Federal Court  Cour fédérale

Date: 20211105

Docket: IMM-1141-21

Citation: 2021 FC 1188

Ottawa, Ontario, November 5, 2021

PRESENT: Madam Justice Pallotta

BETWEEN:

QUNELYN ALLADA BAGATNAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Qunelyn Allada Bagatnan, sought permanent residence from within Canada based on humanitarian and compassionate (H&C) considerations. An immigration officer (Officer) refused the application on the basis that Ms. Bagatnan failed to establish that H&C considerations justify an exemption, under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], from the legislative requirement to apply for permanent residence from outside of Canada.

[2] On this application for judicial review, Ms. Bagatnan seeks to overturn the Officer's decision. She submits the Officer breached procedural fairness by failing to disclose concerns with her credibility and the sufficiency of the H&C application, depriving her of the opportunity to make her case. Also, Ms. Bagatnan submits the Officer's decision is unreasonable in that the Officer ignored evidence, particularly in relation to the best interests of her child (BIOC) and her establishment in Canada, and failed to conduct a comprehensive analysis of the BIOC.

[3] I am not persuaded that the Officer breached procedural fairness or that the decision is unreasonable. For the reasons below, this application for judicial review is dismissed.

II. **Issues and Standard of Review**

[4] The issues on this application for judicial review are whether the Officer breached procedural fairness and whether the Officer's decision is unreasonable, based on the following alleged errors:

1. Did the Officer breach procedural fairness by failing to disclose specific concerns and provide an opportunity to respond with additional evidence or submissions?
2. Did the Officer ignore evidence and unreasonably assess the BIOC and Ms. Bagatnan's establishment in Canada?

[5] Questions of procedural fairness are reviewable on a standard that is akin to correctness: *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific Railway*]. The duty of procedural fairness is "eminently variable", inherently flexible, and context-specific: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 77 [*Vavilov*]. A court

assessing a procedural fairness question is required to ask whether the procedure was fair, having regard to all of the circumstances: *Canadian Pacific Railway* at para 54.

[6] Whether the Officer's decision is reasonable is determined according to the guidance set out in *Vavilov*. The reasonableness standard of review is a deferential but robust form of review: *Vavilov* at paras 12-13, 75 and 85. The reviewing court does not ask what decision it would have made, attempt to ascertain the range of possible conclusions, conduct a new analysis, or seek to determine the correct solution to the problem: *Vavilov* at para 83. Instead, the reviewing court must focus on the decision actually made, and consider whether the decision as a whole is transparent, intelligible, and justified: *Vavilov* at paras 15 and 83. In this regard, it is not enough for the outcome of a decision to be justifiable; the decision must be justified by the decision maker, by way of the reasons: *Vavilov* at para 86. A reasonable decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

[7] The party challenging the decision bears the onus of demonstrating that it is unreasonable: *Vavilov* at para 100.

III. **Background**

[8] Ms. Bagatnan is a citizen of the Philippines. When she entered Canada in May 2018, she was employed as a domestic worker for a family in Hong Kong, and she accompanied the family to Canada for what was supposed to be a one-week stay. Ms. Bagatnan claims that she was

subjected to exploitative working conditions and left the family in July 2018. Ms. Bagatnan's visa expired in June 2018.

[9] In November 2020, Ms. Bagatnan filed an application for a temporary resident permit (TRP) as a Victim of Trafficking in Persons or as a Victim of Family Violence. The TRP application was refused and Ms. Bagatnan filed a second TRP application in December 2020, which remains pending and is not before this Court. An application for leave and for judicial review of the first TRP decision was denied in March 2021. Also in December 2020, Ms. Bagatnan filed an H&C application for permanent residence. The H&C application was refused, and that decision is the subject of judicial review in this proceeding.

