Federal Court  Cour fédérale

Date: 20131010

Docket: IMM-12980-12

Citation: 2013 FC 1024

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, October 10, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GLADYS DORLEAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), for judicial review of a decision by an immigration officer dated December 5, 2012, to reject an application for an exemption on humanitarian and compassionate (H&C) grounds under subsection 25(1) of the IRPA.

II. Facts

[2] The applicant, Gladys Dorléan, is a Haitian citizen, born in Port-au-Prince, in 1945. She gave birth to a daughter, Marie Carmel Jean-Baptiste, in 1966. The applicant indicated that Marie Carmel Jean-Baptiste allegedly married Hatson Lafortune prior to 1994 in Haiti.

[3] Shortly after the marriage, Mr. Lafortune allegedly moved to Canada. He then allegedly applied to bring Ms. Jean-Baptiste to Canada.

[4] In October 1994, Ms. Jean-Baptiste moved from Haiti to join Mr. Lafortune in Canada. She subsequently became pregnant.

[5] On June 12, 1995, the applicant, Ms. Dorléan, came to Canada to attend the second marriage ceremony between her daughter and Ms. Lafortune, as well as to be present at the birth of her grandson. She received a temporary visa to participate in these two events expiring on November 30, 1995.

[6] The applicant remained in Canada illegally until 2005.

[7] On July 12, 2005, the applicant made a refugee claim under the false name of "Évelyne Dorléan". The applicant explained that her son-in-law started this process for her and that she had no choice but to comply with his directions. The refugee claim was refused on January 6, 2006.

[8] On October 18, 2010, the applicant made an H&C application to apply for permanent residence from within Canada.

[9] The H&C application was denied on December 5, 2012.

III. Decision under review

[10] In his decision, the officer first noted that he did not have jurisdiction to assess factors based on a fear of risk, as set out in sections 96 and 97 of the IRPA. The officer stated that he did not therefore consider the applicant's reasons with respect to the socio-economic dynamics in Haiti, but rather assessed the hardship that she would personally face. The officer concluded that the risks detailed in the Applicant's Record were not personalized, and therefore, could not constitute an "unusual and undeserved or disproportionate hardship".

[11] The officer then assessed the other factors identified by the applicant in support of her H&C application, namely, her degree of establishment in Canada and her ties to her homeland.

[12] In assessing the applicant's degree of establishment in Canada, the officer determined that the applicant did not demonstrate that she would have difficulty in meeting financial or emotional needs without the support and assistance of the family unit in Canada. The officer noted that the applicant has not lived with her family in Canada since 2005, and that she rather depended on social assistance to meet her financial needs. The officer also pointed out that the applicant has three

brothers and two sisters in Haiti; thus, she would have some support in Haiti if she were forced to return to and apply for permanent residence from within Haiti.

[13] As for her establishment, the officer also assigned significant weight to the fact that she has had illegal status in Canada since 2005. He also concluded that the applicant had not demonstrated a sufficiently substantial connection to Canada to result in "unusual and undeserved or disproportionate hardship" for her if she were to return to Haiti.

[14] The officer also considered the best interests of the applicant's grandchildren, even though no such allegation was made by the applicant. However, he determined that there was insufficient evidence to conclude that the negative impacts of the applicant's re-establishment in Haiti on her grandchildren would be significant enough to warrant an H&C application.

IV. Issue

[15] Did the officer err in finding that the applicant would not face "unusual and undeserved or disproportionate hardship" if she had to apply for permanent residence from outside Canada?

V. Relevant statutory provisions

[16] Section 25(1) of the IRPA is applicable in this case:

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 — other than under section 34, 35 or 37 — or who does not meet the	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 — sauf si c'est en raison d'un cas visé aux articles

requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — 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.	34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — 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.

VI. Standard of review

[17] The findings of fact and refusal to grant the H&C application are assessed on the standard of reasonableness (*Kisana v Canada (Minister of Citizenship and Immigration)*, 2009 FCJ 189, [2010] 1 FCR 360, at paragraph 18).

