Federal Court  Cour fédérale

**Date: 20220718**

**Docket: IMM-2438-21**

**Citation: 2022 FC 1053**

**Ottawa, Ontario, July 18, 2022**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**MOCHAMAD RUDI HARTONO**
**LISTIANINGSIH**
**NADIVA APRILIA HARTONO**
**FITRA NOVIANA HARTONO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] Under review is a decision by a Senior Immigration Officer rejecting the Applicants' application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds.

[2] The Applicants are a family: husband, wife, and their two daughters. Only the husband, the principal applicant, was named as Applicant; however, the style of cause will be ordered amended with immediate effect to name all family members as applicants.

**Background**

[3] The Applicants are Mochamad Rudi Hartono [the Principal Applicant], the Principal Applicant's wife Listianingsih [the Secondary Applicant], and their two adult daughters: Nadiva Aprilia Hartono, and Fitra Noviana Hartono [the Dependent Applicants]. At the time of the decision, the Dependent Applicants were 20 and 19 years old, making them dependent children under the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [IPRR].

[4] The Applicants' immigration history is unusual.

[5] The Applicants are citizens of Indonesia. The Principal Applicant is a former Indonesian diplomat. He came to Canada with his wife in late 1999 or early 2000. Their daughters were born in Canada in 2000 and 2001; however, as the children of a consular officer, they did not acquire Canadian citizenship at birth (see *Citizenship Act*, RSC 1985, c C-29, s 3(2)(a); see also *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 188).

[6] In March 2013, the Principal Applicant's status was changed from an accredited diplomat to a locally-engaged employee. He received a work permit in May 2013 and his wife received a

visitor record. Both eventually received temporary resident permits. Their daughters were issued study permits, the last of which expired in August 2017.

[7] The Applicant eventually ceased working at the Indonesian Consulate. He received a study permit and completed diploma programs at Evergreen College and the Stratford Career Institute. The Principal and Secondary Applicants subsequently received work permits, which were valid until March 2020. They remain in Canada on visitor records.

[8] Based on the evidence before the officer, the Dependent Applicants are in the unusual situation of having lived their entire lives in Canada but having no Canadian citizenship or other immigration status in Canada, independent of that of their parents. The evidence before the officer suggests that they have not had study permits since August 2017; however, they are dependent children of their parents. On the H&C application, their status in Canada is listed as "Foreign National."

[9] The Applicants applied for permanent residence from within Canada on June 4, 2020.

**The H&C Decision**

[10] The officer considered the Applicants' establishment in Canada. The officer noted that the Applicants have spent most of their lives in Canada and noted the Principal and Secondary Applicants' extensive employment and education experience in Canada. The officer gave their establishment in Canada "moderate positive consideration." The officer also gave "some positive consideration" to the Applicants' community integration.

[11] The officer noted the Dependent Applicant's academic success in Canada and granted their achievements positive consideration. However, the officer noted that while it was submitted that they were enrolled in post-secondary education, the information before the officer was that they had not held study permits since August 2017. The officer gave "moderate negative consideration" to the Dependent Applicant's non-compliance with Canada's immigration laws. The officer further noted that there was no evidence that the Applicants were enrolled in post-secondary studies, such as transcripts or letters of acceptance.

[12] The officer considered the possibility of harm resulting from a possible separation of the Applicants from each other. The officer noted, "it is not my role as a decision-maker to speculate on whether the applicants should separate or remain together." Rather, the officer was of the view that he or she must assess the hardship associated with each scenario and any mitigating factors.

[13] The officer noted the submission that the Dependent Applicants are emotionally reliant on their parents and that, due to the Applicants' religious and cultural background, they would prefer to stay with their parents. However, the officer found there to be little explanation why the Dependent Applicants could not complete their education in Indonesia. The officer also noted that the Primary and Secondary Applicants may be able to procure work or study permits to remain in Canada until their children have completed their studies.

[14] The officer found that even if the Applicants were to separate, there was insufficient evidence that the Dependent Applicants are "so reliant on their parents that they could not

experience any physical separation." The officer noted that the Applicants were adults, were not inadmissible to Canada, and could presumably visit each other.

[15] The officer acknowledged that since the Applicants had been out of Indonesia for a long time, there would be difficulty securing employment and reintegration. However, the officer noted that the Principal Applicant worked for the Indonesian Consulate and would likely have in-depth familiarity with Indonesia. The officer also noted the Principal and Secondary Applicants' extensive employment experience. The officer noted there was no evidence that either had recently sought employment in Indonesia without success. The officer also noted that the Principal Applicant may be able to come to Canada through an economic stream.

[16] Overall, the officer found that "there is only some positive consideration toward their establishment due to the reasons previously discussed" and that returning to Indonesia would "not create more than minimal hardship." The officer was therefore not satisfied that H&C relief was warranted.

**Issue**

[17] The sole issue is whether, within the framework set out in *Vavilov*, the officer's decision is reasonable.

**Discussion**

[18] A number of grounds were advanced by the Applicants in support of their submission that the decision under review is unreasonable. I find most to be without merit; however, I do agree with the Applicants that the officer's findings on establishment lack the "justification, transparency and intelligibility" required by *Vavilov*.

[19] The Applicants submit that it was unreasonable for the officer to give only "moderate positive consideration" to the Applicants' establishment. They submit that they are extremely established in Canada, having lived here for two decades and, in the case of the Dependent Applicants, their entire lives.

[20] The Applicants submit that it was unreasonable for the officer to make a negative inference because the Dependent Applicants were studying without permits. The Applicants submit that minor transgression cannot justify a negative inference (citing *Trach v Canada (Minister of Citizenship and Immigration)*, 2015 FC 282 at para 28, and *Fidel Baeza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 362 at paras 16–19).

