Federal Court Cour fédérale

Date: 20230116

Docket: IMM-1124-22

Citation: 2023 FC 65

Toronto, Ontario, January 16, 2023

PRESENT: Madam Justice Go

BETWEEN:

SUSANA DELA TRINIDAD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ms. Susana Dela Trinidad [Applicant] is a 52-year-old citizen of the Philippines and a single mother of her 12-year-old son Joss, a Philippine national living in his home country.

[2] The Applicant moved from the Philippines to Dubai in 2008 to work. In Dubai, the Applicant began a relationship with the father of her son and became pregnant, after which he

revealed that he was married. The father never provided support for Joss and has no relationship with the Applicant or Joss.

[3] The Applicant came to Canada as a Temporary Foreign Worker in 2013 and worked at a Second Cup in Calgary. In 2015, the Applicant was laid off and moved to Toronto to begin working as a caregiver for an elderly parent in the Troiano family. Throughout this time, the Applicant was rendered incompetent services by an immigration consultant and lost her legal status in 2016 as a result.

[4] The Applicant alleges that after she lost her status, the Troiano family began exploiting her and abusing her verbally with demeaning and threatening languages. This abusive employment experience left the Applicant with mental health issues. Eventually, with the assistance of the Canadian Human Trafficking Hotline [Hotline] and counselling, the Applicant broke free of the Troiano family and found her current work assisting an elderly woman with whom she has developed a close bond.

[5] The Applicant applied for permanent residence on humanitarian and compassionate grounds [H&C application] under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. She seeks judicial review of the decision dated January 12, 2022 by a Senior Officer [Officer] of Immigration, Refugees and Citizenship Canada refusing her H&C application [Decision].

[6] For the reasons that follow, I allow this application as I find the Officer failed to engage with the Applicant's evidence and submissions that she lost her status due to the negligence of her former immigration consultant, and in so doing, made unreasonable findings with respect to the Applicant's non-compliance with immigration law.

I. Issues and Standard of Review

[7] The Applicant submits overall that the Decision was unreasonable and the Officer failed to properly apply the principles surrounding H&C applications in the Decision. Specifically, the Applicant argues:

(1) the Officer unreasonably dealt with the Applicant's immigration history;

(2) the Officer showed no compassion and failed to address the Applicant's accomplishments as a caregiver for a vulnerable person;

(3) the Officer misapprehended the evidence with regard to the negligence of the immigration consultant that led to the Applicant's loss of legal status;

(4) the Officer unreasonably concluded the Applicant would not be subject to discrimination in employment in the Philippines on the basis of her age and gender; and

(5) The Officer's Best Interests of the Child [BIOC] analysis was unreasonable.

[8] The parties agree that the standard of review is reasonableness, in accordance with *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[9] 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-make: *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 and 133-135.

II. Analysis

[10] Under subsection 11(1) of the *IRPA*, foreign nationals wishing to enter and reside in Canada must apply from abroad and obtain a visa before coming to Canada.

[11] Subsection 25(1) of the *IRPA* allows foreign nationals to seek discretionary and equitable relief from the Minister for an exemption from the ordinary requirements of *IRPA*:

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 obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate	**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 estime que des considérations d’ordre humanitaire relatives à l’étranger le justifient,

considerations relating to the foreign national, taking into account the best interests of a child directly affected.	compte tenu de l'intérêt supérieur de l'enfant directement touché.

[12] The Applicant relies on *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] as the authoritative case for how subsection 25(1) of *IRPA* should be applied. The Applicant submits that the purpose of the provision 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. The Applicant asserts that officers must "substantively consider and weigh all the relevant facts and factors before them": *Tramosljanin v Canada (Citizenship and Immigration)*, 2022 FC 1378 at para 14, citing *Kanthasamy* at para 21.

[13] The Respondent emphasizes that H&C decisions are highly discretionary and that relief under subsection 25(1) is an extraordinary remedy that functions as an exception, rather than an alternative immigration scheme or appeal mechanism: *Kanthasamy* at paras 19-23, 63, 90 and 94; *Bakal v Canada (Citizenship and Immigration)*, 2019 FC 417 at para 13; *Huang v Canada (Citizenship and Immigration)*, 2019 FC 265 at paras 19-22. The Respondent reiterates that the hardship inevitably associated with having to leave Canada is insufficient alone to warrant H&C relief: *Kanthasamy* at para 23; *Liang v Canada (Citizenship and Immigration)*, 2017 FC 287 at paras 23-24.