[18] When a decision is made on a standard of reasonableness, reasonableness requires "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a 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 paragraph 47; *Bhattal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 989, at paragraph 3).

VII. Position of the parties

[19] In oral argument, the applicant indicated that the officer committed two reviewable errors:

(a) The officer erred in his analysis of the facts by using conjectures about the applicant's family ties in Haiti and by failing to analyze central facts;

(b) The officer erred in his analysis of the hardship the applicant would face upon her return to Haiti by finding that she [TRANSLATION] "had to establish that the current conditions in Haiti would affect her personally".

[20] With respect to the first point, the respondent submits that the officer reasonably found that the applicant would be able to benefit from the support of family members in Haiti. The respondent states that the applicant bore the burden of demonstrating that she would not benefit from the support of her family in her country of origin, but that she remained silent on that point without taking the opposite position.

[21] The respondent also submits that the officer took into account the applicant's allegations in assessing the H&C application. The respondent adds, however, that the officer was under no obligation to accept all these explanations in his analysis (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708; *Construction Labour Relations v Driver Iron Inc.*, 2012 SCC 65, [2012] 3 SCR 405).

[22] With respect to the second point, the respondent submits that the officer did not err in his analysis, as he took into account all the facts. However, he decided not to accept all of the

applicant's explanations. Furthermore, the respondent submits that the applicant's argument puts a premium on the merits of her application, and therefore, must be dismissed.

VIII. Analysis

Did the officer err in his analysis by using conjectures or failing to analyze facts?

[23] An H&C application is an exceptional and discretionary measure: *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358, at paragraph 15; *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356. To obtain such an exemption, the applicant must show that 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, at paragraph 19). Unusual or undeserved hardship is hardship that is unanticipated by the IRPA or *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*), which result from circumstances beyond her control. Disproportionate hardship results where the obligation to apply for permanent residence from outside Canada disproportionately impacts the applicant given her personal circumstances.

[24] In this case, the Court is satisfied that the officer reasonably considered all the applicant's claims and did not ignore evidence, namely with respect to her family ties in Haiti. The applicant filed a large volume of objective documentation on sexual violence in Haiti, but very little evidence pertaining to her particular circumstances if she were to return to Haiti.

[25] In her H&C application, the applicant indicated that she had three brothers and two sisters in Haiti, but did not provide any information on the nature of her relationship with her family

members. The only reference to the nature of her relationship with them is found in the following sentence [TRANSLATION]: "She would then find herself in a country where she currently has no family ties that can meet her emotional needs" (application for a visa exemption on humanitarian and compassionate grounds, at paragraph 26).

[26] In her memorandum, the applicant reiterates this point and alleges that the officer erred because he presumed that [TRANSLATION] "the existence of siblings guarantees support to the applicant if she were to return to Haiti" (at paragraph 34). However, the applicant still does not provide any explanation as to why her family members would not be able to help to meet her financial or emotional needs.

[27] The Court notes that the Minister of Citizenship and Immigration is under no duty to highlight weaknesses in an H&C application and to request further submissions (*Kisana*, above, at paragraphs 44-45; *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, at paragraphs 8-9).

[28] Thus, the burden was on the applicant to demonstrate that there were sufficient H&C grounds to grant her an exemption and to establish the facts on which her claim rested. She had acted at her own risk by omitting pertinent information in her written submissions on her family ties in Haiti.

[29] In the absence of sufficient evidence on the record, the Court cannot fault the officer for not reaching a different conclusion with respect to the hardship the applicant claims she will face upon

her return to Haiti. The only evidence in the record in this regard is that the applicant has a number of family members in Haiti.

[30] Similarly, the Court cannot accept the applicant's claim that the officer erred in failing to analyze the reasons for her derogatory actions in her refugee claim. They do not bear any relation to the crux of the H&C application, which is based on the applicant's establishment in Canada and the socio-economic conditions in Haiti.

