Federal Court  Cour fédérale

Date: 20221115

Docket: IMM-5981-21

Citation: 2022 FC 1552

Ottawa, Ontario, November 15, 2022

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

JAQUELINE VANESSA NUNES SANTANA
LUIS CARLOS SERAFIM CONSTANTINO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of a Senior Immigration Officer [the "Officer"] of Immigration, Refugees, and Citizenship Canada ["IRCC"], dated August 23, 2021, refusing the Applicants' application for permanent residence from within Canada on

humanitarian and compassionate [H&C] grounds [the "Decision"], pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

II. Background

[2] Jaqueline Vanessa Nunes Santana [the "Principal Applicant"], a 32-year-old female, and her common-law partner, Luis Carlos Serafim Constantino [the "Co-applicant"] a 37-year old male, are citizens of Portugal.

[3] The Principal Applicant spent her early years in Portugal before moving on September 14, 2004, to Canada with her parents and younger brother at the age of 14. She arrived as the dependent of her father who received status through a work permit as a pastry chef. Save for a few short trips to Portugal, she has remained in Canada ever since. She retained legal status in Canada from her arrival until 2011.

[4] The Principal Applicant's father passed away from a sudden heart attack at work in 2009. The Principal Applicant claims to have developed mental health problems following her father's passing. She purportedly suffered from a mental health episode in Portugal in 2011 and has been diagnosed with bipolar disorder.

[5] After the Principal Applicant's mother remarried in 2017, she and the Principal Applicant's younger brother were sponsored by the Principal Applicant's stepfather and obtained permanent resident status. The Principal Applicant, however, was too old for sponsorship as a dependent.

[6] The Co-applicant entered Canada as a visitor in 2014. The Co-applicant has a sister and young nephew that live in Canada.

[7] There is no dispute that the Principal Applicant and Co-applicant are common-law partners. They met in 2019 and have been cohabiting since January 15, 2020.

[8] Without legal status from 2013 to 2019, the Applicant worked illegally at a popular Portuguese bakery. In 2019, the Principal Applicant helped her mother start her own Portuguese bakery. She continues to work at this bakery and assist her mother with day-to-day management.

[9] On February 2, 2021, the Applicants filed the current H&C application, seeking an exemption under subsection 25(1) the *IRPA* to facilitate the processing of her application for permanent residence from within Canada. The Applicants sought H&C relief on the following grounds:

i. Their establishment in Canada;

ii. The Principal Applicant's mental health issues; and

iii. The best interests of the Co-applicant's nephew.

[10] In the Decision, dated August 23, 2021, the Officer refused the Applicants' H&C application. The Applicants ask the Court to set aside the Decision and refer the matter back to IRCC for reconsideration by a different officer.

III. Decision Under Review

[11] After reviewing the relevant factors to the Principal Applicant's establishment in Canada, the Officer gave "little weight" to the Applicant's overall level of establishment. The Officer made the following findings with respect to each factor:

i. Length of Time in Canada: Despite the Principal Applicant's 17 years in Canada, the Officer gave "negative weight" to the length of time the Applicant had been in Canada because a significant portion of this time was spend without status.

ii. Employment History: The Officer gave "no weight" to the Principal Applicant's employment history as she had been working without legal authorization.

iii. Financial Self-Sufficiency: The Officer gave "little weight" to this factor given the Applicants' level of income and savings.

iv. Familial Relationships: Given the Principal Applicant's mother, brother and stepfather along with the Co-applicant's sister and her family live in Canada; the Officer gave "some weight" to the Applicants' familial establishment.

v. Community Ties: Other than supportive letters from the Applicants' friends and family members, the Applicants' level of Community integration was modest. The Officer gave this factor "some weight".

[12] As stated above, the Principal Applicant also pled for H&C consideration based on her mental health problems. The Officer granted this factor "some weight". The Officer accepted that the Principal Applicant has "some form of mental illness", but found, based on evidence from the Principal Applicant's doctor, that her condition was sufficiently stable. Additionally, the Officer reasoned that, if the Principal Applicant returned to Portugal, the Co-applicant would accompany her and her Canadian family would be able to continue to support her through traditional or online communication.

