Federal Court  Cour fédérale

Date: 20221109

Docket: IMM-6906-19

Citation: 2022 FC 1524

Ottawa, Ontario, November 9, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

EMILIA JN PIERRE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Emilia JN Pierre, the applicant, is a 68 year-old citizen of Saint Lucia. She came to Canada as a visitor in 2003 and has remained here ever since. Three of the applicant's sisters, two of her adult sons, and their respective families all live in Canada.

[2] The applicant did not take any steps to regularize her status in Canada after her visitor status expired until 2018, when she submitted an application for permanent residence on

humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The application was based on the applicant's establishment in Canada, the best interests of her Canadian grandchildren (with whom the applicant has a close relationship), and the hardship she would face if she were required to return to Saint Lucia.

[3] In a decision dated October 24, 2019, a Senior Immigration Officer refused the application.

[4] The applicant now applies for judicial review of this decision under subsection 72(1) of the *IRPA*. She submits that the Officer breached the requirements of procedural fairness by making adverse credibility findings without first providing the applicant with an opportunity to address the Officer's concerns. The applicant also submits that the decision is unreasonable.

[5] As I will explain, I agree that the Officer breached the requirements of procedural fairness in rejecting the H&C application on credibility grounds. Since this is a sufficient basis on which to allow the application for judicial review and remit the matter for reconsideration, it is not necessary to address the applicant's argument that the decision is unreasonable.

[6] The parties agree, as do I, that to determine whether the requirements of procedural fairness were met, the reviewing court must conduct its own analysis of the process followed by the decision maker and determine for itself whether the process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship*

and Immigration), [1999] 2 SCR 817 at paras 21-28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56, and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35.

[7] The burden is on the applicant to demonstrate that the requirements of procedural fairness were not met. The ultimate question is whether she knew the case to meet and had a full and fair chance to respond: see *Canadian Pacific Railway Co* at para 56.

[8] Subsection 25(1) of the *IRPA* authorizes the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. The Minister may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations under the Act. As the provision states, relief of this nature will only be granted if the Minister "is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national." Relief under subsection 25(1) of the *IRPA* is an exceptional and highly discretionary measure: see *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125 at para 15, and *Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4.

[9] In the present case, the applicant sought an exemption from the usual requirement that someone in her position must apply for permanent residence from outside Canada. The discretion to make an exception in appropriate cases provides flexibility to mitigate the effects of

a rigid application of the law in appropriate cases: see *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 19; see also *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22. At the same time, subsection 25(1) of the *IRPA* is not intended to be an alternative immigration scheme: see *Kanthasamy* at para 23.

[10] The onus was on the applicant to present sufficient evidence to warrant the exercise of discretion in her favour: see *Kisana v Canada (Citizenship and Immigration)*, 2009 FCA 189 at para 45, *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at para 5, *Ahmad v Canada (Minister of Citizenship and Immigration)*, 2008 FC 646 at para 31, and *Zlotosz v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 724 at para 22. As Justice Abella observed in *Kanthasamy*, "[t]here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1)" (at para 23). What does warrant relief will vary depending on the facts and context of the case (*Kanthasamy* at para 25).

[11] A party seeking H&C relief is expected to put their best foot forward from the outset. As a result, procedural fairness does not require a decision maker to alert an applicant that they may have fallen short before rendering an adverse decision: see *Bradshaw v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 632 at paras 77-80, *Toor v Canada (Citizenship and Immigration)*, 2022 FC 773 at para 16, *Gonzalez Donoso v Canada (Citizenship and Immigration)*, 2022 FC 959 at para 24, and *Ibrahim v Canada (Citizenship and Immigration)*, 2022 FC 1051 at para 13. However, this expectation is premised on the applicant knowing the case they have to meet: see *Babfunmi v Canada (Citizenship and Immigration)*, 2022 FC 948 at

para 21. When a decision turns on considerations that an applicant was unaware of and could not reasonably have anticipated, procedural fairness generally requires notice of the decision maker's concerns and an opportunity to address them before a decision is made.

[12] One way in which this requirement can be triggered is when the decision maker's assessment of the evidence provided in support of an application encompasses concerns about the credibility, reliability, or authenticity of that evidence. If a decision maker suspects that an applicant is not telling the truth, has presented fraudulent documents, or has concealed relevant facts, they are required to put their concerns to the applicant and provide a reasonable opportunity for the applicant to address them: see *Bajwa v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 202 at para 64; see also *Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068 at para 33, and *Iwekaeze v Canada (Citizenship and Immigration)*, 2022 FC 814 at para 27. Accordingly, Immigration, Refugees and Citizenship Canada's Operational Instructions and Guidelines for assessing an applicant's submissions under subsection 25(1) of the *IRPA* (last modified July 24, 2014) state that "if credibility is central to the decision, then interview the applicant."

[13] A decision maker's finding that evidence is insufficient may be a justifiable determination independent of any assessment of the credibility of the evidence: see *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 at para 26, *Herman v Canada (Citizenship and Immigration)*, 2010 FC 629 at para 17, and *Ibabu* at para 35. On the other hand, determinations presented as findings of insufficiency may in fact be veiled or disguised credibility findings. It is not always easy to tell whether this is what has happened or not: see

Gao v Canada (Citizenship and Immigration), 2014 FC 59 at para 32, and *Iwekaeze* at para 27. I am satisfied, however, that in the present case the Officer's conclusions depend on adverse assessments of the credibility of the applicant's evidence in three material respects.

