Federal Court  Cour fédérale

Date: 20220602

Docket: IMM-3143-20

Citation: 2022 FC 799

Ottawa, Ontario, June 2, 2022

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

VANESSA DEL CHIARO PEREIRA
SOPHIA DEL CHIARO COUTINHO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Ms. Vanessa Del Chiaro Pereira (the Principal Applicant) and Sophia Del Chiaro Coutinho (the Minor Applicant) are a mother and daughter from Brazil. Together, they seek judicial review of a decision of a Senior Immigration Officer (Officer) dated February 27, 2020. The Officer's decision denied their application from within Canada for permanent residency status, seeking an exemption from the general rule for these applications to be made from outside Canada, considering humanitarian and compassionate (H&C)

considerations under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

I. Facts

[2] The Principal Applicant first came to Canada in 2004 on a visitor visa. It appears that between 2004 and 2006, she studied at the International Language Academy of Canada and St. George College, and obtained certificates in English as a second language from both institutions.

[3] On August 8, 2005, the Principal Applicant's temporary resident status was renewed. On March 31, 2006, she was granted a study permit.

[4] During her 2004-2006 studies in Canada, the Principal Applicant met Mr. Angelo Countinho Da Silvo Junior, who would eventually become her husband. It is unclear what Mr. Countinho Da Silvo Junior, another Brazilian national, was doing in Canada in 2004-2006, or what his status was.

[5] In June 2006, the Principal Applicant returned to Brazil. In her affidavit of October 8, 2020, she states that Mr. Countinho Da Silvo Junior went home to Brazil independently, but at the same time. The Principal Applicant states in her affidavit that she and Mr. Countinho Da Silvo Junior moved in together in Brazil, but they were only friends at this point (Affidavit of Vanessa Del Chiaro Pereira, para 13). Later, the Principal Applicant moved to São Paulo and Mr. Countinho Da Silvo Junior lived in Southern Brazil.

[6] Mr. Countinho Da Silvo Junior subsequently rented a vacation home in Florianópolis, and invited the Principal Applicant over. The Principal Applicant visited the vacation home in November 2006. She would end up leaving the vacation home late in December 2006. The Principal Applicant wrote in her affidavit that other friends were at the vacation home during her stay at the end of 2006. The Principal Applicant stated that she and Mr. Countinho Da Silvo Junior were romantically involved during this period.

[7] The Principal Applicant returned to the Florianópolis vacation home a few months later, in April 2007. During this time, the Principal Applicant, Mr. Countinho Da Silvo Junior, and Mr. Countinho Da Silvor Junior's partner, Ms. Natalie Ricardo Da Silva, were all at the vacation home. The Principal Applicant's affidavit explains that Mr. Countinho Da Silvo Junior and Ms. Da Silva got married that same month, in April 2007. The H&C Decision calls this a "marriage of convenience" (H&C Decision, page 4).

[8] In May 2007, upon undergoing medical tests, the Principal Applicant states in her affidavit that she found out she was pregnant. The Principal Applicant's daughter, Sophia, was born on August 22, 2007 in Brazil.

[9] The record indicates that Ms. Da Silva is a Canadian citizen (H&C Decision, page 4). Ms Da Silva sponsored Mr. Countinho Da Silvo Junior's application for permanent residence in Canada. He immigrated in November 2008.

[10] Mr. Countinho Da Silvo Junior did not declare his daughter, Sophia, on his application for permanent residence. Mr. Countinho Da Silvo Junior alleges that he thought he only had to declare dependants that were accompanying him to Canada and were financially dependent on him (Affidavit of Vanessa Del Chiaro Pereira, para 17).

[11] On January 31, 2009, the Principal Applicant came back to Canada with a visitor visa. She came to Canada alone. The Minor Applicant arrived less than a month later on February 19, 2009 (Affidavit of Vanessa Del Chiaro Pereira, para 17). The record does not indicate who was looking after the Minor Applicant, who was not with her mother between January 31, 2009 and February 19, 2009.

[12] The Principal Applicant alleges that she and Mr. Countinho Da Silvo Junior began their romantic relationship anew in September 2009. Mr. Countinho Da Silvo Junior and Ms. Da Silva were still married at that time. They are alleged to have divorced in June 2011 (Affidavit of Vanessa Del Chiaro Pereira, para 28).

