Federal Court  Cour fédérale

Date: 20101124

Docket: IMM-1393-10

Citation: 2010 FC 1180

Ottawa, Ontario, November 24, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

ANDREA ESTEFANIA POVEDA MAYORGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Andrea Estefania Poveda Mayorga is a citizen of Ecuador. She applied for a temporary work permit as a live-in caregiver pursuant to section 111 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), after being offered a position to work in Canada as a caregiver for her great-uncle.

[2] In March 2010, a visa officer working with Citizenship and Immigration Canada (the "Officer") rejected the Applicant's application for a temporary work permit on the basis that she had

neither the required paid work experience nor the required six months of classroom training in a field or occupation related to the employment for which the work permit was sought.

[3] The Applicant seeks to have the decision set aside on the basis that the Officer erred by:

i. concluding that she did not meet the requirements of section 112 of the IRPR;

ii. ignoring relevant evidence in making her decision; and

iii. misconstruing the evidence before her in making her decision.

[4] For the reasons that follow, this application is dismissed.

I. Background

[5] In October 2009, the Applicant was asked by Blanca Eleana Escobar, the daughter of the Applicant's great-uncle Carlos Enrique Escobar Cevallos, to act as a live-in caregiver to her great-uncle. Both Ms. Escobar and Mr. Escobar Cevallos are Canadian citizens. Mr. Escobar Cevallos is currently suffering from various ailments, including leukemia, and requires companionship care on a permanent and live-in basis.

[6] At the time she received her job offer, the Applicant was told by Ms. Escobar that (i) her great-uncle needed someone who could speak his language, share his culture, and accompany him on a daily basis; and (ii) her great-uncle's doctor had stated that he could not be left alone and would benefit from the live-in care of a close family member.

[7] After accepting the job offer, the Applicant received a positive Labour Market Opinion on January 21, 2010. She was then interviewed over the telephone on March 1, 2010 by a Program Clerk at the Embassy of Canada in Bogota. Among other things, she claims that at the end of the interview she was told that she would receive some documents and information relating to medical examinations that she would be required to take because she would be staying in Canada for six months. However, she ultimately received a decision letter from the Officer dated March 4, 2010, stating that her application for a work permit had been denied.

II. The Decision under Review

[8] In her short, one-page, letter the Officer stated that the Applicant did not meet the requirements of s. 112 of the IRPR "because you have not demonstrated that you have the required paid work experience, nor the required six months of classroom training, in a field or occupation related to the employment for which the work permit is sought, i.e./ [*sic*] care of an ill, elderly person."

[9] In the Computer Assisted Immigration Processing System (CAIPS) notes, which are considered to form part of her decision, the Officer stated, among other things, that the Applicant had paid experience teaching English to young school children, but she did not submit proof of paid employment caring for the elderly. The Officer added that she was not satisfied that the Applicant meets the work experience/training requirement of the live-in caregiver program. She also noted that she was not satisfied that the Applicant would have the necessary knowledge from her volunteer work to properly care for someone in the condition of her great-uncle.

III. Standard of review

[10] The issues raised by the Applicant are reviewable on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 51-56; *Kniazeva v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 268, at para. 15). In short, the Officer's decision will stand unless it does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" or is not appropriately justified, transparent and intelligible (*Dunsmuir*, above, at para. 47).

IV. Preliminary Issue

[11] In paragraph 16 of the affidavit filed in support of her application for this Judicial Review, the Applicant stated that she had submitted evidence that she "had worked taking care of special disabled children and teaching them English at both the elementary and secondary school level." She then referred to Exhibit "B" to her affidavit, where she attached "a copy of the letter from the school" where she worked. At paragraph 24 of that same affidavit, she added: "At the interview I reiterated when asked that I had paid experience working with children with down [*sic*] syndrome and mental retardation as an elementary and secondary special teacher."

[12] In response to this assertion, the Respondent filed affidavits from the Officer, the Program Clerk who interviewed her over the telephone, and a Program Assistant whose duties include assisting visa officers in processing, interviewing, verifying documents and paper screening temporary resident applications for temporary entry to Canada.

