Federal Court Cour fédérale

Date: 20230329

Docket: IMM-5158-20

Citation: 2023 FC 436

Ottawa, Ontario, March 29, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

IMELDA ESQUEJO CARPO

Applicant

and

The MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a 54-year-old citizen of the Philippines, a trained nurse, and has been employed as a live-in caregiver for various families since arriving in Canada in 2006.

[2] She seeks judicial review of an application for permanent residence on humanitarian and compassionate (H&C) grounds.

[3] For the reasons that follow, this application will be granted.

II. **Background**

[4] The Applicant arrived in Canada in 2006 and began to work as a caregiver, under the now closed, Live-in Caregiver Program (LCP). After working full-time for two years, she was eligible to apply for permanent residence and did so, listing her husband and daughter as dependents.

[5] While the application was in process, the Applicant's relationship with her husband broke down. As a result of his failure to complete the requisite medical examination, the application was refused.

[6] The Applicant indicates she remains estranged from her husband and works tirelessly as a single mother to support her daughter in the Philippines, who at the time of the Decision, was 16 years old.

[7] The daughter lives with the Applicant's brother and his family of four in the Philippines. Since birth, the daughter has suffered from rheumatic heart disease and mitral regurgitation, which requires monthly treatment and medications.

[8] The Applicant is a cancer survivor. She continues to take medication and is regularly monitored because of the high probability that her cancer will return.

[9] On July 17, 2018, the Applicant submitted her H&C application. It was based on her establishment, the best interests of her daughter, and the hardship she would face in the Philippines.

[10] By way of letter dated June 30, 2020, sent to the Applicant's representative, the application was denied. She only became aware of the denial in October 2020.

III. **Issue and Standard of Review**

[11] The only issue is whether the Officer's analysis of the Applicant's H&C factors was reasonable.

[12] There is a presumption of reasonableness whenever a court reviews administrative decisions: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 16.

[13] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision: *Vavilov* at para 85.

[14] To be found to be unreasonable, the Applicant must establish the Decision contains shortcomings or flaws that are more than merely superficial or peripheral to the Decision. To

render the Decision unreasonable, any such shortcomings or flaws must be sufficiently central or significant: *Vavilov* at para 100.

IV. **Analysis**

A. *Establishment*

[15] The Officer noted the Applicant has been in Canada since 2006, other than some travel to the Philippines. The Officer gave the Applicant significant weight toward establishment for the lengthy period of time she spent in Canada.

[16] The Officer gave some weight to establishment due to the Applicant having three sisters, who are Canadian citizens, with whom she is very close.

[17] Letters of support from the adult children of an elderly couple that the Applicant cares for, together with two letters of support from the adult children of a previous person the Applicant provided caregiving to, the adult children having also employed the Applicant as a housecleaner, were given "some weight" toward establishment.

[18] Following the foregoing "significant weight" and "some weight" the Officer then noted some of the employment had been illegal since the Applicant's work permit expired in 2016.

[19] Because the Applicant was working illegally, the Officer found her non-compliance with Canadian laws detracted from her overall establishment.

[20] The Applicant also received some weight for her documented “sound financial management” and for taking a course to learn how to better care for elderly people and people with disabilities as well as for completing a personal support worker certificate program. Having made friends in Canada and participating in the community was also given some weight.

[21] Some weight was given to the Applicant for donating money to a hospital in the Greater Toronto Area.

[22] The Officer concluded the establishment analysis by finding that “overall, the Applicant is established in Canada”.

B. *Best Interest of the Child*

[23] The Applicant’s daughter has a rheumatic heart condition that requires injections every three weeks, medical attention and some medication. The Applicant states she is the only one paying for the bills and medicine but if she lived in the Philippines she would not be able to provide the medicine and her daughter will suffer. This submission was supported by a letter from a pediatric cardiologist confirming the daughter has rheumatic heart disease and severe mitral regurgitation, requiring injections every 21 days.

[24] The Officer accepted the medical diagnosis and treatment plan but found there was no evidence that the Applicant paid for the treatment as the Applicant’s financial information did not show remittances to the Philippines. The Officer found the Applicant was not paying for the child’s treatment so they gave this aspect of the BIOC little weight.

[25] There was no evidence that the Applicant's brother paid for her daughter's expenses. The Applicant clearly stated in her sworn affidavit that she paid her daughter's medical expenses and moved to Canada for work as she could not afford to pay them if she was in the Philippines.

[26] There was no examination by the Officer of the benefits to the Applicant's child of the Applicant being in Canada. Instead, the Officer conducted a hardship assessment of whether the child was able to go to school in the Philippines. A hardship analysis interwoven with and indistinguishable from a BIOC analysis is not transparent because the Court cannot assess the weight afforded to the factors: *Osun v Canada (Citizenship and Immigration)*, 2020 FC 295 [*Osun*] at para 24.