[14] The principles advanced by the parties guide my reasons. Applying these principles, I find two of the arguments raised by the Applicant persuasive.

Issue 1: The Officer failed to adequately engage with the evidence concerning the negligence of the immigration consultant

[15] In support of her H&C application, the Applicant provided a sworn affidavit that contained detailed accounts of her immigration history in Canada, her employment experiences, BIOC factors, as well as efforts she has made to regularize her status in Canada. Specifically on the last point, the Applicant stated that she retained an immigration consultant Mr. Manuel Viola [Manny] who made several serious errors throughout his engagement by the Applicant. These were: (a) sending the Applicant incorrect and duplicated forms causing excessive delay in the processing of a Labour Market Impact Assessment application and work permit application; (b) submitting application forms containing wrong dates to the wrong office; and (c) failing to apply for restoration of the Applicant's status.

[16] After paying Manny $2,000 for his 'service', the Applicant had to spend another $20,000 on legal fees just to get access to her own immigration file in an attempt to restore her status twice. The Applicant included with her H&C application a complaint she initiated against the immigration consultant, and an email allegedly from Manny admitting to his errors. In her H&C application, the Applicant's then-counsel also provided submissions to the Officer arguing that Manny's negligence caused the Applicant to lose her status and rendered her vulnerable to exploitation as a person living without status.

[17] In the Decision, the Officer found the email screenshot submitted as evidence of the immigration consultant's negligence unclear as it was undated and unsigned, and gave it little weight. While expressing sympathy for the Applicant, the Officer noted it was necessary for the

Applicant to meet the requirements to be able to qualify for certain programs. The Officer also noted that there is no guarantee that her temporary resident status, if appropriately achieved, would have led to permanent resident status. The Officer ultimately afforded “this factor” some weight, although it is unclear to which “factor” the Officer was referring.

[18] The Applicant takes issue with the Officer assigning little weight to the apology email from Manny on the basis that it was undated and unsigned. The Applicant points out that the sender’s email is apparent and the surrounding information of the screenshot show discernible dates.

[19] The Applicant submits that the Officer’s approach to her submissions on why she lost her status, and the resulting consequences such as the abuse she faced from her former employer, lacked the requisite level of empathy for an assessment on H&C grounds. The Applicant relies on *Bobadilla v Canada (Citizenship and Immigration)*, 2022 FC 161 [*Bobadilla*], where the Court found that the officer’s failure to consider the impacts of a third-party’s actions on an applicant’s immigration status, as well as the officer’s expectation that the applicant do nothing to support herself until their status was resolved, was unreasonable: at paras 21-22.

[20] In *Bobadilla*, the applicant’s employment agency allegedly unfairly and illegally treated her, which led to the applicant staying and working illegally in Canada without status, including after she realized she had been misled by the agency: at paras 18 and 20. At para 18, Justice Mosley stated:

> …the Officer demonstrated a lack of compassion for the circumstances in which the Applicant received allegedly unfair and

> illegal treatment by the staffing agency. The Officer emphasized that the Applicant had remained in Canada without status instead of engaging with that evidence. While that is but one factor to be considered in the s. 25 analysis, it had to be adequately considered to be consistent with the approach discussed by the Supreme Court majority in *Kanthasamy,* at para 13. H&C considerations refer to "those facts, established by the evidence, that would excite in a reasonable man [*sic*] in a civilized community a desire to relieve the misfortunes of another."

[21] Justice Mosley found that while the officer noted that some of the time the applicant worked in Canada without authorization was because she was misled by the employment agency, the officer unreasonably discredited this explanation as the applicant continued to work in Canada without authorization after realizing she was misled: *Bobadilla* at para 20.

[22] I find the Officer in this case committed a similar error.

[23] I acknowledge the Respondent's submission that the Officer considered the contents of the email from Manny and decided to grant it some weight. However, having done so, the Officer did not, in my view, address the Applicant's key submission that the consultant's negligence was the cause of her loss of status.

[24] Instead of engaging with the Applicant's submission that she would have retained legal status in Canada but for the negligence of the immigration consultant, the Officer focused on whether or not the Applicant could apply again for status and whether she would meet the requirements for permanent residence status after the fact. In so doing, the Officer completely ignored the Applicant's submission that she lost her immigration status through no fault of her own in the first place.

[25] I agree with the Respondent that officers have discretion to assign low weight to evidence lacking specific detail or with an unidentified source, where there is no corroborative evidence: *Seyoboka v Canada (Citizenship and Immigration)*, 2016 FC 514 at para 36. In this case, however, the Applicant submitted affidavit evidence listing the litany of errors committed by the consultant. I note that the Officer did not refer to the Applicant's affidavit at all when discussing the consultant's negligence, even though the Officer appeared to have accepted the Applicant's affidavit evidence overall.