[31] The Court notes that, when she filed her claim for refugee protection in 2005, the applicant had already been living in Canada illegally for ten years. The applicant's reasons for making a refugee claim under a false name at the time do not address her disrespect for and disregard of the law, which enabled her to establish herself in Canada in 1995. The Court considers that the officer reasonably assigned significant weight to this disrespect for and disregard of the law in determining the applicant's establishment.

[32] However, the Court finds that even if those reasons had been "central" to the H&C application, as the applicant submits, such a failure would not be sufficient to set aside the officer's decision. The Court quotes from *Newfoundland and Labrador Nurses' Union*, above, in which the Supreme Court of Canada stated as follows:

> Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that did not impugn the validity of either the reasons or the result under a reasonableness analysis. If the reasons allowed the reviewing court to understand why the tribunal made its decision and permitted it to determine whether the conclusion was within the range of acceptable outcomes, the *Dunsmuir* criteria were met. [Emphasis added.]

[33] The Court finds that the reasons provided by the officer make it possible to understand the basis for the officer's conclusion that the applicant's degree of establishment in Canada would not cause an unusual and undeserved or disproportionate hardship upon her return to Haiti.

Did the officer err in his analysis of the hardship caused by the conditions in Haiti?

[34] The officer considered the applicant's risk claims related to an eventual return to Haiti. The officer found that those claims were unfounded on the basis that the applicant failed to show that she would be personally affected by those risks.

[35] The case law of this Court has repeatedly confirmed that H&C applications must present a particular risk that is personalized to the applicant (*Lalane v Canada (Minister of Citizenship and Immigration)*, 2009 FC 6, 338 FTR 224; *Ye v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1072, at paragraph 10). The Court refers to the observations in *Lalane*, above:

> [38] The allegation of risks made in an H&C application must relate to a particular risk that is personal to the applicant. The applicant has the burden of establishing a link between that evidence and his personal situation. Otherwise, every H&C application made by a national of a country with problems would have to be assessed positively, regardless of the individual's personal situation, and this is not the aim and objective of an H&C application. That conclusion would be an error in the exercise of the discretion provided for in section 25 of the IRPA which is delegated to, *inter alia*, the PRRA officer by the Minister. . . .
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> . . .
>
> [42] The question is not when or to where the applicant will be removed. The issue here is whether applying for a visa from outside Canada would cause the applicant unusual and undeserved or disproportionate hardship. The applicant has the burden of proving the particular facts of his personal situation, which mean that applying for a visa from outside Canada would cause him unusual and undeserved or disproportionate hardship. . . . [Emphasis added.]

[36] There must necessarily be a link between evidence supporting generalized risk and that of personalized risk. Thus, the onus is on the applicant to demonstrate a link between the risk and her personal situation. Even if generalized risk could be proven in this case, this is not enough to succeed in an H&C claim (see *Paul v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1300, [2010] 1 FCR 232; *Ramotar v Canada (Minister of Citizenship and Immigration)*, 2009 FC 362; *Chand v Canada (Minister of Citizenship and Immigration)*, 2009 FC 964).

[37] The Court finds that the evidence was weak, or even non-existent, regarding the applicant's personal risk in Haiti. The H&C application focused only on the socio-economic conditions in Haiti facing the general population on a daily basis. The officer therefore reasonably concluded that the applicant did not establish that her circumstances indicate personal risk.

[38] The officer's decision, on the basis of the evidence, does not warrant the Court's intervention. These reasons fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. The onus was on the applicant to show the officer that sufficient H&C grounds existed to warrant an exemption from the requirements of the Act. However, the applicant failed to discharge this burden.

IX. Conclusion

[39] For all the foregoing reasons, the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the applicant's application for judicial review be dismissed with no question of general importance to certify.

"Michel M.J. Shore"
Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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