Federal Court Cour fédérale

Date: 20240814

Docket: IMM-1830-23

Citation: 2024 FC 1262

Ottawa, Ontario, August 14, 2024

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

BIBI ZAMIENA KENNEDIE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Bibi Zamiena Kennedie, is a citizen of Guyana. She is a victim of sexual assault, resulting in pregnancy as a teenager, and domestic violence at the hands of her former spouse. These abuses occurred in Guyana, and in Trinidad and Tobago where the Ms. Kennedie resided with her then spouse before coming to Canada.

[2] Ms. Kennedie travelled to Canada several times over the years, beginning in 2013, for surgery and treatment in respect of a tumour in her eye that resulted in partial blindness. She has remained in Canada since arriving here the last time in February 2017. Ms. Kennedie held visitor status until February 2018. Since February 2017, she has worked for several families as a caregiver, and most recently as a full-time personal caregiver for someone with dementia.

[3] Ms. Kennedie sought to regularize her status in 2022 by filing an application for permanent residence from within Canada on humanitarian and compassionate [H&C] grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] (reproduced in Annex "A" below). A senior immigration officer [Officer] refused her H&C application, citing insufficient factors in the application for relief [Decision]. She thus seeks to have the Decision set aside.

[4] The overarching issue on this judicial review is whether the Decision is reasonable. More granularly, Ms. Kennedie argues that the Officer failed to conduct a global assessment of her personal circumstances with compassion (i.e. to apply the *Chirwa* approach as set out in *Kanthasamy*), unreasonably assessed her establishment in Canada, unreasonably ignored evidence, and failed to engage with arguments and made conclusions that were contrary to her evidence.

[5] The Respondent submits that the Applicant's arguments essentially amount to rearguing her circumstances or a request for the Court to reweigh the evidence. I disagree. For the more detailed reasons below, the judicial review application will be granted.

II. Analysis

[6] I find Ms. Kennedie has demonstrated to the Court's satisfaction that the Decision is unreasonable in three determinative respects, in that the Officer: (1) failed to apply the *Chirwa* approach; (2) unintelligibly discounted the Applicant's establishment in Canada; (3) unreasonably considered the availability of healthcare in Guyana. In my view, these errors individually, and certainly cumulatively, render the Decision unreasonable, warranting the Court's intervention. I decline to consider Ms. Kennedie's additional arguments.

[7] The party challenging an administrative decision has the onus of demonstrating that it is unreasonable. Stated another way, the Court must determine whether the Decision is intelligible, transparent, and justified. There is no dispute between the parties, and I agree, that the presumptive reasonableness standard of review applies here: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 10, 25, 99.

[8] A decision may be unreasonable if the decision maker misapprehended the evidence before it: *Vavilov*, above at paras 125-126. Flaws or shortcomings, however, must be more than superficial, peripheral to the merits of the decision, or a "minor misstep" to warrant intervention by the Court: *Vavilov*, above at para 100.

[9] There is a fine line, in my view, between reweighing evidence, which is not the role of the Court in judicially reviewing an administrative decision, and assessing whether the administrative decision maker misapprehended the evidence before them. The latter nonetheless

requires the Court to delve into the evidence to make the necessary determination in the face of an assertion of misapprehension, including ignoring the evidence.

[10] With the above principles in mind, I turn to the more granular, determinative issues.

(1) The Officer failed to apply the *Chirwa* approach

[11] I am persuaded that the Officer unreasonably failed to consider Ms. Kennedie's circumstances globally and with compassion.

[12] The Supreme Court of Canada guides that H&C considerations under subsection 25(1) of the *IRPA* refer to circumstances "which would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another": *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at paras 13 and 21, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338 [*Chirwa*].

[13] The application of the *Chirwa* principle to the assessment of an H&C request for relief from the obligations under the *IRPA*, is a factually infused or fact-driven exercise (i.e. the Minister may examine the circumstances concerning a foreign national seeking permanent residence under subsection 25(1)).

[14] The Respondent submits that the Officer reasonably noted Ms. Kennedie's difficult childhood and marriage (i.e. sexual assault resulting in pregnancy during childhood, and subsequent abuse at the hands of her former spouse).

[15] I agree with the Applicant, however, that the Officer did not consider these circumstances compassionately. The Officer gives "no weight" to her fear regarding her former spouse because there is little evidence that he has attempted to contact her in Canada. In my view, this reads more like a risk assessment than an empathetic approach invoking "sorrow or pity excited by the distress or misfortunes of another": *Kanthasamy*, above at para 13. I find that the Officer treats Ms. Kennedie's medical condition and partial blindness in a similar, unreasonable manner.

[16] Further, while the Officer refers in the establishment analysis to the sexual assault Ms. Kennedie experienced as a child, the Officer does not grapple with it. The Officer's hardship analysis about her possible return to Guyana, for example, is silent on this experience.

[17] Stating only that the Officer considered Ms. Kennedie's circumstances and examined all the documentation, the conclusion does not evince any kind of global assessment. Rather, the Decision, in my view, unreasonably takes a segmented approach to the H&C factors the Officer considered, contrary to this Court's jurisprudence. See, for example, *Zhou v Canada (Citizenship and Immigration)*, 2024 FC 24 at para 16, citing *Kanthasamy*, above at para 45, and *Muti v Canada (Citizenship and Immigration)*, 2022 FC 1722 at para 10.

(2) The Officer unintelligibly discounted the Applicant's establishment in Canada

[18] The Officer notes that the Applicant has resided in Canada for over 5 years, which, in the Officer's view, "is not a significant amount of time." In discounting Ms. Kennedie's establishment, however, the Officer unintelligibly describes her stay in Canada as "prolonged."

