Federal Court Cour fédérale

Date: 20220426

Docket: IMM-2752-21

Citation: 2022 FC 603

Ottawa, Ontario, April 26, 2022

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

MARIA ESTHER RUSTRIAN FONSECA

Applicant

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Maria Esther Rustrian Fonseca, a 58-year-old citizen of Mexico, seeks judicial review of a decision dated April 1, 2021 [Decision] of a senior immigration officer [Officer] refusing her application for permanent residence on humanitarian and compassionate [H&C] grounds. The Officer determined that Ms. Fonseca's overall establishment in Canada was not sufficient to warrant an exemption on H&C grounds and that she did not

provide sufficient evidence to demonstrate the financial difficulties she would face if she returned to Mexico. The Officer also found that Ms. Fonseca failed to demonstrate that her family continues to be dependent on her employment in Canada.

[2] I am allowing the present application because the Officer has misconstrued the nature of the exemption that Ms. Fonseca was seeking in her application. I certainly cannot blame the Officer for the confusion as Ms. Fonseca's application material is far from being a beacon of clarity; however, under the circumstances, I cannot consider the Decision as being reasonable.

II. Facts and analysis

[3] Ms. Fonseca has legally been in Canada for the better part of the last 22 years. She first obtained a work permit and entered Canada in July 2000 as a seasonal farm worker from Mexico, and throughout the years that followed, she received several work permits and work permit extensions. She would return to Canada every year, from 2001 to 2003, in conjunction with the farm worker program. In 2003, Ms. Fonseca secured employment with Nation Wide Canning Ltd. [Nation Wide Canning] as a machine operator, eventually progressing to becoming a supervisor and instructor. Initially, Ms. Fonseca would travel every year to Canada from Mexico to work for the company for a few months at a time; however, in February 2009, she decided to return to and remain in Canada, and with the exception of the 2013 holiday period, Ms. Fonseca worked for Nation Wide Canning until 2014, when she moved back to Mexico upon the expiry of her work permit at the time.

[4] There seems to be some confusion as to whether Ms. Fonseca was actually in Canada in 2015, but what seems to be clear is that she was refused a work permit for 2015 and 2016. However, in February 2017, she returned to Canada to again take up a position with Nation Wide Canning, and other than for short periods in December 2018 and June 2019, she has remained in Canada on a valid work permit, working for the company and living in the company residence near its rural plant in Cottam, Ontario; her current work permit expires on July 3, 2022.

[5] Ms. Fonseca claims that prior to coming to Canada in 2000, she was very poor and had no means of supporting herself and that the only job she could find was selling tortillas on the streets of Mexico. Ms. Fonseca asserts that although her children are now adults, her employment in Canada has allowed her to financially support her sons and pay for their education; one of her sons now resides in Canada as a temporary foreign worker. Her employment with Nation Wide Canning also allowed Ms. Fonseca to support her mother financially when she became ill. She wishes to settle permanently in Canada so as to continue to support the members of her family who depend on her financially.

[6] Of significance is that in September 2011, Ms. Fonseca applied for permanent residency under the Canadian Experience Class [Federal Program]; however, her application was refused in October 2011 on account of her not meeting Canada's official language requirements – her language ability in English was limited. That decision was never taken to judicial review. It would seem that Ms. Fonseca's English language skills were also the reason for the refusal of her 2017 application for permanent residency under the Ontario Immigrant Nominee Program, In-Demand Skills stream [Ontario Program].

[7] In January 2020, Ms. Fonseca filed her application for permanent residence on H&C grounds; the decision with respect to this application is the subject matter of the present application. I need not go into the analysis of the factors considered by the Officer as it is clear from the Decision that the Officer was under the mistaken belief that the exemption being sought by Ms. Fonseca was to allow her to file the application from within Canada, while in reality, she was seeking an exemption from the official languages requirements of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[8] It must be kept in mind that Ms. Fonseca's education and English language skills are limited. She had used an immigration consultant to prepare her application, but the work of the consultant left much to be desired.