IV. **Analysis**

A. *Did the Officer breach procedural fairness by failing to disclose specific concerns and provide an opportunity to respond with additional evidence or submissions?*

[10] Ms. Bagatnan asserts the Officer focused on deficiencies in the evidence and ignored the actual evidence that was before them. As the Officer did not provide notice of concerns about a lack of supporting evidence and about her credibility, Ms. Bagatnan states that she did not know "the case against her" and she was deprived of the right to address the Officer's concerns in order make her case. Ms. Bagatnan relies on *Asanova v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1173 [*Asanova*] at paragraph 29 in support of her argument:

> …the duty of procedural fairness can require that an applicant be given an opportunity to respond to a decision maker's concerns before a decision is made when those concerns go beyond simply whether the legislative or related requirements are met on the face of the application. When, for example, an applicant for a visa may be unaware of the existence or the basis of the concern, procedural fairness can require prior notice of the concern before a decision is

> made so that the applicant has an opportunity to try to disabuse the officer of the concern.
>
> [Citations omitted.]

[11] Ms. Bagatnan alleges that the Officer drew significant inferences that were contrary to her evidence. For example, the Officer inferred that she and her Canadian-born infant son would live in Cabuyao City, Philippines, where Ms. Bagatnan's mother and eldest son reside, rather than in Iloilo as Ms. Bagatnan had stated in her H&C application. The Officer also made inferences about the support that would be available to Ms. Bagatnan in the Philippines. Ms. Bagatnan submits that the Officer's inferences were drawn without consulting with her, and she was deprived of an opportunity to adduce additional evidence or to make submissions in response. She relies on her affidavit filed in support of this application for judicial review, which outlines the evidence she would have provided to the Officer if she had been given the opportunity to do so.

[12] Also, Ms. Bagatnan alleges the Officer drew negative inferences, which were credibility determinations, without providing an opportunity to respond. The Officer drew a negative inference from Ms. Bagatnan's failure to tell the police that she had fled from her former employer due to abusive working conditions. The Officer also drew a negative inference from the contradiction between Ms. Bagatnan's explanation that she left a fake note telling her employer that she had a boyfriend in Toronto and was leaving to live with him (which she explained was a lie so that she could escape exploitive working conditions) and statements that Ms. Bagatnan's church friend and cousin had made to police that Ms. Bagatnan did have a boyfriend in Toronto. Ms. Bagatnan states that she would have provided explanations for the friend's and cousin's statements, if she had been given an opportunity to do so.

[13] The respondent submits that the duty of fairness does not require an officer to notify an applicant of a concern that arises directly from the legislation: *Kim v Canada (Minister of Citizenship and Immigration)*, 2019 FC 526 at para 9 [*Kim*]; *Marsh v Canada (Minister of Citizenship and Immigration)*, 2017 FC 408 at paras 35-40 [*Marsh*]. The respondent contends that the Officer did not base their decision on concerns about the credibility, accuracy, or genuineness of the documents that Ms. Bagatnan submitted in support of her H&C application. Rather, the Officer assessed the evidence that was submitted and concluded that Ms. Bagatnan had failed to demonstrate that H&C considerations warrant an exemption from the requirements of the *IRPA*. In the circumstances, the Officer was under no obligation to give Ms. Bagatnan an opportunity to address concerns before rendering a decision.

[14] Ms. Bagatnan counters that the *Kim* and *Marsh* decisions are not applicable to her case as they involve judicial review of decisions to refuse post-graduate work permit applications, and unlike H&C applications, the legislative requirements for post-graduate work permits are clear.

[15] I find Ms. Bagatnan has not established a breach of procedural fairness.

[16] I agree with the respondent that in the circumstances, the Officer was under no obligation to give Ms. Bagatnan an opportunity to address concerns before rendering a decision. The Officer did not raise concerns based on a new issue, or raise concerns that Ms. Bagatnan could not reasonably have expected. In my view, the Officer's concerns relate to a lack of evidence to support Ms. Bagatnan's submissions that the BIOC and her establishment in Canada warrant an exemption under section 25 of the *IRPA*. The onus of establishing that an H&C exemption is

warranted lies with an applicant; an officer is not required to highlight weaknesses in an application and request further submissions: *Kisana v Canada (Minister of Citizenship & Immigration)*, 2009 FCA 189 at para 45 [*Kisana*]. The Officer was under no obligation to provide an opportunity to fill in gaps in the evidence: *Singh v Canada (Minister of Citizenship and Immigration)*, 2014 FC 983 at para 7.

[17] Furthermore, the *Asanova* case that Ms. Bagatnan relies on states that an officer may be required to provide an opportunity to respond to concerns when the concerns go beyond simply whether the legislative or related requirements are met on the face of the application. In my view, Ms. Bagatnan has not established that the Officer's decision was based on concerns that go beyond whether the legislative or related requirements for special relief under section 25 of the *IRPA* were met.

[18] There is no merit to Ms. Bagatnan's submission that, instead of giving her an opportunity to respond to concerns, the Officer drew inferences and rendered a decision based on these inferences. Decision makers are expected to consider the evidence before them and draw inferences from such evidence as part of the decision-making process. The Officer drew negative inferences based on a lack of supporting evidence and contradictions in the evidence and submissions provided. An officer is under no obligation to give notice of contradictions between the submitted documents, and an opportunity to address the contradictions: *Begum v Canada (Minister of Citizenship and Immigration)*, 2013 FC 265 at paras 46 (citing *Kisana* at para 45) and 47.

[19] In summary, the Officer based their decision on the evidence and submissions that were provided and did not stray into matters that could not have been reasonably anticipated. Ms. Bagatnan prepared her H&C application with assistance from counsel. If Ms. Bagatnan believed that further evidence or explanations about the evidence would have been helpful for her application, such evidence or explanations ought to have been included in the application package. Her contention that the Officer erred by drawing significant inferences without consulting with her would effectively relieve Ms. Bagatnan of her onus, and stall the Officer's ability to make a final decision.

B. *Did the Officer unreasonably assess the BIOC and Ms. Bagatnan's establishment in Canada?*

[20] Ms. Bagatnan submits the Officer ignored or misconstrued relevant evidence regarding the best interests of her Canadian-born infant son, and failed to conduct a comprehensive analysis of the BIOC. She asserts that the Officer's finding that accorded "some positive weight" to the BIOC is unintelligible, and contrary to the Supreme Court of Canada's instruction that a decision maker should consider a child's best interests as important factors, give them substantial weight, and be alert, alive and sensitive to them: *De Oliveira Borges v Canada (Minister of Citizenship and Immigration)*, 2021 FC 193 at para 6, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at 864, 1999 CanLII 699.

[21] Ms. Bagatnan submits an officer cannot simply recite the evidence of hardship and reach a conclusion without conducting a comprehensive and comparative assessment of the BIOC. She points to *Hawthorne v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475 at paragraph 4, where the Federal Court of Appeal states that the BIOC are determined by

considering the benefit to the child if their parent is not removed from Canada as well as the hardship the child would suffer due to the parent's removal, either by remaining in Canada separated from the parent or by voluntarily accompanying the parent abroad. Similarly, in *Williams v Canada (Minister of Citizenship and Immigration)*, 2012 FC 166 at paragraph 63, the Court stated that when assessing a child's best interests an officer must establish first what is in the child's best interest, second the degree to which the child's interests are compromised by one potential decision over another, and then finally, in light of the foregoing assessment, determine the weight that this factor should play in the ultimate balancing of positive and negative factors assessed in the application.

[22] Ms. Bagatnan argues that the Officer recited the hardship to her child as set out in the H&C application, then concluded that the best interests of the child are to leave Canada with her without conducting the requisite analysis of the possible scenarios, rendering the decision unreasonable. Furthermore, she contends that the Officer disregarded evidence such as health concerns of travelling during the COVID-19 pandemic, the risk of violence in the Philippines, and the effect of living in the countryside with limited resources.

[23] In my view, Ms. Bagatnan misunderstands the Officer's reasons with respect to the BIOC analysis. She asserts that the Officer ignored evidence but does not identify evidence that was ignored, as opposed to not accepted. Also, she asserts that the entire BIOC assessment consists of a single, conclusory paragraph in the Officer's decision, when that is not the case. The Officer considered the child's age, health concerns as a result of COVID-19, whether the child would face a risk of violence or be forced to live in the countryside due to limited resources, and the

available support for the child. Ms. Bagatnan had asserted that she would not have adequate community support in the Philippines but the Officer noted a lack of evidence to establish her assertion. The Officer noted that Ms. Bagatnan's immediate family members reside in the Philippines, and there was little evidence to demonstrate that they would not offer her support. Ms. Bagatnan's mother has raised her eldest son, and Ms. Bagatnan previously lived with her mother and eldest son in Cabuyao City, Philippines. The Officer considered Ms. Bagatnan's assertion that she would live in the countryside in Iloilo, two to three hours away from the market and a school, and found it likely that she would return to live with her mother and eldest son in Cabuyao City.

