Federal Court  Cour fédérale

Date: 20240301

Docket: IMM-6127-23

Citation: 2024 FC 350

Ottawa, Ontario, March 1, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

SRI WAHYUDINI

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Sri Wahyudini, is seeking a Judicial Review under section 72(1) of the *Immigration and Refugee Protection Act* [IRPA] concerning the rejection of her permanent resident application on humanitarian and compassionate grounds (H&C). The Judicial Review is granted for the following reasons.

[2] The Applicant is a citizen of Indonesia who first came to Canada on a work permit as a Live-in Caregiver in 2014. Due to indirect misrepresentation, on June 3, 2021, the Immigration

Division of the Immigration and Refugee Board found the Applicant inadmissible to Canada. Unbeknownst to her, the immigration agent that she hired in Indonesia to assist her with coming to Canada sent an altered International English Language Testing System ("IELTS") certificate with her work permit application. This agent worked with her abusive employer to recruit her to Canada. When the Applicant escaped her abusive workplace, the abusive employer reported her to Immigration for alleged fraud.

[3] The Applicant suffered severe abuse and exploitation at the hands of her first employer in Canada and the recruiter who assisted her with obtaining her first work permit. The Employment Standards Branch of British Columbia has acknowledged this abuse in a decision. Also, during her admissibility hearing at the Immigration Division, the Minister's Representative concurred that the Applicant was indeed the victim of fraud and that what had happened to her was "extremely unfortunate."

[4] In acknowledgement of her inadmissibility, the Applicant requested an exemption under the IRPA on H&C grounds, considering the abuse that she faced and her vulnerabilities and establishment in Canada. The Senior Immigration Officer (the "Officer") who decided her case determined that the Applicant's contributions in Canada were not unusual or extraordinary.

[5] In her submission for H&C application, the Applicant had documented the history of her severe abuse and exploitation at the hands of her first employer in Canada that forced her to flee. After fleeing, the Applicant was able to secure an open work permit under the Temporary Foreign Workers at Risk pilot program in BC, with which she continued to work as a live-in caregiver for a new employer. Since that time, she had tried to regularize and maintain her status and has continued to establish herself in Canada. Other relevant evidence before the Officer also

included the circumstances of her leaving Indonesia. This included losing her parents as a child and losing her husband and son to a house fire in 2005. In addition to the emotional trauma of this unfortunate event that has been enduring and documented by support letters, this was when the Applicant also needed to support herself. According to the transcript of her admissibility hearing, she initially set up a business, but after it went bankrupt, she was unsuccessful to get a job in the country. This is when she left the country to work in Taiwan as a caregiver. In Taiwan, a friend encouraged the Applicant to apply to go to Canada and put her in touch with an agent who ultimately committed the indirect misrepresentation for which the Applicant is inadmissible.

[6] It is a relevant procedural history that the Applicant's H&C application was first refused on February 15, 2022. However, it was settled out of Court and sent back for redetermination. The Applicant made additional submissions but the Officer ultimately refused it on or about December 18, 2022 (the "Decision").

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

II. Legislative Overview

[8] The following sections of the IRPA is relevant:

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	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

34, 35, 35.1 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, 35.1 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 considerations relating to the foreign national, taking into account the best interests of a child directly affected.	visé aux articles 34, 35, 35.1 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, 35.1 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, compte tenu de l'intérêt supérieur de l'enfant directement touché.

III. Issues and Standard of Review

[9] The Applicant raises the following two issues:

a) Is the Officer's assessment of the Applicant's H&C factors unreasonable?

b) Did the Officer ignore important evidence the Applicant submitted to support her application?

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

[11] 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).

IV. Analysis

[12] H&C applications are exceptional in the sense that an applicant requests the Minister to exercise Ministerial discretion to relieve them from requirements in the IRPA. The Supreme Court of Canada in *Kanthasamy v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338, confirmed that the purpose of this humanitarian and compassionate discretion 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).

[13] I agree with my colleague, Madam Justice Sadrehashemi in *Tuyebekova v Canada (Citizenship and Immigration)*, 2022 FC 1677 at para 11 that the purpose of humanitarian and compassionate discretion is to "mitigate the rigidity of the law in an appropriate case," and there is no limited set of factors that warrants relief (*Kanthasamy* at para 19).

[14] The factors warranting relief will vary depending on the circumstances, but 'officers making humanitarian and compassionate determinations must substantively consider and weigh *all* the relevant facts and factors before them" (*Kanthasamy* at para 25 citing *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at paras 74-75 [*Baker*]).

[15] Therefore, context matters in assessing H&C applications and the officers must be alert and alive to the individual circumstances of the applicants before them.

[16] The following is part of the undisputed evidence before the Officer that is relevant to the Applicant's particular circumstances:

- The Applicant was found to be inadmissible to Canada for indirect misrepresentation.
- The Applicant was a widowed woman from Indonesia who had lost her husband and young son in a tragic and traumatizing house fire in 2005. The Applicant had submitted relevant evidence of gender-based discrimination in Indonesia.
- The Applicant had submitted evidence of various vulnerabilities. These included evidence of severe abuse and exploitation at the hands of her first employer, evidence of being a victim of fraud and evidence of obtaining ongoing support by the Salvation Army Illuminate, a service for survivors of human trafficking and exploitation in Canada.
- The Applicant had also provided evidence of her establishment in Canada, including on her employment history, income, religious and community involvement, her friendships, professional retraining and business licence, certificates of completion of English language classes, support from a member of parliament, the Indonesian consulate, etc.

