Federal Court  Cour fédérale

Date: 20211213

Docket: IMM-3884-20

Citation: 2021 FC 1407

Toronto, Ontario, December 13, 2021

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

LOURDES DELA PENA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Lourdes Dela Pena, seeks judicial review of a decision of a Senior Immigration Officer [Officer] that refused her application under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for permanent residence on humanitarian and compassionate [H&C] grounds and denied her alternate request for a temporary resident permit [TRP].

[2] For the reasons that follow, I find that the Applicant has demonstrated that the decision is unreasonable. The application is therefore granted and shall be returned to a different officer for redetermination.

I. Background

[3] The Applicant is a 46-year-old citizen of the Philippines. For the past 20 years, she has worked outside her country to help support her family and some of her relatives' education. Between 2000 and 2012, she worked primarily in Hong Kong and Taiwan. She came to Canada in 2012 on a temporary work permit that expired in 2014.

[4] She sought the help of an immigration and employment agency [Agency] to obtain a renewal and continued to work in Canada. The Applicant asserts that the Agency charged illegal recruitment fees and took unlawful deductions from her pay, while making false representations about assisting the Applicant to obtain immigration status and to complete the necessary filings. She and three others have initiated court proceedings against the Agency for these activities.

[5] The Applicant's application for a work permit extension was refused in September 2016 and her application for a temporary resident visa was refused in August 2016.

[6] In August 2018, the Applicant submitted an application for permanent residence on H&C grounds and requested a TRP in the alternative. The H&C application was based on four factors: establishment in Canada; adverse country conditions in the Philippines; the Applicant's legal action against the Agency; and the Applicant's financial support for her mother.

[7] In May 2019, the Applicant submitted a separate application for a temporary resident visa and work permit that was refused on April 24, 2020. On August 11, 2020, the H&C application was denied, as was the alternative request for a TRP. That decision is now the subject of this judicial review [the Decision].

II. Decision under review

[8] In the Decision, the Officer found that the Applicant had not demonstrated sufficient establishment in Canada. Despite residing in Canada for a significant period, developing friendships, being involved in her church and community, and maintaining employment, the Officer found that the length of time the Applicant was without immigration status, her failure to regularize her status, her unauthorized employment, and the absence of family in Canada weighed against a finding of establishment.

[9] The Officer acknowledged various adverse country conditions in the Philippines relating to crime, sexual harassment or discrimination in the workplace, and corruption and impunity in the criminal justice system, but concluded that there was no evidence to indicate that the Applicant had been a victim or would be affected by these conditions on return to the Philippines.

[10] The Officer noted that there were research reports indicating high rates of unemployment and poverty in the Philippines, and that the Applicant had indicated concern with her age, but stated that the Applicant's familiarity with the Philippines, Tagalog language skills, education, and international work experience would assist the Applicant in finding employment. If not, the

Officer concluded that the Applicant could seek work overseas. The Officer inferred that the Applicant's ability to continue to support her mother financially was unlikely to be adversely affected.

[11] The Officer noted the Applicant's ongoing legal action against the Agency but concluded that it did not require her to remain in Canada and that she would be able to maintain contact with and instruct her counsel from abroad.

[12] On the TRP request, the Officer concluded that the Applicant had not established any exceptional circumstances or compelling reasons to overcome her inadmissibility as an overstay. The Officer did not consider the Applicant's need to stay in Canada to pursue her legal action to outweigh the risk that the Applicant would overstay her authorization.

III. Issues and Standard of Review

[13] The following issues are raised by this application:

1. Did the Officer's establishment analysis unreasonably focus on the Applicant's lack of status and fail to consider the evidence fully?
2. Did the Officer rely on speculation in concluding that the Applicant would not face hardship if she were to return to the Philippines?
3. Did the Officer provide insufficient reasons for refusing the TRP request?

[14] The standard of review of the substance of an H&C decision is reasonableness (*Choi v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 494 [*Choi*] at paras 10-11; *(Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [*Vavilov*] at paragraphs 16-17 and 25). An Officer's TRP decision is also reviewed on a standard of reasonableness (*Ju v Canada*

(Citizenship and Immigration), 2021 FC 669 at para 11). None of the situations for departing from the presumption of reasonableness applies in this case *(Vavilov* at paragraphs 16-17 and 25).

[15] In conducting a reasonableness review, the Court must determine whether the decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 85-86; *Canada Post Corp* v *Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31). A reasonable decision when read as a whole, and taking into account the administrative setting, bears the hallmarks of justification, transparency, and intelligibility (*Vavilov* at paras 85, 91-95, 99-100).

