Federal Court  Cour fédérale

**Date: 20240426**

**Docket: IMM-7452-21**

**Citation: 2024 FC 642**

**Ottawa, Ontario, April 26, 2024**

**PRESENT: The Honourable Madam Justice Turley**

**BETWEEN:**

**HELMER YESID GALINDO CABALLERO**
**ALEXANDRA VANEGAS CARRION**
**JADEN ALEXANDER GALINDO VANEGAS (A MINOR)**
**ANTWAN YESID GALINDO VANEGAS (A MINOR)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS FOR JUDGMENT

## I. Overview

[1] The Applicants, citizens of Colombia, seek judicial review of a decision of a Senior Immigration Officer [Officer], dated October 5, 2021, denying their application for permanent residence on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the

*Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The Applicants challenge the Officer's decision on both procedural fairness and reasonableness grounds.

[2] I am allowing the application because the Officer erroneously applied an elevated threshold in assessing the Applicants' establishment in Canada. More specifically, the Officer erred in concluding that the Applicants' level of establishment did not warrant H&C relief because it was not "unusual" relative to similarly situated individuals. In basing their establishment analysis on this requirement of exceptionality compared to others, the Officer failed to undertake the requisite contextual, fact-specific exercise.

## II. Analysis

### A. *Preliminary matter*

[3] Prior to the hearing, the Court issued a Direction requesting that counsel for the parties be "prepared to address this Court's decisions in *Del Chiaro Pereira v Canada (Citizenship and Immigration)*, 2022 FC 799 and *Baptiste v Canada (Citizenship and Immigration)*, 2024 FC 181 as they relate to the issue raised by the Applicants concerning whether the H&C Officer unreasonably used the standard of 'exceptionality' in assessing the Applicants' establishment in Canada": Direction dated March 1, 2024.

[4] On March 4, 2024, the Applicants filed a Notice of Intention to Act in Person dated February 26, 2024. The Notice was served on both parties' counsel on March 1, 2024. The Court Registry was advised that the Applicants would not be attending the March 7, 2024 hearing. At

the judicial review hearing, I determined that I would base my decision on the parties' memoranda of argument as filed, but heard the Respondent's submissions in response to the Court's March 1, 2024 Direction.

B. *Standard of review*

[5] The determinative issue is the Officer's application of an elevated threshold to the Applicants' level of establishment in Canada.

[6] The applicable standard of review is reasonableness. Reasonableness is a robust but deferential standard of review: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 12-13 [*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; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]. A decision should only be set aside if there are "sufficiently serious shortcomings" such that it does not exhibit the requisite attributes of "justification, intelligibility and transparency": *Vavilov* at para 100; *Mason* at paras 59-61.

C. *The Officer erred in assessing the Applicants' level of establishment in Canada*

(1) General H&C principles

[7] Generally, foreign nationals can only apply for permanent residence in Canada from outside the country. However, subsection 25(1) of the *IRPA* provides an exemption to this general rule, allowing foreign nationals to apply from within Canada. An exemption based on H&C

grounds is an exceptional and highly discretionary remedy: *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 94 [*Kanthasamy*]; *Williams v Canada (Citizenship and Immigration)*, 2022 FC 695 at para 12 [*Williams*]; *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at para 12.

[8] While H&C relief is appropriately described as "exceptional" or "extraordinary," an applicant is not required to meet a legal threshold of "exceptionality" under subsection 25(1) of the *IRPA*: *Farhat v Canada (Citizenship and Immigration)*, 2023 FC 1427 at para 29 [*Farhat*]; *Subar v Canada (Citizenship and Immigration)*, 2022 FC 340 at para 28 [*Subar*]; *Jimenez v Canada (Citizenship and Immigration)*, 2021 FC 1039 at para 28.

[9] Rather, an applicant must establish that their circumstances "would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy* at para 21, citing *Chirwa v Canada (Minister of Immigration)* (1970), 4 IAC 338 at p 350. This requires H&C officers to engage in a global assessment and weigh the relevant considerations cumulatively to determine if relief is justified in the circumstances of each case: *Mirashi v Canada (Citizenship and Immigration)*, 2023 FC 323 at para 20; *Williams* at para 11.

(2) The Officer imposed an elevated threshold

[10] In my view, the Officer erred in imposing an elevated threshold in their assessment of the Applicants' level of establishment in Canada. The Officer concluded that the Applicants' circumstances did not merit H&C relief because their level of establishment was not "unusual" compared to others who had been in Canada for a similar amount of time. In doing so, the Officer

erroneously "introduced an implicit exceptional establishment threshold that is not required" by the *Kanthasamy* test: *Farhat* at para 33.

[11] The Officer's concluding paragraph on establishment reads as follows:

> During their time in Canada it is not unusual, if not expected, for the applicants to attain a level of establishment. Activities such as forming social networks, pursuing employment, education and volunteer activities are not uncharacteristic of newcomers to the country. Based on the evidence provided, it is determined that the applicants' 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 discretion.
>
> [Emphasis added]
>
> Humanitarian & Compassionate Grounds Reasons for Decision dated October 5, 2021 at p 3 [Officer's Decision].

[12] Comparing an applicant's situation with similarly situated individuals is not inherently unreasonable: *Farhat* at para 30; *Bhujel v Canada (Citizenship and Immigration)*, 2023 FC 828 at paras 52-57; *Del Chiaro Pereira v Canada (Citizenship and Immigration)*, 2022 FC 799 at paras 53-55 [*Del Chiaro Pereira*]; *Al-Abayechi v Canada (Citizenship and Immigration)*, 2021 FC 1280 at para 15 [*Al-Abayechi*]; *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at para 21 [*Damian*]. While it is permissible to use words such as "unusual" in an attempt to situate the establishment on a spectrum, an officer must not limit their ability to weigh all relevant H&C considerations: *Del Chiaro Pereira* at para 54.