[21] The Respondent submits that the establishment analysis was reasonable and the Applicants' submissions largely amount to a request that the evidence be reweighed. With respect to the negative inference due to studying without status, the Respondent first notes that there was no evidence before the officer that the Dependent Applicants were enrolled in a post-secondary institution. The Respondent submits that an officer is entitled to draw a negative

inference from evidence of non-compliance with Canadian immigration law (citing *Zlotosz v Canada (Minister of Citizenship and Immigration)*, 2017 FC 724) and it is not the role of the Court to reweigh the evidence.

[22] I agree with the Respondent that part of the Applicants' submission with respect to the positive weight given to their establishment amounts to request to reweigh the evidence. The Applicants' belief that their establishment is more significant than the officer gives them credit for is not, without anything more, a reason to set aside the decision.

[23] The Applicants have also taken issue with the negative weight given to the Dependent Applicants studying in Canada without a permit. Contrary to the Applicants' submission, immigration officers are entitled to weigh non-compliance with Canadian immigration law against applicants. However, this is not without limits. An officer may discount establishment attained in contravention of Canada's immigration laws, but only to the extent of the contravention. It cannot be used to discount establishment attained while an applicant had status. Furthermore, an officer cannot fault an applicant for non-compliance beyond their control. For example, those who come to Canada illegally as children cannot be faulted for non-compliance with Canada's immigration laws, so long as they seek to normalize their status in a timely manner once they come of age (see e.g. *Mitchell v Canada (Minister of Citizenship and Immigration*, 2019 FC 190 [*Mitchell*] at para 27, and *Damian v Canada (Minister of Citizenship and Immigration*, 2019 FC 1158 [*Damian*] at paras 2 & 27; but see *Zhao v Canada (Minister of Citizenship and Immigration)*, 2021 FC 38 at para 38, where *Mitchell* and *Damian* were distinguished on the basis of the applicant's control over her fraudulent arrival to Canada).

[24] I find that the officer erred in giving negative weight to the Dependent Applicants' non-compliance with Canada's immigration laws. While the officer is entitled to deference as to the weight given, the officer is still constrained by the applicable legal principles. There are a number of issues with the officer's analysis.

[25] First, the officer's reasons with respect to the Dependent Applicants' education without lack of status are inconsistent. The officer does not consider their post-secondary studies because they provided no documentation, yet also makes a negative inference due to a lack of status. This is effectively the same error as that found by Justice Walker in *Mitchell* at paragraph 27:

> The issue with the Officer's treatment of the Applicant's Canadian employment is that she first discounted his work history because he provided no documentation and then stated that any work done in Canada would have been without authorization "and I give this some negative consideration". If the Officer cannot give the Applicant's alleged work history any weight because it has not been established, it is unreasonable for her to then ascribe negative weight to any work he may have undertaken.

[26] Second, the Dependent Applicants' lack of study permits is largely outside of their control. At the time their permits expired, they were minors. At the time of the officer's decision, they remained dependent children as defined in the IPRR. Arguably, they were not fully responsible for their status in Canada. In any event, within a short period of becoming adults, they sought to normalize their status by becoming permanent residents. These circumstances are similar to those in *Mitchell* and *Damian*. In my opinion, it was unreasonable to weigh the Dependent Applicants' non-compliance against them.

[27] Third, the Applicants have two decades of establishment in Canada. While the evidence suggests that the Dependent Applicants have been studying in Canada since 2017 without permits, for the first 16-17 years of their lives, the Dependant Applicants lived in Canada and established themselves in compliance with Canada's immigration laws. These years of establishment cannot be discounted due to their later non-compliance.

[28] Fourth, the Dependent Applicants are also dependent children of their parents, who have legal status in Canada. Therefore, while the Dependant Applicants may not be entitled to study in Canada, there is no evidence that they have ever resided in Canada in contravention of Canada's immigration laws. This lessens any negative weight of non-compliance.

[29] Finally, both the Primary and Secondary Applicants have status in Canada. Their establishment cannot be discounted due to their daughters' perceived lack of study permits.

[30] In the conclusion of the decision, the officer states, "there is only some positive consideration toward their establishment due to the reasons previously discussed." The Dependent Applicants' lack of study permits is the only negative consideration previously discussed. As outlined, I am of the view that the officer's analysis of that negative consideration was faulty.

[31] Accordingly, it is unsafe to rely on the officer's analysis, and the decision must be set aside.

[32] The Applicants proposed a certified question directed to one of their grounds of attack, namely “Is it incorrect or unreasonable to require, as part of an H&C analysis that an applicant establish that the circumstances of hardship that she or he will face on removal are exceptional and are not those faced by others similarly situated?”

[33] The decision did not turn on this ground and accordingly, this question cannot be certified in this case.

**JUDGMENT in IMM-2438-21**

**THIS COURT'S JUDGMENT is that:**

1. The style of cause is amended with immediate effect to name as the Applicants Mochamad Rudi Hartono, Listianingsih, Nadiva Aprilia Hartono, and Fitra Noviana Hartono;
2. The application is granted;
3. The decision under review is set aside;
4. The Applicants' application for permanent residence from within Canada on humanitarian and compassionate grounds is to be determined by a different officer; and
5. No question is certified.

"Russel W. Zinn"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2438-21 |
| **STYLE OF CAUSE:** | MOCHAMAD RUDI HARTONO, LISTIANINGSIH, NADIVA APRILIA HARTONO, FITRA NOVIANA HARTONO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | APRIL 7, 2022 |
| **JUDGMENT AND REASONS:** | ZINN J. |
| **DATED:** | JULY 18, 2022 |

**APPEARANCES:**

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| Micheal Crane | FOR THE APPLICANT |
| Gordon Lee | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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