Federal Court  Cour fédérale

Date: 20240205

Docket: IMM-6607-22

Citation: 2024 FC 181

Calgary, Alberta, February 5, 2024

PRESENT: Madam Justice Go

BETWEEN:

Monique BAPTISTE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Monique Baptiste, the Applicant, is a 46-year-old citizen of St. Vincent and the Grenadines [SVG]. The Applicant has lived in Canada since 2002 without status and she first attempted to regularize her status by submitting an application for permanent residence on humanitarian and compassionate [H&C] grounds on August 4, 2021.

[2] In her H&C application, the Applicant claimed she fears returning to SVG as she and her sister were victims of domestic gender-based violence inflicted by their two older brothers. The Applicant explained these traumatic events caused her to suffer from severe depression and Post-Traumatic Stress Disorder [PTSD]. The Applicant stated that she did not attempt to regularize her status before because she was afraid of being deported. The Applicant also stated that she is self-employed, and has become a second mother to her niece.

[3] A Senior Immigration Officer [Officer] rejected the Applicant's H&C application on June 17, 2022, finding that the Applicant "has not demonstrated it would be unacceptable to deny the relief sought" [Decision].

[4] The Applicant seeks judicial review of the Decision. For the reasons set out below, I grant the application.

II. Issues and Standard of Review

[5] The Applicant raises the following issues:

a. The Officer erred in law by requiring the Applicant to demonstrate "exceptional" establishment in comparison to others in the country for a similar amount of time.

b. The Officer's assessment of the Applicant's past non-compliance with immigration law is unreasonable.

c. The Officer erred in law in applying the dissenting opinion from the Supreme Court's judgement in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*].

d. The Officer's assessment of the Applicant's circumstances is unreasonable.

[6] The parties agree that the Decision is reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[7] 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). The onus is on the Applicant to demonstrate that the decision is unreasonable (*Vavilov* at para 100). To set aside a decision on this basis, "the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

III. Analysis

[8] I find the Officer erred by requiring the Applicant to demonstrate "exceptional" establishment and by conducting an unreasonable assessment of the Applicant's circumstances.

[9] After noting the Applicant's submissions and evidence on establishment, the Officer reached the following conclusion on the Applicant's degree of establishment:

> During their time in Canada it is not unusual, if not expected, for applicants to attain a level of establishment. The applicant has spent a notable amount of time in Canada. However, it is noted that duration alone is not necessarily indicative of this factor. Activities such as seeking employment are not uncharacteristic of newcomers to the country. Based on the evidence provided, it is determined that the applicant's establishment in Canada is not unusual compared to others who have been here for a similar amount of time and therefore does not merit exceptional circumstances.
>
> [Emphasis added]

[10] The Applicant submits, and I agree, in so finding, the Officer applied the standard of exceptionality when assessing the Applicant's degree of establishment, contrary to the Court's instruction in *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 [*Zhang*] at paras 19-29. The Officer's use of the word "therefore" made clear that their determination that the Applicant's establishment is not "unusual" was the basis for the Officer's finding that it did not merit "exceptional" relief granted under H&C.

[11] As Justice Zinn explained in *Zhang*:

> [28] […] There is no requirement that any individual factor, such as establishment or hardship, be exceptional. Nor is there a requirement that an applicant's circumstances as a whole meet the threshold of being exceptional when compared to others. What is required is that an applicant's personal circumstances warrant humanitarian and compassionate relief.

[12] The Respondent submits the Applicant took the Officer's finding out of context, and argues that the Officer did not expect the Applicant to demonstrate "exceptional circumstances" nor impose a legal threshold of such. Rather, the Respondent submits, the Officer found the Applicant failed to proffer evidence in support of her submission on her establishment in Canada, and used the word "exceptional" descriptively, as opposed to using it to impose a legal or elevated threshold: *Davis v Canada (Citizenship and Immigration)*, 2022 FC 238 at paras 36-38; *Arney v Canada (Citizenship and Immigration)*, 2023 FC 1478 at paras 11-15; *Del Chiaro Pereira v Canada (Citizenship and Immigration)*, 2022 FC 799 at paras 50-55; and *Toor v Canada (Citizenship and Immigration)*, 2022 FC 773 at para 20.