[13] On November 21, 2012, the Principal Applicant and Mr. Countinho Da Silvo Junior had their second child together, Arthur Del Chiaro Countinho. The Applicant's third child, Agatha Del Chiaro Countinho, was born on August 26, 2015 (Affidavit of Vanessa Del Chiaro Pereira, para 30). Both children are Canadian citizens by birth.

[14] On May 20, 2015, Mr. Countinho Da Silvo Junior sponsored the Principal Applicant for a Family Class sponsorship application under the common-law spouse category. The application

was refused for misrepresentation on October 2, 2017. The misrepresentations included that the Principal Applicant concealed information in her application and during her interview that she had been in a relationship with Mr. Countinho Da Silvo Junior since 2005 and had a child with him in August 2007. She also concealed that she continued to be in a relationship with Mr. Countinho Da Silvo Junior when he was married to Ms. Da Silva (H&C Decision, page 4).

[15] The Principal Applicant married Mr. Countinho Da Silvo Junior on November 17, 2017. She submitted that once she obtained a valid work permit, she opened her own construction business and that her spouse owns a carpentry business. Shortly thereafter the Applicants submitted an application for permanent residence from within Canada on H&C grounds.

[16] On February 27, 2020, the Officer reviewed the circumstances of the Applicants' request and decided that an exemption would not be granted. It is the Officer's refusal to grant the application for relief that is challenged through judicial review. The application for leave and judicial review was filed on July 20, 2020, pursuant to section 72 of the IRPA.

II. Decision under Judicial Review

[17] The Applicants presented the establishment in Canada, the best interests of the children (BIOC) and the country conditions in Brazil to support their H&C application. The Principal Applicant also alleged to be remorseful for her misrepresentation. The Officer's reasons do not explain how the Officer weighed the elements in the Applicants' H&C application against the Principal Applicant's prior misrepresentation, if at all.

[18] The Officer made the following findings:

A. *Establishment in Canada*

[19] The Officer weighed establishment positively. The Officer gave positive weight to the Principal Applicant's employment and fiscal responsibility in Canada, as well as the family's length of time in Canada, which totaled eleven years. However, the Officer found that although some measure of establishment was expected to have occurred in the Applicants' eleven years, their degree of establishment was not found to be "exceptional" in relation to similarly situated individuals who have been in Canada for a comparable amount of time (H&C Decision, page 5).

[20] The Officer also favourably viewed the Principal Applicant's efforts towards improving her language skills and her investment in her role as a parent, which was supported by the Principal Applicant's submissions of certificates of participation in parenting programs, proof of a donation to her children's school, and certificates of completion for English language training (H&C Decision, page 5).

[21] However, the Officer ultimately found that it was unlikely the Applicants had integrated into Canadian society to the extent that their departure would create hardship beyond that is anticipated by the IRPA (H&C Decision, page 5).

B. *Best interests of the children*

[22] The Officer stated that they must always be alert, alive and sensitive to the best interests of children when assessing a section 25 application. The Officer ultimately found that it would likely be in the children's best interests to remain in Canada (H&C Decision, page 7). However, the Officer was satisfied that the Applicants' return to Brazil as a family unit would not adversely affect the best interests of the child (H&C Decision, page 7). The Officer also writes that the BIOC does not outweigh all of the other factors in a case (H&C Decision, page 6).

[23] In contemplating the Applicants' potential separation from their family, the Officer acknowledges that families should stay together when it is possible, but that "the option would exist for this family to relocate together to Brazil and remain as a family unit" (H&C Decision, page 6).

[24] The Officer acknowledged the submissions that the Minor Applicant would suffer hardship if removed from Canada and returned to Brazil, where she does not speak the language and has only lived as an infant. The Minor Applicant was thirteen years old at the time of the decision, having arrived in Canada at the age of one and a half years old. The Officer found that it was reasonable to believe the Minor Applicant could apply skills gained through transitioning between schools in Canada to adjust to a new school environment in Brazil.

