Federal Court Cour fédérale

Date: 20180828

Docket: IMM-5457-17

Citation: 2018 FC 860

Toronto, Ontario, August 28, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

MARLENE BENITEZ DE TORRES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Benitez de Torres brings this application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of the October 23, 2017 decision of a senior immigration officer [Officer]. The Officer refused her application, made pursuant to subsection 25(1) of the IRPA, for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds. In seeking H&C relief, the applicant indicated

that she would be at risk and suffer undue hardship if required to return to Colombia due to her health care needs.

[2] Ms. Benitez de Torres submits that, in refusing the application, the Officer erred by: (1) misapprehending evidence of her vulnerability if removed to Colombia; and (2) applying the wrong legal test.

[3] For the reasons set out below, I am satisfied that the Officer's failure to address Ms. Benitez de Torres' evidence that she lacked a family or social support network in Colombia in light of the medical evidence before the Officer amounts to an error warranting the Court's intervention. The application is granted.

II. Background

[4] Ms. Benitez de Torres is a Colombian citizen in her seventies. She alleges that in July 2015, members of a paramilitary organization murdered her common law husband and took control of her farm, leaving her destitute and in hiding. She came to Canada in December 2015 seeking shelter with her daughter, a professional physiotherapist, and made a refugee claim.

[5] Her claim for protection was denied by the Refugee Protection Division [RPD] in 2016, and her application for leave to judicially review the negative decision was dismissed by this Court on August 24, 2016.

[6] She subsequently submitted an H&C application citing among other bases that: (1) she was 71 years of age; (2) she had no children in Colombia and that her siblings were not in a position to assist her; (3) she had been diagnosed with post-traumatic stress disorder [PTSD] and was being treated for Parkinson's disease associated with dementia; and (4) if returned to Colombia, she would become unable to care for herself.

III. Decision under Review

[7] The officer first noted that the applicant's risk arising from her allegations of persecution in Colombia had been previously assessed before the RPD. The Officer stated that the evidence advanced in support of the H&C application did not identify new risks relating to her allegations of persecution and that a positive H&C decision was not warranted on this basis.

[8] The Officer then addressed the risk arising from the applicant's medical circumstances. The Officer identified the medical reports and letters provided in support of the H&C application, noting that they established she suffers from PTSD, Parkinson's disease, and some degree of dementia. The Officer then turned to the documentary evidence describing the Colombian public health care system, noting that the evidence indicated high-quality care is available in urban centres, that access to health care in rural areas can be more challenging, and that all Colombian residents have access to care. Finding that health care facilities and treatment were available in Colombia, the Officer concluded there was no risk that requiring Ms. Benitez de Torres to apply for permanent residence from outside Canada would cause hardship.

[9] Turning to Ms. Benitez de Torres' personal circumstances, the Officer acknowledged that the evidence established that she was a welcome addition and asset within her daughter's family, but stated that this was not the test for granting an H&C exemption. The Officer also noted that when she entered Canada, Ms. Benitez de Torres knew separation was a possibility given her lack of status, and that if she returned to Colombia, there was a possibility for reunification in Canada through other immigration programs.

[10] The officer also addressed the best interests of the applicant's two grandchildren. The Officer noted that applicant had not lived with them prior to her arrival in Canada and that there was insufficient evidence suggesting the applicant's daughter was unable to care for her family before the applicant arrived. While the Officer acknowledged that the grandchildren benefited from the applicant's presence, the Officer was not satisfied that refusing the H&C application would be contrary to the children's best interests.

IV. Issue and Standard of Review

[11] The only issue the Court needs to address is the Officer's failure to substantively engage with and address the evidence relating to Ms. Benitez de Torres' medical circumstances and the lack of family and social support in Colombia.

[12] The standard of review applicable to an officer's exercise of discretion in considering an application for H&C relief is reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]; *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at

para 45 [*Kanthasamy*]; *Taylor v Canada (Citizenship and Immigration)*, 2016 FC 21 at paras 16-18).

