Federal Court Cour fédérale

Date: 20121105

Docket: IMM-8691-11

Citation: 2012 FC 1292

Ottawa, Ontario, November 5, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EUNETA ULLICA LE BLANC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Exceptional new circumstances in the human condition of an applicant may require a comprehensive review of a decision that may have been fully warranted prior to the exceptional significant change in personal situation of an applicant.

II. Introduction

[2] The Applicant requested an exemption on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] from the requirement to apply for permanent residence from outside Canada. An Immigration Officer refused the Applicant's request, finding that she would not suffer unusual and undeserved or disproportionate hardship if she had to apply for permanent residence outside Canada.

III. Judicial Procedure

[3] This is an application under subsection 72(1) of the *IRPA* for judicial review of the Officer's decision, dated November 1, 2011.

IV. Background

[4] The Applicant, Ms. Euneta Ullica Le Blanc, a citizen of Antigua and Barbuda, was born in 1945.

[5] The Applicant's brother and niece are her only living immediate family; both are Canadian citizens who have been resident in Canada since 1975. Her niece has signed sponsorship documents in support of her application for permanent residence. The Applicant's sister, a Canadian citizen resident in Canada since 1972, passed away in 2011.

[6] The Applicant was employed by a family acquaintance in Antigua as a live-in domestic from December 2006 to October 2007; she worked as a domestic for another employer from January 1999 to December 2006.

[7] The house of the Applicant's employer suffered hurricane damage in 2007. The employer can no longer continue to employ or accommodate the Applicant.

[8] The Applicant was a visitor in Canada from October 2007 until April 2008. She returned to Antigua in April 2008, where she again lived with her employer. The Applicant returned to Canada on December 18, 2008 and was admitted as a visitor for six months; her visitor status was later extended to December 30, 2010. In Canada, the Applicant lived with her sister until her sister passed away.

[9] The Applicant applied for permanent residence on H&C grounds on June 25, 2009. The Officer declined the application on November 1, 2011.

[10] The Applicant alleges that she is no longer able to work and no longer has a support network in Antigua. According to the Applicant, her employer was her sole source of emotional support in Antigua and can no longer provide her with that support. The Applicant alleges she has mental health problems and a learning disability that makes it difficult for her to communicate. She has not, however, supplied supporting medical documentation.

V. Decision under Review

[11] The Officer denied the Applicant's request under subsection 25(1) of the *IRPA* for an exemption from the requirement to apply for permanent residence from outside Canada. The Officer found that the Applicant had not demonstrated that denying her request would result in unusual and

undeserved or disproportionate hardship. In particular, the Officer stated that "[t]he hardship the applicant would suffer is directly related to the application of the law" (Decision at p 4).

[12] Although the Officer accepted that the Applicant's only remaining family lived in Canada, she found that the Applicant had lived separately and apart from these relatives "for most of her life, and there is no prejudicial effect on her if she had to be separated from her family again" (Decision at p 4). In support, the Officer observed that the Applicant had returned to Antigua after her first visit to Canada.

[13] Reasoning that the Applicant's family could support her financially while abroad, the Officer was not persuaded by the Applicant's claim that she could not return to Antigua "because she is unemployed and cannot take care of herself" (Decision at p 4); the Officer noted her family pledged to support her financially in Canada.

[14] Noting that the Applicant's alleged health problems did not prevent her from working in Antigua and that she had not submitted supporting medical documentation, the Officer assigned little weight to the Applicant's allegation of health problems.

VI. Issue

[15] Was the Officer reasonable in finding that requiring the Applicant to apply for permanent residence from outside Canada would not result in unusual and undeserved or disproportionate hardship?

VII. Relevant Legislative Provisions

[16] The following legislative provisions of the *IRPA* are relevant:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	**25.** (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

VIII. Position of the Parties

[17] The Applicant submits that, in an H&C application, hardship must be (i) unusual and undeserved or (ii) disproportionate. Unusual and undeserved hardship is hardship not anticipated by the *IRPA* or *Immigration and Refugee Protection Regulations*, SOR/2002-227 [*Regulations*] and resulting from circumstances beyond an applicant's control. Hardship not meeting the criteria for unusual and undeserved hardship is disproportionate if refusing an exemption requested on H&C grounds disproportionately impacts an applicant because of personal circumstances (IP-5 Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds).

[18] According to the Applicant, the Officer's statement that "[t]he hardship the applicant would suffer is directly related to the application of the law" shows the Officer considered unusual and undeserved hardship but not disproportionate hardship (Decision at p 4). The Applicant cites *Kaur v Canada (Minister of Citizenship and Immigration)*, 2010 FC 805, which holds that this is a reviewable error and that decision-makers "cannot fail to have regard to the applicant's personal circumstances" (para 18). The Applicant submits the Officer only considered personal circumstances to assess unusual and undeserved hardship.

[19] The Applicant argues the following personal circumstances show that refusing to exempt her from the requirement to apply for permanent residence from outside Canada results in disproportionate hardship: (i) the location of her only family in Canada; (ii) her learning disability; (iii) her lack of support base in Antigua; (iv) her family's ability and willingness to support her financially and emotionally.

[20] The Applicant argues that a letter from her sister in support of her H&C claim was sufficient to establish that she has mental health problems and a learning disability. The Officer, the Applicant submits, had "no reason not to believe" the letter.