[25] The Officer devotes less analysis to how a move might affect the Principal Applicant's Canadian children, who have spent their whole lives in Canada, and were seven and four years

old at the time of the application. The Officer writes that it is reasonable to believe that these children have been exposed to Brazilian language, culture and customs through their parents, and that there is no evidence that they cannot continue to participate in extracurricular activities in Brazil (H&C Decision, pages 6-7). The Officer also explains that the Principal Applicant did not provide evidence from objective professional sources to support the view that her children's best interests would be compromised if they moved to Brazil, or that they would be better served by remaining in Canada (H&C Decision, page 7).

[26] The Officer concluded that the circumstances concerning the children's best interests were insufficient to warrant an exemption when considered against the other H&C factors. The Applicants do not challenge the Officer's BIOC assessment on judicial review.

C. *Country conditions in Brazil*

[27] The Officer found that the Applicants' submissions with respect to adverse country conditions in Brazil related to general country conditions. The Officer further found that the Applicants did not appear to be part of a group that would be discriminated against in Brazil, or that the country's adverse living conditions would have a negative impact on them to the extent that an exemption was justified (H&C Decision, pages 5-6).

III. Standard of Review and Legal Framework

[28] The parties agree that the Officer's decision is subject to review on a standard of reasonableness based on *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. I share that view.

[29] Under the *Vavilov* framework, a 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 (*Vavilov* at para 85).

[30] For a decision to be unreasonable, the applicant must establish that the decision contains flaws that are sufficiently central or significant (*Vavilov* at para 100). It is not sufficient that the reviewing court might have come to a different decision had it been apprised of the merits of the case. A reviewing court must refrain from reweighing evidence, and it should not interfere with factual findings absent exceptional circumstances (*Vavilov* at para 125). The reviewing court's starting point is the principle of judicial restraint, recognizing the role to be played by administrative decision makers (*Vavilov* at para 13). The position is one of respect.

[31] There are also parameters to the H&C framework. These were established by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 SCR 909 [*Kanthasamy*].

[32] The Applicant must justify the exemption requested. The purpose of section 25 is 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'" (*Kanthasamy* at para 21), thus re-establishing the approach taken in *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*].

[33] Foreign nationals can invoke section 25 of the IRPA to avoid the ordinary requirement that persons who wish to make an application for permanent residence in this country must make those applications from outside Canada. Section 25 of the IRPA gives the Minister discretion to grant permanent resident status if the Minister is of the opinion that such relief is justified for H&C reasons. However, section 25 does not have the purpose of relieving the hardship involved in a removal from Canada, or any difficulties applicants may encounter in having to apply for permanent residence from abroad.

[34] But the *Chirwa* test is also meant to prevent undue overbreadth. Indeed, the *Kanthasamy* Court quotes *Chirwa* where it acknowledges that the power is to mitigate the rigidity of the law in appropriate circumstances, but not "to be applied so widely to destroy the essentially exclusionary nature of the Immigration Act and Regulations" (para 14). Section 25 continues to be an exception. As the *Kanthasamy* Court says, hardship is inevitable associated with having to leave Canada. It is not intended to become an alternative immigration scheme (para 23).

IV. Arguments and Analysis

[35] In the present case, the Applicants contend that four reversible errors were committed:

1. The Officer's reliance on the Applicants' adaptability put the Applicants in a "catch-22" where positive factors were turned into negative considerations;
2. The Officer erred by assessing whether the Applicants were exceptionally established;
3. The Officer's findings on adverse conditions in Brazil and the impact on the Applicants are not justifiable;
4. The Officer unreasonably used a lens of "unusual, undeserved or disproportionate hardship" to assess the application.

[36] The Respondent submits that the Applicants fail to engage with the substance of the Officer's reasons, and have not demonstrated that judicial intervention is warranted.

[37] On judicial review, the Court's role is to assess whether the decision maker reached a reasonable decision within the confines of the record, the relevant statutory provisions and the jurisprudence.