[14] First, among the factors the applicant relied on to support her H&C application was her establishment in Canada. That establishment was somewhat limited, however. According to the applicant, despite having lived in Canada for some 15 years, she depends on family members for financial support. She stated that she has never worked in Canada. On the other hand, she also stated that she has never collected social assistance.

[15] In view of the limited evidence of establishment, on a strict sufficiency analysis, the Officer could reasonably have determined that this factor did not weigh heavily in the applicant's favour. Instead, the Officer assessed this evidence as follows:

> It should be noted that the applicant does not explain how her rent is paid or by whom. She does not demonstrate through tangible documentary evidence that she does not receive social assistance, and she does not show evidence that her family members support her financially. She does not demonstrate how she has provided for herself and paid for her day-to-day living expenses over all these years. I draw a negative inference from this.
>
> It is reasonable to think that renting accommodations and paying routine costs and living expenses require a job. The applicant does not live with her children or her sisters/brothers in Canada. It is reasonable to think that if she is not receiving social assistance, she must have undeclared employment or receive some other form of government assistance. She does not explain it in this application and does not corroborate her claims with tangible evidence. I draw a negative inference from this.

[16] I agree with the applicant that the Officer has made adverse findings regarding the credibility of her account of her economic circumstances. While the Officer's findings are couched in terms of the absence of corroborative evidence, explicit adverse credibility findings are not required to trigger procedural fairness concerns: see *Adeoye v Canada (Citizenship and Immigration)*, 2012 FC 680 at para 8, and *Hamza v Canada (Citizenship and Immigration)*, 2013 FC 264 at para 30. It is clear that the Officer disbelieved the applicant's claim that she has not worked in Canada or received social assistance.

[17] Second, among the hardships the applicant contended she would face in Saint Lucia was a risk of harm at the hands of her abusive ex-common law husband, who still lives next door to the applicant's house in Saint Lucia. The applicant's personal statement as well as letters from two of her adult children, Marina and Marcus (both of whom are police officers, one in Saint Lucia, the other in Bermuda) described the abusive relationship in which the applicant and her children had lived for many years and from which the applicant had escaped when she left Saint Lucia for Canada in 2003.

[18] The Officer assessed this evidence as follows:

> I note that the applicant, in her forms, stated that she was in a common-law relationship with Baptiste Pompilus (born December 1946) between 1973 and 2003. Apart from the applicant's statements and claims made in the submitted letters, there is no tangible documentary evidence in the file to establish this spouse's existence.
>
> The children bear the applicant's family name, and birth certificates were not submitted as evidence with the submissions. It is therefore not possible to corroborate the fact that the former spouse Baptiste Pompilus is the father of the applicant's children. I draw a negative inference from this.

[19] Once again, I agree with the applicant that the Officer is doubting the truthfulness of the applicant's assertions – namely, that there is someone in Saint Lucia named Baptiste Pompilus who is her ex-common law spouse and the father of her children. I cannot agree with the respondent that the Officer was merely commenting on the insufficiency of the evidence the applicant presented.

[20] Third, there is a related problem with the Officer's assessment of the letters from the applicant's adult children, Marina and Marcus. The Officer states the following:

> The letters submitted by Marina and Marcus are not accompanied by copies of the said authors' identity cards and the routing of these letters is unknown. Without diminishing the impact of domestic violence on an individual, in the absence of trustworthy documentary evidence, the fact remains that these letters seem self-serving.
>
> It should be noted that the applicant is represented by a law firm specializing in immigration. It is expected that allegations presented be supported by trustworthy documentary evidence.

[21] It may well be true that counsel for the applicant (not Mr. Ormston) should have provided documentation to verify the identities of the authors of the letters (or explained why it was not available). However, the Officer appears to link this deficiency in the H&C application to the "trustworthiness" of the information in the letters themselves. This link is reinforced by the Officer's further observation that the letters "seem self-serving:" see *Hamza* at paras 38-39, and *Zmari v Canada (Citizenship and Immigration)*, 2016 FC 132 at para 21. To be clear, I am not suggesting that a concern about self-serving evidence standing alone triggers procedural fairness rights. If properly linked to the issue of the sufficiency of the evidence, the determinative question on judicial review will generally be the reasonableness of the decision maker's

treatment of this factor: see *Ferguson* at para 27, *Alexander v Canada (Citizenship and Immigration)*, 2021 FC 762 at paras 64-65, and *Iwekaeze* at paras 20-23. In the present case, however, I am satisfied that the Officer's assessment of the letters from Marina and Marcus turns on credibility concerns of which the applicant had no notice.

[22] The Officer's adverse determinations in these three respects do not relate to peripheral matters; rather, they bear directly on some of the key considerations advanced by the applicant in support of her request for relief under subsection 25(1) of the *IRPA*. Since the applicant did not know that the Officer would have these concerns about the credibility of her account (and could not reasonably have anticipated that there would be such concerns), the applicant did not know the case she had to meet to obtain the relief she was seeking. As a result, the requirements of procedural fairness were not met. The decision must, therefore, be set aside and the matter remitted for redetermination by a different decision maker.

[23] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-6906-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Senior Immigration Officer dated October 24, 2019, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6906-19
STYLE OF CAUSE:	EMILIA JN PIERRE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 17, 2022
JUDGMENT AND REASONS:	NORRIS J.
DATED:	NOVEMBER 9, 2022

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