

## III. Issue and Standard of review

[21] The sole issue before me is whether the Decision was reasonable.

[22] It is well established that a denial of H&C relief pursuant to subsection 25(1) of the IRPA is reviewed on the reasonableness standard (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 (*Kanthasamy*); *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 18 (*Kisana*); *Marshall v Canada (Minister of Citizenship and Immigration)*, 2017 FC 72 at para 27 (*Marshall*)). Subsection 25(1) provides the Minister a mechanism to deal with exceptional circumstances. As a result, H&C decisions are highly discretionary and must be reviewed with considerable deference (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4).

[23] It is not the role of this Court to reweigh the evidence or to substitute its own appreciation of the appropriate outcome (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). My role is to determine whether the Decision is justified, transparent and intelligible and falls within the range of possible, acceptable outcomes which are defensible on the facts of the Applicant's case and in law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

## IV. Analysis

[24] Subsection 25(1) of the IRPA permits the Minister to provide relief from the requirements of the statute to a foreign national in Canada who applies for permanent resident status if the Minister is satisfied that "it is justified by humanitarian and compassionate

considerations relating to the foreign national". The Supreme Court of Canada (SCC) comprehensively considered the purpose and proper application of subsection 25(1) in *Kanthasamy*. The SCC's guidance was recently summarized by my colleague Justice Norris as follows:

> [25] In *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*]), the Supreme Court of Canada endorsed an approach to s 25(1) that is grounded in its equitable underlying purpose. The humanitarian and compassionate discretion enacted in the provision is meant to provide flexibility to mitigate the effects of a rigid application of the law in appropriate cases (*Kanthasamy* at para 19). Justice Abella, writing for the majority, approved of the approach taken in *Chirwa v Canada (Minister of Citizenship and Immigration)*, (1970), 4 IAC 338, where it was held that humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act" (*Kanthasamy* at para 13).
>
> (*Mursalim v Canada (Citizenship and Immigration)*, 2018 FC 596 at para 25 (*Mursalim*)).

[25] The question before me is whether the Decision is reasonable against the principles set out in *Kanthasamy.*

*The Officer's assessment of the Applicant's relationship with Ms. Rarama*

[26] The Applicant makes a number of submissions regarding the Officer's assessment of the Applicant's common-law relationship with Ms. Rarama. The Applicant first submits that the Officer took no notice of his relationship with Ms. Rarama despite the fact that it was openly revealed and described in Justice Strickland's 2014 Rarama Decision. This argument is clearly contradicted in the Decision. The Officer reviewed the couple's relationship as a core element of

the H&C assessment and accepted it as genuine. Through the course of the Decision, the Officer reviewed many aspects of the relationship and the consequences to Ms. Rarama and the family generally should the Applicant be required to leave Canada.

[27] The Applicant then focuses his submissions on his eligibility for spousal sponsorship by Ms. Rarama. He submits that the officer assessing the spousal sponsorship application had notice of the Applicant's relationship with Ms. Rarama and should have notified her and requested further information. In failing to do so, that officer breached the Applicant's right to procedural fairness. The Applicant argues that, in undertaking the H&C assessment, the Officer should not have relied on the eligibility decision made in respect of the sponsorship application.

[28] The decision regarding the Applicant's spousal sponsorship application and his eligibility for sponsorship is not before this Court. In any event, the Applicant has not cited authority for the proposition that the officer assessing the sponsorship application was required to request additional information from Ms. Rarama regarding her finalized permanent residence application. The Applicant has also not cited authority for the argument that the Officer committed an error in failing to reconsider the prior eligibility determination or in failing to ask for additional information, particularly when the evidence before the Officer confirmed the eligibility determination (see paragraphs 31-32 of this judgment). The Applicant was required to substantiate his H&C application. An officer makes no error in deciding a case based on the information provided by an applicant (*Thandal v Canada (Minister of Citizenship and Immigration)*, 2008 FC 489 at para 9). The cases cited by the Respondent are on point in this

regard (*Kisana, supra*; *Deol v Canada (Minister of Citizenship and Immigration)*, 2009 FC 406 at paras 67-68). In *Kisana*, the FCA held (at para 45):

> [45] In the context of H&C applications, it has been consistently held that the onus of establishing that an H&C exemption is warranted lies with an applicant; an officer is under no duty to highlight weaknesses in an application and to request further submissions (see, for example: *Thandal v. Canada (MCI)*, 2008 FC 489 at para. 9).

[29] I find that the Officer was not required to probe the prior eligibility decision or to ask for additional information from either the Applicant or Ms. Rarama in assessing the H&C application.

[30] The Applicant submits that the Officer's statement that he was not eligible to be sponsored by Ms. Rarama was incorrect. The Applicant appears to base this submission on two arguments: (1) Ms. Rarama did not misrepresent her marital status in her own application for permanent residence and the Officer's statement to this effect is false; and (2) the accepted fact of their common-law relationship should override the provisions of paragraph 125(1)(d) of the IRP Regulations.

[31] The Applicants arguments are not persuasive. His assertion that Ms. Rarama did not knowingly misrepresent her marital status in order to obtain permanent residence is contradicted by Ms. Rarama herself. In her letter of February 22, 2018, she stated:

> Since my common-law partner, ARIEL GONZALES, was undocumented, I believe that I will have a problem with the application if included and he is always afraid to reveal himself since he overstayed in Canada for so long. I hesitated to declare him because of his situation and because of that he was not examined when I was applying for permanent resident. I apologize

> for overlooking this. He is now ready to be examined any time if needed.