[38] In the present case, the burden on the Applicants was to show that the decision was unreasonable, that the facts, established by evidence, would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another so that these misfortunes warrant the granting of special relief. That burden was not discharged. The Officer reasonably exercised their discretion and found that the H&C exemption was not justified based on the evidence provided by the Applicants in support of their H&C application. The Officer thoroughly considered the evidence and the Applicants' submissions with respect to the relevant

H&C factors. As a whole, the Officer's decision shows a coherent and rational chain of analysis whose outcome is justified by the facts and the law. I repeat. The role of a reviewing court is not to reassess the merits of the decision maker's findings. It is to control the legality of the decision, whether it is reasonable or not.

A. *The establishment section does not contain an improper "catch-22" analysis*

[39] The Applicants submit that the Officer turned positive factors into negative considerations by relying on the Applicants' establishment to find that they are adaptable and resourceful and can re-settle in Brazil (Applicants' Further Memorandum of Argument, para 54). The Applicants submit that this reasoning places humanitarian applicants in an impermissible "catch-22" where establishment will be diminished because applicants have demonstrated their ability to re-settle in their home country (Applicants' Further Memorandum of Argument, para 61).

[40] The Applicants argue that this reasoning runs afoul of the view expressed in *Lauture v Canada (Citizenship and Immigration)*, 2015 FC 336 [*Lauture*] (Rennie J.).

[41] In *Lauture*, this Court criticized the decision maker's analysis for indicating that the applicants' ability to establish themselves successfully in Canada demonstrated that they would also be able to establish themselves successfully in their country of origin. The Court in *Lauture* also found that the decision maker engaged in impermissible analysis by finding that although the applicants' "engagement in society" was favourable, the officer did not weigh this as an

establishment factor in favour of the applicants, but dismissed it because the same level of engagement could occur in their home country (*Lauture* at para 21).

[42] The Respondent submits that unlike *Lauture*, the Officer explicitly considered the Applicants' establishment factors, and gave these positive weight.

[43] I agree that the Officer's assessment of establishment does not mirror the analysis this Court found to be problematic in *Lauture*. The Officer did not use the Applicants' ability to adapt in Canada against them.

[44] This argument was addressed squarely in *Zhou v Canada (Citizenship and Immigration)*, 2019 FC 163 [*Zhou*], and subsequent cases. *Zhou* distinguished itself from *Lauture* because the decision maker in *Zhou* gave positive weight to the applicants' establishment in Canada but found that their establishment was balanced against other factors. In *Zhou*, 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.

[45] I find that the *Zhou* analysis applies to the case here. As in *Zhou*, the Officer weighed the Applicants' establishment in Canada positively. Some examples of the Officer's language on the Applicants' establishment are included below:

- "The PA's employment and fiscal responsibility in Canada have been given positive weight in this assessment." (H&C Decision, page 5)
- "The PA's efforts towards improving her language skills and her investment in her role as a parent are commendable and have been viewed favourably." (H&C Decision, page 5)
- "I have given some positive consideration to the efforts of the applicants in regards to establishing themselves in Canada through employment and their length of time here." (H&C Decision, page 8)

[46] The Officer assessed establishment on its own, and viewed it as a positive factor for the Applicants' application. As with every element in the analysis, there are various shades to the colour it takes. It is not because an element is positive that it is dispositive. In the end, the various considerations must rise to the *Chirwa* test. Here, the Officer found that this was insufficient to grant an application based on H&C considerations. As in *Zhou*, reduced hardship in having to leave Canada and get re-established in a country of origin because of skills acquired

in Canada or not is part of the equation and can be considered by the decision maker (*Pretashi v Canada (Citizenship and Immigration)*, 2021 FC 817 (Kane J.) at para 57).

[47] Finally, although the Officer noted that the Principal Applicant had used her skills to establish herself and her family in Canada, the Officer separately assessed the Applicants' allegations of hardship, which focused on adverse country conditions and employment prospects in Brazil, and the BIOC.

[48] Further, contrary to the Applicants' submission that the Officer unreasonably imported a hardship analysis into the establishment section (Applicants' Further Memorandum of Argument, para 65), this Court has determined that it is not unreasonable to address hardship and establishment in the same part of the decision. In *Brambilla v Canada (Citizenship and Immigration)*, 2018 FC 1137, Diner J. had the following to say at para 12:

> [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.

