Federal Court  Cour fédérale

Date: 20190702

Docket: IMM-5918-18

Citation: 2019 FC 881

Ottawa, Ontario, July 2, 2019

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

NESHA MARGARET ALEXANDER

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Nesha Margaret Alexander, is a citizen of Grenada who applied for permanent residence on humanitarian and compassionate [H&C] grounds. A Senior Immigration Officer [Officer] refused the application, and she now seeks judicial review of that decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] Ms. Alexander submits that in refusing the application, the Officer erred by applying the wrong legal test and engaging in an arbitrary and therefore unreasonable assessment of her application.

[3] The respondent submits that the decision is reasonable. The respondent has also raised a clean hands argument, which Ms. Alexander objects to on the basis that it did not form part of the Officer's reasons for refusing the application.

[4] Having considered the submissions, I am unable to conclude that the Officer committed any reviewable error. I need not address the respondent's submissions on clean hands. The application is dismissed for the reasons that follow.

II. Background

[5] Ms. Alexander arrived in Canada in September 2001 on a visitor's visa. In March 2007, an exclusion order was issued against her. In July 2007, she received a negative pre-removal risk assessment. She was scheduled to be removed on September 29, 2007, but she failed to appear. In October 2007, a warrant was issued for her arrest. In August 2015, she gave birth to her son, a Canadian citizen.

[6] In July 2017, Ms. Alexander requested that her application for permanent residence be processed from within Canada based on H&C considerations. She relied upon the best interests of her Canadian-born child; her role as the child's primary caregiver; the child's relationship

with his father, who is a permanent resident in Canada; and adverse country conditions in Grenada.

[7] In considering the application, the Officer addressed the best interests of the child, the adverse country conditions in Grenada, Ms. Alexander's establishment in Canada, and the negative factors arising out of her immigration history.

[8] The Officer found it would be in the best interests of the child that Ms. Alexander remain in Canada, noting that she is his primary caregiver, his father would be unable to care for him alone, the quality of life in Canada is better than in Grenada, and the child would be separated from his father and aunts if he accompanied his mother to Grenada. However, the Officer noted that if Ms. Alexander were returned to Grenada, her son would accompany her and would continue to receive her care and love; that there would be access to extended family in Grenada to support his mother through the transition; and that he would adapt easily in light of his age. The Officer weighed these considerations and concluded that Ms. Alexander's son would be negatively impacted by her removal and found this to be an important factor.

[9] The Officer gave positive weight to the adverse country conditions in Grenada, namely criminality and insecurity. The Officer also addressed the emotional impact of returning to Grenada after an extended absence. The Officer found these circumstances were mitigated by the fact that Ms. Alexander had lived in Grenada most of her life, she was young and hardworking, and she would have the support of her family. The Officer nonetheless acknowledged an extensive period of adjustment and again gave positive consideration to this factor.

[10] In considering Ms. Alexander's degree of establishment, the Officer found that she had demonstrated a moderate degree of establishment and that this was a positive factor. However, the Officer noted that the level of establishment was not exceptional.

[11] Turning to negative factors, the Officer noted that Ms. Alexander had overstayed her visitor status, had failed to appear for removal, had been subject to an arrest warrant since October 2007, and had worked for many years without authorization. The Officer found this amounted to a clear disregard for Canada's immigration laws and was a significant counterweight to the positive factors.

[12] Despite the considerable hardship of returning, the effects on her son, and Ms. Alexander's establishment in Canada, the Officer concluded that there were insufficient H&C grounds to warrant an exemption.

III. Issues and Standard of Review

[13] The application raises the following issues:

A. Did the Officer apply the wrong legal test?

B. Did the Officer conduct an arbitrary and, therefore, unreasonable assessment of the application?

[14] The question of whether the Officer adopted the correct legal test will be reviewed on correctness. The Officer's assessment of the application engages questions of mixed fact and law that are to be reviewed against a standard of reasonableness (*Cezair v Canada (Citizenship and*

Immigration), 2018 FC 886 at paras 14 and 15; *Ibabu v Canada (Citizenship and Immigration)*, 2015 FC 1068 at paras 25 and 26).

IV. Analysis

A. *Did the Officer apply the wrong legal test?*

[15] Ms. Alexander argues that the Officer adopted a hardship threshold in assessing the application, contrary to the Supreme Court of Canada's decision in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*].

[16] Although the Officer does conclude that "the hardship that Ms. Alexander would experience in the event of a negative decision is insufficient to warrant a regulatory waiver based on humanitarian considerations," I am not convinced that the Officer erred in this regard.

[17] The Supreme Court's decision in *Kanthasamy* does not stand for the principle that the consideration of hardship in an H&C application is inappropriate. Rather, what is inappropriate is to consider hardship to the exclusion of "*all* relevant humanitarian and compassionate considerations in a particular case" (*Kanthasamy* at para 33 [emphasis in original]). This was reiterated more recently by Justice Alan Diner in *Miyir v Canada (Citizenship and Immigration*), 2018 FC 73 at paragraph 16, where he states:

> [16] For the purposes of the Applications now before this Court, it is notable that *Kanthasamy* did not reject the concept of "hardship" in H&C applications altogether; to the contrary, the Supreme Court's analysis in *Kanthasamy* indicates that "hardship", assessed equitably, flexibly, and as part of the applicant's circumstances as a whole, remains important to H&C analyses (*Mulla v Canada*

> *(Citizenship and Immigration)*, 2017 FC 445 (CanLII) at para 13; *Nwafidelie v Canada (Citizenship and Immigration)*, 2017 FC 144 (CanLII) at para 22 [*Nwafidelie*]).

[18] In this case, judicial review of the Officer's decision cannot be restricted to the consideration of a single sentence at the conclusion of the Officer's reasons. A reference to hardship does not, in itself, establish an error on the part of a decision-maker (*Boukhanfra v Canada (Citizenship and Immigration)*, 2019 FC 4 at para 11). The decision must be considered in its totality. *Kanthasamy* teaches that a reviewing court must go beyond an officer's use of terminology and consider whether the officer considered and gave weight to all of the humanitarian and compassionate considerations raised.

[19] The Officer's reasons reflect a considered review of Ms. Alexander's circumstances, including the best interests of her child. These factors were weighed against Ms. Alexander's non-compliance with and disregard of Canada's immigration laws. Hardship was considered, but it was a single factor that was addressed in the context of all the circumstances considered by the Officer, not to the exclusion of those circumstances. The Officer did not commit an error warranting the Court's intervention.

B. *Did the Officer conduct an arbitrary and therefore unreasonable assessment of the application?*

[20] The applicant argues that the Officer's failure to explain why the many positive factors in the decision were outweighed by Ms. Alexander's non-compliance of and disregard for Canada's immigration laws renders the decision unreasonable. I disagree.

[21] It is evident upon a review of the decision that the Officer did not ignore the best interests of the child or the positive aspects of the application. The Officer fairly identified and assessed each of these factors, finding they weighed in favour of Ms. Alexander's application. In considering the child's interests, the Officer readily acknowledged that those interests favoured Ms. Alexander remaining in Canada and that this factor was to be given important consideration. However, none of these factors, including the best interests of a child, are individually determinative (*Kanthasamy* at para 33; *Legault v Canada (Citizenship and Immigration)*, 2002 FCA 125 at paras 11-12, leave to SCC refused [2002] SCCA No 220; *Hawthorne v Canada (Citizenship and Immigration)*, 2002 FCA 475 at para 2).

[22] Having addressed and characterized the positive aspects of the application, the Officer then assessed the negative elements: Ms. Alexander's lengthy period of non-compliance with and disregard of Canada's immigration laws. Ms. Alexander understandably disagrees with the manner in which the Officer weighed this negative factor against the positive aspects of the application; however, it is trite to state that mere disagreement is an insufficient basis upon which to conclude an officer's decision was unreasonable.

[23] The Officer engaged in a transparent analysis of the positive and negative aspects of the application, weighed these factors, and reached a conclusion. The Officer's decision-making process was justified, transparent, and intelligible, and the outcome is within the range of possible acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

V. Conclusion

[24] The application is dismissed. The parties have not identified a question for certification and none arise.

JUDGMENT IN IMM-5918-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed; and

2. No question is certified.

"Patrick Gleeson"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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