Federal Court Cour fédérale

Date: 20210722

Docket: IMM-1273-20

Citation: 2021 FC 780

Ottawa, Ontario, July 22, 2021

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

VERONICA ELISA GACAYAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Veronica Elisa Gacayan, seeks judicial review of a decision of a Senior Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC"), which refused the Applicant's request for permanent residency on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 (the "*IRPA*"). The Officer found the Applicant had not established that an exemption under H&C grounds was warranted.

[2] The Applicant submits the Officer erred by making numerous typographical and factual errors, and by failing to sufficiently consider the best interests of the child ("BIOC") with respect to the Applicant's grandchild.

[3] The Officer's mishandling of the evidence has the cumulative effect of establishing that the Officer's decision is not justified in relation to the relevant facts. I therefore grant this application for judicial review.

II. <u>Facts</u>

A. *The Applicant*

[4] The Applicant is a 60-year-old woman and a citizen of the Philippines. She has been widowed since 2001.

[5] The Applicant has three children: Ms. Mae Ann Parel (36 years old), Ms. Maureen Mae Reyes (32 years old), and Mr. Marion Nico Gacayan (25 years old). Ms. Reyes is a permanent resident of Canada. The remainder of the Applicant's children reside in the Philippines. The Applicant's mother and two sisters reside in Surrey, British Columbia.

[6] In October 2012, the Applicant first arrived in Canada and remained until March 2013. In April 2014, the Applicant returned to Canada and has remained here since that time. The Applicant currently resides with her daughter, Ms. Reyes, in Yellowknife, Northwest Territories.

[7] Since arriving in 2014, the Applicant has made several applications to remain in Canada. Her status to remain in Canada most-recently expired on February 28, 2018.

[8] On January 16, 2018, the Applicant submitted her H&C request after her application for a super visa was refused. The Applicant's H&C request was based on her establishment and ties to Canada, her desire to assist her family, and the prevalence of poverty and inequality in the Philippines.

[9] Ms. Reyes had her first child shortly after the Applicant submitted her H&C request.

B. *Decision Under Review*

[10] In a decision dated October 24, 2019, the Officer refused the Applicant's request for an exemption from the criteria for permanent residency on H&C grounds under subsection 25(1) of the *IRPA*.

[11] The Officer found the dislocation caused by the Applicant's return to the Philippines would not affect the Applicant's relationships with her relatives in Canada in a manner that warranted H&C relief. Additionally, the Officer noted the Applicant had spent the majority of her life in the Philippines and would not be returning to an unfamiliar environment. The Officer

also found there was insufficient evidence to indicate that the Applicant would be unable to find employment in the Philippines and provide for her family.

III. Preliminary Issue: Style of Cause

[12] The Applicant's Notice of Application, filed with this Court on February 20, 2020, names the Respondent as the Minister of Immigration, Refugees and Citizenship Canada in the style of cause. The parties agree the proper name for the Respondent is the Minister of Citizenship and Immigration, pursuant to subsection 4(1) of the *IRPA*. I therefore amend the style of cause accordingly.

IV. Preliminary Issue: Affidavit Evidence

[13] The Applicant asserts she initially provided IRCC with submissions in January 2018, and again in March 2019. She provides these submissions in her affidavit affirmed March 19, 2020, which forms part of her application record.

[14] The Respondent submits that portions of the Applicant's affidavit are inadmissible because they provide evidence that was not before the Officer.

[15] Some of the Applicant's January 2018 submissions are not contained in the Certified Tribunal Record (the "CTR"), including support letters and personal photographs. None of the Applicant's March 2019 submissions are contained in the CTR, most of which concern the Applicant's relationship to her grandchild. The CTR also contains documents that are not

contained in the Applicant's record, including country condition evidence, a tax reassessment, personal photographs, and a support letter from Ms. Reyes.