I add that there is nothing in *Kanthasamy* that could be seen as prohibiting the examination of hardship. What is unreasonable is to set up the test as being "unusual and undeserved on disproportionate hardship" to decide if there are H&C considerations. Other considerations may

be at play. The *Kanthasamy* majority disagreed with such a categorical approach, noting that there are no such "hard and fast" rule. Rather the adjectives are "treated as descriptive, not creating three new thresholds for relief separate and apart from the humanitarian purpose of s. 25(1)" (*Kanthasamy* at para 33).

[49] Contrary to the Applicants' submissions, the Officer did not engage in an impermissible "catch-22" analysis. There is nothing unreasonable in this assessment.

B. *The use of the word "exceptional" on its own does not render a decision unreasonable*

[50] The Applicants also submit that the Officer erred in comparing the Applicants to similarly situated individuals and concluding that the Applicants' establishment is not exceptional compared to those who have been in Canada for a comparable period. The Applicants submit that the Officer should have instead assessed whether the Applicants were established to the extent that severing the establishment and attempting to re-establish in Brazil would cause hardship (Applicants' Further Memorandum of Argument, para 70).

[51] The Respondent submits that describing the Applicants' establishment as not being exceptional was not unreasonable (Respondent's Further Memorandum of Argument, para 20).

[52] The Applicants submit that the Officer's use of the word "exceptional" indicates that this impermissible test was applied in these circumstances. I do not agree. Section 25 constitutes an exception to the rule in that obligations under the law are made the subject of an exemption. In effect, the case where H&C considerations are present constitutes "an instance that does not

follow the rule" (Oxford Canadian Dictionary, Oxford University Press Canada 2001). While the use of the word "exceptional" by an officer may not be ideal if it were to convey the notion that a bar was set a the "very rare", it is not forbidden as long as the decision as a whole demonstrates that the Officer fairly considered and balanced the relevant facts (*Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 (Lafrenière J.) at para 15; *Morgan v Canada (Citizenship and Immigration)*, 2021 FC 1339 (Zinn J.) at paras 17-19). What is essential is that all of the appropriate considerations are canvassed and assessed against the *Chirwa/Kanthasamy* test.

[53] In *Damian v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1158 at para 21, McHaffie J. said the following:

> [21] Thus, to the extent that words such as "exceptional" or "extraordinary" are used simply descriptively, their use appears to be in keeping with the majority in *Kanthasamy*, although such use may not add much to the analysis. However, to the extent that they are intended to import a legal standard into the H&C analysis that is different than the *Chirwa/Kanthasamy* standard of "exciting in a reasonable person in a civilized community a desire to relieve the misfortunes of another, provided those misfortunes justify the granting of relief," this would appear to be contrary to the reasons of the majority. Given the potential for words such as "exceptional" and "extraordinary" to be taken beyond the merely descriptive to invoke a more stringent legal standard, it may be more helpful to simply focus on the *Kanthasamy* approach, rather than adding further descriptors

[54] In my view, it is possible for an officer to characterize the measure of the establishment in an attempt to situate the establishment on a spectrum, as it is possible to use the adjective "unusual", "undeserved" and "disproportionate" as descriptive and instructive in relation with hardship. What an officer must guard against is to limit their ability to weigh all relevant humanitarian and compassionate consideration. It is inherent in notions like hardship and

establishment that they have degrees. There is nothing absolute in either establishment or hardship, or in the interests of children for that matter. What counts is the standard of "exciting in a reasonable person in a civilized community a desire to relieve the misfortunes of another, provided those misfortunes justify the granting of [special] relief", such that no undue overbreadth is created which could result in an alternative immigration system. Section 25(1) exists for the Minister to mitigate the rigidity of the law in appropriate cases.

[55] There is no indication that the Officer expected the Applicants' establishment to rise by itself to an "exceptional" threshold in order for relief to be granted. The sentence does not impose a higher threshold for relief, but finds that the Applicants' establishment did not stand out (*Al-Abayechi v Canada (Citizenship and Immigration)*, 2021 FC 1280 (Mosley J.) at para 15). It is clear that the Officer is using this term descriptively and not as a legal test. The Officer found that the Applicant had done what is reasonably expected in a common level of establishment, given that the Applicants have been living in Canada for eleven years.

