Federal Court  Cour fédérale

Date: 20220208

Docket: IMM-2547-20

Citation: 2022 FC 161

Ottawa, Ontario, February 8, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

MARISOL VERIDIANO BOBADILLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant seeks judicial review of the decision of a Senior Immigration Officer, dated May 7, 2020, rejecting her application for permanent residence on humanitarian and compassionate (H&C) grounds, pursuant to section 25(1) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 (*IRPA*) and for refusing her application, in the alternative, for a Temporary Resident Permit (TRP).

[2] The Applicant submits that the Officer erred by giving negative weight to her lack of status in Canada, by failing to consider her reasons for overstaying, by using her positive establishment in Canada to mitigate the hardship she would experience should she be required to return to the Philippines, by ignoring evidence, and by providing insufficient reasons.

[3] For the reasons that follow, the application is granted.

II. **Background**

[4] The Applicant is a citizen of the Philippines who has been living in Canada since 2012, and had lived in Taiwan for several years before that, in order to provide financial support to her family. Prior to that, she had never been able to find employment in the Philippines. Her immediate family – husband, two daughters and parents – reside in the Philippines. She also has a son in California.

[5] The Applicant came to Canada with a valid work permit which was extended to August 29, 2014. Her initial employment was in a fish plant in Prince Edward Island. She then sought the assistance of an immigration and employment agency and took a position at a mushroom farm. A further extension request was denied on November 2, 2014, due to delay in obtaining a new Labour Market Impact Assessment. She has remained in Canada since then without status.

[6] An H&C application was submitted in January 2018 and refused on May 7, 2020. In 2019, the Applicant also applied for a TRP, which was denied at the same time as her H&C Application. In addition, she, and three other migrant workers filed a class action law suit against the employment agency she used to obtain employment. The firm allegedly charged them illegal recruiting fees and took unlawful deductions from their wages while making false representations about assisting them to obtain immigration status and to complete the necessary filings.

[7] The Officer was not satisfied that the Applicant had provided sufficient objective evidence to warrant a positive exemption under s. 25.

[8] The Officer considered that the Applicant demonstrated a lack of respect for the immigration laws of Canada by failing to depart Canada when advised to do so and having accepted new employment without having a valid work permit. The Officer considered that the Applicant chose to remain in Canada even after knowing that the employment agency was not acting in her best interests.

[9] Positive weight was given to the Applicant's establishment in Canada through her former employment, volunteer work in her community and participation in community activities. The Officer was also satisfied the Applicant provided financial support to her family in the Philippines when she was working. However, the Officer was not satisfied that there were no other avenues available to support them such as possibly through the receipt of funds from her sister who lives and works in Saudi Arabia. The Officer was not satisfied that the Applicant had

provided sufficient objective evidence to demonstrate that she would be unable to find employment in her country of origin since she had acquired transferable skills while working in Taiwan and Canada. The Officer was satisfied that she could re-establish herself in the Philippines because of her strong family ties and familiarity with the culture and the language.

[10] The Officer found that there was insufficient evidence that the Applicant was continuing to support her daughters in the Philippines or that she was offering any support to the son in California. The Officer considered that the Applicant could reunite with her children if she leaves Canada. The country condition evidence offered in support of the application did not satisfy the Officer that the Applicant would be adversely affected if required to return.

[11] The Officer refused the request for a TRP largely because the Applicant had failed to provide sufficient evidence that the class action lawsuit had been commenced and would require the Applicant's physical presence in Canada.

III. **Issues and Standard of Review**

[12] The sole issue on this application is whether the Officer's decision was reasonable.

[13] As determined by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 30, reasonableness is the presumptive standard for most categories of questions on judicial review, a presumption that avoids undue interference with the administrative decision maker's discharge of its functions.

[14] The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made (*Vavilov* at para 15), including the justification offered for it. To determine whether the decision is reasonable, the reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 86 and 99). Thus, a decision-maker's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47).