[24] Furthermore, the Officer did not fail to consider the different scenarios based on whether Ms. Bagatnan were to remain in Canada versus returning to the Philippines. The Officer found that, either way, the child would remain with Ms. Bagatnan since the Canadian father has had no involvement with the child. The Officer considered the scenario of remaining in Canada, noting that Ms. Bagatnan has been forced to rely on support from friends and community services; she has moved frequently and has had difficulty with financial support. In contrast to living with her mother in the Philippines, the Officer did not find the current living situation in Canada to be one of stability for Ms. Bagatnan and her infant son. In addition to noting a lack of evidence of inadequate community support in the Philippines, the Officer found the community support in Canada did not outweigh the familial support that may be available for Ms. Bagatnan and her infant son in the Philippines. The Officer considered Ms. Bagatnan's submissions that she intends to commence legal proceedings for child support (noting that she had not yet commenced

such proceedings) and the Officer was not satisfied she would be unable to commence proceedings from outside of Canada.

[25] On this application for judicial review, Ms. Bagatnan has filed an affidavit with evidence that was not before the Officer, such as a letter from her eldest son about his living situation in the Philippines. As noted above, the onus of establishing that an H&C exemption is warranted lies with the applicant: *Kisana* at para 45. An applicant has the burden of providing relevant information, including information regarding the best interests of children: *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38 at paras 5 and 8. Again, if Ms. Bagatnan believed that further evidence would have been helpful for her application, such evidence ought to have been included in the application package. Information that was not before the Officer should not be considered in assessing the reasonableness of the decision on judicial review: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19.

[26] With respect to establishment, Ms. Bagatnan submits that the Officer disregarded evidence of her establishment and the community support available in Canada. She states the Officer did not conduct any meaningful analysis of the circumstances that would require her to start her life all over again if she were to return to the Philippines.

[27] I agree with the respondent that the Officer engaged with Ms. Bagatnan's evidence and submissions regarding her establishment in Canada. The Officer acknowledged that Ms. Bagatnan has been living in Canada for over 2.5 years, and her level of establishment was at a

level that would be expected of a person in her circumstances. The Officer gave Ms. Bagatnan's establishment some weight.

[28] The Officer considered Ms. Bagatnan's submissions that she would have to start her life all over again. The Officer found that Ms. Bagatnan would likely return to live with her mother and eldest child in the Philippines, in contrast to an unstable living situation in Canada. Ms. Bagatnan had resided with a number of different Canadian friends before finding lodging in community organizations. The Officer considered Ms. Bagatnan's submissions that her Canadian friends are willing to provide childcare support for her son, but found there were no letters from the friends attesting to such support. The Officer was not satisfied that Ms. Bagatnan would be unable to re-integrate or re-establish herself in the Philippines, noting her transferable skills and the fact that she would be returning to the country where she was born, raised, educated, and previously employed.

[29] As noted above, the Officer considered the support from the community organizations in Canada, and assessed on the other hand the likelihood of support from Ms. Bagatnan's immediate family members who live in the Philippines. The Officer concluded that the community support in Canada did not outweigh the familial support for Ms. Bagatnan in the Philippines. The Officer's findings flow logically from a weighing of the evidence, and they were open to the Officer based on the record.

[30] In summary, the Officer's decision demonstrates a reasonable assessment of the relevant BIOC and establishments factors. The Officer engaged with the evidence and provided reasons that are transparent, intelligible, and justified.

V. **Conclusion**

[31] In my view, the Officer's decision is reasonable. Accordingly, this application for judicial review is dismissed.

[32] Neither party proposes a question for certification. I find there is no question to certify.

JUDGMENT in IMM-1141-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question for certification.

"Christine M. Pallotta"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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