V. Analysis

[13] In seeking H&C relief, Ms. Benitez de Torres identified a number of circumstances as being relevant to her application. These included: (1) her advanced age; (2) her medical issues (PTSD, Parkinson's Disease, some degree of dementia); (3) the degenerative nature of dementia and Parkinson's; (4) the lack of a cure for Parkinson's; (5) the lack of family or social network in Colombia; (6) that the previous factors combined would expose her to serious vulnerability and hardship; and (7) that in Canada, her emotional well-being is improved by the love and affection of her family in addition to the medical and therapeutic treatment she receives.

[14] The respondent submits that the Officer clearly considered the issues put forward in the H&C application and conducted a cumulative assessment of the claim. The respondent submits that Ms. Benitez de Torres' submissions in support of the request for relief placed emphasis on hardship and that the decision in turn reflects this fact; the officer did not assess the whole of the application through a hardship lens.

[15] In *Kanthasamy*, the Supreme Court of Canada recognized that subsection 25(1) of the IRPA, in providing authority to grant relief to foreign nationals seeking permanent residence who are inadmissible or do not meet the requirements of IRPA, is grounded in equity. Subsection 25(1) is intended to provide flexibility, in appropriate cases, to mitigate the effects of a rigid application of the law (*Kanthasamy* at para 19). Justice Abella, writing for the majority,

recognized that subsection 25(1) is not intended to duplicate proceedings pursuant to sections 96 and 97 of the IRPA and that what does warrant relief will vary depending on the facts and context of individual cases. However, “officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them” [emphasis in original] (*Kanthasamy* at paras 24 and 25). An officer must consider an applicant’s circumstances as a whole.

[16] The Officer did not take issue with Ms. Benitez de Torres’ evidence as to her medical issues. In written submissions provided to the Officer, it was noted that (1) “it is not unreasonable to suppose that although Ms. Benitez may be moderately capable of taking care of herself now, eventually she will lose all of her ability to do so” and (2) “it is also not farfetched to assume that Ms. Benitez will fall in depression […] and her physical and mental conditions will deteriorate more rapidly”. These submissions were advanced in the context of medical reports stating “[t]he patient should not be left alone, needs 24-hour supervision” and “as per specialist recommendations Ms. Benitez de Torres needs constant supervision and ongoing help with her activities of daily living, such as dressing, cleaning, and feeding”.

[17] Despite the evidence that Ms. Benitez de Torres required constant supervision and ongoing help with her activities of daily living, the Officer limited the analysis of her medical situation to the availability of public healthcare services in Colombia, finding them to be adequate. This analysis failed to take into account the evidence that Ms. Benitez de Torres required more than access to treatment: she also needed access to daily assistance and supervision. Her requirement for daily support and assistance, a requirement that the evidence

indicated would grow as her medical conditions advanced, made her submissions to the effect that she lacked a family or social network in Colombia of particular relevance in assessing her request for equitable relief. The Officer did not engage with this evidence. The Officer did address the impact that Ms. Benitez de Torres' return to Columbia would have on her daughter and her grandchildren, but again did not assess the impact on Ms. Benitez de Torres of the loss of the support provided by her daughter and her family. This impact was again, in my view, of particular relevance in the context of the evidence of her medical condition and the lack of family support in Colombia.

[18] While the Officer was under no obligation to address all of the evidence and arguments advanced, the medical evidence in this case highlights the need for "supervision" and "help" on a daily basis. This evidence rendered the availability of a family support network of particular relevance. The Officer's failure to address the impact of the absence of any family or social support in Colombia, an issue that relates directly to the request for equitable relief, undermines the requirement for "justification, transparency and intelligibility within the decision-making process" (*Dunsmuir* at para 47).

VI. Conclusion

[19] The Application is granted. The parties have not identified a serious question of general importance for certification and none arises.

JUDGMENT IN IMM-5457-17

THIS COURT'S JUDGMENT is that:

1. The application is granted;
2. The matter is returned for redetermination by a different decision-maker; and
3. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Luis Antonio Monroy	FOR THE APPLICANT
Prathima Prashad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Luis Antonio Monroy Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT