Federal Court  Cour fédérale

Date: 20230406

Docket: IMM-4741-22

Citation: 2023 FC 501

Ottawa, Ontario, April 6, 2023

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ATHALYN CLAUDIA CADOUGAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Athalyn Claudia Cadougan, is a citizen of Saint Vincent and the Grenadines, who arrived in Canada in September 2008. In a decision dated May 13, 2022 a senior immigration officer [Officer] refused her application for permanent residence from within Canada on Humanitarian and Compassionate [H&C] grounds.

[2] The Applicant applies under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for judicial review of the Officer's decision. She argues the Officer erred in assessing the factors identified in her application for H&C relief. The Respondent submits the Officer committed no reviewable error and that the decision is reasonable.

[3] Having considered the oral and written submissions of the parties, I am persuaded that the Court's intervention is warranted. The Application is granted for the reasons that follow.

II. Background

[4] The Applicant's immigration history is lengthy. She arrived in Canada in September 2008. Her refugee protection claim, based on her reported fear of her niece's ex-partner, was denied in November 2010. The Refugee Protection Division concluded the Applicant had failed to demonstrate the absence of adequate state protection. A negative Pre-Removal Risk Assessment issued in 2012, and numerous H&C applications have been refused.

[5] In 2015, the Applicant trained as a personal support worker [PSW] and worked with elderly clients. In 2016, she registered a business and employed four part-time PSWs. In 2017, the Applicant failed to report for removal and a warrant was issued for her arrest.

[6] In 2021, the Applicant submitted a fresh H&C application under the Health-care Workers Permanent Residence Pathway that was refused on the basis that the Applicant was ineligible as a self-employed PSW. The Applicant was briefly detained by the Canada Border Services Agency and her removal cancelled pending determination of the health-care worker application.

[7] On March 3, 2022, the Applicant again submitted an application for H&C relief that identified a number of factors, including her status as a PSW and her role as primary live-in caregiver to an elderly women suffering from dementia. This application was refused on May 13, 2022, and is the subject of this judicial review.

III. Decision under review

[8] In denying the application for H&C relief, the Officer gave positive weight to the Applicant's contributions as the owner of a small business with a strong bond to her clients in addition to her community integration, but concluded the evidence failed to establish she was uniquely able to provide for her client or that alternative arrangements were unavailable. The Officer acknowledged some establishment occurred during periods when removal had been deferred, but found the Applicant's disregard for Canadian immigration law, as evidenced by her failure to report for removal and her work without authorization, resulted in negative consideration.

[9] The Officer then considered the Applicant's concerns that she was at risk in Saint Vincent but gave significant weight to the decision refusing the Applicant's refugee claim. However, the Officer accepted the Applicant would experience some difficulty in returning to Saint Vincent, noting that the deterioration of economic conditions there and the absence of family would make reintegration difficult. However, the Officer found the Applicant's employment history and her familiarity with the culture would minimize hardship. The Officer further found there to be insufficient evidence to demonstrate the Applicant would not obtain necessary medical care for her eye condition.

[10] The Officer then considered the best interests of the Applicant's grandchildren living in Trinidad and Tobago with their mother (the Applicant's daughter). The Officer accepted that returning to Saint Vincent would disrupt the remittances sent to the children, but found insufficient evidence regarding the family's financial and employment situation in Trinidad and Tobago. The Officer found the children's best interest was to remain with their mother, and that their grandmother's removal from Canada would not compromise this.

[11] The Officer then concluded the Applicant did not demonstrate an exceptional level of establishment to justify H&C relief. The Officer weighed the violations of immigration laws against any positive considerations and refused the application.

IV. Issues and Standard of Review

[12] The Applicant raises – and the Respondent's submissions respond to – the following issues; whether the Officer err in finding that:

A. The best interests of the Applicant's client did not warrant H&C relief.

B. The Applicant's work as a PSW during the COVID-19 pandemic did not warrant H&C relief.

C. The Applicant was required to establish an "exceptional level" of establishment to warrant H&C relief.

D. The best interests of the identified affected children did not warrant H&C relief.

[13] The Parties agree that the Officer's decision is to be reviewed against the presumptive standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]).

[14] In conducting a reasonableness review, the Court asks "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). A reasonable decision is one that is internally coherent, and displays a rational chain of analysis (*Vavilov* at para 85).

[15] The party challenging a decision has the burden of demonstrating the decision is unreasonable. Alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision, or reflective of a minor misstep in the reasoning process. Instead, the court must be satisfied any shortcomings or flaws relied upon by the party challenging the decision are sufficiently central or significant so as to render the decision unreasonable (*Vavilov* at para 100).

V. Preliminary matter

[16] At the outset of the hearing, counsel for the Applicant advised the Court that the Applicant's elderly client suffering from dementia, for whom the Applicant had acted as the primary live-in caregiver, has passed away. The Parties do not dispute, and I agree, that this development renders the issue of the Officer's consideration of the interests of the Applicant's client moot. I will not consider issue A.

[17] In not addressing issue A, I acknowledge and have been mindful of counsel for the Applicant's argument that the alleged lack of responsiveness underpinning issue A should inform the Court's consideration of the remaining issues. I have also noted counsel for the Respondent's position that the changed circumstance bleeds into other portions of the application and I briefly address this issue below.

VI. Analysis

A. *PSW work during the COVID-19 pandemic*

[18] The Applicant argues the Officer erred by failing to meaningfully consider and address her submissions related to her contributions as a health-care worker during the pandemic. Despite submissions on this issue, the Officer simply acknowledged the Applicant's prior application and ineligibility for the pathway program because she had performed PSW duties in a self-employed capacity. She argues the Officer's failure to account for her work as a PSW in considering establishment resulted in the Officer placing undue emphasis on her immigration history.

