Federal Court  Cour fédérale

Date: 20191021

Docket: IMM-710-19

Citation: 2019 FC 1313

Ottawa, Ontario, October 21, 2019

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

MONICA DORIS SHACKLEFORD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a senior immigration officer decision that denied an application for permanent residence, made from within Canada, based on humanitarian and compassionate grounds. The judicial review application is of course made pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [IRPA]. For the reasons that follow, the application must be dismissed.

I. The facts

[2] The applicant is a citizen of Jamaica, now aged 72 years old, who came to Canada in January 2005 for the purpose of visiting her sister. She never left. Mrs. Shackleford supported herself in Canada working for Canadian families in her community by being a caregiver to the elderly and young children.

[3] For reasons that remain unknown, she decided in April 2017 to seek to regularise her immigration status by making the application which is the subject of this judicial review. That application was refused on December 20, 2018. I have reviewed the application and the grounds raised in support of the humanitarian and compassionate application ("H&C application"); they are indeed limited. They are that the applicant appears to have supported herself during her years in Canada and a certain number of letters acknowledge her good character. It also appears that she is active in her church. There are no children involved in this case such that the best interests of the child must be taken into account.

II. The decision under review

[4] The Immigration Officer reviewed the matter with some care and identified the appropriate factors as being the establishment and the personal ties of Mrs. Shackleford in Canada. The officer did not find sufficient evidence to engage the application of the subsection 25(1) of the IRPA. It reads:

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act 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.	**25.1 (1)** Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 — ou qui ne se conforme pas à la présente loi; 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.

[5] Right off the bat, the officer states that the review "will include an assessment of hardship and the determination of whether there are sufficient grounds to justify the granting of an exemption and/or permanent resident status based on humanitarian and compassionate factors". The officer clearly considers the factors raised by the applicant, i.e. establishment, family and/or personal ties to Canada resulting in integration into Canadian society.

[6] It is also clear from the decision that hardship is a significant consideration in the decision being made. With respect to every issue raised the counterpoint is made. For instance, the officer speaks of "(t)he applicant's submissions in support of her establishment in Canada have been considered and they are afforded minimal weight as I do not find that they are sufficient to support that the applicant would be unable to secure employment upon her return to Jamaica in a similar capacity". Read as a whole, the reasons conclude that the hardship to be

experienced by the applicant does not reach a level sufficient to grant the exceptional remedy of considering further an application for permanent residence from within Canada based on humanitarian and compassionate grounds. The establishment, while positive, is given minimal weight in view of the lack of authorisation to be in Canada for such a long period of time. Similarly, letters of support from friends and former employers, in her capacity as a caregiver, speak of her character. Nevertheless, the letters are afforded little weight because they are said to be vague and do not demonstrate that "the applicant has made ties to any one person in Canada, such that severing these ties will have a significant negative impact on the applicant, or others in Canada such that she would be unable to return to Jamaica and resume life there with her son and other family members". The officer considered the personal circumstances and found that relocation and resettling in the applicant's country of origin have not been shown to result in a negative impact on her or others in Canada or Jamaica.

III. Arguments and analysis

[7] The parties agree that the review in this case is to be performed on a reasonableness standard (*Kanthasamy v Canada (The Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*], at para 44). The matter was addressed squarely by the Supreme Court and it is dispositive of the issue.

[8] There appears to be a variety of decisions coming out of our Court in view of various sets of facts. It is not easy to find any kind of sustained guidance out of those decisions. Accordingly, the Court should go back to first principles before examining further the particular circumstances of this case.

[9] The *Kanthasamy* decision operated a change in the approach to be taken in the consideration of H&C applications. However, the change is not as profound as the applicant wishes. The majority of the Supreme Court found that the test used in a number of cases, which was whether the hardship was "unusual and undeserved or disproportionate", was not appropriate in and of itself. That test stems from Guidelines prepared by the Minister for those to whom the duty to consider these matters is delegated. The Court states at paragraph 26:

> [26] According to the Guidelines, applicants must demonstrate either "unusual and undeserved" *or* "disproportionate" hardship for relief under s. 25(1) to be granted. "Unusual and undeserved hardship" is defined as hardship that is "not anticipated or addressed" by the *Immigration and Refugee Protection Act* or its regulations, and is "beyond the person's control". "Disproportionate hardship" is defined as "an unreasonable impact on the applicant due to their personal circumstances": Citizenship and Immigration Canada, *Inland Processing*, "IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds" (online), s. 5.10.
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> [Italics in original.]

