Federal Court  Cour fédérale

Date: 20220615

Docket: IMM-672-21

Citation: 2022 FC 902

Ottawa, Ontario, June 15, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

IRENE GONZALEZ DE BARRAGAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Irene Gonzalez De Barragan, seeks judicial review of a decision of a senior immigration officer [Officer], dated January 6, 2021, refusing to grant her an exemption, based on humanitarian and compassionate [H&C] considerations, from the requirement of having to apply for permanent residence from outside Canada.

[2] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicant has failed to persuade me that the Officer's decision was unreasonable. For the reasons below, this application for judicial review is dismissed.

I. Background

[3] The Applicant is a citizen of Columbia. Her three children, five grandchildren and great-grandchild live in Canada as citizens and permanent residents. Since 2011, the Applicant has visited Canada many times. At the time of the H&C decision, she had lived in Canada for approximately 72 months in total since 2013 and the most recent entry on her visitor's visa, was in 2018, which was extended twice.

[4] On January 31, 2019, the Applicant submitted an application for permanent residence from within Canada based on H&C considerations, pursuant to subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Her application was based on her establishment in Canada, age and health considerations, family ties and separation, and the best interests of the children.

[5] In the decision, the Officer was not satisfied, given the evidence adduced and the particular circumstances of the Applicant, that an exception under subsection 25(1) of IRPA was warranted.

[6] The Applicant submits that the Officer erred in applying the wrong tests when assessing (i) the best interests of the children [BIOC] and (ii) the H&C factors put forward by the Applicant.

[7] The parties agree that the applicable standard of review is one of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85).

[8] It is the Applicant who bears the onus of demonstrating that the Officer's decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision" (*Vavilov* at para 100).

[9] The focus must be on the decision actually made, including the justification offered for it, and not the conclusion the court itself would have reached in the administrative decision maker's place. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125).

II. Analysis

[10] An exemption under subsection 25(1) of the IRPA is an exceptional and discretionary remedy (*Fatt Kok v Canada (Citizenship and Immigration)*, 2011 FC 741 at para 7; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 19-20). Subsection 25(1) of the IRPA confers broad discretion on the Minister to exempt foreign nationals from the ordinary requirements of that statute and to grant permanent resident status to an applicant in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. The H&C discretion is a flexible and responsive exception that provides equitable relief, namely to mitigate the rigidity of the law in an appropriate case (*Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at paras 13-14 [*Rainholz*]).

[11] H&C considerations are facts, established by evidence, that would excite in a reasonable person in a civilized community the desire to relieve the misfortunes of another provided these misfortunes warrant the granting of special relief from the otherwise applicable provisions of the IRPA (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 13, 21 [*Kanthasamy*]). As noted by my colleague Justice Andrew D. Little, "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" (*Rainholz* at para 15).

[12] Subsection 25(1) of the IRPA also refers to the need to take into account the BIOC directly affected. In considering the BIOC, an officer must be "alert, alive, and sensitive" to those interests (*Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 75 [*Baker*]).

[13] It is the H&C applicant who bears the onus of establishing that an H&C exemption is warranted. Where there is a lack of evidence or a failure to adduce relevant information in support of such an application, this is at the peril of the applicant (*Rainholz* at para 18).

A. *The Best Interests of the Children*

[14] The Applicant pleads that the Officer failed to accord any weight to the BIOC, or provide an analysis of its relative weight, and failed to meaningfully engage with the evidence. The Respondent submits that, contrary to the Applicant's assertion, the Officer considered the evidence submitted, acknowledged the close relationships, and explicitly found that the BIOC considerations favoured a positive decision.

[15] I am not persuaded that the Officer erred in the BIOC assessment. The Officer identified three grandchildren and one great-grandchild who met the definition of children, acknowledged the role their grandmother played in their lives, referenced the support letters from her grandchildren generally along with the two articles that were submitted, and found that the BIOC favoured a positive decision. The Officer also noted, however, that there was little evidence submitted to suggest that any of the Applicant's children were unable to take care of their own children (the Applicant's grandchildren) or that the children would not continue to have access to

Canadian medical, educational, and social systems or to have the support of their parents and other family members.

[16] The Applicant is not the primary caregiver of the children. Based on the record, it was open to the Officer to conclude that it was not necessary for the wellbeing of the children to grant an exception (*Gutierrez Ortiz v Canada (Citizenship and Immigration)*, 2019 FC 339 at para 25).

[17] In addition, the Applicant submits that the Officer erred by not mentioning Juliana, born in 1997. Juliana, the grandchild of the Applicant, was 21 years old when the application was submitted. The application included numerous letters of support, including one from Juliana. The Applicant's narrative included quotes from eight of the letters of support, including Juliana's letter.

[18] There is a presumption that a decision maker has considered all the evidence brought before them, and a failure to mention a particular piece of evidence does not mean it was ignored *(Burai v Canada (Citizenship and Immigration)*, 2020 FC 966 at para 38). Reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis (*Vavilov* at paras 91, 128). In this case, it is clear that the Officer referred to the support letters, and quoted the Applicant "I have five grandchildren living in Hamilton ages 4, 7, 15 and 21". Furthermore, Juliana is not a minor, and thus I do not find the Officer erred by not specifically addressing Juliana in the decision.

B. *The Test Used by the Officer in Refusing the Application*

[19] The Applicant submits that (i) the Officer applied a standard of exceptionality; and (ii) the decision is not transparent or intelligible because the Officer denied the application after according positive or neutral weight to each factor.

[20] I find the Officer reasonably considered and weighed all of the relevant factors raised by the Applicant and clearly explained that they were not satisfied that these factors warranted an exception. First, the BIOC is not dispositive of an H&C application (*Canada (Minister of citizenship and Immigration) v Hawthorne*, 2002 FCA 475 at paras 2, 8; *Baker* at para 75; *Mebrahtom v Canada (Citizenship and Immigration)*, 2020 FC 821 at para 18 [*Mebrahtom*]). Second, it is not necessarily inconsistent for an Officer to find that the BIOC and other factors weigh in favour of relief and yet conclude that, based on an overall assessment, H&C relief is not justified (*Mebrahtom* at para 19).

[21] In addition, the Applicant submits that the Officer erred in referring to other avenues of immigration and thus adopted an approach that is inconsistent with the approach articulated in *Kanthasamy*. I disagree. The Officer noted (i) that the Applicant had lived in Canada with valid immigration status since 2011; (ii) the availability of alternative immigration options such as sponsorship and a super visa; (iii) the lack of explanation as to why she was not sponsored after 2004; and (iv) the lack of evidence in the record that the Applicant would be ineligible for these programs or that they would not suit her needs. The Officer also noted that the Applicant had

stated that it would cause her excessive hardship to return to Columbia, apply from there, and wait with no guarantees.

[22] Effectively, the Officer concluded that there was little evidence submitted that she would not be able to visit Canada or that she would be ineligible for permanent residence should she apply from abroad. Where there is a lack of evidence or a failure to adduce relevant information in support of an H&C application, this is at the peril of the applicant (*Rainholz* at para 18). In the matter at hand, the onus was on the Applicant to establish grounds upon which the Officer may grant H&C relief, and it was "not on the immigration officer to demonstrate why it should be refused" (*Goraya v Canada (Citizenship and Immigration)*, 2018 FC 341 at para 16).

[23] The Applicant further submitted at the hearing that she cannot obtain a super visa because this requires ties to Columbia. The Respondent replied that the same requirement applies to a temporary visitor's visa, and the Applicant has had no issues obtaining such a visa. I find the Applicant's point to be speculative as it was for her to put forward the evidence.

[24] I do not find that the Officer's reference to the potential availability of alternative avenues of immigration resulted in a reviewable error. The decision was based on a consideration of numerous factors, including the Applicant's establishment, her age and health considerations, family ties and separation, and the BIOC.

III. Conclusion

[25] For the foregoing reasons, I conclude that the Officer's reasons were justified, transparent and intelligible and meet the standard of reasonableness set out in *Vavilov*.

[26] This application for judicial review is hereby dismissed. No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-672-21

THIS COURT'S JUDGMENT is that:

1. The Applicant's application for judicial review is dismissed; and

2. No question of general importance is certified.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	IRENE GONZALEZ DE BARRAGAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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