[13] In other words, simply characterizing an applicant's level of establishment as "usual," "ordinary," or "common" is insufficient to vitiate an officer's decision. However, what is problematic is using these terms to invoke or impose a threshold of exceptionality on an applicant.

Each case will therefore necessarily turn on an assessment of the H&C officer's use of such terms in context to determine whether they are used descriptively (which is reasonable) or as a legal test (which is not reasonable): *Del Chiaro Pereira* at para 55; *Asu v Canada (Citizenship and Immigration)*, 2022 FC 661 at para 10 [*Asu*]; *Al-Abayechi* at para 15; *Damian* at para 21.

[14] What renders a decision unreasonable is requiring, either implicitly or explicitly, that an applicant demonstrate an exceptional or unusual level of establishment as a condition for H&C relief. In *Asu*, Justice Diner put it this way:

> [10] The central flaw here is that the Officer's remark was not simply meant to temper the positive establishment finding with a descriptive observation that the Applicant's establishment was positive but not particularly impressive, but rather "a common level of establishment." Such a descriptive observation, without more, would not pose a problem – as pointed out in *Al-Abayechi*. The problem, however, is that the Officer's comment clearly implies that an exceptional level of establishment is a prerequisite to obtaining H&C relief, and that without it, a section 25(1) waiver would not be justified.
>
> [Emphasis added]

[15] Similarly, Justice Régimbald found that an officer's establishment analysis was unreasonable "because it turned on a search for exceptionality, which supplanted the use of the proper test" [emphasis added]: *Farhat* at para 31. In that case, the officer concluded that the applicant's level of establishment – practising religious observance, engaging in volunteerism, and forming social networks – was a "typical level of establishment for a person in similar circumstances": *Farhat* at para 10.

[16] Here, the error lies in the Officer's ultimate conclusion in their establishment analysis, as set out in paragraph 10 above. After considering the evidence related to the Applicants' degree of establishment in Canada – their social networks, employment, education, and volunteer activities – the Officer determined that H&C relief was not warranted because "compared to others," the Applicants' circumstances "does not merit exceptional discretion": Officer's Decision at p 3.

[17] As I raised with the Respondent's counsel during the hearing, the same concluding phraseology was used by the H&C officer in *Baptiste v Canada (Citizenship and Immigration)*, 2024 FC 181 [*Baptiste*]. In that case, Justice Go determined that the officer erred in applying a "standard of exceptionality when assessing the Applicant's degree of establishment": *Baptiste* at para 10. Notably, Justice Go explained that 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 [o]fficer's finding that it did not merit 'exceptional' relief granted under H&C" [emphasis added]: *Baptiste* at para 10. This reasoning is equally applicable here.

[18] In this case, as in *Farhat*, the Officer's establishment analysis "turned on" this search for exceptionality and came down to how the Applicants' level of establishment in Canada compared to others. Had this been but one element of the Officer's analysis, it would not have been a fatal error. However, it was clearly the decisive factor.

[19] The Officer further failed to assess and weigh the Principal Applicant's cleaning services, as a contractor, for several companies. Rather, the Officer seized on the absence of any indication that these services "could not be performed by another service provider," or that the Principal

Applicant's removal from Canada would or has had a detrimental effect on the business: Officer's Decision at p 3. This Court has concluded that this type of logic, which requires the applicant's work in Canada to be indispensable, amounts to the imposition of "an unreasonably high threshold of exceptionality": *Wahyudini v Canada (Citizenship and Immigration)*, 2024 FC 350 at para 24 [*Wahyudini*].

[20] Finally, the Officer did not explain why the Applicants' level of establishment was not "unusual compared to others". There is simply no indication of what more could have reasonably been expected of the Applicants, in their particular circumstances, for their level of establishment to rise above the "not unusual" threshold imposed by the Officer: *Wahyudini* at para 24; *Farhat* at para 31; *Subar* at paras 17, 23.

[21] To be clear, the error in the Officer's establishment analysis is not the misuse of the word "exceptional". I agree with the Respondent that the Officer appropriately used the word in their decision to describe the nature of H&C relief: *Peter v Canada (Citizenship and Immigration)*, 2022 FC 208 at para 50. As explained, the error lies in the Officer's ultimate conclusion that H&C relief was not justified because the Applicants' level of establishment in Canada was not "unusual".

[22] Furthermore, the remainder of the Officer's assessment of the Applicants' establishment factors also supports that the Officer was solely focused on whether their level of establishment met the "unusual" threshold. I find that when read "holistically and contextually, for the very purpose of understanding the basis on which a decision was made," the Officer's reasons

demonstrate a reliance on an exceptionality test: *Vavilov* at para 97. This is not the legal threshold that an H&C applicant is required to meet in accordance with *Kanthasamy*.

## III. Conclusion

[23] For these reasons, the Officer's establishment analysis is unreasonable and I am allowing this application for judicial review.

[24] The parties did not raise a question for certification and I agree that none arises in this case.

**JUDGMENT in IMM-7452-21**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is allowed.

2. There is no question for certification.

"Anne M. Turley"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-7452-21 |
| **STYLE OF CAUSE:** | HELMER YESID GALINDO CABALLERO, ALEXANDRA VANEGAS CARRION, JADEN ALEXANDER GALINDO VANEGAS (A MINOR), ANTWAN YESID GALINDO VANEGAS (A MINOR) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MARCH 7, 2024 |
| **JUDGMENT AND REASONS FOR JUDGMENT:** | TURLEY J. |
| **DATED:** | APRIL 26, 2024 |

**APPEARANCES:**

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| No one appearing | FOR THE APPLICANTS |
| Mariam Shanouda | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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