[13] In her affidavit, the Program Assistant stated that upon noticing that the employment letter provided by the Applicant and included at page 16 of the certified tribunal record (CTR) did not

match the copy of the letter that was attached to her affidavit, she was asked by the Officer to telephone the Applicant's employer. She further stated that in her telephone conversation with the Director of the school where the Applicant works, she was informed that there are no students with special needs such as mental disabilities or Down's Syndrome in the school. She added that in a second telephone conversation with the prior Director of the school, who signed the letter that appears in the CTR, she was informed that (i) the prior Director did not write the unsigned version that was attached to the Applicant's affidavit; (ii) there were no students at the school with special needs such as Down's syndrome or a mental disability; and (iii) when she included in her letter the words "entre ellos niño@s [*sic*] con capacidades especiales", she did so "at the request of the applicant and meant regular students with some kind of learning difficulty in one subject or another as there always are in all schools because not all students have the same ability to start to read or write or the same ability to understand math."

[14] The affidavit provided by the Program Clerk stated, among other things, that the Program Clerk would not have told the Applicant that she would be receiving the necessary medical forms, nor would she have told her that her application had been approved. She added that, had the Applicant stated, as alleged in paragraph 24 of her affidavit, that she had experience as a school teacher "working with children with downs [*sic*] syndrome and mental retardation", she would have noted this fact in the CAIPS notes.

[15] The affidavit provided by the Officer stated, among other things, that the evidence before her did not satisfy her that the Applicant's employment experience teaching English to children in grades 1-7 could be transferable to taking care of a senior citizen who is in pain and suffering from cancer.

[16] In her written submissions, the Applicant took the position that the affidavit of the Program Assistant was not admissible in these proceedings, as it consisted of evidence entered *ex post facto*. However, during the oral hearing before me, her counsel conceded that the affidavit of the Program Assistant was admissible as a rebuttal to the evidence adduced in the Applicant's affidavit. He also conceded that the Applicant had an opportunity to cross examine the Program Assistant on her affidavit but failed to do so. He did not contend that any of the statements in that affidavit were false. Those statements will therefore be presumed to be true. The same is true with respect to the statements in the other affidavits mentioned above, as the Applicant did not object to those other affidavits.

[17] The Respondent submits that because the Applicant has filed false evidence with this Court in an attempt to appear to have the relevant work experience, she did not come to this Court with clean hands. Accordingly, he submits that this Application should be dismissed without any consideration of its underlying merits.

[18] In *Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2006 FCA 14, at para. 9, the Federal Court of Appeal stated that "if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief." The Court added, (at para. 10) that the factors to be taken into account in deciding whether to dismiss an application in this manner include:

> …the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter

> others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case.

[19] At the oral hearing before me, the Applicant's counsel took the position that the false evidence filed by the Applicant was relatively minor and not material in the context of her overall application. He added that it was purely speculative to suggest, as the Respondent did, that the false evidence had any impact on this Court's decision to grant Leave for Judicial Review in this matter.

[20] I disagree. The false evidence went to the heart of the Applicant's claim that she had the training or work experience in a field or occupation related to the employment for which she was seeking a temporary work permit, as contemplated by paragraph 112(c) of the IRPR. This evidence was emphasized repeatedly throughout the Memorandum of Fact and Law filed by the Applicant in this case, for example, at paragraphs 15, 16, 17, 19, 21, 22, 24 and 25. The repeated references in those paragraphs to the Applicant's paid work experience as a teacher of normal and special needs children, including those suffering from Down's Syndrome and mental retardation, was a central aspect of the Applicant's argument that the Officer erred in concluding that the Applicant did not meet the requirements of paragraph 112(c) of the IRPR. This same false evidence was repeatedly referred to in the affidavit filed by the Applicant in support of this application, for example, at paragraphs 16, 17, 18, 19 and 24.

[21] In my view, the nature of the Applicant's misconduct in filing false evidence was very serious. It has significantly undermined this proceeding. In filing false evidence in her affidavit, the Applicant has cast a strong shadow over her entire affidavit and over the other materials filed in this proceeding. She has also undermined the integrity of our judicial system. In the interest of

upholding the integrity of our judicial system and promoting respect for the administration of justice, this type of misconduct should be strongly deterred. When an Applicant comes to this court for a discretionary order, as is the case here, she must do so with clean hands (*Kouchek v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 323, at para. 6 (T.D.); *Mutanda v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1101, at para. 16).

[22] However, on the particular facts of this case, while I am inclined to agree with the Respondent that this Application ought to be dismissed without any consideration of its underlying merits, I prefer to dismiss it on the merits and to grant the Respondent its request for costs.

V. Relevant Legislation

[23] Pursuant to subsection 11(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), a foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the IRPR. The visa or document may then be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of the IRPA.

[24] Pursuant to section 111 of the IRPR, a foreign national who seeks to enter Canada as a live-in caregiver must make an application for a work permit in accordance with Part 11 of the IRPR and apply for a temporary resident visa, if such a visa is required by Part 9 of the IRPR.

[25] Section 112 of the IRPR sets out the conditions that must be met before a work permit can be issued to a foreign national. That section provides:

Work permits - requirements

112. A work permit shall not be issued to a foreign national who seeks to enter Canada as a live-in caregiver unless they

(*a*) applied for a work permit as a live-in caregiver before entering Canada;

(*b*) have successfully completed a course of study that is equivalent to the successful completion of secondary school in Canada;

(*c*) have the following training or experience, in a field or occupation related to the employment for which the work permit is sought, namely,

(i) successful completion of six months of full-time training in a classroom setting, or

(ii) completion of one year of full-time paid employment, including at least six months of continuous employment with one employer, in such a field or occupation within the three years immediately before the day on which they submit an application for a work permit;

(*d*) have the ability to speak, read and listen to English or French at a level sufficient to communicate effectively in an unsupervised setting; and

(*e*) have an employment contract with their future employer.

Permis de travail : exigences

112. Le permis de travail ne peut être délivré à l'étranger qui cherche à entrer au Canada au titre de la catégorie des aides familiaux que si l'étranger se conforme aux exigences suivantes :

a) il a fait une demande de permis de travail à titre d'aide familial avant d'entrer au Canada;

b) il a terminé avec succès des études d'un niveau équivalent à des études secondaires terminées avec succès au Canada;

c) il a la formation ou l'expérience ci-après dans un domaine ou une catégorie d'emploi lié au travail pour lequel le permis de travail est demandé :

(i) une formation à temps plein de six mois en salle de classe, terminée avec succès,

(ii) une année d'emploi rémunéré à temps plein — dont au moins six mois d'emploi continu auprès d'un même employeur — dans ce domaine ou cette catégorie d'emploi au cours des trois années précédant la date de présentation de la demande de permis de travail;

d) il peut parler, lire et écouter l'anglais ou le français suffisamment pour communiquer de façon efficace dans une situation non supervisée;

e) il a conclu un contrat d'emploi avec son futur employeur.

[26] The phrase “live-in-caregiver” is defined in section 2 of the IRPR to be “a person who resides in and provides child care, senior home support care or care of the disabled without supervision in the private household in Canada where the person being cared for resides”.

VI. Analysis

A. *Did the Officer err in concluding that the Applicant did not meet the requirements under Paragraph 112(c) of the IRPR?*

[27] The Applicant submits that the Officer erred by concluding that she did not have sufficient paid work experience to meet the requirements set out in paragraph 112(c) of the IRPR. The Applicant asserts that she provided evidence of paid work experience as an elementary and secondary school teacher for special needs children and non-special needs children for six years. She further asserts that this was confirmed by a letter from her employer. She maintains that the Officer erred by failing to properly assess whether the skills that she developed while working with children with Down’s syndrome and mental retardation are transferable to the caregiver job in respect of which she sought a temporary work permit.

[28] Once the Applicant’s false evidence is excluded from consideration, her position is reduced to the assertion that the Officer erred by failing to assess whether her paid work experience in teaching elementary and secondary school children without special needs is transferable to experience in caring for a terminally-ill elderly person.

[29] The Applicant submits that if experience in caring for geriatric patients as a nurse may be transferable to caring for children, as was found in *Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 684, then the inverse should also be true. She states that the decision in *Ouafae v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 459, provides further support for her position. In that case, it was found that an applicant who had experience as a teacher of primary school-aged children for 7 years likely had the required aptitudes for supervising and caring for children.

[30] In my view, those two cases are distinguishable on the basis that the potential transferability of skills from nursing experience with geriatric patients to caring for children, and from teaching primary school-aged children to supervising and caring for children, is much more readily apparent than the potential transferability of skills from teaching elementary and secondary school students to providing care for a terminally-ill elderly person.

[31] I am satisfied that experience from teaching elementary and secondary school students without special needs is sufficiently different from caring for a terminally-ill elderly person that the Officer did not err in failing to explicitly assess in her decision letter or in her CAIPS notes the transferability of the Applicant's work experience to the care-giver position for which she sought a work permit. The Applicant did not demonstrate how her paid work experience was or might be transferable to caring for a terminally-ill elderly person. Keeping in mind that the false version of her employer's letter, which referred to her experience with children with Down's Syndrome and mental retardation, was not before the Officer, it would not have been readily apparent from the evidentiary record that the Applicant's work experience might be transferable to the caregiver job in respect of which she sought a temporary work permit.