C. *The Officer did not unreasonably assess the submissions on country conditions*

[56] Further, the Applicants submit that the Officer's analysis with respect to the hardship the Applicants would face due to adverse country conditions in Brazil lacks justification since it does take into account the evidence that was submitted (Applicants' Further Memorandum of Argument, paras 72, 75).

[57] The Respondent submits that the Officer's decision considered Brazil's country conditions, and their potential impact on the Applicants. The Respondent reiterated the Officer's

finding that the Applicants had failed to provide evidence that those with a similar identity to theirs had been affected by the country's adverse country conditions enough to justify an exemption (Respondent's Further Memorandum of Argument, para 23).

[58] Although the Officer may not have explicitly addressed every argument or piece of evidence submitted by the Applicants about the high unemployment rate in Brazil and that women earn 50% less than their male counterparts, it has not been shown that the Officer's analysis is unreasonable. Silence on a particular point does not necessarily warrant judicial intervention. Reasons can be express or implied. (*Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156 (Stratas J.) at paras 31, 38). Here, the Officer addressed the issue of the country conditions specifically and found it lacking.

It is worth including the Officer's findings at pages 5-6 of the decision:

> I have reviewed these submissions and I do not find that the general country conditions in Brazil are a strong factor in this assessment as the evidence does not support that the applicants are members of a group that would be discriminated against or that the country's adverse conditions would have a direct negative impact on them to the extent that an exemption is justified in their particular case.

[59] The Officer also writes that "country conditions in Brazil may not be perfect […] I find that they describe general country conditions in Brazil that are experienced by most persons in that country" (H&C Decision, page 5). The Officer does not find that these conditions are sufficient to justify an exemption to the IRPA.

[60] I understand the Officer's reasons to acknowledge that there are adverse conditions in Brazil, as in numerous countries around the globe, which may impact the Applicants, but that the link between them is tenuous, and insufficient to warrant an exemption. This is not unreasonable. In fact, it is well established that general adverse country conditions, which do not have a clear relationship with an applicant's specific and personal situation, do not weigh in favour of permanent residence being granted based on H&C considerations (*Nyabuzana v Canada (Citizenship and Immigration)*, 2021 FC 1484 (Gascon J.) [*Nyabuzana*] at para 34; *Laguerre v Canada (Citizenship and Immigration)*, 2020 FC 603 (Gagné A.C.J.) at para 28). It bears repeating that section 25 is not to be treated as an alternative immigration system.

D. *The Officer did not conduct an impermissible analysis*

[61] Finally, the Applicants submit that the Officer uses the notion of "unusual and undeserved or disproportionate hardship" as a lens to assess the claim (Applicants' Further Memorandum of Argument, paras 77, 79). The Applicants additionally submit that the Officer constrained the analysis to the extent that it could only be approved if the Applicants demonstrated unusual, undeserved or disproportionate hardship, even though this is not the appropriate test for H&C (Applicants' Further Memorandum of Argument, para 91).

[62] The Respondent submits that the Applicants parse words out from the Officer's decision to assert that the Officer constrained the analysis to the concepts of unusual, undeserved or disproportionate hardship (Respondent's Further Memorandum of Argument, para 7). The Respondent submits instead that the use of adjectives and descriptors does not mean that the Officer failed to engage in a global assessment of H&C factors.

[63] Had the Officer measured the H&C application against the test of "unusual and undeserved or disproportionate hardship", this Court's intervention would have been warranted. Indeed it would be required. But such was not the case. Hardship remains a relevant consideration to establish that a reasonable person in a civilized community would see the circumstances as enough to excite a desire to relieve the misfortunes of another person. The *Kanthasamy* Court never said otherwise. The Supreme Court's analysis in *Kanthasamy* indicates that "hardship", assessed equitably, flexibly, and globally remains important to H&C analyses (*Lin v Canada (Citizenship and Immigration)*, 2021 FC 1452 (Kane J.) at para 40; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 (Crampton C.J.) at paras 17-19; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 (Diner J.) at paras 15-16). How does one measure the misfortunes of someone else, to the point that they excite the desire to relieve them, if the hardships suffered cannot be considered?