[10] The Court found that treating the words to discuss hardship as "unusual and undeserved or disproportionate", as if they came from the legislation and were the standard to be applied, is not appropriate. They should not treated as the test to be applied. Instead, the standard encapsulated in this short formula is meant to provide assistance to the immigration officers. It does not fetter the discretion that is inherent in subsection 25(1). At paragraphs 30 and 31 of *Kanthasamy*, one can read:

> [30] A second approach is found in decisions which treat *Chirwa* less categorically, using the language in *Chirwa* as co-extensive with the Guidelines: see *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956, at paras. 16-17 (CanLII); *Chen v. Canada (Minister of Citizenship and Immigration)*, 232 F.T.R. 118, at para. 15. In these decisions, the Federal Court and Federal Court of Appeal have made it clear that the Guidelines and the "unusual and undeserved or

> disproportionate hardship" threshold merely provide assistance to the immigration officer but that they should not be interpreted as fettering the immigration officer's discretion to consider factors other than those listed in the Guidelines. In *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, [2003] 2 F.C. 555, the Federal Court of Appeal noted that the Guidelines are "not meant as 'hard and fast' rules" and are, rather, "an attempt to provide guidance to decision makers when they exercise their discretion": para. 9. And in *Singh v. Canada (Minister of Citizenship and Immigration*), 2014 FC 621, the Federal Court noted that humanitarian and compassionate considerations "are not limited … to hardship" and that the "Guidelines can only be of limited use because they cannot fetter the discretion given by Parliament": paras. 10 and 12 (CanLII).
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> [31] This second approach, which seems to me to be more consistent with the goals of s. 25(1), focuses more on the equitable underlying purpose of the humanitarian and compassionate relief application process. It sees the words in the Guidelines as being helpful in assessing when relief should be granted in a given case, but does not treat them as the only possible formulation of when there are humanitarian and compassionate grounds justifying the exercise of discretion.

[11] However, the notion of hardship continues to be an important consideration in the review of applications on H&C grounds. It has not been evacuated from H&C considerations. That is clear from my reading of paragraph 33 of *Kanthasamy*. The Court is far from rejecting hardship as a consideration relevant to H&C based applications. Rather it finds that the three adjectives "unusual, undeserved, disproportionate" do not establish a threshold. They are said to be instructive but not determinative. I reproduce in its entirety paragraph 33:

> [33] The words "unusual and undeserved or disproportionate hardship" should therefore be treated as descriptive, not as creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1). As a result, what officers should not do, is look at s. 25(1) through the lens of the three adjectives as discrete and high thresholds, and use the language of "unusual and undeserved or disproportionate hardship" in a way that limits their ability to consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case. The three

> adjectives should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision.
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> [Italics in original.]

[12] In my view, it is an examination through the lens of the three adjectives so that a higher threshold is created that is objectionable. As the Court notes at paragraph 23, "(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)". The H&C application is not to be treated either as another way of immigrating to Canada: "Nor was s. 25(1) intended to be an alternative immigration scheme".

[13] In *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559, the Court noted that "H&C considerations include such matters as children's rights, needs and best interests; maintaining connections between family members; and averting the hardship a person would suffer on being sent to a place where he or she has no connections (see *Baker*, at paras. 67 and 72)" (para 41). As can be readily seen, they all have a measure of hardship.

[14] There must be some articulation of the humanitarian and compassionate considerations that could be sufficient to grant the exemption in a particular set of circumstances. The Minister is subject to the legislation and he cannot act arbitrarily. The decision to refuse an application must be reasonable, taking into account all the factors, which include hardship. Similarly, the reviewing court must not either substitute its discretion for that which is given to the Minister and delegated to agents who act on behalf of the Minister. Without seeking to define that which

may be impossible to define (the quip from Justice Potter Stewart about obscenity in *Jacobellis v Ohio*, 378 US at 197 comes to mind: "I know it when I see it"), there must be a measure of the severity to the circumstances that could legitimately attract humanitarian and compassionate considerations. These will be assessed together with other considerations, such as the best interests of children or the establishment in the community.