[13] The Officer granted "no weight" to the best interests of the Co-applicant's nephew. Although there may be an initial period of adjustment, the Officer was not convinced there would be an adverse impact to the Co-applicant's nephew if the Co-applicant were to leave Canada.

[14] Weighed together, the Officer found that the Applicants' advanced H&C grounds were insufficient to warrant a subsection 25(1) exemption.

IV. Issues

[15] Was the Decision reasonable?

V. Standard of Review

[16] The standard of review is reasonableness [*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paragraph 25].

VI. Analysis

[17] Under subsection 25(1) of the *IRPA*, a foreign national can receive an exception from the ordinary subsection 11(1) requirement that an individual must apply for permanent resident status from outside of Canada.

[18] The Applicants argue that the Officer erred in three ways that render the Decision unreasonable:

i. By giving negative weight to the time the Principal Applicant spent in Canada;

ii. By failing to consider that the Principal Applicant's stable life in Canada helped her manage her mental health problems;

iii. By failing to consider the negative effects that the Principal Applicant's removal would have on the family-owned bakery.

[19] The latter two of these arguments are not supported by the evidence. The Officer reasonably considered and was sensitive to the Principal Applicant's mental health issues. The Officer accepted that a doctor had diagnosed the Principal Applicant with bipolar disorder and that she had mental health issues. Moreover, the Officer observed that crucial support from the Principal Applicant's family would not vanish if she left Canada. The Co-applicant would presumably travel with the Principal Applicant and the Principal Applicant could continue to remain connected with and supported by her Canadian family members through long-distance communication.

[20] Similarly, I find the Officer committed no error by failing to consider the negative effects of the Principal Applicant's departure from Canada on the family business. A reviewing Court must assess the reasonableness of an officer's decision in light of the record that was before the officer [*Vavilov* at paragraph 94]. In this case, the Principal Applicant, in her submissions, asked the Officer to consider her work at the family bakery as part of her "History of Stable Employment". In line with this request, the Officer considered the Principal Applicant's work at the family bakery when determining how much weight to attribute to the Principal Applicant's history of employment within the framework of her establishment in Canada. The Principal Applicant did not ask the Officer to consider detriment to the business in and of itself.

[21] However, I do find that the Officer erred by giving "negative weight" to the Principal Applicant's time in Canada. The Applicant's counsel at the hearing acknowledged that the consideration by the Officer with respect to this issue is the key to the Court finding the Decision unreasonable.

[22] The Officer's conclusions in this case go unreasonably beyond the basic proposition that positive consideration of the length of time an applicant has spent illegally in Canada is only warranted when the applicant has been in Canada due to circumstances beyond the applicant's control [*Mann v Canada,* 2009 FC 126 at paragraphs 12 to 15].

[23] The Principal Applicant arrived in Canada in 2004 as a 14-year-old child and remained in Canada legally through 2011. It is only after this period that the Principal Applicant was in

Canada illegally. Still, the Officer failed to attribute positive weight to the Principal Applicant's time in Canada.

[24] While immigration officers are certainly entitled to weigh non-compliance with Canadian immigration law against an applicant, this principle is not without limits [*Hartono et al v Canada (The Minister of Citizenship and Immigration)*, 2022 FC 1053 at paragraph 23]. Here the Officer seemingly concludes that the detriment from Principal Applicant's illegal period in Canada outweighs the positive consideration of her legal period by such an extent as to render her entire stay and residence in Canada worthy of no consideration. However, the Officer fails to explain why; the Officer's reasons do not disclose any engagement with the Principal Applicant's legal period in Canada or explanation for why it is insufficient to earn the Principal Applicant even the slightest positive consideration. The reasons lack the transparency, intelligibility and justification required under *Vavilov* and are therefore unreasonable.

[25] The application is allowed.

JUDGMENT in IMM-5981-21

THIS COURT'S JUDGMENT is that

1. The application is allowed and the matter is referred to a different officer for reconsideration.
2. There is no question for certification.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5981-21
STYLE OF CAUSE:	JAQUELINE VANESSA NUNES SANTANA, LUIS CARLOS SERAFIM CONSTANTINO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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