[64] The sort of "hardship" that will warrant an H&C exemption is one that goes "beyond that which is inherent in having to leave Canada" (*Nyabuzana* at para 27; *Rocha v Canada (Citizenship and Immigration)*, 2015 FC 1070 (Gascon J.) at para 17). Further, a H&C application cannot be used to bypass the regular immigration process.

[65] It is clear that hardship is a significant consideration in the Officer's decision. Here are some examples of the language used:

- "The PA's employment and fiscal responsibility in Canada have been given positive weight in this assessment. Nevertheless, the question is not whether the applicants would make welcome additions to Canadian society, but whether their removal to

Brazil amounts to hardship such that an exemption is justified." (H&C Decision, page 5)

- "The applicants have resided in Canada for eleven years; therefore, a measure of establishment is expected to have occurred. However, this in and of itself may not amount to hardship for the applicants to the extent that their application ought to be approved." (H&C Decision, page 5)
- "There are several forms of communication that the applicants could utilize to maintain these friendships in Brazil, including email, social media, and Skype; the evidence does not support that the applicants would incur hardship in doing so." (H&C Decision, page 5)
- "The evidence does not support that they have integrated into Canadian society to the extent that their departure would cause hardship that was beyond their control and not anticipated by the IRPA." (H&C Decision, page 5)
- "That she chose to remain in Canada in order to pursue other immigration channels, it cannot be argued that the resulting hardship was not anticipated by the IRPA, or that it was beyond her control." (H&C Decision, page 8)

[66] Reviewing these examples in context, I do not find that the Officer applied the wrong legal test. Although the decision maker referred repeatedly to the concept of "hardship", this does not mean that the Officer used the adjectives of "unusual and undeserved or disproportionate" as thresholds that have the effect of excluding the other H&C factors (*Kanthasamy* at para 33). That would require in my view this Court's intervention.

[67] Further, the decision maker was merely addressing the arguments put forth by the Applicants. In the Applicants' application for H&C, the Applicants submitted that it would cause them excessive hardship should they be forced to leave Canada (Applicants' Application for H&C, page 2). Having cast their submissions in this way, the Applicants cannot criticize the Officer for having assessed whether their removal would cause the kind of hardship that excites the desire to relieve misfortunes. There is nothing unreasonable with the Officer's approach as long as it is part of a broad comprehensive analysis that does not exclude other factors.

[68] In this case, the Officer engaged in a global analysis. The Officer assessed the Principal Applicant's employment and financial responsibility positively. As a separate part of the analysis, the Officer gave little weight to the challenges that the Applicants might face in returning to Brazil, because of the presence of their family there. The Officer also considered the Applicants' evidence of personal ties in Canada but found that several forms of communication, such as email, social media and Skype, could be used to maintain these friendships.

[69] I therefore conclude that the Officer did not apply the incorrect legal test by requiring that the Applicants show unusual and undeserved or disproportionate hardship in the manner criticized in *Kanthasamy*.

V. Conclusion

[70] The Officer considered each of the elements put forward by the Applicants on their H&C application, and found positive elements in their application, but was not persuaded that there was sufficient evidence to grant special relief.

[71] The Officer's decision was justified, transparent and intelligible. It is not this Court's role to reassess the H&C application or substitute its own decision. Rather the Court must consider whether there are "sufficiently serious shortcomings in the decision" to signal that the decision is unreasonable (*Vavilov* at paras 15, 86, 99-100). I do not see any such shortcomings in this case.

[72] The application for judicial review is therefore dismissed. Neither party proposed a question for certification. I agree that there is none.

JUDGMENT in IMM-3143-20

THIS COURT'S JUDGMENT is that:

1. The judicial review application is dismissed.

2. There is no question to be certified.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3143-20
STYLE OF CAUSE:	VANESSA DEL CHIARO PEREIRA AND SOPHIA DEL CHIARO COUTINHO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 12, 2021
JUDGMENT AND REASONS:	ROY J.
DATED:	JUNE 2, 2022

APPEARANCES:

Dov Maierovitz	FOR THE APPLICANTS
Brad Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Dov Maierovitz Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT