Federal Court  Cour fédérale

Date: 20191010

Docket: IMM-5565-18

Citation: 2019 FC 1286

Ottawa, Ontario, October 10, 2019

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

NENA SIOCO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Nena Sioco (the "Applicant"), applied for a permanent resident visa and was sponsored by Ms. Victoria Macata Castillo. The Applicant requested an exemption from subsection 117(1)(h) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*") on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). A Migration Officer (the "Officer") at Immigration, Refugees and Citizenship Canada denied the Applicant's application

by way of a letter dated October 29, 2018. It is this letter and the accompanying Global Case Management System ("GCMS") notes that are the subject of this application for judicial review.

[2] On November 13, 2018, the Applicant applied for judicial review of the Officer's decision. I find the Officer's decision is unreasonable and will set it aside for the reasons that follow.

II. **Preliminary Matter: Style of Cause**

[3] The Applicant has named Victoria Macata Castillo as the Applicant in this matter. At the request of the Respondent, and without objections from the Applicant, the style of cause in this matter is amended to reflect Nena Sioco as the proper Applicant. These reasons reflect the now-amended style of cause.

III. **Facts**

[4] Ms. Macata Castillo was born in the Philippines on September 10, 1983. When she was three years old, her parents relinquished Ms. Macata Castillo to the care of the Applicant. From that point onward, the Applicant became Ms. Macata Castillo's *de facto* parent. Ms. Macata Castillo's biological father died in 1997 and her biological mother's whereabouts are unknown. Both of Ms. Macata Castillo's siblings have also passed away. Effectively, her only family—with the exception of her husband and children—is the Applicant.

[5] In September 2007, Ms. Macata Castillo married her husband, a Canadian citizen. She immigrated to Canada in 2008. In due course, Ms. Macata Castillo became a Canadian citizen

herself. Since immigrating to Canada, she has remained in contact with the Applicant, provided her with regular remittance, and visited her twice in the Philippines: once in 2010 and once in 2012.

[6] The Applicant was born on August 3, 1957 and is a citizen of the Philippines. Her parents are deceased and she has two brothers in the Philippines with whom she has no contact. The Applicant had previously applied for a temporary resident visa, but was refused in January 2017.

[7] On May 26, 2017, Ms. Macata Castillo applied to sponsor the Applicant for a permanent resident visa. On June 7, 2017, the Mississauga Case Processing Centre ("CPC") provided a negative recommendation concerning the sponsorship application under subsection 117(1)(h) of the *IRPR* because Ms. Macata Castillo's husband was the co-signor. On the same day, Ms. Macata Castillo requested an exemption on H&C grounds. On October 29, 2018, the Officer wrote a letter denying the application.

IV. **Decision under Review**

[8] The Officer dismissed the sponsorship application on the basis that the Applicant is not a member of the family class under subsection 117(1) of the *IRPR* and that the H&C considerations are not sufficient to grant an exemption. The Officer found that the Applicant specifically ran afoul of subsection 117(1)(h) of the *IRPR*, which reads as follows:

Member	**Regroupement familial**

117 (1) A foreign national is a member of the family class if, with respect to a sponsor, the foreign national is	**117 (1)** Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants :
[…]	[…]
(h) a relative of the sponsor, regardless of age, if the sponsor does not have a spouse, a common-law partner, a conjugal partner, a child, a mother or father, a relative who is a child of that mother or father, a relative who is a child of a child of that mother or father, a mother or father of that mother or father or a relative who is a child of the mother or father of that mother or father	**h)** tout autre membre de sa parenté, sans égard à son âge, à défaut d'époux, de conjoint de fait, de partenaire conjugal, d'enfant, de parents, de membre de sa famille qui est l'enfant de l'un ou l'autre de ses parents, de membre de sa famille qui est l'enfant d'un enfant de l'un ou l'autre de ses parents, de parents de l'un ou l'autre de ses parents ou de membre de sa famille qui est l'enfant de l'un ou l'autre des parents de l'un ou l'autre de ses parents, qui est :
(i) who is a Canadian citizen, Indian or permanent resident, or	**(i)** soit un citoyen canadien, un Indien ou un résident permanent,
(ii) whose application to enter and remain in Canada as a permanent resident the sponsor may otherwise sponsor.	**(ii)** soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

[9] The Officer found that since Ms. Macata Castillo had a spouse and two children in Canada (subsection 117(1)(h)(i) of the *IRPR*) and a biological mother in the Philippines (subsection 117(1)(h)(ii) of the *IRPR*), the Applicant was not a member of the family class and was therefore ineligible for sponsorship.

[10] In the letter, the Officer rejected the H&C exemption request by stating that they had "reviewed [the Applicant's] sponsor's request for humanitarian and compassionate consideration: however, [they] do not find sufficient grounds to warrant an exemption." While the Officer's complete H&C analysis is absent from the decision letter, it can be found in the GCMS notes.

[11] The Officer analyzes the Applicant's H&C application in the GCMS notes. The Officer starts by summarizing the submissions. The Applicant submits that she will suffer unusual and underserved hardship if forced to remain in the Philippines. As she ages, she is becoming less capable of supporting herself. The Applicant asked the Officer to specifically assess her emotional and financial dependency as a *de facto* family member. Additionally, she asked the Officer to consider the support she could provide to Ms. Macata Castillo's family because Ms. Macata Castillo was experiencing difficulties caring for her children at that time due to her pregnancy.

[12] The Officer found that the Applicant is healthy, enjoys full citizenship rights in the Philippines, and is not under the threat of persecution. The Officer further noted that the Applicant receives financial support from Ms. Macata Castillo. The Officer was therefore not satisfied that the Applicant faced "severe financial and economic hardship". Regarding the Applicant's emotional wellbeing, the Officer found insufficient evidence that she was suffering from depression due to her separation from Ms. Macata Castillo. Moreover, the Officer found that Ms. Macata Castillo was free to visit the Applicant at any time, as evidenced by Ms. Macata Castillo's two previous trips to the Philippines. The Officer also turned their mind to the best

interests of Ms. Macata Castillo's two children. The Officer acknowledged the difficulties associated with raising two children while pregnant, but noted that this "situation is not unique across [Canada]" and that Ms. Macata Castillo's family has access to services and other means within Canada to support themselves.

[13] The Officer concluded the analysis by balancing the H&C considerations against the animating purpose of subsection 117(1)(h) of the *IRPR*. The Officer found that the purpose of this provision "is to allow a [Canadian] citizen or a permanent resident… living alone in [Canada] to sponsor one relative if they do not have any other sponsorable family members." The Officer found the H&C considerations insufficient to warrant an exemption from subsection 117(1)(h) of the *IRPR*.

V. **Issues**

[14] The issue in this case is whether the Officer's H&C decision was reasonable. This issue can be further subdivided into two sub-issues:

A. Did the Officer reasonably conduct a *de facto* family member analysis?

B. Did the Officer reasonably address the best interests of the children?

VI. **Standard of Review**

[15] H&C applications are reviewed on the reasonableness standard: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 44 [*Kanthasamy*].

VII. **Analysis**

A. *De Facto Family Member Analysis*

[16] Whether the Applicant is a *de facto* family member is "an important consideration in determining the merits of the H&C application… [to the] extent the applicant would have difficulty in meeting financial or emotional needs without the support and assistance of the family unit in Canada": *Frank v Canada (Citizenship and Immigration),* 2010 FC 270 at para 26 [*Frank*]. Section 12.6 of the Citizenship and Immigration Canada guidelines entitled "IP5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" ("IP5") instructs officers reviewing H&C applications to consider a list of factors in determining whether an individual is a *de facto* family member.

[17] Justice Martineau stated the following concerning *de facto* family members in *Frank* at para 29:

> What is clear from the foregoing is that *de facto* family member status is limited to vulnerable persons who do not meet the definition of family members in the Act and who are reliant on the support, both financial and emotional, that they receive from persons living in Canada. Therefore, *de facto* family member status is not normally given to independent and functional adults who happen to have a close emotional bond with a relative residing in Canada, as is the case in the present application.

(1) Did the Officer conduct a *de facto* family member analysis?

[18] The Applicant argues that the Officer completely failed to conduct a *de facto* family member analysis. She claims that virtually all the factors enumerated in IP5 are missing from the Officer's H&C analysis.

[19] The Respondent states that the Officer did consider whether the Applicant was a *de facto* family member. The Officer acknowledged that the Applicant and Ms. Macata Castillo had a

longstanding relationship, but found that a long relationship and emotional dependence alone does not make an individual a *de facto* family member: *Da Silva v Canada (Citizenship and Immigration)*, 2011 FC 347 at para 30.

[20] I agree with the Respondent: the Officer did consider whether the Applicant was a *de facto* family member. While the Officer did not exhaustively analyse each factor enumerated in IP5, the case law does not suggest that officers must conduct such exhaustive analyses for their decisions to be reasonable. The key to the *de facto* family member analysis is determining whether the individual in question is a vulnerable person who is emotionally and financially dependent on individuals living in Canada: *Frank* at para 29. In this case, the Officer acknowledged that Ms. Macata Castillo requested the Applicant be treated as a *de facto* family member. The Officer also considered the Applicant's financial and emotional dependency on Ms. Macata Castillo. However, while I believe that the Officer did analyze whether the Applicant was a *de facto* family member, I am not persuaded that the Officer's analysis was reasonable.

(2) Was the Officer's *de facto* family member analysis reasonable?

[21] The Applicant submits that the Officer made perverse findings based on the evidence, turning all of the evidence of a *de facto* family membership into negative H&C considerations. The Officer found Ms. Macata Castillo's financial support of the Applicant from abroad to be evidence that the Applicant would not face financial hardship if she remained in the Philippines. Likewise, the Officer found the correspondence between the two women to be evidence that Ms. Macata Castillo would continue to provide the Applicant with sufficient emotional support even

if she remained in the Philippines. Ms. Macata Castillo put forward this evidence of financial and emotional support to demonstrate that the Applicant was a *de facto* family member. Instead, the Officer used this evidence to undermine the H&C claim. The Applicant argues that the Officer's approach is inconsistent with the Supreme Court of Canada's guidance in *Kanthasamy* at para 33. The Applicant further contends that, had she not submitted this evidence of dependency, the Officer would have denied the application on the basis that the Applicant was not a *de facto* family member given the lack of financial and emotional support.

[22] The Respondent does not specifically address the Applicant's assertion that the Officer's findings were perverse. Rather, the Respondent states that the *de facto* family member analysis must be assessed holistically as a part of the broader H&C analysis: *Zafra v Canada (Citizenship and Immigration)*, 2018 FC 420 at para 27. The Respondent also extensively cites pre-*Kanthasamy* jurisprudence emphasizing the exceptional nature of H&C relief: *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at paras 15-20; *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at para 20; *Ramirez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1404 at paras 51-52; *Chieu v Canada (Minister of Citizenship and Immigration)*, [2002] SCJ No 1.

[23] I agree with the Applicant. The Officer made perverse findings that render the decision—as a whole—unreasonable. Throughout the decision, the Officer consistently undermines the factors that support a dependency relationship between the Applicant and Ms. Macata Castillo, which go to show a *de facto* family membership. The Applicant has aptly labelled the Officer's reasoning as exhibiting a "catch-22" problem: if the Applicant provides

evidence of financial and emotional dependency linked to Ms. Macata Castillo, the Officer would conclude that the Applicant's needs are perfectly met in the Philippines, and if the Applicant does not provide such evidence, the Officer would dismiss H&C considerations for lack of evidence. It is clear from how the Officer approached the evidence of financial and emotional dependence that the Officer's H&C analysis is not in accordance with the Supreme Court's teachings in *Kanthasamy*. The purpose of subsection 25(1) of the *IRPA* is "to offer equitable relief in circumstances that 'would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another'": *Kanthasamy* at para 21. Taking the evidence that the Applicant offered to demonstrate *de facto* family membership and turning it into a negative H&C consideration shows that the Officer did not conduct the analysis with this purpose in mind.

[24] During the hearing, the Applicant's counsel raised issue with the Officer's analysis of the time the Applicant and Ms. Macata Castillo had spent apart on their relationship. Counsel argued that the ten years the two women had spent apart would not have been relevant to the legitimacy of their relationship had they been biologically related. Indeed, in *Yu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 956, the applicant and her sister had been apart for twelve years. Nonetheless, Justice Shore held the officer's conclusion that the applicant was not a *de facto* family member was unreasonable. Likewise, in this case, counsel argued the Officer unreasonably imposed an expectation that the Applicant and Ms. Macata Castillo could not be separated for a long period of time because their relationship was non-biological. I agree.

[25] Moreover, the Officer's findings concerning Ms. Macata Castillo's trips to the Philippines were unreasonable. Taking two trips in ten years does not establish that Ms. Macata Castillo "is free to visit the Applicant anytime." Travelling to the Philippines when one has two, now three, small children, and a modest combined family income is not a small feat. Coming to a conclusion that seeing each other twice in ten years is sufficient to satiate the emotional needs of two women—who are essentially mother and daughter—indicates that the Officer approached this decision without compassion in either their mind or heart.

[26] Nowhere in the Officer's letter or the GCMS notes do they speak of their humanitarian concerns or compassion. Taken as a whole, the Officer's decision reads as though they were ticking off boxes on an itemized checklist, rather than holistically turning their mind to H&C grounds.

B. *Best Interests of the Children*

[27] The Applicant argues that the Officer unreasonably dealt with the best interests of Ms. Macata Castillo's children. The Applicant claims the Officer applied a test of unusual hardship by concluding that the situation for Ms. Macata Castillo's children would not be different from those of many children throughout Canada if the Applicant remained in the Philippines. Children are rarely deserving of hardship, so it is unreasonable for the Officer to impose such a test: *Williams v Canada (Citizenship and Immigration)*, 2012 FC 166 at para 67.

[28] The Respondent contends that the Officer reasonably assessed the best interests of Ms. Macata Castillo's children. The Officer noted that Ms. Macata Castillo is able to receive

assistance from her husband, various services, and other means for raising her young family. Thus, her children would not be prejudiced by the Applicant remaining in the Philippines.

[29] I agree with the Respondent, the Officer's analysis of the best interests of the children was reasonable. The Officer acknowledged that the best interests of these children were at issue in this case and conducted a reasonable analysis in light of the circumstances. The Applicant has never been a physical presence in these children's lives. It would not be as though the Applicant remaining in the Philippines would deprive the children from a previously benefitted support. While I imagine it will always be challenging to raise a young family, the fact that Ms. Macata Castillo's children may have to settle for two caregivers—their mother and father—instead of three cannot be characterized as a hardship sufficient to warrant H&C relief.

VIII. **Certified Question**

[30] Counsel for each party was asked if there were any questions requiring certification. They each stated that there were no questions for certification and I concur.

IX. **Conclusion**

[31] The Officer's *de facto* family member analysis renders this decision unreasonable. Thus, this application for judicial review is granted.

JUDGMENT in IMM-5565-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to reflect Nena Sioco as the proper Applicant.

2. The decision under review is set aside and the matter returned back for redetermination by a differently constituted panel.

3. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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