[19] The Respondent argues the Officer made no error in giving the weight it did to the Applicant's PSW work because she was working without authorization. The Respondent submits the Applicant effectively is asking the court to reweigh the evidence by giving more weight to the Applicant's PSW work despite her ineligibility for the government's pathway program. The Respondent also argues that the Applicant's immigration history was not determinative, but was considered with other aspects of the claim.

[20] A reasonable decision is one that is justified, transparent and intelligible. Justification and transparency require that a decision maker meaningfully account for the issues and concerns raised by the parties. While this will not require a decision maker respond to every argument or issue, a failure to meaningfully grapple with key issues or central arguments may cause a reviewing court to question whether the decision maker was sensitive or alert to the matters being raised (*Vavilov* at para 127-128).

[21] In submissions to the Officer, the Applicant argued that H&C relief was warranted because of her contribution as a health-care worker during the pandemic. While ineligible for the pathway program because she was self-employed, she argued the evidence demonstrated her contribution to her clients and their families – contributions they viewed as extraordinary. The Applicant brought the Officer's attention to this Court's decision in *Mohammed v Canada (Citizenship and Immigration)*, 2022 FC 1 at paragraphs 38-43, where Justice Shirzad Ahmed discusses the moral debt owed to health-care workers during the pandemic, and the consideration merited in an H&C assessment by the Immigration Appeal Division. The Applicant also referred to *Uwaifo v Canada (Citizenship and Immigration)*, 2022 FC 679 at paragraphs 25-26, 32-33, where the Court found the Officer had failed to adequately consider the contribution of an essential worker, again in the H&C context.

[22] The Applicant's contribution as a PSW during the pandemic was central to the Application, yet the Officer's consideration of the issue was limited to an acknowledgement of her ineligibility for the pathway program. While it may have been open to the Officer to give more weight to the Applicant's immigration history and distinguish the jurisprudence relied on

by the Applicant, the Officer's failure to consider and respond to the submissions on this central issue renders the decision unreasonable.

B. *Exceptional establishment*

[23] The Applicant argues the Officer erred by requiring the Applicant demonstrate an "exceptional" level of establishment in order to warrant H&C relief. The Respondent argues that the Officer's use of the word "exceptional" in describing the degree of establishment demonstrated cannot be read in isolation of the Officer's actual analysis (citing *Davis v Canada (Citizenship and Immigration)*, 2022 FC 238 at para 43). The Respondent further submits the Officer did not err in concluding an ordinary level of establishment was insufficient in this instance as H&C relief is intended to be exceptional and highly discretionary.

[24] As I stated in *Jimenez v Canada (Citizenship and Immigration)*, 2021 FC 1039:

> [28] Although H&C relief pursuant to subsection 25(1) of the IRPA may well be described as exceptional, extraordinary or special relief, these descriptors do not establish a legal standard that an applicant must meet. Instead, and in accordance with the equitable underlying purpose of subsection 25(1), a decision maker is required to substantively and cumulatively consider and weigh *all* relevant facts and factors raised (*Kanthasamy* at paras 25, 28 and 31). The Officer's establishment analysis is unreasonable for this reason.

[25] In this instance, the Officer has adopted the "exceptional establishment" language in assessing all of the circumstances and, in doing so, concluded that the Applicant's establishment was not "considered an exceptional level of establishment to justify a waiver of regulatory requirements." Both the Officer's placement of this statement and the words used indicate that

the Officer viewed exceptional establishment as a legal standard in considering the request for H&C relief.

C. *Best Interests of the Children*

[26] The Applicant argues the Officer failed to consider all of the children identified as affected by her ability to remain in Canada, namely her grandchildren in Trinidad and Tobago and the grandchild of her late client in Canada.

[27] The Applicant argues that the Officer engaged in speculation when concluding her daughter and grandchildren in Trinidad and Tobago would no longer need remittances, because her daughter was in a position to return to work with the easing of pandemic restrictions. The Applicant supports this argument by pointing out that the evidence establishes that her daughter was relying on remittances since October 2016 – a time when her daughter was working. The Applicant also argues the best interests of her late client's grandson – interests which were expressly identified in the Applicant's H&C submissions – were not addressed or even recognized in the Officer's decision.

[28] The Respondent argues, and I agree, that the Officer's assessment of the best interest of the Applicant's grandchildren in Trinidad and Tobago was reasonable. The Officer did consider the consequences of removal on the Applicant's ability to provide remittances in light of the impact of the COVID-19 pandemic, which was the very issue the Applicant brought to the Officer's attention.

[29] However, I am satisfied that the Officer committed a reviewable error by failing to make any reference to the late client's grandchild. The interests of this child were identified in the Applicant's submissions to the Officer and were supported by a letter from both the child and his mother. The best interests of affected children is an important factor and one to which an Officer is required to be alert, alive and sensitive.

VII. Conclusion

[30] The Application is granted. The parties have not identified a question of general importance and none arises.

[31] The Respondent submits, and I acknowledge that the death of the Applicant's client not only renders the first issue raised by the Applicant moot but may also impact other aspects of the application, in particular the circumstances relating to the affected children. This being the case, the Applicant shall be provided the opportunity to update her submissions on the H&C application to address the changed circumstances prior to the matter being redetermined.

JUDGMENT IN IMM-4292-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the Officer's May 13, 2022 decision is set aside.
2. The Applicant's permanent residence application on Humanitarian and Compassionate grounds is remitted to a different decision-maker to be redetermined.
3. The Applicant is to be provided the opportunity to update her submissions to address the changed circumstances prior to the matter being redetermined.
4. No question of general importance is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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