[17] I am mindful of the fact that the finding of inadmissibility on the basis of misrepresentation is a relevant and serious. As the Respondent submitted, s. 3(1)(f.1) of IRPA refers to the integrity of the Canadian system as one of its objectives. Under s. 16 of IRPA, all applicants must always tell the truth, and s. 40 deals with misrepresentation. The Act

contemplates a significant penalty in the form of a five-year exclusion order for those who have directly or indirectly misrepresented a material fact.

[18] However, the finding of misrepresentation, in and of itself, does not exempt an officer from having to conduct a reasonable assessment of the Applicant's circumstances and to provide clear a chain of reasoning. In this case, the Applicant had provided a documented and undisputed history of abuse and exploitation and being a victim of fraud. This was a focal point of her H&C application. It was through this lens that the Applicant had made her submissions. Yet, nowhere in their notes or reasons has the Officer engaged with these factors.

[19] In the hearing, counsel for the Respondent argued that the Applicant's argument is a request for the Court to reweigh the evidence. He also pointed to how the Officer had listed the factors that they had considered, such as misrepresentation being negative and remorse being positive. I do not find that listing a couple of factors without even signaling which weighs more and why would amount to a reasonable analysis. Moreover, the Officer simply ignored the extensive evidence on the Applicant's vulnerabilities, including gender-related factors for someone of her circumstances in Indonesia, severe exploitation and abuse, or the fact that she was a victim of fraud. These factors were the focal points that defined the Applicant's context. However, they were simply overlooked or ignored in the Officer's analysis (*Pawlaczyk v Canada* (*Citizenship and Immigration*), 2024 FC 184).

[20] The Respondent submits that the Officer looked at all factors globally and was not satisfied that the Applicant discharged their onus, as stated in the Officer's concluding paragraph:

> "I have reviewed all of the information presented by the applicant, including the updated submissions and I am not satisfied that the applicant's humanitarian and compassionate factors justify an exemption from the requirement to be admissible."

[21] I disagree that a general concluding statement is a reasonable substitute for engaging with key evidence or that it amounts to a clear chain of reasoning as contemplated by *Vavilov*.

[22] I also reject's the Respondent's reliance on *Tshiendela v Canada* (*Citizenship and Immigration*), 2022 FC 664 at para 47 to argue that the Applicant's challenge to the Decision is on peripheral or superficial points. As this paragraph states, the reasonableness of a decision may be questioned when the decision maker has failed to account for relevant evidence, which is precisely what happened in this case.

[23] The Officer also failed to properly consider the evidence on the hardship and resulting harm that the Applicant may face if forced to return to Indonesia. Instead, their assessment confused the risks associated with the Applicant's return by relying on the outcome of the Applicant's Pre-Removal Risk Assessment. This is unreasonable and the finding tainted the Officer's conclusion with respect to the hardship the Applicant would face if forced to return to Indonesia in the context of her H&C application.

[24] I also agree with the Applicant that the Officer applied an unreasonably high threshold of exceptionality when considering the Applicant's establishment in Canada, and the hardship she would experience if she were to return to Indonesia. The Officer's take on the Applicant's retraining as a massage-therapist and employment history was that they were not "extraordinary". The Officer's comments on her front line work, including those during the Covid-19 pandemic were that "she has not provided evidence that there is a shortage of individuals in these roles such that her not being able to fulfill them would cause a significant

hardship to the Canadian population, a business or an individual." On her volunteer work with the Indonesian Muslim community, the officer noted that "the applicant has not provided evidence that there would be no one to fulfill her role in these programs". It is unclear what the Officer would consider to be extraordinary (*Chandidas v Canada (Citizenship and Immigration)* 2013 FC 258 at para 80).

[25] This kind of "exceptionality" analysis has repeatedly been rejected by this Court in applying the lead Supreme Court of Canada decision, *Kanthasamy* (see also *Zhang v Canada* (*Citizenship and Immigration*), 2021 FC 1482, at paras 20-24 and 28 [*Zhang*], *Solis Olvera v Canada* (*Citizenship and Immigration*), 2023 FC 1760 at para 24 and *Farhat v Canada* (*Citizenship and Immigration*), 2023 FC 1427 at paras 27-33).

[26] In these cases, the Court confirmed that the exceptionality of H&C relief is not based upon an applicant's exceptional circumstances as compared to others, but rather, on a fact-specific analysis on the applicant's situation. For example, the Court reiterated this test in *Zhang*:

> [28] These passages demonstrate that the Officer was operating with an understanding that the Applicant was required to demonstrate "exceptional" establishment or hardship. <u>This is not the test for a humanitarian and compassionate decision</u>. As set out by Justice McHaffie in *Damian (Damian v Canada (Citizenship and Immigration)* 2019 FC 1158), humanitarian and compassionate exemptions are "exceptional" in the sense that they operate as exceptions to the general rule. <u>There is no requirement that any individual factor, such as establishment or hardship, be exceptional</u>. 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.
>
> [Emphasis added by Applicant]

[27] As *Vavilov* states at para 127: “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 […] The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision-makers demonstrate that they have actually listened to the parties.”

[28] For all these reasons, I find that the Officer’s Decision was unreasonable.

V. Conclusion

[29] The application for judicial review is granted.

[30] There is no question for certification.

JUDGMENT in IMM-6127-23

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.

"Negar Azmudeh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6127-23
STYLE OF CAUSE:	SRI WAHYUDINI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 22, 2024
JUDGMENT AND REASONS:	AZMUDEH, J.
DATED:	MARCH 1, 2024

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