Federal Court  Cour fédérale

Date: 20170724

Docket: IMM-622-17

Citation: 2017 FC 715

Ottawa, Ontario, July 24, 2017

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ANDRE JOHAB PENA TORRES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of an immigration officer [officer] rejecting the applicant's request for an exemption on humanitarian and compassionate grounds [H&C application], pursuant to section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicant is a 23 year old citizen of Mexico and who arrived in Canada in 2002 at the age of 9. He initially came to Canada on a student permit for which he received numerous extensions. Since then, he has completed high school and studied at the Vancouver Film School in 2013 and at the VanArts Program for Acting in 2016, achieving a Diploma in Acting for Film and Television. Lately, he has been employed as an actor and as a cook. The applicant lives in Canada with two older siblings, a brother who is a permanent resident, and a sister who is a Convention refugee and has applied for permanent residency as part of the BC Provincial Nominee Program. His parents are still residing in Mexico and often come to Canada under super visas. During his stay in Canada, the applicant has returned to his native country on numerous occasions, but only for short trips.

[3] The applicant's student permit expired on November 30, 2016, and on June 15, 2016, the applicant filed an H&C application. To support his H&C application, the applicant filed numerous letters of support to demonstrate his strong establishment in Canada and his connections with his community. The applicant also highlighted his long-term relationship with his high school girlfriend and his strong relationship with his siblings and niece. As such, the applicant alleged that his niece looks up to him and that he is a good influence in her life. Furthermore, the applicant alleges that he would encounter difficulties if he had to return to Mexico as he has lost his ability to read and write in Spanish, as well as his familiarity with the Mexican culture, due to his long-term residence in Canada.

[4] On January 24, 2017, the officer denied the applicant's H&C application. The officer acknowledged the fact that the applicant has spent most of his life in Canada. However, he

questioned why the applicant had not made an application earlier to obtain his permanent residence status. If the applicant had decided that he wanted to settle in Canada permanently, he should have looked into applying for other streams such as Canadian Experience Class program [CEC] or the Provincial Nominee Program first [BC PNP]. He granted little weight to the fact that the applicant has been in a five year relationship with his girlfriend and that he spent the last fourteen years of life in Canada. He recognized that the applicant has lost some of his proficiency in the Spanish language, but considered that his parents in Mexico can assist him in his adjustment. The officer also considered the applicant's good influence on his niece and recognized that if the applicant was to leave, there certainly would be a change in her *status quo*, but found that all ties would not necessarily be severed. In conclusion, having "assessed the application globally and weighed all the factors submitted cumulatively", the officer was not satisfied that the applicant "would face significant hardship in applying for permanent residence abroad" [my underlining].

[5] In the present application for judicial review, the applicant strongly contests the general analysis of the officer for each ground raised in his H&C application. Also, and most importantly, the applicant submits that the officer erred by applying the "unusual and undeserved or disproportionate" hardship test, as defined in the Guidelines, a standard that was clearly rejected by the Supreme Court in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*]. On the other hand, the respondent defends the reasonableness of the conclusions reached by the officer, submitting that the applicant has not established that H&C considerations outweighed the requirements of section 11 of the IRPA to

file his permanent resident application from outside Canada, while the use of the expression "significant hardship" by the officer does not imply that he has applied the wrong test.

[6] While an officer's H&C findings are reviewed on the standard of reasonableness (*Kanthasamy* at para 44, *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082, [2016] FCJ No 1058 at para 18 referring to *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] SCJ No 12 at paras 57-59), his or her choice of the applicable legal test is subject to a review on the correctness standard (*Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72, [2017] FCJ No 52 at para 27, *Valenzuela v Canada (Citizenship and Immigration)*, 2016 FC 603, [2016] FCJ No 571 at para 19). There are several grounds for the Court to intervene in this case. In a nutshell, I am satisfied that the officer drew unreasonable or unintelligible conclusions from the evidence, proposed an alternative permanent resident process that does not exist for the applicant and, overall, has not addressed the evidence in a manner that is consistent with the Supreme Court of Canada's clear direction in *Kanthasamy* and the underlying equitable nature of the H&C process.

[7] In *Kanthasamy*, the Supreme Court mentions that "the words 'unusual and undeserved or disproportionate hardship' [used in the Guidelines] should […] be treated as descriptive, not as creating these new thresholds of relief separate and apart from the humanitarian purpose of s. 25(1)" (para 33) [my underlining]. In this respect, the purpose of subsection 25(1) of the IRPA is to offer "an equitable relief" in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another" (*Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 p 350).

However, it is important to remember that subsection 25(1) of the IRPA remains a flexible and responsive exception to the ordinary operation of the Act (*Canada (Public Safety and Emergency Preparedness) v Nizami*, 2016 FC 1177, [2016] FCJ No 1199 at para 16, referring to *Kanthasamy* at para 90). On that note, the Supreme Court in *Kanthasamy* at paragraph 23 underlines that "[t]here will inevitably be some hardship associated with being required to leave Canada. This alone will not generally be sufficient to warrant relief on humanitarian and compassionate grounds under s. 25(1), […] nor was s. 25(1) intended to be an alternative immigration scheme" [my underlining].

[8] In the case at bar, the officer has parsed the evidence in a manner that is inconsistent with *Kanthasamy* by asserting whether "significant hardship" was present, instead of focusing on humanitarian considerations raised by the applicant – most importantly the fact that he has lived most of his life in Canada. From this choice of words, and reading his decision as a whole, it is clear that the officer has imposed a hardship based analysis on the evidence and has simply substituted the threshold "significant hardship" for "unusual and underserved or disproportionate hardship". This error clearly affects the conclusion reached by the officer.

[9] The applicant has primarily been a student and his work history consisted of three months as a cook in a local restaurant. It was unreasonable to advance, as an alternative to the H&C process, that the applicant may qualify for the CEC or the BC PNP programs, as he clearly did not legally qualify for either of those. In order for the applicant to qualify for the BC PNP, the applicant must have the support of his BC based employer and a full-time permanent job offer from them. He must also have a minimum of two years of directly related full-time work

experience in the skilled person that the employer was offering him. Similarly, the CEC has a necessary legal precondition that applicants must have acquired in Canada, one year of full-time work, or the equivalent in part-time work in a Skill Type O, A or B level job. The officer simply offered those alternatives without any legal or factual knowledge of their requirements. Therefore, it was unreasonable to draw a negative inference from his lack of effort to get his permanent residency.

[10] Furthermore, while the officer says that he did give some weight to his lack of literacy in Spanish, he failed to analyse how this will impact the applicant. For example, the applicant seriously questioned how his acting skills earned in Canada will be helpful in Mexico without Spanish literacy skills. Even though the applicant's parents are still residing in Mexico, they will not help him to become literate and understand his native language. Indeed, acquiring literacy skills will be very difficult at his age.

[11] Compounded with the fact that the officer applied the wrong test, cumulatively, the errors noted above render the decision overall unreasonable. Consequently, this application for judicial review is allowed. The impugned decision is set aside and the matter sent back for redetermination by a different officer. Counsels have proposed no question for certification and no such question arises.

JUDGMENT in IMM-622-17

THIS COURT'S JUDGMENT is that the present judicial review application be allowed. The decision made on January 24, 2017 is set aside and the matter sent back for redetermination by a different officer. No question is certified.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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