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IMM-3633-19

2020 FC 917

Elena Starach (*Applicant*)

v.

The Minister of Citizenship and Immigration (*Respondent*)

INDEXED AS: STARACH V. CANADA (CITIZENSHIP AND IMMIGRATION)

Federal Court, Southcott J.—Toronto, August 20 (by videoconference); Ottawa, September 21, 2020.

Citizenship and Immigration — Status in Canada — Permanent Residents — Humanitarian and Compassionate Considerations — Judicial review of immigration officer's decision refusing applicant's permanent residence application under Immigration and Refugee Protection Act (Act), s. 25(1) on humanitarian, compassionate (H&C) grounds — Applicant unable to recall her past or confirm her identity — Asserting de facto statelessness, arguing hardship arising from statelessness, mental, physical health conditions, chronic homelessness — Also seeking relief on H&C grounds from requirement to provide identity documentation — Officer not satisfied applicant's identity, statelessness established — Finding absence of probative evidence not warranting permanent residence — Whether officer's assessment of applicant's H&C factors unreasonable — Officer failing to engage with applicant's request for relief from identification requirements of Immigration and Refugee Protection Act — Act, s. 25(1) authorizing respondent to grant exemption from any obligations of Act (including provisions related to identity) if justified by H&C considerations — Officer's treatment of issue of statelessness also unintelligible — Officer providing no explanation for conclusion — Unreasonable treatment of identity, statelessness issues rendering officer's decision as a whole unreasonable — Matter remitted for re-determination — Application allowed.

This was an application for judicial review of an immigration officer's decision refusing the applicant's application for permanent residence under subsection 25(1) of the *Immigration and Refugee Protection Act* (Act) on humanitarian and compassionate (H&C) grounds.

The applicant suffers from schizophrenia and possible traumatic brain injury. She was unable to recount details of her personal history, including her immigration history in Canada. The applicant asserted that she was a *de facto* stateless person and argued hardship arising from her statelessness, mental and physical health conditions, and chronic homelessness. Due to her inability to recall her past and the apparent impossibility of confirming her identity, she also sought relief on H&C grounds from the requirement to provide identity documentation. The officer was not satisfied that the applicant's name and date of birth were correct and therefore was not satisfied that her identity had been established, nor was he satisfied that the applicant was *de facto* stateless. In the absence of probative evidence of her identity, the officer found that granting permanent residence on H&C grounds was not warranted.

At issue was whether the officer's assessment of the applicant's H&C factors was unreasonable.

Held, the application should be allowed.

The officer entirely failed to engage with the applicant's request for relief from the identification requirements of *Immigration and Refugee Protection Act*. The officer's decision presented a circular and unintelligible analysis of the issues raised by the applicant. The officer could not deny the application based on the lack of identity evidence, without giving some consideration to the request and an explanation for rejecting it. Subsection 25(1) of the Act expressly authorizes the respondent Minister to grant an exemption from any applicable obligations of the Act, if the Minister is of the opinion that it is justified by H&C considerations. This includes provisions of the Act related to identity. There was also support for the applicant's position that subsection 25(1) equips the Minister to address the related challenges faced by persons who, through no fault of their own, are both without identity documentation and stateless.

The officer's treatment of the issue of statelessness was unintelligible as well. The officer was not satisfied that the evidence demonstrated the applicant was more likely than not to be *de facto* stateless. However, the officer's decision provided no explanation for this conclusion, which appeared inconsistent with their analysis of the evidence.

While the officer's rejection of the H&C application was influenced by the conclusion that benefits were available to the applicant, the identity and statelessness issues raised by the applicant were sufficiently fundamental to her request for humanitarian relief, and to the decision, that the officer's unreasonable treatment of those issues rendered the decision as a whole unreasonable. The decision was set aside, and the matter remitted for re-determination.

STATUTES AND REGULATIONS CITED

Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 25(1).

CASES CITED

APPLIED:

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, 441 D.L.R. (4th) 1.

CONSIDERED:

Diarra v. Canada (Minister of Citizenship and Immigration), 2006 FC 1515; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909; *Vairamuthu v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1557 (QL), (2000), 195 F.T.R. 44 (T.D.); *Abeleira v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1008, 55 Imm. L.R. (4th) 75.

APPLICATION for judicial review judicial review of an immigration officer's decision refusing the applicant's application for permanent residence under subsection 25(1) of the *Immigration and Refugee Protection Act* on humanitarian and compassionate grounds. Application allowed.

APPEARANCES

Ben Liston for applicant.

Christopher Ezrin for respondent.

SOLICITORS OF RECORD

Legal Aid Ontario Refugee Law Office, Toronto, for applicant.

Deputy Attorney General of Canada for respondent.

The following are the reasons for judgment and judgment rendered in English by

SOUTHCOTT J.:

I. Overview

[1] The applicant seeks judicial review of a decision of an immigration officer (the Officer) dated May 21, 2019 (the Decision), refusing the applicant's application for permanent residence under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) on humanitarian and compassionate (H&C) grounds.

[2] As explained in greater detail below, this application is allowed, because the Decision is not intelligible in its treatment of either: (a) the applicant's request for a waiver of the requirements under IRPA to establish her identity; or (b) the applicant's argument that she is *de facto* stateless. As such, the Decision does not demonstrate a reasonable consideration of the factors relevant to the applicant's application for H&C relief.

II. Background

[3] The applicant's further memorandum of fact and law describes the applicant's background as follows:

> The Applicant is a 62-year-old woman who suffers from schizophrenia and possible traumatic brain injury. She has spent much of her time since late 2017 hospitalized at the Centre for Addiction and Mental Health ('CAMH') in Toronto. Prior to this, as far as anyone is aware, she lived on streets of Toronto for many years if not decades. The Ontario Public Guardian and Trustee is now appointed as her medical guardian and financial trustee.
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> As a result of her conditions the Applicant is unable to recount details of her personal history, including her immigration history in Canada. She is also unable to provide consistent information about her place of birth. She has indicated at various times that she was born in Poland, but hospital records also mention her country of origin as the former Yugoslavia. The Polish consulate in Toronto has confirmed that they have no records to confirm her nationality. Both Immigration, Refugees and Citizenship Canada ('IRCC') and the Canada Border Services Agency ('CBSA') have no records of her prior immigration history. CAMH has not

> located any medical records prior to 2017, and Service Ontario does not have any civil records.

[4] I do not understand any of these facts to be in dispute.

[5] The applicant filed an application for permanent residence on H&C grounds, asserting that she is a *de facto* stateless person and arguing hardship arising from her statelessness, mental and physical health conditions, and chronic homelessness. Due to her inability to recall her past and the apparent impossibility of confirming her identity, she also sought relief on H&C grounds from the requirement to provide identity documentation.

III. Decision under Review

[6] In the Decision that is the subject of this application for judicial review, the Officer reviewed the submissions by the applicant's counsel in support of her position that she is *de facto* stateless, as well as evidence that efforts had been made to confirm her identity and immigration status. The Officer also referred to letters from health care and social work providers, explaining the applicant's medical conditions, chronic homelessness, limited insight into her illness, need for support and shelter, and personal history, and explaining her efforts to pursue treatment and housing options.

[7] The Officer found that the applicant has mental health issues and memory deficits preventing her from providing complete and accurate information regarding her identity. After reviewing the evidence provided, the Officer was not satisfied that the applicant's name and date of birth are correct and therefore was not satisfied that her identity had been established. Noting the scant supporting evidence surrounding her country of birth or citizenship and her memory deficits, the Officer was also not satisfied that the applicant is *de facto* stateless.

[8] The Officer then referred to the submissions from the applicant's representative that, without status in Canada, she cannot access housing or social benefits such as the Ontario Disability Support Program ([ODSP). However, the Officer noted evidence that the applicant has been able to access mental health services, has a community mental health team that will support her after she is discharged from hospital, and has recently been able to obtain ODSP payments. The Officer found there was little corroborative evidence that the applicant is unable to access housing due to her lack of immigration status in Canada.

[9] In conclusion, the Officer recognized that the applicant is in a very difficult situation but was not satisfied that her identity had been established and, in the absence

of probative evidence of her identity, found that granting permanent residence on H&C grounds was not warranted.

IV. Issues and Standard of Review

[10] As articulated by the applicant, the question for the Court's consideration is whether the Officer's assessment of her H&C factors is unreasonable, because:

A. The absence of identity documentation cannot reasonably be a threshold issue for an H&C application premised on the absence of identity documentation;

B. The Officer erred in assessing the applicant's submissions and evidence surrounding her *de facto* statelessness; or

C. The Officer misunderstood and/or ignored relevant evidence of the hardship caused by the applicant's lack of status.

[11] Consistent with the articulation of the question above, parties agree that this question is reviewable on the standard of reasonableness.

V. Analysis

[12] I have little difficulty concluding that the Decision must be set aside as unreasonable. As explained by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1, the reasonableness standard looks to considerations such as the intelligibility of a decision (at paragraph 15) including its internal rationality (at paragraph 104). The Decision in the present case fails this assessment.

[13] As previously noted, the material facts of this matter are not in dispute. Because of her mental and physical illness, the applicant is unable to establish her identity. In recognition of this challenge, her application for H&C relief sought a waiver of the usual requirements to provide documentation verifying an applicant's identity when submitting an H&C application.

[14] However, the Officer entirely failed to engage with this request. The Decision noted the request, and the Officer accepted that, due to her mental health issues, the applicant has been unable to provide accurate information regarding her identity. The Decision then stated that, given the lack of supporting evidence as to her identity, the Officer was not satisfied that the applicant's identity was established. The Officer subsequently found, at the conclusion of the Decision, that granting permanent

residence on H&C grounds was not warranted in the absence of probative evidence of identity.

[15] This analysis demonstrates no consideration whatsoever of the applicant's request for relief from the identification requirements of IRPA. The Decision presents a circular and unintelligible analysis of the issues raised by the applicant. Her H&C application submits that, for reasons outside her control, she is unable to provide identity documentation and that this difficulty, and her resulting statelessness, contribute significantly to the hardship that grounds her request for H&C relief. She therefore requests relief from the identification requirement. When presented with that request, it cannot be reasonable for the Officer to deny the application based on the lack of identity evidence, without giving some consideration to the request and an explanation for rejecting it.

[16] I note that the respondent has identified for the Court that there is jurisprudence suggesting the requirements prescribed by IRPA for the provision of identity documentation cannot be waived by an officer considering an H&C application under subsection 25(1). In *Diarra v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1515 (*Diarra*), the Court upheld the decision of an immigration officer, denying an H&C application, which turned at least in part on the applicant failing to submit adequate identity documentation. Justice Pinard stated as follows at paragraphs 13–14:

> In my opinion, in this case, the immigration officer was entitled to require the applicant's passport as proof of identity. First of all, as specified in paragraphs 50(1)(*a*) and (*b*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations), a foreign national seeking permanent residence in Canada must hold a passport or a travel document issued by the country of which he or she is a citizen or a national. In this case, the respondent notes that the immigration officer had explained to the applicant that she could not accept a copy of a birth certificate and a school identity book because of the requirements set out in subsection 50(1) of the Regulations. In addition, the immigration officer advised the applicant on several occasions of the importance of submitting identity documents for the processing of his file.
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> In *Vairamuthu v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1557 (T.D.) (QL), the Court ruled that evidence of identity is an essential element to be considered in deciding an application for permanent residence on humanitarian and compassionate considerations, as specified in the Act and Regulations, and the immigration officer cannot waive this requirement. Therefore, the immigration officer did not err in invoking the lack of evidence of the applicant's identity in rejecting his application, and considering the warnings given to the applicant, she did not in any way infringe the principles of natural justice or procedural fairness. [Emphasis in original.]

[17] The respondent notes that *Diarra* was cited by the Supreme Court of Canada in *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R.

909 (*Kanthasamy*), at paragraph 18. However, the respondent acknowledges that the Supreme Court did not reference *Diarra* for the point set out above. I do not read *Kanthasamy* as endorsing a conclusion that an immigration officer considering an H&C application is unable to waive provisions of IRPA related to identity. Indeed, I find this a strange proposition, given that subsection 25(1) of IRPA expressly authorizes the Minister of Citizenship and Immigration to grant an exemption from any applicable obligations of IRPA, if the Minister is of the opinion that it is justified by H&C considerations.

[18] The applicant would distinguish *Diarra* as involving an application that did not seek a waiver of identification requirements. She also notes that the decision in *Vairamuthu v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1557 (QL), (2000), 195 F.T.R. 44 (T.D.), upon which *Diarra* relies, was decided under immigration legislation predating IRPA. The applicant refers the Court instead to Justice Elliot's more recent decision in *Abeleira v. Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1008, 55 Imm. L.R. (4th) 75 (*Abeleira*), involving a stateless man who sought H&C relief to allow him to apply for permanent residence from within Canada. While Justice Elliot identified several reviewable errors in the decision denying Mr. Abeleira H&C relief, the applicant relies in particular on portions of her analysis regarding the Officer failing to consider whether Mr. Abeleira could be removed from Canada to apply for permanent residence from outside the country (at paragraphs 36–40):