[13] I reject the Respondent's submissions. I note firstly, while the Officer did comment on the absence of certain evidence regarding the Applicant's employment, the Officer also noted this issue was not determinative. Further, I find the Officer's use of the term "exceptional" was not descriptive, as the Officer adopted similar phrasing later on in the Decision:

> This H&C decision focused on a global assessment of factors and considered circumstances particular to the applicant that may be sufficiently compelling to allow for the requested exemption. It is noted invoking sections A25 and A25.1 of the IRPA is an exceptional measure and not simply an alternate means of applying for permanent resident status in Canada. After **having considered the totality of the circumstances** based on the evidence as a whole, **including the exceptional nature of H&C relief, the applicant has not demonstrated that it would be unacceptable to deny the relief sought.**
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> [Emphasis added by the Applicant]

[14] These reasons lend further credence to the Applicant's argument that the Officer applied a wrong legal test. Irrespective of whether the Officer's conclusion is a "verbatim" reproduction of the dissenting opinion in *Kanthasamy*, as the Applicant suggests, I find the Officer's reasons amounted to the imposition of a stringent, "exceptional" legal standard on an H&C relief, contrary to the majority's teaching in *Kanthasamy*: *Damian v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1158 at para 20.

[15] In addition, I find that the Officer erred in their assessment of the Applicant's circumstances, particularly with respect to the hardship faced by the Applicant due to past trauma of gender-based violence.

[16] The Applicant described, with details, in her H&C application that her two older brothers, who were alcoholics, would attack the sisters with a machete and other weapons. While the Applicant reported the abuse to police, all the police did was warn the brothers but never detained them. The Applicant cited that the abuse severely affected her mental health and led her to flee to Canada in 2002.

[17] In support of her mental health claim, the Applicant submitted two letters, one from her primary care physician Dr. Nicole Sookhai, and another from Dr. Kirollos Mikail, both from Rexdale Community Health Centre. Dr. Mikail's letter confirmed that the Applicant has a past medical history of depression and PTSD and is currently undergoing treatment.

[18] The Officer noted Dr. Mikail's letter did not indicate their relationship with the Applicant, nor did it indicate when the Applicant was diagnosed with the stated conditions, and when she started treatment. The Officer also noted Dr. Mikhail advocates for the Applicant, stating that staying in Canada is "best for her."

[19] I pause here to note it is unclear whether the Officer accepted the diagnosis with regard to the Applicant's PTSD and depression in light of the Officer's comments about Dr. Mikail's letter. Elsewhere in the Decision, the Officer appeared to acknowledge that the Applicant has mental health needs by noting the "residual effects of the trauma she incurred," and finding there is mental health treatment available to the Applicant in the SVG. However, at one point in the Decision the Officer also described the Applicant as a "non-disabled person."

[20] Notwithstanding these somewhat contradictory observations in the Decision with no clear findings, I conclude that the Officer did accept, at the minimum, that the Applicant suffers from residual effects from the past trauma and requires treatment to deal with those effects should she return to SVG. Further, I find that the Officer did not question the Applicant's claims of abuse.

[21] However, the Officer noted the lack of more recent evidence about the brothers' abusive behaviour toward their female relatives in SVG but noted evidence indicating other male family members were living in the mother's household without incident. The Officer went on to conclude that these factors, in addition to the available mental health treatment, "would mitigate the hardship incurred upon the applicant's return to SVG."

[22] The Applicant submits that whether hardship is mitigated is not the issue, rather, it is whether "it would excite in a reasonable [person] in a civilized community a desire to relive the misfortunes of another": *Kanthasamy* at para 21. The Applicant further argues that the Officer erred by failing to consider whether the hardship, even if mitigated, may still be sufficient to grant the relief sought.

[23] I agree.

[24] In light of the evidence about the Applicant's past trauma and its residual effects, and the abuse suffered by the Applicant in the hands of her two brothers, I find it unreasonable for the Officer to conclude that the Applicant's hardships were "mitigated" when the trauma is, of itself, a source of hardship that the Applicant claims she would face.

[25] The Officer also failed to consider whether hardship, however mitigated, might still warrant granting an exemption in light of the circumstances of the case.

[26] I reject the Respondent's argument that the Officer's findings were based on insufficiency of evidence and as such were reasonable. The Respondent's argument appears to supplement the Officer's reasons. The Officer's failure to make a finding on the critical issue of hardship based on the Applicant's trauma rendered the Decision unreasonable.

IV. Conclusion

[27] The application for judicial review is granted.

[28] There is no question for certification.

JUDGMENT in IMM-6607-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted and the matter sent back for redetermination by a different officer.
2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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