Federal Court  Cour fédérale

Date: 20121029

Docket: IMM-2007-12

Citation: 2012 FC 1255

Ottawa, Ontario, October 29, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

JUANA PILAR LOZANO VASQUEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by a Citizenship and Immigration Canada officer (the officer) dated October 21, 2011 wherein the applicant's permanent residence application was refused (the decision). This conclusion was based on the officer's finding that there were insufficient humanitarian and compassionate (H&C) grounds to warrant an exception allowing the applicant's permanent residence application to be made from within Canada.

[2] The applicant requests that the officer's decision be set aside and the application be referred back to Citizenship and Immigration Canada (CIC) for redetermination by a different officer.

Background

[3] The applicant is a citizen of Ecuador. She first entered Canada in 1992, after being denied a temporary resident visa. The applicant filed a refugee claim which was rejected in December 1993.

[4] In March 1998, the applicant was convicted of having committed fraud contrary to subsection 380(1)(a) of the *Criminal Code*, RSC 1985 as a result of defrauding social service. An admissibility report was written.

[5] In 2001, the applicant failed to report for a pre-removal interview and an immigration warrant was issued. She was apprehended and removed from Canada.

[6] In 2004, the applicant reentered Canada without authorization. She was rearrested in 2006 and a new inadmissibility report was prepared.

[7] In 2006, the applicant submitted an H&C application on the basis that her medical needs including diabetes, open chronic diabetic wounds, hypothyroidism, adrenal insufficiency, hypertension, leg ulcers, advanced osteoarthritis, osteoporosis and mild depression, could not be met in Ecuador. Her pre-removal risk assessment application was rejected in February 2009 and her H&C application was rejected in April of that year. After the applicant sought judicial review, the

file was reassigned to a different officer who made a negative decision in December 2009. That decision was quashed by this Court in November 2010 and returned to CIC which resulted in the decision under review.

Officer's Decision

[8] The officer informed the applicant that her application had been rejected in a letter dated October 21, 2011. Reasons for this decision were provided to the applicant in correspondence dated January 24, 2012.

[9] The officer's reasons list the applicant's biographical information and immigration status history. The officer noted the two hardships identified by the applicant should she be removed from Canada: lack of comparable health care in Ecuador and the absence of a family support network.

[10] The officer noted the applicant has restricted mobility and is bound to a wheelchair and that a doctor's letter provided evidence of the medical problems described above. The officer acknowledged the applicant's argument and written evidence that the Ecuadorian health care system would be inadequate.

[11] The officer summarized correspondence from a regional medical officer at the health management branch that spoke to the quality of health care in Ecuador, which described it as "very good medical care". The officer noted the applicant's response to this evidence was that she lived in

a different city in Ecuador which had more limited care but the officer did not see why the applicant could not commute when needing access to facilities.

[12] The officer noted a 2008 letter from the applicant's physician stating she was unfit to fly, but noted it would fall to the Canada Border Services Agency to assess her condition and determine whether to stay the removal in the event she was required to leave Canada.

[13] Turning to the hardship ground and a lack of a family network, the officer noted the applicant's family members in Canada and the letters of support from them. The officer acknowledged the importance of the applicant's family, including their physical assistance and the presence of the applicant's mother in Canada. The officer found that insufficient evidence was submitted as to why the applicant could not live in an assisted living facility in Ecuador to replace this physical assistance.

[14] As to the emotional support, the officer found the applicant could maintain frequent contact from Ecuador and made the same finding as to financial support.

[15] Considering the applicant's establishment in Canada, the officer expected that a certain level of integration would occur as a result of being in Canada for an extended period of time. However, the officer was not satisfied the applicant's current level of establishment warranted an H&C exemption.

[16] The officer pointed out that the applicant was inadmissible under section 39 of the Act due to her inability to be financially independent and refused to exempt her from that requirement. The officer also found that the applicant was inadmissible due to serious criminality for her fraud conviction. The officer refused to recommend an exemption from this requirement. The officer also found the applicant inadmissible due to reentry to Canada after a forcible removal and similarly refuses to exempt her. Finally, the officer could not determine whether the applicant was inadmissible on health grounds due to lack of evidence.

[17] In conclusion, the officer acknowledged a certain level of hardship would occur, but was not satisfied it would be unusual, undeserved or disproportionate.