[15] In addition, the Court held at para 125 of *Vavilov*, that the reasonableness of a decision is undermined if the evidence is fundamentally misapprehended. In conducting a reasonableness review of factual findings, deference is warranted and it is not the role of the Court to reweigh the evidence or the relative importance given by the decision-maker to any relevant factor (*Kanthasamy v Canada (Minister of Citizenship and Immigration*), 2015 SCC 61 [*Kanthasamy*] at para 112; *Vavilov* at para 96). The party challenging the decision bears the burden of showing that it is unreasonable (*Vavilov* at para 100).

IV. **Analysis**

[16] At the hearing, counsel did not press all of the points raised in the Applicant's Memorandum of Fact and Law and focused on a few key arguments.

[17] Based on those arguments and the record, I am satisfied that the decision of the Officer in this instance was unreasonable. I agree with the Applicant that the Officer erred by ignoring the vulnerability of the Applicant – her reasons as to why she did not leave Canada when required – and thus, did not apply the compassion and empathy required in such applications. In this context, the purpose of the H&C application was not to serve as an alternative route to immigration but to overcome the Applicant's inadmissibility for working without authorization and remaining in Canada without status.

[18] In particular, the Officer demonstrated a lack of compassion for the circumstances in which the Applicant received allegedly unfair and illegal treatment by the staffing agency. The Officer emphasized that the Applicant had remained in Canada without status instead of engaging with that evidence. While that is but one factor to be considered in the s. 25 analysis, it had to be adequately considered to be consistent with the approach discussed by the Supreme Court majority in *Kanthasamy,* at para 13. H&C considerations refer to "those facts, established by the evidence, that would excite in a reasonable man [sic] in a civilized community a desire to relieve the misfortunes of another."

[19] The case of one of the other three workers who initiated the class action law suit was dealt with by Madam Justice Furlanetto in *Dela Pena v Canada (Minister of Citizenship and Immigration)* 2021 FC 1407 [*Dela Pena*]. While there are some minor factual differences, none of them are in my view material to the conclusions reached by Justice Furlanetto. At paragraph 20, she wrote:

> 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.

[20] Justice Furlanetto found that the Officer did not fully engage with the Applicant's employment history and discounted it because of her status. As in this matter, the Officer noted 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 discredited 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.

[21] As in *Dela Pena*, the Officer here did not consider the adverse effects of the employment agency's involvement in the steps taken to obtain status and showed no compassion for the Applicant's circumstances. This is contrary to the approach called for by the Supreme Court in *Kanthasamy*. It was also unreasonable for the Officer to have expected the Applicant to do nothing to support herself while in Canada until her status was resolved: *Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813 at para 23. Moreover, the Officer speculated about the possibility that the Applicant's family would receive support from her sister in Saudi Arabia on which there was no evidence.

[22] On the facts of this case and the reasons provided for the negative decision, I am not satisfied that the Officer "performed the requisite analysis of whether in light of the humanitarian purpose of s 25(1), the evidence as a whole justified relief": *Kanthasamy* at para 45. See also, *Kaur v Canada (Immigration and Citizenship)* 2018 FC 777 at paras 13-18 [*Kaur*].

V. **Conclusion**

[23] I am persuaded that the Officer did not properly consider the evidence put before him or her and failed to explain the decision in light of that evidence, particularly with regard to the Applicant's establishment in Canada. Of greater concern is that the Officer did not justify the decision under the lens of compassion and empathy with regard to the circumstances under which the Applicant came to lose her status and employment in Canada.

[24] Like Justice Fothergill in *Kaur* and Justice Furlanetto in *Dela Pena*, I am not satisfied that the officer performed the analysis called for in *Kanthasamy*. The decision does not represent a reasonable outcome based on the law and the evidence. It lacks justification, transparency and intelligibility on important factors and must, therefore, be returned for reconsideration by another officer.

[25] No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-2547-20

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted for reconsideration by a different officer. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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