[26] Ultimately, while deciding to give "some weight" to the email from Manny, the Officer never engaged with the Applicant's central submission that she lost her status due to the negligence of her former representative. The Officer's failure to do so rendered the Decision unreasonable.

Issue 2: The Officer unreasonably dealt with the Applicant's immigration history

[27] In my view, the Officer's failure to engage with the evidence regarding the immigration consultant also coloured the Officer's assessment of the Applicant's immigration history.

[28] The Officer acknowledged that the Applicant has reasonably established herself since coming to Canada in February 2013. The Officer considered the Applicant's membership in her various communities and her volunteer work, as well as the letters of support provided by her employer, friends, and other community members. The Officer noted that the Applicant is financially independent having considered her employment history in Canada.

[29] The Officer ascribed some positive weight to the Applicant's social network and volunteerism in Canada. However, the Officer opined that the Applicant remaining in Canada without legal status since 2016 and failure to abide by the *IRPA* is a negative consideration that detracts from her positive establishment in Canada.

[30] The Applicant argues that the Officer unreasonably relied on the Applicant's non-compliance with the *IRPA* by remaining in Canada without status to "override the evidence put forward of how deserving [the Applicant] is." The Applicant submits that the Officer was relying on *Joseph v Canada (Citizenship and Immigration)*, 2015 FC 904 [*Joseph*] at para 29 when the Officer stated that "I do not believe that persons who fail to abide by Canada's immigration laws should be better placed to obtain permanent residence than those who follow them." The Applicant distinguishes *Joseph* as the applicants in that case were in Canada illegally for 11 years before trying to regularize their status through an H&C application: at para 5.

[31] The Applicant refers to the Court's statement in *Joseph* that each case is contextual and that sometimes, "illegal status will not be a great obstacle to H&C relief": at para 30. In the case at bar, the Applicant submits that the Officer failed to deal with her submissions showing her sustained efforts to regularize her status.

[32] The Applicant also relies on *Perez v Canada (Citizenship and Immigration)*, 2022 FC 1238 [*Perez*], where the officer's failure to observe "complexities and extenuating circumstances… including a sustained effort to regularize the applicant's status" undermined the reasonableness of the decision: at para 19.

[33] I find that the circumstances in *Perez* differ somewhat from those in the case at bar. However, I consider the Court's comment to be instructive nonetheless, stating it is "often precisely because someone has not complied with Canadian immigration laws that it is necessary to submit an application for H&C relief", and that "[t]he significance of that non-compliance must be assessed in the particular circumstances of the case at hand": *Perez* at para 18.

[34] The Respondent disagrees with the Applicant's characterization of the Officer's reasons regarding the Applicant's non-compliance with immigration laws, asserting it was reasonable for the Officer to consider the Applicant's period of unauthorized stay as a negative factor: *Peter v Canada (Citizenship and Immigration)*, 2020 FC 60 at para 15, citing *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125 [*Legault*]; *Edo-Osagie v Canada (Citizenship and Immigration)*, 2017 FC 1084 [*Edo-Osagie*] at para 17; *Semana v Canada (Citizenship and Immigration)*, 2016 FC 1082 [*Semana*] at para 48; *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 at paras 23-24.

[35] I reject the Respondent's argument. While the above-noted cases do support the Respondent's argument that officers are entitled to consider an applicant's stay in Canada without status, there is more nuance that is relevant here in the Applicant's circumstances. As noted by the Federal Court of Appeal in *Legault,* officers can consider an applicant's "prolonged inability to leave Canada [having] led to establishment", which may warrant positive consideration where the significant period of time of stay was "due to circumstances beyond their control": at para 27 [emphasis added].

[36] On the other hand, I note the Court's comment in *Edo-Osagie* that a decision-maker "may consider the fact that the H&C grounds that an applicant claims <u>are the result of his or her own actions</u>": at para 17, citing *Legault* at para 19 [emphasis added]**.** Finally, it is worth pointing out that there is no suggestion that the Applicant has engaged in fraud with respect to her immigration status, as was the case in *Semana*.

[37] In my view, the Decision simply did not reflect the nuanced approach called for by the jurisprudence. The Officer simply found that the Applicant's failure to abide by immigration law "detract [*sic*] from her positive establishment in Canada" without any further analysis. The Officer did not consider whether the Applicant's failure to abide by immigration law was a result of her own actions, or whether it was due to no fault of her own. Nor did the Officer consider the Applicant's sustained attempts to regularize her status.