[21] Finally, the Applicant argues the Officer ignored evidence in concluding that requiring her to return to Antigua would not be "prejudicial" because she "lived separated from her family for most of her life" (Decision at p 4). The Applicant submits that this finding ignored evidence that she had lived with family friends for 27 years who could no longer accommodate her. The Officer's reasoning that her employment also showed self-sufficiency ignored evidence that she ceased to

work in April 2008 and that she lived in Antigua with a family unable to continue accommodating her.

[22] The Respondent submits the decision falls within a range of possible, acceptable outcomes defensible with respect to the evidence and applicable law. According to the Respondent, the Applicant is in substance challenging the weight assigned to the various factors. Consequently, he submits, there is no basis for judicial review.

[23] The Respondent argues that the Applicant's argument that the Officer failed to consider disproportionate hardship takes a microscopic view of the decision. The Respondent cites *Ahmed v Canada (Minister of Employment and Immigration)* (1993), 156 NR 221 for the principle that reasons should not be read "microscopically" but rather "as a whole".

[24] The Respondent acknowledges that the decision states that the Applicant's hardship was "directly related to the application of the law" but submits that the Officer did consider disproportionate hardship. The Respondent takes the position that the Officer mentions disproportionate hardship several times in the decision. Further, the Officer considered the Applicant's personal circumstances in relation to the disproportionate hardship test, specifically addressing her lack of family in Antigua and family ties to Canada. The Respondent distinguishes *Kaur*, above, on the basis that the decision-maker there made no mention whatsoever of the applicant's personal circumstances.

[25] The Respondent submits that the Applicant's submissions that the Officer ignored evidence amounts to a disagreement with the weight the Officer assigned to the evidence in the Officer's discretion as trier of fact. The Officer is presumed to have considered all the evidence and need not discuss every piece of evidence in reasons. The Respondent further observes that the Officer actually did note that the Applicant lived with family friends who could no longer accommodate her and that she was no longer employed.

[26] Finally, the Respondent submits that the Officer reasonably weighed the Applicant's evidence of establishment factors and alleged hardship. According to the Respondent, the Officer was entitled to find that separating the Applicant from her family would not have a prejudicial effect. Citing *Rettegi v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 153, the Respondent argues that family separation does not always rise to the level of irreparable harm. Moreover, the Officer's conclusion that the Applicant could be self-sufficient in Antigua was supported by the evidence of her employment as a domestic servant and her family's ability to support her financially. The Respondent also argues it was reasonable to assign little weight to the Applicant's alleged health problems, given the absence of medical documentation. Evidence of her employment in Antigua entitled the Officer to assign little weight to this particular allegation.

IX. Analysis

[27] Whether the Officer's finding that requiring the Applicant to apply for permanent residence from outside Canada would not result in unusual and undeserved or disproportionate hardship is reviewable on a reasonableness standard (*Frank v Canada (Minister of Citizenship and Immigration)*, 2010 FC 270).

[28] Because the reasonableness standard applies, the Court may only intervene if the Board's reasons are not justified, transparent or intelligible. To satisfy this standard, the decision must also fall in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[29] The Applicant's submissions that the Officer considered her personal circumstances in regard to the unusual and undeserved hardship but not disproportionate hardship is made on the basis of a remark by the Officer that "[t]he hardship the applicant would suffer is directly related to the application of the law". This essentially amounts to a challenge to the adequacy of the Officer's reasons. The Supreme Court of Canada has, however, held that if reasons are given, a challenge to the reasoning or result is addressed in the reasonability analysis. According to *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, "reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (para 14). A reviewing court may not "substitute [its] own reasons" but may "look to the record for the purpose of assessing the reasonableness of the outcome" (para 15).

[30] To obtain an H&C exemption, the Applicant must show she would face "unusual, undeserved or disproportionate hardship" if she was required to apply for permanent residence from outside Canada (*Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, 340 FTR 29 at para 19). Unusual or undeserved hardship is hardship that is unanticipated by the *IRPA* or *Regulations* which result from circumstances beyond her control. Disproportionate hardship

requires the Applicant to show that the hardship of applying for permanent residence from outside Canada disproportionately impacts her given her personal circumstances (para 20).

[31] In a significant departure from pre-existing personal circumstances, it was unreasonable to conclude that the Applicant would not suffer disproportionate hardship in being required to apply for personal residence from Antigua. That is uniquely due to a fundamental change in the Applicant's personal situation in respect of her emotional support network in Antigua, in recognition of her age and emotional needs as she has not lived alone at any time as reflected by the evidence. The advanced age of the Applicant and her emotional state, even without further medical evidence, warrants a more substantial analysis in respect of the significant change of personal circumstances. The decision, before this Court, was rendered in respect of previous evidence prior to the Applicant's personal change in circumstances (with the passage of time), which, as yet, has not been taken into account. Furthermore, it was a supposition of a hypothetical nature by the decision-maker to speculate that the Applicant's family would, in fact, provide her with the financial needs by which to sustain herself in Antigua. (That may have been the case if she would reside with one of them in Canada; however, that does not mean that the financial assistance, as per the evidence, would be provided if she would leave Canada.) Therefore, a new (or *de novo*) assessment is essential simply due to a transformation in personal circumstances without provision of external circumstances which would warrant the decision as it stands.

X. Conclusion

[32] For all of the above reasons, the Applicant's application for judicial review is granted.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be granted and as a result the matter is to be determined by a different decision-maker. No question of general importance for certification.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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