[15] There is in fact a description of what constitutes humanitarian and compassionate considerations which gives the measure of what constitutes the threshold for section 25(1) applications. The point is driven home when one considers the description presented in *Kanthasamy* that is seen as being appropriate to attract H&C considerations. What is offered through section 25(1) is an "equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": Chirwa, at p. 350" (*Kanthasamy*, para 21). It is difficult to see how the desire to relieve the misfortunes of another does not imply a form of hardship suffered by someone. In fact, the misfortunes are such that they arouse, they provoke the desire to relieve them, which signals also a degree of severity.

[16] The *Kanthasamy* decision does not depart from the requirement to treat the remedy that is the H&C exemption as being exceptional and discretionary. This is not new. It has been part of the *Act*, and its predecessors, since 1966-67 (see *Kanthasamy*, para 12). As was said in *Semana v Canada (The Minister of Citizenship and Immigration)*, 2016 FC 1082, at para 15: "This relief exists outside the normal immigration classes or refugee protection streams by which foreign nationals can come to Canada permanently, and it acts as a sort of safety valve available for exceptional cases. Such an exemption is not an "alternative immigration stream or an appeal

mechanism" for failed asylum or permanent residence claimants". Nothing in *Kanthasamy* suggests that H&C applications are anything other than exceptional: the *Chirwa* description itself, the fact that it is not meant to be an alternative immigration scheme, the fact that the hardship associated with leaving Canada does not suffice are all clear signals that H&C considerations must be of sufficient magnitude to invoke section 25(1). It takes more than a sympathetic case.

[17] Furthermore, the judicial review of these cases is also limited by the nature of the remedy. A review for reasonableness implies significant deference from this Court, especially where there exists a discretion to be exercised by the decision maker. The reviewing court cannot substitute its discretion for that of the decision maker (*Legault v Canada (Minister of Citizenship & Immigration),* 2002 FCA 125, [2002] 4 FC 358 [*Legault*], at para 11). Parliament conferred on the Minister the ability to relieve the misfortunes of another, which implies that the mere disagreement with the Minister or his delegate will fall short on judicial review. A reasonableness review is not to be turned into a correctness review. As we were reminded recently by the Federal Court of Appeal in *Canada (Attorney General) v Heffel Gallery Limited*, 2019 FCA 82, the starting point has to be the decision itself, not the view taken of a sympathetic case in the eyes of the reviewing court:

> [50] In proceeding in this manner, from the outset of its analysis, the Federal Court committed a reviewable error by adopting its interpretation of paragraph 11(1)(b) and measuring it against the Board's interpretation, deeming the Board's interpretation unreasonable because it did not conform to its preferred interpretation. The Federal Court thus effectively succumbed to the temptation which our Court cautioned against in *Delios v. Canada (Attorney General),* 2015 FCA 117, [2015] F.C.J. No. 549 (QL) at paragraph 28:

> Under the reasonableness standard, we do not develop our own view of the matter and then apply it to the administrator's decision, finding any inconsistency to be unreasonable. In other words, as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did, finding any inconsistency to be unreasonable. That is nothing more than the court developing, asserting and enforcing its own view of the matter – correctness review.

[18] The decision under review is not without its faults. Nevertheless I have come to the conclusion that it deserves deference. It falls within the range of possible acceptable outcomes and is therefore reasonable. It is not for the Court to reweigh evidence or to re-litigate the case (*Legault, supra*, at para 11). The test is reasonableness, not correctness. I share the view expressed by Boswell J. in *Stuurman v Canada (Minister of Citizenship and Immigration)*, 2018 FC 194, at para 9, that:

> [9] An officer's decision under subsection 25(1) is highly discretionary, since this provision "provides a mechanism to deal with exceptional circumstances," and the officer "must be accorded a considerable degree of deference" by the Court (*Williams v Canada (Citizenship and Immigration)*, 2016 FC 1303 at para 4, [2016] FCJ No 1305; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 at para 15, [2002] 4 FC 358).

[19] In my view, the reasons for decision to deny relief, read as a whole, and considered in the context of this record, allow this "reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 16).