[9] It seems clear to me from reading the Decision that the Officer was under the impression that Ms. Fonseca was seeking an in-Canada exemption, which is understandable given the manner in which the H&C application was prepared. The introductory letter from her immigration consultant refers specifically to an "In-Canada Application for Permanent Residence via Humanitarian & Compassionate Considerations". More importantly, the supplementary information form was completed as if the particular exemption being sought was for an in-land claim. Box 7, which asks for an explanation as to the H&C reasons that prevent an applicant from leaving Canada, was fully completed, with details as to the length of time Ms. Fonseca has been in Canada, her ability to support herself, and her personal value to Canadian industry in working in a position very few Canadians seek. I accept that her submissions do not address the reasons that prevent her from leaving Canada, but the point is

that it was Box 7 – a box normally completed by applicants seeking an exemption for an in-Canada claim – that was completed. No doubt this influenced the Officer's perspective.

[10] Box 8 – which asks the applicant to clearly indicate the specific exemption he or she is seeking on account of not meeting a particular criterion of the Act (if in fact the applicant is seeking an exemption) – is the box that should have been filled out. However, the box was left pretty well empty, with Ms. Fonseca simply indicating the following: "I do not believe that I am inadmissible to Canada." No reference is made here to the official languages requirements under the Act.

[11] Finally, there is Box 13, where the applicant is to indicate any other information that he or she wants to have considered in his or her application. This is a catch-all box for incidental matters that an applicant wishes to raise for consideration and is not meant to include the very reason why the H&C application is being made. That said, Ms. Fonseca fully completed Box 13, going into detail about having failed to secure permanent residency in 2011 and 2017 on account of her limited abilities in English.

[12] Given that Ms. Fonseca's request for H&C relief was presented in this way, I can certainly understand why the Officer did not appreciate its true nature, in particular since her H&C application was made in 2020, three years after the refusal under the Ontario Program and nine years after the refusal under the Federal Program. In addition, the fact that Ms. Fonseca did not include any evidence relating to either the Federal Program or the Ontario Program in her material in support of her H&C application did not help her case.

[13] That said, and in addition to her submissions in Box 13 of the supplementary information form, the introductory letter of January 6, 2020, did state the following:

> Ms. Rustrian Fonseca did explore other options for applying for permanent residence in Canada; however, her language proficiency always seems to be the issue that holds her back. In fact, in 2011, Ms. Rustrian Fonseca applied to the Canadian Experience Class; however, the application was refused due to her language rest [*sic*] results. Ms. Rustrian Fonseca later applied to the OINP In-Demand Skills program in 2017; however, the application was again refused due to her language test results. Ms. Rustrian Fonseca does not qualify to apply under the Federal Skilled Worker program either. That being said, even though Ms. Rustrian Fonseca does not score highly on the English exams (IELTS/CELPIP), she understands English and communicates well in her workplace and in her personal life, she just simply cannot attain the scores required to apply for permanent residence under the programs available.
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> …
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> To this end, due to limited options for labourers who have been working in Canada for many years, Ms. Rustrian Fonseca is requesting permission to apply for permanent residence in Canada under humanitarian and compassionate grounds so that she can settle in Canada permanently. <u>It would be incredibly unfair to Ms. Rustrian Fonseca, who has given 16 years of her life to working and living in Canada, to deny her the ability to apply for permanent residence in Canada simply because she cannot attain a high enough English score</u>, preventing her from qualifying through other immigration programs available to workers in Canada.
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> [Emphasis added.]

[14] The true nature of the exemption that Ms. Fonseca was seeking was not clearly set out – in fact, it was buried in the submissions – but it was there. I accept that it is not for an officer, when the application itself is not clear, to go digging into the material to find what may be of assistance to an applicant, however, in this case, there were sufficient indications in the material to cause the Officer to step back and consider what exactly Ms. Fonseca was seeking.

[15] Under the circumstances, on account of the Officer having misconstrued the nature of the application being sought, I am persuaded that the Decision is not justified, intelligible and transparent, and that it is therefore not reasonable. I would allow the application and remit the matter back to a different officer for reconsideration.

JUDGMENT in IMM-2752-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter is returned to a different officer for reconsideration;

2. There is no question for certification.

"Peter G. Pamel"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2752-21
STYLE OF CAUSE:	MARIA ESTHER RUSTRIAN FONSECA v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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