Federal Court  Cour fédérale

Date: 20230929

Docket: IMM-4597-21

Citation: 2023 FC 1316

Ottawa, Ontario, September 29, 2023

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

BERNADETTE THERESA CONNELL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant seeks judicial review of a decision of a Senior Immigration Officer [Officer] denying her permanent residence application based on humanitarian and compassionate [H&C] grounds under section 25.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicant challenges the reasonableness of the Decision, arguing that the Officer unreasonably assessed the best interests of the affected children (her son and her cousin's son). The Applicant also asserts that the Officer's hardship analysis is unreasonable. In addition, the Applicant alleges that the Officer erred in failing to consider her alternative request for a temporary resident visa [TRP].

[3] For the reasons that follow, the application for judicial review is granted on three separate grounds. First, I agree with the Applicant that the Officer erred in assessing the best interests of her son. The Officer failed to consider the impact of the Applicant's mental health on her ability to support her son as part of the best interests of the child analysis. Second, the Officer's hardship analysis in terms of the Applicant's mental health is unreasonable because the Officer failed to consider the Applicant's decompression on removal from Canada and did not explain the insufficiency of evidence finding concerning access to medical care in Saint Lucia and Barbados. Third, the Officer erred in failing to consider the Applicant's TRP request.

II. Background

A. *The Applicant's H&C application*

[4] The Applicant is a dual citizen of Barbados and Saint Lucia who first entered Canada as a visitor on August 22, 2012. The Applicant has remained in Canada without status for more than ten years. She has been living in Canada with her maternal cousin and her family, including her cousin's minor son, Aaron.

[5] According to the Applicant's H&C application, she came to Canada to escape her abusive husband. The Applicant's son Kasim lives with her good friend in Barbados, but she provides financial support for him by working cash jobs. Since arriving in Canada, she has upgraded her education and is now a personal support worker. The Applicant attends church, volunteers in her community, and has made friends in Canada.

[6] The Applicant made an H&C application in April 2020 based on her emotional and familial establishment in Canada, and the hardship that would result if she were returned to Saint Lucia or Barbados.

[7] The Applicant has been diagnosed with depression, anxiety, and hypertension. In support of her H&C application, the Applicant filed a psychiatric consultation report that states she meets the requirement of post-traumatic stress disorder [PTSD]. The psychiatrist also concludes that if the Applicant were to return to Barbados, it is likely that her mental health would worsen.

[8] In her H&C submissions, the Applicant requested that a TRP be issued pursuant to subsection 24(1) of the *IRPA* if she did not meet the requirements for permanent residence on H&C grounds.

B. *The Decision*

[9] By letter dated May 27, 2021, the Applicant was advised that her H&C application had been denied. The Officer did not address the Applicant's alternative request for a TRP.

[10] The Officer addressed the main factors raised by the Applicant explaining why they were not satisfied that the Applicant demonstrated the required exceptional circumstances to grant the exemption:

- Establishment in Canada: Although "some level of establishment ha[d] taken place", the fact that the Applicant has remained in Canada without legal authorization weighed negatively;

- The Applicant's ability to find employment: The Officer acknowledged the financial support the Applicant provides to her son, but determined there was insufficient evidence to demonstrate the Applicant could not seek employment in her country in light of her education and skills;

- Best interests of the child with regard to the Applicant's son: The Officer evaluated the teenage son's best interests and concluded that there was insufficient evidence to demonstrate that the Applicant would be unable to provide financial support to him;

- Best interests of the child with regard to the Applicant's cousin's son: The Officer acknowledges their "close bond", but found that he will continue to have the care and support of his mother and that they can maintain contact even if she is returned to Barbados or Saint Lucia;

- The Applicant's fears of her ex-husband: The Officer reviewed the documentary information and concluded that both Saint Lucia and Barbados have a functioning police force and judicial system. In addition, the Applicant has the option of returning to Saint Lucia, where her ex-husband does not reside. The Officer also determined there was insufficient evidence to support the statement that her ex-husband has any influence in Barbados and Saint Lucia;

- COVID-19 concerns: The Officer explained that COVID-19 is a worldwide phenomenon and that it is also present in Canada, thereby presenting similar fears;

- The hardship the Applicant would suffer: The Officer found there was insufficient evidence to demonstrate that the Applicant would be unable to access or be denied access to

psychological and medical assistance in Saint Lucia or Barbados;

- The different standards of living: The Officer acknowledged the different standards of living between the countries, but outlined that the purpose of section 25 of the *IRPA* is to give the Minister the ability to deal with extraordinary situations, which are unforeseen, that compel the Minister to act.