[20] The evidence in support of the application based on H&C considerations in this case was very thin. It boils down to someone who has been illegally in Canada, because without status (s. 11 of IRPA), for 14 years, who claims that she is employed as a caregiver and has been able to sustain herself for all those years. She has some letters of support from former employers and persons who know her, but it is difficult to disagree with the decision maker that these letters lack precision. They are of a general nature, without many details being provided concerning the depth of relationship that could be sufficient. If, in the circumstances of this case, these letters were to be sufficient, one would be hard pressed not to conclude that section 25(1) has become an alternative immigration scheme (Kanthasamy, para 23). Indeed how do these facts and circumstances meet the test to "offer equitable relief in circumstances that "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Chirwa*, at p. 350" (*Kanthasamy*, para 21)?

[21] The decision maker did not measure the hardship associated with being required to leave Canada against "unusual and undeserved" or "disproportionate" hardship such that only where hardship of that magnitude is found would there be room for a successful application. The three adjectives are not even mentioned, let alone used as two thresholds for relief. In the view of the Court, it would be equally inappropriate to turn judicial reviews of H&C decisions into an alternative immigration scheme, for cases it finds sympathetic, than accepting decisions that are arbitrary, or deny relief in cases where the circumstances excite the desire to relieve the misfortunes of someone.

[22] The burden on an H&C applicant is not alleviated. It remains that she must satisfy a reviewing court that the tribunal's decision was unreasonable in that it falls outside of the range of possible, acceptable outcomes and lacks justification, transparency and intelligibility within the decision-making process. In spite of able submissions by counsel for the applicant, that burden has not been discharged

[23] The level of establishment in this case was said by the decision maker to carry low weight. Given the evidence of establishment offered by the applicant, I do not see how this can be unreasonable if one accepts that this cannot constitute an alternative immigration scheme. The mere presence in Canada by someone who has been in this country illegally, for a long time, should affect weight in a negative way. There may well be other considerations, but length of time being illegally in Canada cannot carry much favour. The circumstances of this case do not bring the matter to a level such that the decision is unreasonable.

[24] As in *Edo-Osagie v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1084, the applicant's establishment was not ignored: but it was found to carry minimal weight as it was entered into without authorization. I share the view expressed in that case at paragraph 17:

> [17] It was not unreasonable for the Officer to negatively weigh the circumstances of the Applicants' establishment. This Court has often stated that applicants cannot and should not be rewarded for accumulating time in Canada, when in fact, they have no legal right to do so (*Semana v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1082 [*Semana*] at para 48). …

This does not constitute an unusual or even novel proposition. In *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, this Court found that "(i)t would obviously defeat

the purpose of the Act if the longer an applicant was to live illegally in Canada, the better his or her chances were to be allowed to stay permanently, even though he or she would not otherwise qualify as a refugee or permanent resident" (para 21; see also *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2017 FC 27). The applicant did not show how the proposition can be unreasonable in the face of these authorities and others to the same effect. In fact, the Court of Appeal in *Legault* (*supra*) is binding authority to the effect that the integrity of the immigration system is a relevant consideration (para 19).

[25] The applicant argued that undue focus on establishment gained during unauthorized employment is unreasonable. There has been no demonstration that the focus in this case was undue. I hasten to add that in appropriate cases, "the disruption of that establishment weighs in favour of granting the exemption" (*Sebbe v Canada (Minister of Citizenship and Immigration)*, 2012 FC 813, para 21). There may be cases when the establishment runs so deep and is so extensive, and the integration in the community is so far reaching and profound, that it would be unreasonable for the Minister not to grant chief because disrupting such rich establishment excites a desire to relieve the misfortunes of another. This does not constitute one of those cases. These cases will be few and far between.