[32] In my view, it was reasonably open for the Officer to conclude, on the evidence before her, that the Applicant had not demonstrated that she had either the work experience or the classroom training required by paragraph 112(c) of the IRPR. In short, her conclusion fell well "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" and was appropriately justified, transparent and intelligible (*Dunsmuir*, above, at para. 47).

[33] The Applicant further submits that the Officer misinterpreted paragraph 112(c) by requiring her to have both paid experience and classroom training. In support of this position, she relies on the Officer's use of the word "nor" in her decision letter. In that letter, the Officer stated: "I have determined that you do not meet these requirement(s) because you have not demonstrated that you have the required paid work experience nor the required six months classroom training, in a field or occupation related to the employment for which the work permit is sought, i.e./ [*sic*] care of an ill, elderly person".

[34] I disagree. I do not read this passage or anything in the Officer's CAIPS notes as indicating that the Officer thought that the Applicant had to have both relevant paid work experience and relevant full time training.

B. *Did the Officer err by ignoring relevant evidence in making her decision?*

[35] The Applicant submits that the Officer erred by failing to consider her evidence of paid prior work experience as a teacher of normal and special needs children.

[36] The evidence in question is the letter from her employer that is discussed in Part IV of these reasons above. As I have noted, the version of that letter that was before the Officer was not the fraudulently modified one that was included with the affidavit filed by the Applicant in support of this application. As such, the letter reviewed by the Officer did not contain the fraudulent reference to children with Down's Syndrome and mental retardation.

[37] As explained in the affidavit of the Program Assistant, discussed at paragraph 13 above, the previous Director of the school where the Applicant works confirmed that the special needs children to whom she referred in her letter were "regular students with some kind of learning difficulty in one subject or another".

[38] Particularly having regard to this evidence, I am satisfied that the Officer did not err by ignoring any relevant evidence in making her decision.

C. *Did the Officer err by misconstruing the evidence in making her decision?*

[39] The Applicant submits that the Officer misconstrued the evidence by (i) failing to appreciate that she was hired to provide companionship care and then (ii) assessing whether she had paid work experience akin to geriatric nursing care.

[40] I disagree.

[41] At the outset of her letter dated January 21, 2010, found at page 13 of the CTR, Ms. Blanca Eleana Escobar stated:

> Due to the advance state of his illness, Carlos Escobar requires assistance to perform tasks of every day living such as grooming, walking, and attending medical appointments.
>
> In January 2009, Carlos Escobar was diagnosed with Stage IV, Lymphoma, and in March of the same year he was discharged from the hospital under palliative care. I work full time and I am unable to provide my father with the necessary personal care; therefore, I need to hire the services of a personal support worker. However, this is only a temporary arrangement and as my father's condition worsens, he needs the care of a live-in caregiver.

[42] In addition, in a letter from Mr. Escobar's doctor, Dr. Vadasz, dated January 21, 2010, which was included in the materials submitted by the Applicant in support of her application for a temporary work permit, Dr. Vadasz stated that Mr. Escobar suffers from several very serious chronic medical conditions, including diabetes mellitus, leukemia, arthritis and cognitive deficits. He added: "Mr. Escobar needs care 24 hours per day and would [*sic*] not be left alone. He would benefit from care by close family members. He needs mobility aids, including cane, walker and wheelchair if going out. His overall prognosis is guarded."

[43] In my view, it was entirely appropriate for the Officer to assess whether Ms. Mayorga had either paid work experience or full-time training related to being able to provide live-in care for a person such as Mr. Escobar, particularly having regard to the letters submitted by his doctor and his daughter.

[44] Contrary to the Applicant's submission, the Officer did not require the Applicant to have paid work experience with the elderly. Rather, she simply found that the paid work experience that

the Applicant possessed was not related to the employment for which she sought a work permit, as required by paragraph 112(c) of the IRPR.

[45] On the evidence before her, it was reasonably open for the Officer to make this finding. In short, this conclusion fell well "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" and was appropriately transparent, intelligible and justified in the last two paragraphs of the Officer's CAIPS notes (*Dunsmuir*, above, at para. 47).

D. *Costs*

[46] Pursuant to Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, no costs shall be awarded to or payable by any party in respect of an application for judicial review unless the Court, for special reasons, so orders.

[47] For the reasons described in Part IV above, I am satisfied that special reasons exist for awarding costs to the Respondent.

VII. Conclusion

[48] The application for judicial review is dismissed with costs to the Respondent.

[49] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUGES that this application for judicial review is dismissed with costs to the Respondent.

"Paul S. Crampton"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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