[27] The Officer found it was in the best interests of the child to be reunited with her mother, "even if it is in the Philippines. Family reunification is one of the key objectives of the Immigration and Refugee Protection Act." The Officer therefore placed "significant weight" on such reunification.

[28] The problem with the Officer assigning significant weight to family reunification is that paragraph 3(1)(d) of the *IRPA*, reads, "The objectives of this Act with respect to immigration are to see that families are *reunited in Canada*" [my emphasis]. There is no ambiguity. The objective clearly recognizes the importance of facilitating the reunion of family members who are abroad, with their loved ones in Canada.

[29] To invoke family reunification to justify the denial of an H&C exemption on the basis that it is in the best interest of the child for her mother to be deported to the Philippines to join her, is an error of law. An H&C officer has discretion in the exercise of an H&C exemption, but that discretion does not allow them to ignore their mandatory compliance with the *IRPA*.

[30] The Officer erred in the interpretation of the objective of family reunification and therefore also erred in placing significant weight on such reunification.

[31] After assessing all the evidence, the Officer found they could not conclude that the wellbeing of the Applicant's child would be adversely impacted if the Applicant returned to the Philippines.

[32] The child's best interests must be "well identified and defined" and examined "with a great deal of attention" in light of all the evidence. Once the Officer has done this, it is up to them to determine what weight, in their view, those interests must be given in the circumstances: *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 [*Legault*] at para 12.

[33] The Officer did not conduct an examination of the child's best interests. Instead, the Officer conducted a hardship assessment of whether the child is able to go to school in the Philippines. When a hardship analysis is interwoven with, and indistinguishable from, a BIOC analysis it is not transparent because the Court cannot assess the weight afforded to the factors: *Osun* at para 24.

[34] An administrative decision-maker's misinterpretation of their home statute cannot be taken lightly. The Supreme Court held, with respect to administrative decision makers who receive their powers by statute, that "…the governing scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply 'with the rationale and purview of the statutory scheme under which it is adopted'": *Vavilov* at para 108.

C. *LCP*

[35] The Applicant submits that the Officer unreasonably focused on the grounds for the Applicant's inadmissibility, while failing to consider her efforts to establish herself and the unique circumstances of her case as a member of the LCP class.

[36] The Applicant has worked continuously since arriving in Canada, completed her training as a Personal Support Worker on her own initiative, all the while surviving cancer and supporting her daughter, brother and nieces in the Philippines. The Applicant argues that the Officer erred in finding that these positive factors do not outweigh the Applicant's admitted employment without authorization following the denial of her work permit extension on June 27, 2016. It is important to note that from April 7, 2006 to June 27, 2016, the Applicant did have a

valid work permit. This means that at the time of her H&C request, ten of the twelve years she was in Canada were on a valid work permit, while only two were spent without one.

[37] The Applicant's decade long compliance with Canadian immigration law is an important consideration for the analysis that follows.

[38] There are two points to consider. First, whether the Applicant may benefit from the "flexible and constructive approach" that applies to the consideration of applicants of the LCP as has been held by this Court. Second, whether the Officer unduly focused on the Applicant's work without authorization in the consideration of the Applicant's overall establishment in Canada.

[39] The Applicant submits that the Officer failed to apply the "flexible and constructive approach". This principle originates from *Turingan v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1234 [*Turingan*], a decision of this Court which recognized the vital history of the caregiver programs in Canada and the responsibility of the Canadian government to facilitate the attainment of permanent residence status for program participants: *Santos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 360 at para 26 cited Associate Chief Justice Jerome in *Turingan* at para 8:

> After a thorough analysis of the Foreign Domestic Program, the learned Justice reached the following conclusions:
>
> > (ii) the FDM. [Foreign Domestic Movement Program] was created in response to the recognition that domestic workers were performing a valuable service, often forming significant ties in this country but were generally less likely to achieve permanent residence status than other immigrants;

> (iii) the purpose of the Programme is hence to facilitate the attainment of permanent residence status for foreign domestic workers subject to certain terms and conditions;
>
> (iv) the Programme is to be administered in a flexible manner with the emphasis on extended advice and counselling services available in order that applicants may upgrade their skills, where necessary, to qualify for the Programme...

> It is clear from this passage that the purpose of the Program is to facilitate the attainment of permanent residence status. It is therefore incumbent on the Department to adopt a flexible and constructive approach in its dealings with the Program's participants. The Department's role is not to deny permanent residence status on merely technical grounds, but rather to work with, and assist the participants in reaching their goal of permanent residence status

[40] The flexible and constructive approach endorsed in *Turingan* has been applied in the context of the LCP, as noted by the Applicant, in *Go v Canada (Minister of Citizenship and Immigration)*, 2018 FC 1197 [*Go*], *Marte v Canada (Minister of Citizenship and Immigration)*, 2009 FC 155 [*Marte*], and *Jacob v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1382 [*Jacob*].

[41] The Respondent submits that *Go, Marte* and *Jacob*, do not support the Applicant's position that the Officer ought to have taken a different approach to assessing the factors in the underlying H&C application simply because she arrived in Canada through the LCP.

[42] The Respondent seems to be drawing a distinction between a general application for permanent residence on humanitarian and compassionate grounds and an application for permanent residence under the LCP class with a request for H&C exemption for failure to meet

one of the eligibility requirements of the LCP. While it is true that *Marte* concerns the latter, the facts in *Go* and *Jacob* are much more complex and in fact, support the Applicant's argument that the flexible and constructive approach applies to all participants of the LCP regardless of the particular pathway for status.

[43] In *Go*, the Applicant arrived in Canada as a live-in caregiver and applied for permanent residence under the LCP. In her application form she stated that she lived at the home address of her employer and failed to disclose that she had spent many nights at an apartment made available by her church for Filipino live-in caregivers and nannies. The Officer found that the failure to disclose this secondary address was a relevant matter which could have induced an error in the administration of the *IRPA.* As a result, she was found inadmissible in accordance with paragraph 40(1)(a) for misrepresentation.

[44] The Respondent submits that the facts in *Go* are distinguishable from the case at hand and therefore, the Applicant cannot benefit from the *Turingan* approach. The Respondent characterizes *Go* as "a judicial review of an application for permanent residence which centered on an examination of the residency requirements of the LICP."

[45] I disagree.

[46] At paragraph 5 of *Go*, Justice Harrington makes it very clear that the issue was whether or not the Applicant could benefit from the flexible and constructive approach available for live-in caregivers despite the misrepresentation:

> [5] It is important to note that it was not held that she did not satisfy the requirements of the Live-in Caregiver Program. Rather, by failing to disclose the Church apartment, she foreclosed an avenue of investigation for the Processing Officer who may possibly have had a flexible and constructive approach to living arrangements as this Court contemplated in *Turingan v The Minister of Employment and Immigration*, 1993 FCJ No 1234,72 FTR 316.

[47] *Go* was a judicial review of a decision of the ID, based solely on the issue of inadmissibility. Following a comparison of the various interpretations of the residency requirements of section 5(1)(c) of the *Citizenship Act,* Justice Harrington found that the ID's analysis failed to consider the applicant's living arrangements in a manner that was specific to the LCP:

> [14] Where one lays one's head at night is only one factor to take into consideration. Ms. Go did not have her own room at the Church apartment; she did not leave her clothes there; her mailing address was her employer's home which she did disclose in the application form.
>
> [15] It was unreasonable for the Member to find, on the balance of probabilities, that Ms.Go misrepresented her living arrangements. If this Court could find that it was reasonable for trained Citizenship Judges to uphold three different views of the residency requirement under the *Citizenship Act*, how can it be said that Ms. Go failed to provide a reasonable answer? The problem lay in the question, not the answer. The question was not specific to the Live-in Caregiver Program.

[48] While the *Go* decision is brief and based on a discreet issue, I find Justice Harrington's analysis of the misrepresentation assessment specifically to Ms. Go's status as a live-in caregiver, is but one of many possible examples of the application of the flexible and constructive approach applicable to all live-in caregivers.

[49] In the case under review, the Applicant is not only a member of the LCP class, she also fulfilled the eligibility requirements that would have entitled her to permanent residence, but for her husband's failure to comply with the request for a medical examination. In recognition of this history, I find that it was incumbent on the Officer to consider the purpose of the LCP and the Applicant's contributions to the labour market in caring for families in Canada, while separated from her own family. Failure to do so is evidence of decision making that fails to consider all of the evidence before it, which is sufficient grounds for finding the Decision to be unreasonable.

V. **Conclusion**

[50] Based on the many different errors identified above, I find the Decision is unreasonable. The Decision will be set aside and this matter will be returned to a different Officer for redetermination.

[51] No question was posed for certification, nor does one arise on these facts.

JUDGMENT in IMM-5158-20

THIS COURT'S JUDGMENT is that:

1. This application is granted and the Decision is set aside.

2. This matter is to be returned to a different Officer for redetermination.

3. There is no question for certification.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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