Federal Court Cour fédérale

Date: 20230530

Docket: IMM-8519-22

Citation: 2022~~2~~3 FC 756

Ottawa, Ontario, May 30, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

ELMA CHERYL CLARKE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a citizen of St. Vincent and the Grenadines, seeks judicial review of the decision of a Senior Immigration Officer [Officer] dated July 15, 2022, refusing her application for permanent residence from within Canada based on humanitarian and compassionate [H&C] grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Officer also found insufficient reasons to justify the issuance of a Temporary Resident Permit [TRP] under section 24 of the *IRPA*.

[2] In support of her H&C application, the Applicant provided submissions regarding her establishment in Canada, health issues and hardship faced by the Applicant in St. Vincent and the Grenadines. After reviewing the evidence and submissions, the Officer concluded that the Applicant had failed to demonstrate that her situation was sufficient to warrant the exemption on H&C considerations.

[3] The Applicant asserts that the Officer's H&C decision is unreasonable on the basis that: (a) the Officer found that the Applicant being raped and ignored by the police was not unconscionable; (b) the Officer erred with respect to factors mitigating the Applicant's experience of sexual assault; (c) the Officer failed to apply the correct legal test for H&C applications by imposing a standard of having "deep, permanent, and inflexible roots" as exceptional to others; (d) the Officer's finding on psychological hardships are procedurally unfair due to the consultation of extrinsic evidence without notice; (e) the Officer erred in the assessment of the Applicant's health condition and consequent hardship of removal; and (g) the Officer placed undue consideration on the Applicant's lack of status.

[4] Subsection 25(1) of the *IRPA* gives the Minister discretion to exempt foreign nationals from the ordinary requirements of that statute and grant permanent resident status in Canada if the Minister is of the opinion that such relief is justified by H&C considerations. An H&C determination under section 25(1) of the *IRPA* is a global one, where all the relevant considerations are to be weighed cumulatively in order to determine if relief is justified in the circumstances. Relief is considered justified if the circumstances would excite in a reasonable person in a civilized community a desire to relieve the misfortunes of another [see *Kanthasamy v Canada (Citizenship*

and Immigration), 2015 SCC 61 at paras 13, 28; *Caleb v Canada (Citizenship and Immigration)*, 2020 FC 1018 at para 10].

[5] The granting of an exemption for H&C reasons is deemed to be exceptional and highly discretionary and therefore "deserving of considerable deference by the Court" [see *Qureshi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 335 at para 30]. There is no "rigid formula" that determines the outcome [see *Sivalingam v Canada (Citizenship and Immigration*), 2017 FC 1185 at para 7].

[6] The applicable standard of review of an H&C decision is reasonableness [see *Kanthasamy, supra* at para 44]. In conducting a reasonableness review, the Court's focus is on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 83]. The Court must ask itself whether the decision bears the hallmarks of reasonableness – namely, justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision [see *Vavilov, supra* at para 99]. The burden is on the party challenging the decision to show that it is unreasonable and the Court "must be satisfied that any shortcomings or flaws relied on […] are sufficiently central or significant to render the decision unreasonable" [see *Vavilov, supra* at para 100].

[7] While a number of issues were raised on this application, I find that the Officer's errors in the assessment of the hardship faced by the Applicant upon a return to St. Vincent and the Grenadines render the Officer's decision unreasonable.

[8] By way of background, the Applicant states that she came to Canada in 2000 at the age of 21 for a fresh start after she was raped at 16 years of age by a teacher (who is now a pastor). The Applicant states that at the time she attempted to file a police report, but local authorities did not take her complaint seriously. The Applicant states that she has lived with depression ever since the assault.

[9] Prior to her arrival in Canada, the Applicant had obtained a post-secondary certificate in nursing as a personal support worker and worked from 1998 to 2000 as a geriatric nurse providing care to patients in a small nursing home. After arriving in Canada, she enrolled in a nursing program to continue her education as a personal support worker, but was unable to continue the program due to a lack of finances. As a result, she obtained her bartending license in Canada to work in the hospitality industry and since February of 2006, the Applicant has been working in the food service industry.