[26] The applicant took issue with the fact that the decision maker considered that the skill set acquired in Canada could be of assistance if she returns to Jamaica. The issue is fully and adequately addressed in *Zhou v Canada (Citizenship and Immigration)*, 2019 FC 163, where Locke J., then of this Court, wrote at paragraph 17:

> [17] I recognize the principle set out in Lauture, and I accept that, in assessing the applicants' hardship upon return to China, the

> Officer considered their activities since arriving in Canada. However, I am not convinced that the Officer strayed into impermissible reasoning. The Officer has not turned an otherwise positive factor into a negative factor. In fact, in discussing the applicants' establishment in Canada, the Officer accepted that "the applicants have several positive elements towards their establishment and integration into Canadian society." In the concluding paragraph of the impugned decision, the Officer repeated that she gave positive weight to the applicants' establishment and integration in Canada. However, that positive weight was balanced against the RAD's negative credibility findings and the applicants' familiarity with China. In my view, despite concluding that the applicants' establishment and integration in Canada was a positive factor, it remained open to the Officer to consider that some of the skills the applicants had acquired in Canada could reduce the potential hardship of their return to China. The Officer's assessment of the applicants' establishment was not improperly "filtered through the lens of hardship" as it was in *Marshall v Canada (Citizenship and Immigration)*, 2017 FC 72 at para 35.
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> [My emphasis.]

[27] Although, the decision maker referred repeatedly to the concept of "hardship", I cannot see how it can be reasonably said that he was conducting the analysis through a lens of hardship, assuming that there is such objectionable lens, as opposed to the lens of unusual and undeserved, or disproportionate hardship as found in *Kanthasamy* to be deficient. The other factors were considered, but they were not sufficient to result in a successful application. That on this record is certainly reasonable. The considerations (establishment, personal ties and integration in the community) are very limited in this case: if they were to be sufficient, they would make the H&C applications the equivalent of an alternative immigration scheme for those who stay in the country long enough. I repeat. Hardship is a relevant consideration to establish the circumstances of an applicant which excite a desire to relieve the misfortunes; but there must be a level of hardship that goes beyond hardship associated with having to leave Canada. It must be

that reduced hardship in having to leave Canada because of employment skills acquired in Canada is part of the equation and can be considered by the decision maker.

[28] The applicant claims that the decision maker fixated on hardship and did not "assess how her establishment in Canada weighs in favour of granting an exemption" (factum, para 41). However the insurmountable difficulty faced by the applicant is the lack of evidence of establishment of sufficient quality in order to avoid turning H&C application into an alternative way of immigrating. The findings made by Diner J. in Brambilla v Canada (Minister of Citizenship and Immigration), 2018 FC 1137 are equally applicable to our case:

> [10] I disagree with the Applicants that the Officer applied the wrong test. As the Respondent conceded, the Decision could have been better worded. However, viewed as a whole, the Officer evaluated, as separate components, the Applicants' establishment in Canada and the hardship of applying abroad, and arrived at reasonable conclusions for both considerations. Indeed, both are factors that must be considered (*Nguyen v Canada (Citizenship and Immigration)*, 2017 FC 27 at para 28; *Chokr v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 1022 [*Chokr*] at para 9). Furthermore, the post-*Kanthasamy* jurisprudence has been clear that hardship remains an important factor in H&C requests (see, for instance, *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at paras 15-22 and 33).
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> [11] While the word "hardship" indeed found its way into several paragraphs that discussed establishment, the Officer clearly evaluated both concepts on their own terms.
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> [12] Furthermore, I do not agree with the Applicants that either *XY* or *Lauture* stand for the proposition that an officer cannot address both hardship and establishment within the same part of the H&C analysis. While I agree with the Applicants that it would be best to keep the concepts separate, to read either *Lauture* or *XY* as imposing a blanket prohibition on such commingling is to elevate form over substance. Rather, both of those cases faulted the officers for their failure to evaluate establishment evidence and weigh it along with other factors relevant to whether the H&C exemption applied. In both cases, the officer made the mistake of simply using the positive establishment attributes of the respective

> applicants in Canada, to find that they could therefore successfully establish abroad. …

[29] An appropriate analogy may be that of the sliding scales. The more hardship there is the less other considerations must be present. Conversely the absence of hardship will require that the other considerations be much more acute. In this case, the establishment and the ties in the community were reasonably assessed as being minimal.

[30] As a result, the Court finds that it has not been shown that the decision is unreasonable. The parties agree that there is no question that ought to be certified in accordance with section 74 of the IRPA. This Court shares that view.

JUDGMENT in IMM-710-19

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no serious question of general importance that ought to be certified.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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