> Unlike many other stateless persons, Mr. Abeleria is not known to have been a former citizen of any country, who then subsequently became stateless. He is stateless through the circumstances of his unregistered birth during the Spanish civil war and then being orphaned in Mexico at the age of three.
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> Mr. Abeleira's H&C Application submissions centred on his statelessness and especially the fact that he cannot be removed from Canada. The Officer never determined whether Mr. Abeleira can be removed to another country in order to apply for permanent residence from abroad.
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> Whether the country of origin was Spain or Mexico or the United States – the country of his last habitual residence – the circumstances are shown on the record to be that Mr. Abeleira cannot be removed to any of those countries. As his counsel points out, Mr. Abeleira is in a state of "legal limbo."
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> Therefore, the only four countries to which Mr. Abeleira has any connection at all (Canada being the fourth such country) do not want him because he has no status in any of them. Yet, the Minister says Mr. Abeleira has not shown sufficient humanitarian and compassionate grounds to be permitted to apply for permanent residence from within Canada. He must therefore apply for that status from another country. The conundrum is that there does not appear to be any other country who will accept him. Not only is Mr. Abeleira in a state of legal limbo, there is no way out of it. He appears trapped in an endless loop of "you have to leave to Canada to apply for permanent residence," however "you can't leave Canada because no country will take you."
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> While I fail to see how that can be a reasonable position in which to place any applicant, I do not have the benefit of the Officer's analysis. What makes the

> decision unreasonable is that the Officer never analyzed this problem. While he looked at individual aspects of statelessness such as health care and employment, he failed to see the big picture and did not consider the effect of Mr. Abeleira's statelessness at a global level, particularly whether he can be removed from Canada and, if not, whether it is humane or compassionate to leave him in an indefinite state of limbo in this country.

[19] *Abeleira* is not on all fours with the case at hand, as the reasons for Mr. Abeleira's statelessness differ from those alleged by the applicant, and Justice Elliot's analysis does not focus on the absence of evidence of identity. However, it is clear from the decision that, like the applicant, Mr. Abeleira had no documentation of any kind to prove his identity (at paragraph 13). I agree with the applicant that *Abeleira* lends support to her position that subsection 25(1) of IRPA equips the Minister to address the related challenges faced by persons who, through no fault of their own, are both without identity documentation and stateless.

[20] I also note that neither of the parties interprets the Decision as based on a conclusion by the Officer that the identification requirements of IRPA cannot be waived. As this is not the Officer's line of reasoning, I decline to comment further on the jurisprudence referenced above, other than to observe that the respondent therefore cannot rely on *Diarra* to support the reasonableness of the Decision.

[21] Turning to statelessness, I find the Officer's treatment of this issue to be unintelligible as well. In support of her position before the Officer that she meets the definition of *de facto* statelessness, the applicant's counsel relied on the respondent's policy guidance for H&C assessments, which notes that *de facto* statelessness can result from situations where a person cannot establish their nationality. The Officer accepts the evidence of the applicant's memory deficits and finds that there is little supporting evidence of her country of birth or nationality. However, the Officer was not satisfied that the evidence demonstrated the applicant is more likely than not to be *de facto* stateless. The Decision provides no explanation for this conclusion, which appears inconsistent with the Officer's analysis of the evidence. This component of the Decision is therefore unreasonable.

[22] I note that the respondent does not offer an explanation as to how the Officer arrived at this particular conclusion. Rather, the respondent submits that it did not matter whether the applicant had established statelessness, because the Officer concluded her alleged statelessness had not resulted in hardship warranting H&C relief. The respondent notes the Officer concluded that the applicant was able to access mental health services, had the support of a community mental health team, and was receiving ODSP payments at the time of the Decision. Based on those conclusions, the Officer found there was little corroborative evidence that the applicant was unable to access housing due to her lack of immigration status in Canada.

[23] The applicant challenges the reasonableness of the Officer's hardship analysis, arguing that the Officer failed to appreciate that her access to ODSP benefits was attributable to having filed an H&C application and would cease with the denial of that application. The respondent contests this point and argues the applicant had the onus of establishing this. I need not address this particular set of assertions, as I have disagreed with the respondent's position that the Decision can be understood as turning on whether the applicant could access benefits. While I agree that the Officer's rejection of the H&C application was influenced by the conclusion that benefits were available to the applicant, the identity and statelessness issues raised by the applicant were sufficiently fundamental to her request for humanitarian relief, and to the Decision, that the Officer's unreasonable treatment of those issues renders the Decision as a whole unreasonable.

[24] This application for judicial review must therefore be allowed, the Decision set aside, and the matter remitted for re-determination. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-3633-19

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is remitted to a new immigration officer for re-determination. No question is certified for appeal.