Issues

[18] The applicant submits the following points at issue:

1. Was the officer's decision unreasonable because it was inconsistent with humanitarian and compassionate values?
2. Did the officer ignore evidence that contradicted her conclusions?
3. Did the officer err in her analysis of the applicant's inadmissibilities?

[19] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer ignore evidence that contradicted her conclusions?
3. Was the officer's decision unreasonable?

Applicant's Written Submissions

[20] The applicant submits the officer's decision to reject the applicant's hardship grounds as incompatible with the principle of intelligibility. The applicant is a 60-year-old woman who requires 24-hour supervision and is in a situation of great helplessness and dependency. She is completely dependent on her family for emotional support.

[21] The officer failed to see the applicant as a human being by suggesting that it would not be an unusual or disproportionate hardship for an elderly, depressed, sick and severely disabled woman to be forced into a nursing home in a country overseas. This is not an intelligible application of humanitarian principles. The applicant submits the officer cannot conduct a reasonable H&C analysis without meaningfully engaging these qualities.

[22] Similarly, the applicant submits the officer did not analyze her establishment evidence, but simply recited the evidence before her. This ignores the importance of the family unit as emphasized in the CIC Policy Manual IP 5 and subsection 3(1)(d) of the Act. The decision was unreasonable because it failed to reflect the values of section 25 of the Act.

[23] The applicant further submits the officer erred by failing to consider direct contradictory evidence on the insufficiency of Ecuadorian health care. The officer does not mention or consider four documents the applicant filed on this point. The applicant relies on case law indicating that the more important evidence is, the more willing a court may be to infer from a decision maker's silence that it made a finding without regard to the evidence.

[24] Finally, the applicant submits the officer erred in making admissibility findings. The IP 5 Manual makes clear that an application to remain in Canada as a permanent resident is comprised of two distinct assessments, an H&C assessment of the requested exemptions (stage 1) and a final decision on the permanent resident application (stage 2). The officer considered financial inadmissibility at stage 1 when it should have been considered separately at stage 2 and provided inadequate reasons.

[25] In considering the other grounds of inadmissibility, the officer merely recited the original facts leading to inadmissibility instead of properly balancing them against the hardship that would be suffered by the applicant. The officer's analysis of the applicant's inadmissibilities suggest a closed mind.

Respondent's Written Submissions

[26] The respondent submits that the standard of review of H&C decisions is reasonableness. Significant deference is to be afforded to the decision and a wider scope of possible reasonable outcomes. The H&C process is not an alternative stream for immigration to Canada.

[27] The respondent argues that guidelines are not binding and cannot be applied in such a way as to unduly fetter a decision maker's discretion. The officer considered the applicant's family ties and the applicant is asking this Court to reweigh those findings.

[28] The respondent draws attention to the fact that the applicant agreed quality medical care is available in two Ecuadorian cities. The documents not mentioned by the officer were several years old.

[29] Establishment is relevant to hardship analysis, but is not determinative. This Court has emphatically rejected the claim that establishment is a factor that can, in and of itself, justify a positive H&C decision.

[30] The respondent argues that the applicant's prolonged stay in Canada was not due to matters beyond her own control and H&C applications should not be a conquest by attrition.

[31] Finally, there was no need for a separate stage 2 analysis as the officer had not found that a positive stage 1 decision was warranted but for inadmissibility. The officer found there to be inadequate grounds at the stage 1 stage.

Analysis and Decision

[32] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[33] It is well established that assessments of an officer's decision on H&C applications for permanent residence from within Canada is reviewable on a standard of reasonableness (see *Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 189 at paragraph 18, [2009] FCJ No 713; *Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193 at paragraph 14, [2009] FCJ No 1489; and *De Leiva v Canada (Minister of Citizenship and Immigration)*, 2010 FC 717 at paragraph 13, [2010] FCJ No 868).

[34] Reviewing of the adequacy of reasons should also be done within a reasonableness analysis (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708 at paragraph 22).

[35] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 59). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[36] **Issue 2**

Did the officer ignore evidence that contradicted her conclusions?

The officer, on August 17, 2011, wrote to NHQ – Health Management of Citizenship and Immigration Canada and the letter read in part as follows:

> I was wondering if a medical officer would be available to provide us with his/her professional opinions on whether the client could reasonably have access to quality long-term care facilities in Ecuador, whether the appropriate medication is present and physical care available (since client's mobility is a concern). The applicant stated not to have private health insurance.

[37] The officer, in his decision, summarized the applicant's health problems as follows:

> It was reported that the applicant has numerous medical conditions which include – but are not necessary limited to – diabetes, hypothyroidism, osteoarthritis, degenerative disk disease, has high cholesterol and open chronic diabetic wounds. It was also stated that she has restricted mobility and is wheelchair bound. A recent letter from her family physician dated 09Feb11 was submitted as evidence of the above. The client was in the past also diagnosed with major depressive depression of mild severity and an older letter dated March 2009 from the same physician states that she also had hypertension, hyperthyroid and adrenal insufficiency at the time. Several of the conditions listed above appear to be derived from the diabetes and were said to be treatable with the proper care and medications. The applicant argues that the necessary medical services would most likely not be present or adequate in her native Ecuador. Various documentation and reports related to the situation of the healthcare system in Ecuador were submitted and were carefully reviewed as part of the assessment.

[38] The medical officer's opinion was summarized by the officer, in his decision, as follows:

> An impartial *Regional Medical Officer* at the *Health Management Branch* specializing in the quality and availability of medical care in the region was recently consulted as part of the assessment. In a correspondence dated 23Sep11 (copy on file), the medical officer and doctor informed this office that he has personally visited first-hands tertiary facilities in Guayaquil and Quito and advised that very good medical care is available for individuals with the conditions listed above. He furthermore stated that specialized physicians such as rheumatologists, orthopaedists, endocrinologists and cardiologists are on staff in the hospital there. The medical officer's opinion on the quality and availability of the healthcare facilities in Ecuador was shared with the applicant and the client was given the opportunity to comment on the officer's conclusion.

[39] The applicant submitted evidence which indicated that the health care system in Ecuador needs much improvement and that an overnight wait to see a doctor is not uncommon. It is difficult to have prescriptions filled and hospital pharmacies do not carry expensive drugs. It appears that only basic services are free.

[40] The officer did not deal with any of this evidence in his decision. In *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 at paragraph 17:

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

Here, the applicant's evidence dealt with her ability to receive medical care in her personal situation.

[41] I am of the view that the officer's decision was unreasonable as the officer failed to deal with the evidence submitted by the applicant. This evidence tends to indicate that medical assistance would not be available to the applicant.

[42] In addition, I am of the view that the officer's decision was not transparent. The applicant's application is all about her chronic medical conditions which have resulted in her inability to walk or to take care of her personal needs. The request from the officer to the medical officer requested information on the applicant's access to long term health care facilities in Ecuador, whether she could obtain the appropriate medication and the availability of physical care as she is not mobile when she has no private health insurance.

[43] In my view, none of these requests were addressed in the medical officer's letter. That reply dealt with the availability of specialized doctors and the availability of hospitals. Simply put, the report does not deal with the availability of long term or assisted care facilities for the applicant which is what she requires. As a consequence, the officer had no evidence on this aspect of the case. If these issues had been addressed in the officer's decision, the outcome of the H&C application might well have been different. I therefore find that the officer's decision was also deficient and unreasonable in this respect.

[44] **Issue 3**

Was the officer's decision unreasonable?

H&C decisions are discretionary and have a large range of possible outcomes (see *Holder v Canada (Minister of Citizenship and Immigration)*, 2012 FC 337 at paragraph 18, [2012] FCJ No 353).

[45] In this case, the applicant has presented separate arguments for the component of the decision relating to the exemption from the requirement of applying for permanent residence outside of Canada and for the component relating to exemptions for inadmissibility.

[46] When returning a decision to a tribunal for redetermination, "the Officer responsible is required to re-examine all aspects of the Decision, and the Court should not interfere with this process by isolating one aspect and placing it outside the scope of reconsideration" (see *Malicia v Canada (Minister of Citizenship and Immigration)*, 2006 FC 755 at paragraph 20, [2006] FCJ No 946).

[47] There may be an exception where the parties are in agreement (see *Malicia* above, at paragraph 21) but this is not the case here.

[48] Therefore, since both components were contained in the single decision under review, the officer's decision in its entirety will be returned for redetermination if either determination is found to be unreasonable.