[10] In their decision, the Officer acknowledged the sexual abuse faced by the Applicant when considering the hardship faced by the Applicant in returning to the site of her childhood trauma. The Officer wrote:

> …The past difficulties described by the applicant are ones many unfortunately experience in their lives. I do not find the events described as unconscionable. Remarkably the applicant was able to obtain education in the field of caring for others. This choice of profession and her success within it at a relatively early age in St. Vincent and the Grenadines is reflective of what has been learned about the applicant from her supporters. While it is acknowledged that the applicant's early years were the likely source of difficulties affecting her mental health, she has also met the challenge of those difficulties by seeking to obtain help to assist her with healing.

> While I find the applicant may face a degree of hardship as a result of her early years in St. Vincent and the Grenadines her personal circumstances of having education in the medical field, experience in caring for those in need, especially geriatric patients who often have many challenging needs and her understanding of her own mental health well-being would appear to position her to have a much reduced degree of hardship compared to others who may have experienced similar experiences.
>
> [Emphasis added.]

[11] The Officer found that the Applicant would be able to obtain counselling or other treatment as required in St. Vincent and the Grenadines for her mental health needs. The Officer concluded that the Applicant's circumstances were not exceptional and gave little weight to the hardship of return to St. Vincent and the Grenadines.

[12] The Officer's finding that the Applicant's sexual assault was "not unconscionable" is not only insensitive, but inexcusable. The sexual assault of a minor by an authority figure is most certainly unconscionable. The Respondent does not contest that the Officer's statement was unreasonable, but asserts that, relying on *Lara Martinez v Canada (Citizenship and Immigration)*, 2012 FC 1295 at paras 33-34, the assessment of hardship is forward-looking and that any error in the Officer's assessment of past hardship suffered by the Applicant before coming to Canada would not, without more, warrant the intervention of this Court. The Applicant asserts that *Lara Martinez* is no longer good law as a result of the Supreme Court of Canada's decision in *Kanthasamy*, and that in any event, the Officer's "not unconscionable" finding infected their forward-looking assessment. As detailed below, I agree with the Applicant that the Officer's forward-looking assessment was flawed and thus even on the Respondent's characterization of the applicable legal principles, there is "something more".

[13] The Officer found that the Applicant's hardship was lessened because she is a caring person with training in the medical field and has an understanding of her own mental health. I find that this conclusion is unreasonable. The Applicant has training as a personal support worker nurse and, over 23 years ago, spent no more than three years working with geriatric patients in a nursing home. Her training and work experience are both limited and dated and, on the record before the Officer, entirely unrelated to mental health issues. To suggest that such training and experience would in any way reduce the hardship she would face upon return to St. Vincent and the Grenadines is not only speculative, but illogical.

[14] Moreover, the Officer's generalized comparative approach improperly minimized and disregarded the hardship of the Applicant's removal on the basis that it is not "exceptional" as compared to other, unidentified people in similar circumstances [see *Harder v Canada (Citizenship and Immigration)*, 2022 FC 1260 at para 30]. The Officer stated that the Applicant's sexual assault is a difficulty "many unfortunately experience in their lives" and that her experience training as a personal support worker and her self-awareness of her mental health struggles would mean that the degree of hardship would be "much reduced" as "compared to others who may have experienced similar experiences". I find that the Officer improperly ignored and minimized the hardship faced by the Applicant precisely on the basis that other people also suffer similar circumstances.

[15] I find that the aforementioned errors render the Officer's decision unreasonable. Accordingly, the application for judicial review is allowed, the decision of the Officer is set aside and the matter is remitted to a different officer for redetermination.

[16] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-8519-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The decision of the Senior Immigration Officer dated July 15, 2022 refusing the Applicant's application for permanent residence based on humanitarian and compassionate grounds is set aside and the matter is remitted to a different officer for redetermination.

3. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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