

Federal Court



Cour fédérale

Date: 20131206

Docket: IMM-10465-12

Citation: 2013 FC 1227

Toronto, Ontario, December 6, 2013

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

MARIA NIVEA SALAZAR PIMENTA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application is a challenge to an Citizenship and Immigration Officer's (Officer) humanitarian and compassionate decision, dated September 25, 2012, in which the determination was made that the Applicant failed to provide sufficient evidence to establish that having to apply for permanent residence from outside Canada would amount to unusual and undeserved or disproportionate hardship.

[2] The factual background of the present Application is not in dispute and is stated from the Applicant's perspective by Counsel for the Applicant as follows:

Ms. Salazar is a citizen of Portugal, but she has no connection with that country, having left when she was a small child." The only people in Portugal whom she knows are two elderly half-sisters with whom she has no relationship. She was raised in and is a permanent resident of Brazil. Her husband is a citizen of Venezuela, but was also a permanent resident of Brazil. They had two sons, Fabio and Mario. In 1998, on a family trip to Venezuela, Fabio contracted malaria and as a result underwent numerous medical treatments and tests. However, these failed to uncover the fact that he had bone cancer, which was only diagnosed upon the family's return to Brazil- too late to save him. Fabio died at only 21 years old.

This tragedy had a profound impact on Ms. Salazar's life. She formed a horror of returning to Venezuela, which she blamed for her son's death. She also formed a closer attachment to her son Mario, which included a great deal of anxiety for his well-being. It was nearly impossible for her to cope when he came to Canada in 2007 to study English. Eventually, in October 2008, she and her husband travelled to Canada to see him.

While in Canada, Ms. Salazar found it a great relief to be close to her son. She also became very close to her son's girlfriend Olga (they are now married) and to Olga's family. Her husband's health could not stand the cold weather, so he moved back to Venezuela, but Ms. Salazar remained here with her family.

(Applicant's Written Submissions, paras. 2-4)

[3] The following passages from the decision under view provide the Officer's treatment of the Applicant's request for humanitarian and compassionate consideration:

The applicant has established that her only other child passed away in 1999, at the age of 21. The applicant has equally established, with the assistance of a report provided by a psychologist, that the death of her son has understandably created agony and distress for the applicant. The psychologist states that removing her from Canada would create undue hardship for the applicant as being with her son is helping her cope with the loss of her child. The psychologist further recommends that the applicant seek psychotherapy in order to deal with the guilt she continues to carry. It is noted that, while the

applicant does not have status in Canada at this time, she is not currently facing removal proceeding. Should she leave and regularize her status she could immediately seek to return at any time.

It is noted that the applicant has a sister in Canada as well as other relatives outside of Canada. In addition to her two half sisters in Portugal the applicant also has a husband of 36 years who resides in Venezuela. It is noted in the submissions that the applicant maintains contact with her husband and that there is nothing to show that this relationship has ended. While the applicant speaks about not being comfortable returning to Venezuela, due to its connection to her son's passing thirteen years ago, there is little evidence presented to express what would prevent her and her husband from resuming their lives together in Brazil or perhaps Portugal. Should the applicant return to her husband It would not be unreasonable to believe that he would be willing to support and comfort his wife and that they could continue with the grieving process together.

[Emphasis added]

[4] In my opinion the psychologist's evaluation of the Applicant's mental health is the most critical piece of evidence placed before the Officer for consideration:

PROFESSIONAL OPINION

In order to understand Mrs. Salazar's emotional suffering, her attachment to her son Moria must be contextualized. This Woman lost her oldest son at a young age, The passing of a child is tragic for any parent; however, Mrs. Salazar is plagued by guilt, as she blames herself for his illness, given that he contracted malaria in Venezuela. Although her belief is highly irrational in nature, it is nevertheless real and has served to reinforce her inability to mourn the passing of her son for over twelve years.