[16] The Respondent notes the affidavit of Frances Watt-Gallardo of IRCC, dated June 29, 2020, which affirms IRCC sent the Applicant a confirmation letter on January 19, 2018, indicating receipt of her application and requesting that any further submissions include her unique client identifier ("UCI") number. The Applicant's March 2019 submissions do not contain a UCI number as requested. Additionally, based on the relevant Global Case Management System notes, Frances Watt-Gallardo asserts no further submissions were provided to IRCC by the Applicant between January 2018 (when the application was received) and October 2019 (when the Officer's decision was rendered).

[17] I agree with the Respondent that portions of the Applicant's affidavit that are not contained in the CTR are inadmissible.

[18] Evidence that was not before the decision-maker is generally inadmissible upon judicial review (*Brink's Canada Limitée v Unifor*, 2020 FCA 56 at para 13; *Delios v Canada (Attorney General)*, 2015 FCA 117 at para 42; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 ("*Access Copyright*") at para 19). The rationale behind this rule is that reviewing courts are to review administrative decisions, not determine questions anew that were absent or inadequately placed before the decision-maker (*Bernard v Canada (Revenue Agency)*, 2015 FCA 263 ("*Bernard*") at para 17,

citing *Access Copyright* at para 19). There are three recognized exceptions to this rule, none of which apply in the case at hand (*Bernard* at paras 20-28; *Access Copyright* at para 20).

[19] Based on various errors in the Officer's decision, the Applicant asserts the discrepancy between her affidavit and the CTR is likely due to administrative mistakes on behalf of IRCC. However, the CTR is not only missing certain documents contained in the Applicant's affidavit, but also contains documents that IRCC indicates the Applicant submitted in addition to those included in the Applicant's affidavit.

[20] I find the most likely explanation for the discrepancy between the records is that the Applicant failed to produce an application record that accurately reflects the documents she submitted to the Officer. One alternative explanation is that IRCC failed to produce a complete CTR, which is unlikely in light of the fact that the CTR contains documents that the Applicant did not include in her record. Also unlikely is the extraordinary notion that the CTR includes documents concerning the Applicant and her family (tax reassessments, personal photographs, support letters) that the Applicant herself did not submit.

[21] Given the irregularity of the Applicant's record, I find the evidence in the Applicant's affidavit that was not contained in the CTR was likely not before the Officer and is therefore inadmissible. The Applicant bears the burden of proving she submitted the documents contained in her record to IRCC (*Njagi v Canada (Attorney General)*, 2020 FC 998 at para 24). In the absence of further evidence to contradict the above concerns, I find the Applicant has failed to meet that burden.

V. Issues and Standard of Review

[22] This application for judicial review raises the following issues:

A. *Did the Officer err by committing numerous typographical and factual errors?*

B. *Did the Officer err by failing to consider the BIOC?*

[23] It is common ground between the parties that reasonableness is the applicable standard of review for the above issues.

[24] I agree. The decision of whether to grant H&C relief under subsection 25(1) of the *IRPA* is reviewed upon the reasonableness standard (*Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 ("*Rainholz*") at para 23, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 ("*Vavilov*")).

[25] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

[26] For a decision to be unreasonable, an applicant must establish the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). A reviewing court must refrain from reweighing the evidence that was before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125).

VI. Statutory Framework

[27] Subsection 25(1) of the *IRPA* allows the Minister of Citizenship and Immigration to grant discretionary relief from the requirements of the *IRPA* to certain foreign nationals on H&C grounds:

Humanitarian and compassionate considerations — request of foreign national	**Séjour pour motif d'ordre humanitaire à la demande de l'étranger**
25 (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible — other than under section 34, 35 or 37 — or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada — other than a foreign national who is inadmissible under section 34, 35 or 37 — who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or	25 (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire — sauf si c'est en raison d'un cas visé aux articles 34, 35 ou 37 —, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada — sauf s'il est interdit de territoire au titre des articles 34, 35 ou 37 — qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il

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.	estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[28] Citing *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 ("*Kanthasamy*"), among other cases, Justice Little described the purpose of H&C applications and the relevant considerations in *Rainholz*:

> [14] Humanitarian and compassionate considerations refer to "those facts, established by the evidence, which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another — so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the [*IRPA*]". The purpose of the H&C provision is provide equitable relief in those circumstances.
>
> [15] Subsection 25(1) has been interpreted to require that the officer assess the hardship that the applicant(s) will experience on leaving Canada. Although not used in the statute itself, appellate case law has confirmed that the words "unusual", "undeserved" and "disproportionate" describe the hardship contemplated by the provision that will give rise to an exemption. Those words to describe hardship are instructive but not determinative, allowing subs. 25(1) to respond flexibly to the equitable goals of the provision.
>
> [16] An applicant may raise a wide variety of factors to show hardship on an application for H&C relief. Commonly raised factors include establishment in Canada; ties to Canada; health considerations; consequences of separation of relatives; and the BIOC. The H&C determination under sub. 25(1) is a global one, and relevant considerations are to be weighed cumulatively as part of the determination of whether relief is justified in the circumstances.

> [17] The discretion in subs. 25(1) must be exercised reasonably. Officers making humanitarian and compassionate determinations must substantively consider and weigh all the relevant facts and factors before them.
>
> [18] The onus of establishing that an H&C exemption is warranted lies with the applicants. Lack of evidence or failure to adduce relevant information in support of an H&C application is at the peril of the applicant.
>
> [citations omitted, emphasis added]

VII. Analysis

A. *Did the Officer err by committing numerous typographical and factual errors?*

[29] The Applicant notes the following errors contained in the Officer's decision:

(a) The Officer stated the Applicant's son, Mr. Gacayan, lives in Canada, when in fact he lives in the Philippines.

(b) The Officer stated the Applicant's most recent visa was issued on October 2, 2015, when in fact the Applicant has received three visa extensions since that time and most-recently on February 3, 2017.

(c) The Officer stated the Applicant's status to remain in Canada expired in 2015, when it in fact expired on February 28, 2018.

(d) The Officer initially stated the Applicant has been unemployed since arriving in Canada, yet the Officer later stated the Applicant obtained employment in Canada. The Applicant claims she has not been employed while in Canada.

[30] The Applicant asserts the above errors render the Officer's decision unreasonable, as they establish the Officer was not engaged with the relevant evidence (*Regala v Canada (Citizenship and Immigration)*, 2020 FC 192 at para 7).

[31] The jurisprudence has long held the Court should not interfere with a decision on the basis of typographical errors alone, especially if the errors do not constitute a misunderstanding of the evidence (*Bozik v Canada (Citizenship and Immigration)*, 2017 FC 961 at para 13, citing *Petrova v Canada (Minister of Citizenship and Immigration)*, 2004 FC 506 at para 51).

[32] While I accept the Officer's contradictory statement regarding the Applicant's employment history in Canada was a typographical error, I find the Officer's remaining errors constitute a misunderstanding of the evidence.

[33] In my view, these errors are sufficiently central or significant to render the Officer's decision unreasonable (*Vavilov* at para 100). The country of residence of the Applicant's son, the Applicant's visa history, and the length of time that the Applicant has remained in Canada without status were all key components of the Applicant's H&C application. The Officer's failure to meaningfully grapple with the Applicant's submissions calls into question whether the Officer was actually alert and sensitive to the matter before them (*Vavilov* at para 128).

[34] It is not for this Court to speculate whether the Officer would have reached a different conclusion if the errors in their decision were corrected. In this case, the Officer's mishandling of the evidence has the cumulative effect of establishing that the Officer's decision is not justified in relation to the relevant facts (*Vavilov* at para 85). This conclusion alone is sufficient to set aside the Officer's decision.

[35] In light of the above determination, I find it unnecessary to address the remaining issue raised by the Applicant.

VIII. <u>Conclusion</u>

[36] I find that the cumulative effect of the Officer's mishandling of the evidence entails that the Officer's decision is not justified in relation to the relevant facts. I therefore grant this application for judicial review.

[37] The parties have not proposed a question for certification, and I agree that none arises.

JUDGMENT in IMM-1273-20

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted. The matter is remitted to a different decision-maker for redetermination.

2. The style of cause is hereby amended to list the proper name for the Respondent, the Minister of Citizenship and Immigration.

3. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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