[11] Based on their review of the evidence, the Officer concluded there was no basis to grant the Applicant's application for permanent residence based on H&C grounds.

III. Issues and Standard of Review

[12] The following issues are raised in this application:

A. Whether the Officer erred in assessing the best interests of the children;

B. Whether the Officer erred in the hardship analysis; and

C. Whether the Officer erred in failing to consider the Applicant's alternative request for a TRP.

[13] The parties agree that the first two issues are to be reviewed on the standard of reasonableness in accordance with the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. 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-maker": *Vavilov* at para 85. To withstand scrutiny, a decision must exhibit "the hallmarks of reasonableness – justification, transparency and intelligibility": *Vavilov* at para 99.

[14] The third issue is one of procedural fairness. “The Federal Court of Appeal has held that an alleged failure to consider an argument properly advanced and raised is a procedural fairness issue”: *Turner v Canada (Attorney General)*, 2012 FCA 159 at para 43 [*Turner*]. There is no deference that can be afforded to a decision-maker who fails to consider a party’s argument that should have been considered and addressed: *Turner* at para 43.

[15] Where breaches of procedural fairness are alleged, no standard of review is applied but the Court’s reviewing exercise is “best reflected on a correctness standard”: *Canadian Hardwood Plywood and Veneer Association v Canada (Attorney General)*, 2023 FCA 74 at para 57; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]. When assessing whether procedural fairness was met, a reviewing court asks whether the “procedure was fair having regard to all of the circumstances”: *CPR* at para 54.

IV. Analysis

A. *The best interests of the children*

[16] An officer’s H&C decision is unreasonable if it fails to sufficiently consider and assess the interests of children affected by the decision: *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61 at para 39 [*Kanthasamy*]. An officer must be “alert, alive and sensitive” to the best interests of the children in making their decision: *Baker v Canada (Minister of Citizenship and Immigration)*,[1999] 2 SCR 817 at para 75 [*Baker*].

[17] In my view, the Officer erred in assessing the best interests of the Applicant's son, but reasonably assessed the best interests of her cousin's son.

(1) The Officer failed to consider the adverse impact on the Applicant's mental health

[18] I agree with the Applicant that, in assessing the best interests of the Applicant's son, the Officer erred in failing to consider the adverse impact on the Applicant's mental health if she was required to leave Canada. Rather, the Officer solely focused on the benefit of the Applicant returning to Barbados to care for and support her son.

[19] Where there is evidence before an officer to the effect that a parent's mental health will deteriorate, the officer needs to assess this in the best interests of the children analysis: *Shin v Canada (Citizenship and Immigration)*, 2018 FC 1274 at paras 21-24, 27-30; *Cardona v Canada (Citizenship and Immigration)*, 2016 FC 1345 at para 33; *Montalvo v Canada (Citizenship and Immigration)*, 2018 FC 402 at para 30; *Saidoun v Canada (Citizenship and Immigration)*, 2019 FC 1110 at paras 28-32; *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582 at paras 39, 61; *Rainholz v Canada (Citizenship and Immigration)*, 2021 FC 121 at paras 91-92.

[20] Here, the Applicant filed evidence about her mental health, and specifically addressed the impact on her ability to provide for her son in the written submissions filed in support of her H&C application.

[21] In support of her H&C application, the Applicant submitted a psychiatric report addressing her PTSD symptoms and the impact on her mental health if she had to return to Barbados:

> Bernadette already had significant symptoms of PTSD. When she lived in Barbados, she experienced thoughts of suicide and harm to her children, which have resolved since she has found relative safety in Canada. An important part of recovery for survivors of PTSD is having a sense of physical safety. Bernadette reports that for her, this safety would only come from being in Canada where her abuser has no opportunity to harm her. If Bernadette had to return to Barbados, it is likely that her mental health would worsen.