[32] Ms. Rarama's letter demonstrates she knowingly omitted referring to her relationship with the Applicant in her application for permanent residence. The Officer committed no error in so concluding on the evidence in the record.

[33] The Applicant relies on the 2014 Rarama Decision in support of his argument that Ms. Rarama did not misrepresent her relationship status. However, Justice Strickland's decision focused on the issues Ms. Rarama had encountered in producing relevant evidence and documents regarding her daughter in the Philippines, who was listed as a non-accompanying overseas dependent. Although the decision referenced Ms. Rarama's new common-law relationship in Canada, the issue of the Applicant's status as a spouse, and his omission from Ms. Rarama's permanent residence application, was not in issue or mentioned by Justice Strickland.

[34] Turning to the Applicant's second argument, paragraph 125(1)(d) of the IRP Regulations provides as follows:

| **Excluded relationships** | **Restrictions** |
|---|---|
| 125(1) A foreign national shall not be considered a member of the spouse or common-law partner in Canada class by virtue of their relationship to the sponsor if | 125(1) Ne sont pas considérées comme appartenant à la catégorie des époux ou conjoints de fait au Canada du fait de leur relation avec le répondant les personnes suivantes : |
| […] | […] |
| (d) subject to subsection (2), the sponsor previously made | d) sous réserve du paragraphe (2), dans le cas où le répondant |

| | |
|---|---|
| an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined. | est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle. |

[35] The Applicant was not named in Ms. Rarama's application for permanent residence. He was not examined as part of the application. Ms. Rarama does not contest this fact. As noted above, she stated in her letter that she did not include the Applicant because she feared his status would result in problems for her application.

[36] I find that the Officer's conclusion that the Applicant was not eligible for spousal sponsorship by Ms. Rarama by virtue of paragraph 125(1)(d) of the IRP Regulations was reasonable. The Applicant's common-law relationship with Ms. Rarama was not in question but the existence of the relationship did not overcome the Applicant's ineligibility.

*Was the H&C analysis in the Decision reasonable?*

[37] The Applicant argues that the Officer erred in failing to relate the principles set out by the SCC in *Kanthasamy* to his case. While the Applicant cites excerpts from the SCC's decision at length, he does not identify specific errors in the Officer's analysis and does not suggest how the Officer breached the principles established in the jurisprudence.

[38] The onus was on the Applicant to provide submissions and evidence with his H&C application as to the facts and circumstances that justified an exemption from the operation of paragraph 125(1)(d) of the IRP Regulations. He did not do so and relied instead on general principles in support of his application. As the Officer stated:

> The representative has cited various case law in a document titled Applicable H&C law and "Hardship". I note that the representative has provided little explanation about how [the] case law applies to the Applicant's situation. The Applicant and the representative have provided little details about how the Applicant's departure would affect the best interest of the children or the disruption caused to the Applicant's establishment by a return of the Applicant to his country of origin. I note that there were no psychological evidence or adverse country conditions provided by the Applicant or the representative on file.

[39] The Applicant has adopted the same approach in this application for judicial review. He has submitted a series of principles from H&C jurisprudence, primarily regarding the analysis of establishment and best interests of a child, without explaining how the principles apply to his case.

[40] The Applicant did not cite *Kanthasamy* in the Decision but this omission in and of itself is not a reviewable error. My review of the Decision is focused on the substance of the H&C analysis and whether the Officer reasonably applied the principles established by the SCC and followed in numerous cases by this Court and the Federal Court of Appeal.

[41] I find that the Officer properly applied the principles established in *Kanthasamy* in considering the Applicant's H&C application. The Officer did not use the type of impugned language described by Justice Abella in paragraph 33 of *Kanthasamy* ("unusual and undeserved

or disproportionate hardship"), nor did the Officer overlook any of the H&C factors that were evident on the facts set out in the H&C application.

[42] The Officer considered the length of the Applicant's sojourn in Canada; the fact that he had remained in Canada without authorization for 16-years; his relationship with Ms. Rarama and their division of childcare and paying labour; the Applicant's employment status; his relationship with his two daughters and his worry of being an absent father; the best interests of the couple's daughters; and the inevitable difficulties and emotional stress a separation of the family would occasion. The Officer reviewed the children's ages, their schooling, and the role of their parents in their lives. The Officer also considered other avenues by which the Applicant could rejoin his family in Canada or by which they could join him in the Philippines.

[43] The provision of H&C relief is an exceptional measure. It is not intended to create a parallel immigration system (*Kanthasamy* at para 23; see also *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265, at paras 18-20). I find that the Officer reasonably concluded that the Applicant had not demonstrated facts and circumstances which supported the extension of such relief to him. The Officer provided detailed and thoughtful reasons in the Decision that are intelligible and justified on the record. The Officer carefully considered the H&C factors identified in the case law, particularly those of establishment and best interests of the children. The scope of the analysis was reasonable on the evidence.

## V. Conclusion

[44] The application will be dismissed.

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

**JUDGMENT in IMM-2901-18**

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Elizabeth Walker"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2901-18 |
| **STYLE OF CAUSE:** | ARIEL ESTRELLA GONZALES v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 6, 2019 |
| **JUDGMENT AND REASONS:** | WALKER J. |
| **DATED:** | APRIL 24, 2019 |

**APPEARANCES:**

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| Stephen Jarvis | FOR THE DEFENDANT |

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