For this reason, I find the Respondent's reliance on *Shackleford v Canada (Citizenship and Immigration)*, 2019 FC 1313 [*Shackleford*] misplaced.

[19] *Shackleford* states (at para 23) that, "[t]he mere presence in Canada by someone who has been in this country illegally, for a long time, should affect weight in a negative way," after noting the applicant's 14 years in Canada. Here, the Officer contradictorily states that 5 years is both not a significant amount of time and a prolonged stay. Either way, in my view, *Shackleford* is distinguishable.

[20] The Officer also states that positive weight is given to Ms. Kennedie's establishment ("employed in Canada, and has friends and has volunteered in Canada") because it is at a level that would be expected for someone in her circumstances.

[21] The Officer proceeds, however, to devote considerable attention to Ms. Kennedie's contravention of the *IRPA*, to such an extent that I find it overshadows any positive weight attributed to her establishment. This includes examining her evidence for what it does not include (i.e. "there is little evidence in the H&C materials to demonstrate the applicant applied or attempted to apply for an extension of her visitor record or for a work permit"), rather than what it does.

[22] Yet, an H&C application under subsection 25(1) inherently involves some non-compliance with the *IRPA*: *Augusto v Canada (Citizenship and Immigration)*, 2022 FC 226 at para 23. I thus find the Officer unreasonably concludes that the weight assigned to Ms.

Kennedie's establishment is mitigated by her "prolonged" stay in Canada in contravention of immigration laws, that is, without having obtained authorization to remain and work here.

[23] I am not convinced that the Respondent's reliance on *Sharifpouran v Canada (Citizenship and Immigration)*, 2022 FC 663 [*Sharifpouran*], is of assistance in light of the criminal conviction in that case for illegal importation of opium into Canada. This is far more serious than the contravention of immigration laws alone, in my view, because of the added layer of criminality. In other words, *Sharifpouran* also is distinguishable.

[24] I add that this Court recently was critical of measuring an H&C applicant's establishment in terms of what is "expected" in their circumstances. Such an "approach amounts to evaluating an H&C application through a test that is disjunctive, analytically unsound, and antithetical to the very words of the exemption prescribed by section 25(1) of the statute": *Henry-Okoisama v Canada (Citizenship and Immigration)*, 2024 FC 1160 [*Henry-Okoisama*] at para 45.

[25] As Justice Ahmed explained, "[t]his is the same as finding that the Applicants have to prove that their circumstances were 'exceptional' to warrant an H&C finding": *Henry-Okoisama*, above at para 46.

[26] I acknowledge the Federal Court of Appeal's seemingly contradictory observation that "[s]ection 25 is a discretionary remedy granted in exceptional circumstances": *Zeng v Canada (Minister of Citizenship and Immigration)*, 2010 FCA 118 [*Zeng*] at para 24. That said, in my view, the comment was *obiter* because *Zeng* was not about an H&C application nor the

application of section 25 of the *IRPA*. Instead, *Zeng* concerns the reformulation of the test applicable to Article 1E determinations in the context of exclusions under section 98 of the *IRPA*. Section 25 was proposed by the Minister as a possible alternative to exclusion in cases where the claimant was at risk in their home country, while return to a third country where they once had status no longer was an option. *Zeng* held that the Minister's suggestion was not a viable solution to the dilemma.

[27] Further, the *obiter* observation in *Zeng* was eclipsed several years later by the majority in *Kanthasamy*, in my view, where Justice Abella guides (at para 33) that the adjectives "unusual and undeserved or disproportionate hardship" should not be considered a high threshold. Rather, they "should be seen as instructive but not determinative, allowing s. 25(1) to respond more flexibly to the equitable goals of the provision."

(3) The Officer unreasonably considered the availability of healthcare in Guyana

[28] I find that the Officer unreasonably speculated as to the availability of healthcare in Guyana, in the face of contradictory evidence. The Officer states that "there is little evidence… to demonstrate the applicant could not receive the follow up care or follow up treatment in Guyana if needed," presumably if the eye tumour reoccurs.

[29] The undisputed evidence, however, is that Ms. Kennedie was forced to raise money to come to Canada to have her tumour treated because there was inadequate care in Guyana. The support letters state that she cannot afford to travel between Guyana and Canada to receive medical care. This evidence directly contradicts the Officer's findings regarding the care or

follow up treatment she could receive in Guyana, and the Officer does not refer to any country documentation to support their findings.

[30] In addition, the Applicant provided supporting medical documentation, as well as photos showing the extent of her tumour. In 2021, she required a CT scan to ensure that the tumour did not reoccur. The CT scan states that certain changes in calcification "may be postoperative although minimal residual tumor such as meningioma is difficult to exclude" (emphasis added) and it suggested comparison to previous studies and further evaluation with a gadolinium-enhanced MRI of the orbits. This evidence directly contradicts the Officer's findings regarding the future treatment she requires. Further, while the Officer is not necessarily incorrect in stating that there is little evidence the tumour has reoccurred, this nonetheless is inconsistent with the *Chirwa* approach, in my view, and unreasonably disregards not only the evidence the Applicant provided but also her partial blindness following treatment of the tumour.

III. Conclusion

[31] For the above reasons, the judicial review application will be granted, with the Decision set aside and the matter remitted to a different immigration officer for redetermination.

[32] Neither party proposed a question for certification, and I agree that none arises in the circumstances.

JUDGMENT in IMM-1830-23

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is granted.
2. The January 25, 2023 decision of a senior immigration officer refusing the Applicant's application for permanent residence from within Canada on humanitarian and compassionate grounds is set aside. The matter will be redetermined by a different immigration officer.
3. There is no question for certification.

"Janet M. Fuhrer"
Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27.**
***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch 27.**

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 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.	**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 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.

FEDERAL COURT

SOLICITORS OF RECORD

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