[22] The Applicant's written submissions squarely raised the impact of her mental health on her ability to parent and the significance of considering this factor as part of the assessment of the best interests of her son:

> As leaving Canada would lead to the deterioration of her mental health, it will similarly affect Bernadette's ability to provide for and care for her son Kasim. Therefore, the mental health of his mother is a major component when assessing the best interests of the children. This is true even when the psychiatric assessment does not explicitly indicate the effects on the applicant's ability to parent. [Citations omitted.]

[23] While not addressing the Applicant's mental health in their analysis of the best interests of her son, the Officer acknowledged the Applicant's mental health diagnosis elsewhere in their reasons:

> I acknowledge that the applicant's mental health has been deeply affected by her life. I also acknowledge that the applicant has been diagnosed with depression and PTSD and has a primary care physician in Canada who has referred her to a psychiatrist.

[24] It was incumbent on the Officer, however, to engage with and consider the impact of the Applicant's mental health in assessing the best interests of her son. The Officer did not even acknowledge the Applicant's claim that if she were removed from Canada her mental health would suffer and have a resulting impact on her ability to support her son. The Officer's failure

to consider the impact of this important factor as part of their best interests of the child analysis renders the Decision unreasonable.

(2) The Officer did not err in assessing the best interests of her cousin's son

[25] I am not persuaded that the Officer erred in their assessment of the best interests of the cousin's son. I do not agree with the Applicant that the Officer failed to identify the child's best interests and focused on whether his mother will continue to care for him. To the contrary, I find that the Officer's analysis was "alert, sensitive and alive" to the child's best interests in the circumstances.

[26] The Officer acknowledged the Applicant's "close bond" with her cousin's son and that it may be difficult for him to be separated from her. The Officer further recognized that the child may have "to make adjustments to his life in Canada", but that he had the support of his mother. The Officer determined that while the physical separation will cause some dislocation, they would still be able to remain in contact through telephone calls, letters, and social media outlets. Further, the Officer noted there was insufficient evidence to demonstrate "any barriers" to the child visiting the Applicant in either Saint Lucia or Barbados.

[27] The Applicant relies on this Court's decision in *Babafunmi v Canada (MCI),* 2019 FC 151 [*Babafunmi*]. In that case, the Court found that the officer had overlooked the negative impact of removal of the children's godfather after accepting evidence about the "integral role" the applicant was playing in the children's lives even though he was not the primary caregiver: *Babafunmi* at paras 73-75.

[28] In contrast, in this case, the Officer did not overlook the negative impact the Applicant's removal from Canada would have on her cousin's son. Rather, the Officer recognized there would be difficulties and adjustments, but ultimately found that, in the circumstances, the best interests of the child did not warrant granting an H&C exemption. Finding that the child would have the care and support of his mother in Canada through this transition was a reasonable factor for the Officer to consider in their analysis.

[29] I am satisfied that the Officer sufficiently considered, identified, and examined the best interests of the cousin's son.

B. *The Officer's hardship analysis*

[30] The Applicant challenges the reasonableness of the Officer's hardship analysis concerning the Applicant's health and her ability to find employment outside Canada. On both issues, she argues that the Officer failed to engage with the evidence and explain their insufficiency of evidence findings. In addition, the Applicant asserts that the Officer failed to consider the decompression of the Applicant's mental health as a hardship in and of itself.

[31] I agree that the Officer's analysis of the Applicant's mental and physical health does not withstand scrutiny, but I find no reviewable error in the Officer's analysis of the Applicant's employment prospects outside Canada.

(1) The Officer's analysis of the Applicant's mental health is unreasonable

[32] In my view, the Officer's analysis of the Applicant's health is flawed in two main respects: (i) the Officer failed to consider and assess the impact of removal from Canada on the Applicant's mental health; and (ii) the Officer failed to explain their finding of insufficient objective evidence.

[33] I accept the Applicant's characterization of the Officer's analysis of the impact on the Applicant's mental health as "little more than a superficial assessment." Despite the significant focus on the Applicant's mental well-being in her submissions, the Officer's analysis is very limited, finding simply that there was insufficient evidence she would be unable to access medical care in either Saint Lucia or Barbados:

> I acknowledge that the applicant's mental health has been deeply affected by her life. I also acknowledge that the applicant has been diagnosed with depression and PTSD and she has a primary care physician in Canada who has referred her to a psychiatrist. Both doctors have offered her medication to treat her mental health. While I am sympathetic to the applicant's circumstances, I have insufficient objective evidence that the applicant would be unable or would be denied psychological/medical assistance in Saint Lucia or Barbados should she require it.