[49] I will therefore focus my analysis on the officer's inadmissibility analysis.

[50] The applicant argues the officer's reasons on inadmissibility were inadequate. The purpose of reasons is to demonstrate justification, transparency and intelligibility. They are not to be evaluated as a matter of procedural fairness and inadequacy of reasons does not constitute a discrete ground of review (see *Newfoundland Nurses* above, at paragraphs 1 and 14).

[51] Therefore, the question is whether the reasons given by the officer, taken together with the outcome of rejecting the requested exemption, demonstrate that the result is one inside a range of possible outcomes (see *Newfoundland Nurses* above, at paragraph 14).

[52] I agree with the applicant that the officer's reasons rejecting exemptions on two of the four grounds amount to a recital of facts followed by a bare conclusion. Although in each section the officer acknowledged the applicant's submissions, there is no insight into why they were rejected.

[53] On financial inadmissibility, the officer wrote: "I have considered the exemption request in the context of the entire application and I am not satisfied that circumstances of the case warrant an exemption …".

[54] On illegitimate reentry to Canada, the officer wrote: "While it is understandable that the applicant would want to be physically closer to her relatives in Canada for support after being diagnosed with diabetes, I am however not satisfied that it justifies in itself breaching the requirements of the Act.".

[55] While the applicant's evidence was not entirely ignored by the officer, since it was summarized in the text of the decision, there is no indication of why that evidence provided insufficient grounds for an exemption. The officer simply stated it was so. Therefore, the reasons on these grounds are inconsistent with the *Dunsmuir* above, value of transparency.

[56] On criminality, the applicant argues the officer only considered factors relating to the criminal act and not to the other reasons (i.e. humanitarian and compassionate) the applicant provided justifying an exemption. The officer's reasons on this point do seem entirely concerned with the original criminal offence, as the relevant paragraph starts with, "I again carefully reviewed the circumstances of the case leading to the conviction" (emphasis added) and ends with, "[i]nsufficient information were [sic] provided about the exact circumstances that led to the criminal offence" (emphasis added).

[57] The purpose of a request for exemption is not to relitigate a criminal conviction but to ask the Minister to consider whether an exemption is justified based on the purpose of section 25 of the Act. According to the IP 5 Manual and the principles of administrative law, this requires consideration of all relevant factors. H&C factors (such as establishment and hardship) are by definition, relevant to a consideration of an H&C application.

[58] Here, the applicant's submissions on the H&C factors relevant to her requests for exemptions are clearly known to the officer since they were considered in the decision to not exempt from the requirement of applying from outside of Canada. The failure to consider those factors conflicts with the *Dunsmuir* above, value of justification, since the officer only justifies the decision in relation to the factor of the original criminal offence and not in relation to H&C factors.

[59] On medical inadmissibility, the officer made no determination. Presumably, that makes the applicant's request for an exemption unnecessary at this time.

[60] Taken together, I find that the officer's decision on the stage 2 exemptions falls outside the range of reasonable outcomes.

[61] Because of my findings, I will not deal with the applicant's submissions concerned with the argument that the officer's decision was unreasonable because it is inconsistent with humanitarian and compassionate values.

[62] The application for judicial review is therefore allowed and the matter is referred to a different officer for redetermination.

[63] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

3. (1) The objectives of this Act with respect to immigration are	3. (1) En matière d'immigration, la présente loi a pour objet :
. . .	. . .
(d) to see that families are reunited in Canada;	d) de veiller à la réunification des familles au Canada;
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.
39. A foreign national is inadmissible for financial reasons if they are or will be unable or unwilling to support themself or any other person who is dependent on them, and have not satisfied an officer that adequate arrangements for care and support, other than those that involve social assistance, have been made.	39. Emporte interdiction de territoire pour motifs financiers l'incapacité de l'étranger ou son absence de volonté de subvenir, tant actuellement que pour l'avenir, à ses propres besoins et à ceux des personnes à sa charge, ainsi que son défaut de convaincre l'agent que les dispositions nécessaires — autres que le recours à l'aide sociale — ont été prises pour couvrir leurs besoins et les siens.
72. (1) Judicial review by the Federal Court with respect to any matter — a decision,	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision,

determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.

ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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