As such, Mrs. Salazar has developed an attachment to her son Mario, which is highly insecure in nature. In sum, without close proximity to Mario, Mrs. Salazar becomes highly distressed, reacting in a manner comparable to that of a new mother separated from her infant. The emotional devastation and trauma resulting from the death of her first son has left this woman incapable of understanding that she remains connected to her son in the face of the distance between them. For Mrs. Salazar, her relationship with Mario is only viable when the two are together. Separation is equivalent to an insurmountable loss. This is similar to separation anxiety; however, it is highly intensified by

the tragic and traumatizing loss of her first son. and the guilt she continues to carry into the present.

In sum, Mrs. Salazar is a woman who has not fully come to terms with the death of her eldest son. Therefore, she has become dependent on her relationship with Mario to sustain her emotionally. Without his presence in her life, Mrs. Salazar will no doubt undergo a psychological decompensation, as she lacks adequate coping mechanisms to deal with such a separation, and can not fathom a life away from him.

(Tribunal Record, pp. 43-44)

[5] While the Officers acknowledges the existence of the psychological opinion in the passage from the decision quoted above, it seems that the hardship opinion it contains was either not considered or not understood by the Officer. I come to this conclusion because at the end of the very paragraph in which the opinion is mentioned, the Officer begins to speculate on the options that the Applicant has to leave Canada, without hardship, which is the antithesis of the psychological opinion at the centre of the Applicant's request for humanitarian and compassionate relief. In my opinion, the Officer's failure to come to grips with the exact terms of the psychological assessment constitutes a reviewable error in fact-finding that renders the decision unreasonable.

[6] In *Tigist Damte v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1212, at paragraph 33 and 34, I have spoken about the essence of humanitarian and compassionate decision-making:

Thus, the Guideline test requires a subjective as well as an objective evaluation of hardship: unusual hardship might only require an objective analysis, whereas undeserved and disproportionate impact hardship requires both an objective as well as a subjective analysis. A subjective analysis requires that the facts be viewed from an applicant's perspective. In particular, a disproportionate impact analysis must reflect an understanding of the reality of life a person would face, in body and mind, if forced to leave Canada. In my

opinion, to be credible in determining these essential features, a decision-maker must apparently, and actually, apply compassion.

Applying compassion requires an empathetic approach. This approach is achieved by a decision-maker stepping into the shoes of an applicant and asking the question: how would I feel if I were her or him? In coming to the answer, the decision-maker's heart, as well as analytical mind, must be engaged.

[7] The final two paragraphs of the decision under review disclose the extent of the Officer's understanding of the reality of the Applicant's situation:

It is acknowledged that the applicant has been faced with hardships in relation to the death of her son, and that being with her remaining son provides her comfort. It is not difficult to sympathize with this woman and it is easy to understand her desire to continue living in Canada with her son and daughter in law. However, regardless of where the applicant resides she cannot escape the fact that her son passed away in 1999.

While the death of her son was clearly beyond her control, the other factors are of her own making. The applicant came to Canada to be with her son and to seek permanent residence, with no assurance of being successful in her attempt. She has been in Canada since October 2008 yet waited until April 2012 to submit an application to remain permanently. There is also nothing on file to indicate neither that the applicant has followed the recommendation of the psychologist and sought psychotherapy nor that this psychotherapy assistance would be unavailable to her outside of Canada. The applicant has been able to travel to Canada in the past and does not currently face any impediments or bars to reentering [sic] in the future. The applicant would also not be prevented from communicating with her son via alternate means, should they be separated geographically for periods of time.

[Emphasis added]

[8] In my opinion these statements disclose no understanding of the Applicant's reality, and no humanitarian compassion whatsoever.

ORDER

THIS COURT ORDERS that for the reasons provided, I set aside the decision under review and refer the matter back for reconsideration by a different citizenship and immigration officer.

There is no question to certify.

"Douglas R. Campbell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10465-12

STYLE OF CAUSE: MARIA NIVEA SALAZAR PIMENTA V THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 4, 2013

**REASONS FOR ORDER AND
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DATED: DECEMBER 6, 2013

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