(a) *Failure to consider decompression as a hardship*

[34] Most significantly, the Officer failed to consider and assess the risk of decompression of the Applicant's mental health as a hardship, in and of itself, upon removal from Canada. This Court has consistently held that the failure to consider the impact of removal from Canada on an applicant's mental health renders a decision unreasonable: *Sanchez v Canada (Citizenship and Immigration)*, 2021 FC 1349 at para 51; *Montero v Canada (Citizenship and Immigration)*, 2021

FC 776 at paras 27-30 [*Montero*]; *Saidoun v Canada (Citizenship and Immigration)*, 2019 FC 1110 at para 19; *Jeong v Canada (Citizenship and Immigration)*, 2019 FC 582 at para 57.

[35] The Respondent notes that the psychiatrist's report only refers to the adverse impact on the Applicant's mental health if she had to return to Barbados; it does not refer to Saint Lucia. The Respondent argues that "it appears that the Applicant could return to Saint Lucia (where here [sic] older son, Jamal Leonard Darell Charles, presently resides) without experiencing the mental health deterioration articulated in the report." The Officer, however, does not draw any such conclusion. As Justice Ahmed determined in *Montero*, the reasonableness of a decision "must be assessed in relation to the Officer's reasons, not reasons that the Respondent attempts to import after the fact": *Montero* at para 30.

[36] The Applicant's personal statement supporting her H&C claim explains that her fear relates to both countries. She states that her former husband still has ties to Saint Lucia and that he regularly travels there. Notably, the psychiatric report states: "[a]n important part of recovery for survivors of PTSD is having a sense of physical safety." The Applicant's family doctor reported that she was "having nervous breakdown symptoms and nightmares about the thought of going back." The Applicant also made extensive written submissions concerning the risk of mental health decompression if she was returned to either Saint Lucia or Barbados.

[37] The fundamental flaw in the Officer's analysis is the failure to address whether the Applicant's mental health would deteriorate if she were returned to either Saint Lucia or Barbados. This was a central aspect of the Applicant's claim that was simply ignored by the

Officer. As the Supreme Court held in *Vavilov*, "The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties": *Vavilov* at para 127. This was not done in this case, and, as such, the Decision is unreasonable.

(b) *Failure to explain the insufficiency of evidence*

[38] While decision-makers are entitled to significant deference when making sufficiency of evidence findings, they must be explained with reference to the evidence or by providing a rationale for the finding: *Clarke v Canada (Citizenship and Immigration),* 2023 FC 680 at para 25*; Ahmed v Canada (Citizenship and Immigration),* 2022 FC 618 at para 35; *Sarker v Canada (Citizenship and Immigration),* 2020 FC 154 at para 11*; Magonza v Canada (Citizenship and Immigration), 2019 FC 14* at para 35.

[39] Here, the Officer failed to engage with the evidence and arguments about the lack of access to healthcare in both Saint Lucia and Barbados. The Officer simply made a bald conclusion that "I have insufficient objective evidence that the applicant would be unable or would be denied psychological/medical assistance in Saint Lucia or Barbados should she require it." The Officer makes no mention of the evidence submitted and offers no rationale for their insufficiency finding.

[40] The Applicant submitted nine articles on healthcare in Barbados and thirteen articles about medical care in Saint Lucia. In her written submissions, the Applicant provided a

comprehensive summary of the conditions, arguing there was a lack of access to mental healthcare in both countries. As an example, the Applicant made the following submissions:

> In Barbados, there is a dearth of information on mental healthcare, presumably because of its unavailability. According to the Minister of Health, mental healthcare is "one of the most neglected weapons" in the country's fight against COVID-19, particularly as "mental health had been placed on the back burner." [Citations omitted.]
>
> In Saint Lucia, one political group decried the lack of resources to assist those with mental illness, referring to patients being refused care due to the unavailability of space. They continued their criticism:
>
> Without adequate funding for intervention programs and initiatives, without sufficient human resource capacity to administer psychosocial care in the community and without a commitment from the government to prioritize the health and wellness of the people – more lives will be lost, more families will mourn. [Citations omitted.]

