Federal Court  Cour fédérale

Date: 20181030

Docket: IMM-1149-18

Citation: 2018 FC 1087

Ottawa, Ontario, October 30, 2018

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MARICEL GALAMAY MAGDAY

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to section 72(1) of the Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA or the Act] of a decision [the Decision], dated December 11, 2017, made by a visa officer [the Officer] at the Consulate General of Canada in Hong Kong, refusing the Applicant's application for a two-year work permit under the low-skilled pilot program for employment by a Canadian common-law couple to work as a domestic

childcare helper, on grounds of *bona fides*. For the reasons that follow, the application is allowed.

[2] There is agreement that the standard of review is that of reasonableness with considerable deference owed to the Officer by the Court. It is also common ground that any procedural fairness owed applicants which attracts a standard of correctness that is at the low end of the scale. *Dunsmuir v New-Brunswick*, 2008 SCC 9, at para 47, *Arenas Pareja v Canada (Citizenship and Immigration)*, 2008 FC 1333, *Sulce v Canada (Citizenship and Immigration)*, 2015 FC 1132 at para 5.

[3] In the Court's view, the most significant issue pertains to the reasonableness of the Decision in terms of its transparency and justification. This in turn ultimately raises an issue of procedural fairness.

[4] The Court refers here to the Officer's reference to the apparent lack of financial justification by the Applicant's principal employer as to why she would expend her annual income to engage a live-in caregiver. This appears to be the main ground upon which the visa application was rejected, as is apparent in the Officer's brief reasons in support of his decision, as follows:

> PA [Principal Applicant] is 37-year-old single Philippine ppt [passport] holder, employed in HK as a domestic helper, applying for WP [work permit] under LSP [Low Skilled Pilot]. Job offer lists care for 2 children. Potential Canadian demonstrates financial ability to hire PA, however, I have concerns regarding justification, as PA's expected annual earnings of 22,880CAD per year, not taking into account potential overtime pay and cost of accommodation, are only 2.624CAD less than one of two

> employers total 2016 income as per NOA. It would be unusual to use one's entire income in order to hire a live in caregiver and I have concerns offer of employment is being used as a means to facilitate migration to Canada. Applicant has been employed as a domestic helper in HK since 2012. Previous 6 WP application refusals noted, including offers of employment from sister. Although applicant demonstrates experience in HK caring for children, PA has not demonstrated sufficient establishment or ties to home country. Previous paid work experience in the Philippines or other international work experience not demonstrated. Considering strong socio economic and familial pull factors to Canada, I am not satisfied PA is bf worker who will depart Canada at end of authorized period of stay. Application refused.
>
> [Emphasis added]

[5] The Applicant argued that it was not reasonable to limit the financial considerations relating to expected annual earnings to one spouse's income. Taking into consideration the other spouse's income, the Court would accept that the combined salaries could be sufficient to reasonably support retaining a live-in child worker to care for their children, while the parents worked. The other spouse has an annual income approaching $70,000. Absent the salary paid to the child-care worker, this still leaves a combined family income matching that of the average Canadian family of four persons. On its face therefore, this would be insufficient to explain the refusal.

[6] As a tangent to this discussion, the Court notes that the Applicant also argued that the employers had been issued a positive Labour Market Impact Assessment [LMIA] and therefore the income of one of the employers should be an irrelevant consideration. The Court agrees that reference to one employer's income may be misleading, if not fully explained, but it is not an irrelevant consideration, nor does the LMIA constrain the Officer's decision in these matters. (*Sulce v. Canada (Citizenship and Immigration)*, 2015 FC 1132 at para 29, *Sulce v Canada*

(Citizenship and Immigration), 2015 FC 1132 at para 18, *Chughtai v Canada (Citizenship and Immigration)*, 2016 FC 41 at para 19)

[7] The Court is of the view that the Officer's concerns would appear to be reasonable because the arrangement seems to contradict child rearing norms whereby parents would prefer that one of them stay at home to raise their young child, rather than the parent choose to work in a low-paying job that provides no financial gain if parenting duties are carried out by a live-in child care worker.

[8] In other words, it is not apparent why the family would undergo the nuisance, and perhaps risk of retaining a child care worker from abroad to live in their home for two years to care for their children. The arrangement provides no relative financial advantage given that the costs for the Applicant's services are equal to the annual income of one of the spouses. It also appears contrary to the general norm that suggests that parents usually prefer and enjoy raising their young children if financially able to do so.

[9] The problem with this justification, however, is that the Officer failed to carry through with the concept of preferred parenting choices. This appears to be the veritable point that requires an explanation when no economic gain arises from the live-in child care worker. Because this issue was neither expressed, nor addressed, this bears on the transparency of the decision.

[10] Even taking into consideration the need for deference by reviewing courts to "first seek to supplement them [the reasons] before it seeks to subvert them," stated in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, 2011 SCC 62 at paragraph 12, there nonetheless remains the related issue of procedural fairness.

[11] Reflecting on this reasoning, the Court is of the view that this is not a situation where the Officer can say that there is insufficient information explaining the arrangement. Rather it is a negative conclusion on the credibility of the Applicant and the employers. This conclusion is further inferentially supported by other reasons cited by the Officer, such as the Applicant applying unsuccessfully on several occasions to gain entry to Canada, as supplementing the conclusion that the employment is being used as a means to facilitate migration to Canada.

[12] In such circumstances, where the reasoning of the Officer is both insufficiently expressed and tending towards being a speculative finding on credibility, and where the issue appears likely to bear upon the outcome of the visa application, the Court concludes that it was incumbent upon the Officer to provide the potential employers with an opportunity to provide a reasonable explanation as to why they would delegate significant childcare responsibilities for their young children to a non-resident child care worker, given that the arrangement provides little or no financial gain for themselves, with potential downsides if it does not work out, and contrary to parents normally preferring to have responsibility for raising their children when no other justification to do otherwise comes to mind.

[13] The requirement to provide applicants with an opportunity to respond when credibility issues arise concerning visa applications is generally recognized in Canadian immigration law: see for example, *Tollerene v. Canada (Citizenship and Immigration)*, 2015 FC 538 at para 16, *Liu v Canada MCI*, 2018 FC 866 at Parra 21.

[14] As this issue goes to the heart of the Officer's conclusion rejecting the *bona fides* of the arrangement, the application must be allowed, with the decision being set aside and referred back to another officer for reconsideration.

JUDGMENT in IMM-1149-18

THIS COURT'S JUDGMENT is that:

1. the application is allowed;
2. the Officer’s decision is set aside, and the matter is referred back to a different officer for reconsideration; and
3. there is no question for certification.

“Peter Annis”
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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