[38] I reject the Respondent's argument that the Officer did consider the consultant's negligence into account. That the Officer expressed sympathy for the Applicant elsewhere in the Decision does not take away the Officer's obligation to properly consider all the evidence before them.

[39] Case law confirms that H&C officers should assess the nature of an applicant's non-compliance and its relevance to weigh it in the context of other H&C factors, rather than simply invoking it as an obstacle to granting the relief sought. The Applicant asserts, and I accept, that the Officer failed to do so here in a compassionate or empathetic manner that was "sensitive to

the applicant's circumstances", as Justice Campbell, as he then was, stated in *Dowers v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 593 at para 6:

> A situation such as the Applicant's, where a person comes to Canada and stays without adhering to the immigration laws, but, nevertheless, succeeds to be a positive, productive, and valuable member of society must be given careful attention. Section 25 has no purpose if that person is easily condemned for her or his immigration history. The history must be viewed as a fact which is to be taken into consideration, but within a serious holistic and empathetic exploration of the totality of the evidence, to discover whether good reason exists to be compassionate and humanitarian.

[40] In this particular case, there was evidence before the Officer that the Applicant's adverse immigration history was caused by a negligent, if not incompetent, immigration consultant that the Applicant had the misfortune of trusting. The Officer first erred by failing to engage with the evidence concerning the negligence of the consultant. The Officer then compounded that error by failing to assess the circumstances surrounding the Applicant's non-compliance of immigration law before relying on it to discount the Applicant's positive establishment and accomplishments in Canada as a caregiver.

[41] For these reasons, the Officer's findings with regard to the Applicant's non-compliance and hence her establishment were unreasonable.

Obiter Comment

[42] As I have found the Decision to be unreasonable for the reasons set out above, I need not address the other arguments raised by the Applicant.

[43] Here, I offer additional comments, which I hope will be considered by the new Officer assigned to re-determine the Applicant's H&C application. These comments are strictly *Obiter* because they pertain to an issue that was not made by the parties before this Court, including the Applicant. As the issue in question goes to the heart of the Applicant's H&C application, I do not want to leave it unaddressed and risk creating a false impression that the Court endorses the Officer's inadequate analysis in this regard.

[44] Before the Officer, the Applicant advanced extensive evidence and submissions describing her experience as a "trafficked worker" by her former employer. In her written submissions, the Applicant's then-counsel cited the international legal standard of Trafficking in Persons for Forced Labour as described by the Canadian Council of Refugees [CCR]:

> Trafficking in persons occurs when someone obtains a profit from the exploitation of another person by using some form of coercion, deception or fraud. Exploitation can take many different forms, including through forced labour in various areas [including] domestic work…Regardless of the form of exploitation, trafficking in persons is a violation of a person's basic human rights…(CCR 2018)

[45] The Applicant submitted that the inequalities she faced in the Philippines based on her gender and her status as an unwed mother were the root causes pushing her to migrate to Canada in search for opportunities. The Applicant described how these intersecting vulnerabilities catalyzed by her loss of legal immigration status rendered her vulnerable to exploitation by her "traffickers", i.e. her former employer. The Applicant went on to outline the various ways she was exploited, the steps she took to leave her exploitative employers, and the fear, anxiety and guilt she continued to experience after she left her abusive employment situation.

[46] The Applicant also stated that after reporting the exploitation to the Hotline, the Troiano family accused the Applicant of lying about the abuse she faced, which exacerbated her psychological trauma.

[47] The Officer never addressed the Applicant's submissions with respect to human trafficking, other than noting "an autoreply email for reporting an incident" to the Hotline. This brief observation was made solely in the context of the Applicant's diagnosis of Adjustment Disorder with Mixed Anxiety and Depressed Mood. The Officer promptly went on to find that "insufficient evidence has been presented that the applicant will be unable to access mental health support" should she return to the Philippines.

[48] As noted above, *Kanthasamy* reminds us that the purpose of subsection 25(1) of *IRPA* 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'": at para 21. The Officer, in my view, ought to have considered whether or not the evidence submitted by the Applicant supports a finding that she is a victim of trafficking, and if so, whether the Applicant's experiences as a "trafficked worker" would rise to a level of misfortune that warrants the granting of relief on H&C grounds.

III. Conclusion

[49] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision-maker.

[50] There is no question for certification.

JUDGMENT in IMM-1124-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is referred back for redetermination by a different decision-maker.

3. There is no question for certification.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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