[41] In light of the evidence and submissions, it was incumbent on the Officer to explain how they came to the conclusion that there was insufficient objective evidence supporting a lack of healthcare in both Barbados and Saint Lucia. The failure to address this central issue in the Applicant's claim vitiates the Decision.

(2) The Officer's analysis of the Applicant's employment prospects is reasonable

[42] I do not agree that the Officer's analysis of the Applicant's employment prospects suffers from the same flaws as their analysis of medical hardship. In contrast, the Officer explained the insufficiency of evidence finding concerning the Applicant's ability to obtain employment.

[43] The Officer acknowledged the issues with unemployment in both Saint Lucia and Barbados due to the global pandemic and national economic stagnation. However, based on the Applicant's broad skills and experience in multiple fields, the Officer determined there was insufficient evidence that "she could not reasonably seek or obtain employment in her country" and continue to provide for her family.

[44] As noted by the Officer, the Applicant had training or experience in the following fields: (i) hotel and restaurant management; (ii) interior decorating; (iii) computer hardware, building/repairing basic networking, PC specialist; (iv) cooking; (v) nursing auxiliary; and (vi) personal support work. The Applicant had also volunteered with numerous organizations. Considering the Applicant's diverse skills, experience, and training, it was reasonable for the Officer to conclude that her "employability profile and by extension her employment prospects" were enhanced. Ultimately, the Officer assessed the evidence and determined that the Applicant's specific skillset and experience made her more employable, despite the country condition information. It is not for the Court to re-weigh or re-assess the evidence: *Vavilov* at para 125.

C. *Failure to consider the Applicant's TRP request*

[45] The Officer failed to consider the Applicant's alternative request that if her H&C application was denied, a TRP be issued pursuant to subsection 24(1) of the *IRPA*. This Court has determined that a failure to respond to a request for a TRP constitutes a reviewable error: *Mpoyi v Canada (Citizenship and Immigration)*, 2018 FC 251 at paras 32-33, 36 [*Myopi*];

Catindig v Canada (Citizenship and Immigration), 2018 FC 92 at para 36; *Shah v Canada (Citizenship and Immigration)*, 2011 FC 1269 at paras 77-79 [*Shah*].

[46] The Respondent attempts to justify this failure by arguing that the request for a TRP constituted three lines in a 25-page written submission supporting her H&C application and that "no submissions were provided to support the TRP request." The Respondent further states that the Officer "did not simply articulate that the TRP application was also rejected."

[47] I do not accept either of the Respondent's submissions. First, the length of the Applicant's submissions has no relevance or bearing on the duty to consider and assess the Applicant's alternative request for a TRP. This Court has consistently held that there are no particular requirements governing the form of TRP applications: *Myopi* at para 32; *Shah* at paras 77-79; *Lee v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1461 at paras 16-18 [*Lee*].

[48] In *Lee*, this Court specifically rejected the Respondent's argument that the Applicant had failed to provide sufficient information in their request to enable proper consideration of the TRP request:

> [18] The Respondent defends the Officer's failure to consider the Applicant's request on the basis that the Applicant did not provide sufficient information and argument to enable the Officer to determine whether a TRP is warranted. I reject this argument. I agree with Counsel for the Applicant that the request placed before the Officer, when read in context with the application for permanent residence, made it clear that the Applicant wished to remain in Canada by whatever grant of authority. Therefore, the Applicant's request to the Officer, to consider granting him a TRP, required the Officer to respond without the necessity of a separate

> submission. In my opinion, the failure of the Officer to deal with the request constitutes an error in due process.

[49] Second, the Court cannot take the Officer's silence as implicit rejection of the TRP request. An officer must indicate the request was, in fact, considered even if there is no basis to issue a TRP: Shah at para 77; *Lee* at paras 16, 18.

[50] The Officer's failure to consider and assess the Applicant's request for a TRP was a breach of procedural fairness. If, on redetermination, the new officer does not grant the Applicant's H&C application, then they must turn their minds to her alternative request for a TRP.

JUDGMENT in IMM-4597-21

THIS COURT'S JUDGMENT is that:

1. The application is allowed.

2. The Officer's Decision dated May 26, 2021, is set aside and the matter is remitted for determination by another officer.

3. There is no question for certification.

"Anne M. Turley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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