IV. Analysis

A. *Subsection 25(1) of the IRPA*

[16] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of the IRPA and grant permanent resident status, if the Minister is of the opinion that such relief is justified for H&C reasons. The discretion in subsection 25(1) is a flexible and responsive exception to the ordinary operation of the *IRPA*, to mitigate the rigidity of the law where the facts warrant special relief (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at para 19). The Applicant must justify the exemption requested. The purpose 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), thus re-establishing the approach taken in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*].

[17] In order to make its determination, an officer must substantively consider and weigh all the relevant facts and factors before them and must conduct an assessment of the Applicant's hardship (*Kanthasamy* at paras 22 and 25). Subsection 25(1) presupposes that an applicant has failed to comply with one or more provisions of the IRPA. As such, a decision maker must assess the nature of the non-compliance and its relevance and weigh this against the H&C factors in each case when conducting its analysis (*Mitchell v Canada (Citizenship and Immigration)*, 2019 FC 190 at para 23).

B. *Did the Officer's establishment analysis unreasonably focus on the Applicant's lack of status and fail to consider the evidence fully?*

[18] The Applicant argues that the Officer placed too much emphasis on her lack of status and unauthorized employment in Canada when assessing her establishment, instead of using compassion and considering the Applicant's circumstances and efforts to restore her status.

[19] The Respondent argues that the decision was reasonable and that the Officer appropriately engaged with all of the factors raised by the application, including the Applicant's overstay and unauthorized employment and only raised these factors when relevant.

[20] For the reasons set out below, I agree with the Applicant. The Officer unreasonably focussed on the Applicant's overstay and the unauthorized nature of her employment, and in doing so did not truly assess the extent of establishment and the Applicant's circumstances.

[21] As set out in *Samuel v Canada (Citizenship and Immigration)*, 2019 FC 227 at paragraph 17:

> When an officer takes an applicant's lack of status into consideration (which he is entitled to do), the officer must balance the need to respect Canada's immigration laws with the fact that section 25 of the IRPA will frequently involve applicants who are without status. In my view, it is contrary to this need for balancing and therefore unreasonable to repeatedly discount positive H&C factors related to establishment because of non-status.

[22] In this case, the Officer does not fully engage with the Applicant's employment history, but rather discounts her employment because of her status. The Officer notes the Applicant's submission that some of the time that she worked in Canada without authorization was because she was misled by the Agency. However, the Officer discredits this explanation, on the basis that once the Applicant realized that she had been misled by the Agency she still continued to work in Canada without authorization. While the Officer later goes on to note under his hardship analysis that the circumstances with the Agency were unfortunate, there is no consideration for the impact of these events on the Applicant's establishment. The Officer has not considered the complications resulting from the Agency's involvement in the steps taken to obtain status and has not shown any compassion for the Applicant's circumstances. As stated in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at paragraphs 31-33, the reviewing court must have some reason to believe that the officer has considered not just hardship, but the *Chirwa* approach and humanitarian and compassionate factors in the broader sense.

[23] The Officer was obliged to consider the steps taken by the Applicant to establish herself, to engage with the circumstances around the Applicant's experience with the Agency, and the factual background associated with her trying to obtain status.

[24] Further, the inference from the Officer's reasoning is that the Applicant should have done nothing to support herself while in Canada until her status was resolved. As stated in *Sebbe v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 813 [*Sebbe*] at paragraph 23, it is unrealistic to presume that an applicant can simply put their life on hold while they await a decision on their status:

> [23] ... it is entirely irrelevant whether the persons knew he or she was subject to removal when they took steps to establish themselves and their families in Canada. While some may suggest that in establishing themselves applicants are using a back-door to gain entry into Canada, that view can only be valid if the applicants have no real hope to remain in the country. In virtually all these cases applicants retain hope that they will ultimately be successful in remaining here. Given the time frame most of these applicants spend in Canada, it is unrealistic to presume that they would put their lives on hold awaiting the final decision.

[25] The Applicant attempted to regularize her immigration status from the time her initial work permit expired in 2014. The fact that the Applicant sought employment while her application for status and authorization was pending must be considered in context. The Officer has not established that circumstances around the Applicant's entry and stay in Canada discredit the Applicant or would encourage illegal entry to Canada (*Choi* at paras 22-23; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 19).

[26] The Respondent refers to the Court's decision in *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 [*Shackleford*] as authority for the reliance of the Officer on the Applicant's illegal status in the consideration of establishment. I do not dispute that this is a factor that must be considered and that will impact the weight to be given to the length of stay in

Canada. As noted in *Shackleford*, the mere presence in Canada by someone who has been in this country illegally, for a long time, cannot carry much favour.

[27] In this case, it was not unreasonable for the Officer to consider the Applicant's status as a factor; however, it was unreasonable for the Officer to not fully engage with the Applicant's evidence.

[28] The Officer notes that the Applicant has developed relationships in Canada. However, the treatment of the evidence relating to these relationships is largely cursory and does not address the substance of the letters submitted on the Applicant's behalf (*Gamboa Saenz v Canada (Citizenship and Immigration)* 2019 FC 713 at paras 4-6), the full nature of the Applicant's activities in Canada, her evidence that those activities have benefited her community, or the hardship she will face by losing the connections made. As noted in *Sebbe* at paragraph 21, an officer is required to analyze and assess the degree of establishment of an applicant and must examine whether the disruption of that establishment weighs in favour of granting the exemption.

[29] It is not enough for the Officer to simply reference the evidence and then to conclude that this does not demonstrate that the Applicant has a great deal of establishment in Canada without explaining why the evidence is not viewed to meet this threshold. The Officer must show that they have engaged with the evidence.

[30] In my view, these omissions render the Officer's analysis of the Applicant's establishment unreasonable.

C. *Did the Officer rely on speculation in concluding that the Applicant would not face hardship if she were to return to the Philippines?*

[31] The Applicant argues that the Officer erred in his hardship analysis by relying on speculation as to the Applicant's ability to obtain employment in the Philippines. The Applicant indicated in her evidence that she had to leave the Philippines to find work. For close to 20 years she worked outside the Philippines in order to earn money to support her family. The Applicant asserts that the Officer did not meaningfully consider this evidence in the analysis; I agree.

[32] While the Officer acknowledges that the country evidence indicates a high rate of unemployment and poverty in the Philippines, he does not apply this evidence to the Applicant in a meaningful way. The Officer notes that the Applicant was born and raised in the Philippines, that her first language is Tagalog and that she has completed high school and has some post secondary education. However, these are the same circumstances that forced the Applicant to leave the Philippines in the first place. The Officer does not explain how these characteristics will now assist the Applicant in finding employment, particularly as the articles indicate that unemployment has increased.

[33] The Officer concludes that these characteristics, the Applicant's limited work experience in the Philippines, her past work in Taiwan and her work in Canada will "greatly assist" her in obtaining employment in the Philippines. There is no explanation to support this conclusion. The

Officer has not accounted for the passage of time, the Applicant's age or her past experience in not finding steady and reliable employment in the Philippines in this analysis.

[34] Indeed, despite mentioning age discrimination as a challenge presented by the Applicant, the Officer has not addressed this issue at all and how the Applicant's age may affect her job prospects.

[35] I agree with the Applicant, the conclusion of the Officer is speculative and is not justified sufficiently against the Applicant's evidence and the country evidence.

[36] The degree of speculation with the Applicant's employment is compounded by the fact that the Applicant financially supports her mother. While the Officer acknowledges that the Applicant has raised this concern, the Officer shows little empathy for this consideration.

[37] The Officer goes on to state that if the Applicant cannot obtain employment in the Philippines that she could apply for work overseas to provide financial support for her mother in the same way as she has done in the past. However, I agree with the Applicant, this finding runs contrary to the purpose of the H&C application and raises considerations that were not contemplated by the Applicant's application (*Hermann v Canada (Citizenship and Immigration)*, 2014 FC 266 at paras 14-16).

[38] Further, by concluding that the Applicant may not be able to find employment in the Philippines and may need to go elsewhere to find work, the Officer is contradicting earlier

findings and is acknowledging the likelihood that there may be hardship to the Applicant if she returns to the Philippines. This reasoning is not intelligible in the context of the Officer's other findings.

[39] For all of these reasons, I am of the view that the Officer's analysis of the country evidence relating to employment was not reasonable.

D. *Did the Officer provide insufficient reasons for refusing the TRP request?*

[40] While little attention was spent on the TRP request, I will go on to consider this issue for completeness.

[41] The Applicant argues that the Officer's reasons for refusing the TRP lacks justification and accordingly fails to meet the standard outlined in *Vavilov*. The Officer's reasons on the TRP request are as follows:

> Having carefully reviewed the applicant's materials I find that the applicant has not satisfied me that there are sufficient reasons to justify the issuance of a TRP. Specifically, I find that the applicant's need to remain in Canada to pursue litigation against her former employer and former employment agency does not outweigh the risk that the applicant would overstay the time that she was authorized to remain in Canada.

[42] Although brief, these reasons respond to the sole basis on which the Applicant applied for the TRP – to carry on her legal action against the Agency.

[43] In my view, the Officer's reasons are not deficient on this issue and provide sufficient justification for the foundation for the request.

V. Conclusion

[44] For the reasons set out above, it is my view that the Officer's decision on the Applicant's H&C application is not reasonable. The application is therefore granted and the matter will be referred back to another officer for redetermination.

[45] No question for certification was proposed by the parties and I am of the view that none arises in this case.

JUDGMENT IN IMM-3884-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The matter is remitted to a different officer for redetermination.

3. No certified question shall issue.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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